WORLD TRADE ORGANIZATION

WT/DS517/R

18 April 2019

(19-2573)

Page: 1/77

Original: English

CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION 11
1.1 Complaint by the United States 11
1.2 Panel establishment and composition 11
1.3 Panel proceedings 11
2 FACTUAL ASPECTS 12
2.1 Measure at issue 12
2.2 China's system of TRQ administration for wheat, rice, and corn 13
2.2.1 Initial allocation of TRQ amounts 14
2.2.1.1 Announcement of TRQ amounts available for allocation 14
2.2.1.2 Application criteria 14
2.2.1.3 Application process 16
2.2.1.4 Allocation principles 17
2.2.1.5 Public comment process 17
2.2.2 Rules and requirements for allocated TRQ amounts 18
2.2.2.1 STE and non-STE portions of TRQs 18
2.2.2.2 Usage requirements for wheat, rice, and corn imported under TRQ allocations 19
2.2.2.3 Return of unused TRQ amounts and penalties for their non-use 19
2.2.3 Reallocation of returned TRQ amounts 20
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 21
4 ARGUMENTS OF THE PARTIES 21
5 ARGUMENTS OF THE THIRD PARTIES 21
6 INTERIM REVIEW 22
6.1 Factual aspects 22
6.2 Claims under Paragraph 116 of China's Working Party Report 22
6.3 Claim under Article XIII:3(b) of the GATT 1994 26
6.4 Claim under Article X:3(a) of the GATT 1994 26
7 FINDINGS 26
7.1 Claims under Paragraph 116 of China's Working Party Report 26
7.1.1 Introduction 26
7.1.2 Legal provision 27
7.1.3 Horizontal issues 29
7.1.4 Assessment of the individual aspects of China's TRQ administration challenged under Paragraph 116 31
7.1.4.1 Basic eligibility criteria 31
7.1.4.1.1 Introduction 31
7.1.4.1.2 Basic eligibility criteria at issue 31
7.1.4.1.3 Main arguments of the parties 32
7.1.4.1.4 Analysis by the Panel 32
7.1.4.1.5 Conclusion 36

7.1.4.2 Allocation principles and reallocation procedures 36
7.1.4.2.1 Introduction 36
7.1.4.2.2 Allocation principles and reallocation procedures at issue 36
7.1.4.2.3 Main arguments of the parties 37
7.1.4.2.4 Analysis by the Panel 38
7.1.4.2.4.1 Allocation principles 38
7.1.4.2.4.2 Reallocation procedures 41
7.1.4.2.5 Conclusion 42
7.1.4.3 Public comment process 42
7.1.4.3.1 Introduction 42
7.1.4.3.2 Public comment process at issue 42
7.1.4.3.3 Main arguments of the parties 43
7.1.4.3.4 Analysis by the Panel 43
7.1.4.3.5 Conclusion 44
7.1.4.4 STE and non-STE portions of TRQs 45
7.1.4.4.1 Introduction 45
7.1.4.4.2 Provisions at issue concerning STE and non-STE portions of TRQs 45
7.1.4.4.3 Main arguments of the parties 45
7.1.4.4.4 Analysis by the Panel 47
7.1.4.4.4.1 Allocation of STE and non-STE portions of the TRQs 47
7.1.4.4.4.2 Procedure for non-STE recipients to import under STE portions of TRQs 50
7.1.4.4.5 Conclusion 51
7.1.4.5 Public notice 51
7.1.4.5.1 Introduction 51
7.1.4.5.2 Extent of the public notice at issue 51
7.1.4.5.3 Main arguments of the parties 52
7.1.4.5.4 Analysis by the Panel 53
7.1.4.5.5 Conclusion 55
7.1.4.6 Usage requirements for wheat, rice, and corn imported under TRQ allocations 55
7.1.4.6.1 Introduction 55
7.1.4.6.2 Usage requirements at issue 56
7.1.4.6.3 Main arguments of the parties 56
7.1.4.6.4 Analysis by the Panel 57
7.1.4.6.4.1 Usage requirements for wheat and corn imported under TRQ allocations 57
7.1.4.6.4.2 Usage requirement for rice imported under TRQ allocations 60
7.1.4.6.5 Conclusion 61
7.1.5 Overall assessment of China's TRQ administration under Paragraph 116 62
7.2 Claim under Article XIII:3(b) of the GATT 1994 64
7.2.1 Introduction 64
7.2.2 Legal provision 64

7.2.3 Main arguments of the parties 64
7.2.4 Analysis by the Panel 65
7.2.5 Conclusion 68
7.3 Claim under Article X:3(a) of the GATT 1994 68
7.3.1 Introduction 68
7.3.2 Legal provision 68
7.3.3 Main arguments of the parties 69
7.3.4 Analysis by the Panel 70
7.4 Claim under Article XI:1 of the GATT 1994 73
7.4.1 Introduction 73
7.4.2 Legal provision 73
7.4.3 Main arguments of the parties 73
7.4.4 Analysis by the Panel 75
8 CONCLUSIONS AND RECOMMENDATIONS 76

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	12
Annex B-2	Integrated executive summary of the arguments of China	32

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	51
Annex C-2	Integrated executive summary of the arguments of Brazil	54
Annex C-3	Integrated executive summary of the arguments of Canada	56
Annex C-4	Integrated executive summary of the arguments of Ecuador	60
Annex C-5	Integrated executive summary of the arguments of the European Union	63
Annex C-6	Integrated executive summary of the arguments of Japan	65
Annex C-7	Integrated executive summary of the arguments of Ukraine	67

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Financial Services	Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R and Add.1, adopted 9 May 2016, as modified by Appellate Body Report WT/DS453/AB/R, DSR 2016:II, p. 599
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
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
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III	Panel Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU *(Ecuador)* / WT/DS27/R/GTM, WT/DS27/R/HND *(Guatemala and Honduras)* / WT/DS27/R/MEX *(Mexico)* / WT/DS27/R/USA *(US)*, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
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

Short Title	Full Case Title and Citation
EC – Hormones	Appellate Body Report, *European Communities – 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 – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
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
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, DSR 2017:III, p. 1067
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R, DSR 2017:VII, p. 3131
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p.2019
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 – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769

Short Title	Full Case Title and Citation
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW2 and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report WT/DS381/AB/RW/USA / WT/DS381/AB/RW2
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 – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if applicable)	Description/Long Title
USA-1	Working Party Report	*Report on the Working Party on the Accession of China* WT/ACC/CHN/49 (October 1, 2001)
USA-2	Accession Protocol	*Protocol on the Accession of the People's Republic of China* WT/L/432 (November 23, 2001)
USA-11	2003 Provisional Measures	*Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Ministry of Commerce and National Development and Reform Commission 2003 Order No. 4, issued 27 September 2003)
USA-13	2003 List of NDRC Authorized Agencies	*Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Ministry of Commerce and National Development and Reform Commission, Public Notice No. 54, issued 15 October 2003)
USA-14	Catalogue of Import State Trading Enterprises	*Catalogue of Import State Trading Enterprises* (Ministry of Foreign Trade and Economic Cooperation 2001 Announcement No. 28, published 11 December 2001)
USA-15	2017 Allocation Notice	*Allocation Notice and Attached Application Criteria and Allocation Principles for Import Tariff-Rate Quotas for Grains in 2017* (National Development and Reform Commission 2016 Public Notice No. 23, issued 10 October 2016)
USA-16	2016 Allocation Notice	*Allocation Notice and Attached Application Criteria and Allocation Principles for Import Tariff-Rate Quotas for Grains in 2016* (National Development and Reform Commission 2015 Public Notice No. 22, issued 29 September 2015)
USA-17	2017 Reallocation Notice	*Reallocation Notice for Import Tariff-Rate Quotas for Agricultural Products in 2017* (National Development and Reform Commission and Ministry of Commerce 2017 Public Notice No. 11, issued 11 August 2017)
USA-19	2017 Announcement of Applicant Enterprise Data	*Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2017* (National Development and Reform Commission, issued 1 December 2016)
USA-20	2016 Announcement of Enterprise Data	*Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2016* (National Development and Reform Commission, issued 4 December 2015)
USA-23	China's Schedule CLII, Part I, Section I (B)	Schedule CLII − People's Republic of China, Part I − Most-Favoured-Nation Tariff: Section I (B) − Tariff Quotas
CHN-15	TRQ Guidelines	Guideline on the Examination and Approval of Grain Import TRQs (National Development and Reform Commission, published 27 May 2017)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO
COFCO	China National Cereals, Oils and Foodstuffs Import and Export Corporation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
MOFCOM	Ministry of Commerce of China
NDRC	National Development and Reform Commission of China
Non-STE	Non-state trading enterprises
Schedule CLII	China's Schedule of Concessions and Commitments on Goods
STEs	State trading enterprises
TRQ	Tariff rate quota
Vienna Convention	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

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 15 December 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) 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 9 February 2017.

1.2 Panel establishment and composition

1.3. On 18 August 2017, 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 22 September 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS517/6, 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/DS517/6 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 1 February 2018, the United States requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 12 February 2018, the Director-General composed the Panel as follows:

Chairperson:	Mr Mateo Diego-Fernández
Members:	Mr Stefán H. Jóhannesson Mr Esteban B. Conejos, Jr

1.6. Australia, Brazil, Canada, Ecuador, the European Union, Guatemala, India, Indonesia, Japan, Kazakhstan, the Republic of Korea, Norway, the Russian Federation, Singapore, Chinese Taipei, Ukraine, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. On 5 March 2018, after consultation with the parties, the Panel adopted its Working Procedures[5] and timetable.

1.8. In accordance with the timetable, on 3 April and 15 May 2018, the United States and China respectively submitted their first written submissions. On 29 May 2018, the Panel received third-party submissions from Australia, Brazil, Canada, Ecuador, and the European Union.

1.9. On 9 and 10 July 2018, the Panel held its first substantive meeting with the parties. A session with the third parties took place on 10 July 2018, during which Brazil, Ecuador, the European Union, Japan, and Ukraine made oral statements. Prior to the substantive meeting, on 2 July 2018, the Panel sent the parties a list of questions for oral responses at the meeting. Following the meeting, on 13 July 2018, the Panel sent written questions to the parties and third parties. On the same date, the United States sent written questions to China. Responses to these questions were received by the Panel on 3 August 2018.

[1] See WT/DS517/1.
[2] WT/DS517/6.
[3] See WT/DSB/M/401, item 2.
[4] WT/DS517/7/Rev.1.
[5] See the Panel's Working Procedures in Annex A-1.

1.10. On 24 August 2018, the parties filed their second written submissions to the Panel.

1.11. On 16 October 2018, the Panel held its second substantive meeting with the parties. Prior to the substantive meeting, on 8 October 2018, the Panel sent the parties a list of questions for oral responses at the meeting. Following the meeting, on 19 October 2018, the Panel sent written questions to the parties. Responses to those questions were received by the Panel on 2 November 2018. The Panel gave the parties an opportunity to comment on each other's responses. These comments were received by the Panel on 16 November 2018.

1.12. On 30 November 2018, the Panel issued the descriptive part of its Report to the parties. On 14 December 2018, the Parties provided their comments on the descriptive part of the report. On 15 February 2019, the Panel issued its Interim Report to the parties. On 6 March 2019, the parties individually requested a review of parts of the Interim Report. The Panel gave the parties an opportunity to comment on each other's request for review. These comments were received by the Panel on 20 March 2019. Following the interim review process, on 3 April 2019, the Panel issued its Final Report to the parties.

2 FACTUAL ASPECTS

2.1 Measure at issue

2.1. In its panel request, the United States challenges China's administration of its tariff rate quotas (TRQs) for wheat, rice, and corn as follows:

> The United States considers that China administers TRQs for wheat, short- and medium-grain rice, long grain rice, and corn inconsistently with its WTO obligations. In particular, China administers each of its TRQs for wheat, short- and medium- grain rice, long grain rice, and corn inconsistently with its commitments specified in paragraph 1.2 of Part I of the Protocol on the Accession of the People's Republic of China (WT/L/432) ("Accession Protocol"), which incorporates the commitments in paragraph 116 of the Report of the Working Party on the Accession of China (WT/MIN(01)/3) ("Working Party Report"), as well as with Articles X:3(a), XI:1, and XIII:3(b) of the GATT 1994.
>
> The legal instruments through which China has established its TRQs for wheat, short- and medium- grain rice, long grain rice, and corn include, but are not limited to, the following, operating separately or collectively:
>
> - *Customs Law of the People's Republic of China* (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 28 December 2013, in Order No. 8)
> - *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods* (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective 1 January 2002)
> - *Regulation of the People's Republic of China on Import and Export Duties* (State Council, Order No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, amended 6 February 2016, in Order No. 666)
> - *Foreign Trade Law of the People's Republic of China* (adopted at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, effective 1 July 2004)
>
> as well as any amendments, or successor, replacement, or implementing measures.
>
> The legal instruments through which China administers each of its TRQs for wheat, short- and medium- grain rice, long grain rice, and corn include, but are not limited to, the following, operating separately or collectively:

- *Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Ministry of Commerce and National Development and Reform Commission 2003 Order No. 4, issued 27 September 2003)

- *Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Ministry of Commerce and National Development and Reform Commission, Public Notice No. 54, issued 15 October 2003)

- *Application Criteria and Allocation Principles for Import Tariff-Rate Quotas for Grains in 2017* (National Development and Reform Commission 2016 Public Notice No. 23, issued 10 October 2016)

- *Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2017* (National Development and Reform Commission, issued 1 December 2016)

- *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2017* (National Development and Reform Commission and Ministry of Commerce 2017 *Public* Notice No. 11, issued 11 August 2017)

- *Application Criteria and Allocation Principles for Import Tariff-Rate Quotas for Grains in 2016* (National Development and Reform Commission 2015 Public Notice No. 22, issued 29 *September* 2015)

- *Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2016* (National Development and Reform Commission, issued 4 December 2015)

- *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2016* (National Development and Reform Commission and Ministry of Commerce 2016 Public Notice No. 19, issued 17 August 2016).

as well as any amendments, or successor, replacement, or implementing measures.[6]

2.2 China's system of TRQ administration for wheat, rice, and corn[7]

2.2. China's TRQ administration operates on an annual basis. TRQ certificates for wheat, rice, and corn are valid and must be used from 1 January to 31 December every year.[8]

2.3. Applicants must apply for TRQ allocations from 15 to 30 October of the year preceding that for which TRQ certificates will be issued by the National Development and Reform Commission of China (NDRC).[9] TRQ amounts are allocated and TRQ certificates are issued before 1 January of the year in which they have to be used.[10] If applicants that receive TRQ allocations are unable to contract for

[6] WT/DS517/6, pp. 1-2.

[7] During these proceedings, the two parties submitted several exhibits containing the same legal instruments or documents, as well as English translations thereof. The legal instruments or documents which we cite in this Report and the exhibits in which they have been submitted by the parties are as follows: 2003 Provisional Measures (USA-11, CHN-5); 2003 List of NDRC Authorized Agencies (USA-13, CHN-6); Catalogue of Import State Trading Enterprises (USA-14, CHN-13); 2017 Allocation Notice (USA-15, CHN-7); 2016 Allocation Notice (USA-16, CHN-10); 2017 Reallocation Notice (USA-17, CHN-9); 2017 Announcement of Applicant Enterprise Data (USA-19, CHN-8); and 2016 Announcement of Enterprise Data (USA-20, CHN-11). There are certain differences in the translations contained in some of those exhibits. In response to questions from the Panel in this regard (e.g. Panel question Nos. 12, 18, and 46), the parties provided clarification on certain translated terms, where relevant. Paragraph 6.2 of the Panel's Working Procedures states that "[a]ny objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question". Neither party has raised any such objection. In the interest of brevity and simplicity, and since the United States submitted the listed exhibits before China, in our citations in this Report, we refer only to the exhibits submitted by the United States.

[8] 2003 Provisional Measures, (Exhibit USA-11), Article 15.

[9] 2003 Provisional Measures, (Exhibit USA-11), Article 10.

[10] 2003 Provisional Measures, (Exhibit USA-11), Article 14.

importation, or have contracted but are unable to complete importation, under their allocated TRQ amounts, they must return such unused TRQ amounts by 15 September of that year.[11] Returned TRQ amounts are made available for reallocation. Applicants must apply for TRQ reallocations from 1 to 15 September[12] and the NDRC makes the reallocations before 30 September.[13]

2.4. Below, the various stages and aspects of China's TRQ administration are described in further detail.

2.2.1 Initial allocation of TRQ amounts

2.5. The NDRC, in conjunction with the Ministry of Commerce of China (MOFCOM), is the authority responsible for allocating TRQ amounts for wheat, rice, and corn.[14] The application period is from 15 to 30 October of the year preceding that for which TRQ certificates will be issued.[15]

2.6. In accordance with the 2003 Provisional Measures, the NDRC issues annual allocation notices one month before the application period for TRQs in the International Business Daily, the China Economic Herald, and on MOFCOM's and the NDRC's websites.[16] The annual allocation notices generally have similar content and follow the same structure.[17] They set out, among other things, total TRQ amounts available for each type of grain and the portions thereof reserved for importation through state trading enterprises (STEs), application criteria, application period, allocation principles, and other requirements. Below, we describe the process of allocation of TRQ amounts by the NDRC.

2.2.1.1 Announcement of TRQ amounts available for allocation

2.7. The annual allocation notices set out the total TRQ amounts that are available for allocation in any given year, as well as the portions thereof reserved for importation through STEs. For instance, the TRQ amounts available for allocation in 2017 were as follows:

> The 2017 grain import tariff-rate quota quantities are: wheat – 9.636 million tons, with a state trading proportion of 90%; corn – 7.20 million tons, with a state trading proportion of 60%; [] rice – 5.32 million tons (of which: 2.66 million tons of long-grain rice and 2.66 million tons of medium- and short-grain rice), with a state trading proportion of 50%.[18]

2.2.1.2 Application criteria

2.8. Applicants must meet the application criteria set out in the annual allocation notices to be eligible to receive TRQ allocations. The annual allocation notices divide these criteria into two: basic eligibility criteria and grain-specific eligibility criteria. Possession of the basic eligibility criteria is "a prerequisite" for eligibility.[19] Applicants must also meet one of the grain-specific eligibility criteria corresponding to the type of grain in respect of which they applied for a TRQ allocation.[20]

---

[11] 2003 Provisional Measures, (Exhibit USA-11), Article 23; and 2017 Reallocation Notice, (Exhibit USA-17), para. 1.

[12] 2003 Provisional Measures, (Exhibit USA-11), Article 24.

[13] 2003 Provisional Measures, (Exhibit USA-11), Article 26.

[14] 2003 Provisional Measures, (Exhibit USA-11), Article 7.

[15] 2003 Provisional Measures, (Exhibit USA-11), Article 10.

[16] 2003 Provisional Measures, (Exhibit USA-11), Article 10.

[17] Although some differences exist in the texts of the various allocation notices issued each year, the 2017 Allocation Notice was the instrument in force at the time of the Panel's establishment and both parties use the 2017 Allocation Notice as a basis for their arguments. We therefore also refer to this Notice in our description of China's TRQ administration system and in our assessment of the parties' claims and arguments.

[18] 2017 Allocation Notice, (Exhibit USA-15), Article I. The English translation of China's legal instruments provided by the United States refers to "white rice". However, in response to questioning from the Panel, both parties agreed that this refers to "rice" in general. (United States' response to Panel question No. 18(a), para. 48; and China's response to Panel question No. 18(a), para. 58). We therefore use the term "rice" throughout the remainder of this Report.

[19] 2017 Allocation Notice, (Exhibit USA-15), Article II.

[20] 2017 Allocation Notice, (Exhibit USA-15), Article II.

2.9. In the 2017 Allocation Notice, the basic eligibility criteria were set out as follows:

> Having registered with the industry and commerce administrative departments prior to October 1, 2016; possessing a good financial condition, [good] taxpayer record, and a [good] integrity situation; as of 2015, no record of violating regulations with respect to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, environmental protection, and other areas; not having been placed on a "Credit China" website blacklist [of entities] receiving punishment; having fulfilled social responsibilities associated with [their] operations; having no conduct in violation of the *Provisional Measures for the Administration of Import Tariff-Rate Quotas for Agricultural Products*.[21]

2.10. China states that, in practice, the NDRC does not conduct an individual assessment of each of these basic eligibility criteria. Rather, the uniform social credit code that is provided by each applicant in its application form is used to generate a credit report through Credit China.[22] Credit China is managed by the NDRC, and is connected to databases of dozens of government agencies.[23] China adds that, while the credit report is generated using all of the information available through Credit China, the NDRC only uses Credit China's "blacklist" of entities with a record of violation to determine applicants' eligibility.[24] Although entities are placed on Credit China's blacklist for having a record of violation in a range of areas, China states that only records of violations of "industry and commerce registration, tax payments, customs, and [] court judgements"[25] within the previous two years[26] will render applicants ineligible to receive TRQ allocations.

2.11. China further states that the NDRC determines an applicant's eligibility to receive TRQ allocations not only by checking Credit China's blacklist, but also by checking (i) whether the applicant has attested to the accuracy of the information submitted in its application; and (ii) whether the applicant has prior violations of the 2003 Provisional Measures.[27]

2.12. In the 2017 Allocation Notice, the grain-specific eligibility criteria were as follows:

> (1) Wheat
>
> 1. State trading enterprise;
>
> 2. Enterprise with actual import performance (not including imports through agents) in 2016;
>
> 3. Flour production enterprise with wheat usage of more than 100,000 tons in 2015 or 2016;
>
> 4. Food production enterprise with flour usage of more than 50,000 tons in 2015 or 2016;
>
> 5. Enterprise without actual import performance in 2016 but which possesses import-export operating rights and certification of its 2016 annual processing trade enterprise operating conditions and production capacity, issued by the department of commerce at its location, and which engages in processing trade using wheat or flour as the raw material.
>
> (2) Corn
>
> 1. State trading enterprise;
>
> 2. Enterprise with actual import performance (not including imports through agents) in 2016;

[21] 2017 Allocation Notice, (Exhibit USA-15), Article II. (emphasis original)
[22] China's first written submission, para. 14.
[23] China's first written submission, para. 14.
[24] China's responses to Panel question No. 8(c), para. 24, and No. 47, para. 8.
[25] China's response to Panel question No. 48, para. 9.
[26] China's response to Panel question No. 49, para. 11.
[27] China's response to Panel question No. 47, para. 8. See also China's first written submission, para. 35.

3. Feed production enterprise with corn usage of more than 50,000 tons in 2015 or 2016;

4. Other production enterprise with corn usage of more than 150,000 tons in 2015 or 2016;

5. Enterprise without actual import performance in 2016 but which possesses import-export operating rights and certification of its 2016 annual processing trade enterprise operating conditions and production capacity, issued by the department of commerce at its location, and which engages in processing trade using corn as the raw material.

(3) [] rice (separate applications are required for long-grain rice and medium- and short-grain rice)

1. State trading enterprise;

2. Enterprise with actual import performance (not including imports through agents) in 2016;

3. Grain enterprise possessing grain wholesale and retail qualifications, with a [] rice sales value of more than CNY 100 million in 2015 or 2016;

4. Food production enterprise with [] rice usage of more than 50,000 tons in 2015 or 2016;

5. Enterprise without actual import performance in 2016 but which possesses import-export operating rights and certification of its 2016 annual processing trade enterprise operating conditions and production capacity, issued by the department of commerce at its location, and which engages in processing trade using [] rice as the raw material.[28]

2.2.1.3 Application process

2.13. The application period for wheat, rice, and corn TRQs is from 15 to 30 October of the year preceding that for which TRQ certificates will be issued.[29]

2.14. The annual allocation notices include, as annexes, an application form that requires applicants to provide information regarding, among other things, the nature of the ownership of the enterprise, registered capital, tax payments, asset-liability ratio, and import and sales performance as well as production and operation capacity for the first or second year preceding the one for which the application is made.[30]

2.15. The application form also requires an applicant to commit to:

> Guarantee its conformity with the grain import tariff-rate quota application criteria stipulated by the government, guaranteeing the authenticity, accuracy, and completeness of the application form; having obtained the grain import tariff-rate quota, guarantee that grain import business activities will be carried out according to relevant government laws, regulations, and provisions.[31]

2.16. Group enterprises applying for wheat or corn TRQ allocations must "independently apply ... in the name of each processing plant".[32] Group enterprises applying for rice TRQ allocations "may choose to apply in the name of the group headquarters or a subsidiary enterprise, but the headquarters and the subsidiary enterprise must not apply at the same time".[33]

[28] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[29] 2003 Provisional Measures, (Exhibit USA-11), Article 10.
[30] 2017 Allocation Notice, (Exhibit USA-15), Annex: 2017 Grain Import Tariff-Rate Quota Application Form.
[31] 2017 Allocation Notice, (Exhibit USA-15), Annex: 2017 Grain Import Tariff-Rate Quota Application Form.
[32] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[33] 2017 Allocation Notice, (Exhibit USA-15), Article II.

2.17. Applications for TRQ allocations for wheat, rice, and corn are submitted to agencies duly authorized by the NDRC.[34] The NDRC has authorized 37 local agencies to accept applications from enterprises within their territories.[35] These local agencies are responsible for the following tasks:

> (1) To accept applicants' applications and forward them to the Ministry of Commerce or NDRC;
>
> (2) To accept inquiries and convey them to the Ministry of Commerce or NDRC;
>
> (3) To inform applicants of any part of their applications that do not meet the requirements, and remind them of their revisions; [and]
>
> (4) To issue an *Agricultural Product Import Tariff-Rate Quota Certificate* to approved applicants.[36]

2.18. The NDRC's local agencies "in accordance with the criteria announced, accept the applications and related materials submitted by the applicants for wheat, corn, [] rice, and cotton, and transmit the applications to NDRC for approval prior to November 30, concurrently submitting a copy to the Ministry of Commerce".[37]

2.2.1.4 Allocation principles

2.19. The TRQ amounts allocated to eligible applicants are determined by the NDRC. The 2003 Provisional Measures provide for two methods for determining the TRQ allocation amounts, namely, allocation "in accordance with the applicants' number of applications, past actual import performance, production capacity, and other relevant commercial standards", or allocation "based on a first-come first-served method".[38] The initial allocation of TRQ amounts is made solely on the basis of the former method, also referred to as "allocation principles" in the annual allocation notices.[39]

2.20. The 2017 Allocation Notice sets out the allocation principles as follows:

> The aforementioned grain import tariff-rate quotas will be allocated in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operating situation, etc.) and other relevant commercial standards.[40]

2.21. China states that, in practice, applicants' actual import performance under previously allocated TRQ amounts is "the factor given the most weight in NDRC's allocation analysis"[41], and that "[n]ew applicants are only considered in the event that the entire non-STE portion of the TRQs is not fully allocated to applicants with historic import performance", in which case "information concerning production capacity is a key factor".[42]

2.2.1.5 Public comment process

2.22. After receiving the applications from the NDRC's local agencies by 30 November, the NDRC publishes on its website a so-called announcement of applicant enterprise data, which includes a list

[34] 2003 Provisional Measures, (Exhibit USA-11), Article 11; 2017 Allocation Notice, (Exhibit USA-15), Article III.
[35] 2003 List of NDRC Authorized Agencies, (Exhibit USA-13).
[36] 2003 Provisional Measures, (Exhibit USA-11), Article 8. (emphasis original)
[37] 2003 Provisional Measures, (Exhibit USA-11), Article 12. See also 2017 Allocation Notice, (Exhibit USA-15), Article III.
[38] 2003 Provisional Measures, (Exhibit USA-11), Article 13.
[39] China's response to Panel question No. 52(a), para. 14. See also United States' first written submission, para. 28; and China's first written submission, para. 16 (referring to 2017 Allocation Notice, (Exhibit USA-15), Article IV).
[40] 2017 Allocation Notice, (Exhibit USA-15), Article IV.
[41] China's first written submission, para. 49. See also China's response to Panel question No. 52, para. 13.
[42] China's first written submission, para. 50.

of TRQ applicants together with relevant data submitted by each applicant.[43] The period during which the list of applicants and applicants' data will be available online is specified on the NDRC's website.[44]

2.23. Within that period, the public is invited to provide "feedback with relevant opinions" if they are "in disagreement with the data reported by the enterprises".[45] The public comments are taken into account by the NDRC in determining applicants' eligibility to receive TRQ allocations and in determining the TRQ amounts allocated to individual applicants.[46]

2.24. China states that the NDRC, in practice, verifies comments received from the public and provides applicants an opportunity to rebut any such comments.[47] China also states that NDRC will only take into account verified public comments relating to "the violation records of an applicant in the areas of industry and commerce registration, tax payments, customs, compliance with court judgements, and compliance with the 2003 Provisional Measures" and "data concerning the actual import performance and the historical processing capacity of the applicant".[48]

2.2.2 Rules and requirements for allocated TRQ amounts

2.25. Once the application process is complete, the NDRC, through its local agencies, informs applicants of the results of their applications and issues the TRQ certificates.[49]

2.26. Applicants that receive TRQ allocations are called end-users[50] and must comply with several rules and requirements when importing grains under TRQs allocated to them and when using grains imported under their TRQ allocations. The rules and requirements vary depending on the type of TRQ, grain, and enterprise involved and are described in further detail below.

2.2.2.1 STE and non-STE portions of TRQs

2.27. Article 4 of the 2003 Provisional Measures divides TRQs into STE and non-STE portions[51], and requires STE portions to be indicated in TRQ certificates.[52] STE portions of TRQs must be imported through STEs, and non-STE portions of TRQs must be imported through enterprises that have trading rights or, if the end-user has trading rights, by the end-user itself.[53]

2.28. Article 38 of the 2003 Provisional Measures defines STEs as:

> [E]nterprises conferred by the government with privileges in the exclusive import business of certain products. The list of state trading enterprises is verified, determined, and announced by the Ministry of Commerce.[54]

---

[43] 2017 Allocation Notice, (Exhibit USA-15), Article III; and 2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19).

[44] In the allocation process for 2017, this period was from 1 December to 14 December. (2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19)).

[45] 2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19).

[46] United States' first written submission, paras. 93-95; and China's responses to Panel question Nos. 55(a) paras. 21-23, 55(c), para. 25, and 55(e), para. 27.

[47] China's first written submission, para. 114; and response to Panel question No. 9(c), para. 30.

[48] China's response to Panel question No. 55(a), para. 23. (emphasis omitted)

[49] 2003 Provisional Measures, (Exhibit USA-11), Article 14.

[50] Article 39 of the 2003 Provisional Measures defines "end-users" as follows:

> [M]anufacturing enterprises, traders, wholesalers, retailers, etc. that directly apply for and obtain agricultural product import tariff-rate quotas. (2003 Provisional Measures, (Exhibit USA-11), Article 39).

For ease of reference, throughout this Report, we use the term "recipient" in referring to end-users within the meaning of this provision.

[51] 2003 Provisional Measures, Article 4 (Exhibit USA-11). See also 2017 Allocation Notice, (Exhibit USA-15), Article I.

[52] 2003 Provisional Measures, (Exhibit USA-11), Article 14.

[53] 2003 Provisional Measures, (Exhibit USA-11), Article 4. Although this was not the case when the 2003 Provisional Measures were adopted, China explains that all enterprises in China now have trading rights, which are granted automatically upon registration. (China's response to Panel question No. 1(e), para. 6). We therefore do not address or refer to "trading rights" in this Report.

[54] 2003 Provisional Measures, (Exhibit USA-11), Article 38.

The National Cereals, Oils and Foodstuffs Import and Export Corporation (COFCO) is the only STE for grains designated by the Ministry of Commerce.[55]

2.29. According to Article 22 of the 2003 Provisional Measures, if an end-user that receives an STE portion of a TRQ is unable to sign a contract through an STE (i.e. COFCO) prior to 15 August, the end-user may, "upon seeking approval" from MOFCOM or the NDRC, entrust any enterprises to import or import by itself.[56]

2.30. China states that while the NDRC is not legally prevented from allocating STE portions of TRQs to non-STE applicants, in practice, it allocates the entire STE portions of wheat, rice, and corn TRQs to COFCO.[57] China further states that the entire STE portion of each TRQ is allocated to COFCO without applying the basic eligibility criteria and allocation principles described in sections 2.2.1.2 and 2.2.1.4 above[58], and that the obligation to return unused TRQ amounts and the penalties for their non-use, described in section 2.2.2.3 below, also do not apply to COFCO.[59]

2.2.2.2 Usage requirements for wheat, rice, and corn imported under TRQ allocations

2.31. TRQ amounts allocated to an enterprise must be "self-used", and imported goods must be "operated for processing" by the enterprise itself.[60] The 2017 Allocation Notice specifies that:

> Among these [goods], imported wheat and corn are required to be processed and used in [the enterprise's] own plant; imported [] rice is required to be organized for sale in the name of the enterprise itself.[61]

2.32. As noted in paragraph 2.16 above, group enterprises that own multiple processing plants must independently apply for wheat and corn TRQ allocations in the name of each processing plant, and independently process wheat and corn imported under TRQ allocations in each processing plant.[62] Group enterprises applying for rice TRQ allocations may choose to apply in the name of the group headquarters or a subsidiary enterprise, but the headquarters and the subsidiary enterprises must not apply at the same time[63], and the rice must be organized for sale in the name of the entity that files the application.[64]

2.33. China states that, while the processing requirements for wheat and corn imported under TRQ allocations apply in all circumstances, the NDRC does not "monitor whether recipients comply with the processing requirement on a daily basis" and that the NDRC, in the event it "were to become aware of a situation in which a recipient had transferred its [unprocessed] grains to another entity", would "evaluate, on a case-by-case basis, whether the recipient should be subject to a penalty in the form of a reduced allocation in the following year".[65] If the recipient is found to have been "unable to process its full allocation for unexpected reasons", the NDRC would, according to China, not subject that recipient to a penalty.[66] China further points out that the NDRC has "not yet" encountered a situation where a TRQ recipient has transferred unprocessed wheat or corn to other entities.[67]

2.2.2.3 Return of unused TRQ amounts and penalties for their non-use

2.34. TRQ certificates for wheat, rice, and corn are valid and must be used from 1 January to 31 December of the year for which they are issued.[68] An end-user must return unused TRQ amounts

[55] Catalogue of Import State Trading Enterprises, (Exhibit USA-14). See also China's first written submission, para. 9; and United States' first written submission, para. 19.
[56] 2003 Provisional Measures (Exhibit USA-11), Article 22.
[57] China's first written submission, para. 9.
[58] China's responses to Panel question No. 6, para. 19, and No. 63, para. 44.
[59] China's response to Panel question No. 6, para. 20.
[60] 2017 Allocation Notice, (Exhibit USA-15), Article V(2).
[61] 2017 Allocation Notice, (Exhibit USA-15), Article V(2).
[62] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[63] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[64] China's response to Panel question No. 59(c), para. 39.
[65] China's response to Panel question No. 57(a), para. 29.
[66] China's response to Panel question No. 57(a), para. 29.
[67] China's response to Panel question No. 57, para. 29.
[68] 2003 Provisional Measures, (Exhibit USA-11), Article 15.

to the original certificate-issuing agency by 15 September of that year. In this regard, the 2003 Provisional Measures state that:

> In the event that an end-user holding an agricultural product import tariff-rate quota is unable to sign import contracts for, or has already signed import contracts for but is unable to complete, the entire quota quantity already applied for and obtained for the current year, [the end-user] must return the quota quantity it was unable to complete to the original certificate-issuing agency prior to September 15.[69]

2.35. Article 30 of the 2003 Provisional Measures imposes penalties in the form of deductions to the TRQ allocations in the following year for end-users that fail to return unused TRQ amounts by 15 September. More particularly, it states that:

> In the event that an end-user, in violation of the provisions in Article 23 of these Measures, fails to complete imports for the entire agricultural import tariff-rate quota quantity allocated during the current year, and also fails to return to the original certificate-issuing agency by September 15 the quota quantity it failed to import during the current year, there will be a corresponding deduction to its tariff-rate quota quantity allocated in the following year, according to the proportion not completed.[70]

2.36. Article 31 imposes penalties in the form of deductions to the TRQ allocations in the following year for end-users that are unable to complete importation under TRQs for two consecutive years even if they comply with the obligation to return unused amounts. More particularly, it states that:

> In the event that an end-user fails to complete imports for the entire agricultural import tariff-rate quota quantity allocated for two consecutive years, but has returned to the original certificate-issuing agency by September 15 the quota quantity that it failed to utilize during the current year, there will be a corresponding deduction to its tariff-rate quota quantity allocated in the following year, according to its proportion not completed in the most recent year.[71]

2.2.3 Reallocation of returned TRQ amounts

2.37. As described in section 2.2.2.3 above, an end-user must return unused TRQ amounts by 15 September of the year for which they are issued, in which case they are reallocated by the NDRC in conjunction with MOFCOM. The application period for TRQs available for reallocation is from 1 to 15 September of the same year.[72] End-users that have fully utilized their TRQ allocations prior to the end of August, as well as new users that meet the application criteria in the allocation notice but did not apply during the original allocation process, are eligible to apply for reallocation.[73]

2.38. One month before the application period for reallocation, the NDRC issues a reallocation notice in the International Business Daily, the China Economic Herald, and on MOFCOM's and the NDRC's websites, which sets out the application criteria for reallocation.[74]

2.39. The 2003 Provisional Measures and the annual reallocation notices set out the method for reallocating returned TRQ amounts. The 2003 Provisional Measures state, in relevant part:

> Tariff-rate quota reallocated quantities are allocated in accordance with the application criteria promulgated and according to the first-come-first-served method. The minimum quota quantity is determined using the commercially viable shipping quantities for each type of agricultural product.[75]

[69] 2003 Provisional Measures, (Exhibit USA-11), Article 23. See also 2017 Reallocation Notice, (Exhibit USA-17), para. 1.
[70] 2003 Provisional Measures, (Exhibit USA-11), Article 30. (emphasis omitted)
[71] 2003 Provisional Measures, (Exhibit USA-11), Article 31.
[72] 2003 Provisional Measures, (Exhibit USA-11), Article 24.
[73] 2003 Provisional Measures, (Exhibit USA-11), Article 25. See also 2017 Reallocation Notice, (Exhibit USA-17), para. 2.
[74] 2003 Provisional Measures, (Exhibit USA-11), Article 24.
[75] 2003 Provisional Measures, (Exhibit USA-11), Article 26.

2.40. The 2017 Reallocation Notice states that:

> The National Development and Reform Commission and the Ministry of Commerce will carry out reallocation of quotas returned by users according to the order in which applications were submitted online. Before October 1, the tariff-rate quota reallocation results will be notified to the end-users.
>
> When the number of applications that meet the criteria, in total, is smaller than the reallocated tariff-rate quota quantity, every applicant's application can be satisfied; when the number of applications that meet the criteria, in total, is larger than the reallocated tariff-rate quota quantity, reallocation will be carried out according to the Allocation Principles and the Allocation Rules.[76]

2.41. China states that the NDRC, in practice, reallocates returned TRQ amounts based on the first-come, first-served method, and that the allocation principles used during the initial allocation process do not apply to the reallocation process.[77]

2.42. Reallocation notices include, as annexes, an application form, which is similar to that used for the initial allocation process.[78] Applications for reallocation of returned TRQ amounts may be submitted to the NDRC's local agencies.[79]

2.43. According to the 2017 Reallocation Notice, from 1 September of each year, the NDRC's local agencies "carry out reporting of the applications that meet the criteria via an agricultural product import tariff-rate quota computerized management system". This Notice also states that, before 20 September, the local agencies "report these up in writing" to the NDRC.[80]

2.44. The 2003 Provisional Measures direct the NDRC to reallocate returned TRQ amounts before 30 September.[81] They also state that applicants that receive a reallocation may import by themselves or through other enterprises.[82]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that China's administration of its wheat, rice, and corn TRQs is inconsistent with China's obligations under Paragraph 116 of the Report of the Working Party on the Accession of China (WT/MIN(01)/3) (China's Working Party Report), as well as with Articles X:3(a), XI:1, and XIII:3(b) of the GATT 1994. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measure into conformity with its WTO obligations.[83]

3.2. China requests that the Panel reject the United States' claims.[84]

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 22 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, Ecuador, the European Union, Japan, and Ukraine are reflected in their executive summaries, provided in accordance with paragraph 25 of the Working

[76] 2017 Reallocation Notice, (Exhibit USA-17), para. 5. (emphasis omitted)
[77] China's response to Panel question No. 52(b), para. 15.
[78] 2017 Reallocation Notice, (Exhibit USA-17), Annex 1: 2017 Grain Import Tariff-Rate Quota Reallocation Application Form.
[79] 2003 Provisional Measures (Exhibit USA-11), Article 24.
[80] 2017 Reallocation Notice, (Exhibit USA-17), para. 4.
[81] 2003 Provisional Measures, (Exhibit USA-11), Article 26.
[82] 2003 Provisional Measures, (Exhibit USA-11), Article 26.
[83] See WT/DS517/6; and United States' first written submission, para. 309.
[84] See China's first written submission, para. 157.

Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). Guatemala, India, Indonesia, Kazakhstan, the Republic of Korea, Norway, the Russian Federation, Singapore, Chinese Taipei, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 15 February 2019, the Panel issued its Interim Report to the parties. On 6 March 2019, China and the United States each submitted written requests for the Panel to review aspects of the Interim Report. On 20 March 2019, both parties submitted comments on the other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The numbering of some of the footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Final Report and, where it differs, includes the corresponding numbering in the Interim Report.

6.3. The parties' requests for substantive modifications are discussed below. In addition to the requests discussed below, corrections were made for typographical and other non-substantive errors in the Report, including those identified by the parties.

6.1 Factual aspects

6.4. The United States requests that we modify our description of the application form annexed to the 2017 Allocation Notice in paragraph 2.14. First, the United States requests that we clarify that the form requires information regarding the "nature" rather than the "ownership" of the applicant. Second, the United States requests that we clarify that an applicant can submit information for the first or second year preceding the one for which the application is made.[85] The United States submits the same two requests in relation to paragraphs 7.32 and 7.36.[86] China does not oppose either request but asks that we disregard certain parts of the reasoning provided by the United States in support of its first request. More particularly, China asks that we disregard the United States' argument that information regarding the "nature" of the applicant "requires an indication of whether the enterprise is a state asset or private enterprise".[87] In light of the text of the application form, and the views expressed by both parties, we have modified paragraphs 2.14, 7.32, and 7.36 by referring to the "nature of the ownership" rather than the "ownership" of the applicant and by clarifying that applicants can submit information for the first or second year preceding the one for which the application is made.

6.2 Claims under Paragraph 116 of China's Working Party Report

6.5. The United States requests that the term "challenged measure" be replaced with "challenged measures" in paragraph 7.1 because the United States included several legal instruments in its panel request, and China's TRQ administration comprises numerous aspects.[88] The United States submits the same or similar requests in relation to paragraphs 7.11, 7.12, 7.13, 7.14, 7.15, and 7.162.[89] China opposes the United States' request, arguing that the United States' panel request identified "a singular 'measure' consisting of China's *administration* of its TRQs" and distinguished this from "the 'legal instruments *through which* China has established its TRQs for wheat, short- and medium- grain rice, long grain rice, and corn'".[90] We agree that the challenged measure is China's administration of its wheat, rice, and corn TRQs which, as we explain below, covers the legal instruments and acts of the relevant authorities that implement, or put into practical effect, China's TRQs.[91] Our understanding of China's administration of its wheat, rice, and corn TRQs therefore covers all the legal instruments identified in the United States' panel request. We therefore do not

[85] United States' request for review of the Interim Report, para. 13.
[86] United States' request for review of the Interim Report, para. 13.
[87] China's comments on the United States' request for review of the Interim Report, para. 8 (quoting the United States' request for review of the Interim Report, para. 13).
[88] United States' request for review of the Interim Report, para. 3.
[89] United States' request for review of the Interim Report, paras. 6, 7, 9, 10, 11, 12, and 21.
[90] China's comments on the United States' request for review of the Interim Report, para. 1 (quoting WT/DS517/6). (emphasis added by China) See also ibid. paras. 2, 3, 4, 5, 6, 7, and 12.
[91] See para. 7.7 below.

consider it accurate or appropriate to refer to "challenged measures" in the plural, and thus reject the United States' request. We have, however, made textual modifications to certain paragraphs, including those identified by the United States, in order to clarify that the challenged measure is China's administration of its wheat, rice, and corn TRQs.

6.6. The United States requests that we refer to "the customary rules of interpretation of public international law" reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties in paragraph 7.5 rather than to the provisions of the Convention themselves. In the United States' view, this would better reflect the fact that the United States is not a party to the Convention.[92] China has not commented on this request. We consider the United States' proposed modification useful and have adjusted the text of paragraph 7.5 accordingly.

6.7. The United States requests that we refer to the 1993 version, rather than the 2007 version, of the Shorter Oxford English Dictionary in setting out our understanding of the ordinary meaning of certain terms in Paragraph 116 of China's Working Party Report, and asks that we modify footnotes 135 through 140 to paragraph 7.9 (footnotes 96 through 101 to paragraph 7.9 of the Interim Report) accordingly.[93] China has not commented on this request. We note that both versions of the Shorter Oxford English Dictionary contain identical definitions for the terms at issue. We therefore do not consider it useful to make the requested modifications, and reject the United States' request.

6.8. The United States requests that we modify our description of the structure of China's arguments, in paragraph 7.12, in order to reflect the fact that China did not address all of the United States' claims in its first written submission.[94] China opposes the United States' request, arguing that it addressed all of the United States' claims at the Panel's first meeting with the parties and in its subsequent submissions.[95] We have slightly modified the text of paragraph 7.12 in order to accommodate both parties' arguments.

6.9. The United States requests that we remove the characterization, in the first sentence of paragraph 7.13, of its claims under Paragraph 116 of China's Working Party Report as "intertwined", and rather indicate that "the United States in certain instances offers the same evidence in support of separate claims".[96] China has not commented on this request. In our view, the characterization of the United States' claims as intertwined is accurate, regardless of whether this intertwined nature stems from the United States' reliance on "the same evidence in support of separate claims". We do not consider it necessary or useful to modify the text of paragraph 7.13, and thus reject the United States' request.

6.10. The United States requests that we modify the fifth sentence of paragraph 7.13, which describes the Panel's approach in analysing the United States' claims under Paragraph 116 of China's Working Party Report, in order to indicate that the obligations under Paragraph 116 are legally independent. More particularly, the United States requests that we not describe our holistic assessment of the compatibility of China's TRQ administration as "synthesizing our intermediate analyses" regarding the individual aspects of the measure, but rather as being "in addition to our analyses" regarding the individual aspects of the measure.[97] The United States submits the same request in relation to the fifth sentence of paragraph 7.162.[98] China has not commented on this request. We agree that our analyses of the individual aspects of China's TRQ administration should not be viewed as intermediate. We have therefore removed this term from paragraphs 7.13 and 7.162, but have not found it necessary or useful to make further modifications.

6.11. China requests that we modify the description in paragraph 7.44[99] of the NDRC's practice in determining an applicant's eligibility to receive TRQ allocations, in order to better reflect China's explanation that the NDRC, in practice, generates an applicant's credit report through Credit China

[92] United States' request for review of the Interim Report, para. 4.
[93] United States' request for review of the Interim Report, para. 5.
[94] United States' request for review of the Interim Report, para. 7.
[95] China's comments on the United States' request for review of the Interim Report, para. 3.
[96] United States' request for review of the Interim Report, para. 8.
[97] United States' request for review of the Interim Report, para. 10.
[98] United States' request for review of the Interim Report, para. 21.
[99] In its request for review of the Interim Report, China refers to paragraph 7.4 rather than paragraph 7.44 (China's request for review of the Interim Report, p. 2). This appears to be a typographical error, and we have not made any modifications to paragraph 7.4 of our Report.

by using the applicant's uniform social credit code.[100] The United States does not oppose China's request but asks that we clarify that this description is based on China's explanation of the NDRC's practice.[101] We consider China's suggested modification, and the United States' suggested clarification, accurate and useful, and have adjusted the text of paragraph 7.44 accordingly.

6.12. The United States requests that we revise our finding in paragraph 7.61 that it is sufficient for China to list the factors that the NDRC will take into account in allocating TRQ amounts and that Paragraph 116 of China's Working Party Report does not require China to specify how the NDRC will evaluate these factors and what weight it will accord to them. In the United States' view, this finding is inconsistent with the Panel's understanding of the meaning and nature of the obligations under Paragraph 116, as well as with the Panel's findings in paragraphs 7.69 and 7.84 on certain other aspects of China's TRQ administration.[102] China opposes the United States' request, arguing that the Panel "properly … concluded that the United States' proposed standard was overly stringent" and that there are no inconsistencies in the Panel's findings.[103] We note that interim review provides parties an opportunity to request the Panel "to review precise aspects of the interim report"[104] and is not an appropriate stage for the parties to raise new arguments or to re-argue their case on the basis of arguments already put before the Panel.[105] Further, we do not consider that our finding in paragraph 7.61 is inconsistent with any other finding in our Report. We therefore reject the United States' request that we revise our finding in paragraph 7.61. We have nonetheless modified paragraphs 7.69, 7.82, and 7.84, in order to clarify that there are no inconsistencies in our findings on different aspects of China's TRQ administration.

6.13. China requests that we modify the description in paragraph 7.77 of the public comment process, by clarifying that the NDRC only publishes "certain" information submitted by applicants in their TRQ applications.[106] The United States does not oppose China's request but asks us to add that this description is based on China's explanation.[107] We find China's suggestion useful, but consider it more accurate to use the term "relevant" as this is the term used in China's legal instrument, the 2017 Announcement of Applicant Enterprise Data.[108] We have adjusted the text of paragraph 7.77 accordingly. Since the description of the public comment process is based on a legal instrument, the 2017 Announcement of Applicant Enterprise Data, rather than China's explanation, we do not consider it accurate to include the United States' proposed addition.

6.14. The United States requests that we "avoid confusion" by adding a direct reference to Article 30 of the 2003 Provisional Measures in footnote 281 to paragraph 7.105 (footnote 241 to paragraph 7.105 of the Interim Report), which sets out the legal basis for the requirement to return unused TRQ amounts.[109] China has not commented on this request. We note that footnote 281, first, provides a direct reference to Article 23 of the 2003 Provisional Measures, which is the legal basis for the requirement to return unused TRQ amounts. Footnote 281, then, explains that Article 30 of the 2003 Provisional Measures imposes penalties for failure to comply with the requirement to return unused TRQ amounts, and quotes the text of this provision. Thus, in our view, footnote 281 provides all the necessary information and does not cause confusion. We therefore reject the United States' request.

6.15. The United States requests that we add the phrase "with trading rights" to our description in paragraph 7.114 of the procedure for non-STE recipients to import under STE portions of TRQs, in order to accurately reflect Articles 4 and 22 of the 2003 Provisional Measures, and to specify that non-STE recipients of STE portions of TRQs may only seek approval to import through enterprises "with trading rights".[110] China opposes the United States' request on the basis that trading rights

[100] China's request for review of the Interim Report, p. 2.
[101] United States' comments on China's request for review of the Interim Report, para. 3.
[102] United States' request for review of the Interim Report, paras. 15-17.
[103] China's comments on the United States' request for review of the Interim Report, para. 9.
[104] Article 15.2 of the DSU.
[105] Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.
[106] China's request for review of the Interim Report, p. 2.
[107] United States' comments on China's request for review of the Interim Report, para. 4.
[108] 2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19).
[109] United States' request for review of the Interim Report, para. 18.
[110] United States' request for review of the Interim Report, para. 19.

are no longer relevant to China's TRQ administration.[111] We note that the term "trading rights" appears several times in the 2003 Provisional Measures. As clarified in our factual description of China's TRQ administration above, we, however, do not refer to this term in our Report because China explains that all enterprises in China have trading rights, which are granted automatically upon registration.[112] The United States has not contested China's explanation or otherwise suggested that trading rights are relevant. In light of this, we do not find it useful to refer to trading rights in describing the procedure for non-STE recipients to import under STE portions of TRQs, or elsewhere, and therefore reject the United States' request.

6.16. The United States requests that we revise our finding in paragraph 7.132 that China's failure to give public notice of the outcomes of the NDRC's allocation and reallocation processes would not inhibit the filling of each TRQ by preventing grain importers and exporters from entering into commercial arrangements for the importation of wheat, rice, and corn, because nothing prevents TRQ recipients from publishing their own outcomes or contacting grains exporters. In the United States' view, this finding "does not include, however, circumstances where a TRQ holder (the STE, COFCO, for example) may not wish to enter into commercial arrangements for the importation of grains".[113] China opposes the United States' request, arguing that it is based on "a purely speculative hypothetical" and "only serves to confirm that [the United States] lacks any valid basis for arguing that the information currently published by China is insufficient".[114] We reiterate that interim review is not an appropriate stage for the parties to raise new arguments or re-argue their case on the basis of arguments already put before the Panel.[115] Furthermore, consideration of "circumstances where a TRQ holder (the STE, COFCO, for example) may not wish to enter into commercial arrangements for the importation of grains" would, in our view, not alter the finding that China's failure to give public notice of the outcomes of the NDRC's allocation and reallocation processes would not inhibit the filling of each TRQ. More particularly, if TRQ recipients do not wish to enter into commercial arrangements with grain exporters, they will presumably not do so regardless of whether China provides public notice of the allocation and reallocation outcomes. We therefore reject the United States' request that we revise our finding in paragraph 7.132.

6.17. China requests that we modify paragraph 7.145 and footnote 337 thereto (footnote 297 of the Interim Report) by deleting references to Articles 30 and 31 of the 2003 Provisional Measures since these provisions impose penalties for non-use of TRQ allocations, rather than penalties for failure to comply with the usage requirements for wheat and corn imported under TRQ allocations.[116] China requests that we instead refer to China's explanation "that in cases where NDRC imposes penalties on recipients for not having met the usage requirements for imported wheat and corn under the TRQs, such penalties would take the form of deductions in TRQ allocations in the coming year".[117] The United States opposes the deletion of references to Articles 30 and 31 of the 2003 Provisional Measures, arguing that a TRQ recipient who "knows it can not or may not be able to process the full amount of its wheat or corn allocation in its own plant … may not apply for or import as much grain, and in the latter scenario would be subject to the TRQ utilization penalty referenced in Articles 30 and 31".[118] However, the United States does not object to China's request that an additional reference be provided to China's explanation of the penalties for failure to comply with the usage requirements for wheat and corn.[119] We note that while the penalties in Articles 30 and 31 of the 2003 Provisional Measures are not directly applicable to failure to comply with the usage requirements for wheat and corn, the operation of the usage requirements, in conjunction with the penalties for non-use of TRQ allocations, has an effect on the filling of the TRQs. It is this effect that forms the basis for the United States' claim and our finding under Paragraph 116 of China's Working Party Report. We therefore reject China's request for the deletion of the references to Articles 30 and 31 of the 2003 Provisional Measures in paragraph 7.145 and footnote 337 thereto. However,

[111] China's comments on the United States' request for review of the Interim Report, para. 10.
[112] See fn 53 above (referring to China's response to Panel question No. 1(e), para. 6).
[113] United States' request for review of the Interim Report, para. 20.
[114] China's comments on the United States' request for review of the Interim Report, para. 11.
[115] Appellate Body Reports, *EC − Sardines*, para. 301; and *EC − Selected Customs Matters*, para. 259. See also Panel Reports, *Japan − DRAMs (Korea)*, para. 6.2; *US − Poultry (China)*, para. 6.32; *India − Agricultural Products*, para. 6.5; *India − Solar Cells*, para. 6.24; *Russia − Pigs*, paras. 6.6-6.7; *US − Zeroing (EC) (Article 21.5 − EC)*, para. 7.26; and *Brazil − Taxation*, para. 6.7.
[116] China's request for review of the Interim Report, pp. 3-4.
[117] China's request for review of the Interim Report, p. 4 (referring to China's response to Panel question No. 58(a), para. 33).
[118] United States' comments on China's request for review of the Interim Report, para. 6.
[119] United States' comments on China's request for review of the Interim Report, para. 11.

we have made certain modifications to paragraph 7.145 to clarify the relevance of the penalties for non-use of TRQ allocations in Articles 30 and 31 of the 2003 Provisional Measures, for the usage requirements for wheat and corn. Further, we consider that China's explanation that penalties similar to those in Articles 30 and 31 of the 2003 Provisional Measures apply to failure to comply with the usage requirements for wheat and corn supports our finding in paragraph 7.145, and we therefore agree with both parties that an additional reference to this explanation in footnote 337 is appropriate and useful.

6.3 Claim under Article XIII:3(b) of the GATT 1994

6.18. The United States requests that the term "contracting party" be replaced by the term "Member" in paragraph 7.187.[120] China has not commented on this request. We note that the term "contracting party" appears as part of a quote from Article XIII:3(a) of the GATT 1994. Paragraph 2(a) of the Explanatory Note to the GATT 1994, provides that "references to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'". We therefore do not consider it necessary to modify the quote in paragraph 7.187, and reject the United States' request.

6.19. The United States requests a "clarification, for accuracy and for consistency" in paragraph 7.190. More particularly, the United States requests that we explain that a TRQ gives applicants permission or opportunity to import goods at the in-quota rate "up to the total TRQ amounts allocated" rather than "up to the total TRQ amounts available for allocation".[121] China opposes the United States' request, arguing that the proposed "clarification" would be inconsistent with the Panel's finding that Article XIII:3(b) of the GATT 1994 requires public notice of the total TRQ amounts available for allocation, not the total TRQ amounts actually allocated.[122] We agree with China that the United States' requested modification is not a "clarification, for accuracy and for consistency" but rather a substantive modification that would not be consistent with our interpretation of Article XIII:3(b) and our finding that this provision requires public notice of the total TRQ amounts of available for allocation, not the total TRQ amounts actually allocated. We therefore reject the United States' request.

6.4 Claim under Article X:3(a) of the GATT 1994

6.20. The United States requests that the reference to a "well-established principle in WTO case law" in paragraph 7.212 be deleted, since it could be "misunderstood as indicating that prior panel and appellate reports have precedential value" and since the DSU provides more direct support for the relevant finding.[123] The United States suggests further modifications to paragraph 7.212 and footnote 404 thereto (footnote 364 of the Interim Report) to clarify that the finding is based on the provisions of the DSU. China has not commented on this request. While we have not found it necessary to introduce all of the United States' suggested modifications, we have deleted the reference to a "well-established principle in WTO case law" and have made certain other textual modifications to paragraph 7.212 and footnote 404 thereto in order to address the concern identified by the United States. Although not specifically requested by the United States, we have also made the same modifications in paragraph 7.238 and footnote 446 thereto (footnote 406 of the Interim Report) concerning the claim under Article XI:1 of the GATT 1994.

7 FINDINGS

7.1 Claims under Paragraph 116 of China's Working Party Report

7.1.1 Introduction

7.1. The United States raises several claims under Paragraph 116 of China's Working Party Report, namely that China violates the obligations to administer its wheat, rice, and corn TRQs on a transparent, predictable, and fair basis, using clearly specified administrative procedures and requirements that would not inhibit the filling of each TRQ.[124] Each claim takes issue with specific aspects of China's administration of its wheat, rice, and corn TRQs. Such aspects include the basic

[120] United States' request for review of the Interim Report, para. 22.
[121] United States' request for review of the Interim Report, para. 23.
[122] China's comments on the United States' request for review of the Interim Report, para. 13.
[123] United States' request for review of the Interim Report, para. 24.
[124] United States' first written submission, paras. 64 and 309.

eligibility criteria to receive TRQs (basic eligibility criteria); the principles for allocating the TRQ amounts (allocation principles) and the procedures for reallocating the amounts of returned TRQs (reallocation procedures); the use of a public comment process; the administration of STE and non-STE portions of TRQs; the extent of the public notice provided in connection with allocation, return and reallocation of TRQs; and the usage requirements imposed on wheat, rice, and corn imported under TRQ allocations (usage requirements).[125]

7.2. While acknowledging that certain aspects of its TRQ administration could be better reflected in its legal instruments[126], China generally rejects all of the United States' claims under Paragraph 116.[127]

7.1.2 Legal provision

7.3. Paragraph 116 of China's Working Party Report states in relevant part:

> The representative of China stated that upon accession, China would ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ.[128]

7.4. Previous WTO panels have not yet addressed Paragraph 116. We therefore find it useful to set out our understanding of the meaning and nature of the legal obligations laid down in this provision, before proceeding to our assessment of the claims.

7.5. As a threshold matter, we note that Paragraph 1.2 of China's Accession Protocol stipulates that "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of [China's] Working Party Report, shall be an integral part of the WTO Agreement."[129] Paragraph 342 of China's Working Party Report, in turn, refers to the commitments contained in a number of its paragraphs, including Paragraph 116.[130] In light of this, we consider that China's commitments under Paragraph 116 are enforceable under the DSU, and we will interpret these obligations in accordance with the customary rules of interpretation of public international law reflected in the relevant provisions of the Vienna Convention on the Law of Treaties.[131]

7.6. Paragraph 116 contains multiple obligations, which may be grouped into three categories. The first category concerns the basis of China's TRQ administration, and requires this basis to be transparent, predictable, uniform, fair, and non-discriminatory. The second category concerns the timeframes, administrative procedures and requirements China uses in its TRQ administration, and requires these timeframes, administrative procedures and requirements to be clearly specified. The third category concerns the effects of the aforementioned time-frames, administrative procedures and requirements, and requires that they provide effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit the filling of each TRQ.

7.7. All obligations set forth in Paragraph 116 apply only to China's administration of its TRQs, as opposed to the TRQs themselves. In this regard, we consider that China's administration of its TRQs covers the legal instruments and acts of the relevant authorities that implement the TRQs or put them into practical effect.[132]

---

[125] United States' first written submission, paras. 65, 70, 113, 152, 165, 180, and 190-192; and response to Panel question No. 19(b), paras. 53-55.

[126] China's opening statement at the first meeting of the Panel, para. 14; and response to Panel question No. 26, para. 73.

[127] China's first written submission, para. 157; responses to Panel question No. 24(b), paras. 71-72 and No. 26, para. 73; and second written submission, paras. 57-61.

[128] China's Working Party Report, (Exhibit USA-1), Paragraph 116.

[129] China's Accession Protocol, (Exhibit USA-2), Paragraph 1.2.

[130] China's Working Party Report, (Exhibit USA-1), para. 342.

[131] For a similar approach, see e.g. Appellate Body Reports, *China – Raw Materials*, para. 278; and *China – Rare Earths*, para. 5.19; and Panel Reports, *China – Auto Parts*, paras. 7.740-7.741; *China – Raw Materials*, paras. 7.112-7.114; and *China – Rare Earths*, para. 7.40.

[132] For a similar approach under Article X:3(a) of the GATT 1994 concerning the administration of trade regulations, see e.g. Appellate Body Reports, *EC – Bananas III*, para. 200; *EC – Selected Customs Matters*,

7.8. Paragraph 116 lists the multiple obligations contained therein using the conjunction "and", which, as both parties agree[133], suggests that these are legally independent obligations. Therefore, a breach of any of these obligations would lead to a violation of Paragraph 116.[134] In our assessment, we focus only on the six obligations the United States has invoked in challenging China's TRQ administration under Paragraph 116, namely the obligations to (a) administer TRQs on a transparent basis; (b) administer TRQs on a predictable basis; (c) administer TRQs on a fair basis; (d) administer TRQs using clearly specified administrative procedures; (e) administer TRQs using clearly specified requirements; and (f) administer TRQs using timeframes, administrative procedures and requirements that would not inhibit the filling of each TRQ.

7.9. Since the obligations set forth in Paragraph 116 are legally independent, we consider it important to set out our understanding of the meaning and nature of each obligation the United States has invoked in the case before us. The first three obligations concern the "basis" for China's TRQ administration, in other words, the underlying set of rules or principles according to which China administers its TRQs.[135] In our view, these obligations require China to administer its TRQs through an underlying set of rules or principles that are easily understood or discerned by applicants and other interested parties (administer TRQs on a transparent basis)[136]; that allows applicants and other interested parties to easily anticipate how decisions regarding TRQ administration are made (administer TRQs on a predictable basis)[137]; and that is impartial and equitable, requiring the relevant authorities to administer TRQs in accordance with the applicable rules and standards (administer TRQs on a fair basis).[138] With respect to the fourth and fifth obligations, we consider that they require China to use administrative procedures and requirements that are set out in plain or obvious detail (use clearly specified administrative procedures and requirements).[139] The sixth obligation, concerning the effects of China's TRQ administration, requires China to employ timeframes, administrative procedures and requirements that would not restrain or prevent the filling of each TRQ (administer TRQs in a manner that would not inhibit the filling of each TRQ).[140] Although this obligation concerns the effects of China's TRQ administration on the filling of each TRQ, we do not believe that the United States is required to quantify such effects in order to prevail under this claim. Rather, the United States can substantiate this claim with reference to the design, architecture and structure of China's TRQ administration, in its relevant context.[141]

paras. 199-201 and 224; and *EC – Poultry*, para. 115; and Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.869-7.870.

[133] United States' first written submission, para. 63; and response to Panel question No. 24(a), para. 77; and China's response to panel question No. 24(b), para. 71. Some third parties have also expressed the same view. (See Brazil's third-party statement, para. 3; and response to Panel question No. 1(b); Canada's response to Panel question No. 1(b), para. 6; European Union's response to Panel question No. 1(b), paras. 39-41; and Japan's response to Panel question No. 1(b)).

[134] For a similar approach under Article X:3(a) of the GATT 1994 requiring uniform, impartial and reasonable administration of trade regulations, see e.g. Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383; and *Thailand – Cigarettes (Philippines)*, para. 7.867.

[135] The Shorter Oxford Dictionary defines "basis" as "[a] thing on which anything is constructed and by which its constitution or operation is determined; a footing (of a specified kind); a determining principle; a set of underlying or agreed principles". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 188).

[136] The Shorter Oxford Dictionary defines "transparent" as "[e]asily seen through or understood; easily discerned; evident, obvious". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3373).

[137] The Shorter Oxford Dictionary defines "predictable" as "[a]ble to be predicted. Also (of a person), acting in a way that is easy to predict". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2329).

[138] The Shorter Oxford Dictionary defines "fair" as " [o]f a person, action, argument, etc.: just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 907).

[139] The Shorter Oxford Dictionary defines "clearly" as, " [d]istinctly; plainly; manifestly, obviously" and "specify" as "... [s]peak or treat of a matter etc. in detail; give details or particulars". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vols. 1 and 2, pp. 415 and 2973).

[140] The Shorter Oxford Dictionary defines "inhibit" as " [r]estrain, prevent" and "filling" as " [s]omething which fills or is used to fill a space or hole, stop up a gap, etc". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, pp. 949 and 1369).

[141] For a similar approach under Article XI:1 of the GATT 1994 concerning quantitative restrictions on importation and exportation, see e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.217; and Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.45.

7.1.3 Horizontal issues

7.10. In this section, we address certain horizontal issues arising from the United States' claims under Paragraph 116 of China's Working Party Report, before proceeding to our assessment of the individual claims.

7.11. First, we explain how we have structured our assessment of the United States' claims under Paragraph 116. The United States challenges several aspects of China's administration of its wheat, rice, and corn TRQs under several obligations set forth in Paragraph 116. More particularly, and as explained above, the United States claims that China's TRQ administration violates six obligations under Paragraph 116, namely the obligations to (a) administer TRQs on a transparent basis; (b) administer TRQs on a predictable basis; (c) administer TRQs on a fair basis; (d) use clearly specified administrative procedures; (e) use clearly specified requirements; and (f) administer TRQs in a manner that would not inhibit the filling of each TRQ. In substantiating these claims, the United States challenges several specific aspects of China's TRQ administration, namely those relating to (i) the basic eligibility criteria; (ii) the allocation principles and the reallocation procedures; (iii) the use of a public comment process; (iv) the administration of STE and non-STE portions of TRQs; (v) the extent of the public notice provided in connection with allocation, return and reallocation of TRQs; and (vi) the usage requirements.[142] The United States combines different aspects of China's administration of its wheat, rice, and corn TRQs in arguing that it violates a particular obligation under Paragraph 116.

7.12. A panel has discretion to decide the order of its analysis and, in doing so, it may take into account how the parties have presented their claims and arguments.[143] In the case before us, the United States has presented its claims on the basis of alleged violations of the obligations laid down in Paragraph 116, and has addressed, under separate subheadings, which aspects of China's TRQ administration violate a particular obligation.[144] China, in turn, has presented its arguments on the basis of the aspects of its TRQ administration, and has addressed, cumulatively, the claims presented by the United States about an aspect of China's TRQ administration.[145]

7.13. Both approaches have their own logic, and they both give rise to a certain amount of repetition because of the intertwined nature of the United States' claims. For ease of explanation, and to avoid unnecessary repetition, we have decided to assess the claims on the basis of the aspects of China's administration of its wheat, rice, and corn TRQs. That is, we will analyse all claims raised by the United States about an aspect of China's TRQ administration, and then proceed to the next aspect. In considering whether each aspect of China's TRQ administration is consistent with the relevant legal obligations, we will not undertake an "isolated consideration of each element"[146], and will, where appropriate, take into consideration the interlinkages between different aspects of China's TRQ administration. Next, we will conduct a holistic assessment of the compatibility of China's TRQ administration with the obligations set forth in Paragraph 116, by synthesizing our analyses regarding the individual aspects of China's TRQ administration.[147]

7.14. Second, we recall that the obligations set forth in Paragraph 116 apply to China's TRQ administration[148], and that Article 11 of the DSU requires us to examine the applicability of the obligations set forth in Paragraph 116 to the measure before us. Hence, as pointed out in paragraph 7.7 above, we have to satisfy ourselves that the aspects the United States challenges

[142] United States' first written submission, paras. 65, 70, 113, 152, 165, 180, and 190-192; and response to Panel question No. 19(b), paras. 53-55.

[143] See, e.g. Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126; and Panel Reports, *Argentina – Financial Services*, para. 7.67; and *EU – Poultry Meat (China)*, para. 7.12.

[144] United States' first written submission, paras. 70-222.

[145] China's first written submission, paras. 45-55, 61-76, 93-100, 110, 112-115, and 124-134.

[146] Panel Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.530 (quoting Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.21.)

[147] For a similar approach, see e.g. Panel Report, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.529. In responding to the United States' claims, China points to the importance of assessing the compatibility with the obligations laid down in Paragraph 116 of its TRQ administration "as a whole". (See China's second written submission, paras. 57-61; and opening statement at the second meeting of the Panel, paras. 20-25). By taking into account the interlinkages between individual aspects of China's TRQ administration and by conducting a holistic assessment of the compatibility of China's TRQ administration with the obligations laid down in Paragraph 116, we do exactly that.

[148] See para. 7.7 above.

form part of China's TRQ administration, as opposed to the TRQs themselves. In this regard, we recall that a TRQ is essentially a two-level tariff measure, consisting of a lower tariff rate imposed on imports within the quota volume and a higher tariff rate imposed on imports outside the quota volume. TRQ administration, on the other hand, consists of the legal instruments and acts of the relevant authorities that implement TRQs or put them into practical effect.[149]

7.15. None of the aspects that the United States challenges determines the level of the within-quota or outside-quota tariff rates, nor the quota volumes. Therefore, they cannot be considered as forming part of China's TRQs. Rather, the challenged aspects serve to implement China's TRQs or to put them into practical effect in that they determine who is eligible to receive a TRQ allocation or reallocation, the amount of the TRQ allocation or reallocation, how allocated TRQ amounts are to be utilized, how products imported under TRQs are to be used, and the consequences of not utilizing allocated TRQ amounts. We therefore consider that all the challenged aspects form part of China's TRQ administration, as opposed to forming part of the TRQs themselves.

7.16. China argues that the usage requirements for wheat, rice, and corn imported under TRQs and the penalties for non-use of TRQ allocations, form part of the TRQs themselves and therefore fall outside the scope of Paragraph 116.[150] Specifically, China submits that the usage requirements are "substantive rules" that "condition access to the TRQ" and therefore form part of the TRQ.[151] China also submits that the usage requirements "define the parameters of the quota itself" because "if imports will not be used for the specified purpose, they will not be accessible for importation regardless of whether the applicant submits an application or complies with any other administrative procedural requirement".[152] We disagree with these arguments. China has not explained, and it is not clear to us, in what sense the usage requirements define the parameters of the quota itself or constitute substantive rules that condition access to the TRQ. The usage requirements do not define the types or volumes of wheat, rice, and corn covered by China's TRQs, nor do they affect the within-quota or outside-quota tariff rates. Rather, they are requirements that recipients of TRQ allocations must comply with when using the wheat, rice, or corn imported under their TRQ allocations.[153]

7.17. We also do not agree with China that the usage requirements and the penalties for non-use of TRQ allocations are included in its Schedule of Concessions and Commitments on Goods (Schedule CLII) in such a way as to suggest that these requirements and penalties form part of China's TRQs.[154] With respect to the penalties for non-use of TRQ allocations, we note that they are not included in the parts of China's Schedule that set out the description and tariff item number of the covered products, the quota quantities, and within-quota tariff rates. Rather, they are set out in the parts that describe how China is to implement and apply its TRQs.[155] With respect to the usage requirements, we note that they are not mentioned in China's Schedule CLII. China argues that the usage requirements are "contemplated" in its Schedule because the Schedule allows China to take into account applicants' production capacity in allocating TRQ amounts during the first year.[156] As explained in detail in paragraphs 7.148 and 7.149 below, we do not consider that the reference made to the consideration of production capacity in connection with the allocation of TRQ amounts implies that China's Schedule allows it to impose usage requirements. In any case, as with the penalties for non-use of TRQ allocations, the reference to production capacity is not included in the parts of China's Schedule that set out the description and tariff item number of the covered products,

[149] Ibid.

[150] China's responses to Panel question No. 31, para. 85, and No. 38(a), paras. 94-95 and 101; and second written submission, paras. 49 and 70-79. The European Union and Japan submit similar views. (European Union's third-party submission, para. 144; and Japan's response to Panel question No. 2).

[151] China's second written submission, para. 75. See also China's response to Panel question No. 38(a), paras. 94-95.

[152] China's second written submission, para. 78. See also China's response to Panel question No. 38(a), para. 95.

[153] See section 2.2.2.2 above.

[154] China's response to Panel question No. 38(a), para. 101; and second written submission, para. 79.

[155] China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), Para. 6).

[156] China's response to Panel question No. 27, paras. 78-79.

the quota quantities, and within-quota tariff rates, but rather in the parts that describe how China is to implement and apply its TRQs.[157]

7.18. For these reasons, we find that Paragraph 116 applies to all aspects challenged by the United States, including the usage requirements and penalties for non-use of TRQ allocations.

7.19. Having addressed these horizontal issues, we now assess the United States' claims concerning the individual aspects of China's TRQ administration, followed by our holistic assessment of the compatibility of that administration with the obligations invoked by the United States under Paragraph 116.

7.1.4 Assessment of the individual aspects of China's TRQ administration challenged under Paragraph 116

7.1.4.1 Basic eligibility criteria

7.1.4.1.1 Introduction

7.20. The United States claims that four of the basic criteria for eligibility to receive wheat, rice, and corn TRQs are inconsistent with four obligations set forth in Paragraph 116, namely, the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.

7.21. China does not contest the United States' claims about the basic eligibility criteria, but maintains that "while China acknowledges that the Basic Criteria need to be updated, this does not mean that China's system of TRQ administration is inconsistent with Paragraph 116".[158] While taking note of China's acknowledgement of the need to update the basic eligibility criteria, we consider that our obligation under Article 11 of the DSU to conduct an objective assessment of the matter before us requires us nevertheless to examine the consistency of those criteria with Paragraph 116.[159]

7.22. Below, we describe the basic eligibility criteria at issue and summarize the parties' main arguments. We then assess whether the basic eligibility criteria are inconsistent with the four obligations the United States has invoked, taking into account our understanding of the meaning and nature of each of the relevant obligations laid out in paragraph 7.9 above.

7.1.4.1.2 Basic eligibility criteria at issue

7.23. The basic criteria for eligibility to receive wheat, rice, and corn TRQs are published in the NDRC's annual allocation notices.[160] The 2017 Allocation Notice contains eight such criteria. The United States takes issue with the following four:

- Possessing "a good financial condition";
- Possessing "[a good] integrity situation";
- Possessing "no record of violating regulations with respect to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, environmental protection, and other areas"; and

[157] China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), Para. 6).

[158] China's response to Panel question No. 26, para. 73. See also China's response to Panel question No. 24(b), paras. 71-72; and second written submission, paras. 57-61.

[159] For a similar approach, see, e.g. Panel Reports, *US – Shrimp (Ecuador)*, paras. 7.9-7.12, *US – Poultry (China)*, paras. 7.445-7.446; and *US – Shrimp (Thailand)*, paras. 7.20-7.21 (referring to Appellate Body Reports, *EC – Hormones*, para. 109; and *US – Gambling*, paras. 139-141).

[160] The 2016 and 2017 Allocation Notices both list the basic eligibility criteria in their Articles II entitled "Application Criteria". Although there are some differences between the texts of these Articles in the two Allocation Notices, the main criteria remain the same.

- "having fulfilled social responsibilities associated with [their] operations".[161]

7.24. The second paragraph of Article II of the 2017 Allocation Notice states that the possession of the basic eligibility criteria is a "prerequisite" for obtaining a TRQ allocation.[162]

7.1.4.1.3 Main arguments of the parties

7.25. The United States argues that the terms used in the four challenged eligibility criteria are inherently vague and that the 2017 Allocation Notice fails to define them in a way that is easily understandable to potential applicants. In the United States' view, this runs counter to the obligations to administer TRQs on a transparent[163] and predictable basis[164], and to use clearly specified requirements.[165] The United States also argues that the vagueness in these criteria may cause different applicants to interpret them differently and submit different information to the NDRC to demonstrate their eligibility to receive TRQ allocations, and the latter may therefore use different information in assessing the eligibility of different applicants. In the United States' view, this runs counter to the obligation to administer TRQs on a fair basis.[166]

7.26. China generally points out that the NDRC "[i]n practice … does not conduct an individual assessment of each of the Basic Criteria" but rather uses the government website Credit China's "blacklist" of enterprises with "records of non-compliance with industry and commerce registration, tax payments, customs, and [non-]compliance with court judgments" to determine applicants' eligibility.[167] Thus, the NDRC does not take into account all of the basic eligibility criteria set forth in the annual allocation notices, and, instead, bases its assessment on whether an applicant appears in Credit China's blacklist.

7.27. In response to this statement by China, the United States submits that China has not substantiated its assertions regarding the practice of the NDRC[168] and that, in any event, the discrepancy between China's legal instruments and the stated practice of the NDRC further supports its claims of inconsistency of the basic eligibility criteria with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.[169]

7.1.4.1.4 Analysis by the Panel

7.28. Below, we first assess the United States' claims in respect of each of the four basic eligibility criteria at issue. Thereafter, we examine the implications of China's statement that, in practice, the NDRC bases its eligibility assessment on whether an applicant appears in Credit China's blacklist.

7.29. The United States claims that the four basic eligibility criteria at issue violate the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.

7.30. Starting with the criteria that applicants must possess a good integrity situation and have fulfilled social responsibilities associated with their operations, we agree with the United States that the terms "integrity situation" and "social responsibilities" are inherently vague. Both of these terms can be interpreted as having many different meanings. Looking at the context in which they appear in China's legal instruments, we note that these vague terms are not defined, nor is there any guidance as to the kinds of information that the NDRC will consider in assessing compliance with

[161] 2017 Allocation Notice, (Exhibit USA-15), Article II; and United States' first written submission, paras. 78-84, 119-125, 157, and 180-185.
[162] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[163] United States' first written submission, paras. 78-84; and opening statement at the first meeting of the Panel, para. 9.
[164] United States' first written submission, paras. 119-125; and opening statement at the first meeting of the Panel, para. 11.
[165] United States' first written submission, paras. 180-188; and opening statement at the first meeting of the Panel, para. 15.
[166] United States' first written submission, para. 159.
[167] China's first written submission, para. 14. See also China's first written submission, paras. 35-38; and responses to Panel question No. 8(c), para. 24, and No. 8(g), para. 28.
[168] United States' opening statement at the second meeting of the Panel, paras. 3 and 16.
[169] United States' opening statement at the first meeting of the Panel, paras. 11, 26-27, and 38; response to Panel question No. 19(b), para. 55; and second written submission, paras. 84-94.

these requirements. In our view, lack of such guidance leaves potential applicants in the dark. Without further clarification as to their meaning in the context of China's TRQ administration, the terms "integrity situation" and "social responsibilities" may be interpreted in different ways.

7.31. For these reasons, we find these two criteria to be inconsistent with the obligation to administer TRQs on a transparent basis because they are not easily understood or discerned by applicants and other interested parties. Similarly, we find them to be inconsistent with the obligation to administer TRQs on a predictable basis because they do not allow applicants and other interested parties to easily anticipate how the NDRC determines applicants' integrity situation and their fulfilment of social responsibilities, and thus their eligibility to receive TRQ allocations. We also find these criteria to be inconsistent with the obligation to administer TRQs using clearly specified requirements because the requirements that these two criteria entail are not set out in plain or obvious detail.

7.32. The United States argues that the vagueness in these two criteria also leads to a violation of the obligation to administer TRQs on a fair basis. As explained above, fairness requires that China's TRQ administration be impartial and equitable, and that the relevant authorities administer TRQs in accordance with the applicable rules and standards.[170] We have found the two criteria at issue to be vague, and concluded, on that basis, that China does not administer its TRQs on a transparent and predictable basis, using clearly specified administrative requirements. However, we are not convinced that the vagueness in these criteria, in and of itself, is sufficient to demonstrate that China does not administer its TRQs on a fair basis. The United States' claim concerning the fairness of the basic eligibility criteria is premised on the argument that the vagueness in these criteria may cause applicants to submit different information which would, in turn, cause the NDRC to assess different applicants' eligibility on the basis of different types of information.[171] In our view, however, the United States has not substantiated this argument. In particular, we note that the application form attached to the 2017 Allocation Notice requires applicants to submit a list of specific information and to "[g]uarantee its conformity with the grain import tariff-rate quota application criteria".[172] More particularly, the form requires information on the nature of the ownership of the enterprise, registered capital, tax payments, asset-liability ratio, and import and sales performance as well as production and operation capacity for the first or second year preceding the one for which the application is made.[173] The form does not provide applicants with the possibility to submit additional information, including information they may believe is relevant to determine compliance with the basic eligibility criteria. The United States argues that "the application is not necessarily just the form … but may also include 'related materials submitted by the applicant'".[174] In making this argument, the United States refers to Article 12 of the 2003 Provisional Measures, which states:

> Agencies authorized by NDRC, in accordance with the criteria announced, accept the applications *and related materials submitted by the applicants* for wheat, corn, [] rice, and cotton, and transmit the applications to NDRC for approval prior to November 30, concurrently submitting a copy to the Ministry of Commerce.[175]

7.33. While this provision indicates that applicants have the possibility to submit materials along with their applications, the text also suggests that these will be materials related to the applications. Therefore, it does not alter the fact that the application form requires the same types of information from all applicants. We are not convinced by the argument that applicants would, on their own motion, submit unsolicited information simply because they may believe such information to be relevant to determine compliance with the basic eligibility criteria. Therefore, regardless of the vagueness in the criteria, the United States has not demonstrated that there is a risk of different applicants submitting different types of information to the NDRC and the latter making its eligibility assessment based on those different types of information.

[170] See para. 7.9 above.
[171] United States' first written submission, paras. 157-159.
[172] 2017 Allocation Notice, (Exhibit USA-15), Annex: 2017 Grain Import Tariff-Rate Quota Application Form.
[173] 2017 Allocation Notice, (Exhibit USA-15), Annex: 2017 Grain Import Tariff-Rate Quota Application Form.
[174] United States' response to Panel question No. 65(a), para. 24 (quoting 2003 Provisional Measures, (Exhibit USA-11), Article 12).
[175] 2003 Provisional Measures, (Exhibit USA-11), Article 12. (emphasis added)

7.34. The United States also submits that "[p]otential applicants may choose not to apply at all because they are unable to understand the Basic Criteria or because they perceive the criteria in a way that they conclude in error they are not eligible".[176] We consider it unlikely that potential applicants would forego the possibility of applying for TRQ allocations − which are, as pointed out by the United States[177], a commercial advantage − merely due to the vagueness in certain eligibility criteria.

7.35. We therefore do not consider that the United States has made a *prima facie* case that the vagueness in the two criteria at issue leads to a violation of the obligation to administer TRQs on a fair basis.

7.36. Turning to the criterion that applicants must possess a good financial condition, we consider that this is less vague than the two criteria examined above. We note that some guidance could arguably be found in the application form attached to the annual allocation notices, which requires applicants to submit data on the nature of the ownership of the enterprise, registered capital, tax payments, asset-liability ratio, and import and sales performance as well as production and operation capacity for the first or second year preceding the one for which the application is made.[178] China's legal instruments, however, do not clarify whether this information is relevant to the criterion of having a good financial condition, nor do they clarify what other information may be relevant. Without further clarity in China's legal instruments, it does not seem possible for potential applicants and other interested parties to know what is meant by possessing a good financial condition.

7.37. For these reasons, we find this criterion to be inconsistent with the obligation to administer TRQs on a transparent basis because it is not easily understood or discerned by applicants and other interested parties. Similarly, we find this criterion to be inconsistent with the obligation to administer TRQs on a predictable basis because it does not allow applicants and other interested parties to easily anticipate how the NDRC determines the state of applicants' financial condition, and thus their eligibility to receive TRQ allocations. We also find this criterion to be inconsistent with the obligation to administer TRQs using clearly specified requirements because the requirements that this criterion entails are not set out in plain or obvious detail.

7.38. The United States argues that the vagueness in the criterion of possessing a good financial condition also leads to a violation of the obligation to administer TRQs on a fair basis. In this regard, the United States submits the same arguments as those concerning the criteria of possessing a good integrity situation and having fulfilled social responsibilities associated with their operations.[179] For the reasons explained in paragraphs 7.32 through 7.35 above, we disagree with these arguments, and consider that the United States has not made a *prima facie* case that China has violated this obligation.

7.39. Turning now to the criterion that applicants must have no record of violation, we recall that this criterion is set out in Article II of the 2017 Allocation Notice as "no record of violating regulations with respect to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, environmental protection, and other areas". The United States takes issue with two elements of this criterion, namely, the lack of explanation of what constitutes a "violation" and the lack of identification of the areas of regulation with which applicants must comply, in particular due to the residual category "other areas".[180]

7.40. We disagree with the United States' argument that this criterion lacks clarity because of the term "violation". We consider this term to be self-explanatory. In our view, potential applicants and other interested parties would reasonably understand that "violation" of a rule in one of the listed areas of regulation entails breaking, or not complying with, that rule. Proceeding to the areas of regulation with which applicants must comply, the United States argues that the 2017 Allocation Notice "fails to further define any of the named areas or to identify which regulations the applicant

[176] United States' response to Panel question No. 65(a), para. 25.

[177] United States' opening statement at the first meeting of the Panel, para. 46; and response to Panel question No. 28, para. 105.

[178] 2017 Allocation Notice, (Exhibit USA-15), Annex: 2017 Grain Import Tariff-Rate Quota Application Form.

[179] United States' first written submission, paras. 157-159.

[180] United States' first written submission, para. 82.

must demonstrate compliance with in order to have fulfilled these criteria"[181], but does not explain why it considers that the named areas lack clarity. We are not convinced that the reference to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, and environmental protection lacks clarity. Nor are we convinced that it is necessary to identify each and every specific regulation with which applicants must comply. However, we agree with the United States that the reference to "other areas" is vague, and also note that China's legal instruments contain no guidance regarding the scope of such "other areas". The inclusion of this open-ended category could lead to applicants being disqualified for having a record of violation in any area of regulation, even those unrelated to China's wheat, rice, and corn TRQs.

7.41. Due to the vagueness in the reference to "other areas", we find the criterion of having no record of violation to be inconsistent with the obligation to administer TRQs on a transparent basis because this particular element is not easily understood or discerned by applicants and other interested parties. Similarly, we find this criterion to be inconsistent with the obligation to administer TRQs on a predictable basis because it does not allow applicants and other interested parties to easily anticipate how the NDRC determines applicants' record of violation in "other areas", and thus their eligibility to receive TRQ allocations. Finally, we also find this criterion to be inconsistent with the obligation to administer TRQs using clearly specified requirements because, insofar as the vagueness of the term "other areas" is concerned, the requirements that this criterion entails are not set out in plain or obvious detail.

7.42. The United States argues that the vagueness in this criterion also leads to a violation of the obligation to administer TRQs on a fair basis. In this regard, the United States submits the same arguments as those concerning the criteria of possessing a good integrity situation and having fulfilled social responsibilities associated with their operations.[182] For the reasons explained in paragraphs 7.32 through 7.35 above, we disagree with these arguments, and consider that the United States has not made a *prima facie* case that China has violated this obligation.

7.43. Having concluded our assessment of the United States' claims regarding the four basic eligibility criteria at issue, we now turn to China's statement regarding the NDRC's practice in the assessment of applicants' eligibility to receive TRQ allocations. The United States claims that this stated practice violates the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.

7.44. At the outset, we recall that the 2017 Allocation Notice contains eight basic eligibility criteria, one of which is "not having been placed on a 'Credit China' website blacklist [of entities] receiving punishment".[183] China explains that the NDRC, in practice, does not conduct an individual assessment of each of these criteria but rather generates an applicant's credit report through Credit China by using the uniform social credit code that is provided by each applicant in its application. China explains that the credit report contains a multitude of information such as "general registration information of the enterprise; the administrative licenses acquired by the enterprise; the administrative punishments received by the enterprise; and whether the enterprise is on the Good Credit List, Watch List, or Black List". China also states that only the blacklist is considered in determining an applicant's eligibility.[184] The blacklist is a list of enterprises with a record of non-compliance in a range of areas, but China explains that only records of violations with industry and commerce registration, tax payments, customs, or court judgments within the previous two years will render an applicant ineligible to receive TRQ allocations.[185] China also explains that any instance of non-compliance disqualifies an applicant from being eligible to receive TRQs.[186]

[181] United States' first written submission, para. 82. See also ibid. para. 123.
[182] United States' first written submission, paras. 157-159.
[183] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[184] China's response to Panel question No. 8(c), para. 24.
[185] China's first written submission, para. 14; and response to Panel question No. 48, para. 9 and No. 49, para. 11.
[186] China's response to Panel question No. 8(d), para. 25. China further explains that the NDRC determines applicants' eligibility to receive TRQ allocations not only by checking Credit China's blacklist, but also by checking (i) whether the applicant has attested to the accuracy of the information submitted in its application; and (ii) whether the applicant has prior violations of the 2003 Provisional Measures. (China's response to Panel question No. 47, para. 8. See also China's first written submission, para. 35). However, these two additional steps are not relevant to the resolution of the present claims that concern the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.

7.45. In other words, according to China, the NDRC, in practice, bases its eligibility assessment on whether an applicant appears in Credit China's blacklist and does not examine whether the applicant meets the other basic eligibility criteria set out in the 2017 Allocation Notice. In response to a question, China points out that this practice is "confirmed by NDRC officials".[187] However, China has not submitted evidence showing that applicants and other interested parties are made aware of this practice. We thus agree with the United States that this practice is not easily understood or discerned by applicants and other interested parties. Accordingly, we find it shows that China fails to administer its TRQs on a transparent basis. Similarly, we do not consider that applicants and other interested parties can easily anticipate that the NDRC, in practice, determines applicants' eligibility to receive TRQ allocations based on whether they appear in Credit China's black list and not based on an assessment of the remaining basic eligibility criteria. Accordingly, we find that the NDRC's stated practice shows that China fails to administer its TRQs on a predictable basis. We also do not consider that this practice is set out, in China's legal instruments or elsewhere, in plain or obvious detail. Accordingly, this practice shows that China fails to administer its TRQs using clearly specified requirements.

7.46. We also consider that this practice renders China's TRQ administration inconsistent with the obligation to administer TRQs on a fair basis. As noted in paragraph 7.9 above, this obligation requires that China administers its TRQs through a system that is impartial and equitable, and that the relevant authorities administer TRQs in accordance with the applicable rules and standards. Above, we have found unconvincing the United States' argument that vagueness in the four eligibility criteria at issue renders China's TRQ administration inconsistent with the fairness obligation set forth in Paragraph 116. However, the disparity between what is written in China's legal instruments and what the NDRC does in practice with regard to the basic eligibility criteria does not represent administration in accordance with the applicable rules and standards. On this basis, we find that China fails to administer its TRQs on a fair basis.

7.1.4.1.5 Conclusion

7.47. For the reasons set out above, and taking into account China's acknowledgement that the basic eligibility criteria need to be updated, we find that the four basic eligibility criteria challenged by the United States are inconsistent with the obligations, set forth in Paragraph 116 of China's Working Party Report, to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements.

7.1.4.2 Allocation principles and reallocation procedures

7.1.4.2.1 Introduction

7.48. The United States claims that the allocation principles are inconsistent with four obligations set forth in Paragraph 116, namely, the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. The United States also claims that the reallocation procedures are inconsistent with the obligation to administer TRQs using clearly specified administrative procedures. China rejects the entirety of the United States' claims.

7.49. Below, we describe the allocation principles and reallocation procedures at issue and summarize the parties' main arguments. We then proceed to assess whether the allocation principles and reallocation procedures are inconsistent with the obligations the United States has invoked, taking into account our understanding of the meaning and nature of each of the relevant obligations laid out in paragraph 7.9 above.

7.1.4.2.2 Allocation principles and reallocation procedures at issue

7.50. Once the NDRC has determined which applicants are eligible to receive TRQ allocations, it allocates the TRQ amounts among the eligible applicants in accordance with the allocation principles, set out in the annual allocation notices published by the NDRC. The 2017 Allocation Notice prescribes that the TRQ amounts will be allocated:

[187] China's response to Panel question No. 8(a), para. 22.

> [I]n accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operating situation, etc.) and other relevant commercial standards.[188]

7.51. For the reallocation of unused TRQs amounts that are returned by recipients before 15 September, the NDRC follows the reallocation procedures. These are set out in different parts of China's legal instruments. Article 26 of the 2003 Provisional Measures provides that "[t]ariff-rate quota reallocated quantities are allocated in accordance with the application criteria promulgated and according to the first-come-first-served method".[189] The 2017 Reallocation Notice states, in relevant parts:

> The National Development and Reform Commission and the Ministry of Commerce will carry out reallocation of quotas returned by users according to the order in which applications were submitted online. …
>
> When the number of applications that meet the criteria, in total, is smaller than the reallocated tariff-rate quota quantity, every applicant's application can be satisfied; when the number of applications that meet the criteria, in total, is larger than the reallocated tariff-rate quota quantity, reallocation will be carried out according to the *Allocation Principles* and the *Allocation Rules*.[190]

7.1.4.2.3 Main arguments of the parties

7.52. With respect to the allocation principles, the United States points to the lack of explanation of two elements, namely, the NDRC's evaluation of applicants' "actual production and operating capacities (including historical production and processing, actual import performance, and operations)"[191], and the meaning of the term "other relevant commercial standards" as well as the factors covered by this term.[192] With respect to the first element, the United States maintains that China's legal instruments do not clearly explain how the NDRC evaluates applicants' actual production and operating capacities and weighs the listed factors.[193] With respect to the second element, the United States submits that the term "other relevant commercial standards" suggests that the NDRC, in making allocations, takes into account factors other than those that are clearly cited in China's legal instruments, without any clarification of the factors and types of information the NDRC may take into account.[194] For these reasons, the United States contends that the allocation principles are inconsistent with the obligations, set forth in Paragraph 116, to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures.[195]

7.53. China states that, in practice, "'actual import performance' is the factor given the most weight in NDRC's allocation analysis"[196] and that "[n]ew applicants are only considered in the event that the entire non-STE portion of the TRQs is not fully allocated to applicants with historic import performance", in which case "information concerning production capacity is a key factor".[197] In China's view, these principles are sufficiently clear since Paragraph 116 does not require China to eliminate any element of discretion from its TRQ allocation process.[198] China further argues that allocation in accordance with "other relevant commercial standards" is consistent with Paragraph 116 since China's Schedule CLII explicitly refers to allocation of TRQ amounts on this

[188] 2017 Allocation Notice, (Exhibit USA-15), Article IV.
[189] 2003 Provisional Measures, (Exhibit USA-11), Article 26.
[190] 2017 Reallocation Notice, (Exhibit USA-17), para. 5. (emphasis original)
[191] United States' first written submission, para. 87.
[192] United States' first written submission, para. 88.
[193] United States' first written submission, para. 87; and second written submission, para. 17.
[194] United States' first written submission, para. 88; and second written submission, para. 18.
[195] United States' first written submission, paras. 96, 126-129, 133, 155-156, 170-171, and 174.
[196] China's first written submission, para. 49. See also China's first written submission, para. 17.
[197] China's first written submission, para. 50. See also China's first written submission, para. 17.
[198] China's first written submission, para. 51. See also China's first written submission, para. 17.

basis.[199] Finally, China argues that Paragraph 116 does not require it "to make applicants aware of how NDRC evaluates individual applications, including the weight assigned to particular factors".[200]

7.54. In response, the United States submits that China has not substantiated its assertions regarding the NDRC's practice[201], and that, in any event, the discrepancy between China's legal instruments and the stated practice of the NDRC further supports its claim of inconsistency of the allocation principles with the obligations to administer TRQs on a transparent, predictable, and fair basis.[202]

7.55. With respect to the reallocation procedures, the United States points out that the annual reallocation notices state that the NDRC will reallocate returned TRQ amounts "according to the order in which applications were submitted online" and that "[w]hen the total sum of qualified application amounts is greater than the tariff quota reallocation amount, the reallocation will be carried out according to the Allocation Principles".[203] The United States argues that, since reallocation is based on the allocation principles and these are not defined or explained in China's legal instruments, the procedures for reallocation are also not clearly specified.[204]

7.56. China argues that this claim has no basis because the allocation principles are not used by the NDRC during the reallocation process and that reallocation is done on a first-come, first-served basis.[205]

7.57. In response, the United States maintains that the 2017 Reallocation Notice references both the first-come, first-served method and reallocation according to the allocation principles, and that therefore China's administrative procedures for reallocation are not clearly specified in its legal instruments.[206]

7.1.4.2.4 Analysis by the Panel

7.58. The United States claims that the allocation principles are inconsistent with four obligations set forth in Paragraph 116, namely the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. The United States also claims that the reallocation procedures are inconsistent with the obligation to administer TRQs using clearly specified administrative procedures. We first assess the claims concerning the allocation principles, followed by the claim concerning the reallocation procedures.

7.1.4.2.4.1 Allocation principles

7.59. In this section, we first assess the United States' claims in respect of the allocation principles set out in China's legal instruments. Thereafter, we examine the implications of China's statement regarding how the NDRC conducts the allocation process in practice.

7.60. The United States claims that the allocation principles in China's legal instruments violate the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. In support of these claims, the United States focuses on two elements in the allocation principles.

7.61. First, the United States points to the reference to "actual production and operating capacities (including historical production and processing, actual import performance, and operations)". While the United States does not take issue with the factors themselves, it submits that Paragraph 116

[199] China's first written submission, para. 53 (quoting China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), para. 6.[C]).
[200] China's response to Panel question No. 10(b), para. 37. See also China's response to Panel question No. 24(a), para. 68.
[201] United States' opening statement at the second meeting of the Panel, paras. 3 and 16. See also United States' response to Panel question No. 45, paras. 1-2.
[202] United States' opening statement at the first meeting of the Panel, paras. 11 and 29; and response to Panel question No. 19(b), para. 55. See also United States' response to Panel question No. 45, para. 3.
[203] United States' first written submission, para. 168 (quoting 2017 Reallocation Notice, (Exhibit USA-17).
[204] United States' first written submission, para. 169.
[205] China's response to Panel question No. 52(b), para. 15.
[206] United States' response to Panel question No. 64, para. 20.

requires China to not only list the relevant factors for allocation but also to specify how each of these factors is evaluated.[207] We find the United States' interpretation of Paragraph 116 too stringent insofar as it would prevent China from having in place a system of TRQ allocation where the authorities take into account all factors listed in their legal instruments and decide how much weight to accord to them in light of the relevant circumstances.

7.62. The United States has not explained why the listing in China's legal instruments of the factors that the NDRC takes into account in the allocation process does not allow applicants and other interested parties to easily understand or discern the basis for that process, and why the legal instruments should also specify how each factor is to be evaluated and what weight each factor will be accorded. Thus, we do not consider that the United States has demonstrated that this element of the allocation principles violates the obligation to administer TRQs on a transparent basis. Similarly, the United States has not explained why the listing of the relevant factors in China's legal instruments does not allow applicants and other interested parties to easily anticipate how the NDRC will allocate TRQ amounts. Thus, we do not consider that the United States has demonstrated that this element of the allocation principles violates the obligation to administer TRQs on a predictable basis. Finally, the United States has not established that the allocation principles are not set out in plain or obvious detail in China's legal instruments. Thus, we do not consider that the United States has demonstrated that this element of the allocation principles violates the obligation to administer TRQs using clearly specified administrative procedures.

7.63. Second, the United States argues that China's legal instruments do not explain what "other relevant commercial standards" entail, and that therefore applicants cannot discern how fulfilment of such standards may be demonstrated.[208] We agree with the United States' view that this is a vague and open-ended term that could cover a multitude of factors, which are unknown to applicants and other interested parties. In response to the United States' argument, China points out that this term also appears in China's Schedule CLII[209], which reads, in relevant parts:

> In the first year, allocations to end users by the SDPC of the tariff-quotas … shall be based on a first-come, first-served system or the requests of the applicants and their historical import performance, production capacity, or *other relevant commercial criteria* subject to specific conditions to be published one month in advance of the opening of the application period so as to ensure an equitable distribution and complete tariff-quota utilization.[210]

7.64. This part of China's Schedule CLII concerns the allocation of TRQ amounts in the first year. We agree with the United States that the inclusion of the term "other relevant commercial criteria" in China's Schedule CLII does not "shield" China from complying with the obligations under Paragraph 116 to administer its TRQs on a transparent and predictable basis and to use clearly specified administrative procedures.[211] Nor does it diminish these obligations. A harmonious interpretation of China's obligations in its Schedule CLII and those in Paragraph 116 suggests that the former sets out different permitted methods for China's allocation of TRQ amounts and that the latter imposes obligations on China to administer its chosen method of TRQ allocation on a transparent and predictable basis and to use clearly specified administrative procedures. As pointed out by the United States, this view is supported by the language of China's Schedule CLII, which adds that China's chosen method of TRQ allocation is "subject to specific conditions to be published one month in advance of the opening of the application period so as to ensure an equitable distribution and complete tariff-quota utilization".[212]

7.65. China also submits that the inclusion of the residual category "other relevant commercial standards" provides the NDRC with the discretion it needs to adapt its allocation decisions to particular factual circumstances, and that this is common practice among WTO Members, including the United States.[213] We note that the present claim has been brought under China's Working Party

[207] United States' first written submission, para. 87; and second written submission, paras. 16-17.
[208] United States' first written submission, para. 88; and second written submission, para. 18.
[209] China's first written submission, para. 53; second written submission, para. 31.
[210] China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), paras. 6.B and 6.C. (emphasis added)
[211] United States' second written submission, para. 18.
[212] United States' response to Panel question No. 24(a), paras. 94-96; and second written submission, para. 18.
[213] China's first written submission, paras. 54-55.

Report, which contains specific obligations undertaken by China with regard to its TRQ administration. We agree with China that we should not read Paragraph 116 so as to preclude the relevant authorities from having any discretion in administering TRQs. Indeed, it is for this reason that we have found that China is not required to set out, in its legal instruments, the precise manner in which its authorities evaluate relevant factors in allocating the TRQ amounts. This does not, however, provide China's relevant authorities with unfettered discretion. In allocating TRQ amounts, the NDRC is bound by the obligations set forth in Paragraph 116. The inclusion of the vague notion "other commercial standards" runs counter to those obligations because it may potentially entail a range of factors that cannot easily be understood or discerned by applicants and other interested parties. In our view, this violates China's obligation to administer its TRQs on a transparent basis. For the same reasons, we are of the view that applicants and other interested parties cannot easily anticipate what information the NDRC will take into account in allocating TRQ amounts, and that therefore China also fails to administer its TRQs on a predictable basis. Similarly, we find that the vagueness of this notion shows that China fails to administer its TRQs using clearly specified administrative procedures because the procedures concerning the allocation of TRQs are not set out in plain or obvious detail in China's legal instruments.

7.66. The United States argues that the vagueness in the allocation principles also leads to a violation of the obligation to administer TRQs on a fair basis. As explained above, we consider this obligation to require that China administer its TRQs in an impartial and equitable manner, and that the Chinese authorities act in accordance with the applicable rules and standards.[214] While we have found that the reference to "other commercial standards" in the allocation principles is vague and therefore in violation of China's obligations to administer its TRQs on a transparent and predictable basis, and to use clearly specified administrative procedures, we do not believe that this vagueness, in and of itself, is sufficient to demonstrate that China does not administer its TRQs on a fair basis. The United States' claim concerning the fairness of the allocation principles is premised on the argument that the vagueness in these principles may cause applicants to submit different information which, in turn, would cause the NDRC to allocate TRQ amounts to different applicants based on different types of information.[215] As we discussed in addressing the fairness of the basic eligibility criteria[216], the application form attached to the 2017 Allocation Notice requires all applicants to submit a list of specific information, and does not provide applicants with the possibility of submitting additional information, including information they may believe is relevant to TRQ allocation. Once again, we do not consider plausible the United States' argument that applicants may nonetheless submit "different information in support of the listed principles", or that applicants may allow the vagueness in the term "other commercial standards" to influence their decisions on whether to apply for TRQs and what TRQ amounts to apply for.[217] We therefore consider that the United States has not made a *prima facie* case that the vagueness in allocation principles laid down in China's legal instruments leads to a violation of China's obligation to administer its TRQs on a fair basis.

7.67. Having concluded our assessment of the United States' claims regarding the allocation principles in China's legal instruments, we now turn to China's statement regarding how the NDRC conducts its allocation process in practice. The United States claims that this stated practice violates the obligations to administer TRQs on a transparent, predictable, and fair basis.

7.68. China states that, in practice, the NDRC gives the most weight to actual import performance, and that new applicants are only considered in the event that the entire non-STE portions of the TRQs are not fully allocated to applicants with historic import performance, in which case information concerning production capacity is a key factor.[218] In response to a question, China points out that the existence of this practice is "confirmed by NDRC officials".[219] However, China has not submitted evidence showing that applicants and other interested parties are made aware of this practice. The United States submits that the NDRC's stated practice regarding the allocation principles further supports its claims that China has violated its obligations to administer TRQs on a transparent, predictable, and fair basis.[220]

[214] See para. 7.9 above.
[215] United States' first written submission, paras. 155-156.
[216] See paras. 7.32-7.35 above.
[217] See United States' response to Panel question No. 65(b), paras. 29-30.
[218] China's first written submission, paras. 17 and 49-50.
[219] China's response to Panel question No. 10(a), para. 36.
[220] See United States' response to Panel question No. 19(b), para. 55.

7.69. Above, we have found that it is permissible for China to have in place a system of TRQ allocation where all relevant factors are listed in the legal instruments and the authorities take into account all listed factors and decide how much weight to accord to them in light of the relevant circumstances.[221] China's explanation of the NDRC's practice, however, suggests that the NDRC, in making allocation decisions, does not take into account all the factors listed in the annual allocation notices, and that actual import performance supersedes all the other factors. China explains that, under this practice, an applicant without actual import performance does not receive a TRQ allocation at all regardless of its actual production and operating capacities, except where the TRQ amounts are not fully allocated to applicants with actual import performance.[222] Applicants and other interested parties are, however, not put on notice of this practice. We thus agree with the United States that this practice is not easily understood or discerned by applicants and other interested parties. Accordingly, we find it shows that China fails to administer its TRQs on a transparent basis. Similarly, we do not consider that applicants and other interested parties can easily anticipate that, in practice, actual import performance supersedes all other factors. Nor can they easily anticipate that applicants without actual import performance would not receive TRQ allocations unless the entire non-STE portions are not fully allocated to applicants with actual import performance. Accordingly, we find that the NDRC's stated practice shows that China fails to administer its TRQs on a predictable basis.

7.70. We also consider that this practice renders China's TRQ administration inconsistent with its obligation to administer TRQs on a fair basis. As noted in paragraph 7.9 above, this obligation requires that China administers its TRQs through a system that is impartial and equitable, and that the relevant authorities administer TRQs in accordance with the applicable rules and standards. Above, we have found unconvincing the United States' argument that the vagueness in the allocation principles renders China's TRQ administration inconsistent with the fairness obligation in Paragraph 116. However, the disparity between what is written in China's legal instruments and what China states that the NDRC does in practice in allocating TRQ amounts does not represent administration in accordance with the applicable rules and standards. On this basis, we find that China fails to administer its TRQs on a fair basis.

7.1.4.2.4.2 Reallocation procedures

7.71. The United States claims that the reallocation procedures in China's legal instruments violate the obligation to administer TRQs using clearly specified administrative procedures. In this regard, the United States points to the 2017 Reallocation Notice, arguing that this instrument suggests that "reallocation will be carried out according to the *Allocation Principles* and the *Allocation Rules*".[223] Following China's explanation that the NDRC, as set out in the 2003 Provisional Measures, reallocates returned TRQ amounts based on the first-come, first-served method, rather than the allocation principles[224], the United States argues that the reference to two different methods in the 2017 Reallocation Notice and the NDRC's alleged practice of using only the first-come, first-served method demonstrate China's violation of the obligation in Paragraph 116 to administer TRQs using clearly specified administrative procedures.[225]

7.72. While the 2003 Provisional Measures, reproduced in paragraph 7.51 above, clearly set out the first-come, first-served method as the sole reallocation method, the 2017 Reallocation Notice, also reproduced in paragraph 7.51 above, is less clear. It first states that the NDRC "will carry out reallocation of quotas returned by users according to the order in which applications were submitted online", which, as suggested by both parties[226], could be viewed as a reference to the first-come, first-served method. It, however, goes on to state that "when the number of applications that meet the criteria, in total, is larger than the reallocated tariff-rate quota quantity, reallocation will be carried out according to the *Allocation Principles* and the *Allocation Rules*", which the United States

[221] See para. 7.61 above.
[222] China's first written submission, para. 50. See also China's first written submission, para. 17.
[223] United States' first written submission, paras. 168-169 (quoting 2017 Reallocation Notice, (Exhibit USA-17)). (emphasis original)
[224] China's responses to Panel question No. 11, para. 41; and No. 52(b), para. 15.
[225] United States' response to Panel question No. 64, paras. 20-21; and comments on China's response to Panel question 52, para. 10.
[226] United States' response to Panel question No. 64, para. 20; and China's response to Panel question No. 11, para. 41).

understands to be a reference to the allocation principles, set out in Article IV of the 2017 Allocation Notice.[227]

7.73. The United States presents claims against China's TRQ administration as spelled out in the various legal instruments adopted by China as well as the practice of the relevant Chinese authorities. Therefore, we base our assessment of these claims on the entirety of the various elements making up China's TRQ administration. With respect to the reallocation procedures, while the use of the first-come, first-served method is clearly specified in the 2003 Provisional Measures[228], the clarity of this aspect of China's TRQ administration is, in our view, diminished by the vagueness in the 2017 Reallocation Notice. The latter contains only an indirect reference to the first-come, first-served method but an explicit reference to the allocation principles.[229] An assessment of the ensemble of China's legal instruments therefore shows that the reallocation procedures are not set out in plain or obvious detail, in violation of the obligation to administer TRQs using clearly specified administrative procedures.

7.1.4.2.5 Conclusion

7.74. For the reasons set out above, we find that the allocation principles are inconsistent with the obligations, set forth in Paragraph 116 of China's Working Party Report, to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. We also find that the reallocation procedures are inconsistent with the obligation, set forth in Paragraph 116, to administer TRQs using clearly specified administrative procedures.

7.1.4.3 Public comment process

7.1.4.3.1 Introduction

7.75. The United States claims that the public comment process is inconsistent with four obligations set forth in Paragraph 116, namely the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. China rejects the entirety of the United States' claims.

7.76. Below, we describe the public comment process at issue and summarize the parties' main arguments. We then assess whether the public comment process is inconsistent with the four obligations the United States has invoked, taking into account our understanding of the meaning and nature of each of the relevant obligations as laid out in paragraph 7.9 above.

7.1.4.3.2 Public comment process at issue

7.77. The public comment process is mentioned only in the announcement of applicant enterprise data, which the NDRC publishes on its website after the receipt of TRQ applications in a given year. It includes a list of TRQ applicants as well as the relevant information they have submitted to the NDRC in their applications.[230] The announcement indicates that the public is invited to provide "feedback with relevant opinions" if they disagree with the data applicants have submitted.[231] Neither the announcements of applicant enterprise data nor any other of the relevant legal instruments provide further information on the public comment process.

[227] United States' response to Panel question No. 64, para. 20.
[228] China's comments on the United States' response to Panel question No. 64, para. 47.
[229] The 2017 Reallocation Notice contains the following definition: "the *Application Criteria* and *Allocation Principles for Import Tariff-Rate Quotas for Cotton in 2017* (National Development and Reform Commission 2016 Public Notice No. 23, hereinafter referred to as the 'Allocation Principles')". (2017 Reallocation Notice, (Exhibits USA-17)). (emphasis original)
[230] 2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19). See also 2016 Announcement of Applicant Enterprise Data, (Exhibit USA-20).
[231] 2017 Announcement of Applicant Enterprise Data, (Exhibit USA-19). See also 2016 Announcement of Applicant Enterprise Data, (Exhibit USA-20).

7.1.4.3.3 Main arguments of the parties

7.78. The United States argues that the public comment process runs counter to the obligations to administer TRQs on a transparent[232] and predictable[233] basis and to use clearly specified administrative procedures[234] because China's legal instruments do not clarify how the NDRC evaluates the information received from the public, whether the NDRC informs applicants of any comments, and whether applicants have an opportunity to rebut such comments. The United States also argues that China fails to administer TRQs on a fair basis because, given the lack of clarity on how the NDRC treats information received from the public and whether applicants have an opportunity to rebut it, that information "could introduce bias or inequity due to the potential motivations of a submitter or the inability of NDRC or the applicant to verify or refute the information provided".[235]

7.79. China rejects the United States' claims and argues that Paragraph 116 does not require that all the procedures that are part of the public comment process be spelled out in the legal instruments.[236] According to China, the public comment process serves as "an additional means for NDRC to verify the data that it receives from applicants".[237] China asserts that, in practice, applicants are informed of the public's comments and provided with an opportunity to rebut such comments, and that comments that are not relevant to the applicants' eligibility will not be taken into account.[238] China also submits that "[t]he existence of the public comment process is clear on the face of the measures" and that the United States has not presented evidence showing that there has been actual confusion on the part of applicants about the public comment process or that an applicant sought clarification concerning this process, which was not provided.[239]

7.1.4.3.4 Analysis by the Panel

7.80. The United States claims that the public comment process violates the obligations to administer TRQs on a transparent, predictable and fair basis, and to use clearly specified administrative procedures. The United States contends that the public comment process does not allow applicants to know whether the NDRC has received comments from the public about their applications, and if so, whether they will have an opportunity to rebut any such comments.

7.81. China's legal instruments do not provide any clarity on these aspects of the public comment process. China asserts that, in practice, applicants are informed of the public's comments received, and are provided with an opportunity to rebut such comments.[240] However, China has not submitted evidence of the existence of this alleged practice, except stating that "[t]he existence of this practice has been confirmed by NDRC officials".[241] We do not consider this statement, alone, to be sufficient to substantiate China's assertion about the existence of a mechanism whereby applicants are informed of the public's comments on their applications and have an opportunity to rebut such comments. In any case, the thrust of the United States' claim is the lack of clarity in the public comment process, and the fact that applicants and other interested parties do not know whether China's TRQ administration requires the NDRC to verify the public's comments and to provide applicants the opportunity to rebut such comments. We now turn to the United States' specific claims about the public comment process.

7.82. Starting with the obligation to administer TRQs on a transparent basis, we note that the annual announcements of applicant enterprise data explicitly set out the possibility for the public to provide comments, but contain no language on any potential subsequent verification process and whether the NDRC allows applicants the opportunity to rebut such comments. The absence of this

[232] United States' first written submission, paras. 93-96.
[233] United States' first written submission, paras. 122 and 128.
[234] United States' first written submission, para. 173; and second written submission, paras. 97-98.
[235] United States' first written submission, para. 160.
[236] China's first written submission, para. 115.
[237] China's first written submission, para. 113.
[238] China's first written submission, paras. 113-114 and 117.
[239] China's first written submission, paras. 114-115.
[240] China's first written submission, para. 113.
[241] China's response to Panel question No. 9(a), para. 29. We asked China how this confirmation was communicated, and whether there was official record of it. In response, China pointed out that the confirmation was communicated orally to MOFCOM officials during in-person meetings with NDRC officials. (China's response to Panel question No. 43, paras. 3-5.)

important information leaves applicants and other interested parties unable to easily understand or discern the rules and principles through which the NDRC evaluates comments from the public, including whether applicants will have a chance to rebut such comments. As explained by China, the public's comments are relevant to the NDRC's assessment of applicants' eligibility to receive TRQ allocations and to the NDRC's allocation of TRQ amounts.[242] We consider that the lack of clarity regarding the public comment process is particularly problematic in light of the vagueness or open-endedness of certain basic eligibility criteria and allocation principles that we have found to be inconsistent with China's various obligations set forth in Paragraph 116. We therefore consider that the public comment process is inconsistent with China's obligation to administer TRQs on a transparent basis. Similarly, since applicants and other interested parties cannot easily anticipate whether the NDRC will verify comments from the public and whether it will allow applicants an opportunity to rebut such comments, China violates the obligation to administer its TRQs on a predictable basis. We also find that, since the procedure for public comments is not set out in plain or obvious detail in China's legal instruments, this violates China's obligation to administer its TRQs using clearly specified administrative procedures.

7.83. China argues that the obligations set forth in Paragraph 116 do not require that China's legal instruments specify all the procedures for evaluating public comments[243], that the United States has not provided evidence of actual confusion among applicants[244], and that applicants can submit an inquiry for further information concerning the public comment process.[245] We do not agree with these arguments. In our view, Paragraph 116 imposes positive obligations for China to administer its TRQs on a transparent and predictable basis and to use clearly specified administrative procedures. We do not consider that China complies with these obligations simply because applicants and other interested parties may be able to discover the content and functioning of the public comment process by seeking out such information on their own initiative. We also do not believe that the United States is necessarily required to substantiate its claims under these obligations by providing evidence of actual confusion among applicants and other interested parties. Rather, the United States may, and in our view, has, substantiated its claims through the design, architecture and structure of China's TRQ administration.

7.84. With respect to the obligation to administer TRQs on a fair basis, we recall that this obligation requires China's administration of TRQs to be impartial and equitable, and that the Chinese authorities act in accordance with the applicable rules and standards.[246] As we have already found, China's legal instruments do not specify whether the public's comments will be verified and whether applicants will be given an opportunity to rebut such comments. Further, as China acknowledges, any member of the public, including competing applicants and other entities or people with an interest in impairing an applicant's opportunity to receive a TRQ allocation, may submit comments.[247] A system that allows entities with conflicting interests to comment on the information provided by applicants but does not clarify whether those applicants or other interested parties have an opportunity to learn about such comments and to rebut them, cannot, in our view, be considered impartial and equitable. Thus, we find that the public comment process violates China's obligation to administer its TRQs on a fair basis.

7.1.4.3.5 Conclusion

7.85. For the reasons set out above, we find that the public comment process is inconsistent with the obligations, set forth in Paragraph 116 of China's Working Party Report, to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures.

[242] China's first written submission, para. 15; and response to Panel question No. 55(e), para. 27.
[243] China's first written submission, para. 115.
[244] China's first written submission, para. 114; and opening statement at the first meeting of the Panel, paras. 16 and 19.
[245] China's second written submission, para. 59.
[246] See para. 7.9 above.
[247] China's response to Panel question No. 9(d), para. 31

7.1.4.4 STE and non-STE portions of TRQs

7.1.4.4.1 Introduction

7.86. The United States claims that China's administration of STE and non-STE portions of its wheat, rice, and corn TRQs violates five obligations under Paragraph 116, namely the obligations to administer TRQs on a transparent, predictable, and fair basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ. China rejects the entirety of the United States' claims.

7.87. Below, we describe the relevant provisions of China's legal instruments concerning STE and non-STE portions of TRQs and summarize the parties' main arguments. We then assess whether China's administration of STE and non-STE portions of TRQs is inconsistent with the five obligations the United States invokes, taking into account our understanding of the meaning and nature of each of the relevant obligations laid out in paragraph 7.9 above.

7.1.4.4.2 Provisions at issue concerning STE and non-STE portions of TRQs

7.88. Article 4 of the 2003 Provisional Measures divides China's wheat, rice, and corn TRQs into STE and non-STE portions and the annual allocation notices set out the portions of TRQs reserved for importation through STEs in any given year. In the 2017 Allocation Notice, the STE portions of TRQs are set out as follows:

> The 2017 grain import tariff-rate quota quantities are: wheat − 9.636 million tons, with a state trading proportion of 90%; corn − 7.20 million tons, with a state trading proportion of 60%; [] rice − 5.32 million tons (of which: 2.66 million tons of long-grain rice and 2.66 million tons of medium- and short-grain rice), with a state trading proportion of 50%.[248]

Neither the 2003 Provisional Measures nor the 2017 Allocation Notice contains further provisions concerning the allocation of STE and non-STE portions of TRQs.

7.89. Article 4 of the 2003 Provisions Measures sets out the following procedures for importation of goods under STE and non-STE portions of TRQs:

> State trading quotas must be imported through state trading enterprises; non-state trading quotas are imported through enterprises that have trading rights, and end-users that have trading rights may also import by themselves.[249]

It is undisputed that COFCO is the only designated STE for grains.[250]

7.90. Article 22 of the 2003 Provisional Measures sets out the following procedure for recipients of STE portions of TRQs that have not signed a contract for importation with an STE prior to 15 August:

> With respect to state trading agricultural product import tariff-rate quota quantities allocated to end-users, in the event that a contract has not been signed prior to August 15 of the current year, upon seeking approval from the Ministry of Commerce or NDRC according to the administrative jurisdiction set forth in Article 7 of these *Measures*, the end-user is permitted to entrust any enterprises that have trading rights to import; end-users that have trading rights may also import by themselves.[251]

7.1.4.4.3 Main arguments of the parties

7.91. First, the United States points to China's use of a "single application process" for allocating STE and non-STE portions of TRQs. Since applicants are neither able to request one or the other

[248] 2017 Allocation Notice, (Exhibit USA-15), Article I.
[249] 2003 Provisional Measures, (Exhibit USA-11), Article 4.
[250] Catalogue of Import State Trading Enterprises, (Exhibit USA-14). See also China's first written submission, para. 9; and United States' first written submission, para. 19.
[251] 2003 Provisional Measures, (Exhibit USA-11), Article 22. (emphasis original)

portion, nor provided any information concerning how the NDRC allocates these portions, the United States argues that China violates its obligations to administer its TRQs on a transparent[252] and predictable basis[253] and to use clearly specified administrative procedures.[254] The United States also argues that the single application process inhibits the filling of each TRQ, since "[e]ach type of importation process has its own costs, time constraints, and administrative burdens" and "the uncertainty inherent in China's process" could cause applicants not to apply for TRQs or to apply for smaller amounts.[255]

7.92. Second, the United States points to the procedure for non-STE recipients of STE portions of TRQs to import under such TRQs, in particular, that non-STE recipients must initially attempt to contract with COFCO and, if unsuccessful by 15 August, seek approval from the NDRC to import by themselves or through another enterprise. In the United States' view, China violates the obligations to administer its TRQs on a predictable basis and not to inhibit the filling of each TRQ, since COFCO is not required to contract with non-STE recipients of STE portions of TRQs and the NDRC's approval to import without COFCO is not automatic. Non-STE recipients therefore cannot predict if they will be able to import under STE portions allocated to them[256], and may ultimately be unable to do so.[257] Non-STE recipients that are unable to import under STE portions of their TRQ allocations will not be eligible to apply for reallocation and may face penalties for non-use of TRQ allocations in the form of deductions to their allocations in the following year, adding to the lack of predictability[258] and to the inhibiting effect of China's TRQ administration.[259] The United States further argues that the lack of clarification in China's legal instruments regarding the procedure for seeking the NDRC's approval to import also violates China's obligation to administer its TRQs using clearly specified administrative procedures.[260]

7.93. China submits that all of the United States' arguments are inapposite because the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO and does not require COFCO to return unused TRQ amounts.[261] Since non-STE applicants, in practice, receive only non-STE portions of TRQs, China considers it unnecessary to provide these applicants with information regarding the allocation of STE portions of TRQs.[262] Similarly, China considers that the United States' concerns about non-STE recipients' ability to use STE portions of TRQs are "hypothetical" since non-STE applicants, in practice, do not receive STE portions of TRQs.[263]

7.94. In response, the United States maintains that China has not substantiated its assertions regarding the NDRC's practice, and that, in any event, such practice further demonstrates China's violation of its obligations under Paragraph 116.[264] More particularly, the alleged practice further demonstrates that China does not administer its TRQs on a transparent and predictable basis, using clearly specified administrative procedures, since it "departs" from what is stated in China's legal instruments.[265] It also demonstrates that China does not administer its TRQs on a fair basis, since the NDRC does not apply the basic eligibility criteria and allocation principles set out in China's legal instruments in allocating the entire STE portions of TRQs to COFCO, and does not subject COFCO to the requirement to return unused TRQ amounts.[266] Lastly, the alleged practice also demonstrates that China's TRQ administration inhibits the filling of each TRQ, since the NDRC "excludes" COFCO's unused TRQ amounts from reallocation and thereby "prevents imports that would otherwise be completed by non-STE applicants".[267] In response, China argues that nothing in China's Schedule

[252] United States' first written submission, paras. 89-92.
[253] United States' first written submission, paras. 130-132 and 146.
[254] United States' first written submission, para. 172.
[255] United States' first written submission, paras. 198-199, 201, and 205-206.
[256] United States' first written submission, para. 147.
[257] United States' first written submission, paras. 201-202.
[258] United States' first written submission, paras. 147-148.
[259] United States' first written submission, paras. 202-204.
[260] United States' first written submission, paras. 174-175.
[261] China's first written submission, para. 92.
[262] China's first written submission, paras. 94-95 and 99.
[263] China's first written submission, paras. 96-97.
[264] United States' second written submission, paras. 59-60; and response to Panel question No. 45(a), paras. 1-3.
[265] United States' opening statement at the first meeting of the Panel, para. 56; and second written submission, paras. 69-75.
[266] United States' second written submission, paras. 76-78.
[267] United States' second written submission, paras. 82-83.

CLII or its legal instruments precludes the NDRC from allocating the entire STE portions of TRQs to COFCO and not requiring COFCO to return unused TRQ amounts.[268]

7.1.4.4.4 Analysis by the Panel

7.95. Below, we assess, first, the United States' claims regarding the allocation of STE and non-STE portions of the TRQs including the implications of China's statement concerning the NDRC's practice in this regard. We then address the United States' claims regarding the procedure for non-STE recipients of STE portions of TRQs to import under those portions.

7.1.4.4.4.1 Allocation of STE and non-STE portions of the TRQs

7.96. We begin by assessing the parts of China's legal instruments that pertain to the allocation of STE and non-STE portions of TRQs and the United States' claims concerning the so-called "single application process" for these two portions. We then assess the implications of China's statement that the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO and does not require COFCO to return unused TRQ amounts.

7.97. The United States claims that the lack of clarity in China's legal instruments and the use of a so-called "single application process" violate the obligations to administer TRQs on a transparent and predictable basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.98. At the outset, we note that China's legal instruments explicitly distinguish between STE and non-STE portions of TRQs. More particularly, Article 4 of the 2003 Provisional Measures states that TRQs are "divided into state trading quotas and non-state trading quotas"[269] and the annual allocation notices indicate specific STE portions of available TRQ amounts.[270] Despite this, neither China's legal instruments nor any other document explains to applicants and other interested parties how the NDRC allocates these two portions of TRQs, nor are applicants provided the possibility to apply specifically for one portion or the other. We therefore consider that applicants and other interested parties are unable to easily understand or discern the set of rules or principles through which the NDRC allocates STE and non-STE portions of TRQs, in violation of China's obligation to administer its TRQs on a transparent basis. Similarly, we consider that applicants and other interested parties cannot easily anticipate how the NDRC allocates STE and non-STE portions of TRQs, in violation of China's obligation to administer its TRQs on a predictable basis. We also consider that the NDRC's process for allocating STE and non-STE portions of TRQs is not set out in plain or obvious detail, in violation of China's obligation to administer its TRQs using clearly specified administrative procedures.

7.99. The United States also claims that the uncertainty in the NDRC's allocation of STE and non-STE portions of TRQs inhibits the filling of each TRQ. As argued by the United States[271], the procedures for importing under STE and non-STE portions of TRQs differ. More particularly, recipients of non-STE portions may import by themselves or through another enterprise, whereas recipients of STE portions must import through the designated STE COFCO or, if unsuccessful by 15 August, seek the NDRC's approval to import by themselves or through another enterprise.[272] Above we found that the uncertainty in the NDRC's allocation of STE and non-STE portions of TRQs renders China's TRQ administration inconsistent with the obligations to administer TRQs on a transparent and predictable basis, and to use clearly specified administrative procedures. However, we do not believe that the mere existence of such uncertainty is sufficient to demonstrate that China administers its TRQs in a manner that would inhibit the filling of each TRQ. As noted by the United States[273], the receipt of a TRQ is a benefit or commercial advantage since it allows for importation of products at a reduced in-quota rate. The United States has not established that the uncertainty in the NDRC's allocation of

[268] China's second written submission, paras. 29-30.
[269] 2003 Provisional Measures, (Exhibit USA-11), Article 4.
[270] 2017 Allocation Notice, (Exhibit USA-15), Article I.
[271] See United States' first written submission, paras. 200-203.
[272] 2003 Provisional Measures, (Exhibit USA-11), Articles 4 and 22.
[273] United States' opening statement at the first meeting of the Panel, para. 46; and response to Panel question No. 28, para. 105.

STE and non-STE portions of TRQs, in and of itself, would cause applicants to forego such an advantage by not applying for TRQs or applying for smaller amounts.

7.100. Having assessed the United States' claims concerning China's legal instruments, we now turn to consider the implications of China's statement that the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO and does not require COFCO to return unused TRQ amounts. The United States claims that this stated practice violates the obligations to administer TRQs on a transparent, predictable, and fair basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.101. With respect to the NDRC's stated practice of allocating the entire STE portions of TRQs to COFCO, we agree with the United States that a number of provisions in China's legal instruments suggest that STE portions of TRQs could be allocated to STE as well as non-STE applicants.[274] First, Article 4 of the 2003 Provisional Measures states that "[s]tate trading quotas must be imported through state trading enterprises", and that "non-state trading quotas are imported through enterprises that have trading rights, and end-users that have trading rights may also import by themselves".[275] The statement that STE portions must be imported through STEs would, in our view, be redundant if non-STE applicants could not receive allocations of STE portions of TRQs. Instead, this provision suggests that non-STE applicants can receive non-STE or STE portions of TRQs, or a mix of the two. The different portions would simply have to be used in accordance with the relevant procedures in Article 4.

7.102. Second, Article 14 of the 2003 Provisional Measures requires STE portions to be indicated in the TRQ certificate and, accordingly, the annexed TRQ certificate requires an indication of "7. Arranged Quantity" and "8. of which State Trading".[276] Again, it would, in our view, be redundant to require that STE portions of allocated TRQ amounts be indicated in individual recipients' TRQ certificates if non-STE applicants could only receive non-STE portions. Instead, this suggests that any applicant, including a non-STE applicant, can receive both non-STE and STE portions of TRQs.

7.103. Third, Article 22 of the 2003 Provisional Measures sets out a procedure for recipients that have been allocated STE portions of TRQs and have not signed a contract by August 15, to seek approval to entrust any enterprise to import or to import by themselves.[277] Again, in our view, this procedure would be redundant if non-STE applicants could not receive STE portions of TRQs. Instead, this provision suggests that non-STE applicants can receive STE portions and therefore use the procedure in Article 22 in cases where they fail to contract with COFCO for importation under allocated STE portions of TRQs by 15 August.

7.104. Based on our reading of these provisions, we consider that China's legal instruments set out STE and non-STE portions of TRQs as being available for allocation to both STE and non-STE applicants, in accordance with the eligibility criteria and allocation principles laid down in the annual allocation notices. Indeed, China itself states that nothing in its legal instruments prevents the NDRC from allocating STE portions of TRQs to non-STE applicants.[278] We see nothing, in China's legal instruments or elsewhere, that would alert applicants and other interested parties to the NDRC's stated practice of allocating the entire STE portions of TRQs only to COFCO. While China states that "[a]pplicants become aware of this practice through their participation in the TRQ administration", this assertion does not, in our view, suffice.[279]

7.105. With respect to the NDRC's stated practice of not requiring COFCO to return unused TRQ amounts, we agree with the United States that the requirement to return unused TRQ amounts is set out in China's legal instruments as generally applicable to all recipients of TRQ allocations.[280] Article 23 of the 2003 Provisional Measures, which contains this requirement, states in relevant part:

[274] See United States' second written submission, para. 62.
[275] 2003 Provisional Measures, (Exhibit USA-11), Article 4.
[276] 2003 Provisional Measures, (Exhibit USA-11), Article 14.
[277] 2003 Provisional Measures, (Exhibit USA-11), Article 22.
[278] China's second written submission, para. 29. See also China's responses to Panel question No. 5(c), para. 14, No. 5(e), para. 16, and No. 5(f), para. 17.
[279] China's response to Panel question No. 5(b), para. 13.
[280] See United States' second written submission, paras. 64-66.

> In the event that an end-user holding an agricultural product import tariff-rate quota is unable to sign import contracts for, or has already signed import contracts for but is unable to complete, the entire quota quantity already applied for and obtained for the current year, [the end-user] must return the quota quantity it was unable to complete to the original certificate-issuing agency prior to September 15.[281]

7.106. The requirement to return unused TRQ amounts thus applies to "end-users", which are defined in Article 39 of the 2003 Provisional Measures as follows:

> "End-users" as mentioned in these Measures refer to manufacturing enterprises, traders, wholesalers, retailers, etc. that directly apply for and obtain agricultural product import tariff-rate quotas.[282]

7.107. Thus, as China also confirms[283], end-users are enterprises that apply for and receive TRQ allocations. This definition suggests that any enterprise that applies for and receives TRQ allocations is considered an end-user and is therefore subject to the requirement to return unused TRQ amounts. We find unconvincing China's argument that the 2003 Provisional Measures "provide for two mutually exclusive categories of applicants, STEs and 'end users'".[284] STEs are defined in Article 38 of the 2003 Provisional Measures as:

> "State trading enterprises" as mentioned in these Measures refer to enterprises conferred by the government with privileges in the exclusive import business of certain products. The list of state trading enterprises is verified, determined, and announced by the Ministry of Commerce.[285]

7.108. We see nothing in this definition, or elsewhere in China's legal instruments, to suggest that an STE such as COFCO should not be considered an end-user and therefore should not be subject to the requirement to return unused TRQ amounts, insofar as that STE applies for and receives a TRQ allocation, including an allocation of STE portions of a TRQ.

7.109. As explained above, China's legal instruments suggest that both STE and non-STE applicants can receive STE portions of TRQs, and that the requirement to return unused TRQ amounts applies to both STE and non-STE recipients of TRQ allocations. As also explained above, there is no indication in China's legal instruments or elsewhere that COFCO receives the entire STE portions of TRQs and is not required to return unused TRQ amounts. China's statement therefore demonstrates that the NDRC's practice differs from what is set out in China's legal instruments. In our view, the disparity between what is set out in China's legal instruments and the NRDC's stated practice demonstrates that applicants and other interested parties cannot easily understand or discern the set of rules or principles through which the NDRC, in practice, administers STE and non-STE portions of TRQs. It therefore further supports our finding of inconsistency with the obligation to administer TRQs on a transparent basis. Similarly, this disparity demonstrates that applicants and other interested parties cannot easily anticipate how the NDRC, in practice, allocates STE and non-STE portions of TRQs, further supporting our finding of inconsistency with the obligation to administer TRQs on a predictable basis. This disparity also shows that the NDRC, in practice, allocates STE and non-STE portions of TRQs in a manner that is not set out in plain or obvious detail, further supporting our

[281] 2003 Provisional Measures, (Exhibit USA-11), Article 23. See also 2017 Reallocation Notice, (Exhibit USA-17), para. 1. Article 30 of the 2003 Provisional Measures imposes penalties in the form of deductions to the TRQ allocations in the following years, for failure to comply with the obligation to return unused TRQ amounts. More particularly, it states:

> In the event that an end-user, in violation of the provisions in Article 23 of these Measures, fails to complete imports for the entire agricultural import tariff-rate quota quantity allocated during the current year, and also fails to return to the original certificate issuing agency by September 15 the quota quantity it failed to import during the current year, there will be a corresponding deduction to its tariff-rate quota quantity allocated in the following year, according to the proportion not completed. (2003 Provisional Measures, (Exhibit USA-11), Article 30.)

[282] 2003 Provisional Measures, (Exhibit USA-11), Article 39.

[283] China's first written submission, para. 19; and response to Panel question No. 1(a), para. 1.

[284] China's second written submission, para. 30. See also China's response to Panel question No. 1(b), para. 2.

[285] 2003 Provisional Measures, (Exhibit USA-11), Article 38.

finding of inconsistency with the obligation to administer TRQs using clearly specified administrative procedures.

7.110. In addition, the disparity between what is set out in China's legal instruments and the NRDC's stated practice demonstrates that the NDRC does not use the otherwise applicable rules when administering STE and non-STE portions of TRQs. More particularly, China acknowledges that the NDRC does not apply the basic eligibility criteria and allocation principles in allocating the entire STE portions of TRQs to COFCO[286], and does not subject COFCO to the requirement to return unused TRQ amounts.[287] We have explained above that fairness requires that China's TRQ administration be impartial and equitable, and that the Chinese authorities act in accordance with the applicable rules and standards.[288] In our view, China's statement that the NDRC, in practice, does not follow the otherwise applicable rules regarding the basic eligibility criteria, allocation principles, and the requirement to return unused TRQ amounts therefore demonstrates that China violates the obligation to administer its TRQs on a fair basis.

7.111. We note China's argument that nothing in China's Schedule CLII or its legal instruments precludes the NDRC from allocating the entire STE portions of TRQs to COFCO and not requiring COFCO to return unused TRQ amounts.[289] We wish to emphasize that our findings above concern solely the consistency of China's TRQ administration with the obligations in Paragraph 116. Whether the NDRC's stated practice is consistent with China's Schedule CLII is not a matter before us. Nor is it our task to consider China's compliance with its own domestic legislation.[290]

7.112. With respect to the implications of the NDRC's stated practice on the filling of China's wheat, rice, and corn TRQs, we agree with the United States that this practice would result in the exclusion of certain TRQ amounts that would otherwise be available to non-STE applicants.[291] More particularly, China's statement that the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO and does not require COFCO to return unused TRQ amounts demonstrates that the NDRC precludes non-STE applicants from applying for and receiving COFCO's unused TRQ amounts during the reallocation process. In our view, China's statement concerning the NDRC's practice therefore demonstrates that China's TRQ administration restrains the filling of its TRQs, in violation of the obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ.

7.1.4.4.4.2 Procedure for non-STE recipients to import under STE portions of TRQs

7.113. The United States claims that the procedure for non-STE recipients to import under STE portions of TRQs violates the obligations to administer TRQs on a predictable basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ. China argues that the United States' claims are "hypothetical" in light of the NDRC's stated practice of allocating the entire STE portions of TRQs to COFCO. However, we consider it appropriate to address these claims because the procedure concerning non-STE recipients' use of STE portions of TRQs appears in China's legal instruments, and China acknowledges that its legal instruments do not prevent the NDRC from allocating STE portions to non-STE applicants, in which case this procedure would be relevant.[292]

7.114. We recall that non-STE recipients of STE portions of TRQs must import through a designated STE or, if unsuccessful by 15 August, seek approval from the NDRC to import on their own or through any other enterprise.[293] It is undisputed that COFCO is the only designated STE for grains, and that there is no requirement in China's legal instruments for COFCO to agree to contract with non-STE recipients of STE portions of TRQs. It is also undisputed that there is no clarification, in China's legal instruments or elsewhere, of the procedure to be followed by non-STE recipients of STE portions when seeking approval to import without COFCO following 15 August.[294] In light of this, we consider that applicants and other interested parties cannot easily anticipate how non-STE recipients are to

[286] China's responses to Panel question No. 6, para. 19, and No. 63, para. 44.
[287] China's response to Panel question No. 6, para. 20.
[288] See para. 7.9 above.
[289] China's second written submission, paras. 29-30.
[290] See Panel Reports, *US – Hot-Rolled Steel*, para. 7.267; and *US – Stainless Steel (Korea)*, para. 6.50.
[291] See United States' second written submission, para. 83.
[292] China's responses to Panel question Nos. 5(c), para. 14, 5(e), para. 16, and 5(f), para. 17; and second written submission, para. 29.
[293] 2003 Provisional Measures, (Exhibit USA-11), Articles 4 and 22.
[294] See China's response to Panel question No. 5(d), para. 15.

import wheat, rice, and corn under STE portions of TRQs, in violation of China's obligation to administer its TRQs on a predictable basis. Similarly, we consider that the procedure for seeking approval to import without COFCO is not set out in plain or obvious detail, in violation of China's obligation to administer its TRQs using clearly specified administrative procedures.

7.115. Turning to the effects of this procedure on the filling of China's TRQs, we note that non-STE recipients are prevented from utilizing STE portions of their TRQ allocations if they do not succeed in contracting with COFCO or obtaining approval from the NDRC to import without COFCO.[295] We also agree with the United States that the effects go beyond the possibilities for non-STE recipients to utilize STE portions of their TRQs allocations. Under China's legal regime, non-STE recipients that are prevented from utilizing STE portions of their TRQs allocations would not be eligible to apply for reallocation. Furthermore, they may face penalties for non-use of TRQ allocations in the form of deductions in the TRQ amounts allocated to them in the following year.[296] In our view, the restrictions imposed on the possibilities for non-STE recipients to utilize STE portions of their TRQ allocations, and the implications on their ability to participate in reallocation and to receive the full amount of TRQ allocations in future years, violate China's obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ.

7.1.4.4.5 Conclusion

7.116. For the reasons set out above, we find that the administration of STE and non-STE portions of the TRQs is inconsistent with the obligations, set forth in Paragraph 116 of China's Working Party Report, to administer TRQs on a transparent, predictable, and fair basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.1.4.5 Public notice

7.1.4.5.1 Introduction

7.117. The United States claims that the extent of the public notice provided in connection with the allocation, return and reallocation of China's wheat, rice, and corn TRQs violates three obligations under Paragraph 116, namely the obligations to administer TRQs on a transparent and predictable basis, and in a manner that would not inhibit the filling of each TRQ. China rejects the entirety of the United States' claims.

7.118. Below, we describe the extent of the public notice provided by China and summarize the parties' main arguments. We then assess whether the extent of the public notice provided in connection with the allocation, return, and reallocation of China's TRQs is inconsistent with the three obligations the United States has invoked, taking into account our understanding of the meaning and nature of each of the relevant obligations laid out in paragraph 7.9 above.

7.1.4.5.2 Extent of the public notice at issue

7.119. The annual allocation notices set out the total TRQ amounts available for allocation in any given year. In the 2017 Allocation Notice, the total TRQ amounts available for allocation were as follows:

[295] 2003 Provisional Measures (Exhibits USA-11), Articles 4 and 22. Non-STE recipients may also face obstacles in utilizing STE portions of their TRQ allocations where the NDRC grants approval but the timeline for the approval process does not permit the non-STE recipients sufficient time to arrange for importation by themselves or through other enterprises. As pointed out by the United States, non-STE recipients of STE portions cannot apply for approval to import by themselves or through other enterprises until 15 August and are required to return unused TRQ amounts a month hereafter, on 15 September, in order to avoid facing penalties for non-use. Since Article 22 of the 2003 Provisional Measures does not set out a deadline for the NDRC to reach a decision, non-STE recipients of STE portions could potentially have insufficient time to import, even where approval is granted.

[296] More particularly, and as described in paras. 2.34-2.36 above, a recipient receives corresponding deductions to its TRQ allocation in the following year, if it fails to return unused TRQ amounts by 15 September or if it fails to use the full TRQ amounts allocated to it in two consecutive years. (2003 Provisional Measures, (exhibit USA-11), Articles 30 and 31).

> The 2017 grain import tariff-rate quota quantities are: wheat − 9.636 million tons, with a state trading proportion of 90%; corn − 7.20 million tons, with a state trading proportion of 60%; [] rice − 5.32 million tons (of which: 2.66 million tons of long-grain rice and 2.66 million tons of medium- and short-grain rice), with a state trading proportion of 50%.[297]

It is undisputed that China does not provide public notice of the TRQ amounts that are actually allocated, returned, or reallocated, in respect of individual applicants or in the aggregate.

7.1.4.5.3 Main arguments of the parties

7.120. First, the United States contends that China violates the obligation to administer its TRQs on a transparent basis by failing to provide public notice of (i) the total amounts of allocated TRQs and the ratio of STE and non-STE portions thereof, (ii) the total amounts of returned TRQs, (iii) the total TRQ amounts available for reallocation, (iv) the total amounts of reallocated TRQs, (v) the names of individual enterprises that receive TRQ allocations or reallocations, (vi) the TRQ amounts allocated to each individual recipient, and (vii) the TRQ amounts reallocated to each individual recipient.[298] In the United States' view, an applicant cannot understand the reasons for his own outcome or how the NDRC allocates and reallocates returned TRQ amounts without public notice of the outcomes of the allocation and reallocation processes, i.e. items (i) and (iv) through (vii).[299] Further, the United States argues that applicants cannot know whether reallocation will or did take place in any given year, without public notice of the TRQ amounts returned and made available for reallocation, i.e. items (ii) and (iii).[300]

7.121. Second, the United States contends that China violates the obligation to administer its TRQs on a predictable basis by failing to provide public notice of (i) the total amounts of returned TRQs, (ii) the total TRQ amounts available for reallocation, (iii) the total amounts of reallocated TRQs, (iv) the names of individual enterprises that receive TRQ reallocations, and (v) the TRQ amounts reallocated to each individual recipient.[301] Similar to its arguments concerning transparency, the United States argues that an applicant cannot predict how the NDRC will reallocate returned TRQ amounts without public notice of the outcomes of the reallocation process, i.e. items (iii) through (v).[302] Further, the United States argues that applicants cannot know whether reallocation will take place, and if so in what amount, without public notice of the TRQ amounts returned and made available for reallocation, i.e. items (i) and (ii).[303]

7.122. Third, the United States contends that China violates the obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ, by failing to provide public notice of (i) the total amounts of allocated TRQs and the ratio of STE and non-STE portions thereof, (ii) the total amounts of returned TRQs and the ratio of STE and non-STE portions thereof, (iii) the total TRQ amounts available for reallocation and the ratio of STE and non-STE portions thereof, (iv) the total amounts of reallocated TRQs and the ratio of STE and non-STE portions thereof, (v) the names of individual enterprises that receive TRQ allocations or reallocations, (vi) the TRQ amounts allocated to each individual recipient, and (vii) the TRQ amounts reallocated to each individual recipient.[304] In the United States' view, traders lack the "necessary commercial information to engage in importation" under the TRQs without public notice of the outcomes of the allocation and reallocation processes, i.e. items (i) and (iv) through (vii).[305] Further, the United States argues that potential applicants are less likely to apply for reallocation or more likely to apply for smaller amounts without

[297] 2017 Allocation Notice, (Exhibit USA-15), Article I.
[298] United States' first written submission, paras. 97-112. See also United States' response to Panel question No. 20(b), para. 57.
[299] United States' first written submission, paras. 99 and 111.
[300] United States' first written submission, para. 106.
[301] United States' first written submission, paras. 135-144. See also United States' response to Panel question No. 20(b), para. 58.
[302] United States' first written submission, para. 142.
[303] United States' first written submission, para. 138.
[304] United States' first written submission, paras. 207-213. See also United States' response to Panel question No. 20(b), para. 59.
[305] United States' first written submission, paras. 207-211; and opening statement at the first meeting of the Panel, para. 18.

public notice of the total TRQ amounts returned and made available for reallocation, i.e. items (ii) and (iii).[306]

7.123. China generally argues that the United States' arguments regarding the scope of public notice go too far, maintaining that "the additional information requested by the United States is not supported by a reasonable definition of transparency".[307] China submits that applicants that desire further clarification on the NDRC's allocation and reallocation of TRQ amounts can submit an inquiry for further information.[308] China also argues that the information required by the United States is not of the kind that would contribute to the filling of the TRQs, since the names of all applicants are published in the annual announcements of applicant enterprise data, and exporters can use this information to contact applicants to inquire whether they have received TRQ allocations and whether they wish to enter into commercial arrangements for the importation of wheat, rice, and corn under such TRQ allocations.[309] Furthermore, China argues that grain importers who receive TRQ allocations or reallocations can initiate commercial arrangements with exporters, and that the United States' argument is "based on a theoretical marketplace where only grain-exporting entities have agency".[310]

7.124. Lastly, China submits that it is not possible, under the timeline contained in its legal instruments and its Schedule CLII, to provide public notice of the amounts of returned TRQ amounts available for reallocation prior to the deadline for submitting applications for reallocation.[311] In China's view, it is "pure speculation" for the United States to assert that this lack of information renders applicants less likely to apply for reallocation or more likely to apply for smaller amounts.[312]

7.1.4.5.4 Analysis by the Panel

7.125. Below, we assess the United States' claims under the obligations to administer TRQs on a transparent and predictable basis, and in a manner that would not inhibit the filling of each TRQ, in turn.

7.126. With respect to the United States' claim that China violates the obligation to administer its TRQs on a transparent basis, the United States argues that Paragraph 116 requires China to give public notice of (i) the total amounts of allocated TRQs and the ratio of STE and non-STE portions thereof, (ii) the total amounts of returned TRQs, (iii) the total TRQ amounts available for reallocation, (iv) the total amounts of reallocated TRQs, (v) the names of individual enterprises that receive TRQ allocations or reallocations, (vi) the TRQ amounts allocated to each individual recipient, and (vii) the TRQ amounts reallocated to each individual recipient.

7.127. At the outset, we note that the obligation to administer TRQs on a transparent basis is a general obligation that does not specifically require public notice of information, let alone public notice of the detailed types of information identified by the United States. This stands in contrast to many other provisions of the covered agreements that require publication or notification of specific types of information.[313] Notably, Article XIII:3 of the GATT 1994, which we address in section 7.2

[306] United States' first written submission, para. 212.

[307] China's first written submission, para. 63. For information concerning individual applicants, specifically, China argues that this constitutes business confidential information, which China should not be required to publish. (China's first written submission, para. 66; response to Panel question No. 28, paras. 82-83; and second written submission, paras. 37-41 (referring to Article XIII of the GATT 1994 and Article 1(11) of the Agreement on Import Licensing Procedures)). The European Union presents a similar view. (European Union's third-party submission, paras. 97-107).

[308] China's first written submission, para. 65.

[309] China's first written submission, para. 68.

[310] China's first written submission, para. 69.

[311] China's first written submission, paras. 72-73. More particularly, since China's legal instruments and its Schedule CLII call for unused TRQ amounts to be returned by 15 September and require applications for reallocation to be submitted between 1 and 15 September, China maintains that it is not possible to publish the total amounts of returned TRQs that are available for reallocation prior to the deadline for submitting applications for reallocations.

[312] China's first written submission, para. 75.

[313] See, e.g. Article X:1 of the GATT 1994 (concerning publication of trade regulations); Articles 1.4(a), 3.3, 3.5(b) and 3.5(c) of the Agreement on Import Licensing Procedures (concerning publication of aspects related to administrative procedures for import licensing, licensing requirements, and the use of quotas); Article 12 of the Anti-Dumping Agreement and Article 22 of the Agreement on Subsidies and Countervailing

below, sets out specific publication or notification obligations in relation to the use of TRQs. We are therefore not convinced that the reference to "transparent" in Paragraph 116, in and of itself, requires China to publish the types of information identified by the United States. In our view, the United States has not demonstrated that China's failure to give public notice of such information entails that the basis for its TRQ administration is not transparent.

7.128. More particularly, and as mentioned in paragraph 7.9 above, the obligation to administer TRQs on a transparent basis requires China to administer its TRQs through an underlying set of rules or principles that are easily understood or discerned by applicants and other interested parties. Above, we have made several findings requiring China to further clarify, in its legal instruments, the various rules and principles through which the NDRC administers TRQs. However, we are not convinced that knowledge of the outcomes of the NDRC's allocation and reallocation processes – including the identities of individual TRQ recipients and the TRQ amounts allocated and reallocated to them as well as the cumulative amounts of TRQ allocations and reallocations and their STE and non-STE ratios – is necessary for applicants and other interested parties to easily understand or discern the underlying set of rules or principles through which the NDRC administers TRQs.

7.129. We are also not convinced that knowledge of the total amounts of returned TRQs made available for reallocation is necessary for applicants and other interested parties to easily understand or discern the underlying set of rules or principles through which the NDRC administers TRQs. The 2017 Reallocation Notice states that unused TRQ amounts must be returned by 15 September and that the NDRC and the Ministry of Commerce "will carry out reallocation of the quotas that are returned".[314] In other words, applicants and other interested parties know that reallocation will take place if allocated TRQ amounts are returned, and that any such amounts of returned TRQs will be available for reallocation. The United States has not explained why this information does not suffice to allow applicants and other interested parties to easily understand or discern the underlying rules or principles through which the NDRC reallocates returned TRQ amounts. As further support for this conclusion, we note that the timeline for reallocation, set forth in China's legal instruments and in its Schedule CLII, requires applications for reallocation to be filed between 1 and 15 September and requires unused TRQ amounts to be returned by 15 September.[315] Thus, we agree with China that this timeline would not allow the NDRC to provide public notice of the total amounts of returned TRQs that are available for reallocation prior to the deadline for applying for reallocation of such TRQ amounts. In response to this argument, the United States maintains that China should publish the total amounts of returned TRQs that were made available for reallocation following the deadline for applicants to apply for reallocation, "to confirm amounts were returned and reallocated".[316] Alternatively, the United States argues that China should publish "daily or weekly updates reporting amounts returned" during the reallocation application period.[317] However, the United States has not explained how this type of subsequent public notice or weekly or daily updates would be necessary for applicants and other interested parties to easily understand or discern the underlying set of rules or principles through which the NDRC reallocates returned TRQ amounts.

7.130. With respect to the United States' claim that China violates the obligation to administer its TRQs on a predictable basis, the United States argues that Paragraph 116 requires China to give public notice of (i) the total amounts of returned TRQs, (ii) the total TRQ amounts available for reallocation, (iii) the total amounts of reallocated TRQs, (iv) the names of individual enterprises that receive TRQ reallocations, and (v) the TRQ amounts reallocated to each individual recipient. We reject the United States' arguments for essentially the same reasons as those explained in relation to the obligation to administer TRQs on a transparent basis. More particularly, we do not consider that knowledge of the listed information is necessary to render China's TRQ administration predictable, in other words to enable applicants and other interested parties to easily anticipate how the NDRC reallocates returned TRQ amounts.

7.131. With respect to the United States' claim that China violates the obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ, the United States argues that

Measures (concerning public notice of the initiation of investigations, preliminary or final determinations, imposition of provisional measures, and conclusion, suspension or termination of investigations).

[314] 2017 Reallocation Notice, (Exhibit USA-17), para. 1.

[315] 2003 Provisional Measures (Exhibit USA-11), Articles 23 and 24; and China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), Paragraphs 8.A and 8.B).

[316] United States' opening statement at the first meeting of the Panel, para. 48.

[317] United States' response to Panel question No. 27(b), para. 101.

Paragraph 116 requires China to give public notice of (i) the total amounts of allocated TRQs and the ratio of STE and non-STE portions thereof, (ii) the total amounts of returned TRQs and the ratio of STE and non-STE portions thereof, (iii) the total TRQ amounts available for reallocation and the ratio of STE and non-STE portions thereof, (iv) the total amounts of reallocated TRQs and the ratio of STE and non-STE portions thereof, (v) the names of individual enterprises that receive TRQ allocations or reallocations, (vi) the TRQ amounts allocated to each individual recipient, and (vii) the TRQ amounts reallocated to each individual recipient.

7.132. In our view, the United States has not demonstrated that China's failure to give public notice of the information listed by the United States violates China's obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ. More particularly, the United States' call for public notice of the outcomes of the NDRC's allocation and reallocation processes − including the identities of individual TRQ recipients and the TRQ amounts allocated and reallocated to them as well as the cumulative amounts of TRQ allocations and reallocations and their STE and non-STE ratios − is premised on the argument that this information is necessary for grain importers and exporters to enter into commercial arrangements for the importation of wheat, rice, and corn under the allocated or reallocated TRQ amounts. However, nothing in China's legal instruments prevents TRQ recipients from publishing their allocation or reallocation outcomes or from contacting grains exporters, should they wish to enter into commercial arrangements for the importation of grains under their allocated or reallocated TRQ amounts.

7.133. We are also not convinced by the United States' argument that the lack of public notice of the total TRQ amounts returned and made available for reallocation would make applicants less likely to apply for reallocation or more likely to apply for smaller amounts, in a manner that would inhibit the filling of each TRQ. As pointed out by the United States, the receipt of a TRQ reallocation is a commercial benefit.[318] Applicants know that the NDRC will reallocate any returned TRQ amounts. The United States has not demonstrated why applicants would forego the possibility of receiving such a commercial benefit solely because they do not know the exact amounts of returned TRQs made available for reallocation in any given year. As mentioned above, we find further support for this conclusion in the timeline for reallocation, set forth in China's legal instruments and in its Schedule CLII, which would not allow the NDRC to provide public notice of the total amounts of returned TRQs that are available for reallocation prior to the deadline for applying for reallocation of such TRQ amounts.

7.1.4.5.5 Conclusion

7.134. For the reasons set out above, we find that the United States has not made a *prima facie* case that the extent of the public notice provided in connection with the allocation, return, and reallocation of China's wheat, rice, and corn TRQs is inconsistent with the obligations, set forth in Paragraph 116, to administer TRQs on a transparent and predictable basis, and in a manner that would not inhibit the filling of each TRQ.

7.1.4.6 Usage requirements for wheat, rice, and corn imported under TRQ allocations

7.1.4.6.1 Introduction

7.135. The United States claims that China's imposition of usage requirements in respect of wheat, rice, and corn imported under TRQ allocations violates the obligation under Paragraph 116 to administer TRQs in a manner that would not inhibit the filling of each TRQ. Further, the United States argues that the NDRC's stated practice on enforcing the usage requirements for wheat and corn demonstrates a violation of the obligations under Paragraph 116 to administer TRQs in a predictable manner and to use clearly specified administrative procedures. China rejects the entirety of the United States' claims.

7.136. Below, we describe the usage requirements at issue and summarize the parties' main arguments. We then assess whether the usage requirements are inconsistent with the obligations the United States has invoked, taking into account our understanding of the meaning and nature of each of the relevant obligations laid out in paragraph 7.9 above.

[318] United States' opening statement at the first meeting of the Panel, para. 46.

7.1.4.6.2 Usage requirements at issue

7.137. The 2017 Allocation Notice sets out the following usage requirements for wheat and corn imported under TRQ allocations:

> The aforementioned grain import tariff-rate quotas obtained by an applicant must be self-used, and the imported goods are required to be operated for processing by the enterprise itself. Among these [goods], imported wheat and corn are required to be processed and used in its own plant;[319]
>
> Group enterprises that own multiple processing plants must independently apply for and independently use import tariff-rate quotas in the name of each processing plant.[320]

7.138. For rice imported under TRQs, the 2017 Allocation Notice sets out the following usage requirements:

> The aforementioned grain import tariff-rate quotas obtained by an applicant must be self-used, and the imported goods are required to be operated for processing by the enterprise itself. Among these [goods], … imported [] rice is required to be organized for sale in the name of the enterprise itself.[321]
>
> Trade-type enterprises applying for [] rice import tariff-rate quotas may choose to apply in the name of the group headquarters or a subsidiary enterprise, but the headquarters and the subsidiary enterprise must not apply at the same time.[322]

7.1.4.6.3 Main arguments of the parties

7.139. With respect to wheat and corn imported under TRQ allocations, the United States points to the usage requirements in the 2017 Annual Allocation Notice that such wheat and corn must be "processed and used" in the TRQ recipient's own plant and that group enterprises with multiple plants must individually apply for TRQ allocations in the name of each plant and individually process wheat and corn imported under TRQ allocations in each plant.[323] The United States argues that the inability of a recipient to sell imported wheat and corn that has not been processed in its own plant and the inability of group enterprises with multiple plants to process wheat and corn in their other plants "in the event [their] business needs or plans change" raise uncertainty and increase costs.[324] With respect to rice imported under TRQ allocations, the United States points to the usage requirement in the 2017 Annual Allocation Notice that such rice must be "organized for sale in the name of" the recipient and that group enterprises "may choose to apply [for rice TRQ allocations] in the name of the group headquarters or a subsidiary enterprise, but the headquarters and the subsidiary enterprise must not apply at the same time".[325] Since recipients face penalties for non-use of TRQ allocations in the form of deductions to the TRQ amounts allocated in the following year, the United States argues that the usage requirements for wheat, rice, and corn will incentivize applicants to request "a *smaller* TRQ amount than it may otherwise wish to receive for commercial purposes".[326] In the United States' view, the combination of the usage requirements and the penalties for non-use of TRQ allocations "would tend to limit importation under the TRQs and therefore inhibit the filling of the TRQs" in violation of Paragraph 116.[327]

7.140. With respect to wheat and corn imported under TRQ allocations, China argues that the usage requirement and penalties for non-use are necessary for the filling of TRQs, since applicants would otherwise be able to apply for a larger allocation of wheat and corn TRQs "solely to reduce the

[319] 2017 Allocation Notice, (Exhibit USA-15), Article V(2).
[320] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[321] 2017 Allocation Notice, (Exhibit USA-15), Article V(2).
[322] 2017 Allocation Notice, (Exhibit USA-15), Article II.
[323] United States' first written submission, paras. 215 and 217.
[324] United States' first written submission, paras. 216-218; and opening statement at the first meeting of the Panel, para. 19.
[325] United States' first written submission, paras. 215 and 217.
[326] United States' first written submission, para. 216. (emphasis original)
[327] United States' first written submission, para. 221.

amounts available to [their] competitors".[328] Further, China argues that its Schedule CLII "requires" or "contemplates" the usage requirements for wheat and corn and the penalties for non-use of TRQ allocations, indicating that these are consistent with Paragraph 116.[329] China also states that the NDRC, in practice, does not "monitor whether recipients comply with the processing requirement on a daily basis" and would not subject a recipient to penalties if it is found to be "unable to process its full allocation for unexpected reasons".[330] In China's view, this renders the United States' argument "unfounded".[331] With respect to rice imported under TRQs, China argues that there is no processing requirement[332], and that such rice is only required to be sold by the recipient itself.[333] In China's view, this requirement "alerts applicants that they will be accountable for utilizing their allocations, thereby incentivizing efficient use of allocations and deterring unlawful sales of TRQ Certificates".[334]

7.141. The United States responds that China has not provided evidence demonstrating the existence of the NDRC's stated practice of not enforcing the usage requirements for wheat and corn if a recipient does not have sufficient processing capacity for unexpected reasons. In any event, since the annual allocation notices give applicants the impression that they must process wheat and corn in their own plants "regardless of China's actual practice, the inhibiting effect of this requirement remains".[335] In the United States' view, the NDRC's stated practice demonstrates that China violates the obligations to administer its TRQs on a predictable basis and to use clearly specified administrative procedures, since China's legal instruments do not support China's argument on the "varied application" of the usage requirements, nor indicate how the NDRC determines an applicant's processing capacity for purposes of the usage requirements.[336]

7.1.4.6.4 Analysis by the Panel

7.142. Below, we assess, first, the United States' claims concerning the usage requirements for wheat and corn set out in China's legal instruments, as well as China's statement concerning the NDRC's practice on enforcing these requirements. We then address the United States' claim pertaining to the usage requirement for rice imported under TRQs.

7.1.4.6.4.1 Usage requirements for wheat and corn imported under TRQ allocations

7.143. The usage requirements for wheat and corn imported under TRQ allocations are set out in the 2017 Allocation Notice and quoted in paragraph 7.137 above. According to these, a recipient of a wheat or corn TRQ allocation is required to process the imported wheat or corn in its own plant. For group enterprises, the imported wheat or corn must be processed separately in each processing plant that has applied for and received wheat or corn TRQ allocations. The United States claims that these usage requirements violate the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.144. We agree with the United States that these requirements restrain recipients' ability to use wheat or corn imported under their TRQ allocations in the most efficient or commercially preferable manner. In our view, circumstances in the market may sometimes make it more efficient or commercially preferable for a TRQ recipient to contract with another enterprise for the processing of its imported wheat or corn, or to sell that wheat or corn without processing. Similarly, there may be circumstances where it would be more efficient or commercially preferable for a group enterprise to have its imported wheat or corn processed in a plant different than that which applied for a TRQ allocation. The usage requirements for wheat and corn set out in China's legal instruments would prevent TRQ recipients from pursuing these business options.

7.145. The operation of the usage requirements for wheat and corn is such that applicants know that they must process wheat and corn imported under TRQ allocations in their own plant and will therefore import the amounts of wheat and corn that they can process in their own plant. The

[328] China's first written submission, para. 126.
[329] China's response to Panel question No. 27(c), paras. 77-79; and second written submission, paras. 51-52.
[330] China's response to Panel question No. 57, para. 29.
[331] China's first written submission, para. 125.
[332] China's first written submission, para. 121.
[333] China's response to Panel question No. 59(a), para. 37, and No. 59(b), para. 38.
[334] China's second written submission, para. 56.
[335] United States' opening statement at the first meeting of the Panel, para. 54.
[336] United States' second written submission, para. 111.

operation of the penalties for non-use of TRQ allocations is such that applicants know that they will face deductions to their TRQ allocations in the following year if they do not import the full amounts of wheat or corn under their TRQ allocations.[337] Therefore, the operation of the usage requirements for wheat and corn, in conjunction with the penalties for non-use of TRQ allocations, is such that applicants will apply for TRQ amounts that they know they can process in their own plant. In our view, this would cause applicants to be overly cautious in deciding the TRQ amounts that they will apply for. We find convincing the argument that, in the absence of such requirements, applicants would apply for larger TRQ amounts. Consequently, we consider that the usage requirements restrain the filling of China's wheat and corn TRQs, and therefore violate the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.146. China argues that its Schedule CLII "indicates that imposing end-use requirements and penalties is consistent with Paragraph 116".[338] With respect to penalties for non-use of TRQ allocations, China points to the following part of its Schedule:

> For all methods of allocation, a quota-holder that does not import its full allocation under a tariff-quota will receive a proportional reduction in the tariff-quota allocation in the subsequent year unless the quantity is returned to the SDPC prior to 15 September. A quota holder that has failed to import its full allocation in two consecutive years and has returned that unused portion by 15 September shall have its quota allocated in the following year on the basis of its fill rate in the most recent year, and will not benefit from any additional reallocations until and unless there are no other applications. The means of calculating the penalty will be included in the TRQ regulation in force and publicly available, and will be applied in a consistent and equitable manner.[339]

7.147. We recall that the United States does not challenge China's imposition of such penalties *per se*.[340] Rather, the United States' arguments and our findings concern the issue of whether the usage requirements, including how these operate in conjunction with the penalties for non-use, inhibit the filling of TRQs. Hence, we do not consider the reference, in China's Schedule CLII, to penalties for non-use of TRQ allocations to be relevant to the claim at hand.

7.148. With regard to the usage requirements, China points to the following part of its Schedule:

> In the first year, allocations to end users by the SDPC of the tariff-quota … shall be based on a first-come, first-served system or the requests of the applicants and their historical import performance, production capacity, or other relevant commercial criteria, subject to specific conditions to be published one month in advance of the opening of the application period so as to ensure an equitable distribution and complete tariff-quota utilization.[341]

7.149. As the United States pointed out, production capacity is referenced in China's Schedule as a factor China may take into account in allocating the TRQ amounts during the first year. The cited part of the Schedule contains no direct reference to processing or other types of usage requirements for wheat and corn imported under TRQ allocations. We understand China to argue that applicants

[337] More particularly, and as described in paragraphs 2.34-2.36 above, a TRQ recipient receives a corresponding deduction to its TRQ allocation in the following year, if it fails to return unused TRQ amounts by 15 September or if it fails to use the full TRQ amounts allocated to it during two consecutive years. (2003 Provisional Measures, (exhibit USA-11), Articles 30 and 31). While China's legal instruments do not provide for a penalty for failure to comply with the usage requirements for wheat and corn, China explains that a TRQ recipient receives the same type of penalty if it does not comply with the usage requirements for wheat and corn. (China's response to Panel question No. 58(a), para. 33). This explanation further supports our finding that the usage requirements for wheat and corn would inhibit the filling of China's TRQs.

[338] China's second written submission, para. 51.

[339] China's response to Panel question No. 27, para. 77 (quoting China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), para. 6.D). See also China's second written submission, para. 51. (emphasis added by China)

[340] See, e.g. United States' second written submission, para. 54, stating "China's response focuses on a different aspect of its measures − the penalties for failure to import and use a TRQ allocation − not the *restrictions on the use* of the imported product". (emphasis original)

[341] China's response to Panel question No. 27, para. 78 (quoting China's Schedule CLII, Part I, Section IB (Most-Favoured-Nation Tariff, Agricultural Products, Tariff Rate Quotas), (Exhibit USA-23), paras. 6.B (concerning STE portions of TRQs) and 6.C (concerning non-STE portions of TRQs)). (emphasis added by China) See also China's second written submission, para. 52.

should infer the usage requirements from the reference in the Schedule to processing capacity as a factor for allocating the TRQ amounts. More particularly, China argues that "[t]aking an enterprise's capacity to produce processed grains into account is only logical if enterprises are required to process grains in their own facilities" and that "[a]bsent this end-use requirement, there would be no purpose for collecting and considering production capacity data".[342] We do not necessarily disagree that production capacity and the usage requirements are related to a certain extent: if production capacity is taken into account in allocating the TRQ amounts, TRQ recipients may well have capacity to process wheat and corn imported under their TRQ allocations.[343] This, however, is not pertinent to the present claim which concerns the inhibiting effect of the usage requirements on the filling of China's TRQs. As noted above, our finding that the usage requirements would inhibit the filling of China's wheat and corn TRQs is based on their restraining effect on the ability of recipients to dispose of wheat and corn imported under their TRQ allocations in the most efficient and commercially preferable manner. Our finding of inconsistency of the usage requirements with the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ, therefore, stands regardless of whether China takes processing capacity into account in the allocation of TRQ amounts.

7.150. China also maintains that the processing requirements for wheat and corn are necessary to "encourage the filling of each TRQ".[344] More specifically, China submits that "if a TRQ applicant could apply for an allocation with no concern for being held accountable for processing that allocation, an applicant could apply for a larger allocation solely to reduce the amounts available to its competitors".[345] However, this argument disregards the fact that such applicants would, under China's legal instruments, face penalties for non-use of their TRQ allocations. Specifically, if an applicant applies for "a larger allocation solely to reduce the amounts available to its competitors", that applicant must return any unused TRQ amounts and would face penalties for non-use of TRQ allocations.[346] As we understand the operation of China's TRQ administration, and as pointed out by China itself[347], it is the penalties for non-use of TRQ allocations that serve to encourage TRQ recipients to fully use TRQ amounts allocated to them. The usage requirements do not serve that purpose, but rather restrict the TRQ recipients' ability to dispose of the imported wheat and corn as their commercial needs require. We therefore do not find this argument convincing.

7.151. Lastly, China submits that usage requirements are "common components" of TRQ administration, imposed by several Members, including the United States.[348] In this regard, we note that the present claim has been brought under China's Working Party Report, which contains specific obligations undertaken by China with regard to its TRQ administration.

7.152. Having assessed the usage requirements for wheat and corn set out in China's legal instruments, we now turn to consider the implications of China's statement concerning the NDRC's practice on enforcing these requirements. China's statement is that the NDRC, in practice, does not "monitor whether recipients comply with the processing requirement on a daily basis" and would not subject a recipient to penalties if it is "unable to process its full allocation for unexpected reasons".[349] The United States claims that this stated practice violates the obligations to administer TRQs on a predictable basis and to use clearly specified administrative procedures.

[342] China's second written submission, para. 52.

[343] We note that processing capacity is only one among multiple factors listed in the 2017 Allocation Notice as factors to be taken into account in allocating the TRQ amounts, and China itself states that, in practice, applicants' actual import performance under previously allocated TRQs is "the factor given the most weight in NDRC's allocation analysis" and that it is only for "new" applicants that "information concerning production capacity is a key factor". (China's first written submission, paras. 49-50). Thus, regardless of processing capacity being a factor in the NDRC's allocation of TRQ amounts, recipients may not necessarily have capacity to process wheat and corn imported under TRQ amounts allocated to them.

[344] China's first written submission, para. 127.

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

[346] More particularly, and as described in paragraphs 2.34-2.36 above, a recipient receives corresponding deductions to its TRQ allocation in the following year, if it fails to return unused TRQ amounts by 15 September or if it fails to use the full TRQ amounts allocated to it in two consecutive years. (2003 Provisional Measures, (exhibit USA-11), Articles 30 and 31).

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

[348] China's first written submission, paras. 128-133.

[349] China's response to Panel question No. 57, para. 29.

7.153. First, we note that, as pointed out by the United States[350], China has provided no evidence of the NDRC's practice, let alone evidence that applicants are made aware of such practice.[351] We agree with the United States that applicants will apply for TRQs, and process wheat and corn imported under their TRQ allocations, taking into consideration the usage requirements announced to the public through China's legal instruments, and not on the basis of any unknown practice of the NDRC.[352] Second, we note that China itself maintains that the usage requirements for wheat and corn apply in all circumstances and that the NDRC's stated practice only concerns the monitoring of TRQ recipients' compliance with these and the consequences in situations where recipients are unable to process wheat and corn for unexpected reasons.[353] Our finding that the usage requirements for wheat and corn would inhibit the filling of China's TRQs is based on their restraining effect on the ability of recipients to efficiently dispose of wheat and corn in all circumstances, not only in situations where they are unable to process wheat and corn for unexpected reasons. Therefore, China's statement concerning the NDRC's practice does not alter our finding that the usage requirements for wheat and corn inhibit the filling of TRQs.

7.154. We also agree with the United States' claims that China's statement concerning the NDRC's practice serves to demonstrate inconsistencies with the obligations under Paragraph 116 to administer TRQs on a predictable basis and to use clearly specified administrative procedures. China's legal instruments set out the usage requirements for wheat and corn as generally applicable in all circumstances. As mentioned in the preceding paragraph, China has presented no evidence that applicants and other interested parties are made aware of the NDRC's stated practice of not enforcing the usage requirements and imposing penalties if a recipient is found to be "unable to process its full allocation for unexpected reasons". China's statement concerning the NDRC's practice therefore demonstrates that applicants and other interested parties cannot easily anticipate how the NDRC, in practice, enforces the usage requirements for wheat and corn, in violation of the obligation to administer TRQs on a predictable basis. Similarly, China's statement demonstrates that the NDRC, in practice, enforces the usage requirements in a manner that is not set out in plain or obvious detail, in violation of the obligation to administer TRQs using clearly specified administrative procedures.

7.1.4.6.4.2 Usage requirement for rice imported under TRQ allocations

7.155. The usage requirement for rice imported under TRQ allocations is set out in the 2017 Allocation Notice and quoted above in paragraph 7.138. According to this requirement, a recipient of a rice TRQ allocation must organize the sale of the imported rice in its own name. Group enterprises may only submit a single application and must apply for rice TRQ allocations either in the name of the headquarters or a subsidiary enterprise. For group enterprises, imported rice must be organized for sale in the name of the enterprise that applied for the rice TRQ allocation, be that the headquarters or a subsidiary enterprise.[354] The United States claims that these requirements violate the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.156. In its first written submission, the United States quotes the text of the usage requirement for rice, set out in the 2017 Allocation Notice, and argues that this requirement, like the usage requirements for wheat and corn, "raises uncertainty and therefore increases costs for a TRQ Certificate holder" and "incentivizes applicants to request a *smaller* TRQ amount than it may otherwise wish to receive for commercial purposes".[355] When asked for further elaboration, the United States argues that the requirement for rice "constrains the TRQ holder's ability to respond as

[350] See United States' openings statement at the first meeting of the Panel, para. 54; and second written submission, paras. 57-58.

[351] We note China's statement that:

As China has explained, NDRC does not monitor compliance with the processing requirement on a daily basis, nor does NDRC operate any kind of application and approval process for recipients that need to transfer grains due to an unexpected lack of processing capacity. Applicants are therefore aware of the possibility of not complying in those circumstances where they are "unable to process [their] full allocation for unexpected reasons" because NDRC would not enforce the processing requirement in those circumstances. (China's response to Panel question No. 57(d), para. 32). While China asserts that applicants are aware of the NDRC's stated practice, we find nothing in the record of these proceedings to substantiate this assertion.

[352] United States' second written submission, paras. 57-58.

[353] China's response to Panel question No. 58, para. 33.

[354] China's response to Panel question No. 59(c), para. 39. The United States does not take issue with this explanation.

[355] United States' first written submission, para. 216. (emphasis original)

business needs or plans change, fosters uncertainty, and therefore increases costs for a TRQ Certificate holder"[356] and that it is "a restriction on normal business practices and therefore make[s] it more burdensome to import rice".[357]

7.157. Taking into account the entirety of the United States' arguments concerning the usage requirement for rice, it is still not clear to us how this requirement "constrains the TRQ holder's ability to respond as business needs or plans change" or in what way it poses "a restriction on normal business practices and therefore make[s] it more burdensome to import rice".

7.158. At times, the United States appears to argue that the usage requirement for rice would inhibit the filling of China's TRQs in the same manner as the usage requirements for wheat and corn.[358] Yet the usage requirements for wheat and corn require that imported wheat and corn be processed in the recipient's own plant. The United States does not specifically argue that such a processing requirement applies to rice imported under TRQ allocations. At other times, the United States argues that it "understands Article V(2) to require … that the rice should be bagged and marketed to downstream consumers by that entity itself, under its own name".[359] China, however, rejects this interpretation, arguing that the usage requirement for rice "only requires a recipient to sell the rice imported under the TRQ itself, without imposing any other restrictions such as the types of buyers, the appearance of the seller's names on the bag, etc".[360] In response, the United States argues that China "does not clarify whether [recipients] must self-process the rice in the production of some downstream product"[361] and points to China having "conceded that the term 'organize for sale' is confusing".[362]

7.159. The United States has challenged the usage requirement for rice only under the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ. In our view, this requires the United States to demonstrate not only that the usage requirement for rice is confusing or lacks clarity, but also that it has a restraining effect on the filling of China's rice TRQ. In this regard, we recall that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency".[363] Therefore, we find that the United States has not made a *prima facie* case that the usage requirement for rice violates China's obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.160. The United States also submits that the requirement for group enterprises applying for a rice TRQ allocation would inhibit the filling of China's TRQs, arguing that "an enterprise with subsidiaries must not apply in the same TRQ year as its subsidiary" and that "[t]he requirement therefore has the effect of inhibiting the filling of the TRQs".[364] Again, the United States fails to explain how the requirement for group enterprises would inhibit the filling of China's rice TRQ. Therefore, this argument by the United States also falls short of making a *prima facie* case that China violates the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ.

7.1.4.6.5 Conclusion

7.161. For the reasons set out above, we find that the usage requirements for wheat and corn are inconsistent with the obligations, set forth in Paragraph 116 of China's Working Party Report, to administer TRQs on a predictable basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ. We further find that the United States has not made a *prima facie* case that the usage requirement for rice is inconsistent with the obligation, set forth in Paragraph 116, to administer TRQs in a manner that would not inhibit the filling of each TRQ.

[356] United States' response to Panel question No. 32, para. 117.
[357] United States' response to Panel question No. 32, para. 119.
[358] See, e.g. United States' response to Panel question No. 72, para. 48.
[359] United States' response to Panel question No. 18(b), para. 50.
[360] China's response to Panel question No. 59(a), para. 37. See also China's response to Panel question No. 59(b), para. 38.
[361] United States' response to Panel question No. 72, para. 49.
[362] United States' response to Panel question No. 72, para. 50.
[363] Appellate Body Report, *US – Gambling*, para. 140.
[364] United States' response to Panel question No. 32, para. 118.

7.1.5 Overall assessment of China's TRQ administration under Paragraph 116

7.162. The United States challenges China's administration of its wheat, rice, and corn TRQs under six of the obligations set forth in Paragraph 116 of China's Working Party Report. Each of the alleged violations of these six obligations challenges specific aspects of China's TRQ administration. In the preceding sections, we have assessed the United States' claims against those specific aspects of China's TRQ administration. In so doing, we have also highlighted, where relevant, the interlinkages between some of the specific aspects. As indicated in paragraph 7.13 above, we will, in this section, provide a holistic assessment of the compatibility of China's TRQ administration with the obligations set forth in Paragraph 116, by synthesizing our analyses regarding the individual aspects of China's TRQ administration.

7.163. The measure at issue, namely, China's administration of its wheat, rice, and corn TRQs, consists of relevant legal instruments adopted by China, such as the 2003 Provisional Measures and the annual allocation and reallocation notices, as well as the practice of the relevant government agencies, in this case the NDRC. Essentially, China's TRQ administration comprises rules and practices that regulate the TRQ application process; the NDRC's evaluation of the applications to determine whether applicants are eligible to receive TRQs and what TRQ amounts to allocate, including through seeking comments from the public; the granting of TRQ certificates; the process for importation under allocated TRQ amounts; the use of wheat, rice, and corn imported under TRQs; the return of unused TRQ amounts; and the reallocation of returned TRQ amounts. The United States has brought claims with respect to all of these aspects, arguing violations of various obligations set forth in Paragraph 116.

7.164. The first stage in China's TRQ administration is the initial allocation process. This process starts with applicants submitting their applications and related materials to the NDRC's local agencies. At this stage, applicants must show their compliance with the basic eligibility criteria, set out in the annual allocation notices. Above, we have found the four basic eligibility criteria the United States challenges to be vague, and therefore inconsistent with the obligations to administer TRQs on a transparent and predictable basis, and to use clearly specified requirements. We have also found the NDRC's stated practice of assessing eligibility on the basis of whether an applicant appears on Credit China's blacklist, and disregarding the remaining basic eligibility criteria set out in the annual allocation notices, to be inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements. Given that the basic eligibility criteria determine which applicants will receive TRQs, our findings about these criteria indicate that the very foundation of China's TRQ administration is flawed. Indeed, China also acknowledges this flaw in stating that its legal instruments should be updated to better reflect the NDRC's practice.

7.165. Once the NDRC has decided which applicants are eligible to receive TRQ allocations, it determines the TRQ amounts that will be allocated to the eligible applicants. The interlinkage between the basic eligibility criteria and allocation principles is obvious: the NDRC only considers eligible applicants in the allocation of TRQ amounts. Allocation decisions are made by applying the allocation principles, set out in the annual allocation notices. Above, we have found elements of the allocation principles to be vague, and therefore inconsistent with the obligations to administer TRQs on a transparent and predictable basis, and to use clearly specified administrative procedures. We have also found the NDRC's stated practice of giving the most weight to actual import performance, rather than taking into account all allocation principles set out in the annual allocation notices, to be inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis. Our findings about the allocation principles show that, like the NDRC's determination of applicants' eligibility to receive TRQs, the NDRC's determination of what TRQ amounts to allocate is also based on unclear rules and principles.

7.166. Before allocating TRQs to eligible applicants, the NDRC conducts a public comment process. While the evidence on the record shows that the NDRC seeks the public's comments on the enterprise data contained in the received TRQ application forms, China's legal instruments do not explain the details of this process, including, importantly, whether applicants are informed of comments about their applications and have an opportunity to rebut any such comments. We have found this to be inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. The public's comments are relevant to the NDRC's assessment of applicants' eligibility and the allocation of TRQ amounts to eligible applicants. The ambiguity in the public comment process therefore carries over, and adds to, the vagueness in

the basic eligibility criteria and the allocation principles. Just as applicants are not aware, at the outset, of the criteria and principles for assessing their applications, they are also not aware, at the public comment stage, whether the public has commented on their applications, and if so, whether they would have a chance to rebut any such comments. Taken together, our findings on the basic eligibility criteria, the allocation principles, and the public comment process show that the actors in the market are not able to know on what basis the NDRC decides who will receive TRQ allocations and in what amounts.

7.167. One important aspect of China's TRQ administration is the distinction between the STE and non-STE portions of TRQs. This distinction is important because, as we observed above, the procedure for the importation of wheat, rice, and corn under an STE portion involves additional requirements compared to the procedure for importation under a non-STE portion. Above, we made findings of violation about the administration of STE and non-STE portions of TRQs in three regards.

7.168. First, we have found that whereas China's legal instruments suggest that non-STE applicants can receive STE as well as non-STE portions of TRQs, those instruments do not explain the basis on which the NDRC allocates these two different portions, and whether applicants can apply for one or the other of these portions. We have found this to be inconsistent with the obligations to administer TRQs on a transparent and predictable basis, and to use clearly specified administrative procedures.

7.169. Second, we have found the NDRC's stated practice of allocating the entire STE portions of TRQs to China's designated STE COFCO and not requiring COFCO to return unused TRQ amounts, without regard for the rules and principles set out in its legal instruments, to be inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures. This stated practice, we have found, also inhibits the filling of China's TRQs by precluding non-STE applicants from applying for reallocation of COFCO's unused TRQ amounts.

7.170. Third, we have found that the additional requirements in the procedure for importation under STE portions of TRQs, as well as the lack of clarity as to how it operates, is inconsistent with the obligations to administer TRQs on a predictable basis and to use clearly specified administrative procedures. We have also found that this could prevent non-STE recipients from being able to use allocated STE portions of TRQs prior to the 15 September deadline for returning unused TRQ amounts. This would not only preclude TRQ recipients from importing grains under their allocated STE portions of TRQs but would also prevent them from applying for reallocation of returned TRQ amounts and prejudice their chances of receiving TRQ allocations in the future, in a manner that would inhibit the filling of each TRQ. We recall that China's TRQ administration comprises two types of penalties for non-use of TRQ allocations. First, recipients that are unable to fully use their allocated TRQ amounts and fail to return unused amounts to the NDRC by 15 September will see their future TRQ allocations deducted proportionate to the amount that they have failed to return. Second, recipients that fail to fully use their allocated TRQ amounts during two consecutive years are subject to the same deductions to their TRQ allocations in the following year, even if they return unused amounts by 15 September.

7.171. After importing grains under their TRQ allocations, recipients are subject to the usage requirements set out in the annual allocation notices. As noted above, a recipient of a wheat or corn TRQ allocation must process the wheat or corn imported under its TRQ allocation in its own plant. Above, we have found that the usage requirements for wheat and corn inhibit the filling of China's TRQs because they restrict recipients' ability to process and sell wheat and corn imported under their TRQ allocations in the most efficient or commercially preferable manner. Since non-use of TRQ allocations results in penalties in the form of deductions in TRQ allocations in the following year, applicants may tend to apply for smaller TRQ amounts than they would have in the absence of the usage requirements. We have also found the NDRC's stated practice of not imposing penalties on recipients that are unable to process their imported wheat and corn for unexpected reasons to be inconsistent with the obligations to administer TRQs on a predictable basis and to use clearly specified administrative procedures. The usage requirements are an important component of China's TRQ administration because they prescribe how TRQ recipients should dispose of the wheat and corn that they import under their TRQ allocations. The inconsistencies we have found in these requirements indicate that China's TRQ administration contains flaws on how TRQ recipients are required to use the grains imported under their TRQ allocations.

7.172. The final stage of China's TRQ administration, which we have discussed above, is the reallocation stage. Unused TRQ amounts must be returned, by 15 September, to the NDRC for reallocation. Above, we have found that China's legal instruments contain diverging provisions with respect to the basis on which the NDRC reallocates returned TRQ amounts, and concluded that this is inconsistent with the obligation to administer TRQs using clearly specified administrative procedures. This finding shows that there continues to be ambiguity in China's TRQ administration throughout the process.

7.173. These findings demonstrate that China's TRQ administration contains legal flaws from the beginning through to the completion of the process. On this basis, we conclude that China's TRQ administration, as a whole, is inconsistent with the obligations, set forth in Paragraph 116, to administer TRQs on a transparent, predictable, and fair basis, using clearly specified administrative procedures and requirements that would not inhibit the filling of each TRQ.

7.2 Claim under Article XIII:3(b) of the GATT 1994

7.2.1 Introduction

7.174. The United States claims that China violates Article XIII:3(b) of the GATT 1994 by not providing public notice of the total TRQ amounts that are actually allocated at the initial allocation stage, and the changes to that amount, which occur at the time unused TRQs are returned and reallocated.[365] China rejects the entirety of the United States' claim.

7.2.2 Legal provision

7.175. Article XIII of the GATT 1994 is entitled "Non-discriminatory Administration of Quantitative Restrictions". Its paragraph 3(b) states as follows:

> In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph. (Emphasis original)

7.176. This provision has not yet been addressed in WTO dispute settlement.

7.177. Article XIII:5 clarifies that Article XIII applies to TRQs:

> The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

7.2.3 Main arguments of the parties

7.178. The United States argues that China violates the obligation set forth in Article XIII:3(b) of the GATT 1994 to "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period" by not providing public notice of the TRQ amounts that are actually allocated at the initial allocation stage. In the United States' view, public notice of the total TRQ amounts that are available for allocation does not suffice to meet this obligation.[366] The United States further argues that China violates the obligation in Article XIII:3(b) to "give public notice of ... any change" in the total quantity or value of the product or products which

[365] United States' first written submission, para. 272.
[366] United States' first written submission, paras. 276-277.

will be permitted to be imported by not providing public notice of changes to the total amounts of TRQs actually allocated. In the United States' view, this part of the provision requires public notice of the total amount of returned TRQs and the total amount of reallocated TRQs.[367]

7.179. China submits that Article XIII:3(b) requires public notice of the total quantity or value of the products that are "initially" fixed, that is the total amounts of TRQs that are initially made available, and not the amounts of TRQs actually allocated, as the United States argues.[368] In other words, this provision requires "only the publication of the total TRQ quantities for wheat, rice, and corn, as provided in China's Schedule CLII".[369] China also submits that the changes in the total quantity or value for which public notice should be given, are the changes to the total TRQ amounts that are initially fixed or made available for allocation.[370]

7.2.4 Analysis by the Panel

7.180. Factually, it is undisputed that China gives public notice of the total TRQ amounts available for allocation each year. Thus far, these amounts have always corresponded to the total TRQ amounts fixed in China's Schedule CLII.[371] It is also undisputed that China does not give public notice of the TRQ amounts that are actually allocated, returned and reallocated.

7.181. Thus, the only issues for us to consider are ones of legal interpretation. Initially, we have to examine whether the obligation under Article XIII:3(b) of the GATT 1994 to "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period" refers to the total TRQ amounts available for the initial allocation or to the total TRQ amounts that are actually allocated at the initial stage. We must also consider the meaning of the obligation to "give public notice of … any change in such quantity or value". As both parties acknowledge, the second part of Article XIII:3(b) requires public notice of any changes to what is considered to be the object of the initial public notice obligation. Hence, the critical question for us is what is the object of the initial public notice obligation under Article XIII:3(b).

7.182. We find it useful to start our interpretation of paragraph 3(b) of Article XIII by examining the structure of Article XIII, and clarifying the place of paragraph 3(b) in that structure. Article XIII contains five paragraphs. The first paragraph sets out the basic principle of non-discrimination in the administration of import restrictions.[372] The second paragraph sets forth rules concerning the methods for applying import restrictions and the distribution of trade whereas the third paragraph requires different types of public notice, depending on the kind of method used. Finally, the fourth paragraph explains the details of the process in situations where a quota is allocated among supplying countries.

7.183. In our view, the most relevant parts of Article XIII for the interpretative issues before us are paragraph 2 and the other subparagraphs of paragraph 3.

7.184. Paragraph 2 of Article XIII explains how trade should be distributed by Members applying import restrictions. The chapeau of this paragraph sets out the main principle that import restrictions should be administered in such a way that the distribution of trade approaches "as closely as possible the shares that various Members may be expected to obtain" in the absence of the restrictions.[373] This paragraph then goes on to list, in its subparagraphs (a) through (d), "specific instances of authorized forms of allocation".[374] Subparagraph (a) stipulates that, "wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3(*b*) of this Article". Subparagraph (b) states that "in cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota". Hence, these two

[367] United States' first written submission, paras. 278-281.
[368] China's first written submission, para. 85.
[369] China's first written submission, para. 83. See also ibid. paras. 84-86.
[370] China's first written submission, para. 87.
[371] For instance, the Allocation Notices for 2016 and 2017 refer to such total amounts. See 2016 Allocation Notice, (Exhibit USA-16), Article I and the 2017 Allocation Notice, (Exhibit USA-15), Article I.
[372] Panel Reports, *EC – Bananas III*, para. 7.69.
[373] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.
[374] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.

subparagraphs express a preference for the use of quotas over the use of import licences or permits. Subparagraph (c) states that, except where quotas are allocated among supplying countries as provided for in subparagraph (d), Members shall not require that import licences or permits be utilized for importation from a particular country or source. Subparagraph (d) explains how allocations will be calculated in cases where the importing country allocates a quota among different supplying countries.

7.185. Hence, paragraph 2 identifies two ways of "applying import restrictions", namely (i) by fixing the total amount of a quota and (ii) by using import licences or permits. It also sets forth obligations to be observed in cases where a quota is allocated among different supplying countries.

7.186. Paragraph 3 of Article XIII lays down two sets of rules concerning publication or notification in the administration of TRQs, each corresponding to one of the two ways of applying TRQs described in its paragraph 2. Thus, subparagraph (a) of paragraph 3 explains the notification requirements "[i]n cases in which import licences are issued in connection with import restrictions". Subparagraph (b) addresses the notification requirements "[i]n the case of import restrictions involving the fixing of quotas". Subparagraph (c) sets out the notification requirements "[i]n the case of quotas allocated among supplying countries".

7.187. We find it important to note that each of the subparagraphs of paragraph 3 requires notice of different types of information, under different circumstances. For example, subparagraph (a) requires the importing Member to provide "upon request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries". Subparagraph (b), the provision at issue in this dispute, requires the importing Member to "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value". Subparagraph (c) requires the importing Member to "promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof".

7.188. This overview of the obligations in Article XIII shows that the drafters designed this provision in such a way that an importing Member is subject to a particular publication or notification obligation depending on how it administers quantitative restrictions and TRQs. In this case, China's TRQs are administered by fixing their total amounts. The United States has brought a claim under paragraph 3(b), which is the provision that describes the public notice obligations in cases involving the fixing of quotas or TRQs. As noted above, the issue before us is what is the object of the initial public notice obligation to "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period" under Article XIII:3(b). Is it the total TRQ amounts that are available for allocation or the total amounts of TRQs that are actually allocated?

7.189. The United States notes that the dictionary meaning of "permit", which appears in the text of Article XIII:3(b), is to "[a]llow the doing or occurrence of; give permission or opportunity for", or "[a]llow or give consent to (a person or a thing) to do or experience something", and argues that, therefore, the obligation under Article XIII:3(b) "refers to those amounts for which consent is given for actual importation during a specified period".[375] Therefore, the United States argues that, at the initial stage of TRQ distribution, Article XIII:3(b) requires China to give public notice of "the total amounts authorized on the TRQ Certificates issued to selected applicants".[376]

7.190. As argued by the United States, the dictionary meaning of "permit" refers, among other things, to "[a]llow the doing or occurrence of; give permission or opportunity for", or "[a]llow or give consent to (a person or a thing) to do or experience something". However, it is not clear to us how the United States infers from this dictionary definition that, at the initial allocation stage, Article XIII:3(b) requires public notice of the total TRQ amounts actually allocated to TRQ applicants, as opposed to the total TRQ amounts available for allocation. In our view, given the nature of a TRQ, which fixes the total amount of products that may be imported at a reduced in-quota rate, "give permission or opportunity for" would be better interpreted as referring to the total quantity or value

[375] United States' first written submission, para. 270.
[376] United States' first written submission, para. 276.

of the TRQ, and not to the amount of actual allocations made by the NDRC. By definition, a TRQ is available for allocation among applicants provided they meet certain conditions laid down in the importing Member's laws and regulations. In other words, applicants are given permission or opportunity to import goods at the in-quota rate, up to the total TRQ amounts available for allocation. This suggests that the obligation in Article XIII:3(b) to "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period" should be interpreted as requiring public notice of the total TRQ amounts available for allocation to all applicants.

7.191. In our view, our interpretation accords with the overall structure of Article XIII, outlined above, and the forward-looking nature of the public notice obligation set forth in paragraph 3(b).

7.192. We recall that "[i]n cases in which import licences are issued in connection with import restrictions", paragraph 3(a) of Article XIII requires the importing Member to provide "all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences amount supplying countries". This obligation thus requires the provision of information regarding the administration of restrictions and the licences granted over a past period. In contrast, paragraph 3(b) sets out a forward-looking public notice obligation "[i]n the case of import restrictions involving the fixing of quotas", requiring public notice of "the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value". In our view, whereas the obligation in paragraph 3(a) requires the importing Member to provide information concerning its administration and the import licences actually granted by it over a recent period, the forward-looking obligation in paragraph 3(b) requires public notice of the total TRQ amounts that are available for allocation during a specified future period.

7.193. This view also finds support in the negotiating history of the GATT. The Report of the Sub-Committee on Quantitative Restrictions and Exchange Control, dated 21 November 1946, states in relevant part:

> It was generally agreed that Members should undertake to supply adequate information about the administration of their import restrictions. In cases in which import licences were used, information should be supplied at the request of any Member having a substantial interest in the trade about the administration of the licenses and about the licenses granted, but there should be no obligation to reveal the names of importing or supplying firms. Where quotas were fixed, public notice should be given *in advance* of the size of the quota; and where the quota is allocated among supplying countries all Members having an interest in supplying the product should be given prompt notice of the shares of the various countries in the quotas.[377]

7.194. This document demonstrates that the drafters' intended, in cases where import restrictions are administered through the fixing of a quota, that public notice should be given "in advance of the size of the quota".[378] In our view, the use of the term "in advance" reinforces the view that, where a quota or a TRQ is fixed, public notice of the total amount of the quota or the TRQ should be provided before traders decide to engage in the importation of the relevant product. To us, prior public notice means public notice of the total amount of fixed quotas or TRQs available for allocation. Public notice of the total amounts of quotas or TRQs actually allocated would, in our view, be *ex post*.

7.195. We note the United States' argument that "China's *pro forma* announcement each year of the total TRQ quantities that it has committed to provide in its Schedule is not sufficient".[379] In the same vein, the European Union, a third party, argues that China's interpretation would render paragraph 3(b) *inutile* because the total amount of initially-fixed TRQs is already indicated in China's Schedule CLII.[380] We disagree with this argument, for two reasons. First, not all TRQs are

[377] United Nations - Economic and Social Council - Preparatory Committee of the International Conference on Trade and Employment - Committee II - Report of the Sub-Committee on Quantitative Restrictions and Exchange Control, p. 17. (emphasis added)

[378] United Nations - Economic and Social Council - Preparatory Committee of the International Conference on Trade and Employment - Committee II - Report of the Sub-Committee on Quantitative Restrictions and Exchange Control, p. 17.

[379] United States' first written submission, para. 277.

[380] European Union's response to Panel question No. 3, para. 57.

found in the Schedules of Members maintaining such TRQs. There are autonomous TRQs that Members adopt without an international obligation to do so. Article XIII:3(b) applies to such TRQs, and allows WTO Members and their exporters to know the total quantity or value of imports that will be permitted under such TRQs during a specified future period. Second, Article XIII:3(b) would also require public notice in cases where a Member decides to increase the quantity or value of its TRQ beyond the quantity or value set forth in its Schedule.

7.196. These considerations all suggest that the object of the initial notice requirement under Article XIII:3(b) is the total TRQ amounts that are available for allocation. It follows from this that the obligation under Article XIII:3(b) to provide public notice of "any change in such quantity or value" refers to changes in the total amounts of TRQs available for allocation.

7.2.5 Conclusion

7.197. For the reasons set out above, we conclude that Article XIII:3(b) of the GATT 1994 requires public notice of the total TRQ amounts that are available for allocation, and any changes thereto, and not the total TRQ amounts that are actually allocated, and changes hereto. We therefore reject the United States' claim that China violates Article XIII:3(b) by publishing only the TRQ amounts available for allocation, and any changes thereto.

7.3 Claim under Article X:3(a) of the GATT 1994

7.3.1 Introduction

7.198. The United States claims that China fails to administer its TRQs in a reasonable manner, in violation of Article X:3(a) of the GATT 1994. Under this claim, the United States takes issue with several specific aspects of China's TRQ administration, namely (a) the basic eligibility criteria, (b) the allocation principles, (c) the use of numerous local agencies, (d) the use of a public comment process, (e) the administration of STE and non-STE portions of TRQs, and (f) the extent of the public notice provided in connection with allocation, return and reallocation of TRQs. China rejects the entirety of the United States' claim.

7.3.2 Legal provision

7.199. Article X:3(a) of the GATT 1994 reads as follows:

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

7.200. Article X:1 of the GATT 1994 reads as follows:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

7.201. Paragraph 3(a) of Article X stipulates that laws, regulations, decisions and rulings of the kind described in paragraph 1 have to be administered in a uniform, impartial and reasonable manner. Paragraph 1, in turn, provides a comprehensive list encompassing laws, regulations, judicial

decisions and administrative rulings of general application, concerning, among other things, rates of duty, taxes or other charges, on imports.

7.202. There have been a number of disputes involving the interpretation of Article X:3(a). Generally speaking, Article X:3 is considered to establish minimum standards for transparency and procedural fairness in the administration of trade regulations.[381] A threshold issue is to distinguish the substance of the challenged measure from its administration since it is only the administration that can be challenged under Article X:3(a).[382] Article X:3(a) applies not only to the administration of the relevant laws or regulations in particular cases, but also to legal instruments that govern such administration.[383] Uniformity, impartiality and reasonableness, within the meaning of Article X:3(a), are legally independent obligations, thus an inconsistency with any of these three obligations will lead to a violation of this provision.[384]

7.3.3 Main arguments of the parties

7.203. The United States argues that China fails to administer its wheat, rice, and corn TRQs in a reasonable manner in respect of several specific aspects of its administration. First, the United States argues that the basic eligibility criteria and the allocation principles are vague and undefined, which "undermines the ability of applicants to reasonably comply" with them[385] and "hamper[s] TRQ applicants who are rejected from understanding the reasons for their denial" and from "correcting or improving applications in the future".[386] Second, the United States contends that numerous local agencies are authorized to interpret the basic eligibility criteria, which may lead to inequitable application of such.[387] Third, the United States argues that the use of a public comment process without guidance on how such comments are "vetted or considered", "exacerbates" the unreasonable nature of China's TRQ administration as it could "introduce bias or inequity due to the potential motivations of a submitter".[388] Fourth, the United States argues that the allocation of STE and non-STE portions of TRQs through a single application process prevents applicants from being able to choose or anticipate which type of TRQ they may receive and therefore limits applicants' ability to "anticipate and commercially plan" for the type of TRQ allocation they receive.[389] Fifth, the United States argues that the Chinese authorities do not publish information regarding the allocation, return and reallocation of TRQs, which deprives applicants and other market participants of information necessary to understand the allocation process and to connect buyers and sellers in the grains market.[390]

7.204. China rejects the United States' assertion that China's administration of its TRQs is not reasonable within the meaning of Article X:3(a), generally arguing that the United States has to show that the challenged legal instruments "necessarily lead[]" to a lack of reasonable administration.[391]

7.205. With respect to the basic eligibility criteria and the allocation principles, China reiterates its view of how the NDRC, in practice, determines applicants' eligibility and the amounts of TRQs to be allocated.[392] While China acknowledges that the basic eligibility criteria should be updated to better reflect the NDRC's practice, it does not consider that the United States has demonstrated that these criteria necessarily lead to unreasonable administration or cause any negative impact on applicants.[393] China similarly argues that the United States has failed to show that the allocation

[381] Panel Reports, *China – Raw Materials*, para. 7.685.
[382] Appellate Body Report, *EC – Bananas III*, para. 200.
[383] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873.
[384] Panel Reports, *Argentina – Hides and Leather*, para. 11.86; *China – Raw Materials*, para. 7.685; *Thailand – Cigarettes (Philippines)*, para. 7.867; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383.
[385] United States' first written submission, para. 232.
[386] United States' first written submission, para. 238. See also United States' first written submission, para. 244.
[387] United States' first written submission, paras. 230 and 249.
[388] United States' first written submission, paras. 230 and 253.
[389] United States' first written submission, paras. 230 and 257-260.
[390] United States' first written submission, paras. 230 and 262-266; and response to Panel question No. 20, para. 60.
[391] China's first written submission, paras. 30-31.
[392] China's first written submission, paras. 35-38 and 49-50.
[393] China's opening statement at the first meeting of the Panel, para. 14 and response to Panel question No. 8(f), para. 27.

principles necessarily lead to unreasonable administration.[394] As for the use of numerous local agencies, China contends that the United States' argument is without merit since the local agencies are not authorized to conduct a substantive review of applications, and that their role is limited to receiving the applications, making sure they are complete, and then forwarding them to the NDRC for the substantive assessment.[395] Concerning the public comment process, China submits that the United States' concerns are unfounded since the NDRC, in practice, verifies information received from the public, provides applicants an opportunity to rebut any such comments, and only takes into account comments that have been verified.[396] With respect to the STE and non-STE portions of TRQs, China maintains that, in practice, non-STE applicants do not receive STE portions of TRQs, which are allocated entirely to COFCO, and that therefore this argument has no basis.[397] As regards public notice, China contends that the United States does not present sufficient evidence to support its allegation that the lack of public notice of the TRQ amounts that have been allocated, returned and reallocated prevents traders from entering into arrangements to utilize TRQs.[398] In China's view, the information that China publishes does allow participants to enter into commercial arrangements.[399]

7.206. In response to China's assertions regarding the NDRC's practice concerning the basic eligibility criteria as well as the STE and non-STE portions of TRQs, the United States submits that China has not substantiated its assertions and that the stated practice, in any event, further demonstrates China's violation of Article X:3(a).[400]

7.3.4 Analysis by the Panel

7.207. In examining the United States' claim under Article X:3(a) of the GATT 1994, we make the following observations.

7.208. The United States has also challenged China's administration of its wheat, rice, and corn TRQs under Paragraph 116 of China's Working Party Report, including under China's obligations to administer its TRQs on a transparent, predictable, and fair basis. In paragraphs 7.47, 7.74, 7.85, 7.116, and 7.161 above, we have found a violation of these specific obligations under Paragraphs 116 in respect of China's TRQ administration.

7.209. We also note that the obligations laid down in Paragraph 116 of China's Working Party Report are more specific to the measure at issue in these proceedings for two reasons. First, the obligations in Paragraph 116 are specific to China's administration of its TRQs, compared to the obligation set forth in Article X:3(a) requiring reasonable administration of all trade laws, regulations, judicial decisions and administrative rulings of general application. Second, the obligations in Paragraph 116 are part of China's Working Party Report and apply exclusively to China. The obligation in Article X:3(a) is of a more general nature that covers administration of a much broader range of measures, and applies to all WTO Members.

7.210. While Paragraph 116, unlike Article X:3(a), does not directly refer to "reasonable" administration, we recall that "the fact that two provisions have a different 'scope and content' does not, in and of itself, imply that a panel must address each and every claim under those provisions".[401] We also recall that, in support of its claim under Article X:3(a), the United States largely repeats the arguments presented in connection with the relevant parts of its claims under Paragraph 116. As already mentioned, we have addressed these arguments in the context of the United States' claims under Paragraph 116 and have found violations of China's obligations to administer its TRQs on a transparent, predictable, and fair basis. More particularly, we have found that China does not administer its wheat, rice, and corn TRQs on a transparent, predictable, and fair basis, nor use

[394] China's first written submission, paras. 57-59.
[395] China's first written submission, paras. 39-40.
[396] China's first written submission, paras. 113-114 and 117.
[397] China's first written submission, paras. 94 and 101-102.
[398] China's first written submission, paras. 80-82.
[399] China's first written submission, para. 79.
[400] United States' second written submission, paras. 138-141.
[401] Appellate Body Reports, *Argentina – Import Measures*, para. 5.194.

clearly specified requirements, in respect of the basic eligibility criteria, the allocation principles, the use of a public comment process, and the administration of STE and non-STE portions of TRQs.[402]

7.211. The United States formulates an additional argument in support of its claim under Article X:3(a), namely that the alleged interpretation and application of the "vague and undefined" eligibility criteria by 37 local agencies renders the manner in which China administers its TRQs unreasonable.[403] Given that we have already found that the basic eligibility criteria used in China's TRQ administration violate its obligations to administer TRQs on a transparent, predictable, and fair basis and to use clearly specified requirements, we do not believe that it is necessary or useful for us to also consider whether the alleged interpretation and application of these inconsistent basic eligibility criteria by 37 local agencies is WTO-inconsistent.

7.212. Finally, we recall that panels are not required to examine all legal claims made by the complaining party, and need only examine those claims that must be addressed to resolve the matter at issue in the dispute.[404]

7.213. In light of the foregoing, we consider that it is not necessary for us to make a finding under Article X:3(a) of the GATT 1994 to secure a positive solution to this dispute.

7.214. At the same time, we note that panels have discretion to make additional findings beyond those strictly necessary to resolve a dispute.[405] Such additional findings could include, for example, alternative factual findings that could serve to assist the Appellate Body in completing the analysis, should it disagree with the panel's findings.[406] In this regard, we are of the view that, should our report be appealed and the Appellate Body need to complete the analysis with regard to the United States' claim under Article X:3(a), the factual findings that we have made under Paragraph 116 in relation to four of the United States' arguments presented under Article X:3(a) would assist the Appellate Body. With regard to the United States' remaining argument concerning the alleged involvement of the local agencies in the substantive assessment of TRQ applications, we make the following factual findings that would assist the Appellate Body in completing the analysis.

7.215. The United States' argument is premised on the factual contention that the local agencies of the NDRC participate in the substantive review of TRQ applications.[407] China denies that the NDRC's local agencies are involved in the substantive review of TRQ applications. According to China, these agencies are simply in charge of receiving applications, making sure that the applicants submitted all the required information, and sending the applications to the NDRC for a substantive review. It follows that the local agencies do not independently interpret the basic eligibility criteria.[408]

7.216. The United States' view is based on its reading of certain provisions in China's legal instruments on TRQ administration. Specifically, the United States refers to Articles 8 and 12 of the 2003 Provisional Measures, and contends that, together, these provisions indicate that the local agencies are involved in the substantive review of applications.[409]

7.217. Article 8 of the 2003 Provisional Measures reads:

---

[402] We note that, in addressing the claims under Paragraph 116 regarding the obligations to administer TRQs on a transparent, predictable, and fair basis, we have rejected some of the United States' arguments, for instance those pertaining to China's lack of public notice. See paras. 7.125-7.134 above. We do not consider that addressing these arguments again under Article X:3(a) would have led to a different outcome and contributed to the resolution of this dispute.

[403] United States' first written submission, para. 249.

[404] Appellate Body Report, *US − Wool Shirts and Blouses*, pp. 18-20, DSR 1997:I, p. 323, at pp. 339-341 (referring to Articles 3.2, 3.4, 3.7, 3.9, and 11 of the DSU).

[405] Appellate Body Reports, *US − Softwood Lumber IV*, para. 118; *US − Gambling*, para. 344; *US − Carbon Steel (India)*, para. 4.274; and *EC − Poultry*, para. 135.

[406] See, e.g. Appellate Body Reports, *US − Softwood Lumber IV*, para. 118; *Canada − Wheat Exports and Grain Imports*, para. 126; *China − Auto Parts*, para. 208; *US − Tuna II (Mexico)*, para. 405; and *US − Carbon Steel (India)*, para. 4.274. See also Panel Reports, *US − COOL (Article 21.5 − Canada and Mexico)*, para. 7.672; *India − Solar Cells*, para. 7.76; and *US − Anti-Dumping Methodologies (China)*, para. 7.500.

[407] United States' first written submission, para. 247.

[408] China's first written submission, para. 40.

[409] United States' response to Panel question No.3(a), para. 19.

> Article 8. The Ministry of Commerce and NDRC separately entrust their respective authorized agencies to be responsible for the items listed below:
>
> (1) To accept applicants' applications and forward them to the Ministry of Commerce or NDRC;
>
> (2) To accept inquiries and convey them to the Ministry of Commerce or NDRC;
>
> (3) To inform applicants of any part of their applications that do not meet the requirements, and remind them of their revisions;
>
> (4) To issue an Agricultural Product Import Tariff-Rate Quota Certificate to approved Applicants.[410]

The tasks described in paragraphs (1), (2) and (4) are of a logistical nature and thus support China's argument that the local agencies are not involved in the substantive review of applications. Regarding the nature of the requirement laid down in paragraph (3), China states, in response to a question, that the word "requirements" refers to two formal requirements, namely, to submit a complete application form containing all the necessary information requested by the NDRC and to sign the application form.[411] Seen in light of the logistical tasks listed in the remaining three paragraphs of Article 8, we find convincing China's explanation that paragraph (3) entrusts the local agencies with checking the completeness of and signature on application forms. Therefore, we consider that the text of Article 8 does not support the view that the NDRC's local agencies are involved in the substantive review of TRQ applications.

7.218. Paragraph 2 of Article 12 of the 2003 Provisional Measures reads:

> Agencies authorized by NDRC, in accordance with the criteria announced, accept the applications and related materials submitted by the applicants for wheat, corn, white rice, and cotton, and transmit the applications to NDRC for approval prior to November 30, concurrently submitting a copy to the Ministry of Commerce.[412]

7.219. The United States maintains that the phrase "in accordance with the criteria announced" supports the view that the agencies are involved in the substantive review of the applications.[413] However, this provision indicates that the main function of the agencies is to "accept" the applications, and "transmit" them to the NDRC. We do not read the phrase "in accordance with the criteria announced" as describing the kind of review, if any, that such agencies will conduct. Therefore, we consider that this provision does not support the United States' assertion either.

7.220. In support of its view, the United States also refers to certain parts of the texts of allocation and reallocation notices that read "deliver the enterprise application forms that *meet the publicly announced criteria*" or "carry out reporting of the applications *that meet the criteria*".[414] However, such textual elements, without more, fall short of proving that the local agencies are involved in the substantive review of TRQ applications.

7.221. Finally, we note that the "Guideline of the Examination and Approval of Grain Import TRQs" also seems to support China's position. The Guideline reads, in relevant part:

> XIII. General Procedures
>
> 1. The applicant prepares all the application materials and submit [*sic*] them to the local authorized agencies according to the requirements of this Guidance. *The local authorized agencies accept and collect the application materials, compile them into forward documents and log into the online NDRC Service Hall to register*.

[410] 2003 Provisional Measures, (Exhibit USA-11), Article 8.
[411] China's response to Panel question No. 3(b), para. 8.
[412] 2003 Provisional Measures, (Exhibit USA-11), Article 12, paragraph 2.
[413] United States' second written submission, para. 128.
[414] United States' response to Panel question No. 3(a), para. 20.

> 2. After the online registration, the authorized agencies can choose to mail the application materials to the NDRC Service Hall, or go to the Service Hall to submit the materials.
>
> 3. *Once received the application materials, officials in the Service Hall will examine the form of the materials, and will accept those that meet the formal requirements*.[415]

7.222. In our view, this passage from the Guideline supports China's position that the NDRC's agencies are not involved in the substantive review of TRQ applications. For instance, the Guideline clarifies that the agency will "accept and collect the application materials". The Guideline also suggests that after the agency receives and compiles the application materials, it will forward them to the NDRC and that the officials of the NDRC will examine the materials and accept those that meet the relevant requirements.

7.223. Based on the foregoing, we conclude that the United States has not proven its assertion that the NDRC's local agencies are involved in the substantive review of TRQ applications.

7.4 Claim under Article XI:1 of the GATT 1994

7.4.1 Introduction

7.224. The United States claims that China's administration of its wheat, rice, and corn TRQs is inconsistent with Article XI:1 of the GATT 1994 because it imposes impermissible restrictions on the importation of these goods. Specifically, the United States contends that two aspects of China's administration of its TRQs violate Article XI:1, namely (a) the administration of STE and non-STE portions of TRQs; and (b) the usage requirements for wheat, rice, and corn imported under TRQ allocations.[416] China rejects the entirety of the United States' claim.

7.4.2 Legal provision

7.225. Article XI:1 of the GATT 1994 reads as follows:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

7.226. Article XI:1 generally proscribes prohibitions or restrictions other than duties or other charges on the importation or exportation of goods. The prohibition against quantitative restrictions envisaged by Article XI:1 has been interpreted to reflect that "tariffs are GATT's border protection 'of choice'".[417]

7.227. In terms of its scope, Article XI:1 proscribes restrictions on importation "other than duties, taxes and other charges". Thus, restrictions that take the form of duties, taxes or other charges fall outside the scope of Article XI:1.[418] Article XI:1 is comprehensive in terms of the form that measures that are proscribed therein can take, as evidenced by the phrase "whether made effective through quotas, import or export licences or other measures".[419]

7.4.3 Main arguments of the parties

7.228. With regard to the administration of STE and non-STE portions of TRQs, the United States notes that different requirements and commercial considerations apply to these portions.[420] China's

[415] TRQ FAQs, (Exhibit CHN-15), section XIII. (emphasis added)
[416] United States' first written submission, paras. 284 and 291.
[417] Panel Report, *Turkey – Textiles*, para. 9.63.
[418] Appellate Body Reports, *Argentina – Import Measures*, para. 5.219.
[419] Panel Reports, *India – Autos,* paras. 7.246-7.247 (referring to GATT Panel Report, *Japan - Semi-Conductors*, para. 106); *India – Quantitative Restrictions*, para. 5.128; *Indonesia – Import Licensing Regimes*, para. 7.41; and *Argentina – Hides and Leather*, para. 11.17.
[420] United States' first written submission, para. 297.

use of a single application process, in the United States' view, increases uncertainty as applicants cannot choose which type of TRQ to apply for or predict which type they may receive.[421] This "discourage[s] applicants from applying for allocations of wheat, rice or corn TRQ at all, or may lead them to apply for a smaller allocation", in violation of Article XI:1 of the GATT 1994.[422] The United States further points out that non-STE recipients of STE portions of TRQs must contract with COFCO for importation and that COFCO is not obliged to enter into such contracts. Recipients of STE portions of TRQs cannot seek approval from the NDRC to import themselves or through another enterprise until 15 August, and approval is not automatic. Therefore, the United States argues, recipients of STE portions may not be able, or have sufficient time, to import under some or all of their TRQ allocations.[423] This would prevent such recipients from applying for additional TRQ amounts during the reallocation process and may lead to penalties for non-use of TRQ allocations in the form of deductions to their TRQ allocations in the following year. In the United States' view, this constitutes a "substantial limitation on [a recipient's] ability to successfully imported [sic] grains according to their commercial interests".[424]

7.229. At the outset, China refers to the Appellate Body's finding that a TRQ is a tariff-based measure that falls outside the scope of Article XI:1, and argues that measures necessary for the administration of TRQs similarly cannot be subject to a challenge under this provision.[425] Assuming for the sake of argument that Article XI:1 is applicable, China contends that no uncertainty is introduced in its administration of STE and non-STE portions of TRQs because the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO, which is not required to return any unused portions thereof. Since non-STE applicants receive non-STE portions of TRQs only[426], there is, in China's view, no limiting effect on imports of wheat, rice, and corn under the TRQs.

7.230. In response, the United States points out that it is not challenging China's use of TRQs but rather its administration of these TRQs. In the United States' view, such administration falls within the scope of Article XI:1 and its "association with, connection to, or proximity to 'duties, taxes or other charges'" does not "shield" it from scrutiny under this provision.[427] With respect to the NDRC's stated practice, the United States submits that China has not substantiated its assertions and that this, in any event, further demonstrates China's violation of Article XI:1.[428] More particularly, if the entire STE portions of TRQs are allocated to COFCO and the latter is not required to return unused amounts for reallocation, "this volume is unavailable to non-STE users, who would likely be willing and able to import some or all of this amount", resulting in "a significant limitation on imports".[429]

7.231. With regard to the usage requirements, the United States notes that wheat and corn imported under TRQ allocations have to be processed and used in the recipient's own plant while imported rice has to be organized for sale in the name of the recipient itself.[430] According to the United States, these requirements restrict TRQ recipients from selling or transferring imported wheat, rice, and corn and thereby "creates waste and increases unnecessarily the cost of using imported products in their production processes".[431] The United States further asserts that "failure to utilize all imported grain covered by a TRQ Certificate may lead to reduction in the next year's allocation", referring to the penalties for non-use of TRQ allocations.[432] In the United States' view, the usage requirements and penalties for non-use therefore discourage importers from applying for allocations or from requesting TRQ allocations in the amounts they would otherwise have requested, in violation of Article XI:1.[433]

7.232. At the outset, China argues that the usage requirements constitute "substantive conditions" for access to its wheat, rice, and corn TRQs and thus form part of these TRQs. In China's view, these

[421] United States' first written submission, paras. 294-296.
[422] United States' first written submission, para. 301.
[423] United States' first written submission, paras. 297-299.
[424] United States' first written submission, para. 301.
[425] China's first written submission, paras. 106 and 135-136 (quoting Appellate Body Report, *EC – Bananas (Article 21.5 – Ecuador)*, para. 335).
[426] China's first written submission, para. 107.
[427] United States' second written submission, para. 150.
[428] United States' second written submission, para. 158.
[429] United States' second written submission, paras. 158 and 160.
[430] United States' first written submission, para. 303.
[431] United States' first written submission, para. 306.
[432] United States' first written submission, para. 306.
[433] United States' first written submission, para. 308.

usage requirements, like the TRQs themselves, fall outside the scope of Article XI:1.[434] Again, assuming that Article XI:1 is applicable, China argues that there is no processing requirement for rice[435] and that the NDRC, in practice, does not monitor the processing requirements for wheat and corn on a daily basis and does not impose penalties if a recipient is found to have been "unable to process its full allocation for unexpected reasons".[436] In China's view, there is thus no limiting effect on imports of wheat, rice, and corn.[437] On the contrary, China argues that the imposition of usage requirements and penalties for non-use of TRQ allocations is necessary to prevent TRQ licences from being "misused" and to ensure efficient allocation and use of imported grains.[438]

7.233. In response, the United States argues that the usage requirements do not serve to define the scope of the TRQs or the goods that may be imported under them, and thus do not form part of the TRQs.[439] Along with the other aspects the United States challenges in this dispute, they constitute a "series of steps, or events, that are taken or occur in the carrying out of China's TRQ[s]"[440] which, according to the United States, fall within the scope of Article XI:1. With respect to the NDRC's stated practice, the United States submits that China has not substantiated its assertions, nor provided any evidence that WTO Members, applicants, or other interested entities are aware of this alleged practice.[441]

7.4.4 Analysis by the Panel

7.234. In examining the United States' claim under Article XI:1 of the GATT 1994, we make the following observations.

7.235. The same aspects of China's TRQ administration challenged under Article XI:1 are also challenged under Paragraph 116 of China's Working Party Report, including under China's obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ. In sections 7.1.4.4 and 7.1.4.6 above, we have found a violation of this specific obligation under Paragraph 116 in respect of the aspects of China's TRQ administration that are also challenged under Article XI:1.

7.236. While they are not identical, the legal obligations laid down in Article XI:1 and the relevant part of Paragraph 116 both address situations where a measure has a limiting effect on imports. However, we consider that, compared to Article XI:1, the way Paragraph 116 addresses this obligation is much more specific to the measure at issue in these proceedings, for two reasons. First, the obligation in Paragraph 116 is specific to the administration of TRQs, as opposed to other measures. It specifically addresses situations where the administration of TRQs has a limiting effect on imports, such that it would inhibit the filling of those TRQs. Second, the obligation in Paragraph 116 is part of China's Working Party Report, and therefore applies exclusively to China, as opposed to other WTO Members. The obligation in Article XI:1, on the other hand, is of a more general nature, in that it covers a much broader range of measures and applies to all WTO Members.

7.237. We also note that, in support of its claim under Article XI:1, the United States essentially repeats the arguments presented in support of its claim regarding the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ, under Paragraph 116. Notably, under Article XI:1, the United States argues that China's TRQ administration restricts imports of wheat, rice, and corn solely at the in-quota rates under the TRQs.[442] Thus, both claims take issue with the alleged restricting or inhibiting effect China's TRQ administration has on the quantity of imports made under the TRQs. The United States does not suggest that China's TRQ administration restricts imports of wheat, rice, and corn outside the TRQs.[443] As already mentioned, we have found a violation of the specific obligation under Paragraph 116, addressing the same concern as

[434] China's first written submission, paras. 135-138; and response to Panel question No. 38(a), paras. 93 and 95.
[435] China's first written submission, para. 148.
[436] China's response to Panel question No. 57, para. 29.
[437] China's first written submission, paras. 139 and 143.
[438] China's first written submission, para. 154.
[439] United States' second written submission, para. 153; and opening statement at the second meeting of the Panel, para. 46.
[440] United States' response to Panel question No. 38(a), para. 131; and second written submission, para. 150.
[441] United States' second written submission, para. 157.
[442] United States' response to Panel question No. 38(c), para. 144.
[443] United States' response to Panel question No. 38(c), paras. 142-144.

Article XI:1. More particularly, we have found that China's administration of its wheat, rice, and corn TRQs inhibits the filling of these TRQs.[444] We have therefore resolved the issue of whether China's TRQ administration restricts imports at the in-quota rates under the TRQs.[445]

7.238. Finally, we recall that panels are not required to examine all legal claims made by the complaining party, and need only examine those claims that must be addressed to resolve the matter at issue in the dispute.[446]

7.239. In the light of the foregoing, we consider that it is not necessary for us to make a finding under Article XI:1 of the GATT 1994 to secure a positive solution to this dispute. We are also of the view that, should our Report be appealed and the Appellate Body consider it necessary to complete the analysis with regard to the United States' claim under Article XI:1, the factual findings we made in sections 7.1.4.4 and 7.1.4.6 above, would assist the Appellate Body.

7.240. We therefore do not make a finding on the United States' claim under Article XI:1 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to the United States' claims under Paragraph 116 of China's Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol:

   i. The basic eligibility criteria used in China's administration of its TRQs for wheat, rice, and corn are inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified requirements;

   ii. The allocation principles used in China's administration of its wheat, rice, and corn TRQs are inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified administrative procedures;

   iii. The reallocation procedures used in China's administration of its wheat, rice, and corn TRQs are inconsistent with the obligation to administer TRQs using clearly specified administrative procedures;

   iv. The public comment process used in China's administration of its wheat, rice, and corn TRQs is inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified administrative procedures;

   v. The administration of STE and non-STE portions of China's wheat, rice, and corn TRQs is inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, to administer TRQs using clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;

   vi. The United States has not demonstrated that the extent of the public notice provided in connection with the allocation, return, and reallocation of China's wheat, rice, and corn TRQs is inconsistent with the obligations to administer TRQs on a transparent and

[444] See section 7.1.5 above.

[445] We note that, in addressing the claim under Paragraph 116 regarding the obligation not to inhibit the filling of each TRQ, we rejected some of the United States' arguments, for instance the one concerning the usage requirement for rice. We do not consider that addressing these arguments again under Article XI:1 would have led to a different outcome and contributed to the resolution of this dispute.

[446] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-20, DSR 1997:I, p. 323, at pp. 339-341 (referring to Articles 3.2, 3.4, 3.7, 3.9 and 11 of the DSU).

predictable basis, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;

vii. The usage requirements for imported wheat and corn used in China's administration of its TRQ for wheat and corn are inconsistent with the obligations to administer TRQs on a predictable basis, to administer TRQs using clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;

viii. The United States has not demonstrated that the usage requirement for imported rice used in China's administration of its TRQ for rice is inconsistent with the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ;

And, therefore, China's administration of its wheat, rice, and corn TRQs is, as a whole, inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, to administer TRQs using clearly specified requirements and administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;

b. With respect to the United States' claim under Article XIII:3(b) of the GATT 1994, the United States has not demonstrated that China's administration of its wheat, rice, and corn TRQs is inconsistent with this provision;

c. With respect to the United States' claim under Articles X:3(a) and XI:1 of the GATT 1994, we consider that it is not necessary for us to make findings under these provisions to secure a positive solution to this dispute.

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. We conclude that, to the extent that the measure at issue is inconsistent with China's obligations under Paragraph 116 of its Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol, it has nullified or impaired benefits accruing to the United States under that Working Party Report.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that that the DSB request China to bring its measure into conformity with its obligations under Paragraph 116 of China's Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol.

_____

WORLD TRADE ORGANIZATION

WT/DS517/R/Add.1

18 April 2019

(19-2574)

Page: 1/68

Original: English

CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS517/R.

_____

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	12
Annex B-2	Integrated executive summary of the arguments of China	32

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	51
Annex C-2	Integrated executive summary of the arguments of Brazil	54
Annex C-3	Integrated executive summary of the arguments of Canada	56
Annex C-4	Integrated executive summary of the arguments of Ecuador	60
Annex C-5	Integrated executive summary of the arguments of the European Union	63
Annex C-6	Integrated executive summary of the arguments of Japan	65
Annex C-7	Integrated executive summary of the arguments of Ukraine	67

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 5 March 2018

General

1. (1) In this proceeding, 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 apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) 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.

(2) 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.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. China shall submit any such 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. 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.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) 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, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the United States should be numbered USA-1 USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit in connection with the next submission thus would be numbered USA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Questions

8. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

9. The Panel shall meet in closed session.

10. The parties shall be present at the meetings only when invited by the Panel to appear before it.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. 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.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. 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. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that China shall be given the opportunity to present its oral statement first. If China chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day prior to the meeting. In that case, the United States shall present its opening statement first, followed by China. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its

statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the integrated executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These integrated 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.

22. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, its oral statements and its responses to questions following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

23. The integrated executive summary shall be limited to no more than 30 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. 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 integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

26. 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.

27. 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.

Interim and Final Report

28. 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

29. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

    a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

    b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

    c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy, preferably in Microsoft Word format and PDF format, of all documents that it submits in paper. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits in CD-ROMs or DVDs.

    d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

    e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party only by e-mail, on a CD-ROM or DVD, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

    f. Each party and third party shall submit its documents to 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.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

_____

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	12
Annex B-2	Integrated executive summary of the arguments of China	32

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. China is both a significant producer and a significant consumer of grains, including wheat, rice, and corn. China permits imports of these grains through the administration of tariff-rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn ("grains"). According to China's own notifications and Chinese customs data, China's TRQs for wheat, corn, and rice do not fill, despite market conditions indicating sufficient Chinese demand.

2. China has breached numerous of its obligations under Paragraph 116 of the *Report of the Working Party on the Accession of China* ("Working Party Report"), incorporated by reference as a binding obligation into China's Accession Protocol. In particular, China administers its TRQs for corn, wheat, and rice inconsistently with six of these distinct obligations: (1) to administer the TRQ on a transparent basis; (2) to administer the TRQ on a predictable basis; (3) to administer the TRQ on a fair basis; (4) to administer the TRQ using administrative procedures that are clearly specified; (5) to administer the TRQ using requirements that are clearly specified; and (6) to administer the TRQ using timeframes, administrative procedures, and requirements that would not inhibit the filling of the TRQs.

3. The United States also explains how China breaches Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") because China's TRQ administration is not reasonable, because China: (1) utilizes vague eligibility criteria and allocation principles to allocate the TRQ that applicants cannot reasonably understand; (2) permits numerous authorized agents to independently interpret the vague criteria; (3) publishes applicant data for comment and "disagreement" without clear guidelines regarding how this information will be verified and used; and (3) fails to make public information regarding TRQ allocation or reallocation in a manner that would make importation feasible.

I. PARAGRAPH 116 OF THE WORKING PARTY REPORT

A. Transparent Basis

4. For TRQ administration to be on a transparent basis, the system or principles pursuant to which administration of the TRQ occurs must be easily discerned and understood. If what is published does not allow Members and applicants to easily understand the basis for TRQ administration then that publication alone would not be sufficient to satisfy this requirement. China does not administer its TRQs on a transparent basis, because: (i) the eligibility criteria and allocation principles set out in China's instruments are vague and not "easily discerned;" (ii) China does not provide any public information regarding which entities received TRQ allocations and in what amounts; (iii) China does not make public what unused TRQ quantities, if any, are returned and made available for reallocation; and, (iv) China does not publicize information regarding which entities received reallocations of TRQ and in what amounts.

5. First, the *Allocation Notice* enumerates these basic criteria, but does not define them such that the requirements would be easily understandable or obvious to Members or potential applicants. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are preconditions of eligibility to receive TRQ. However, Members and applicants cannot easily discern or understand, from the text of the *2003 Provisional Measures* and *Allocation Notice* − even read with the application form itself − what all of the basic criteria are or how NDRC or its authorized agents might apply them in evaluating a TRQ application. Therefore, because each of the basic criteria discussed above is not "easily discerned or understood," the basis on which China administers its TRQs is not transparent. China therefore breaches Paragraph 116.

6. The *2003 Provisional Measures* and *Allocation Notice* also set forth non-transparent allocation principles by which TRQs are allocated. As with the basic criteria described above, China's instruments fail to define or explain the allocation principles on which allocation and reallocation of the relevant TRQs will be based.

7. It is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." The instruments do not provide any context, or even content, for the factor "other relevant commercial standards." That is, there apparently are "other" standards that are "relevant" to NDRC's decision-making with respect to the allocation of TRQ amounts, but these are not identified in the *2003 Provisional Measures* or the *Allocation Notice*. Among other principles *not* reflected in the *Allocation Notice*'s short statement of allocation principles, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading.

8. China apparently verifies applicant information through a public comment process. This additional step renders NDRC's administration of the TRQ application and allocation process, including NDRC's determinations with respect to both the basic criteria and allocation principles, much less clear, and increases applicants' uncertainty regarding the status or sufficiency of their applications considerably.

9. Second, China also fails to administer its grains TRQs on a transparent basis because it fails to provide information on the results of the TRQ allocation process. Without such information, Members and applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

10. Because China fails to make public the amounts allocated, the recipients of allocations, and the amounts allocated to different importing entities, China administers its TRQs through a process or set of rules or procedures that is *not* easily understood, discernable, or obvious, and thus not on a transparent basis, inconsistent with Paragraph 116 of the Working Party Report.

11. Third, NDRC does not administer the TRQs on a transparent basis because it launches a reallocation process by publishing the annual *Reallocation Notice*, but does not provide information on what amounts, if any, were returned unused and are thus available for reallocation to other importers or interested entities. China does not provide any additional information to Members, applicants or traders − either in the *Reallocation Notice* or, for example, after the September 15 deadline − regarding the amounts actually returned and available for reallocation.

12. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders do not even know whether a reallocation will, or did, take place in a given year. Rather, the public simply sees the same *Reallocation Notice* issued every year, setting out the same application instructions and timeframes without more.

13. Finally, NDRC does not provide Members or the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Additionally, without knowing the results of the allocation process, traders inside and outside of China lack the necessary commercial information to engage in importation under the reallocated portion of the TRQs. Thus, for these reasons as well, China fails to administer its TRQs on a transparent basis, in breach of Paragraph 116 of the Working Party Report.

B. Predictable Basis

14. China fails to administer its TRQs on a "predictable" basis for many of the same reasons its administration is not on a "transparent" basis. That is, the lack of clarity in China's requirements and processes not only renders them not transparent, it prevents Members and applicants from being able to easily predict or anticipate how administration will occur. China's TRQs are not administered on a "predictable" basis because: (i) the eligibility criteria and allocation principles are vague and Members and applicants cannot anticipate how they will be applied; (ii) China does not provide information on what amounts, if any, were returned unused and made available for reallocation; (iii) China does not provide information on which entities receive reallocations and in what amounts; and, (iv) applicants receiving a state trading allocation cannot predict whether they will be able to import the full amount.

15. First, the basic criteria for TRQ eligibility and the allocation principles set out in China's legal instruments are vague. The unpredictability caused by the vagueness of the criteria is compounded in some cases by the fact that NDRC apparently verifies or supplements information submitted by an applicant by allowing any member of the public to submit their own comments and information if it is in "disagreement" with an applicant's data.

16. Second, China launches a reallocation process by publishing the annual *Reallocation Notice,* but does not publish information on what amounts, if any, were returned unused and are thus available for reallocation. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders cannot easily predict or anticipate whether a reallocation will take place in a given year. Nor can they easily predict or anticipate how much of a reallocation they might receive were they to apply.

17. Third, NDRC does not provide the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot easily predict or anticipate how NDRC assesses the various applicants and determines reallocated amounts. Therefore, Members and potential applicants are unable to easily predict or anticipate the outcome of the TRQ reallocation process generally, because they are not able to see or understand the outcome of prior processes.

18. Finally, inability of applicants to anticipate whether they might receive a state trading allocation leads to significant uncertainty for potential applicants due to the additional requirements associated with the state trading portion of the TRQ.

C. Fair Basis

19. China must administer its TRQs in an impartial manner and in accordance with rules or standards. China does not administer its TRQs in an impartial manner or in accordance with rules or standards because in many instances no rules or standards exist and, where they do exist, they are vague or unclear.

20. First, China's administration is not impartial, or carried out in accordance with rules or standards, because the allocation principles enumerated in Article IV of the *Allocation Notice* are not defined; or, in the case of "other relevant commercial standards," not even identified. Similarly, the allocation principles fail to set out clear rules and standards on the basis of which NDRC will make decisions regarding the allocation and reallocation of TRQ amounts.

21. The vagueness of the allocation principles provided in China's *Allocation Notices* impacts not only whether to apply and the information submitted to obtain the amount applied for, but also the decision regarding how much to apply for.

22. Applicants base their decisions, including whether to apply for a TRQ allocation, which commodity to apply for, and what quantity to apply for, on the published legal instruments, including the annually issued *Allocation* and *Reallocation Notices*. Thus, applicants submit information, including "quantity applied for" and "name of agricultural product quota applied for" based on their understanding of "actual production and operating capacities (including historical production and processing, actual import performance, and operating situation, etc.) and other relevant commercial standards."

23. Second, China's administration is not impartial, or carried out in accordance with rules or standards, because the basic criteria are not defined. It is also unclear how NDRC considers comments from the public where that information may go to "disagreement" with an applicant's eligibility. This aspect of China's administrative process exacerbates the unfair nature of the administration, because not only do the basic criteria themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter or the inability of NDRC or the applicant to verify or refute the information provided.

24. The vagueness of the basic criteria impacts not only the *information* an applicant may submit to demonstrate eligibility, but also the decision *whether to apply* at all. Further, the application is not necessarily just the form supplied by NDRC as part of its annual *Allocation Notice*, but may also include "related materials submitted by the applicant" per Article 12 of the *2003 Provisional*

Measures. The vagueness of the criteria may result in applicants submitting more or less additional information at any of these stages in the process. Potential applicants may choose not to apply at all because they are unable to understand the basic criteria or because they perceive the criteria in a way that they conclude in error they are not eligible.

25. Finally, applicants "bear responsibility for the authenticity of the application materials and information they submit." Applicants attest, on the application form, that they have read and understood the *Allocation Notice* and commit to guaranteeing "conformity with the grain import tariff-rate quota application criteria stipulated by the government." Thus, the *Allocation Notice* puts the burden of demonstrating eligibility and attesting to accuracy on the applicant. These applicants are basing their understanding of eligibility on the only information available to them, the basic criteria in the annual *Allocation Notices*. One applicant may attest that they guarantee conformity with the requirement to fulfill social responsibilities based on their understanding of that vague term, while another decides not to apply because they do not understand or are not comfortable attesting that they conform to the requirement because it is unclear.

26. For these reasons, the use of vague and undefined eligibility criteria does not provide TRQ administration on a fair basis; that is, based on rules and standards which can be discerned and understood by Members and applicants.

27. Therefore, because of the lack of clear rules or standards with respect to the evaluation of basic criteria, China also fails to administer its TRQs on a fair basis, in breach of China's commitments under Paragraph 116 of the Working Party Report.

D. Clearly Specified Administrative Procedures

28. The obligation under Paragraph 116 of the Working Party Report requires that China use administrative procedures that are set out in plain obvious detail. China does not administer its TRQs using administrative procedures that are "clearly specified" because (1) its allocation principles and reallocation procedures are vague and undefined, or not specified at all; and (2) China does not clearly specify the procedure for obtaining NDRC approval to import through a non-state trading entity using a state trading quota after August 15.

29. First, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Second, the instruments do not provide any context, or even content, for the factor "other relevant commercial standards." Third, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading. Fourth, China apparently verifies applicant information in part through a public comment process. This additional step renders NDRC's determinations with respect to both the basic criteria and allocation principles unclear, and increases applicants' uncertainty regarding the status or sufficiency of their applications.

30. In addition, China does not clearly specify the procedures for seeking approval from NDRC to import state trading quota after August 15. Neither the *2003 Provisional Measures,* nor *Allocation Notice* specifies the procedure for obtaining NDRC approval, however, nor details on what basis NDRC will determine whether to grant approval. Although China makes clear *there is a procedure* to be utilized to seek approval to import state trading quota without COFCO after August 15, none of the measures specify what that procedure is.

E. Clearly Specified Requirements

31. The obligation under Paragraph 116 of the Working Party Report requires that China use requirements that are set out in plain obvious detail. China does not administer its TRQs using requirements that are "clearly specified" because its basic criteria, which applicants must demonstrate compliance with in order to be eligible to receive TRQ allocation or reallocation, are not set out in plain or obvious detail.

32. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are requirements to receive a TRQ allocation. However, the text of the *2003 Provisional Measures* and *Allocation Notice* − even read with the application form itself − does not detail the basic criteria or

how NDRC or its local authorities might apply them in evaluating a TRQ application. No other measures detail these requirements.

F. Not Inhibit the Filling of Each TRQ

33. China's measures breach Paragraph 116 of the Working Party Report because China does not administer its TRQs using administrative procedures and requirements that would not inhibit the filling of each TRQ. In the context of China's TRQ administration, China must not employ timeframes, procedures, or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

34. First, China employs a single application process to allocate both the state trading and non-state trading portions of the TRQ, without permitting applicants to choose which portion they apply for. Nor can applicants understand the basis upon which NDRC will determine which applicants receive an allocation of the state trading portion, which restricts the TRQ Certificate holder from employing its importer of choice.

35. Applicants do not have any information regarding how NDRC will determine which applicants will receive state trading allocations. Therefore, they cannot anticipate whether they might receive an allocation of the state trading portion of the TRQ, or the non-state trading portion, which can be imported directly or through a non-state enterprise, or both.

36. Therefore, the uncertainty inherent in China's process makes it more difficult to negotiate with potential exporters, contract for sale, and import the commodities. These uncertainties may also induce applicants to limit the quantities for which they apply, just as the potential inability to complete a contract through the state trading entity may increase the amount of unused TRQ allocations returned to NDRC by September 15. And where a TRQ Certificate holder must return unused amounts, she is not eligible to apply for a reallocation of TRQ amounts to be imported without the need to import through an STE.

37. Second, China withholds critical information on the recipients of the initial allocation, and the amounts actually allocated and reallocated. Thus, grain-exporting entities do not have information that is necessary to enter into commercial relationships with potential importers, inhibiting the filling of each TRQ.

38. Specifically, China does not announce which applicants are allocated TRQ amounts and in what amounts, which prevents traders from understanding the TRQ allocations and making commercial arrangements to import the grains. With respect to reallocation, traders have even less information and thus are less able to fill the TRQs in the short time period remaining. Uncertainty about how much quota will be reallocated, or whether reallocation will take place at all, may make potential importers less likely to apply for a reallocation quota amount or lead them to apply for a smaller amount than they otherwise would have. If any TRQ amounts are reallocated, the lack of information on recipients makes it more difficult and costly for traders in China and foreign exporters to identify recipients and enter into contracts for sale or importation.

39. Finally, the processing restrictions and penalties for non-use impose a significant burden on TRQ Certificate holders and discourages applicants from applying for the full amounts desired for import. These processing requirements, and the inability of an importer to sell any unused imported products in the event its business needs or plans change, raises uncertainty and therefore increases costs for a TRQ Certificate holder. Further, because unused amounts may be reported in the following year's allocation application and may be counted against the applicant in the next allocation, the usage requirement incentivizes applicants to request a *smaller* TRQ amount than it may otherwise wish to receive for commercial purposes.

40. The *Allocation Notice* also provides that group enterprises possessing multiple processing plants must individually apply for, and individually use, TRQ allocations in the name of each processing plant. An enterprise with multiple plants could not import corn or wheat for use at one facility but then, for business reasons, choose to process it at another facility. Again, the plant usage restriction would discourage applicants from applying for the quantity actually needed or desired for commercial purposes. The usage requirements therefore have the effect of inhibiting the filling of the TRQs.

II. ARTICLE X:3(A) OF THE GATT 1994

41. The manner in which China administers its TRQs is inconsistent with China's obligations under Article X:3(a) of the GATT 1994. Of relevance in this dispute is China's obligation to administer its TRQs in a "reasonable manner." An inconsistency with a Member's WTO obligations under Article X:3(a) arises where "the identified features of the challenged administration necessarily lead to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner." According to the panel in *China − Raw Materials*, "necessarily lead to an inconsistency" does not mean administration is unreasonable in every instance. Rather, the administration may be inconsistent with Article X:3(a) if there is a "*very real risk*" or an "inherent danger" of unreasonable administration in a specific, identifiable situation.

42. China fails to administer its TRQs in a "reasonable manner," and therefore breaches Article X:3(a) of the GATT 1994, for several reasons.

43. First, China fails to administer its TRQs in a reasonable manner because it announces and applies vague basic criteria and allocation principles that make it difficult for applicants to understand and comply with its requirements. It is not rational, sensible, or appropriate to announce criteria and principles, but fail to make them comprehensible. Furthermore, the allocation principles provide further uncertainty. Again, the poorly specified allocation principles limit an applicant's ability to interpret the Chinese government's requirements for importers. Applicants who receive limited TRQ allocations are unable to understand which allocation principles may have caused their allocation.

44. Second, China uses thirty-six separate provincial and municipal "authorized agencies" to receive and review applications for TRQ allocations and reallocations. The *Allocation Notice* reiterates that these authorized agencies will act as the intermediary between the central level of NDRC and applicants. Similarly, authorized local entities approved by NDRC are obligated to receive and review applications for TRQ allocation and reallocation, referring applications that comply with the requirements to NDRC, and referring insufficient applications back to applicants.

45. China's TRQ administration instruments do not provide guidance to the authorized agencies regarding the definition or requirements associated with a number of the basic criteria. For this reason, applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Prior panels have found separate local entities interpreting overly vague criteria to be a circumstance that can result in non-sensible or irrational administration of laws, regulations, decisions, or rulings.

46. Third, China provides for the publication of applicant data and permits the public to provide "disagreement," "feedback," and "opinions," without providing relevant guidance regarding how these comments are vetted, considered, or impact the TRQ allocation process. This aspect of China's administrative process exacerbates the unreasonable nature of the administration, because not only do the basic criteria and allocation principles themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter. Such a process prevents evaluation of TRQ applicants, and administrative decisions with respect to eligibility, from being made in a rational or sensible manner.

47. China's instruments do not provide any information regarding how NDRC determines which applicants will receive which TRQ allocation, or how an individual entity's TRQ allocation might be split between the non-state trading and state trading portions of the TRQ.

48. Fourth, China does not publish information regarding actual annual allocated TRQ volumes in the aggregate at the time of allocation (January 1), or in the aggregate at the time of reallocation (September 30). Similarly, China does not publish information regarding the total allocated amount of the TRQ that must be imported through a state-owned enterprise, and what amount may be imported directly by TRQ Certificate holders. This means meaningful information regarding the amount of wheat, rice, and corn permitted to be imported, as well as the amount of unallocated TRQ available for subsequent applicants is not provided on an annual basis.

49. Fifth, China does not release information regarding the specific TRQ allocation recipients or the TRQ volumes each recipient was granted. This information is particularly critical during the reallocation process when TRQ Certificate holders have a limited period of time within which to

contract for and import the authorized grain. The lack of published information regarding the successful TRQ applicants and permitted import volumes therefore further impedes the identification of appropriate importers to contract with, or to consolidate import volumes with, to permit cost-effective importation.

50. When coupled with the lack of clarity regarding the basic criteria, the failure to provide information regarding actual TRQ allocation and reallocation volumes prevents interested importers from understanding and utilizing the TRQ system. Additionally, without knowing the results of the allocation process traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

III. ARTICLE XIII:3(B) OF THE GATT 1994

51. Article XIII:(3)(b) of the GATT 1994 requires Members to provide public notice of *both* the "total quantity or value of the product or products which will be permitted to be imported during a specified future period," *and* "of any change in such quantity or value." China does not provide information regarding: the quantity of wheat, rice, or corn permitted to be imported at the initiation of the TRQ period; any changes to the quantity permitted to be imported after unused TRQ amounts have been returned to NDRC; or, any changes to this amount after reallocation of TRQ.

52. Permission to import under the TRQ is only granted to successful applicants. Thus, the amount of TRQ "which will be permitted to be imported during a specific future period" corresponds to the total amounts authorized on the TRQ Certificates issued to selected applicants.

53. China does not provide a public notification of the amounts allocated under the initial allocation process. This failure to provide even aggregate public notice of the total volume for which permission to import has been granted under each TRQ is inconsistent with China's obligation under Article XIII:3(b). China's *pro forma* announcement each year of the total TRQ quantities that it has committed to provide in its Schedule is not sufficient. To succeed in satisfying its obligation to provide public notification of amounts "permitted to be imported," China must publicly announce the amounts for which permission to import has *in fact* been granted.

54. China's TRQ administration is also inconsistent with the second public notice obligation, which requires Members to provide a public notification regarding any changes to quantities permitted to be imported. When unused TRQ allocation amounts are surrendered to the local authorized agent as required by the annual *Reallocation Notice*, the total amount of product that "will be permitted to be imported" is reduced. Thus, after September 15, the total quantity of product permitted to be imported has changed.

55. China does not publish information regarding unused allocation amounts that TRQ holders return to NDRC, or regarding the amounts available to applications for potential reallocation. Because the return of unused TRQ allocations reflects a "change" in the total quantity "permitted to be imported," China's failure to publically announce the change in these amounts breaches its obligations under Article XIII:3(b) of the GATT 1994.

56. Finally, it is not clear to applicants or importers whether in any given year China in fact grants additional permission to any applicants for the importation of reallocated TRQ amounts. Assuming the issuance of each annual *Reallocation Notice* in fact indicates that NDRC will undertake a reallocation process, the results of that process would, again, change the total quantity of product "permitted to be imported during a specified future period."

IV. ARTICLE XI:1 OF THE GATT 1994

57. Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product. When considering "a limitation on action, a limiting condition or regulation" or "something that has a limiting effect" in the context of Article XI:1, panels and the Appellate Body have considered a wide range of factors affecting the competitive opportunities and the ability to import products.

58. China's administration of its TRQs for wheat, rice, and corn imposes impermissible "restrictions … on the importation of" these grains within the meaning of Article XI:1 of the GATT 1994. First, China's administration of the state trading and non-state trading portions of the TRQ through a single application process creates significant uncertainty for TRQ applicants. Each portion of the

TRQ has its own requirements and commercial considerations. However, applicants cannot indicate for which TRQ portion they wish to apply, and do not know on what basis NDRC will determine which applicants receive allocations for which portion, or in what amounts.

59. The inability of traders to anticipate what type of allocation they may receive leads to significant uncertainty for potential applicants, because different requirements and commercial considerations are associated with the state trading and non-state trading portions of the TRQ.

60. The differing requirements and commercial consideration of state trading and non-state trading TRQ allocation, when combined with applicants' inability to decide or predict which allocation they will receive and the time limits of contracting, result in significant risks and uncertainty for TRQ applicants. Furthermore, these requirements, uncertainty, and potential penalties associated with failure to import discourage applicants from applying for TRQ allocations at all, or may lead them to apply for a smaller TRQ allocation than they might otherwise have in the absence of such uncertainty. These aspects of China's TRQ administration thus constitute a restriction on the importation of rice, wheat and corn, in breach of Article XI:1 of the GATT 1994.

61. Second, China imposes usage restrictions and penalties for non-use, which creates burdens and uncertainty for importers and thereby discourage use of the TRQs. The restrictions impose limitations and limiting conditions on importation by creating or increasing risks and uncertainties associated with importation, and thereby increasing the costs associated with importation. Restricting TRQ Certificate holders from selling or transferring imported wheat, rice, or corn creates waste and increases unnecessarily the cost of using imported products in their production processes. Further, China's restrictions prevents TRQ Certificate holders from reacting to commercial considerations in a meaningful way. Failure to utilize all imported grain covered by a TRQ Certificate may lead to reductions in the next year's allocation. To avoid these outcomes, TRQ applicants would request a smaller amount of imports than they might otherwise request if acting pursuant to their commercial interests, rather than in the light of China's requirements and penalties.

62. Previous panels have found that measures imposing limitations of this kind constitute restrictions under Article XI:1 of the GATT 1994. China's requirements thus constitute a "restriction… on the importation" of these products, in breach of China's obligations under Article XI:1 of the GATT 1994.

EXECUTIVE SUMMARY OF THE U.S ORAL STATEMENTS AT THE FIRST MEETING

63. [Summaries of the U.S. oral statements at the first substantive meeting are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

64. [Summaries of the U.S. responses to the Panel's 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

65. In an attempt to rebut the *prima facie* showing of the United States, China advances a series of unsubstantiated assertions that according to China explain the administration "in practice" of China's TRQs. When asked for evidence regarding these alleged practices by the Panel and for more information on TRQ allocation and reallocation generally by the United States, China has provided little more than general assertions and "confirmation" from Chinese government officials. China has not provided documentation, data, legal instruments, or any other evidence, as requested by the Panel and the United States, to substantiate its assertions on those alleged TRQ administration practices, or to demonstrate compliance with its WTO obligations.

66. The Panel is to assess the facts put forward by both parties to the dispute. The Panel would need to weigh the evidence on the record in this dispute to make its findings of fact and consider the arguments made by both parties on "the applicability of and conformity with the relevant covered agreements." If the Panel has rejected China's assertions as to alleged NDRC "practices," then these non-facts (unsubstantiated allegations) cannot provide further bases in support of the U.S. claims.

However, it may be that the Panel finds it appropriate to address certain arguments of China or the United States relating to these assertions as part of the Panel's explanation of its interpretation or its application of the provisions of the covered agreements to the facts (including the substance of the measures).

67. The U.S. First Written Submission established that the legal instruments establishing China's TRQ administration are inconsistent with China's WTO obligations. China's assertions, even aside from not being supported by evidence, only underscore China's failure to comply with its WTO obligations rather than demonstrate compliance.

I. CHINA FAILS TO REBUT THE U.S. CLAIMS UNDER PARAGRAPH 116

68. China "does not disagree with the United States concerning the ordinary meaning of the terms that comprise the six obligations referenced by the United States, and China does not disagree with the United States concerning the legal standard that should be applied by the Panel." China in this manner accepts both the substance of the legal obligations and agrees that each obligation should be considered independently.

A. Transparent Basis

69. China primarily disagrees with what is required for China to administer its TRQs on a basis that is "easily understood, discerned, or obvious." China addresses certain of the bases set out by the United States but fails to rebut the *prima facie* case made by the United States.

70. First, China does not address the inconsistency of the basic criteria with Paragraph 116, except to indicate that it does not use the basic criteria to determine eligibility.

71. Second, with regard to allocation principles, China asserts that, for purposes of China's obligation to administer its TRQs on a transparent basis, "it is sufficient for applicants to know that TRQs will be allocated in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operations) and other relevant commercial standards." However, China's legal instruments do not provide any context, or even content, for "other relevant commercial standards." Further, China, noting that its allocation of TRQs "is not automatic," states that it "does not believe, however, that transparent . . . TRQ administration requires the elimination of any element of discretion from the allocation process." China does not recognize the relationship between this discretion and its WTO obligations, rather, it states that "China's view that this is the most transparent . . . way of achieving full utilization of the TRQ should not be 'second guess[ed].'"

72. China relies on the Headnotes to Schedule CLII to defend the use of "other relevant commercial standards," suggesting that the Schedule's reference to a "residual category" authorizes China to publish the vague "other relevant commercial standards," without further definition. However, even aside from the fact that this language only applied to the first year, Schedule CLII can neither shield China from other obligations in the covered agreements, nor provide derogations from the obligations provided in those agreements. Further, nothing in the Schedule indicates that China need not specify what these standards are in the measures that actually implement the TRQs, and indeed China's Schedule CLII contemplates distribution based on "relevant commercial criteria, subject to specific conditions to be published." Thus, the Headnotes anticipate the publication of more detail in line with China's Paragraph 116 obligation to administer TRQs on a transparent basis.

73. Third, China does not consider publication of information to be required by the obligation to administer TRQs on a transparent basis. China argues that because applicants may request certain information, on an individual basis, there is no inconsistency with its obligation to Members to administer its TRQs on a transparent basis. China's responses disregard the affirmative nature of China's obligation to ensure that *China* administers its TRQs on a transparent basis. China also argues that information on which entities received TRQ allocations is business confidential. The United States continues to disagree.

74. Finally, China argues its failure to provide information on amounts returned and reallocated does not amount to inconsistency with its obligations because "China's Schedule CLII commitments incorporate a publication schedule that is irreconcilable with publishing additional information regarding reallocation in advance of or after the September 15 deadline." China's Schedule does

not comprise a "publication schedule;" rather, the Headnotes set out certain deadlines for the allocation and reallocation process. The Schedule does not limit or prohibit the publication of information, including information necessary to ensure that China administers its TRQs on a transparent basis.

B. Predictable Basis

75. China fails to directly address the claims that it does not administer its TRQs on a predictable basis.

76. First, China states that it "does not contest the U.S. claim," and thus appears to concede that the basic criteria are inconsistent with Paragraph 116, including the requirement to be administered on a predictable basis.

77. Second, with regard to whether its allocation principles are sufficiently predictable, China relies on the same argument made in response to the claim that they are not transparent because China addresses, collectively, the separate claims regarding the allocation principles. China fails to provide any reason its allocation principles are sufficient to meet the obligation to administer its TRQs in a predictable manner.

78. Third, China fails to directly address the claims that it does not administer its TRQs on a predictable basis because China does not provide information on what amounts, if any, were returned unused and made available for reallocation, and because China does not provide information on which entities receive reallocations and in what amounts. Rather, China addresses the lack of information generally, relying on the availability of individual inquiries, Schedule CLII, and business confidentiality to assert China administers its TRQs consistent with Paragraph 116 as a whole. These arguments are insufficient to rebut the U.S. case that China does not administer its TRQs on a predictable basis.

79. Finally, the United States demonstrated that China does not administer its TRQs on a predictable basis because applicants receiving a state trading allocation cannot predict what type of allocation they will receive and whether they will be able to import the full amount. China disagreed with the factual basis for this argument, asserting that "applicants do not receive allocations from the STE portion of each TRQ . . . [t]he entire STE portion of each TRQ is allocated to COFCO." China's asserted "practice" is inconsistent with its measures.

80. Regardless of whether China "in practice" allocates the STE portion to COFCO, non-STE applicants, or both, the legal instruments relied upon by applicants indicate that applicants could receive (1) an STE portion of the TRQ, which will be required to be imported through COFCO, (2) a non-STE portion, or (3) a mixed allocation, a portion of which will be subject to the requirement to import through COFCO. The inability of applicants to anticipate whether they might receive a state trading allocation thus leads to significant uncertainty for potential applicants, and is inconsistent with Paragraph 116.

C. Fair Basis

81. China does not contest the U.S. claim that China's basic criteria are unfair, but claims this is insufficient to find an inconsistency with Paragraph 116 because "Paragraph 116 relates to the administration of the TRQs as a whole." China's argument is without merit.

82. China again argues that it is entitled to discretion, and thus China's determination that a basis is fair should not be second-guessed. However as noted above, China's TRQ administration, including any exercise of discretion in allocating TRQs, must be consistent with its WTO obligations.

D. Clearly Specified Procedures

83. With respect to the claim that China does not clearly specify the procedure for obtaining NDRC approval to import a state trading quota through a non-state trading entity after August 15, China concedes "the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process."

E. Clearly Specified Requirements

84. China does not contest that the basic criteria are "requirements" or that they are not clearly specified. However, China asserts that "the articulation of the basic criteria constitutes a specific aspect of China's administration of the TRQs, while Paragraph 116 relates to the administration of the TRQs as a whole." The basic criteria are requirements used to administer the TRQs. Failure to ensure that these are clearly specified is inconsistent with Paragraph 116.

85. With respect to allocation information, China asserts that because any grain-exporter can use the applicant information published in the *Announcement of Applicant Enterprise Data* "to identify companies with the capacity to meet its needs and make overtures accordingly," the information China presently provides does not inhibit the filling of each TRQ. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all. China points to a work-around that entities could deploy to mitigate the impact, which does not diminish China's obligation to not inhibit the fill or excuse China's failure to provide sufficient public information regarding the results of the allocation process.

86. China characterizes the processing requirement as follows: "End users that do not have sufficient capacity to process the raw grains that they import under their quota may sell those imported grains to other entities for processing." The distinction between end users with processing capacity and those without sufficiency capacity to process the grains they import is absent from China's legal instruments. But if China differentiates its application or enforcement of the requirement based on the end user's capacity, this further demonstrates the claim that the restriction, coupled with penalties for non-use, inhibits the filling of each TRQ.

F. Not Inhibit the Filling of Each TRQ

87. China must not employ timeframes, procedures or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

88. With regard to the first reason for inconsistency, that administering both portions of the TRQ in a single process inhibits the filling of each TRQ, China responds only that the U.S. claims "largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of entire STE portion of the TRQ to COFCO." China's response fails to rebut the *prima facie* case because China's own legal instruments and Schedule CLII indicate that end users, including non-STE end users, who apply for TRQ allocations can receive an STE portion of the TRQs.

89. China also fails to rebut the second argument, that China's failure to provide sufficient public information regarding the results of the allocation and reallocation process prevents traders, including foreign exporters, from making use of the TRQ amounts available. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all.

90. Third, China imposes restrictions on the use of imported products, coupled with penalties for non-use, which also discourage applicants from applying for the full quantities desired. China responds that, on the contrary, the usage restriction encourages full TRQ utilization. But China's response focuses on a different aspect of its measures − the penalties for failure to import and use a TRQ allocation − not the *restrictions on the use* of the imported product. The United States has not challenged a general prohibition on the sale or transfer of TRQ Certificates, or what China characterizes as a "restriction on transferring or selling the quota itself."

91. Further, China's annual *publication* of these usage restrictions, as notified to potential applicants by the *Allocation Notice*, creates uncertainty because an applicant understands it must apply for a specific amount of each TRQ and will be responsible for processing the grains once imported, without any flexibility to process elsewhere should circumstances change between applying and importing. Further, because the potential applicant understands that unused amounts

may be reported and counted against the applicant in the next allocation, the usage requirement incentivizes an applicant to request a smaller TRQ amount than it may otherwise wish to receive for commercial purposes, regardless of how China applies or enforces the requirement in practice.

92. Thus, the combination of restrictions on the usage of imported products and the penalties imposed on TRQ Certificate holders for failing to import the full TRQ amounts would therefore inhibit the filling of the TRQs.

II. China's Assertions Provide Additional Bases for Finding Inconsistencies with Paragraph 116

93. In its First Written Submission, China highlights "certain key aspects of its system for administering its grains TRQs that the United States overlooked or misunderstood in its description of China's legal framework for administering its TRQs." However, China's description of these "key aspects" directly contradicts China's own legal instruments, announcements, and other publically available information, and, if accurate, demonstrates further inconsistency with the obligations in Paragraph 116. The United States notes that the characterization "if accurate" is important because China has provided no evidence to support its assertions.

A. Allocation of STE Portions to COFCO China Allocates the Entire STE Portion to COFCO and COFCO is Not Required to Return Unused Amounts, Inconsistent with Paragraph 116

94. Based on the legal instruments, and absent different information on allocation of the STE portion of each TRQ, Members, applicants, and other interested entities would necessarily understand and predicate application decisions on the understanding that they could be allocated an amount of the STE TRQ portion, or receive a mixed allocation of both the STE and non-STE portion, which would need to be imported through different entities. However, China asserts in this proceeding that, in practice, COFCO is allocated the full STE portion of each TRQ, which is between 50 percent and 90 percent of each TRQ, depending on the grain. In addition, China now asserts COFCO is not required to return any unused portion of its TRQs for reallocation. China's published measures do not expressly provide for COFCO's exemption from this requirement, nor is it discernable based on China's measures.

95. If accurate, China's assertions that the entire STE portion of each TRQ is allocated to COFCO, and that COFCO is not required to return unused amounts, are inconsistent with China's obligations to administer each TRQs on a basis that is (a) transparent, (b) predictable, (c) fair basis, and (d) does not inhibit its filling.

96. First, the actual basis for TRQ administration is not discernable because NDRC does not publish, indicate, or otherwise disclose the fact that COFCO receives the entire STE portion, and this significant portion of each TRQ (50 to 90 percent depending on the commodity) is therefore unavailable to applicants. Based on Schedule CLII and China's legal instruments, if an STE is an end user then any TRQ allocated must be returned or a penalty assessed. If, as China asserts, COFCO is not required to return unused portions, China does not administer its TRQs on a transparent basis.

97. Second, the legal instruments China issues lead Members, applicants, and other interested entities to anticipate being able to receive an allocation of the STE portion, non-STE portion, or a mixed allocation. Thus, where a Member, applicant, or other interested entity sought to anticipate the TRQ allocation, reallocations, and other administration requirements based on the system of rules and procedures established by China's legal instruments, the prediction is incorrect. Instead, China claims that in practice it allocates the entire STE portion to COFCO, and does not require COFCO to return unused quota. The actual basis for TRQ administration is thus not predictable because NDRC does not publish, indicate, or otherwise disclose this information.

98. Third, China asserts that "[a]pplicants become aware of this practice through their participation in the TRQ administration system." China's obligation is not just to "applicants," but to other Members. This practice further suggests that China's TRQs are not allocated or administered in accordance with rules and standards, or on an impartial basis. That is, China ignores the basic criteria and allocation principles purporting to be rules or standards, and instead allocates between 50 to 90 percent of each TRQ to a single government controlled entity regardless of its interest in

importing the grains or any other published criteria. This practice is not in accordance with rules and standards.

99. Fourth, China sets out a clear requirement that all end users return unused amounts for reallocation, but in fact COFCO is not subject to this requirement, nor does COFCO appear to be penalized for its failure to comply. This practice again appears to be neither impartial − as it treats the government owned entity more favorably than other end users − nor in accordance with China's own rules and standards.

100. NDRC's allocation of the STE portion of each TRQ to COFCO, and the exemption of those significant portions from the requirement to return unused amounts for reallocation inhibits the fill of each TRQ. The results of this practice are significant and recognized in these proceedings. Specifically, while China declined to provide specific fill rates for the STE and non-STE portions of the TRQs, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." Therefore, necessarily *COFCO is declining to import large volumes of its allocations each year*, and its failure to return unused quantities is ensuring that this TRQ quantity is not available to other entities.

101. Therefore, in 2017 between 25 and 61 percent of each TRQ was not available for reallocation to applicants. This effectively excluded from China's TRQ administration a significant volume of wheat, corn, and rice, despite measures and an annual *Allocation Notice* announcing the scheduled amounts available for allocation and reallocation. This scenario squarely fits within the plain meaning of "inhibit the filling."

B. China's Reliance on Credit China Instead of Published Criteria is Inconsistent with Paragraph 116

102. China asserts that it roundly ignores each of the basic criteria; China now states that "in practice, [China] does not conduct an individual assessment of the Basic Criteria," but rather uses an unannounced evaluation method − Credit China reviews − to evaluate an applicant's eligibility. China's assertion is inconsistent with China's obligations to administer TRQs (a) on a transparent basis; (b) on a predictable basis; (c) on a fair basis; and (d) using clearly specified requirements.

103. First, even assuming *arguendo*, that China's unsupported assertions are accurate, using an unannounced method of determining eligibility is even less transparent than using a vague, but announced method. Members, applicants, and other interested entities cannot discern that NDRC relies solely on Credit China. Given China's statements it is unclear which information contained in the Credit China system is used to evaluate applicants, resulting in an application process, the basis on which China administers its TRQs, that is not easily understood or discernable.

104. Second, China sets out a basis on which it purports to administer TRQs but uses another basis; Members, applicants and other interested entities are not able to anticipate how TRQs will be allocated based on the measures.

105. Third, while the annually announced basic criteria purport to establish the rules and standards for TRQ administration, China conceded it does not administer its TRQs in accordance with these rules and standards. It is plainly inconsistent with China's Paragraph 116 obligations to administer its TRQs in contravention of, or with disregard for, announced rules and standards. Therefore based on China's assertion, China does not administer its TRQs on a fair basis.

106. Finally, by publishing the annual *Allocation Notice,* China is notifying the public, including Members, applicants, and other entities, that applicants must demonstrate compliance with the basic criteria to be eligible for a TRQ allocation. NDRC annually publishes a list of criteria, but rather uses unannounced requirements − verified by the Credit China report − to evaluate an applicant's eligibility. Therefore, the requirements used to administer TRQs are not specified at all, and China is inconsistent with its obligations under Paragraph 116.

C. China's Procedure for Verification and Rebuttal of Public Comments

107. Each year China issues an Announcement *of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains,* and provides an opportunity for the public to submit comments to NDRC regarding

each applicant. No other measure or legal instrument references, let alone describes, the public comment process.

108. China now asserts that if NDRC receives a comment regarding a particular applicant, an administrative procedure to verify its accuracy, including an opportunity for the applicant to rebut the comment, is used to determine whether the comment should be considered in determining the applicant's eligibility. This statement is unsupported by the measures or any other evidence on the record.

109. The verification and rebuttal process described by China is an administrative procedure, that is, it is a set of instructions for performing a specific task. Here, the task is verifying a public comment by collecting additional information and soliciting a response from the applicant. China has made no effort however to specify or even notify Members, applicants, or other entities of this procedure. It is not described, referenced, or otherwise suggested by any measure or information provided by China. For this additional reason, China does not administer its TRQs consistent with Paragraph 116. Article IV of the *Allocation Notice* does not indicate that NDRC applies different principles depending on applicant type. Rather, it suggests that all of these factors will be considered.

D. China Asserts that Different Allocation Principles Apply to Certain Applicant Types

110. China now states that with respect to allocation of the non-STE portion, a general trade TRQ applicant's historic import performance is the most important factor in determining the amount of the allocation. For a processing trade applicant, the applicant's production and processing capacities are key factors in addition to its historic performance in determining the amount of the allocation. In addition, China asserts that new applicants are only considered if the TRQ is not fully allocated to applicants with historical import performance. The legal instruments provided by China do not reflect this.

111. China's asserted practice diverges from its publicly announced legal instruments and would thus be inconsistent with its obligation to administer TRQs on a transparent basis. Noting that China is obligated to administer its TRQs based on a system or principles that are easily discerned and understood, China has in this instance announced one set of principles and subsequently indicated that it is using an alternative, unannounced set of principles in practice. This is simply not a transparent basis for administering its TRQs.

112. China sets out a basis on which it purports to administer TRQs but uses another basis; Members and traders are not able to anticipate how TRQs will be allocated based on the measures. Therefore, China again purports to set out a process or set of rules or principles for allocating TRQ Certificates, but asserts it in practice applies a different set of principles. Moreover, China applies the principles differently to different types of applicants, without disclosing this to Members, applicants, or other interested entities. For these reasons, Members, applicants, and other interested entities cannot anticipate or plan for the basis on which allocation amounts are actually determined.

E. China Does Not Apply or Enforce the Usage Requirements to Certain TRQ Holders with Insufficient Processing Capacity

113. China's Allocation Notice makes clear that TRQ Certificate holders must process in their own facilities all wheat and corn imported pursuant to the TRQ. Because TRQ holders are also penalized for not using (*i.e.*, importing) their allocations, applicants are incentivized to limit their applications according to their processing capacities. China asserts that it would not apply or enforce the processing requirement in accordance with the rules and principles set out in the *Allocation Notice.* The *Allocation Notice* does not suggest this kind of flexibility, or provide any guidance regarding how NDRC evaluates an applicant's or a TRQ Certificate holder's current capacity for purposes of this requirement.

114. China's assertions regarding its usage restrictions, namely, that it would not uniformly apply the processing requirement set out in the *Allocation Notice,* further demonstrates that China does not administer its TRQs on a predictable basis or using clearly specified requirements. China publishes a processing requirement applicable to all TRQ holders, but asserts it would apply or

enforce the requirement only with respect to certain TRQ holders. Non-enforcement of significant requirements at the discretion of NDRC renders China's administration unpredictable.

115. China's publication of a processing requirement applicable to all TRQ holders, but application or enforcement of the requirement only with respect to certain TRQ holders, is inconsistent with its obligation to administer TRQs using clearly specified requirements. The *Allocation Notice* does not indicate this varied application, nor does it indicate how NDRC determines an applicant's capacity for purposes of this requirement.

116. China has thus failed to clearly specify its requirements for use of the imported grains. Instead, China has led Members, applicants, and other interested entities to believe one requirement exists, while secretly imposing a different standard. In this circumstance, China has not sufficiently specified its TRQ administration requirements to comply with Paragraph 116.

III. China Fails to Rebut and Provides Additional Bases for Finding Inconsistency with GATT 1994

117. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies.

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

118. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies with GATT 1994 Article X:3(a).

119. First, China, in its First Written Submission, asserts that to be inconsistent with Article X:3(a) the cited administrative practice must "necessarily lead[] to an unreasonable administration of the grains TRQs." China suggests that the "necessarily leads" approach is stricter than the one contemplated by the panel in *China – Raw Materials*, which described administration where there is "a very real risk" of unreasonable administration as inconsistent with Article X:3(a). In this vein, China also asserts that the availability of an alternative means of "achieving a Member's stated administrative objective does not render a Member's chosen means unreasonable." The description of the interpretative approach provided by the panel in *China – Raw Materials* is a restatement of the interpretative approach described in the Appellate Body report for *EC – Selected Customs Matters* and panel report for *Argentina – Hides and Leathers*, and in any event, China has failed to comply with Article X:3(a) applying any of the interpretative approaches.

120. Second, even while China accepts that no showing of trade effects is required, China asserts that "'Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world.'" The structure and requirements built into a particular measure may be sufficient to demonstrate a breach of Article X:3(a).

121. Six separate aspects of China's TRQ administration result in unreasonable administration. Neither China's First Written Submission, nor China's Responses to Panel Questions respond in any meaningful way to the evidence presented by the United States of China's inconsistency with Article X:3(a) of the GATT 1994.

122. First, China asserts that the lack of proper basic criteria does not cause "any negative impacts – actual or possible – on TRQ applicants," because while the criteria listed are erroneous it simply uses information typically supplied by the applicant to determine eligibility. However, the failure to provide clear applicant criteria is not just an issue for NDRC and its authorized agents who must determine eligibility, but for Members and those potential applicants to whom the criteria are communicated. These criteria discourage new applicants who are unable to interpret China's requirements, as well as applicants who have previously failed to receive an allocation. China asserts that applicants can just seek information regarding their rejection from NDRC, but the annual publication of erroneous criteria suggests they would not even understand the appropriate questions to ask.

123. Second, in response to concerns raised regarding the allocation principles, China asserts that the "alleged vagueness of the Allocation Principles" does not "necessarily lead[] to an unreasonable

administration of the TRQ." However, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Failure to provide this information to applicants results in administration that is not sensible or rational. Moreover, taken together with the additional catch-all, "other relevant commercial criteria," this creates additional confusion for applicants.

124. Third, China simply rejects as a "misunderstand[ing]" the role that authorized agencies play in the administration of China's TRQs. Rather, both the *2003 Provisional Measures* and the annual issued *Allocation* and *Reallocation Notices* call for an evaluation by the local authorized agents of whether the applicant has met the basic criteria. Structuring its TRQ administration so as to permit numerous entities to independently evaluate and determine whether applicants are consistent with undefined criteria leads to a situation where applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Without clear criteria, guidance or other information, it is therefore impossible to ensure that the criteria are interpreted and applied in a consistent manner. For these reasons, the application of vague and undefined criteria by thirty-seven separate authorized agents as part of the administration of TRQ allocation renders the manner in which China administers its TRQs unreasonable.

125. Fourth, with regard to the public comment process, China alleges that it relies on a previously undisclosed process related to the verification of public comments and opportunity for rebuttal to suggest that its administration is "reasonable." Again, there is nothing to suggest that members of the public understand the vague and undefined basic criteria any better than applicants. They are permitted to comment on applicants' compliance when there is no clear indication of what compliance means. Further, this entire process is curious as China suggests the only relevant factor regarding eligibility is passing the Credit China background check.

126. Fifth, China asserts that the use of a single application process for allocating STE and non-STE TRQ portions "cannot create uncertainty where there is only a single type of allocation granted to non-STE applicants." Numerous aspects of China's legal instruments indicate to Members, applicants, traders, and other interested entities that a certain volume of imports are to be completed "through" the STE, but that any eligible applicant may receive a TRQ allocation in either the STE or non-STE portion. Thus, China informs Members and applicants that they may receive STE or non-STE allocations regardless of whether this is accurate. For this reason, this process fails to be a reasonable means of TRQ administration and is a breach of GATT 1994 Article X:3(a).

127. Finally, China responds that the United States has provided "no factual evidence that the information currently published by China prevents traders from entering into necessary arrangements to utilize their allocations." As described above, it is the structure and architecture of this measure that is at issue, and there is no requirement for evidence of actual trade impact.

128. Additionally, certain aspects of China's "in practice" administration, if accurate, do not demonstrate that China has not acted inconsistently with Article X:3(a), but rather further demonstrate a breach of Article X:3(a).

129. First, with regard to the basic criteria, which China annually announces and has cited in its FAQs, China asserts that in practice "NDRC does not conduct an individual assessment of each of the Basic Criteria." Instead, "NDRC generates a credit report through 'Credit China,'" and "utilizes all of the information available through Credit China in evaluating each applicant." The use of divergent, unpublished criteria hamper Members' and applicants' ability to understand the application process and potential reasons for rejection, and thus result in unreasonable administration.

130. Second, China has indicated that it provides the entire STE portion of each TRQ to a single entity − COFCO. This administrative practice is "unreasonable." China once again annually announces one practice to Members and applicants, and then in reality employs a very different practice for distributing TRQ allocations. A system where applicants are required to apply to the Chinese government for permission to import wheat, corn, and rice on the basis of specifications and applications that have no bearing on the actual decision making of the government is not rational or sensible, and results in inconsistency with Article X:3(a). For these additional reasons, China has breached Article X:3(a) of the GATT 1994.

B. Article XIII:3(b) of the GATT 1994

131. China claims that the plain meaning of the terms of Article XIII:3(b) of the GATT 1994 provides that "the scope of the provision is . . . limited to the total quota quantities set forth in China's Schedule CLII." Rather, Article XIII:3(b) requires the provision of meaningful aggregate information regarding TRQs both with regard to the initial amounts permitted to be imported in a specified future period and any changes to that amount.

132. China further points to GATT 1994 Article XIII:3(a), indicating that this subparagraph addresses those situations where a license is issued. China's analysis is again in error. Article XIII:3(b) deals with "import restrictions involving the fixing of quotas;" thus addressing instances where a Member fixes a quota. Conversely, Article XIII:3(a) applies to instances where "import licenses are issued in connection with import restrictions." Article XIII:3(a) thus addresses circumstances where import licenses are required in order to effectuate an import restriction.

133. China appears to also contend that, while TRQs are subject to the provisions of Article XIII of the GATT 1994 as prescribed by paragraph 5, more generally TRQs are not "quantitative restrictions." This is inaccurate. Paragraph 5 of Article XIII makes clear that TRQs are a type of import restraint addressed by Article XIII and that more specifically, the reference to "fixing of quotas" includes TRQs. More generally, the reference to quantitative restrictions in the title of Article XIII does not circumscribe the scope of Article XIII, and in any event Article XIII:5 expressly provides that TRQs are within the scope of Article XIII.

C. Article XI:1 of the GATT 1994

134. China makes three primary arguments with regard to Article XI:1. First, China claims that TRQs and all associated requirements − whether characterized as administrative or substantive − are outside the scope of Article XI:1 of the GATT 1994. As part of this argument, China asserts that the U.S. claim should fail because other claims could have been made under other articles of the GATT 1994 or other agreements. Finally, China argues that the United States has not demonstrated a "limiting effect" on imported products.

135. With regard to the first argument, China asserts that TRQs are simply outside the scope of Article XI:1, and that while "non-automatic import licenses generally have been found to be within the scope of Article XI:1," this is not the case where licenses are for the purposes of administering TRQs specifically. China further clarifies that in its view, not just the duty, at an in-quota or out-of-quota level, is excluded from consideration under Article XI:1, but all "substantive conditions that a Member imposes upon access to the TRQ" are outside the scope of Article XI:1 of the GATT 1994.

136. However, this dispute does not challenge the "imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general," but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ" including specific administrative actions and omissions China uses to authorize imports pursuant to those TRQs. Nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import restrictions from the obligations under Article XI:1. Rather, Article XI:1 is squarely applicable to China's TRQ administration because Article XI:1 explicitly addresses prohibitions or restrictions "made effective through quotas, import or export licenses or other measures." That is, restrictions on imports that are produced or operative because of quotas, import or export licenses or other measures.

137. China also asserts that the U.S. claim should have been brought under another article or agreement depending on whether the challenged aspect is considered "administrative" or "substantive." This argument is without merit. Specifically, China attributes "a certain scepticism" to the analysis of import licensing procedures under GATT 1994 Article XI:1 in the *Argentina − Import Measures* dispute, and draws from this the conclusion that "claims relating to the administration of import licensing systems, including TRQ licensing systems should be brought under the [Import Licensing] Agreement." No such conclusion is supported by the Appellate Body's discussion in *Argentina − Import Measures*. Moreover, the *Agreement on Import Licensing Procedures* (the "Import Licensing Agreement") itself states that "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols." Unlike other WTO agreements, which have explicit conflicts clauses, the Import Licensing Agreement expressly notes that the GATT 1994

applies simultaneously. For this reason, prohibitions and restrictions on importation related to import licensing may appropriately be considered under Article XI:1 of the GATT 1994.

138. China makes a further argument that "substantive elements of a TRQ form part of the quota itself and must be examined under provisions of the GATT 1994 other than Article XI:1, most notably Article II of the GATT 1994." China notes that "[s]ubstantive conditions of access define the quota itself." As noted by the United States, in some instances Members negotiated specific narrow TRQs; for instance, a Member may have a TRQ open to only certain other countries or for a narrowly defined product like "skimmed milk powder (for school lunch)." These narrowly defined and scheduled TRQs are different from the obligations imposed by China through its regulatory process and subsequent "practice." Further, contrary to China's assertion, China's Schedule CLII contains no authorization or agreement to the challenged aspects of China's TRQ administration. Rather, the Headnotes indicate that China will implement TRQ regulations making clear their practices and methodologies, and demand that these regulations "be applied in a consistent and equitable manner." For these reasons, nothing bars a challenge to China's measures under Article XI:1 of the GATT 1994.

139. Finally, China misunderstands the burden of proof. It is not necessary to demonstrate a limiting effect by recourse to trade flows. Rather, as explained by the Appellate Body, this "limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context." Two administrative procedures – the usage restrictions and associated penalties, and the administration of the TRQ for both the STE and non-STE portion through a single process – are structured so as to have a limiting effect on imports.

140. The United States has demonstrated this restriction first by reference to China's administration of the state trading and non-state trading portions of the TRQ through a single application process that creates significant uncertainty for TRQ applicants. Second, China's use restrictions on products imported under the TRQ, combined with penalties for non-use of the full allocation, also restricts imports inconsistent with Article XI:1.

141. China asserts "there is no 'uncertainty' . . . because all non-STE applicants receive non-STE allocation." However, at no point does China communicate this information to Members, applicants or other interested entities. Instead, China's STE and non-STE TRQs administration – as described in its Schedule, its *2003 Provisional Measures*, and annual *Allocation* and *Reallocation Notices* – indicates that allocation of the STE portion is provided to end users and results in concerns and self limitation for applicants who anticipate potentially receiving this TRQ allocation.

142. With regard to the usage restrictions and associated penalties, China again asserts that "'in practice,' an end user that finds it is unable to process all of the grains imported under its quota may sell those grains directly to any other entity." Again, however, there is no evidence that Members, applicants, or other interested entities are aware of China's alleged "practice." To the contrary, China annually announces in its *Allocation Notices* that for the wheat and corn TRQs, all product must be processed by the TRQ holder. Previous panels have found that measures imposing limitations of this kind constitute restrictions on importation under Article XI:1 of the GATT 1994.

143. China's submissions suggest a number of additional restrictions on imports. In particular, if China's unsupported assertions are accurate, the provision of the entire STE share to COFCO, and the failure to require COFCO to return unused allocation for reallocation is a significant limitation on imports.

144. China asserts that contrary to the directions provided in its Schedule CLII and *2003 Provisional Measures*, which suggest that some amount of the STE portions of each TRQ will be allocated to end users who must import "through" an STE, China allocates the entire STE share directly to COFCO. China is thus annually providing large quantities of each TRQ portion to a government controlled entity – COFCO. That government controlled entity subsequently declines to import significant volumes of wheat, corn, and rice, and is not required to return the allocation so as to make it available to other end users. This allocation, refusal to import, and refusal to reallocate unused TRQ is a blatant restriction on importation.

145. The results of this practice are significant. Specifically, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." COFCO is declining to use between 25 to 61 percent of the overall TRQ, and because China does not require COFCO to return unused allocations this volume is unavailable to non-STE users who would likely be willing and able to import some or all of this amount.

146. The ability of China to limit imports at the in-quota duty rate, by allocating 50 to 90 percent of each TRQ to COFCO is an additional significant restriction on the importation of wheat, corn, and rice into the Chinese market, and is further inconsistent with China's obligation under Article XI:1 of the GATT 1994.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENTS AT THE SECOND MEETING

147. China is incorrect in arguing that a "holistic approach" means that consistency with one or more requirements of Paragraph 116 would excuse an inconsistency with another requirement of Paragraph 116. China did not undertake an obligation to administer some parts of its process at a WTO plus level and others at a WTO minus level, such that general TRQ administration averages out to Paragraph 116. China's so-called "holistic" approach should be rejected.

148. With regard to Article XIII:3(b) of the GATT 1994, the United States notes that while China purports to agree that Article XIII:3(b) is a "forward-looking" and "ongoing" obligation, it continues to contend that the text has no practical meaning after a Member has included TRQ amounts in its schedule, unless the Member offers larger TRQs than required under its schedule.

149. China continues to broadly argue that TRQs generally are not subject to Article XI:1 because they are not "quantitative restrictions," but rather "duties" and thus outside the scope of Article XI:1. However, the United States has not challenged the imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general, but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ," including specific administrative requirements and processes pursuant to those TRQs. It is these administrative aspects that constitute restrictions on importation, not the connection to lower or higher duty rates.

150. Further, nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import prohibitions or restrictions from liability under Article XI:1. China continues to suggest that processing requirements and associated penalties are not subject to Article XI:1 because they are "substantive conditions" for accessing the TRQ and thus part of the TRQ itself. China is in error.

151. GATT 1994, Article X:3(a) specifically addresses the manner of "administration" of "laws, regulations, decisions and rulings," and thus expressly does not address substantive concerns related to those laws, regulations, decisions, and rulings. By contrast, the applicability of Article XI:1 turns on whether the challenged measure is a prohibition or restriction on importation *other than* a duty, tax, or other charge.

152. A measure is not exempt from Article XI:1 because a Member has imposed the prohibition or restriction in addition to a duty, tax, or other charge. To that end, the United States reiterates that it is not challenging the in-quota or out-of-quota duty rates or the application of those rates to particular products. The United States is challenging the importation restrictions in China's measures that are in addition to the in-quota duty rates.

153. China goes on to conflate the negotiated terms of a Member's TRQ contained in its schedule − such as maintaining a TRQ on a country specific basis or limiting it to a particular end-use − with "substantive conditions" that China suggests can be put in place at the Member's discretion and are not subject to review under Article XI:1. China's Schedule CLII includes a description of the products as "corn," "wheat," etc., the relevant tariff item numbers, the in-quota duties and TRQ quantity amounts, and other terms and conditions, such as implementation stages for TRQ quantities. China negotiated TRQs applicable to grains for any use, so long as they fit under the cited tariff item numbers. China has not negotiated TRQs like those in Canada's or Japan's Schedules of Concessions that identify products through certain end uses, such as skim milk powder for school lunches.

154. The Schedule does not, as China suggests, "provide for the imposition of . . . end-use requirements, through taking account of capacity to produce processed grain." China also suggests that an exercise of judicial economy would be appropriate, and the Panel should only make certain findings under Paragraph 116 and Article XIII:3(b).

155. Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") establishes the standard terms of reference when the Dispute Settlement Body ("DSB") charges a panel with examining a matter the complaining party has referred to the DSB. DSU Article 11 sets out the "function" of panels, and tracks the standard terms of reference. In pertinent part, these provisions establish that the DSB tasks a panel with "examining" a matter and then making "such other findings as will assist the DSB in making the recommendation" set out in DSU Article 19.1 (that is, a recommendation that the Member bring the measure into conformity with that agreement). A panel should "address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."

156. Because compliance will not simply be a matter of China eliminating or removing its TRQ administration measures, but rather reforming its TRQ administration measures so as to comply with China's specific WTO obligations, it is important to make findings on each of these obligations so as to properly guide implementation. Without sufficient findings to inform implementation, it is likely that the dispute will not be resolved.

157. China argued in its Second Written Submission for specific applications of judicial economy, first with respect to Paragraph 116 and Article X:3(a) of the GATT 1994 and, second, with respect to Paragraph 116 and Article XIII:3(b) of the GATT 1994.

158. China "agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same." China contends that if the Panel were to consider both Paragraph 116 and Article X:3(a) it would "inevitably reach the same conclusion" under both provisions.

159. As described at length in this dispute, China maintains a complex and opaque TRQ administration that is difficult to understand and participate in and results in underutilization of China's TRQs. Unlike a dispute where the inconsistent measure will likely be withdrawn, China will continue to maintain TRQ administration measures for allocating licenses and permitting importation at in-quota duty levels. It will be critical for China to consider whether the measures taken to comply are: transparent, predictable, fair, clearly specified, and unlikely to inhibit the fill of the TRQ, as well as reasonable. For this reason, sufficiently precise findings with regard to Paragraph 116 and Article X:3(a) would be helpful to inform the actions China must take to come into compliance with its WTO obligations.

160. China continues to argue that whatever the Panel determines Article XIII:3(b) requires should be sufficient to satisfy the transparency requirement under Paragraph 116 of the Working Party Report. The United States disagrees. Article XIII:3(b) requires public notice of the amounts permitted to be imported and changes to those amounts.

161. Paragraph 116 requires China to administer its TRQs, including with respect to allocation and reallocation, through a process or set of rules or principles that is easily understood, discerned, or obvious. As part of this obligation, China should be providing information to Members and applicants regarding how the rules function, how they are applied, and the results of applying those rules in a timely manner. This will include and go beyond the specific information required to be made public by Article XIII:3(b) of the GATT 1994. For this reason, findings under both Article XIII:3(b) and Paragraph 116 of the Working Party Report would be important to help resolve the dispute.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

162. [Summaries of the U.S. responses to the Panel's questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. In the present dispute, the United States challenges the consistency of China's administration of its tariff rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn with certain of its obligations under the GATT 1994 and Paragraph 116 of the *Working Party Report* to China's Protocol of Accession. Specifically, the United States challenges six specific aspects of China's system of TRQ administration: the basic criteria for determining eligibility for TRQ allocations and reallocations ("Basic Criteria"); the principles for determining TRQ allocations ("Allocation Principles"); the information published concerning allocation and reallocation of the TRQs; the administration of the portions of the TRQs reserved for state trading enterprises ("STEs") and non-state trading enterprises ("non-STEs"); the public comment process; and the end-use requirements and penalties for non-use.[1]

2. For the reasons set out in China's written submissions, oral statements, responses to questions from the Panel and the United States, and comments on the United States' responses to questions from the Panel, China submits that the U.S. claims under Paragraph 116 of the *Working Party Report* to China's Protocol of Accession and Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 are unfounded and unsupported.

II. SUMMARY OF CHINA'S SYSTEM OF TRQ ADMINISTRATION

3. China's National Development and Reform Commission ("NDRC") is the authority responsible for allocating and reallocating the grains TRQs. Within NDRC, the Department of Economy and Trade is charged with overseeing the administration of the TRQs. Thirty-seven provincial and municipal departments are authorized to process TRQ applications.[2]

4. The grains TRQs are divided into STE and non-STE quotas.[3] NDRC issues an annual *Allocation Notice*, which provides the TRQ amounts for each grain, including the STE portion for each TRQ; the Basic Criteria for TRQ allocation eligibility; and the Allocation Principles that NDRC applies to determine the allocations that will be granted to eligible applicants.[4]

5. In relation to the non-STE portions of the grains TRQs, applicants must satisfy the Basic Criteria and commodity-specific requirements provided in the 2016 and 2017 *Allocation Notices* in order to be eligible for a TRQ allocation. Both processing and general trade applicants apply for TRQs between October 15 and October 30 of each year, and submit their application forms to a local authorized agency.[5]

6. When an authorized agency receives an application form, it will confirm that all of the information requested by the form has been provided and that the applicant has signed the form.[6] The authorized agencies are available to answer questions that applicants have in relation to the application form and the application process. The agencies answer these questions on the basis of the *TRQ Guideline of the Examination and Approval of Grain Import TRQ* ("TRQ Guidelines") and the *Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and*

[1] See China's first written submission, para. 22.

[2] See *Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Ministry of Commerce and National Development and Reform Commission, Public Notice No. 54, issued 15 October 2003) ("*2003 List of NDRC Authorized Agencies*") (CHN-6).

[3] *Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Ministry of Commerce and National Development and Reform Commission 2003 Order No. 4, issued 27 September 2003) ("*2003 Provisional Measures*"), Article 4 (CHN-5).

[4] See *2017 Allocation Notice* (CHN-7).

[5] See *2003 Provisional Measures*, Articles 10 and 11 (CHN-5).

[6] If an authorized agency determines that an application form is incomplete, the form is returned to the applicant with instructions on how to properly complete the form. See *2003 Provisional Measures*, Article 8 (CHN-5).

Answers ("TRQ FAQs") that NDRC publishes on its official website.[7] If a question is not covered by the guidelines or the TRQ FAQs, the authorized agency forwards the question to NDRC, and NDRC tells the authorized agency how to respond.[8] Questions may also be posed directly to NDRC through NDRC's official website.[9] Responses to questions submitted in writing are provided within ten working days, pursuant to Article 34 of the *2003 Provisional Measures*.[10]

7. The authorized agencies do not conduct a substantive assessment of the applications. After determining that the applications are complete and properly signed, the local authorized agency delivers the applications to NDRC.[11]

8. NDRC then reviews the applications to determine whether the applicants meet the Basic Criteria.[12] The uniform social credit code that is provided by each applicant in its application is used to generate a credit report through "Credit China" (https://www.creditchina.gov.cn).[13] The information that is used in generating a credit report includes the general registration information of the enterprise; the administrative licenses acquired by the enterprise; the administrative punishments received by the enterprise; and whether the enterprise is on the Good Credit List, Watch List, or Black List. Only the Black List is considered by NDRC. The components of the credit report are illustrated in Exhibit CHN-19.[14] Applicants with records of non-compliance (i.e. applicants who have been "blacklisted") are rejected. Applicants who inquire concerning the reasons for a rejected application will be provided with a response by NDRC or the relevant authorized agency within ten working days.[15]

9. Concurrent with the eligibility review, NDRC publishes the list of applicants by issuing the *Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains*. This notice also provides the opportunity for the public to submit comments to NDRC regarding each applicant.[16] NDRC relies on public comments to double check that applicants are eligible to receive TRQ allocations.[17] If NDRC receives a comment regarding a particular applicant, NDRC asks the responsible authorized agency to collect information in relation to the comment so that NDRC can verify its accuracy. The authorized agency also informs the applicant that a comment has been submitted in relation to its application, and the applicant is given an opportunity to provide a response. If NDRC concludes pursuant to the comment and the information collected by the authorized agency that the applicant has not fully met the Basic Criteria or that it has submitted falsified information in its application, then the application is rejected. If NDRC concludes otherwise, then the applicant remains on the list.[18]

10. Following the eligibility review, NDRC allocates the non-STE quota for each grains TRQ among the eligible applicants based on the Allocation Principles provided in Article 4 of the 2016 and 2017

[7] See Guideline on the Examination and Approval of Grain Import TRQs (National Development and Reform Commission, published 27 May 2017) ("TRQ Guidelines") (CHN-15) and Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and Answers (National Development and Reform Commission, published 27 May 2017) ("TRQ FAQs") (CHN-14).

[8] See *2003 Provisional Measures*, Article 8 (CHN-5).

[9] TRQ applicants can access the NDRC's Online Inquiry Page, available at: http://services.ndrc.gov.cn:8080/ecdomain/portal/portlets/bjweb/newpage/itemlist/itemlist.jsp?admintype=&themetype=&keyword=010092.

[10] Article 34 of the *2003 Provisional Measures* provides that "[i]nquiries relating to the allocation and reallocation of agricultural product import tariff-rate quota[s] shall be posed in writing to the Ministry of Commerce, NDRC or their respective authorized agencies. The Ministry of Commerce, NDRC or their authorized agencies shall reply to such inquiries within 10 working days."

[11] See China's response to Panel question No. 3(c), paras. 9 and 10. At this stage, if an application is found to be incomplete, NDRC will notify the responsible authorized agency, and the authorized agency will require the applicant to resubmit a complete application prior to NDRC's publication of the *Announcement of Enterprise Data*.

[12] *2017 Allocation Notice*, Article 2 (CHN-7).

[13] These credit reports are publicly searchable using an entity's name or social credit code.

[14] See China's responses to Panel questions No. 8(c), para. 24 and No. 47, para. 8.

[15] See *2003 Provisional Measures*, Article 34 (CHN-5).

[16] See Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2017 (National Development and Reform Commission, issued 1 December 2016) ("2017 Announcement of Enterprise Data") (CHN-8).

[17] See China's response to Panel question No. 55(a), paras. 22 and 23.

[18] See China's first written submission, para. 15.

Allocation Notices.[19] With respect to the allocation of the non-STE quota, a general trade TRQ applicant's historic import performance is the most important factor in determining the amount of the allocation. For a processing trade applicant, the applicant's production and processing capacities are key factors in addition to its historic performance in determining the amount of the allocation. New applications are considered in the event that the entire non-STE portion of the TRQ has not been fully allocated to applicants with historic import performance under the TRQs.[20]

11. When NDRC has completed its substantive review of each application, the authorized agencies inform each applicant of the results of its application. The annual import tariff rate quotas for agricultural products are implemented from January 1 of each year. In 2016 and 2017, the non-STE portion of each TRQ was fully allocated and fully utilized, with the one exception of short- and medium-grain rice in 2016, for the technical reason explained by China in its responses to Panel questions.[21]

12. In relation to the STE portions of the TRQs, China National Cereals, Oils and Foodstuffs Import and Export Corporation ("COFCO") is the only enterprise designated as a state trading enterprise for grains.[22] COFCO is therefore allocated the full STE portion of each TRQ.[23] This amounts to between 50 percent and 90 percent of each grains TRQ, depending on the grain, in accordance with China's Schedule CLII.[24] COFCO cannot apply for an allocation from the non-STE portion of the TRQ. No STE other than COFCO has ever received an STE portion of a TRQ allocation because COFCO is the sole authorized STE importer for grains.[25]

13. In practice, because the STE portions of the TRQs are allocated entirely to COFCO, any other TRQ allocation to an end-user is non-state trading only. If an end-user is unable to sign or complete import contracts for the entire TRQ allocation on their certificate by the end of the year, the end-user must return the unused quantity before September 15.[26] COFCO is not required to return any unused portion of its grains TRQs for reallocation, nor is it subject to penalties for less than full utilization. Only end-users are subject to the obligation to return unused amounts for reallocation and penalties for non-use.[27] All entities are subject to usage requirements.[28]

14. End-users who have imported their TRQ allocation by the end of August, as well as new users that conform to the Basic Criteria, may apply for any returned allocation amounts, from September 1 to September 15.[29] The procedures for reallocations follow the procedures for initial allocations in relation to the completeness check by the authorized agencies and the eligibility review by NDRC. Reallocations are granted based on the "first-come, first-served" methodology specified in Article 26 of the *2003 Provisional Measures*. The unused amounts of the non-STE portions of the TRQs are in fact returned and reallocated.[30]

[19] 2017 *Allocation Notice*, Article 4 (CHN-7); 2016 *Allocation Notice*, Article 4 (CHN-10); see also *2003 Provisional Measures*, Article 13 (CHN-5).

[20] See China's first written submission, paras. 16 and 17; China's response to Panel question No. 51, para. 13.

[21] See China's response to Panel question 10, para. 35 and fn 41.

[22] See *Catalogue of Import State Trading Enterprises* (Ministry of Foreign Trade and Economic Cooperation 2001 Announcement No. 28, issued 2001) (CHN-13).

[23] See China's responses to Panel questions, Table 1.

[24] See Schedule CLII − People's Republic of China, Part I − Most-Favoured-Nation Tariff: Section I-B − Tariff Quotas (WT/ACC/CHN/49/Add.1) (CHN49A1-02) ("China's Schedule CLII").

[25] See China's response to Panel question No. 6(e), para. 19.

[26] *2003 Provisional Measures*, Article 23 (CHN-5).

[27] See China's response to Panel question No. 6(e), para. 20.

[28] See China's response to Panel question No. 6, para. 20. China notes that certain Panel questions refer to the usage requirements alternatively as "end-use requirements" or "processing requirements". China explained the difference between processing requirements applicable only to entities engaged in processing trade and the end-use processing requirement applicable to all general trade recipients of wheat and corn in its response to Panel question No. 58(b). It is the end-use processing requirement applicable to all general trade recipients that is challenged by the United States.

[29] *2003 Provisional Measures*, Articles 24, 25 (CHN-5); *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2017* (National Development and Reform Commission 2017 Public Notice No. 11, issued 11 August) ("*2017 Reallocation Notice*") para. 1 (CHN-9).

[30] See China's second written submission, Table 1.

III. THE PANEL SHOULD EXERCISE JUDICIAL ECONOMY REGARDING CERTAIN OF THE U.S. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994 AND PARAGRAPH 116 OF THE *WORKING PARTY REPORT*

A. Examining the United States' Claims Under Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994 Is Unnecessary to Resolve this Dispute

15. The United States is pursuing claims under both Paragraph 116 and Article X:3(a) of the GATT 1994 with respect to the Basic Criteria; Allocation Principles; information published concerning allocations and reallocations of the TRQs; administration of the STE and non-STE portions of the TRQs in conjunction with penalties for non-use; and the public comment process.

16. It is undisputed that it is within the bounds of a panel's discretion "to determine only those claims on which a finding is necessary 'for the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings'" and thereby "'ensure effective resolution of disputes to the benefit of all Members'".[31] In China's view, the exercise of judicial economy with respect to the U.S. claims under Article X:3(a) of the GATT 1994 that it has also brought under Paragraph 116, and the United States' claims under Paragraph 116 that it has also brought under Article XIII:3(b) of the GATT 1994, would be the most efficient and effective means to resolve this dispute.[32]

17. China acknowledges that there are circumstances in which the exercise of judicial economy by a panel may not be appropriate, such as where different remedies are available under different applicable provisions. No such circumstances exist here. The United States has not argued that the exercise of judicial economy will preclude the possibility of it obtaining a remedy under another provision. Rather, it asserts only that its claims implicate "distinct" legal obligations, and that "the scope and content" of those obligations "are not the same."[33]

18. China agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same.[34] While Paragraph 116 addresses TRQ administration specifically, the scope of Article X:3(a) applies to administration generally and is therefore broader. The content of the provisions also differs because of the TRQ-specific outcomes set out in the latter half of the first sentence of Paragraph 116 (provision of effective import opportunities, etc.). The provisions nonetheless overlap to a significant degree because of the series of requirements set forth in the first part of the first sentence of Paragraph 116 (administration on a transparent, predictable, etc. basis). These requirements combine to encompass the specific obligation contained in Article X:3(a) underlying the United States' claim − the obligation to administer measures of the kind described in Article X:1 in a reasonable manner.[35] To require China to administer its TRQs on a transparent, predictable, uniform, fair and non-discriminatory basis, using clearly specified timeframes, administrative procedures and requirements, is therefore to require China to administer its TRQs in the "reasonable" manner mandated by Article X:3(a).

19. Thus, China disagrees with the United States that the differences between the scope and content of these provisions require examining the U.S. claims under both provisions, or that such differences require the Panel to decline to exercise judicial economy.[36] On the contrary, these differences militate in favour of foregoing analysis of the U.S. claims under Article X:3(a).

---

[31] See China's response to Panel question No. 22, para. 61, quoting Appellate Body Report, *Australia − Salmon*, para. 223. See also Appellate Body Report, *India − Patents (US)*, para. 87 ("... a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties — provided that those claims are within that panel's terms of reference.").

[32] See also European Union's third-party submission, paras. 12-14.

[33] See China's second written submission, para. 7, quoting United States' response to Panel question No. 21(a), para. 65 and No. 21(b), para. 68.

[34] See United States' response to Panel question No. 21, para. 65.

[35] See United States' first written submission, para. 228.

[36] See Appellate Body Report, *Argentina − Import Measures*, para. 5.194. The Appellate Body explained that:

B. Examining the United States' Claims Under Article XIII:3(b) of the GATT 1994 and Paragraph 116 of the *Working Party Report* Is Unnecessary to Resolve this Dispute

20. The United States is also pursuing claims under Paragraph 116 and Articles XIII:3(b) and X:3(a) of the GATT 1994 relating to the publication of allocation and reallocation information. The United States clarified in its responses to questions from the Panel that the information it claims is required under Paragraph 116 and Article XIII:3(b) includes the total amounts actually allocated, returned and reallocated. China has already explained why it does not consider it necessary for the Panel to examine the United States' claim under Article X:3(a) relating to this information. In China's view, it is similarly unnecessary for the Panel to examine the United States' claim under Paragraph 116, for the following reasons.

21. China explained in its first written submission that Article XIII:3(b) requires publication of the total amounts that will be permitted to be imported during the specified future period and any changes to those amounts during that specified period.[37] This requirement does not extend to publishing amounts actually allocated, either in the aggregate or individually. Article XIII:3(b) thus expressly provides specific public notice requirements with respect to the administration of TRQs, including total amounts.

22. In contrast, Paragraph 116 makes no reference to public notification of TRQ amounts. The United States is trying to read such a requirement into Paragraph 116 through the more general requirement to administer TRQs on a transparent and predictable basis. China does not believe that the Panel could reasonably conclude that the precise public notice requirements in Article XIII:3(b) do *not* require publication of the amounts actually allocated, returned for reallocation, and reallocated, but find that such amounts *must* be published under Paragraph 116. Accordingly, China submits that the Panel's analysis with respect to publication of amounts actually allocated, returned, and reallocated should begin and end with Article XIII:3(b), as this will efficiently resolve the question of whether China is obligated to publish this information.

IV. THE UNITED STATES HAS FAILED TO ESTABLISH THAT CHINA'S SYSTEM OF TRQ ADMINISTRATION IS INCONSISTENT WITH ITS WTO OBLIGATIONS

A. Basic Criteria

1. The Basic Criteria Do Not Render China's System of TRQ Administration as a Whole Inconsistent with Paragraph 116 of the *Working Party Report*

23. The articulation of the Basic Criteria constitutes a particular aspect of China's administration of the TRQs. Paragraph 116 however relates to the *administration* of the TRQs as a whole. Consequently, while China acknowledges that the description of the Basic Criteria needs to be updated to better reflect the nature of NDRC's assessment,[38] this does not mean that China's system of TRQ administration is inconsistent with Paragraph 116.[39]

24. As the United States acknowledged in its first written submission, "China's administration of its TRQs relates to all aspects of its execution, or carrying out, of those TRQs".[40] Accordingly, even if the Panel were to conclude that any of the specific aspects challenged by the United States are inconsistent with the obligations in Paragraph 116, the Panel would have to then evaluate whether the inconsistency of those specific aspects with Paragraph 116 is a sufficient basis upon which to conclude that the administration of the TRQs as a whole is inconsistent with Paragraph 116.

25. In referring to its TRQ administration "as a whole", China is referring to its system of TRQ administration in its entirety. China's system of TRQ administration includes, *inter alia*, the six

---

In our view, the fact that two provisions have a different "scope and content" does not, in and of itself, imply that a panel must address each and every claim under those provisions. Indeed, if this were so, then only in the rarest of circumstances would a panel be able to exercise judicial economy on a claim. Ibid.

[37] See China's first written submission, paras. 85-87.

[38] See China's oral statement to the Panel at the first meeting, para. 14.

[39] See China's response to Panel question No. 26, para. 73.

[40] See United States' first written submission, para. 67.

specific aspects challenged by the United States − the Basic Criteria; Allocation Principles; public comment process; public notice requirements; usage requirements and penalties; and administration of the STE and non-STE portions of the TRQs. China's system of TRQ administration also includes aspects not challenged by the United States, such as the application forms for TRQ allocations and reallocations utilized by NDRC; the applicant categories and application periods specified by NDRC in the annual Allocation Notice; the public inquiry process; the TRQ FAQs and TRQ Guidelines issued by NDRC; NDRC's reliance on the first-come, first-served method at the reallocation stage; the process by which NDRC and the local authorized agencies inform recipients that they have received allocations and reallocations; and the designation of COFCO as the sole STE authorized to import grains.[41]

26. Under a holistic analysis, no single administrative measure or practice is determinative of whether China's administration is consistent with Paragraph 116. To illustrate, access to information relating to allocation and reallocation is facilitated through the right of any entity (applicant or non-applicant) to submit any inquiry relating to the grains TRQs to local authorized agencies and NDRC. The inquiry feature interacts with all of the other features of China's TRQ system, including the Basic Criteria, to further the administration of the TRQs on a transparent, predictable, and fair basis, using clearly specified procedures and requirements that do not inhibit the filling of each TRQ. Any entity could submit an inquiry to NDRC requesting further details as to the operation of the public comment procedure. The question of the consistency or inconsistency of China's administration with Paragraph 116 thus is not decided by any one aspect.[42]

27. The contents of Paragraph 116 affirm that a holistic analysis is appropriate. None of the requirements set forth in Paragraph 116 pertain to specific aspects of TRQ administration, such as when and how to provide public notice of permitted imports or the mechanisms to use in determining allocation and reallocation amounts and recipients. Rather, they pertain to the administration of the TRQs regime as a whole. China also considers that the Agreement on Import Licensing Procedures ("ILP Agreement") suggests such a holistic approach is appropriate when evaluating China's administration of the TRQs.[43] Article 3.2 of the ILP Agreement requires non-automatic licensing procedures to be "no more administratively burdensome than absolutely necessary to administer the measure". China notes that the Members had this standard in mind with respect to China's TRQ administration.[44] It is well-established that evaluating the necessity of a measure entails a holistic analysis that involves weighing and balancing a series factors not limited to the measure itself.[45] China considers that the holistic evaluation of the administration of non-automatic licensing procedures under the ILP Agreement indicates that a similar evaluation should be undertaken with respect to the administration of TRQ licensing procedures under Paragraph 116.

28. China thus requests that the Panel reach a conclusion on the consistency of China's administration with Paragraph 116 that rests on China's system of TRQ administration as a whole.

2. The United States Has Not Demonstrated that the Basic Criteria Are Inconsistent with Article X:3(a) of the GATT 1994

29. The United States argues that the inclusion of "vague" or "undefined" Basic Criteria is inconsistent with China's obligation to administer its TRQs in a "reasonable manner" under Article X:3(a) of the GATT 1994. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Basic Criteria under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Basic Criteria

[41] See China's response to Panel question No. 60(b), para. 41.
[42] See China's second written submission, para. 59.
[43] See China's second written submission, para. 60.
[44] See *Working Party Report*, para. 112 ("…members asked that China ensure that its TRQ arrangements be no more administratively burdensome than absolutely necessary…").
[45] See, e.g. Appellate Body Report, *EC − Seal Products*, para. 5.169, referring to Appellate Body Reports, *Korea − Various Measures on Beef*, para. 164, *US − Gambling*, para. 306, and *Brazil − Retreaded Tyres*, para. 182.

necessarily leads to an unreasonable administration of the grains TRQs,[46] and because the United States has failed to "support its claim with solid evidence".[47]

30. In evaluating whether the United States has in fact demonstrated that the Basic Criteria necessarily lead to the unreasonable administration of the grains TRQs, the specific factual circumstances in which the Basic Criteria are applied must be examined in light of their objective.[48] There is no evidence that similarly situated applicants are being treated differently in NDRC's evaluation, or that the requirements have in fact caused prejudice to the United States or other Members.[49] China acknowledges that a showing of trade effects is not required to establish inconsistency with Article X:3(a). China recalls however, that "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world" and that this "can involve and examination of whether there is a "possible impact on the competitive situation due to…unreasonableness in the application" of the measure.[50]

31. When the "real effect" of the Basic Criteria is examined, it is evident that China's administration of the Basic Criteria is consistent with Article X:3(a). The "real effect" is that all applicants are subject to the same *pro forma* screening before their applications are forwarded to NDRC for substantive review. There is no evidence that grains traders operating in China are being negatively impacted by an unreasonable application of the Basic Criteria. Furthermore, the "possible impacts'' alleged by the United States are based on a misunderstanding of the function of the Basic Criteria in the TRQ administration process.

32. The United States emphasizes that the Basic Criteria are "insufficiently specified to permit applicants to properly understand and subsequently meet the criteria."[51] However, the Basic Criteria are met as soon as an applicant signs the application, passes the standard background check, and is confirmed not to have violated the *2003 Provisional Measures*.[52] What an applicant must properly understand are the requirements to provide certain operational data and to sign the application form − requirements which are clearly specified in the form itself. The descriptions of each of the Basic Criteria have no bearing on this aspect of the application process. The United States also theorizes that the Basic Criteria "prevent applicants from correcting or improving their applications in the future."[53] As China explained in its first written submission, any applicant whose form is rejected by a local agency is informed as to the reason for the rejection and provided an opportunity to complete and resubmit the form.[54] The application of the Basic Criteria therefore cannot "have caused, [n]or are likely to cause", this outcome.[55]

---

[46] See Appellate Body Report, *EC − Selected Customs Matters*, para. 201.

[47] See Panel Report, *Thailand − Cigarettes*, para. 7.874, quoting Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews,* para. 217. The Appellate Body stated:

> We observe, first, that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.
>
> Ibid.

[48] See Panel Report, *US − COOL*, para. 7.851 (finding that "whether an act of administration can be considered reasonable within the context of Article X:3(a) entails a consideration of factual circumstances specific to each case" and "an examination of the features of the administrative act at issue in light of its objective, cause or the rationale behind it"). See also Panel Report, *Thailand − Cigarettes*, para. 7.921. The Panel found that the Appellate Body's "clarification of the principles underlying the chapeau of Article XX provide guidance on the analysis of the reasonableness requirement under Article X:3(a)" and noted that "for example…the rationale that can explain [the measure at issue] is also relevant to evaluating the question of whether it is an administrative process that leads to unreasonable administration".

[49] See Panel Report, *Thailand − Cigarettes*, para. 7.969 (finding a violation of Article X:3(a) where proven delays under Thailand's customs review process tended "to show prejudice caused to other Member governments and traders").

[50] See Panel Report, *Argentina − Hides and Leather*, para. 11.77 (emphasis added).

[51] See United States' first written submission, para. 233.

[52] See China's first written submission, para. 35.

[53] See United States' first written submission, para. 238.

[54] See China's first written submission, para. 38.

[55] See Panel Report, *China − Raw Materials*, para. 7.705, quoting Appellate Body Report, *EC − Selected Customs Matters*, para. 225. The Appellate Body stated:

33. In relation to the U.S. argument that authorized agencies may be providing divergent interpretations of the Basic Criteria, the United States misunderstands the role that authorized agencies play in the administration of China's TRQs. Authorized agencies do not conduct substantive reviews of applications. The role of authorized agencies is explained in Articles 8, 11 and 12 of the *Provisional Measures*. The role of the authorized agencies pursuant to these provisions is simply to check the applications for completeness and forward applications to NDRC for review. The authorized agencies do not interpret the Basic Criteria, and if they receive a question that is not answered by the TRQ FAQs or TRQ Guidelines, they forward such questions to NDRC. Accordingly, there is no opportunity for "divergent interpretations" or "inequitable application" of the eligibility criteria.[56]

34. The reasonableness of the Basic Criteria must also be evaluated in light of their objective, which is to ensure that all TRQ applicants are accountable for the information they submit and are acting in accordance with the law, so as to ensure that the administration of each TRQ is "uniform, fair, just, predictable and non-discriminatory".[57] This objective is both reasonable and reconcilable with China's administration of the Basic Criteria.[58] When considered in conjunction with the fact that the Basic Criteria are applied uniformly and impartially, and that only NDRC is authorized to conduct a substantive review of each application, it is evident that China's measures are consistent with its obligations under Article X:3(a).[59]

35. Finally, the reasonableness of the Basic Criteria must be evaluated with due regard to China's right, and the right of all Members, to deploy the manner of administration that each considers "most appropriate in the particular circumstances in which it is situated".[60] China developed a preliminary screening step in order to efficiently ensure that the hundreds of applicants for TRQ allocations reviewed by NDRC are complete. China reasonably assessed that it would not be an efficient use of NDRC's limited resources to both confirm completeness and conduct substantive reviews of each application.[61]

36. For these reasons, the United States has failed to demonstrate that the inclusion of the Basic Criteria necessarily leads to an unreasonable administration of the grains TRQs, and the U.S. claim under Article X:3(a) must fail.

[W]e may conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non- uniform application of the legal instrument at issue.

Ibid.

[56] See United States' first written submission, para. 230. See also China's second written submission, paras. 21-27.

[57] See *2003 Provisional Measures*, Article 1 (CHN-5).

[58] See Panel Report, *Thailand – Cigarettes*, fn 1573 (discussing the Appellate Body's holding in *US – Shrimp* that one of the bases for its conclusion that a measure resulted in unjustifiable discrimination was the difficulty of reconciling the application of the measure with its stated objective).

[59] See Panel Report, *Thailand – Cigarettes*, paras. 7.922 and 7.929. The Panel found as follows in examining the Philippines' claims under Article X:3(a):

[G]ranting dual function officials the power to make customs and fiscal decisions concerning cigarettes, both imported and domestic, as well as access to confidential information on imported cigarettes would appear to constitute an act of inappropriate and/or not sensible administration *unless there is a particular rationale that can explain the concerned act*. … In conclusion*, given the rationale behind it*, and considered in conjunction with safeguards in the system, we find that the Philippines has not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X:3(a).

Ibid (emphasis added).

[60] See Panel Report, *Thailand – Cigarettes*, para. 7.925.

[61] See China's first written submission, para. 42.

B. Allocation Principles

1. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Paragraph 116 of the *Working Party Report*

37. The United States claims that the Allocation Principles are inconsistent with Paragraph 116 of the *Working Party Report*, because the Allocation Principles are not transparent, predictable, fair, or clearly specified.

38. In China's view, transparent, predictable, fair, and clearly specified TRQ administration does not require that an applicant know precisely how NDRC weighs the factors identified by the Allocation Principles. China submits that it is sufficient for applicants to know that TRQs will be allocated "in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operations) and other relevant commercial standards". China also submits that applicants can easily discern from China's measures that there are different categories of applicants, and that NDRC takes an applicant's category into account in applying the Allocation Principles.[62]

39. The United States further claims that the content of the category "other relevant commercial criteria" in the Allocation Principles is not defined, and that this also renders the Allocation Principles not "transparent", "predictable", "fair", or "clearly specified" within the meaning of Paragraph 116. China does not believe that the use of a residual category renders the Allocation Principles inconsistent with Paragraph 116 of the *Working Party Report*. The use of residual categories like "other relevant commercial criteria" is common practice in the administrative regulations of WTO Members.[63] Such categories are purposefully broad in order to preserve the administering authority's ability to take into account all relevant information.

40. China's method of distributing allocations is not automatic, and China does not suggest otherwise. China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process. China submits that it is responsibly exercising "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[64] In this case, China wants to utilize the expertise of NDRC officials to the maximum extent possible by granting them latitude to make sufficiently individualized decisions with respect to applications.[65] China's view that this is the most transparent, predictable, and fair way to achieve full utilization of the TRQ should not be "second guess[ed]", even if there are other methods of allocation that might achieve this objective.[66] China also notes that the United States has presented no evidence that any applicants are actually confused by the Allocation Principles.

2. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Article X:3(a) of the GATT 1994

41. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Allocation Principles under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQs.

---

[62] See China's oral statement to the Panel at the second meeting, paras. 14 and 15.

[63] See China's first written submission, para. 54 (quoting the U.S. sugar TRQ regulations).

[64] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel found:

> A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions.

Ibid.

[65] See Panel Report, *Thailand – Cigarettes*, para. 7.924.

[66] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel determined that it was "not in a position to second guess the specific needs of the Thai government in assigning selected customs and tax officials with a dual role as a director of a state enterprise, TTM" and "therefore recognize[d] that the Thai government officials…may indeed be well equipped to apply their expertise in laws and regulations relating to customs and internal taxes to the management of TTM".

42. In relation to the argument that applicants must be able to understand how NDRC evaluates "actual production and operating capacity", China repeats that reasonable administration does not require that the measures provide a detailed understanding of the basis upon which NDRC evaluates each application.

43. In relation to the inclusion of "other relevant commercial criteria", the United States similarly fails to demonstrate that this necessarily leads to unreasonable administration. As China has explained, this residual category is a commonly used mechanism for preserving a necessary element of discretion in administrative decision-making processes. As China has also explained, including a reasonable element of discretion as part of its allocation process is permissible. Thus, the Panel should reject the United States' argument that China fails to administer its TRQs for wheat, rice, and corn in a reasonable manner due to the alleged vagueness of the Allocation Principles.

C. Administration of STE vs. Non-STE Portions of the TRQs

1. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Paragraph 116 of the *Working Party Report*

44. The United States alleges in relation to the STE vs. non-STE allocation process that China does not administer its TRQs on a transparent or predictable basis and that it does not use administrative procedures that are clearly specified. In support of these allegations, the United States repeatedly emphasizes that the *2017 Allocation Notice* does not address how NDRC determines which applicants will receive allocations from the STE versus non-STE portions of each TRQ, nor do the Allocation Principles distinguish or refer to the STE portion specifically.[67]

45. The *2017 Allocation Notice* does not provide this information and the Allocation Principles do not otherwise distinguish the STE portion because applicants do not receive allocations from the STE portion of each TRQ. The entire STE portion of each TRQ is allocated to COFCO.

46. The United States also argues that it is not transparent or predictable to deny an applicant the opportunity to specify whether the applicant is requesting an allocation under the STE or non-STE portion of the TRQs and whether the applicant would accept an STE allocation, if granted.[68] Applicants are not given this opportunity because applicants are not granted allocations under the STE portion of the TRQs.

47. The fact that applicants are not granted allocations from the STE portion also moots the United States' argument that because end-users with such allocations would need to seek approval from NDRC to import directly in the event that the STE does not secure a contract to import the full amount of the allocation by August 15, the TRQ holder "*may not be able to* import the full amount of TRQ allocation received."[69] No TRQ Certificate holder is ever required to seek approval from NDRC for the right to import directly because no TRQ Certificate holder other than COFCO is ever granted an STE allocation in the first instance. No TRQ Certificate holder is therefore ever in a position where they "have just thirty days to contract for importation."[70] For this reason, the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process.

48. The United States' argument that applicants allocated an amount from the STE portion of the TRQ "cannot be certain they will be able to import the full amount within the specified timeframes, and thus be eligible to apply for a reallocation, if desired, and avoid any penalties associated with failing to import" is also moot.[71] The United States' proposed hypothetical category of applicants granted STE allocations does not exist. All non-STE applicants receive the same type of allocation. All non-STE applicants can therefore easily predict whether they will be able to import the amounts allocated within specified time periods.

[67] See United States' first written submission, paras. 91 and 92, 130-132, 172.
[68] See United States' first written submission, paras. 92, 132.
[69] See United States' first written submission, para. 147 (emphasis original).
[70] See United States' first written submission, para. 148.
[71] See United States' first written submission, para. 145.

49. The United States' arguments in relation to the use of administrative procedures that would not inhibit the filling of each TRQ largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of the entire STE portion of the TRQ to COFCO.[72] In arguing that the STE vs. non-STE distinction inhibits the filling of the TRQ, the United States elaborates on the alleged inability of applicants to request a particular allocation type.[73] As explained, however, applicants do not have the ability to choose which allocation type to apply for because the STE portion is only available to COFCO.

50. The United States also reiterates that applicants do not have information regarding the STE vs. non-STE allocation process. Again, because no applicants receive state trading allocations, there is no need for applicants to understand the basis on which that hypothetical determination would be made. Furthermore, there are no "costs, time constraints, and administrative burdens" that are distinct to "each type of importation process" which result in "uncertainty" that "makes it more difficult to negotiate with potential exporters" because there is only one type of importation process for all TRQ applicants other than COFCO – direct importation.[74]

51. In sum, China's administration of its TRQs is not inconsistent with its obligations under Paragraph 116 of the *Working Party Report* because the administration of both the STE and non-STE portions of the TRQ is transparent, predictable, uses administrative procedures that are clearly specified, and does not inhibit the filling of each TRQ.

2. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article X:3(a) of the GATT 1994

52. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should find that China administers the STE and non-STE portions of the TRQs consistently with Article X:3(a).

53. The United States claims that because China administers a "single application process", applicants are less able "to anticipate and commercially plan for the allocated TRQ amounts they receive."[75] As China has explained, the use of a "single application process" does not create uncertainty because there is only a single type of allocation granted to non-STE applicants. The United States also claims that "TRQ Certificate holders can receive state trading, non-state trading, or a mixed allocation. However, no guidance is provided regarding how NDRC determines the allocation."[76] This outcome is not possible. Mixed allocations cannot be granted because NDRC grants only one type of allocation to non-STE applicants.[77] It follows that since no mixed allocations are granted, there is no risk that each portion of a mixed allocation will not be granted in commercially viable amounts and that this will "further increase risks and costs associated with importation, compounding an already unreasonable process."[78] The United States' claim under Article X:3(a) relating to the administration the STE vs. non-STE portions of the TRQs should therefore be rejected.

3. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article XI:1 of the GATT 1994

54. The United States argues that "[t]he use of a single application for the state trading and non-state trading TRQ allocations constitutes a 'restriction' on importation of wheat, rice, and corn within the meaning of Article XI:1 of the GATT 1994" because the United States argues that "differing requirements and commercial consideration of state trading and non-state trading TRQ allocation,

[72] See United States' first written submission, paras. 190-205.
[73] See United States' first written submission, para. 197.
[74] See United States' first written submission, para. 201.
[75] See United States' first written submission, paras. 230, 255-260.
[76] See United States' first written submission, para. 242.
[77] The United States points out that the sample TRQ Certificate annexed to the *2003 Provisional Measures* indicates that an applicant may be allocated a certain amount categorized as "state-trading". See United States' first written submission, para. 258. In practice, TRQ Certificates do not allocate amounts of this type because, as explained above, there is only one type of allocation available to non-STE applicants.
[78] See United States' first written submission, para. 259.

when combined with applicants' inability to decide or predict which allocation they will receive" creates uncertainty that discourages applicants from applying for allocations.[79]

55. The U.S. claim under Article XI:1 of the GATT 1994 is unfounded. First, as China will explain in Part F below, TRQs, including measures necessary for their administration, are not "restrictions… on the importation of any product" within the meaning of Article XI:1.[80] Second, as China has explained above, all non-STE applicants receive non-STE allocations that present the same requirements and implicate the same commercial considerations, therefore there is no "uncertainty" introduced into the administrative process via the allocation of the non-STE and STE portions of the TRQs.

4. The United States Has Not Demonstrated that the Allocation of the STE Portions of the TRQs Entirely to COFCO Is Inconsistent with Paragraph 116 of the *Working Party Report* or Articles X:3(a) and XI:1 of the GATT 1994

56. With respect to Paragraph 116, China disagrees that it is not transparent, predictable, or fair for China's measures and practices to distinguish between STEs and non-STEs. STEs and non-STEs are different entities and China's measures expressly distinguish between them. It is therefore easily discernible, predictable, and fair that non-STEs and STEs are subject to different requirements.[81]

57. Specifically, in China's view, there is nothing inherently unfair in NDRC's decision to allocate the STE portions of the TRQs entirely to COFCO without applying the Basic Criteria and Allocation Principles. The STE portions of the TRQs may be allocated only to those STEs authorized to import grains. As China has explained, COFCO is the only STE authorized to import grains.[82] Applying the Basic Criteria and the Allocation Principles to COFCO would therefore not make sense.

58. As China has explained, COFCO is not an end-user as defined in China's written measures. COFCO is therefore not required to return its unused amounts for reallocation.[83] Requiring the only STE authorized to import grains to return unused grains would not make sense because no other STE would be eligible to apply for COFCO's unused amounts at the reallocation stage.[84]

59. For the same reason, penalizing COFCO at the initial allocation stage for failing to utilize its entire allocation would not make sense. The amounts not allocated to COFCO could not be allocated to any other STE because COFCO is the only STE authorized to import grains. Reducing COFCO's annual allocation would therefore guarantee that part of the STE portion of each TRQ would not be utilized. In contrast, by allocating the entire STE portion of each TRQ to COFCO each year, NDRC preserves the opportunity for the STE portions to be fully utilized.[85]

60. With respect to Article XI:1, the United States has failed to demonstrate that allocating the entire STE portion of each TRQ to COFCO exerts a "limiting effect" on imports independent of the underlying TRQ and is therefore inconsistent with Article XI:1. In its responses to questions from the Panel, China provided data with respect to the allocation of the STE and non-STE portions of the TRQ. This data confirms that both the non-STE and STE portions of the TRQs are fully allocated. Specifically, the data confirm that each year, the STE portions of the TRQs have been fully allocated to COFCO. When there is full allocation, allocation is not operating as an aggregate limitation on in-quota imports. Thus, China's practice of allocating the entire STE portion to COFCO is not exerting a limiting effect on imports independent of the underlying TRQ.[86]

[79] See United States' first written submission, paras. 292, 301.
[80] See, e.g. Appellate Body Report, *EC – Bananas (21.5)*, para. 335.
[81] See China's response to Panel question No. 63, para. 44.
[82] See China's response to Panel question No. 5(a), para. 12.
[83] See China's second written submission, para. 30.
[84] See China's response to Panel question No. 66, para. 46.
[85] See China's response to Panel question No. 66, para. 47.
[86] See China's second written submission, paras. 88 and 89.

D. Public Comment Process

1. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Paragraph 116 of the *Working Party Report*

61. The U.S. claims under Paragraph 116 relate to the fact that the process for evaluating and verifying public comments is not spelled out in the relevant measures. In practice, all of the U.S. concerns are unfounded. Applicants are informed of comments, they are provided with an opportunity to rebut comments, and comments are only taken into account if the information provided is verified. The United States believes that the procedures for evaluating the comments need to be described on the face of the measures, but the United States has presented no evidence that any applicant is in fact confused about the public comment process. Nor has the United States presented any evidence that an applicant has sought clarification concerning the public comment process from NDRC, and such clarification has not been provided.

62. The United States acknowledges that "it is clear on the face of the *Announcement of Applicant Enterprise Data*" that this procedure exists.[87] The United States therefore concedes that it is clear from China's measures that a public comment process is part of China's system of TRQ administration. The United States' desire for more information regarding precisely how this procedure works in practice is not determinative of whether in fact this aspect is "clearly specified". The fact that the existence of the public comment process is easily discerned from China's measures and that further details can be acquired by interested entities using the public inquiry process is sufficient to comply with Paragraph 116.

2. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Article X:3(a) of the GATT 1994

63. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a) relating to the public comment process. Even if the Panel proceeds to examine the U.S. claim, it should reject it because the United States largely repeats the arguments that it presents in relation to Paragraph 116, which provide no basis for arguing that the public comment process necessarily leads to the unreasonable administration of the grains TRQs.

E. Information Concerning TRQ Allocation and Reallocation

1. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994

64. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claims that Paragraph 116 and Article X:3(a) require China to publish the total amounts actually allocated, returned, and reallocated.[88] Even if the Panel proceeds to examine the United States' claims concerning the publication of this information under Paragraph 116 and Article X:3(a), for the reasons China explained in its first written submission, the United States has failed to establish that either Paragraph 116 or Article X:3(a) requires China to publish this information.[89] China also explained in its submissions and responses to Panel questions that neither Paragraph 116 nor Article X:3(a) require China to publish the identities of TRQ recipients and the individual amounts actually allocated to each recipient.[90] China notes that the European Union agrees with China that no requirement to publish the identities of the recipients of TRQ allocations and reallocations can be derived from the text of Paragraph 116 or Article X:3(a).[91]

[87] See United States' response to Panel question No. 9, para. 33.
[88] See Section III.B, *supra*.
[89] See China's first written submission, paras. 61-82.
[90] See China's first written submission, paras. 66 and 67.
[91] See China's oral statement to the Panel at the first meeting, para. 28, citing European Union's third party submission, paras. 103 and 104.

2. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Article XIII:3(b) of the GATT 1994

65. Properly interpreted, Article XIII:3(b) requires only the publication of the total TRQ quantities for wheat, rice, and corn, as provided in China's Schedule CLII. Article XIII:3(b) refers to "import restrictions involving the fixing of quotas". "To fix" means to "settle definitely" or to "determine".[92] Article XIII:3(b) therefore refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows − "which will be permitted to be imported" − must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.

66. Under the plain meaning of the terms of Article XIII:3(b), the scope of this provision is therefore limited to the total quota quantities set forth in China's Schedule CLII. It does not extend to the specific quantities later permitted to be imported in connection with individual import licenses issued to particular entities.

67. The requirement to give public notice of "any change in such quantity or value" must also be interpreted in relation to the "fixing of quotas". It follows that the "change" referred to can only be a change to the quotas that are initially "fixed". As noted above, in China's case, these are the quotas provided in China's Schedule CLII. Thus, the "change" that must be notified would be "any change" to those scheduled quotas − not "any change" to the specific quantities allocated from those quotas, whether at the time unused quotas are returned or at the time of reallocation. China notes that Canada agrees with China that these terms require only publication of the total amount that a Member decides will be permitted to be imported at the within-quota rate in a quota year, and any subsequent change to that amount.[93]

68. The fact that total TRQ amounts may also be provided in a Member's schedule does not render the public notice requirements of Article XIII:3(b) "useless".[94] As China explained in its responses to questions from the Panel, the TRQ information in a Member's schedule will not always satisfy the specific public notice requirements set out in Article XIII:3(b), such as where the specific dates of the quota period are not provided in the schedule.[95] The public notice requirements in Article XIII:3(b) are also necessary to ensure that importers do not mistakenly equate an announcement that a Member intends to eliminate a scheduled TRQ through formal negotiations for a decision to halt administration of that TRQ during the quota period.[96] Article XIII:3(b) is also necessary to ensure notice continues to be provided in relation to quota periods that open between when a Member negotiates a change to its TRQ commitments pursuant to Article XXVIII and publishes an updated schedule.[97] Additionally, in the event that a Member will not be administering a scheduled TRQ during the quota period because better access conditions will be applied than scheduled, Article XIII:3(b) would ensure a Member provided public notice of that information.[98]

69. The existence of Article XXVIII of the GATT 1994 similarly does not render redundant the obligation in Article XIII:3(b) to publish any change in quantity or value. Article XXVIII requires a Member to inform other Members if it wishes to withdraw or modify any concession embodied in its schedule as a formal matter. This is not the same as notifying the public of an increase in the amount of a TRQ over and above the amount specified in a schedule for a given year. If China were to decide to increase the amounts of its TRQs beyond the amounts specified in its Schedule CLII during the

[92] See *New Shorter Oxford English Dictionary*, Vol. 1, p. 962.

[93] See China's oral statement to the Panel at the first meeting, para. 22, citing Canada's third-party submission, paras. 34 and 35.

[94] See European Union's third-party submission, para. 95.

[95] See China's response to Panel question No. 36, para. 90.

[96] See Notification of Brazil in Document G/AG/N/BRA/44 of 22 February 2018.

[97] See, e.g. Notification by the European Union in Document G/AG/N/EU/40, of 15 November 2017 (noting where applicable "[q]uantity updated with effect from 1 January 2017, pursuant to the result of negotiations under Articles XXIV:6 and XXVIII GATT relating to the accession of Croatia to the European Union.").

[98] See, e.g. Notification of Mexico in Document G/AG/N/MEX/35 of 2 February 2018.

quota period, it would be required by the terms of Article XIII:3(b) to publish this change. China would not be required to inform other Members of this change pursuant to Article XXVIII of the GATT 1994, and so the obligation in Article XXVIII does not render the obligation in Article XIII:3(b) redundant.

70. China's decision to publish only the total aggregate amounts available for importation under each TRQ specified in China's Schedule CLII is therefore consistent with its obligations under Article XIII:3(b) of the GATT 1994.

F. End-Use Requirements and Penalties for Non-Use

1. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Paragraph 116 of the *Working Party Report*

71. China disagrees with the United States that its end-use requirements and penalties inhibit the filling of the TRQs. In China's view, the United States' claim concerning these components of China's TRQs fails on three related grounds.

72. First, the United States has challenged China's end-use requirements and penalties under a requirement listed in the first sentence of Paragraph 116, which addresses the *administration* of China's TRQs. For the reasons China explains in Part 2, China's end-use requirements and penalties are not *administrative* in nature, but instead are *substantive* rules that form part of the TRQ itself. Consequently, these components of the TRQ are not subject to challenge under the requirement to administer TRQs in a manner that would not inhibit the filling of the TRQs.

73. Second, even if end-use requirements and penalties could be properly evaluated under Paragraph 116, the United States has not demonstrated that end-use requirements and penalties inhibit the filling of the TRQs. In China's view, these measures cannot inhibit the filling of the TRQs because they do not exert a limiting effect on the quantity of in-quota imports. China elaborates on this point in Part 2.

74. Third, China's Schedule CLII indicates that imposing end-use requirements and penalties is consistent with Paragraph 116. As China explained in its responses to Panel questions, penalties for non-use are expressly required by Schedule CLII, at paragraph 6(D).[99] Had the Members felt that the imposition of penalties, whether alone or in conjunction with end-use requirements, serves to inhibit rather than encourage the filling of TRQs, it is reasonable to presume that they would not have been included in China's Schedule.

75. Similarly, Schedule CLII specifies that China may take into account "production capacity" in determining allocations.[100] Grains imported into China are typically processed prior to sale. Taking an enterprise's capacity to produce processed grains into account is only logical if enterprises are required to process grains in their own facilities. Absent this end-use requirement, there would be no purpose for collecting and considering production capacity data. As China explained in its first written submission, requiring production of processed grains in the applicant's own facilities is a reasonable means of ensuring efficient allocation of the TRQs.[101] To interpret Paragraph 116 as prohibiting measures explicitly or implicitly contemplated by Schedule CLII is to preclude a harmonious interpretation of China's obligations.

76. For these reasons, the Panel should reject the United States' challenge under Paragraph 116 to these components of China's TRQs.

[99] See China's response to Panel question No. 27, para. 77.
[100] See China's response to Panel question No. 27, para. 78.
[101] See China's first written submission, para. 126.

2. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Article XI:1 of the GATT 1994

77. The United States alleges that China's end-use requirements and penalties for non-use are inconsistent with Paragraph 116 of the *Working Party Report* because they inhibit the filling of each TRQ.[102] The United States also alleges that these end-use requirements and penalties are prohibited under Article XI:1 of the GATT 1994. The United States challenges the end-use requirements in combination with penalties and the end-use requirements *per se*.

78. China submits that its end-use requirements, whether separately or in combination with penalties for non-use, are not inconsistent with Article XI:1. First, TRQs are not subject to Article XI:1. A TRQ is not a prohibited "quantitative restriction" because it does not restrict the quantity of imports. A TRQ limits the volume of imports that may take advantage of the lower in-quota rate, but it imposes no limit on the total volume of imports that may enter once the in-quota volume is filled; out-of-quota imports are simply subject to the higher, out-of-quota rate. The Appellate Body has previously considered and rejected the proposition that TRQs are subject to Article X1:1. TRQs are "duties" subject to Article II of the GATT 1994, not "quantitative restrictions" prohibited under Article XI:1.[103]

79. Second, the end-use requirements and penalties are not subject to Article XI:1 because they are substantive conditions on access to the TRQ and therefore form part of the TRQ itself. TRQs are stepped tariffs, consisting of a lower in-quota rate and a higher out-of-quota rate. To access the in-quota rate, importers will typically need to comply with certain *administrative* procedures, such as completing and submitting applications. In addition, access to a TRQ may also be limited by certain *substantive* conditions.

80. The distinction between the substantive content of a measure of general application and its administration has been clearly drawn by the Appellate Body in the context of interpreting the scope of Article X:3(a).[104]

81. In China's view, end-use requirements and penalties are substantive rules. These measures condition access to the TRQ in the same manner that customs classification rules condition access to certain duties. As substantive rules, these measures form part of the TRQ and fall outside the scope of Article XI:1.

82. Substantive conditions of access include conditioning access based on the country of origin of the imports. For example, Members may reserve a portion of a TRQ for imports from a designated country or countries.[105] If no imports originate from a designated country, the portion of the quota reserved for that country may not be available for importation. In this way, the condition contributes to defining the amount of the quota that is available − it does not address how that quota will be administered. The consistency of this type of reservation with a Member's WTO obligations could be

[102] See United States' first written submission, para. 192.

[103] See Appellate Body Report, *EC − Bananas (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 335 (explaining that "[i]n contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I [i.e. on an MFN basis]" and that "Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions.").

[104] Appellate Body Reports, *EC − Bananas III*, para. 200 and *EC − Poultry*, para. 115.

[105] See Notification by Canada in Document G/AG/N/CAN/116, of 12 March 2018 (Conditioning access to cheese and curd by specifying that "allocation to supplying: 69.9% of the tariff rate quota (TRQ) is reserved for imports from the EU, 30.1% for imports from all other sources."); see also Notification by the United States in Document G/AG/N/USA/120, of 28 March 2018 (noting where the tariff quota quantity "does not include quantities reserved for Mexico under NAFTA"); Notification by the United States in Document G/AG/N/USA/117, of 29 September 2017 (distinguishing between "Canada and all others" with respect to country import arrangement for "[s]ugar containing products (articles containing over 10% dry weight of sugars)"). Countries may also condition access by scheduling unlimited access for particular importers. See Notification by Thailand in Document G/AG/N/THA/84 of 10 February 2017 (specifying entities that may receive unlimited quantities of "[s]oya beans, edible and inedible, whether or not broken" and "soya bean cake").

properly analysed under Article II of the GATT 1994. Another type of substantive condition of access is the specification of certain end-uses for imports. This practice is common among Members.[106]

83. End-use requirements are substantive because they define the parameters of the quota itself; if imports will not be used for the specified purpose, they will not be accessible for importation regardless of whether the applicant submits an application or complies with any other administrative procedural requirement. China considers that a useful point of reference for distinguishing substantive conditions on access from administrative procedural requirements is whether the conditions in question are set forth in the Member's schedule. For example, China's Schedule CLII provides for the imposition of penalties and also of end-use requirements, through taking account of capacity to produce processed grains.

84. The conclusion that the substantive elements of a TRQ must be examined under Article II is even stronger when, as in this case, the challenged aspects of the TRQ are set forth in the responding Member's schedule. As China discussed in its responses to Panel questions, the usage requirements and penalties for non-use are contemplated by China's Schedule CLII (and, in the case, of the penalties for non-use, are expressly required).[107] The usage restrictions and penalties for non-use therefore form part of the quota described in China's Schedule. However one defines the distinction between substance and procedure, and between which elements of a TRQ form part of the "quota" that is excluded from Article XI:1 and which do not, certainly those elements that are set forth in the Member's schedule are outside the purview of Article XI:1. Otherwise the "treatment" that a Member is *allowed* to provide under its schedule in accordance with Article II could be found to constitute a prohibited "quantitative restriction" under Article XI:1

85. In contrast to substantive conditions on access, administrative procedures pertaining to import licensing could be subject to Article XI:1. However, the question of whether evaluation under Article XI:1 is appropriate in light of the applicability of the ILP Agreement, which specifically addresses this subject, is unsettled. Past statements by the Appellate Body suggest that administrative procedures used to administer TRQs should be examined under the ILP Agreement, at least in the first instance.[108] Acknowledging the applicability of the ILP Agreement to administrative measures and the applicability of Article II to TRQs avoids the conflict between Article II and Article XI:1 that necessarily results from the United States' overly broad interpretation of Article XI:1.

86. Even if end-use requirements and penalties were properly subject to Article XI:1, the United States has not demonstrated that these requirements have a "limiting effect" on imports separate from the limiting effect of the quota itself. Such an effect must be demonstrated to establish a breach of Article XI:1.[109]

87. In *Argentina – Import Measures*, the Appellate Body observed that "not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so."[110] To violate Article XI:1, "the challenged measures themselves must limit the importation of products, and the limitation caused by other measures should not be attributed to them."[111] If elements such as the usage restrictions and penalties for non-use do not themselves "limit the

[106] See China's second written submission, para. 77.
[107] See China's response to Panel question No. 27.
[108] See Appellate Body Report, *EC – Bananas III*, para. 204. The Appellate Body explained that:
> Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

Ibid. See also China's response to Panel question No. 38, paras. 97-99.
See also Panel Report, *Turkey – Rice*, para. 7.38. The Panel held that:
> In contrast to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the provisions of the Import Licensing Agreement invoked by the United States and Articles X:1 and X:2 of the GATT 1994 deal with the administration or application of trade measures rather than with the substantive content of such measures *per se*.

Ibid. See also China's response to Panel question No. 38(a), para. 96.
[109] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[110] Appellate Body Report, *Argentina – Import Measures*, para. 5.243.
[111] Appellate Body Report, *Argentina – Import Measures*, para. 5.244 (emphasis added).

importation of products independently of the limiting effect of another restriction", then those elements "cannot be said to produce the limiting effect and, thus, [they] will not amount to a 'restriction' captured by the prohibition in Article XI:1."[112]

88. The United States has not demonstrated that the usage restrictions and penalties for non-use have a limiting effect on imports separate from the limiting effect of the quota itself. The United States offers nothing but speculation about how the existence of usage restrictions and penalties for non-use might affect the import behaviour of an individual importer.[113] In the context of a TRQ, however, the limiting effect on trade results from the aggregate limitation on imports at the in-quota tariff rate. Unless the usage restrictions and penalties for non-use cause import levels to fall below the TRQ volume, they cannot have a limiting effect on trade that is independent of the TRQ itself. The United States has presented no evidence that this is the case. Moreover, China has confirmed that the non-STE portion of each TRQ was fully utilized in 2016 and 2017, with one exception in the case of short- and medium-grain rice (which is not subject to usage restrictions and is therefore irrelevant in this context). It is therefore evident that the usage restrictions and penalties for non-use do not have an independent limiting effect on imports.

89. These considerations illustrate why the United States' reliance on cases such as *India – Quantitative Restrictions* and *Indonesia – Import Licensing* is misplaced.[114] Those disputes did not concern TRQs. In the context of a TRQ, and even accepting that TRQs can be examined under Article XI:1, the complainant must demonstrate that the challenged aspects of the TRQ have an independent limiting effect on trade. The United States has failed to do so.

V. CONCLUSION

90. For the reasons set forth in its submissions, China respectfully requests that the Panel reject the United States' claims.

_____

[112] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[113] See, e.g. United States' first written submission, para. 306.
[114] See, e.g. United States' first written submission, para. 307.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	51
Annex C-2	Integrated executive summary of the arguments of Brazil	54
Annex C-3	Integrated executive summary of the arguments of Canada	56
Annex C-4	Integrated executive summary of the arguments of Ecuador	60
Annex C-5	Integrated executive summary of the arguments of the European Union	63
Annex C-6	Integrated executive summary of the arguments of Japan	65
Annex C-7	Integrated executive summary of the arguments of Ukraine	67

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. As a major agricultural exporter,[1] Australia has a significant interest in ensuring a transparent and predictable global trading system − including the transparent and predictable operation of tariff rate quotas (TRQs) for agricultural products. This dispute raises a number of interpretative questions regarding the interaction between the administration of TRQs and: (i) paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol; as well as (ii) a number of provisions of the General Agreement on Tariffs and Trade 1994.

2. In these proceedings, Australia has focused on the interaction between the administration of TRQs and the disciplines set out in paragraph 116 of China's Working Party Report.

II. PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT, INCORPORATED INTO CHINA'S ACCESSION PROTOCOL

3. Paragraph 116 of the Working Party Report is incorporated into China's Accession Protocol and therefore contains binding obligations on China.[2] As recognised by both the panel and Appellate Body in *China − Measures Affecting Imports of Automobile Parts*, the commitments China made in these accession documents are enforceable as an integral part of the WTO Agreement.[3] China is therefore bound to administer TRQs in accordance with the commitments made in that paragraph, namely to:

> … ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ. China would apply TRQs fully in accordance with WTO rules and principles and with the provisions set out in China's Schedule of Concessions and Commitments on Goods.[4]

4. In Australia's view, China's commitments in paragraph 116 address three distinct but interrelated aspects of TRQ administration:

(i) the *basis* on which TRQs are administered ("on a transparent, predictable, uniform, fair and non-discriminatory basis");

(ii) the *manner* in which TRQs should be administered ("using clearly specified timeframes, administrative procedures and requirements"); and

(iii) the *outcome* of TRQ administration ("[to] provide effective import opportunities … [to] reflect consumer preferences and end-user demand and … [to] not inhibit filling of each TRQ").

[1] In particular, Australia is one of the leading global exporters of wheat, and the largest exporter of wheat to China. In 2017, China imported AUD$551 million HS 1001 (Wheat and meslin). Australia has been the top import source in this category since 2014: China Customs Data.

[2] See paragraph 1.2 of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"). The paragraphs listed for incorporation are contained in paragraph 342 of the Report on the Working Party of the Accession of China (WT/ACC/CHN/49) ("Working Party Report"). Paragraph 116 is listed as one of these paragraphs and is therefore incorporated into China's Accession Protocol. See also United States' first written submission, paras. 57-69.

[3] Panel Report, *China − Auto Parts*, paras 7.740-7.741; Appellate Body Report, *China − Auto Parts*, paras. 213-214.

[4] Paragraph 116, Working Party Report.

5. As treaty text, these commitments must be interpreted using principles of international treaty interpretation[5] in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties 1969* − that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[6]

(i) "ensure TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis"

6. The first tranche of commitments in paragraph 116 relates to the basis on which TRQs are administered. The ordinary meaning of the verb "to administer" is "manage as a steward; carry on or execute (an office, affairs etc.)".[7] The breadth of this term − and the lack of any textual qualification − indicates that it encompasses the full spectrum of activities associated with the administration of TRQs.

7. With respect to object and purpose, Australia observes that TRQs and the disciplines placed upon them arose from the commitment of Members in the Uruguay Round to phase out non-tariff barriers, such as quantitative restrictions, in favour of "tariffication". In this way, TRQs are permitted under WTO rules because they are recognised as a tool for Members to move towards greater trade liberalisation. However, to function as a tool for liberalisation, Members must administer TRQs consistently with the relevant prescribed disciplines. The commitments in paragraph 116 of China's Working Party Report were included to require China to undertake an express "commitment to administer TRQs in a simple, timely, predictable, uniform, non-discriminatory and non- trade restrictive manner, and in a way that would not cause trade distortions".[8]

8. In Australia's view, the breadth and context of the term "to administer", together with the object and purpose of the disciplines governing the administration of TRQs − and of paragraph 116 in China's Working Party Report − indicates that the commitments in this paragraph apply to *all* administrative actions and legal instruments associated with the allocation and reallocation of TRQs.[9]

9. A "basis" is "a determining principle; a set of underlying or agreed principles".[10] In Australia's view, this term indicates that all actions and legal instruments within the broad scope of "administration" (discussed above) must be *determined by* transparency, predictability, uniformity, fairness and non-discrimination.

10. The object and purpose of the disciplines governing TRQ administration and of paragraph 116 of China's Working Party Report in particular (discussed above) further support this interpretation.

11. Australia considers that any aspects of TRQ administration not based on or determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination, or that contradict these determining principles, would therefore not be consistent with this commitment.

(ii) "using clearly specified timeframes, administrative procedures and requirements"

12. The second tranche of commitments in paragraph 116 relates to the manner in which TRQs must be administered − that is, by having the relevant timeframes, administrative procedures and requirements associated with the allocation and reallocation of TRQs "clearly specified". The ordinary meaning of "clearly" is "distinctly; plainly; manifestly, obviously".[11] The verb "to specify" is defined as "mention or name (a thing, that) explicitly; state categorically or explicitly".[12] These terms indicate that the timeframes, administrative procedures and requirements associated with TRQ administration must be stated plainly and explicitly.

[5] In accordance with Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.
[6] Article 31(1), Vienna Convention on the Law of Treaties 1969.
[7] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 29.
[8] Paragraph 112, Working Party Report.
[9] United States' first written submission, paras. 66-69.
[10] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 194.
[11] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 427.
[12] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 2, 2007, page 2944.

13. In Australia's view, in light of the object and purpose of the disciplines governing TRQ administration and of paragraph 116, the requirement to "clearly specify" these aspects of TRQ administration is to ensure that the audience that relies on this information can both obtain that information *and* understand what is required.

14. Australia considers that this commitment therefore requires that information on TRQ timeframes, administrative procedures and requirements must be explicit, accessible and comprehensible for the intended audience.

(iii) *"that would provide effective import opportunities; that would reflect consumer preferences* and end-user demand and that would not inhibit filling of each TRQ"

15. The third tranche of commitments in paragraph 116 makes clear that the administration of TRQs, in accordance with the prescribed basis and manner, should ensure outcomes that, among other things, do not inhibit the filling of each TRQ.

16. The ordinary meaning of "inhibit" is to "restrain, prevent";[13] and "fill" means to "make or become full".[14] In Australia's view, this indicates that a Member's administration of TRQs *must not prevent* the TRQ from being "full" − that is, from being fully exhausted.

17. In Australia's view, taken together, the individual prescribed commitments in paragraph 116 therefore create a broad and comprehensive obligation for China to administer TRQs on a specific basis, in a specific manner, to ensure specific outcomes.

18. Applying the relevant legal framework to the context of this dispute, Australia considers that the Panel will need to determine whether not complying with any one of the commitments in paragraph 116 amounts to a breach of China's obligation. In particular, Australia observes that the facts before the Panel indicate China's TRQs for wheat, corn and rice have been underfilled over several years.[15] Australia considers that the Panel will therefore need to examine:

- whether the mere underfilling of a TRQ alone determines that China's TRQ administration has inhibited the filling of each TRQ;
- whether inhibiting the filling of each TRQ alone amounts to a breach of paragraph 116; or
- whether a breach of paragraph 116 is only established if the specific basis and/or the specific manner in which China administers its TRQs has inhibited the filling of each TRQ.

III. CONCLUSION

19. In summary, Australia submits that China's distinct but interrelated commitments in paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol, create a broad and comprehensive obligation for China to ensure all actions and legal instruments associated with the allocation and reallocation of TRQs are administered:

- on a specific basis (determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination);
- in a specific manner (making explicit, accessible and comprehensible the information on TRQ timeframes, administrative procedures and requirements); and
- to ensure specific outcomes (including to ensure the filling of TRQs is not prevented).

20. We thank the Panel for the opportunity to submit these views.

[13] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 1384.
[14] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 962.
[15] United States' first written submission, paras. 42-51.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. Brazil interprets the overall object and purpose of the set of different obligations under Paragraph 116 of China's Working Party Report as aiming for the reduction of the additional burden imposed on exporter Members by Tariff Rate Quotas (TRQs). Conforming to Article XIII:2 of the GATT, in applying import restrictions, Members "shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".

2. Moreover, Brazil understands that Paragraph 116 determines different types of obligations, which should be addressed separately on its own terms. The reason for this approach is that the violation of even one of these obligations will most likely affect both the overall transparent, predictable and fair basis of the TRQ's administration and its final outcome. In this sense, even if in practice the totality of the TRQ is filled, there may still be a violation of the different obligations set out in the provision, as the competitive opportunities of exporters would be nevertheless affected. Brazil thus believes that the Panel should analyze each obligation on its own terms. Some of those obligations are commented below.

a. TRANSPARENCY

3. Brazil believes that the definition of "transparency" as the "ease of assessment of information" should provide useful guidance in the present case. Brazil thus understands that the test to be applied by the Panel should comprise the prompt availability of information to an exporter and the ease of understanding how the domestic authorities implement the rules of administration of the TRQs. In that sense, it is Brazil's view that the obligation to readily publicize detailed information about the amounts allocated under the TRQs and the legal/administrative reasoning justifying the actual distribution of the quotas are an integral part of the obligation of administering TRQs in a transparent manner.

b. PREDICTABILITY

4. Paragraph 116 of the Working Party Report establishes China's obligation of administering its TRQs in a "predictable" manner. As defined by the United States, "the term 'predictable', in context, supports an interpretation that China must administer its TRQs through a process or system of rules or procedures such that applicants can easily predict or anticipate *how* decisions regarding TRQ administration, including allocation and reallocation, will be made". Brazil agrees that this is a useful test for the Panel to apply when assessing the conformity of China's administration of its grains TRQs under the predictability obligation provided by Paragraph 116.

5. Brazil does not believe that the obligations enshrined in Paragraph 116 imply "the elimination of any element of discretion from the allocation process". Such discretion, however, is not unbounded, as it must be subject to an obligation that the administration of −in the present dispute − TRQs is performed in a uniform, impartial, reasonable manner and, in the present case, in a way that is transparent, predictable and fair.

c. EFFECTS OF THE ADMINISTRATION OF TRQs

6. As regards the effects resulting from the absence of transparency and predictability in Members' domestic rules for the importation of agricultural products, Brazil notes that the system of tariff quotas imposes transaction costs to the exporter. Therefore, the principles of transparency, predictability, uniformity, fairness and non-discrimination should be duly respected by the Members who utilize TRQs so as to avoid the imposition of additional burdens over Members that export agricultural products.

II. APPLICATION OF ARTICLE XI OF THE GATT TO THE ADMINISTRATION OF TRQs

7. Brazil believes that Article XI:1 of the GATT encompasses a broad range of measures, for in accordance with said provision no Member shall institute or maintain prohibitions or restrictions other than duties, taxes or other charges "whether made effective through quotas, import or export licenses *or other measures*". Therefore, Brazil does not see why *a priori* these measures could not fall within the scope of Article XI:1.

8. While the TRQs can be considered duties and thus not covered by Article XI:1 of the GATT, a measure unrelated to the TRQ itself, which restricts access to a lower tariff bound in the schedule can be considered a "restriction on the importation of a product" within the meaning of the provision, as importers would have their access to the market hindered. Such measures restrict access much in the same way of other requirements which have been found to be inconsistent with Article XI:1 of the GATT, such as the requirements in the panel in *India − Quantitative Restrictions* where an import measure that required goods to be imported only by the "actual user" violated Article XI:1 and the prohibitions on importers from trading and/or transferring imported products in *Indonesia − Import Licensing* likewise.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute raises issues on the interpretation of provisions under the GATT 1994 and China's Protocol of Accession regarding the administration of tariff rate quotas (TRQs). Canada appreciates the opportunity it has had to provide its views on these issues and provides the following summary of its key arguments.

II. INTERPRETATION UNDER ARTICLE X:3(A) OF THE GATT 1994

2. Article X:3(a) requires that a Member administer its "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" in a manner that is uniform, impartial and reasonable[1]. There are three key elements that should direct the Panel's analysis in assessing a claim under Article X:3(a).

3. First, the Panel must consider whether the matter at issue involves measures described in Article X:1 and therefore fall within the scope of Article X:3(a). Article X:1 describes a broad range of measures relevant to trade including those "pertaining to … rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports." In Canada's view, Article X:3(a) applies to the administration of a wide range of measures, including requirements for importation, that could affect trade and traders.

4. Second, the Panel must focus its analysis on assessing the Member's "administration"[2] of the relevant legal instruments. Article X:3(a) focuses on the manner in which Members administer or apply the legal instruments rather than disciplining the substantive content of the measure[3].

5. Nonetheless, as clarified by the Appellate Body in *EC – Selected Customs Matters*, it is possible to challenge under Article X:3(a) "the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1"[4]. To the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1"[5].

6. Third, the Panel must examine whether the respondent administers the legal instruments in a manner that is uniform, impartial or reasonable. These terms represent legally independent obligations[6]; a failure to comply with one or more of these obligations will result in an inconsistency with Article X:3(a).

7. Canada notes that Article X:3(a) does not prescribe in detail how a Member must administer its trade measures in order to meet its requirements. Article X:3(a) allows some discretion for the Member to administer its trade measures "in the manner it deems fit", although such discretion must be exercised in a way that respects "certain minimum standards for transparency and procedural fairness" [7]. The Panel must ultimately "exercise a balanced judgment" between the "traders' fundamental right" to minimum standards of transparency and procedural fairness, and the

[1] Panel Reports, *US – COOL*, para. 7.812.
[2] The Appellate Body has described "administration" as "putting into practical effect, or applying, a legal instrument of the kind described in Article X:1." See Appellate Body Report, *EC – Selected Customs Matters*, para. 224.
[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 199.
[4] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.
[5] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873.
[6] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.867.
[7] Panel Reports, *US-COOL*, para. 7.861.

"sovereign right" afforded to Members to manage the manner in which they administer domestic measures[8].

8. Previous panel reports provide some guidance. For example, a vague application criterion, which was interpreted by numerous departments, without any guidance, has been found to necessarily lead to an unreasonable administration inconsistent with Article X:3(a)[9] because applications with equal descriptions could succeed or fail based on interpretations applied by officials[10].

9. Other panels have noted that if the measures were applied in a way that negatively affects traders' commercial interests, for example through a procedure that "inherently contains the possibility of revealing confidential business information", this may support a finding of inconsistency with Article X:3(a)[11].

10. Finally Canada notes that while the scope of Article X:3(a) is broad, bringing a claim under Article X:3(a) should be undertaken cautiously and it must be supported by "solid evidence" in reflection of the "gravity of the accusations" inherent in the claim under Article X:3(a)[12].

11. In Canada's view, China's administration of the TRQs falls within the scope of Article X:3(a) and therefore the panel should follow the guidance provided in previous panel reports in assessing whether, based on the evidence before it, the application criteria are unreasonable due to vagueness and application by numerous departments and agencies without guidance and whether the administration of the State Trading Portion of the TRQ is unreasonable on the basis that it negatively affects the competitive situation of the applicant.

III. INTERPRETATION OF THE OBLIGATION UNDER PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT

12. In Canada's view, the obligations under paragraph 116 of China's Working Party Report can be divided into three key elements: (1) the TRQ must be administered on a basis that is transparent, predictable and fair; (2) the timeframes, administrative procedures and requirements must be clearly specified; and (3) these clearly specified timeframes, administrative procedures and requirements must provide for effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit filling of the TRQ. Within each of these three elements are specific obligations that must be met.

13. Under the first element, China must fulfil all three requirements - to administer the TRQ on a transparent, predictable and fair basis; a failure to fulfil any one of these requirements will result in a failure to comply with the obligation under paragraph 116.

14. Canada notes that there is some overlap between the obligations under the first element of paragraph 116, which requires China to administer the TRQ on a transparent, predictable and fair basis, and Article X:3(a) of the GATT 1994, which requires a Member to administer its laws, regulations, decisions and rulings of general application in a manner that is uniform, impartial and reasonable. As such, the legal standard adopted under Article X:3(a) can provide guidance with respect to the legal standard applied under the first element of paragraph 116.

15. Under the second element of paragraph 116, China is required to set out timeframes and administrative procedures in a manner that is explicit and understandable to the traders that are required to follow and use these procedures.

16. With respect to the third element of paragraph 116, this requires ensuring that the clearly specified timeframes and administrative procedures and requirements are conducive to effective

[8] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.874.
[9] Panel Reports, *China – Raw Materials*, paras. 7.744-7.746.
[10] Panel Reports, *China – Raw Materials*, para. 7.743.
[11] Panel Report, *Argentina – Hides and Leather*, para. 11.94.
[12] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

import opportunities under the TRQs, reflect consumer preferences and end-user demand, and do not inhibit filling of the TRQs.

17. A failure to meet the specific obligations in any one of these three elements would result in a failure to meet the obligations under paragraph 116.

IV. INTERPRETATION OF ARTICLE XIII:3(B)

18. Article XIII:3(b) contains a publication requirement that requires a Member applying a quota, or by virtue of Article XIII:5 a TRQ, to publish the quantity or value of the products that will be permitted for import and any change to this figure.

19. In Canada's view, with respect to a TRQ, this provision requires Members to publish the total quantity or value of the goods that the Member is permitting to be imported at a within-quota rate for a specified future period, and if there is any change to the quantity or value that is being permitted to be imported, the Member must publish the revised number.

20. In Canada's view, the obligation under Article XIII:3(b) goes beyond publishing the TRQ quantities set out in the Member's schedule and publishing any changes made to the schedule with respect to these quantities, as this would be of limited utility and is already effectively covered under the Decision on the Procedures for the Modification and Rectification of Schedules.

21. However, in Canada's view the obligation under Article XIII:3(b) does extend as far as requiring that the Member continually publish or notify each time an allocation is granted, returned or reallocated. Reading in this requirement would be more prescriptive than what is contemplated under Article XIII:3(b).

22. Canada also notes that the specific information that needs to be published or notified will depend to some extent on the TRQ regime and system of allocation. The outcome required under Article XIII:3(b) is that the relevant traders can obtain information on the amount of quota available for allocation each year.

V. INTERPRETATION OF GATT ARTICLE XI

23. Canada recognizes that TRQs are not prohibited by Article XI:1, as noted by the Appellate Body in *EC − Bananas III (Article 21.5 − US)* and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I[13]. In addition, TRQs must be consistent with Article II of the GATT 1994 such that "in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff must not fall short of the scheduled amount"[14].

24. In Canada's view, to the extent that the TRQ is subject to conditions or requirements set out in the Member's schedule, those conditions are permitted; however, the implementation or administration of the TRQ and related conditions are subject to other applicable provisions of the GATT 1994 such as Article XI:1 and other relevant WTO agreements such as the Import Licensing Agreement. TRQ administration, which involves granting of approval to import at a lower duty rate, is a type of import licensing within the meaning of Article XI:1.

25. Therefore, the administration of the TRQs − separate from the underlying TRQs which are permissible − is still governed by the disciplines of Article XI:1 and Members are required to refrain from administering their TRQs in a way that could restrict imports.

26. Article XI:1 disciplines measures, whether considered individually or taken together, that have a limiting effect on importation or exportation. Thus, a panel could find that a single specific measure is inconsistent with Article XI:1 or that the effect of a number of measures, taken together, results in a quantitative restriction.

[13] Appellate Body Reports, EC − Bananas III *(Article 21.5 − US)*, para. 335.
[14] Ibid.

A. State-Trading portion of TRQs

27. In Canada's view, the Panel should, in assessing whether China's TRQ administration is consistent with Article XI:1, consider whether it has a "limiting effect on importation by negatively affecting the competitive opportunities available"[15]. In conducting this analysis, Canada invites the Panel to consider the guidance found in the panel's report in *Argentina − Import Measures*. While Canada recognizes that *Argentina − Import Measures* did not involve TRQ administration, both that case and this matter involve administrative procedures that can be characterized as an import licensing system as defined in paragraph 1 of Article 1 of the Import Licensing Agreement.

28. In Canada's view, the Panel should consider whether, based on the evidence before it, China's administration of the state-trading portion of the TRQs cumulatively restricts imports contrary to Article XI:1 by i) creating uncertainty regarding the applicant's ability to import the full share of the quota that it has been assigned; ii) imposing a significant burden on the applicants that is unrelated to their normal importing activity; and iii) restricting market access for imported products by preventing the applicants from importing as much as they desire or need.

B. User Requirements

29. The United States argues that China imposes user requirements which require the applicant to self-use its share of the TRQ allocation; to process the imported goods itself; and in the case of an enterprise that owns multiple processing plants, to require each processing plant to apply for and use the TRQ in its own name[16]. The applicant could be subject to penalties for non-use of its allocated share of the TRQ[17].

30. In *Indonesia − Import Licensing Regimes*, the panel found that the requirements that forced the importers "to either use all the products they import for processing or find alternative ways to dispose of unused products that do not involve selling or transferring them" constituted a restriction that had a limiting effect on importation contrary to Article XI:1[18]. In Canada's view, if the Panel finds that the applicants are subject to the user requirements as described by the United States, the Panel could reach a similar conclusion in this case.

31. With respect to penalties for non-use, Canada notes that the right to impose these are set out in China's schedule and therefore the imposition of penalties for non-use is permitted as part of China's tariff schedule. However, any additional details relating to the administration of the penalties and usage requirements that are set out outside of China's tariff schedule[19] can constitute additional conditions and requirements that form part of the regime for administering the TRQ. These additional administrative procedures and requirements, which are not included in China's schedule but designed to implement the TRQ, are part of the administrative procedures or licensing regime subject to Article XI:1.

32. Further, in Canada's view, to the extent that the cumulative effect of more than one requirement of the import licensing regime results in a restriction in addition to the underlying TRQ, the requirements could collectively result in a violation of Article XI:1.

VI. CONCLUSION

33. Canada thanks the Panel for the opportunity to comment on the legal issues raised in this dispute.

[15] Panel Report, *Colombia − Ports of Entry*, para. 7.257.
[16] United States' first written submission, paras. 303 and 304.
[17] United States' first written submission, paras. 306 and 308.
[18] Panel Report, *Indonesia − Import Licensing Regimes*, paras. 7.198 - 7.200.
[19] See for example *2003 Provisional Measures*, Article 23 (Exhibit US-11); 2017 *Allocation Notice*, Article V (Exhibit US-15).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL

Ecuador considers that the Panel should take into account both the literal and teleological interpretation of the multilateral rules, as well as the references of the existing jurisprudence on the provisions in which the Complainant has based its allegations.

The Republic of Ecuador considers that this dispute has a high relevance for the country in terms of administration of tariff quotas and the treatment that other countries give to them in the international arena. Similarly, Ecuador strongly recommends and requests the Panel to review in detail the scope of application of the provisions invoked by the Claimant and Respondent, and the specific annotations provided within this submission.

Ecuador believes that the Panel should take into account previous cases which had set forth specific recommendations and findings regarding the application of tariff quotas, as well as the existing jurisprudence.

Ecuador recommends that the Panel should take into account while analyzing the submissions, regulations, and laws, the principle good faith, which is a fundamental principle of international law in general, and of international trade law in particular, thus, a basic tenant of the WTO´s Dispute Settlement System and in the light of its object, context, purpose and all of the rules of interpretation established in the Vienna Convention on the Law of the Treaties. In that regard, the Panel is in the need to assess such determinations by interpreting all the agreements cited in the request for consultations through the rules of general interpretation set out in the Vienna Convention on the Law of Treaties.

2 REGARDING VIOLATION OF PART I, PARAGRAPH **1.2 OF CHINA'S PROT**OCOL OF ACCESSION

1. Ecuador reaffirms that Dispute Settlement System (DSS) adopted by the WTO and all its Members is based upon one of the most important Principles in the International Law i.e. "Good Faith", therefore all the procedures under the DSS should be based considered by "Good Faith".

2. "Not only action but also the absence of action, and in particular the failure to inform about the applicable trade laws, regulations, procedures and practices, promptly and accurate, may constitute a formidable barrier to trade."[1] In this regard, the United States alleges that China violated Part I, para. 1.2 of the Protocol of Accession because the basis for China´s TRQ[2] is not (1) transparent; (2) predictable; or (3) fair; because its grains TRQs are not administered using (4) clearly specified administrative procedures, or (5) clearly specified requirements; this on behalf (6) using timeframes, administrative procedures, and requirements that would not inhibit the filling of each TRQ. Therefore the United States reaffirms that TRQs for corn, wheat, and rice are not fulfilling the statement from Part I, para 1.2 of the Protocol of Accession.

3. On the other hand, China disproves the claim held by United States by saying that China's method of distributing allocations is not automatic. "China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process."[3] China ensures certain obligations such as transparent, predictable, uniform, fair and non-discriminatory basis, clearly specified timeframes, administrative procedures and requirements. China also bases its argument in the Panel Report of Thailand –

[1] Van Den Bossche. The law and policy of the World Trade Organization. Cambridge. Second Edition. 2008.

[2] "a tariff rate quota involves the application of a higher tariff rate to imported goods after a specific quantity of the ítem has entered the country at a lower prevailing rate" – Panel Report, US- Line Pipe, para. 7.18.

[3] Para. 51. China's first written submission (DS517)

Cigarettes in order to exercise "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[4]

3 REGARDING VIOLATION OF ARTICLE X:3 (A) OF THE GATT 1994

1. The United States claims that China attempts to Article X:3(a) of the GATT 1994 because China's TRQ administration is not reasonable. China responded that the United States must demonstrate that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQ.

2. Article X:3 (a) of the GATT 1994 mentions "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

3. Regarding to the term "shall administer" the Panel in the case EC-Bananas III agreed that the text of the Article X:3(a) indicates that the requirements of uniformity, impartiality and reasonableness do not apply to the laws, regulations, decisions and rulings themselves but rather to the administration of those laws, regulations, decisions and rulings.[5] While in Argentina- Hides and Leather, the Panel found that there is no requirement in Article X:3(a) that it apply only to "unwritten" rules.[6] Furthermore, talking about the term "uniform" the jurisprudence agrees that uniform is understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision.[7]

4. On the same line, by "impartial" the jurisprudence alleges that "impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, [8]unbiased and unprejudiced manner."[9] Finally, by "reasonable" the case China- Raw Materials the Panel concluded that the lack of any definition, guidelines or standards poses a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

4 REGARDING VIOLATION OF ARTICLE XI:1 OF THE GATT 1994

1. The United States claims that China's administration of its TRQs for wheat, rice, and corn is inconsistent Article XI: 1 of the GATT 1994, because it imposes impermissible "restrictions" on the importation of wheat, rice, and corn. Article XI: 1 of the GATT 1994 bars prohibitions or restrictions on importation or exportation other than through duties, taxes, or other charges. The United States alleges that China's process administration creates commercial uncertainty limiting importation and its TRQ administration use restrictions on products imported under the TRQ.

2. China alleges that "no evidence of the quantification of the effects of a measure alleged to restrict imported products is required to demonstrate a limitation on the importation of products under Article XI:1. In determining whether a measure is inconsistent with Article XI:1"[10] and reaffirms that the restriction on the transfer of licenses, usage requirements, and penalties must be examined within the fact, as China assures, that they are designed and structured to increase competitive opportunities for imports and promote the filling of each TRQ.

3. It is a lot of jurisprudence in cases on the interpretation of the Article XI:1 of the GATT 1994. In the case Japan – Semi-conductors, the Panel established that non-binding measures, restricting the export of certain semi-conductors at below-cost were nevertheless restrictions.[11] However, the Panel in EEC- Minimum Import Prices established that in the case of automatic import licensing constituted a restriction of the type meant to fall under the purview of Article XI:1.[12] Nonetheless,

[4] Panel Report, *Thailand – Cigarettes*, para. 7.924. "A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions."

[5] Appellate Body Report EC-Bananas. para 200

[6] Panel Report. Argentina- Hides and leather. para. XI.739

[7] Appellate Body Report EC – Selected Customs Matters. para 224

[8] Panel Report China- Raw Materials. para. 7743

[9] Panel Report Thailand – Cigarettes. Para. VII.899

[10] Chinas first written submission (DS517) para. 144

[11] Panel Report. Japan-Semiconductors. Para 106.

[12] Panel Report EEC- Minimum Import Prices. Para. 4.1

the case Brazil- Retreaded Tyres the Panel concluded that "what is important in considering whether a measure falls within the types of measures covered by Article XI:1 is the nature of the measure.[13]

5 REGARDING VIOLATION OF ARTICLE XIII:3 (B) OF THE GATT 1994

1. The United States assure that China failed in providing "meaningful" information to the public regarding actual TRQ allocation at the time of allocation, at the time unused quota amounts are returned, and at the time of reallocation.[14] At last, the United States reaffirms that China maintains an import prohibition or restriction other than duties, taxes, or other charges, through administrative actions creating a limitation on importation, violating with the Article XIII:3(b) of the GATT 1994.

2. China refutes by saying that the article invoked refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows − "which will be permitted to be imported" − must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.[15]

3. It is no existent jurisprudence or related to the interpretation of Article XIII: 3(b).

[13] Panel Report Brazil – Retreaded Tyres. Para. 7.361
[14] Paraphrase. para. 56.United States first written submission (DS517)
[15] Paraphrase. Para 85. China's first written submission (DS517)

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. As a preliminary matter, the EU submits that the Panel's findings as regards Paragraph 116 of the Working Party Report, as incorporated into China's Protocol of Accession to the WTO will be sufficient to solve this dispute because Article X:3(a) of the GATT 1994 and Paragraph 116 impose broadly overlapping obligations and Paragraph 116 appears to be the more specific provision. Hence, the Panel should exercise judicial economy on the claims raised by the US concerning Article X:3(a).

2. Paragraph 116 concerns all actions or omissions by which China manages, runs, or carries out its TRQs regime, whether they concern concrete punctual actions or omissions, or the guiding principles of that regime, including the legal instruments that regulate the administration of the TRQs.

3. The various obligations contained in Paragraph 116 relate to the same matter, i.e. the administration of the TRQs regime and they all respond to the same concerns raised by WTO Members. It is logical to expect that these obligations may sometimes overlap and may impart meaning to each other.

4. With regard to the Basic Criteria, and the Allocation principles that must be fulfilled in order to receive an allocation under the TRQs at issue, as well as the and "public comment process", China's explanations tend to confirm that China does not administer these TRQs in compliance with Paragraph 116. Indeed, China has relied on how those criteria, principles and process are applied "in practice", but has not demonstrated that this practice is set out in a clear, transparent and predictable way. Rather, China has invoked the apparently unlimited latitude for the NDRC to change that practice as it sees fit.

5. Moreover, the EU has pointed to a rather manifest disconnect between various parts of China's schedule, which presuppose that the portions of the tariff-quota reserved for importation through STE should be allocated to different applicants, and China's defence in the present case, according to which the STE portions of the TRQs are allocated entirely to COFCO.

6. With regard to the Information concerning allocation and reallocation the EU considers that if some information must be published pursuant to paragraph 3(b), together with paragraph 5 of Articles XIII of the GATT 1994, then it is not necessary to examine if the same information requirement can also be derived by more general provisions.

7. In keeping with the object and purpose of the GATT, Article XIII:3 must be interpreted as obliging the Member which administer a TRQ to give public notice of both the total amount of permitted imports (as initially fixed by that Member) and of any change in such amount. Thus, in the present case China should give public notice of the total amount authorized for import on the TRQ certificates issued to selected applicants during the allocation process, the amounts returned by 15 September and those authorized following the reallocation process.

8. On the other hand, the EU considers that neither Paragraph 116 nor Article X:3(a) of the GATT 1994 can be interpreted as requiring China to make public the identity of TRQ certificate holders, and the amount allocated or reallocated to each of them.

9. China's explanations concerning the allocation process for the state trading portion of the TRQs raise serious concerns that China's allocation system could be incompatible with its WTO obligations. First, the STE portion of each TRQ is allocated to COFCO according to undisclosed criteria, and therefore in violation of Paragraph 116. Second, the explanation provided by China seems to be at odds with China's commitments under paragraphs 6.A, 6.B, 6.C of Section I B and note 1of its Schedule.

10. With regard to the usage restrictions and penalties for non-use applied by China, the EU would like to stress that it agrees with China that the usage restrictions and penalties for non-use cited by the US fall outside the scope of Article XI:1 of the GATT 1994, because Article XI:1 of the GATT 1994 does not apply to TRQs. Indeed, TRQs are not "quantitative import restrictions" within the meaning of Article XI:1 of the GATT 1994, but tariff measures.

11. Many Members have bound in their Schedules TRQs or unlimited tariff concessions which are subject to an end-use condition. The possibility to provide for certain usage conditions may encourage Members to make concessions that they would not make otherwise. If Article XI:1 would apply to those usage restrictions, Members would be deterred from making further concessions.

12. Similarly, the processing requirement is not part of the "administration" of the TRQs within the meaning of Paragraph 116, but a substantive condition.

13. Finally, with regard to the penalties for the non-use of TRQs, the EU shares China's view that this type of measures may contribute to a more efficient and effective use of the TRQs and therefore comply with Paragraph 116, provided the penalties are not disproportionate or applied inconsistently. China has confirmed those penalties are not applied to COFCO with respect to the non-use of the STE portion of the TRQs, which is allocated to it.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. LEGAL NATURE OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. With respect to the legal nature of China's obligations under Paragraph 116 of the Working Party Report, Paragraph 116 provides that "China would ensure that TRQs were administered on a transparent, predictable, [… and] fair [...] basis using clearly specified timeframes, administrative procedures and requirements [...] that would not inhibit the filling of each TRQ." In the same paragraph, it is also provided that "China would apply TRQs fully in accordance with WTO rules and principles."

2. Paragraph 116 is incorporated into China's Accession Protocol, which, in turn, is incorporated into the WTO Agreement. Specifically, Paragraph 1.2 of the Protocol states that the Protocol "shall be an integral part of the WTO Agreement" and therefore contains binding obligations for China. Consequently, any failure by China to administer its TRQs in a manner consistent with its commitment under Paragraph 116 would constitute a breach of its WTO obligations.

3. In this dispute, the United States argues that China's administration of its grains TRQs is inconsistent with Paragraph 116 of the Working Party Report, as well as Articles X:3(a), XI:1, and XIII:3(b) of the GATT 1994.[1] While there may be overlapping obligations between Paragraph 116 and the relevant provisions of the GATT 1994, Japan observes that China's obligations under Paragraph 116 are not less stringent than those provided under the provisions of the GATT 1994. Thus, the Panel should examine if China meets the requirements stipulated under Paragraph 116 in order to examine whether China's administration of its grains TRQs is inconsistent with its obligations under the WTO agreements.

II. INTERPRETATION OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

4. With respect to the interpretation of China's obligations under Paragraph 116 of the Working Party Report, Japan is of the view that the three following considerations should be taken into account.

5. First, the United States argues that Paragraph 116 contains six "related but independent obligations" or "related but distinct commitments", and that "failure by China to administer TRQs consistent with any of these commitments represents a distinct breach."[2] In response to Panel's question No. 1, subparagraph (a), in Japan's view, the legal standard under each of the six obligations is particular to China's obligations regarding its administration of TRQs under Paragraph 116. Based on this understanding, Japan considers that the legal standards under the six obligations may rest on common elements such as "transparent basis", as "transparent basis" would be essential in examining other elements cited in Paragraph 116. At the same time, other elements may have differences with respect to the way evaluation is made of relevant aspects of China's TRQs administration. In response to the Panel's question No. 1, subparagraph (b), Japan is of the view that failure by China to administer its TRQs in a manner consistent with any of its commitments including those found in Paragraph 116 means that China is in breach of its WTO obligations.

6. Second, in response to the Panel's question No. 2, per paragraph cited by the Panel (para. 144), Japan recognizes that the European Union submits that "the processing requirement is not part of the 'administration' of the TRQs within the meaning of Paragraph 116 of the Working Party Report", and, as the Panel's question describes, that it is "therefore not susceptible to a challenge under Paragraph 116 of China's Working Party Report."[3] Japan also considers that the processing

[1] United States' first written submission, paras. 5-6.
[2] United States' first written submission, paras. 63-64.
[3] European Union's third party submission, para. 144.

requirement is not part of the administration of TRQs within the meaning of Paragraph 116, as argued by the European Union in its submission.

7. Third, as a general matter, Japan considers that TRQs are "import measures" rather than traditional "quantitative restrictions" such as quotas or bans. This is because they do not prohibit or restrict the quantity of imports, but they rather apply a lower tariff for a certain volume of imports and improve market access. In this regard, the Appellate Body stated in *EC − Bananas III* that "tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I".[4] Therefore, Japan is of the view that there may be differences among Member's import measures such as TRQs as there may be differences among Members in terms of their market structure, business practice and so on. However, such differences must remain within the confines of the WTO Agreements.

[4] Appellate Body Report, *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 - United States)*, para. 335.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

I. INTRODUCTION

Mr. Chairperson, distinguished Members of the Panel,

1. Ukraine welcomes this opportunity to present its views to the Panel concerning the administration of tariff rate quotas ("TRQs") for grains by the People's Republic of China ("China") and its correspondence with the relevant provisions of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

2. As a third party, Ukraine has a systemic and trade interest in a proper and consistent interpretation of the provisions of the World Trade Organization ("WTO") covered agreements, in particular the GATT 1994. Ukraine will focus on some key issues relating to the interpretation of Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 in its oral statement. Ukraine clarifies that it does not have any specific views on the factual aspects of the case.

II. ARGUMENTS

Article X:3(a) of the GATT 1994

3. In paras. 223-266 of its First Written Submission, the United States argues that China's administration of its TRQs for grains is incompatible with China's obligations under Article X:3(a) of the GATT 1994 because of numerous violations of reasonableness requirement of Article X:3(a).

4. In turn, China claims that the United States has not demonstrated that the alleged vagueness of eligibility criteria and principles for allocation necessarily results in an unreasonable administration of the grains TRQs.[1] Ukraine would like to highlight the following case law in this regard.

5. The panel in Thailand − Cigarettes (Philippines) stipulated that the administration under Article X:3(a) "includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation",[2] including administrative processes leading to administrative decisions. Thus, it is essential for the complainant to show how and why "certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument" provided in Article X:1.[3]

6. In Dominican Republic − Import and Sale of Cigarettes case, the panel stated that requirements of Article X:3(a) such as uniformity, impartiality, and reasonableness are not cumulative[4] which means that it is enough to demonstrate violation of one requirement to establish violation of Article X:3(a). On the other hand, in order to comply with Article X:3(a) it is necessary to fulfil all three requirements.[5]

7. The United States claims that China's administration of grains TRQs is not reasonable.[6] In this regard, in US − COOL, the panel stipulated that "reasonable" administration under Article X:3(a) "entails a consideration of factual circumstances specific to each case."[7]

8. Notwithstanding the above-mentioned reasoning of the panel regarding assessment on the case-by-case basis whether administration is reasonable, Ukraine believes that in any case "rigorous

* Ukraine has requested that its Oral Statement serve as Integrated Executive Summary.
[1] China's First Written Submission, para. 29.
[2] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.873.
[3] Ibid.
[4] Panel Report, *Dominican Republic − Import and Sale of Cigarettes*, para. 7.383.
[5] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.867.
[6] US' First Written Submission, para. 223.
[7] Panel Report, *US − COOL*, para. 7.851.

compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure"[8] and this is for the respondent to substantiate that the administration of the measure is conducted in uniform, impartial, and reasonable manner.

Article XIII:3(b) of the GATT 1994

9. Realizing that there is no interpretation of Article XIII:3(b) of the GATT 1994 up to date, Ukraine draws the Panel's attention to the customary rules of interpretation of public international law available under Article 3.2 of the Dispute Settlement Understanding ("DSU") which are codified in the Vienna Convention on the Law of Treaties, namely Articles 31-33 thereof.

10. Ukraine believes that special attention should be given to the interpretation of the phrases "notice of the total quantity or value of the product or products" and "any change in such quantity or value" of Article XIII:3(b), bearing in mind that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[9]

Article XI:1 of the GATT 1994

11. Article XI:1 of the GATT 1994 was already interpreted by the preceding panels and Appellate Body regarding application of TRQs.[10]

12. Nevertheless, panel reports are binding between the parties for the particular dispute[11] and the determination whether a measure constitutes a breach of member's obligations under the WTO Agreements should be made on a case-by-case basis,[12] taking account of all relevant facts.

13. In Article XI:1 the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests that the scope of Article XI:1 covers a measure through which a prohibition or restriction is produced or becomes operative.

14. Thus, the Panel in this case is not prevented from examining whether China's TRQs administration is a measure through which "impermissible restrictions on the importation"[13] produced or became operative. In Ukraine's view, the relevant guidance in this case is to establish whether China's TRQs administration "imposes a restriction or prohibition on importation."[14]

III. CONCLUSION

15. Mr. Chairperson, distinguished members of the Panel and representatives of the delegations, this concludes Ukraine's oral statement. We thank the Panel for its consideration of the views of Ukraine. We look forward to answering any questions that the Panel may have.

_____

[8] Appellate Body Report, *US − Shrimp*, para. 182.
[9] Vienna Convention on the Law of Treaties, Article 31.
[10] Appellate Body Report, *EC − Bananas III (Article 21.5 − US)*, para. 335.
[11] Appellate Body Report, *Japan − Alcoholic Beverages II*, page 14.
[12] Appellate Body Report, *China − Raw Materials*, para. 328.
[13] US' First Written Submission, para. 335.
[14] Panel Report, *Indonesia − Import Licensing Regimes*, para. 7.55.

WORLD TRADE ORGANIZATION

WT/DS517/R/Add.1

18 April 2019

(19-2574)

Page: 1/68

Original: English

CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS517/R.

_____

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	12
Annex B-2	Integrated executive summary of the arguments of China	32

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	51
Annex C-2	Integrated executive summary of the arguments of Brazil	54
Annex C-3	Integrated executive summary of the arguments of Canada	56
Annex C-4	Integrated executive summary of the arguments of Ecuador	60
Annex C-5	Integrated executive summary of the arguments of the European Union	63
Annex C-6	Integrated executive summary of the arguments of Japan	65
Annex C-7	Integrated executive summary of the arguments of Ukraine	67

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	4

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 5 March 2018

General

1. (1) In this proceeding, 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 apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) 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.

(2) 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.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. China shall submit any such 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. 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.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) 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, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the United States should be numbered USA-1 USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit in connection with the next submission thus would be numbered USA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Questions

8. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

9. The Panel shall meet in closed session.

10. The parties shall be present at the meetings only when invited by the Panel to appear before it.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. 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.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. 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. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that China shall be given the opportunity to present its oral statement first. If China chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day prior to the meeting. In that case, the United States shall present its opening statement first, followed by China. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its

statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the integrated executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These integrated 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.

22. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, its oral statements and its responses to questions following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

23. The integrated executive summary shall be limited to no more than 30 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. 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 integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

26. 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.

27. 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.

Interim and Final Report

28. 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

29. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

    a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

    b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

    c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy, preferably in Microsoft Word format and PDF format, of all documents that it submits in paper. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits in CD-ROMs or DVDs.

    d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

    e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party only by e-mail, on a CD-ROM or DVD, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

    f. Each party and third party shall submit its documents to 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.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

_____

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	12
Annex B-2	Integrated executive summary of the arguments of China	32

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. China is both a significant producer and a significant consumer of grains, including wheat, rice, and corn. China permits imports of these grains through the administration of tariff-rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn ("grains"). According to China's own notifications and Chinese customs data, China's TRQs for wheat, corn, and rice do not fill, despite market conditions indicating sufficient Chinese demand.

2. China has breached numerous of its obligations under Paragraph 116 of the *Report of the Working Party on the Accession of China* ("Working Party Report"), incorporated by reference as a binding obligation into China's Accession Protocol. In particular, China administers its TRQs for corn, wheat, and rice inconsistently with six of these distinct obligations: (1) to administer the TRQ on a transparent basis; (2) to administer the TRQ on a predictable basis; (3) to administer the TRQ on a fair basis; (4) to administer the TRQ using administrative procedures that are clearly specified; (5) to administer the TRQ using requirements that are clearly specified; and (6) to administer the TRQ using timeframes, administrative procedures, and requirements that would not inhibit the filling of the TRQs.

3. The United States also explains how China breaches Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") because China's TRQ administration is not reasonable, because China: (1) utilizes vague eligibility criteria and allocation principles to allocate the TRQ that applicants cannot reasonably understand; (2) permits numerous authorized agents to independently interpret the vague criteria; (3) publishes applicant data for comment and "disagreement" without clear guidelines regarding how this information will be verified and used; and (3) fails to make public information regarding TRQ allocation or reallocation in a manner that would make importation feasible.

I. PARAGRAPH 116 OF THE WORKING PARTY REPORT

A. Transparent Basis

4. For TRQ administration to be on a transparent basis, the system or principles pursuant to which administration of the TRQ occurs must be easily discerned and understood. If what is published does not allow Members and applicants to easily understand the basis for TRQ administration then that publication alone would not be sufficient to satisfy this requirement. China does not administer its TRQs on a transparent basis, because: (i) the eligibility criteria and allocation principles set out in China's instruments are vague and not "easily discerned;" (ii) China does not provide any public information regarding which entities received TRQ allocations and in what amounts; (iii) China does not make public what unused TRQ quantities, if any, are returned and made available for reallocation; and, (iv) China does not publicize information regarding which entities received reallocations of TRQ and in what amounts.

5. First, the *Allocation Notice* enumerates these basic criteria, but does not define them such that the requirements would be easily understandable or obvious to Members or potential applicants. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are preconditions of eligibility to receive TRQ. However, Members and applicants cannot easily discern or understand, from the text of the *2003 Provisional Measures* and *Allocation Notice* − even read with the application form itself − what all of the basic criteria are or how NDRC or its authorized agents might apply them in evaluating a TRQ application. Therefore, because each of the basic criteria discussed above is not "easily discerned or understood," the basis on which China administers its TRQs is not transparent. China therefore breaches Paragraph 116.

6. The *2003 Provisional Measures* and *Allocation Notice* also set forth non-transparent allocation principles by which TRQs are allocated. As with the basic criteria described above, China's instruments fail to define or explain the allocation principles on which allocation and reallocation of the relevant TRQs will be based.

7. It is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." The instruments do not provide any context, or even content, for the factor "other relevant commercial standards." That is, there apparently are "other" standards that are "relevant" to NDRC's decision-making with respect to the allocation of TRQ amounts, but these are not identified in the *2003 Provisional Measures* or the *Allocation Notice*. Among other principles *not* reflected in the *Allocation Notice*'s short statement of allocation principles, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading.

8. China apparently verifies applicant information through a public comment process. This additional step renders NDRC's administration of the TRQ application and allocation process, including NDRC's determinations with respect to both the basic criteria and allocation principles, much less clear, and increases applicants' uncertainty regarding the status or sufficiency of their applications considerably.

9. Second, China also fails to administer its grains TRQs on a transparent basis because it fails to provide information on the results of the TRQ allocation process. Without such information, Members and applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

10. Because China fails to make public the amounts allocated, the recipients of allocations, and the amounts allocated to different importing entities, China administers its TRQs through a process or set of rules or procedures that is *not* easily understood, discernable, or obvious, and thus not on a transparent basis, inconsistent with Paragraph 116 of the Working Party Report.

11. Third, NDRC does not administer the TRQs on a transparent basis because it launches a reallocation process by publishing the annual *Reallocation Notice*, but does not provide information on what amounts, if any, were returned unused and are thus available for reallocation to other importers or interested entities. China does not provide any additional information to Members, applicants or traders − either in the *Reallocation Notice* or, for example, after the September 15 deadline − regarding the amounts actually returned and available for reallocation.

12. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders do not even know whether a reallocation will, or did, take place in a given year. Rather, the public simply sees the same *Reallocation Notice* issued every year, setting out the same application instructions and timeframes without more.

13. Finally, NDRC does not provide Members or the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Additionally, without knowing the results of the allocation process, traders inside and outside of China lack the necessary commercial information to engage in importation under the reallocated portion of the TRQs. Thus, for these reasons as well, China fails to administer its TRQs on a transparent basis, in breach of Paragraph 116 of the Working Party Report.

B. Predictable Basis

14. China fails to administer its TRQs on a "predictable" basis for many of the same reasons its administration is not on a "transparent" basis. That is, the lack of clarity in China's requirements and processes not only renders them not transparent, it prevents Members and applicants from being able to easily predict or anticipate how administration will occur. China's TRQs are not administered on a "predictable" basis because: (i) the eligibility criteria and allocation principles are vague and Members and applicants cannot anticipate how they will be applied; (ii) China does not provide information on what amounts, if any, were returned unused and made available for reallocation; (iii) China does not provide information on which entities receive reallocations and in what amounts; and, (iv) applicants receiving a state trading allocation cannot predict whether they will be able to import the full amount.

15. First, the basic criteria for TRQ eligibility and the allocation principles set out in China's legal instruments are vague. The unpredictability caused by the vagueness of the criteria is compounded in some cases by the fact that NDRC apparently verifies or supplements information submitted by an applicant by allowing any member of the public to submit their own comments and information if it is in "disagreement" with an applicant's data.

16. Second, China launches a reallocation process by publishing the annual *Reallocation Notice,* but does not publish information on what amounts, if any, were returned unused and are thus available for reallocation. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders cannot easily predict or anticipate whether a reallocation will take place in a given year. Nor can they easily predict or anticipate how much of a reallocation they might receive were they to apply.

17. Third, NDRC does not provide the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot easily predict or anticipate how NDRC assesses the various applicants and determines reallocated amounts. Therefore, Members and potential applicants are unable to easily predict or anticipate the outcome of the TRQ reallocation process generally, because they are not able to see or understand the outcome of prior processes.

18. Finally, inability of applicants to anticipate whether they might receive a state trading allocation leads to significant uncertainty for potential applicants due to the additional requirements associated with the state trading portion of the TRQ.

C. Fair Basis

19. China must administer its TRQs in an impartial manner and in accordance with rules or standards. China does not administer its TRQs in an impartial manner or in accordance with rules or standards because in many instances no rules or standards exist and, where they do exist, they are vague or unclear.

20. First, China's administration is not impartial, or carried out in accordance with rules or standards, because the allocation principles enumerated in Article IV of the *Allocation Notice* are not defined; or, in the case of "other relevant commercial standards," not even identified. Similarly, the allocation principles fail to set out clear rules and standards on the basis of which NDRC will make decisions regarding the allocation and reallocation of TRQ amounts.

21. The vagueness of the allocation principles provided in China's *Allocation Notices* impacts not only whether to apply and the information submitted to obtain the amount applied for, but also the decision regarding how much to apply for.

22. Applicants base their decisions, including whether to apply for a TRQ allocation, which commodity to apply for, and what quantity to apply for, on the published legal instruments, including the annually issued *Allocation* and *Reallocation Notices*. Thus, applicants submit information, including "quantity applied for" and "name of agricultural product quota applied for" based on their understanding of "actual production and operating capacities (including historical production and processing, actual import performance, and operating situation, etc.) and other relevant commercial standards."

23. Second, China's administration is not impartial, or carried out in accordance with rules or standards, because the basic criteria are not defined. It is also unclear how NDRC considers comments from the public where that information may go to "disagreement" with an applicant's eligibility. This aspect of China's administrative process exacerbates the unfair nature of the administration, because not only do the basic criteria themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter or the inability of NDRC or the applicant to verify or refute the information provided.

24. The vagueness of the basic criteria impacts not only the *information* an applicant may submit to demonstrate eligibility, but also the decision *whether to apply* at all. Further, the application is not necessarily just the form supplied by NDRC as part of its annual *Allocation Notice*, but may also include "related materials submitted by the applicant" per Article 12 of the *2003 Provisional*

Measures. The vagueness of the criteria may result in applicants submitting more or less additional information at any of these stages in the process. Potential applicants may choose not to apply at all because they are unable to understand the basic criteria or because they perceive the criteria in a way that they conclude in error they are not eligible.

25. Finally, applicants "bear responsibility for the authenticity of the application materials and information they submit." Applicants attest, on the application form, that they have read and understood the *Allocation Notice* and commit to guaranteeing "conformity with the grain import tariff-rate quota application criteria stipulated by the government." Thus, the *Allocation Notice* puts the burden of demonstrating eligibility and attesting to accuracy on the applicant. These applicants are basing their understanding of eligibility on the only information available to them, the basic criteria in the annual *Allocation Notices*. One applicant may attest that they guarantee conformity with the requirement to fulfill social responsibilities based on their understanding of that vague term, while another decides not to apply because they do not understand or are not comfortable attesting that they conform to the requirement because it is unclear.

26. For these reasons, the use of vague and undefined eligibility criteria does not provide TRQ administration on a fair basis; that is, based on rules and standards which can be discerned and understood by Members and applicants.

27. Therefore, because of the lack of clear rules or standards with respect to the evaluation of basic criteria, China also fails to administer its TRQs on a fair basis, in breach of China's commitments under Paragraph 116 of the Working Party Report.

D. Clearly Specified Administrative Procedures

28. The obligation under Paragraph 116 of the Working Party Report requires that China use administrative procedures that are set out in plain obvious detail. China does not administer its TRQs using administrative procedures that are "clearly specified" because (1) its allocation principles and reallocation procedures are vague and undefined, or not specified at all; and (2) China does not clearly specify the procedure for obtaining NDRC approval to import through a non-state trading entity using a state trading quota after August 15.

29. First, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Second, the instruments do not provide any context, or even content, for the factor "other relevant commercial standards." Third, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading. Fourth, China apparently verifies applicant information in part through a public comment process. This additional step renders NDRC's determinations with respect to both the basic criteria and allocation principles unclear, and increases applicants' uncertainty regarding the status or sufficiency of their applications.

30. In addition, China does not clearly specify the procedures for seeking approval from NDRC to import state trading quota after August 15. Neither the *2003 Provisional Measures,* nor *Allocation Notice* specifies the procedure for obtaining NDRC approval, however, nor details on what basis NDRC will determine whether to grant approval. Although China makes clear *there is a procedure* to be utilized to seek approval to import state trading quota without COFCO after August 15, none of the measures specify what that procedure is.

E. Clearly Specified Requirements

31. The obligation under Paragraph 116 of the Working Party Report requires that China use requirements that are set out in plain obvious detail. China does not administer its TRQs using requirements that are "clearly specified" because its basic criteria, which applicants must demonstrate compliance with in order to be eligible to receive TRQ allocation or reallocation, are not set out in plain or obvious detail.

32. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are requirements to receive a TRQ allocation. However, the text of the *2003 Provisional Measures* and *Allocation Notice* − even read with the application form itself − does not detail the basic criteria or

how NDRC or its local authorities might apply them in evaluating a TRQ application. No other measures detail these requirements.

F. Not Inhibit the Filling of Each TRQ

33. China's measures breach Paragraph 116 of the Working Party Report because China does not administer its TRQs using administrative procedures and requirements that would not inhibit the filling of each TRQ. In the context of China's TRQ administration, China must not employ timeframes, procedures, or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

34. First, China employs a single application process to allocate both the state trading and non-state trading portions of the TRQ, without permitting applicants to choose which portion they apply for. Nor can applicants understand the basis upon which NDRC will determine which applicants receive an allocation of the state trading portion, which restricts the TRQ Certificate holder from employing its importer of choice.

35. Applicants do not have any information regarding how NDRC will determine which applicants will receive state trading allocations. Therefore, they cannot anticipate whether they might receive an allocation of the state trading portion of the TRQ, or the non-state trading portion, which can be imported directly or through a non-state enterprise, or both.

36. Therefore, the uncertainty inherent in China's process makes it more difficult to negotiate with potential exporters, contract for sale, and import the commodities. These uncertainties may also induce applicants to limit the quantities for which they apply, just as the potential inability to complete a contract through the state trading entity may increase the amount of unused TRQ allocations returned to NDRC by September 15. And where a TRQ Certificate holder must return unused amounts, she is not eligible to apply for a reallocation of TRQ amounts to be imported without the need to import through an STE.

37. Second, China withholds critical information on the recipients of the initial allocation, and the amounts actually allocated and reallocated. Thus, grain-exporting entities do not have information that is necessary to enter into commercial relationships with potential importers, inhibiting the filling of each TRQ.

38. Specifically, China does not announce which applicants are allocated TRQ amounts and in what amounts, which prevents traders from understanding the TRQ allocations and making commercial arrangements to import the grains. With respect to reallocation, traders have even less information and thus are less able to fill the TRQs in the short time period remaining. Uncertainty about how much quota will be reallocated, or whether reallocation will take place at all, may make potential importers less likely to apply for a reallocation quota amount or lead them to apply for a smaller amount than they otherwise would have. If any TRQ amounts are reallocated, the lack of information on recipients makes it more difficult and costly for traders in China and foreign exporters to identify recipients and enter into contracts for sale or importation.

39. Finally, the processing restrictions and penalties for non-use impose a significant burden on TRQ Certificate holders and discourages applicants from applying for the full amounts desired for import. These processing requirements, and the inability of an importer to sell any unused imported products in the event its business needs or plans change, raises uncertainty and therefore increases costs for a TRQ Certificate holder. Further, because unused amounts may be reported in the following year's allocation application and may be counted against the applicant in the next allocation, the usage requirement incentivizes applicants to request a *smaller* TRQ amount than it may otherwise wish to receive for commercial purposes.

40. The *Allocation Notice* also provides that group enterprises possessing multiple processing plants must individually apply for, and individually use, TRQ allocations in the name of each processing plant. An enterprise with multiple plants could not import corn or wheat for use at one facility but then, for business reasons, choose to process it at another facility. Again, the plant usage restriction would discourage applicants from applying for the quantity actually needed or desired for commercial purposes. The usage requirements therefore have the effect of inhibiting the filling of the TRQs.

II. ARTICLE X:3(A) OF THE GATT 1994

41. The manner in which China administers its TRQs is inconsistent with China's obligations under Article X:3(a) of the GATT 1994. Of relevance in this dispute is China's obligation to administer its TRQs in a "reasonable manner." An inconsistency with a Member's WTO obligations under Article X:3(a) arises where "the identified features of the challenged administration necessarily lead to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner." According to the panel in *China − Raw Materials*, "necessarily lead to an inconsistency" does not mean administration is unreasonable in every instance. Rather, the administration may be inconsistent with Article X:3(a) if there is a "*very real risk*" or an "inherent danger" of unreasonable administration in a specific, identifiable situation.

42. China fails to administer its TRQs in a "reasonable manner," and therefore breaches Article X:3(a) of the GATT 1994, for several reasons.

43. First, China fails to administer its TRQs in a reasonable manner because it announces and applies vague basic criteria and allocation principles that make it difficult for applicants to understand and comply with its requirements. It is not rational, sensible, or appropriate to announce criteria and principles, but fail to make them comprehensible. Furthermore, the allocation principles provide further uncertainty. Again, the poorly specified allocation principles limit an applicant's ability to interpret the Chinese government's requirements for importers. Applicants who receive limited TRQ allocations are unable to understand which allocation principles may have caused their allocation.

44. Second, China uses thirty-six separate provincial and municipal "authorized agencies" to receive and review applications for TRQ allocations and reallocations. The *Allocation Notice* reiterates that these authorized agencies will act as the intermediary between the central level of NDRC and applicants. Similarly, authorized local entities approved by NDRC are obligated to receive and review applications for TRQ allocation and reallocation, referring applications that comply with the requirements to NDRC, and referring insufficient applications back to applicants.

45. China's TRQ administration instruments do not provide guidance to the authorized agencies regarding the definition or requirements associated with a number of the basic criteria. For this reason, applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Prior panels have found separate local entities interpreting overly vague criteria to be a circumstance that can result in non-sensible or irrational administration of laws, regulations, decisions, or rulings.

46. Third, China provides for the publication of applicant data and permits the public to provide "disagreement," "feedback," and "opinions," without providing relevant guidance regarding how these comments are vetted, considered, or impact the TRQ allocation process. This aspect of China's administrative process exacerbates the unreasonable nature of the administration, because not only do the basic criteria and allocation principles themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter. Such a process prevents evaluation of TRQ applicants, and administrative decisions with respect to eligibility, from being made in a rational or sensible manner.

47. China's instruments do not provide any information regarding how NDRC determines which applicants will receive which TRQ allocation, or how an individual entity's TRQ allocation might be split between the non-state trading and state trading portions of the TRQ.

48. Fourth, China does not publish information regarding actual annual allocated TRQ volumes in the aggregate at the time of allocation (January 1), or in the aggregate at the time of reallocation (September 30). Similarly, China does not publish information regarding the total allocated amount of the TRQ that must be imported through a state-owned enterprise, and what amount may be imported directly by TRQ Certificate holders. This means meaningful information regarding the amount of wheat, rice, and corn permitted to be imported, as well as the amount of unallocated TRQ available for subsequent applicants is not provided on an annual basis.

49. Fifth, China does not release information regarding the specific TRQ allocation recipients or the TRQ volumes each recipient was granted. This information is particularly critical during the reallocation process when TRQ Certificate holders have a limited period of time within which to

contract for and import the authorized grain. The lack of published information regarding the successful TRQ applicants and permitted import volumes therefore further impedes the identification of appropriate importers to contract with, or to consolidate import volumes with, to permit cost-effective importation.

50. When coupled with the lack of clarity regarding the basic criteria, the failure to provide information regarding actual TRQ allocation and reallocation volumes prevents interested importers from understanding and utilizing the TRQ system. Additionally, without knowing the results of the allocation process traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

III. ARTICLE XIII:3(B) OF THE GATT 1994

51. Article XIII:(3)(b) of the GATT 1994 requires Members to provide public notice of *both* the "total quantity or value of the product or products which will be permitted to be imported during a specified future period," *and* "of any change in such quantity or value." China does not provide information regarding: the quantity of wheat, rice, or corn permitted to be imported at the initiation of the TRQ period; any changes to the quantity permitted to be imported after unused TRQ amounts have been returned to NDRC; or, any changes to this amount after reallocation of TRQ.

52. Permission to import under the TRQ is only granted to successful applicants. Thus, the amount of TRQ "which will be permitted to be imported during a specific future period" corresponds to the total amounts authorized on the TRQ Certificates issued to selected applicants.

53. China does not provide a public notification of the amounts allocated under the initial allocation process. This failure to provide even aggregate public notice of the total volume for which permission to import has been granted under each TRQ is inconsistent with China's obligation under Article XIII:3(b). China's *pro forma* announcement each year of the total TRQ quantities that it has committed to provide in its Schedule is not sufficient. To succeed in satisfying its obligation to provide public notification of amounts "permitted to be imported," China must publicly announce the amounts for which permission to import has *in fact* been granted.

54. China's TRQ administration is also inconsistent with the second public notice obligation, which requires Members to provide a public notification regarding any changes to quantities permitted to be imported. When unused TRQ allocation amounts are surrendered to the local authorized agent as required by the annual *Reallocation Notice*, the total amount of product that "will be permitted to be imported" is reduced. Thus, after September 15, the total quantity of product permitted to be imported has changed.

55. China does not publish information regarding unused allocation amounts that TRQ holders return to NDRC, or regarding the amounts available to applications for potential reallocation. Because the return of unused TRQ allocations reflects a "change" in the total quantity "permitted to be imported," China's failure to publically announce the change in these amounts breaches its obligations under Article XIII:3(b) of the GATT 1994.

56. Finally, it is not clear to applicants or importers whether in any given year China in fact grants additional permission to any applicants for the importation of reallocated TRQ amounts. Assuming the issuance of each annual *Reallocation Notice* in fact indicates that NDRC will undertake a reallocation process, the results of that process would, again, change the total quantity of product "permitted to be imported during a specified future period."

IV. ARTICLE XI:1 OF THE GATT 1994

57. Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product. When considering "a limitation on action, a limiting condition or regulation" or "something that has a limiting effect" in the context of Article XI:1, panels and the Appellate Body have considered a wide range of factors affecting the competitive opportunities and the ability to import products.

58. China's administration of its TRQs for wheat, rice, and corn imposes impermissible "restrictions … on the importation of" these grains within the meaning of Article XI:1 of the GATT 1994. First, China's administration of the state trading and non-state trading portions of the TRQ through a single application process creates significant uncertainty for TRQ applicants. Each portion of the

TRQ has its own requirements and commercial considerations. However, applicants cannot indicate for which TRQ portion they wish to apply, and do not know on what basis NDRC will determine which applicants receive allocations for which portion, or in what amounts.

59. The inability of traders to anticipate what type of allocation they may receive leads to significant uncertainty for potential applicants, because different requirements and commercial considerations are associated with the state trading and non-state trading portions of the TRQ.

60. The differing requirements and commercial consideration of state trading and non-state trading TRQ allocation, when combined with applicants' inability to decide or predict which allocation they will receive and the time limits of contracting, result in significant risks and uncertainty for TRQ applicants. Furthermore, these requirements, uncertainty, and potential penalties associated with failure to import discourage applicants from applying for TRQ allocations at all, or may lead them to apply for a smaller TRQ allocation than they might otherwise have in the absence of such uncertainty. These aspects of China's TRQ administration thus constitute a restriction on the importation of rice, wheat and corn, in breach of Article XI:1 of the GATT 1994.

61. Second, China imposes usage restrictions and penalties for non-use, which creates burdens and uncertainty for importers and thereby discourage use of the TRQs. The restrictions impose limitations and limiting conditions on importation by creating or increasing risks and uncertainties associated with importation, and thereby increasing the costs associated with importation. Restricting TRQ Certificate holders from selling or transferring imported wheat, rice, or corn creates waste and increases unnecessarily the cost of using imported products in their production processes. Further, China's restrictions prevents TRQ Certificate holders from reacting to commercial considerations in a meaningful way. Failure to utilize all imported grain covered by a TRQ Certificate may lead to reductions in the next year's allocation. To avoid these outcomes, TRQ applicants would request a smaller amount of imports than they might otherwise request if acting pursuant to their commercial interests, rather than in the light of China's requirements and penalties.

62. Previous panels have found that measures imposing limitations of this kind constitute restrictions under Article XI:1 of the GATT 1994. China's requirements thus constitute a "restriction… on the importation" of these products, in breach of China's obligations under Article XI:1 of the GATT 1994.

EXECUTIVE SUMMARY OF THE U.S ORAL STATEMENTS AT THE FIRST MEETING

63. [Summaries of the U.S. oral statements at the first substantive meeting are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

64. [Summaries of the U.S. responses to the Panel's 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

65. In an attempt to rebut the *prima facie* showing of the United States, China advances a series of unsubstantiated assertions that according to China explain the administration "in practice" of China's TRQs. When asked for evidence regarding these alleged practices by the Panel and for more information on TRQ allocation and reallocation generally by the United States, China has provided little more than general assertions and "confirmation" from Chinese government officials. China has not provided documentation, data, legal instruments, or any other evidence, as requested by the Panel and the United States, to substantiate its assertions on those alleged TRQ administration practices, or to demonstrate compliance with its WTO obligations.

66. The Panel is to assess the facts put forward by both parties to the dispute. The Panel would need to weigh the evidence on the record in this dispute to make its findings of fact and consider the arguments made by both parties on "the applicability of and conformity with the relevant covered agreements." If the Panel has rejected China's assertions as to alleged NDRC "practices," then these non-facts (unsubstantiated allegations) cannot provide further bases in support of the U.S. claims.

However, it may be that the Panel finds it appropriate to address certain arguments of China or the United States relating to these assertions as part of the Panel's explanation of its interpretation or its application of the provisions of the covered agreements to the facts (including the substance of the measures).

67. The U.S. First Written Submission established that the legal instruments establishing China's TRQ administration are inconsistent with China's WTO obligations. China's assertions, even aside from not being supported by evidence, only underscore China's failure to comply with its WTO obligations rather than demonstrate compliance.

I. CHINA FAILS TO REBUT THE U.S. CLAIMS UNDER PARAGRAPH 116

68. China "does not disagree with the United States concerning the ordinary meaning of the terms that comprise the six obligations referenced by the United States, and China does not disagree with the United States concerning the legal standard that should be applied by the Panel." China in this manner accepts both the substance of the legal obligations and agrees that each obligation should be considered independently.

A. Transparent Basis

69. China primarily disagrees with what is required for China to administer its TRQs on a basis that is "easily understood, discerned, or obvious." China addresses certain of the bases set out by the United States but fails to rebut the *prima facie* case made by the United States.

70. First, China does not address the inconsistency of the basic criteria with Paragraph 116, except to indicate that it does not use the basic criteria to determine eligibility.

71. Second, with regard to allocation principles, China asserts that, for purposes of China's obligation to administer its TRQs on a transparent basis, "it is sufficient for applicants to know that TRQs will be allocated in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operations) and other relevant commercial standards." However, China's legal instruments do not provide any context, or even content, for "other relevant commercial standards." Further, China, noting that its allocation of TRQs "is not automatic," states that it "does not believe, however, that transparent . . . TRQ administration requires the elimination of any element of discretion from the allocation process." China does not recognize the relationship between this discretion and its WTO obligations, rather, it states that "China's view that this is the most transparent . . . way of achieving full utilization of the TRQ should not be 'second guess[ed].'"

72. China relies on the Headnotes to Schedule CLII to defend the use of "other relevant commercial standards," suggesting that the Schedule's reference to a "residual category" authorizes China to publish the vague "other relevant commercial standards," without further definition. However, even aside from the fact that this language only applied to the first year, Schedule CLII can neither shield China from other obligations in the covered agreements, nor provide derogations from the obligations provided in those agreements. Further, nothing in the Schedule indicates that China need not specify what these standards are in the measures that actually implement the TRQs, and indeed China's Schedule CLII contemplates distribution based on "relevant commercial criteria, subject to specific conditions to be published." Thus, the Headnotes anticipate the publication of more detail in line with China's Paragraph 116 obligation to administer TRQs on a transparent basis.

73. Third, China does not consider publication of information to be required by the obligation to administer TRQs on a transparent basis. China argues that because applicants may request certain information, on an individual basis, there is no inconsistency with its obligation to Members to administer its TRQs on a transparent basis. China's responses disregard the affirmative nature of China's obligation to ensure that *China* administers its TRQs on a transparent basis. China also argues that information on which entities received TRQ allocations is business confidential. The United States continues to disagree.

74. Finally, China argues its failure to provide information on amounts returned and reallocated does not amount to inconsistency with its obligations because "China's Schedule CLII commitments incorporate a publication schedule that is irreconcilable with publishing additional information regarding reallocation in advance of or after the September 15 deadline." China's Schedule does

not comprise a "publication schedule;" rather, the Headnotes set out certain deadlines for the allocation and reallocation process. The Schedule does not limit or prohibit the publication of information, including information necessary to ensure that China administers its TRQs on a transparent basis.

B. Predictable Basis

75. China fails to directly address the claims that it does not administer its TRQs on a predictable basis.

76. First, China states that it "does not contest the U.S. claim," and thus appears to concede that the basic criteria are inconsistent with Paragraph 116, including the requirement to be administered on a predictable basis.

77. Second, with regard to whether its allocation principles are sufficiently predictable, China relies on the same argument made in response to the claim that they are not transparent because China addresses, collectively, the separate claims regarding the allocation principles. China fails to provide any reason its allocation principles are sufficient to meet the obligation to administer its TRQs in a predictable manner.

78. Third, China fails to directly address the claims that it does not administer its TRQs on a predictable basis because China does not provide information on what amounts, if any, were returned unused and made available for reallocation, and because China does not provide information on which entities receive reallocations and in what amounts. Rather, China addresses the lack of information generally, relying on the availability of individual inquiries, Schedule CLII, and business confidentiality to assert China administers its TRQs consistent with Paragraph 116 as a whole. These arguments are insufficient to rebut the U.S. case that China does not administer its TRQs on a predictable basis.

79. Finally, the United States demonstrated that China does not administer its TRQs on a predictable basis because applicants receiving a state trading allocation cannot predict what type of allocation they will receive and whether they will be able to import the full amount. China disagreed with the factual basis for this argument, asserting that "applicants do not receive allocations from the STE portion of each TRQ . . . [t]he entire STE portion of each TRQ is allocated to COFCO." China's asserted "practice" is inconsistent with its measures.

80. Regardless of whether China "in practice" allocates the STE portion to COFCO, non-STE applicants, or both, the legal instruments relied upon by applicants indicate that applicants could receive (1) an STE portion of the TRQ, which will be required to be imported through COFCO, (2) a non-STE portion, or (3) a mixed allocation, a portion of which will be subject to the requirement to import through COFCO. The inability of applicants to anticipate whether they might receive a state trading allocation thus leads to significant uncertainty for potential applicants, and is inconsistent with Paragraph 116.

C. Fair Basis

81. China does not contest the U.S. claim that China's basic criteria are unfair, but claims this is insufficient to find an inconsistency with Paragraph 116 because "Paragraph 116 relates to the administration of the TRQs as a whole." China's argument is without merit.

82. China again argues that it is entitled to discretion, and thus China's determination that a basis is fair should not be second-guessed. However as noted above, China's TRQ administration, including any exercise of discretion in allocating TRQs, must be consistent with its WTO obligations.

D. Clearly Specified Procedures

83. With respect to the claim that China does not clearly specify the procedure for obtaining NDRC approval to import a state trading quota through a non-state trading entity after August 15, China concedes "the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process."

E. Clearly Specified Requirements

84. China does not contest that the basic criteria are "requirements" or that they are not clearly specified. However, China asserts that "the articulation of the basic criteria constitutes a specific aspect of China's administration of the TRQs, while Paragraph 116 relates to the administration of the TRQs as a whole." The basic criteria are requirements used to administer the TRQs. Failure to ensure that these are clearly specified is inconsistent with Paragraph 116.

85. With respect to allocation information, China asserts that because any grain-exporter can use the applicant information published in the *Announcement of Applicant Enterprise Data* "to identify companies with the capacity to meet its needs and make overtures accordingly," the information China presently provides does not inhibit the filling of each TRQ. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all. China points to a work-around that entities could deploy to mitigate the impact, which does not diminish China's obligation to not inhibit the fill or excuse China's failure to provide sufficient public information regarding the results of the allocation process.

86. China characterizes the processing requirement as follows: "End users that do not have sufficient capacity to process the raw grains that they import under their quota may sell those imported grains to other entities for processing." The distinction between end users with processing capacity and those without sufficiency capacity to process the grains they import is absent from China's legal instruments. But if China differentiates its application or enforcement of the requirement based on the end user's capacity, this further demonstrates the claim that the restriction, coupled with penalties for non-use, inhibits the filling of each TRQ.

F. Not Inhibit the Filling of Each TRQ

87. China must not employ timeframes, procedures or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

88. With regard to the first reason for inconsistency, that administering both portions of the TRQ in a single process inhibits the filling of each TRQ, China responds only that the U.S. claims "largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of entire STE portion of the TRQ to COFCO." China's response fails to rebut the *prima facie* case because China's own legal instruments and Schedule CLII indicate that end users, including non-STE end users, who apply for TRQ allocations can receive an STE portion of the TRQs.

89. China also fails to rebut the second argument, that China's failure to provide sufficient public information regarding the results of the allocation and reallocation process prevents traders, including foreign exporters, from making use of the TRQ amounts available. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all.

90. Third, China imposes restrictions on the use of imported products, coupled with penalties for non-use, which also discourage applicants from applying for the full quantities desired. China responds that, on the contrary, the usage restriction encourages full TRQ utilization. But China's response focuses on a different aspect of its measures − the penalties for failure to import and use a TRQ allocation − not the *restrictions on the use* of the imported product. The United States has not challenged a general prohibition on the sale or transfer of TRQ Certificates, or what China characterizes as a "restriction on transferring or selling the quota itself."

91. Further, China's annual *publication* of these usage restrictions, as notified to potential applicants by the *Allocation Notice*, creates uncertainty because an applicant understands it must apply for a specific amount of each TRQ and will be responsible for processing the grains once imported, without any flexibility to process elsewhere should circumstances change between applying and importing. Further, because the potential applicant understands that unused amounts

may be reported and counted against the applicant in the next allocation, the usage requirement incentivizes an applicant to request a smaller TRQ amount than it may otherwise wish to receive for commercial purposes, regardless of how China applies or enforces the requirement in practice.

92. Thus, the combination of restrictions on the usage of imported products and the penalties imposed on TRQ Certificate holders for failing to import the full TRQ amounts would therefore inhibit the filling of the TRQs.

II. China's Assertions Provide Additional Bases for Finding Inconsistencies with Paragraph 116

93. In its First Written Submission, China highlights "certain key aspects of its system for administering its grains TRQs that the United States overlooked or misunderstood in its description of China's legal framework for administering its TRQs." However, China's description of these "key aspects" directly contradicts China's own legal instruments, announcements, and other publically available information, and, if accurate, demonstrates further inconsistency with the obligations in Paragraph 116. The United States notes that the characterization "if accurate" is important because China has provided no evidence to support its assertions.

A. Allocation of STE Portions to COFCO China Allocates the Entire STE Portion to COFCO and COFCO is Not Required to Return Unused Amounts, Inconsistent with Paragraph 116

94. Based on the legal instruments, and absent different information on allocation of the STE portion of each TRQ, Members, applicants, and other interested entities would necessarily understand and predicate application decisions on the understanding that they could be allocated an amount of the STE TRQ portion, or receive a mixed allocation of both the STE and non-STE portion, which would need to be imported through different entities. However, China asserts in this proceeding that, in practice, COFCO is allocated the full STE portion of each TRQ, which is between 50 percent and 90 percent of each TRQ, depending on the grain. In addition, China now asserts COFCO is not required to return any unused portion of its TRQs for reallocation. China's published measures do not expressly provide for COFCO's exemption from this requirement, nor is it discernable based on China's measures.

95. If accurate, China's assertions that the entire STE portion of each TRQ is allocated to COFCO, and that COFCO is not required to return unused amounts, are inconsistent with China's obligations to administer each TRQs on a basis that is (a) transparent, (b) predictable, (c) fair basis, and (d) does not inhibit its filling.

96. First, the actual basis for TRQ administration is not discernable because NDRC does not publish, indicate, or otherwise disclose the fact that COFCO receives the entire STE portion, and this significant portion of each TRQ (50 to 90 percent depending on the commodity) is therefore unavailable to applicants. Based on Schedule CLII and China's legal instruments, if an STE is an end user then any TRQ allocated must be returned or a penalty assessed. If, as China asserts, COFCO is not required to return unused portions, China does not administer its TRQs on a transparent basis.

97. Second, the legal instruments China issues lead Members, applicants, and other interested entities to anticipate being able to receive an allocation of the STE portion, non-STE portion, or a mixed allocation. Thus, where a Member, applicant, or other interested entity sought to anticipate the TRQ allocation, reallocations, and other administration requirements based on the system of rules and procedures established by China's legal instruments, the prediction is incorrect. Instead, China claims that in practice it allocates the entire STE portion to COFCO, and does not require COFCO to return unused quota. The actual basis for TRQ administration is thus not predictable because NDRC does not publish, indicate, or otherwise disclose this information.

98. Third, China asserts that "[a]pplicants become aware of this practice through their participation in the TRQ administration system." China's obligation is not just to "applicants," but to other Members. This practice further suggests that China's TRQs are not allocated or administered in accordance with rules and standards, or on an impartial basis. That is, China ignores the basic criteria and allocation principles purporting to be rules or standards, and instead allocates between 50 to 90 percent of each TRQ to a single government controlled entity regardless of its interest in

importing the grains or any other published criteria. This practice is not in accordance with rules and standards.

99. Fourth, China sets out a clear requirement that all end users return unused amounts for reallocation, but in fact COFCO is not subject to this requirement, nor does COFCO appear to be penalized for its failure to comply. This practice again appears to be neither impartial − as it treats the government owned entity more favorably than other end users − nor in accordance with China's own rules and standards.

100. NDRC's allocation of the STE portion of each TRQ to COFCO, and the exemption of those significant portions from the requirement to return unused amounts for reallocation inhibits the fill of each TRQ. The results of this practice are significant and recognized in these proceedings. Specifically, while China declined to provide specific fill rates for the STE and non-STE portions of the TRQs, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." Therefore, necessarily *COFCO is declining to import large volumes of its allocations each year*, and its failure to return unused quantities is ensuring that this TRQ quantity is not available to other entities.

101. Therefore, in 2017 between 25 and 61 percent of each TRQ was not available for reallocation to applicants. This effectively excluded from China's TRQ administration a significant volume of wheat, corn, and rice, despite measures and an annual *Allocation Notice* announcing the scheduled amounts available for allocation and reallocation. This scenario squarely fits within the plain meaning of "inhibit the filling."

B. China's Reliance on Credit China Instead of Published Criteria is Inconsistent with Paragraph 116

102. China asserts that it roundly ignores each of the basic criteria; China now states that "in practice, [China] does not conduct an individual assessment of the Basic Criteria," but rather uses an unannounced evaluation method − Credit China reviews − to evaluate an applicant's eligibility. China's assertion is inconsistent with China's obligations to administer TRQs (a) on a transparent basis; (b) on a predictable basis; (c) on a fair basis; and (d) using clearly specified requirements.

103. First, even assuming *arguendo*, that China's unsupported assertions are accurate, using an unannounced method of determining eligibility is even less transparent than using a vague, but announced method. Members, applicants, and other interested entities cannot discern that NDRC relies solely on Credit China. Given China's statements it is unclear which information contained in the Credit China system is used to evaluate applicants, resulting in an application process, the basis on which China administers its TRQs, that is not easily understood or discernable.

104. Second, China sets out a basis on which it purports to administer TRQs but uses another basis; Members, applicants and other interested entities are not able to anticipate how TRQs will be allocated based on the measures.

105. Third, while the annually announced basic criteria purport to establish the rules and standards for TRQ administration, China conceded it does not administer its TRQs in accordance with these rules and standards. It is plainly inconsistent with China's Paragraph 116 obligations to administer its TRQs in contravention of, or with disregard for, announced rules and standards. Therefore based on China's assertion, China does not administer its TRQs on a fair basis.

106. Finally, by publishing the annual *Allocation Notice,* China is notifying the public, including Members, applicants, and other entities, that applicants must demonstrate compliance with the basic criteria to be eligible for a TRQ allocation. NDRC annually publishes a list of criteria, but rather uses unannounced requirements − verified by the Credit China report − to evaluate an applicant's eligibility. Therefore, the requirements used to administer TRQs are not specified at all, and China is inconsistent with its obligations under Paragraph 116.

C. China's Procedure for Verification and Rebuttal of Public Comments

107. Each year China issues an Announcement *of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains,* and provides an opportunity for the public to submit comments to NDRC regarding

each applicant. No other measure or legal instrument references, let alone describes, the public comment process.

108. China now asserts that if NDRC receives a comment regarding a particular applicant, an administrative procedure to verify its accuracy, including an opportunity for the applicant to rebut the comment, is used to determine whether the comment should be considered in determining the applicant's eligibility. This statement is unsupported by the measures or any other evidence on the record.

109. The verification and rebuttal process described by China is an administrative procedure, that is, it is a set of instructions for performing a specific task. Here, the task is verifying a public comment by collecting additional information and soliciting a response from the applicant. China has made no effort however to specify or even notify Members, applicants, or other entities of this procedure. It is not described, referenced, or otherwise suggested by any measure or information provided by China. For this additional reason, China does not administer its TRQs consistent with Paragraph 116. Article IV of the *Allocation Notice* does not indicate that NDRC applies different principles depending on applicant type. Rather, it suggests that all of these factors will be considered.

D. China Asserts that Different Allocation Principles Apply to Certain Applicant Types

110. China now states that with respect to allocation of the non-STE portion, a general trade TRQ applicant's historic import performance is the most important factor in determining the amount of the allocation. For a processing trade applicant, the applicant's production and processing capacities are key factors in addition to its historic performance in determining the amount of the allocation. In addition, China asserts that new applicants are only considered if the TRQ is not fully allocated to applicants with historical import performance. The legal instruments provided by China do not reflect this.

111. China's asserted practice diverges from its publicly announced legal instruments and would thus be inconsistent with its obligation to administer TRQs on a transparent basis. Noting that China is obligated to administer its TRQs based on a system or principles that are easily discerned and understood, China has in this instance announced one set of principles and subsequently indicated that it is using an alternative, unannounced set of principles in practice. This is simply not a transparent basis for administering its TRQs.

112. China sets out a basis on which it purports to administer TRQs but uses another basis; Members and traders are not able to anticipate how TRQs will be allocated based on the measures. Therefore, China again purports to set out a process or set of rules or principles for allocating TRQ Certificates, but asserts it in practice applies a different set of principles. Moreover, China applies the principles differently to different types of applicants, without disclosing this to Members, applicants, or other interested entities. For these reasons, Members, applicants, and other interested entities cannot anticipate or plan for the basis on which allocation amounts are actually determined.

E. China Does Not Apply or Enforce the Usage Requirements to Certain TRQ Holders with Insufficient Processing Capacity

113. China's Allocation Notice makes clear that TRQ Certificate holders must process in their own facilities all wheat and corn imported pursuant to the TRQ. Because TRQ holders are also penalized for not using (*i.e.*, importing) their allocations, applicants are incentivized to limit their applications according to their processing capacities. China asserts that it would not apply or enforce the processing requirement in accordance with the rules and principles set out in the *Allocation Notice.* The *Allocation Notice* does not suggest this kind of flexibility, or provide any guidance regarding how NDRC evaluates an applicant's or a TRQ Certificate holder's current capacity for purposes of this requirement.

114. China's assertions regarding its usage restrictions, namely, that it would not uniformly apply the processing requirement set out in the *Allocation Notice,* further demonstrates that China does not administer its TRQs on a predictable basis or using clearly specified requirements. China publishes a processing requirement applicable to all TRQ holders, but asserts it would apply or

enforce the requirement only with respect to certain TRQ holders. Non-enforcement of significant requirements at the discretion of NDRC renders China's administration unpredictable.

115. China's publication of a processing requirement applicable to all TRQ holders, but application or enforcement of the requirement only with respect to certain TRQ holders, is inconsistent with its obligation to administer TRQs using clearly specified requirements. The *Allocation Notice* does not indicate this varied application, nor does it indicate how NDRC determines an applicant's capacity for purposes of this requirement.

116. China has thus failed to clearly specify its requirements for use of the imported grains. Instead, China has led Members, applicants, and other interested entities to believe one requirement exists, while secretly imposing a different standard. In this circumstance, China has not sufficiently specified its TRQ administration requirements to comply with Paragraph 116.

III. China Fails to Rebut and Provides Additional Bases for Finding Inconsistency with GATT 1994

117. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies.

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

118. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies with GATT 1994 Article X:3(a).

119. First, China, in its First Written Submission, asserts that to be inconsistent with Article X:3(a) the cited administrative practice must "necessarily lead[] to an unreasonable administration of the grains TRQs." China suggests that the "necessarily leads" approach is stricter than the one contemplated by the panel in *China – Raw Materials*, which described administration where there is "a very real risk" of unreasonable administration as inconsistent with Article X:3(a). In this vein, China also asserts that the availability of an alternative means of "achieving a Member's stated administrative objective does not render a Member's chosen means unreasonable." The description of the interpretative approach provided by the panel in *China – Raw Materials* is a restatement of the interpretative approach described in the Appellate Body report for *EC – Selected Customs Matters* and panel report for *Argentina – Hides and Leathers*, and in any event, China has failed to comply with Article X:3(a) applying any of the interpretative approaches.

120. Second, even while China accepts that no showing of trade effects is required, China asserts that "'Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world.'" The structure and requirements built into a particular measure may be sufficient to demonstrate a breach of Article X:3(a).

121. Six separate aspects of China's TRQ administration result in unreasonable administration. Neither China's First Written Submission, nor China's Responses to Panel Questions respond in any meaningful way to the evidence presented by the United States of China's inconsistency with Article X:3(a) of the GATT 1994.

122. First, China asserts that the lack of proper basic criteria does not cause "any negative impacts – actual or possible – on TRQ applicants," because while the criteria listed are erroneous it simply uses information typically supplied by the applicant to determine eligibility. However, the failure to provide clear applicant criteria is not just an issue for NDRC and its authorized agents who must determine eligibility, but for Members and those potential applicants to whom the criteria are communicated. These criteria discourage new applicants who are unable to interpret China's requirements, as well as applicants who have previously failed to receive an allocation. China asserts that applicants can just seek information regarding their rejection from NDRC, but the annual publication of erroneous criteria suggests they would not even understand the appropriate questions to ask.

123. Second, in response to concerns raised regarding the allocation principles, China asserts that the "alleged vagueness of the Allocation Principles" does not "necessarily lead[] to an unreasonable

administration of the TRQ." However, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Failure to provide this information to applicants results in administration that is not sensible or rational. Moreover, taken together with the additional catch-all, "other relevant commercial criteria," this creates additional confusion for applicants.

124. Third, China simply rejects as a "misunderstand[ing]" the role that authorized agencies play in the administration of China's TRQs. Rather, both the *2003 Provisional Measures* and the annual issued *Allocation* and *Reallocation Notices* call for an evaluation by the local authorized agents of whether the applicant has met the basic criteria. Structuring its TRQ administration so as to permit numerous entities to independently evaluate and determine whether applicants are consistent with undefined criteria leads to a situation where applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Without clear criteria, guidance or other information, it is therefore impossible to ensure that the criteria are interpreted and applied in a consistent manner. For these reasons, the application of vague and undefined criteria by thirty-seven separate authorized agents as part of the administration of TRQ allocation renders the manner in which China administers its TRQs unreasonable.

125. Fourth, with regard to the public comment process, China alleges that it relies on a previously undisclosed process related to the verification of public comments and opportunity for rebuttal to suggest that its administration is "reasonable." Again, there is nothing to suggest that members of the public understand the vague and undefined basic criteria any better than applicants. They are permitted to comment on applicants' compliance when there is no clear indication of what compliance means. Further, this entire process is curious as China suggests the only relevant factor regarding eligibility is passing the Credit China background check.

126. Fifth, China asserts that the use of a single application process for allocating STE and non-STE TRQ portions "cannot create uncertainty where there is only a single type of allocation granted to non-STE applicants." Numerous aspects of China's legal instruments indicate to Members, applicants, traders, and other interested entities that a certain volume of imports are to be completed "through" the STE, but that any eligible applicant may receive a TRQ allocation in either the STE or non-STE portion. Thus, China informs Members and applicants that they may receive STE or non-STE allocations regardless of whether this is accurate. For this reason, this process fails to be a reasonable means of TRQ administration and is a breach of GATT 1994 Article X:3(a).

127. Finally, China responds that the United States has provided "no factual evidence that the information currently published by China prevents traders from entering into necessary arrangements to utilize their allocations." As described above, it is the structure and architecture of this measure that is at issue, and there is no requirement for evidence of actual trade impact.

128. Additionally, certain aspects of China's "in practice" administration, if accurate, do not demonstrate that China has not acted inconsistently with Article X:3(a), but rather further demonstrate a breach of Article X:3(a).

129. First, with regard to the basic criteria, which China annually announces and has cited in its FAQs, China asserts that in practice "NDRC does not conduct an individual assessment of each of the Basic Criteria." Instead, "NDRC generates a credit report through 'Credit China,'" and "utilizes all of the information available through Credit China in evaluating each applicant." The use of divergent, unpublished criteria hamper Members' and applicants' ability to understand the application process and potential reasons for rejection, and thus result in unreasonable administration.

130. Second, China has indicated that it provides the entire STE portion of each TRQ to a single entity − COFCO. This administrative practice is "unreasonable." China once again annually announces one practice to Members and applicants, and then in reality employs a very different practice for distributing TRQ allocations. A system where applicants are required to apply to the Chinese government for permission to import wheat, corn, and rice on the basis of specifications and applications that have no bearing on the actual decision making of the government is not rational or sensible, and results in inconsistency with Article X:3(a). For these additional reasons, China has breached Article X:3(a) of the GATT 1994.

B. Article XIII:3(b) of the GATT 1994

131. China claims that the plain meaning of the terms of Article XIII:3(b) of the GATT 1994 provides that "the scope of the provision is . . . limited to the total quota quantities set forth in China's Schedule CLII." Rather, Article XIII:3(b) requires the provision of meaningful aggregate information regarding TRQs both with regard to the initial amounts permitted to be imported in a specified future period and any changes to that amount.

132. China further points to GATT 1994 Article XIII:3(a), indicating that this subparagraph addresses those situations where a license is issued. China's analysis is again in error. Article XIII:3(b) deals with "import restrictions involving the fixing of quotas;" thus addressing instances where a Member fixes a quota. Conversely, Article XIII:3(a) applies to instances where "import licenses are issued in connection with import restrictions." Article XIII:3(a) thus addresses circumstances where import licenses are required in order to effectuate an import restriction.

133. China appears to also contend that, while TRQs are subject to the provisions of Article XIII of the GATT 1994 as prescribed by paragraph 5, more generally TRQs are not "quantitative restrictions." This is inaccurate. Paragraph 5 of Article XIII makes clear that TRQs are a type of import restraint addressed by Article XIII and that more specifically, the reference to "fixing of quotas" includes TRQs. More generally, the reference to quantitative restrictions in the title of Article XIII does not circumscribe the scope of Article XIII, and in any event Article XIII:5 expressly provides that TRQs are within the scope of Article XIII.

C. Article XI:1 of the GATT 1994

134. China makes three primary arguments with regard to Article XI:1. First, China claims that TRQs and all associated requirements − whether characterized as administrative or substantive − are outside the scope of Article XI:1 of the GATT 1994. As part of this argument, China asserts that the U.S. claim should fail because other claims could have been made under other articles of the GATT 1994 or other agreements. Finally, China argues that the United States has not demonstrated a "limiting effect" on imported products.

135. With regard to the first argument, China asserts that TRQs are simply outside the scope of Article XI:1, and that while "non-automatic import licenses generally have been found to be within the scope of Article XI:1," this is not the case where licenses are for the purposes of administering TRQs specifically. China further clarifies that in its view, not just the duty, at an in-quota or out-of-quota level, is excluded from consideration under Article XI:1, but all "substantive conditions that a Member imposes upon access to the TRQ" are outside the scope of Article XI:1 of the GATT 1994.

136. However, this dispute does not challenge the "imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general," but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ" including specific administrative actions and omissions China uses to authorize imports pursuant to those TRQs. Nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import restrictions from the obligations under Article XI:1. Rather, Article XI:1 is squarely applicable to China's TRQ administration because Article XI:1 explicitly addresses prohibitions or restrictions "made effective through quotas, import or export licenses or other measures." That is, restrictions on imports that are produced or operative because of quotas, import or export licenses or other measures.

137. China also asserts that the U.S. claim should have been brought under another article or agreement depending on whether the challenged aspect is considered "administrative" or "substantive." This argument is without merit. Specifically, China attributes "a certain scepticism" to the analysis of import licensing procedures under GATT 1994 Article XI:1 in the *Argentina − Import Measures* dispute, and draws from this the conclusion that "claims relating to the administration of import licensing systems, including TRQ licensing systems should be brought under the [Import Licensing] Agreement." No such conclusion is supported by the Appellate Body's discussion in *Argentina − Import Measures*. Moreover, the *Agreement on Import Licensing Procedures* (the "Import Licensing Agreement") itself states that "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols." Unlike other WTO agreements, which have explicit conflicts clauses, the Import Licensing Agreement expressly notes that the GATT 1994

applies simultaneously. For this reason, prohibitions and restrictions on importation related to import licensing may appropriately be considered under Article XI:1 of the GATT 1994.

138. China makes a further argument that "substantive elements of a TRQ form part of the quota itself and must be examined under provisions of the GATT 1994 other than Article XI:1, most notably Article II of the GATT 1994." China notes that "[s]ubstantive conditions of access define the quota itself." As noted by the United States, in some instances Members negotiated specific narrow TRQs; for instance, a Member may have a TRQ open to only certain other countries or for a narrowly defined product like "skimmed milk powder (for school lunch)." These narrowly defined and scheduled TRQs are different from the obligations imposed by China through its regulatory process and subsequent "practice." Further, contrary to China's assertion, China's Schedule CLII contains no authorization or agreement to the challenged aspects of China's TRQ administration. Rather, the Headnotes indicate that China will implement TRQ regulations making clear their practices and methodologies, and demand that these regulations "be applied in a consistent and equitable manner." For these reasons, nothing bars a challenge to China's measures under Article XI:1 of the GATT 1994.

139. Finally, China misunderstands the burden of proof. It is not necessary to demonstrate a limiting effect by recourse to trade flows. Rather, as explained by the Appellate Body, this "limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context." Two administrative procedures – the usage restrictions and associated penalties, and the administration of the TRQ for both the STE and non-STE portion through a single process – are structured so as to have a limiting effect on imports.

140. The United States has demonstrated this restriction first by reference to China's administration of the state trading and non-state trading portions of the TRQ through a single application process that creates significant uncertainty for TRQ applicants. Second, China's use restrictions on products imported under the TRQ, combined with penalties for non-use of the full allocation, also restricts imports inconsistent with Article XI:1.

141. China asserts "there is no 'uncertainty' . . . because all non-STE applicants receive non-STE allocation." However, at no point does China communicate this information to Members, applicants or other interested entities. Instead, China's STE and non-STE TRQs administration – as described in its Schedule, its *2003 Provisional Measures*, and annual *Allocation* and *Reallocation Notices* – indicates that allocation of the STE portion is provided to end users and results in concerns and self limitation for applicants who anticipate potentially receiving this TRQ allocation.

142. With regard to the usage restrictions and associated penalties, China again asserts that "'in practice,' an end user that finds it is unable to process all of the grains imported under its quota may sell those grains directly to any other entity." Again, however, there is no evidence that Members, applicants, or other interested entities are aware of China's alleged "practice." To the contrary, China annually announces in its *Allocation Notices* that for the wheat and corn TRQs, all product must be processed by the TRQ holder. Previous panels have found that measures imposing limitations of this kind constitute restrictions on importation under Article XI:1 of the GATT 1994.

143. China's submissions suggest a number of additional restrictions on imports. In particular, if China's unsupported assertions are accurate, the provision of the entire STE share to COFCO, and the failure to require COFCO to return unused allocation for reallocation is a significant limitation on imports.

144. China asserts that contrary to the directions provided in its Schedule CLII and *2003 Provisional Measures*, which suggest that some amount of the STE portions of each TRQ will be allocated to end users who must import "through" an STE, China allocates the entire STE share directly to COFCO. China is thus annually providing large quantities of each TRQ portion to a government controlled entity – COFCO. That government controlled entity subsequently declines to import significant volumes of wheat, corn, and rice, and is not required to return the allocation so as to make it available to other end users. This allocation, refusal to import, and refusal to reallocate unused TRQ is a blatant restriction on importation.

145. The results of this practice are significant. Specifically, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." COFCO is declining to use between 25 to 61 percent of the overall TRQ, and because China does not require COFCO to return unused allocations this volume is unavailable to non-STE users who would likely be willing and able to import some or all of this amount.

146. The ability of China to limit imports at the in-quota duty rate, by allocating 50 to 90 percent of each TRQ to COFCO is an additional significant restriction on the importation of wheat, corn, and rice into the Chinese market, and is further inconsistent with China's obligation under Article XI:1 of the GATT 1994.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENTS AT THE SECOND MEETING

147. China is incorrect in arguing that a "holistic approach" means that consistency with one or more requirements of Paragraph 116 would excuse an inconsistency with another requirement of Paragraph 116. China did not undertake an obligation to administer some parts of its process at a WTO plus level and others at a WTO minus level, such that general TRQ administration averages out to Paragraph 116. China's so-called "holistic" approach should be rejected.

148. With regard to Article XIII:3(b) of the GATT 1994, the United States notes that while China purports to agree that Article XIII:3(b) is a "forward-looking" and "ongoing" obligation, it continues to contend that the text has no practical meaning after a Member has included TRQ amounts in its schedule, unless the Member offers larger TRQs than required under its schedule.

149. China continues to broadly argue that TRQs generally are not subject to Article XI:1 because they are not "quantitative restrictions," but rather "duties" and thus outside the scope of Article XI:1. However, the United States has not challenged the imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general, but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ," including specific administrative requirements and processes pursuant to those TRQs. It is these administrative aspects that constitute restrictions on importation, not the connection to lower or higher duty rates.

150. Further, nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import prohibitions or restrictions from liability under Article XI:1. China continues to suggest that processing requirements and associated penalties are not subject to Article XI:1 because they are "substantive conditions" for accessing the TRQ and thus part of the TRQ itself. China is in error.

151. GATT 1994, Article X:3(a) specifically addresses the manner of "administration" of "laws, regulations, decisions and rulings," and thus expressly does not address substantive concerns related to those laws, regulations, decisions, and rulings. By contrast, the applicability of Article XI:1 turns on whether the challenged measure is a prohibition or restriction on importation *other than* a duty, tax, or other charge.

152. A measure is not exempt from Article XI:1 because a Member has imposed the prohibition or restriction in addition to a duty, tax, or other charge. To that end, the United States reiterates that it is not challenging the in-quota or out-of-quota duty rates or the application of those rates to particular products. The United States is challenging the importation restrictions in China's measures that are in addition to the in-quota duty rates.

153. China goes on to conflate the negotiated terms of a Member's TRQ contained in its schedule − such as maintaining a TRQ on a country specific basis or limiting it to a particular end-use − with "substantive conditions" that China suggests can be put in place at the Member's discretion and are not subject to review under Article XI:1. China's Schedule CLII includes a description of the products as "corn," "wheat," etc., the relevant tariff item numbers, the in-quota duties and TRQ quantity amounts, and other terms and conditions, such as implementation stages for TRQ quantities. China negotiated TRQs applicable to grains for any use, so long as they fit under the cited tariff item numbers. China has not negotiated TRQs like those in Canada's or Japan's Schedules of Concessions that identify products through certain end uses, such as skim milk powder for school lunches.

154. The Schedule does not, as China suggests, "provide for the imposition of . . . end-use requirements, through taking account of capacity to produce processed grain." China also suggests that an exercise of judicial economy would be appropriate, and the Panel should only make certain findings under Paragraph 116 and Article XIII:3(b).

155. Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") establishes the standard terms of reference when the Dispute Settlement Body ("DSB") charges a panel with examining a matter the complaining party has referred to the DSB. DSU Article 11 sets out the "function" of panels, and tracks the standard terms of reference. In pertinent part, these provisions establish that the DSB tasks a panel with "examining" a matter and then making "such other findings as will assist the DSB in making the recommendation" set out in DSU Article 19.1 (that is, a recommendation that the Member bring the measure into conformity with that agreement). A panel should "address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."

156. Because compliance will not simply be a matter of China eliminating or removing its TRQ administration measures, but rather reforming its TRQ administration measures so as to comply with China's specific WTO obligations, it is important to make findings on each of these obligations so as to properly guide implementation. Without sufficient findings to inform implementation, it is likely that the dispute will not be resolved.

157. China argued in its Second Written Submission for specific applications of judicial economy, first with respect to Paragraph 116 and Article X:3(a) of the GATT 1994 and, second, with respect to Paragraph 116 and Article XIII:3(b) of the GATT 1994.

158. China "agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same." China contends that if the Panel were to consider both Paragraph 116 and Article X:3(a) it would "inevitably reach the same conclusion" under both provisions.

159. As described at length in this dispute, China maintains a complex and opaque TRQ administration that is difficult to understand and participate in and results in underutilization of China's TRQs. Unlike a dispute where the inconsistent measure will likely be withdrawn, China will continue to maintain TRQ administration measures for allocating licenses and permitting importation at in-quota duty levels. It will be critical for China to consider whether the measures taken to comply are: transparent, predictable, fair, clearly specified, and unlikely to inhibit the fill of the TRQ, as well as reasonable. For this reason, sufficiently precise findings with regard to Paragraph 116 and Article X:3(a) would be helpful to inform the actions China must take to come into compliance with its WTO obligations.

160. China continues to argue that whatever the Panel determines Article XIII:3(b) requires should be sufficient to satisfy the transparency requirement under Paragraph 116 of the Working Party Report. The United States disagrees. Article XIII:3(b) requires public notice of the amounts permitted to be imported and changes to those amounts.

161. Paragraph 116 requires China to administer its TRQs, including with respect to allocation and reallocation, through a process or set of rules or principles that is easily understood, discerned, or obvious. As part of this obligation, China should be providing information to Members and applicants regarding how the rules function, how they are applied, and the results of applying those rules in a timely manner. This will include and go beyond the specific information required to be made public by Article XIII:3(b) of the GATT 1994. For this reason, findings under both Article XIII:3(b) and Paragraph 116 of the Working Party Report would be important to help resolve the dispute.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

162. [Summaries of the U.S. responses to the Panel's questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. In the present dispute, the United States challenges the consistency of China's administration of its tariff rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn with certain of its obligations under the GATT 1994 and Paragraph 116 of the *Working Party Report* to China's Protocol of Accession. Specifically, the United States challenges six specific aspects of China's system of TRQ administration: the basic criteria for determining eligibility for TRQ allocations and reallocations ("Basic Criteria"); the principles for determining TRQ allocations ("Allocation Principles"); the information published concerning allocation and reallocation of the TRQs; the administration of the portions of the TRQs reserved for state trading enterprises ("STEs") and non-state trading enterprises ("non-STEs"); the public comment process; and the end-use requirements and penalties for non-use.[1]

2. For the reasons set out in China's written submissions, oral statements, responses to questions from the Panel and the United States, and comments on the United States' responses to questions from the Panel, China submits that the U.S. claims under Paragraph 116 of the *Working Party Report* to China's Protocol of Accession and Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 are unfounded and unsupported.

II. SUMMARY OF CHINA'S SYSTEM OF TRQ ADMINISTRATION

3. China's National Development and Reform Commission ("NDRC") is the authority responsible for allocating and reallocating the grains TRQs. Within NDRC, the Department of Economy and Trade is charged with overseeing the administration of the TRQs. Thirty-seven provincial and municipal departments are authorized to process TRQ applications.[2]

4. The grains TRQs are divided into STE and non-STE quotas.[3] NDRC issues an annual *Allocation Notice*, which provides the TRQ amounts for each grain, including the STE portion for each TRQ; the Basic Criteria for TRQ allocation eligibility; and the Allocation Principles that NDRC applies to determine the allocations that will be granted to eligible applicants.[4]

5. In relation to the non-STE portions of the grains TRQs, applicants must satisfy the Basic Criteria and commodity-specific requirements provided in the 2016 and 2017 *Allocation Notices* in order to be eligible for a TRQ allocation. Both processing and general trade applicants apply for TRQs between October 15 and October 30 of each year, and submit their application forms to a local authorized agency.[5]

6. When an authorized agency receives an application form, it will confirm that all of the information requested by the form has been provided and that the applicant has signed the form.[6] The authorized agencies are available to answer questions that applicants have in relation to the application form and the application process. The agencies answer these questions on the basis of the *TRQ Guideline of the Examination and Approval of Grain Import TRQ* ("TRQ Guidelines") and the *Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and*

[1] See China's first written submission, para. 22.

[2] See *Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Ministry of Commerce and National Development and Reform Commission, Public Notice No. 54, issued 15 October 2003) ("*2003 List of NDRC Authorized Agencies*") (CHN-6).

[3] *Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Ministry of Commerce and National Development and Reform Commission 2003 Order No. 4, issued 27 September 2003) ("*2003 Provisional Measures*"), Article 4 (CHN-5).

[4] See *2017 Allocation Notice* (CHN-7).

[5] See *2003 Provisional Measures*, Articles 10 and 11 (CHN-5).

[6] If an authorized agency determines that an application form is incomplete, the form is returned to the applicant with instructions on how to properly complete the form. See *2003 Provisional Measures*, Article 8 (CHN-5).

Answers ("TRQ FAQs") that NDRC publishes on its official website.[7] If a question is not covered by the guidelines or the TRQ FAQs, the authorized agency forwards the question to NDRC, and NDRC tells the authorized agency how to respond.[8] Questions may also be posed directly to NDRC through NDRC's official website.[9] Responses to questions submitted in writing are provided within ten working days, pursuant to Article 34 of the *2003 Provisional Measures*.[10]

7. The authorized agencies do not conduct a substantive assessment of the applications. After determining that the applications are complete and properly signed, the local authorized agency delivers the applications to NDRC.[11]

8. NDRC then reviews the applications to determine whether the applicants meet the Basic Criteria.[12] The uniform social credit code that is provided by each applicant in its application is used to generate a credit report through "Credit China" (https://www.creditchina.gov.cn).[13] The information that is used in generating a credit report includes the general registration information of the enterprise; the administrative licenses acquired by the enterprise; the administrative punishments received by the enterprise; and whether the enterprise is on the Good Credit List, Watch List, or Black List. Only the Black List is considered by NDRC. The components of the credit report are illustrated in Exhibit CHN-19.[14] Applicants with records of non-compliance (i.e. applicants who have been "blacklisted") are rejected. Applicants who inquire concerning the reasons for a rejected application will be provided with a response by NDRC or the relevant authorized agency within ten working days.[15]

9. Concurrent with the eligibility review, NDRC publishes the list of applicants by issuing the *Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains*. This notice also provides the opportunity for the public to submit comments to NDRC regarding each applicant.[16] NDRC relies on public comments to double check that applicants are eligible to receive TRQ allocations.[17] If NDRC receives a comment regarding a particular applicant, NDRC asks the responsible authorized agency to collect information in relation to the comment so that NDRC can verify its accuracy. The authorized agency also informs the applicant that a comment has been submitted in relation to its application, and the applicant is given an opportunity to provide a response. If NDRC concludes pursuant to the comment and the information collected by the authorized agency that the applicant has not fully met the Basic Criteria or that it has submitted falsified information in its application, then the application is rejected. If NDRC concludes otherwise, then the applicant remains on the list.[18]

10. Following the eligibility review, NDRC allocates the non-STE quota for each grains TRQ among the eligible applicants based on the Allocation Principles provided in Article 4 of the 2016 and 2017

[7] See Guideline on the Examination and Approval of Grain Import TRQs (National Development and Reform Commission, published 27 May 2017) ("TRQ Guidelines") (CHN-15) and Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and Answers (National Development and Reform Commission, published 27 May 2017) ("TRQ FAQs") (CHN-14).

[8] See *2003 Provisional Measures*, Article 8 (CHN-5).

[9] TRQ applicants can access the NDRC's Online Inquiry Page, available at: http://services.ndrc.gov.cn:8080/ecdomain/portal/portlets/bjweb/newpage/itemlist/itemlist.jsp?admintype=&themetype=&keyword=010092.

[10] Article 34 of the *2003 Provisional Measures* provides that "[i]nquiries relating to the allocation and reallocation of agricultural product import tariff-rate quota[s] shall be posed in writing to the Ministry of Commerce, NDRC or their respective authorized agencies. The Ministry of Commerce, NDRC or their authorized agencies shall reply to such inquiries within 10 working days."

[11] See China's response to Panel question No. 3(c), paras. 9 and 10. At this stage, if an application is found to be incomplete, NDRC will notify the responsible authorized agency, and the authorized agency will require the applicant to resubmit a complete application prior to NDRC's publication of the *Announcement of Enterprise Data*.

[12] *2017 Allocation Notice*, Article 2 (CHN-7).

[13] These credit reports are publicly searchable using an entity's name or social credit code.

[14] See China's responses to Panel questions No. 8(c), para. 24 and No. 47, para. 8.

[15] See *2003 Provisional Measures*, Article 34 (CHN-5).

[16] See Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2017 (National Development and Reform Commission, issued 1 December 2016) ("2017 Announcement of Enterprise Data") (CHN-8).

[17] See China's response to Panel question No. 55(a), paras. 22 and 23.

[18] See China's first written submission, para. 15.

Allocation Notices.[19] With respect to the allocation of the non-STE quota, a general trade TRQ applicant's historic import performance is the most important factor in determining the amount of the allocation. For a processing trade applicant, the applicant's production and processing capacities are key factors in addition to its historic performance in determining the amount of the allocation. New applications are considered in the event that the entire non-STE portion of the TRQ has not been fully allocated to applicants with historic import performance under the TRQs.[20]

11. When NDRC has completed its substantive review of each application, the authorized agencies inform each applicant of the results of its application. The annual import tariff rate quotas for agricultural products are implemented from January 1 of each year. In 2016 and 2017, the non-STE portion of each TRQ was fully allocated and fully utilized, with the one exception of short- and medium-grain rice in 2016, for the technical reason explained by China in its responses to Panel questions.[21]

12. In relation to the STE portions of the TRQs, China National Cereals, Oils and Foodstuffs Import and Export Corporation ("COFCO") is the only enterprise designated as a state trading enterprise for grains.[22] COFCO is therefore allocated the full STE portion of each TRQ.[23] This amounts to between 50 percent and 90 percent of each grains TRQ, depending on the grain, in accordance with China's Schedule CLII.[24] COFCO cannot apply for an allocation from the non-STE portion of the TRQ. No STE other than COFCO has ever received an STE portion of a TRQ allocation because COFCO is the sole authorized STE importer for grains.[25]

13. In practice, because the STE portions of the TRQs are allocated entirely to COFCO, any other TRQ allocation to an end-user is non-state trading only. If an end-user is unable to sign or complete import contracts for the entire TRQ allocation on their certificate by the end of the year, the end-user must return the unused quantity before September 15.[26] COFCO is not required to return any unused portion of its grains TRQs for reallocation, nor is it subject to penalties for less than full utilization. Only end-users are subject to the obligation to return unused amounts for reallocation and penalties for non-use.[27] All entities are subject to usage requirements.[28]

14. End-users who have imported their TRQ allocation by the end of August, as well as new users that conform to the Basic Criteria, may apply for any returned allocation amounts, from September 1 to September 15.[29] The procedures for reallocations follow the procedures for initial allocations in relation to the completeness check by the authorized agencies and the eligibility review by NDRC. Reallocations are granted based on the "first-come, first-served" methodology specified in Article 26 of the *2003 Provisional Measures*. The unused amounts of the non-STE portions of the TRQs are in fact returned and reallocated.[30]

[19] 2017 *Allocation Notice*, Article 4 (CHN-7); 2016 *Allocation Notice*, Article 4 (CHN-10); see also *2003 Provisional Measures*, Article 13 (CHN-5).

[20] See China's first written submission, paras. 16 and 17; China's response to Panel question No. 51, para. 13.

[21] See China's response to Panel question 10, para. 35 and fn 41.

[22] See *Catalogue of Import State Trading Enterprises* (Ministry of Foreign Trade and Economic Cooperation 2001 Announcement No. 28, issued 2001) (CHN-13).

[23] See China's responses to Panel questions, Table 1.

[24] See Schedule CLII − People's Republic of China, Part I − Most-Favoured-Nation Tariff: Section I-B − Tariff Quotas (WT/ACC/CHN/49/Add.1) (CHN49A1-02) ("China's Schedule CLII").

[25] See China's response to Panel question No. 6(e), para. 19.

[26] *2003 Provisional Measures*, Article 23 (CHN-5).

[27] See China's response to Panel question No. 6(e), para. 20.

[28] See China's response to Panel question No. 6, para. 20. China notes that certain Panel questions refer to the usage requirements alternatively as "end-use requirements" or "processing requirements". China explained the difference between processing requirements applicable only to entities engaged in processing trade and the end-use processing requirement applicable to all general trade recipients of wheat and corn in its response to Panel question No. 58(b). It is the end-use processing requirement applicable to all general trade recipients that is challenged by the United States.

[29] *2003 Provisional Measures*, Articles 24, 25 (CHN-5); *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2017* (National Development and Reform Commission 2017 Public Notice No. 11, issued 11 August) ("*2017 Reallocation Notice*") para. 1 (CHN-9).

[30] See China's second written submission, Table 1.

III. THE PANEL SHOULD EXERCISE JUDICIAL ECONOMY REGARDING CERTAIN OF THE U.S. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994 AND PARAGRAPH 116 OF THE *WORKING PARTY REPORT*

A. Examining the United States' Claims Under Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994 Is Unnecessary to Resolve this Dispute

15. The United States is pursuing claims under both Paragraph 116 and Article X:3(a) of the GATT 1994 with respect to the Basic Criteria; Allocation Principles; information published concerning allocations and reallocations of the TRQs; administration of the STE and non-STE portions of the TRQs in conjunction with penalties for non-use; and the public comment process.

16. It is undisputed that it is within the bounds of a panel's discretion "to determine only those claims on which a finding is necessary 'for the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings'" and thereby "'ensure effective resolution of disputes to the benefit of all Members'".[31] In China's view, the exercise of judicial economy with respect to the U.S. claims under Article X:3(a) of the GATT 1994 that it has also brought under Paragraph 116, and the United States' claims under Paragraph 116 that it has also brought under Article XIII:3(b) of the GATT 1994, would be the most efficient and effective means to resolve this dispute.[32]

17. China acknowledges that there are circumstances in which the exercise of judicial economy by a panel may not be appropriate, such as where different remedies are available under different applicable provisions. No such circumstances exist here. The United States has not argued that the exercise of judicial economy will preclude the possibility of it obtaining a remedy under another provision. Rather, it asserts only that its claims implicate "distinct" legal obligations, and that "the scope and content" of those obligations "are not the same."[33]

18. China agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same.[34] While Paragraph 116 addresses TRQ administration specifically, the scope of Article X:3(a) applies to administration generally and is therefore broader. The content of the provisions also differs because of the TRQ-specific outcomes set out in the latter half of the first sentence of Paragraph 116 (provision of effective import opportunities, etc.). The provisions nonetheless overlap to a significant degree because of the series of requirements set forth in the first part of the first sentence of Paragraph 116 (administration on a transparent, predictable, etc. basis). These requirements combine to encompass the specific obligation contained in Article X:3(a) underlying the United States' claim − the obligation to administer measures of the kind described in Article X:1 in a reasonable manner.[35] To require China to administer its TRQs on a transparent, predictable, uniform, fair and non-discriminatory basis, using clearly specified timeframes, administrative procedures and requirements, is therefore to require China to administer its TRQs in the "reasonable" manner mandated by Article X:3(a).

19. Thus, China disagrees with the United States that the differences between the scope and content of these provisions require examining the U.S. claims under both provisions, or that such differences require the Panel to decline to exercise judicial economy.[36] On the contrary, these differences militate in favour of foregoing analysis of the U.S. claims under Article X:3(a).

---

[31] See China's response to Panel question No. 22, para. 61, quoting Appellate Body Report, *Australia − Salmon*, para. 223. See also Appellate Body Report, *India − Patents (US)*, para. 87 ("... a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties — provided that those claims are within that panel's terms of reference.").

[32] See also European Union's third-party submission, paras. 12-14.

[33] See China's second written submission, para. 7, quoting United States' response to Panel question No. 21(a), para. 65 and No. 21(b), para. 68.

[34] See United States' response to Panel question No. 21, para. 65.

[35] See United States' first written submission, para. 228.

[36] See Appellate Body Report, *Argentina − Import Measures*, para. 5.194. The Appellate Body explained that:

B. Examining the United States' Claims Under Article XIII:3(b) of the GATT 1994 and Paragraph 116 of the *Working Party Report* Is Unnecessary to Resolve this Dispute

20. The United States is also pursuing claims under Paragraph 116 and Articles XIII:3(b) and X:3(a) of the GATT 1994 relating to the publication of allocation and reallocation information. The United States clarified in its responses to questions from the Panel that the information it claims is required under Paragraph 116 and Article XIII:3(b) includes the total amounts actually allocated, returned and reallocated. China has already explained why it does not consider it necessary for the Panel to examine the United States' claim under Article X:3(a) relating to this information. In China's view, it is similarly unnecessary for the Panel to examine the United States' claim under Paragraph 116, for the following reasons.

21. China explained in its first written submission that Article XIII:3(b) requires publication of the total amounts that will be permitted to be imported during the specified future period and any changes to those amounts during that specified period.[37] This requirement does not extend to publishing amounts actually allocated, either in the aggregate or individually. Article XIII:3(b) thus expressly provides specific public notice requirements with respect to the administration of TRQs, including total amounts.

22. In contrast, Paragraph 116 makes no reference to public notification of TRQ amounts. The United States is trying to read such a requirement into Paragraph 116 through the more general requirement to administer TRQs on a transparent and predictable basis. China does not believe that the Panel could reasonably conclude that the precise public notice requirements in Article XIII:3(b) do *not* require publication of the amounts actually allocated, returned for reallocation, and reallocated, but find that such amounts *must* be published under Paragraph 116. Accordingly, China submits that the Panel's analysis with respect to publication of amounts actually allocated, returned, and reallocated should begin and end with Article XIII:3(b), as this will efficiently resolve the question of whether China is obligated to publish this information.

IV. THE UNITED STATES HAS FAILED TO ESTABLISH THAT CHINA'S SYSTEM OF TRQ ADMINISTRATION IS INCONSISTENT WITH ITS WTO OBLIGATIONS

A. Basic Criteria

1. The Basic Criteria Do Not Render China's System of TRQ Administration as a Whole Inconsistent with Paragraph 116 of the *Working Party Report*

23. The articulation of the Basic Criteria constitutes a particular aspect of China's administration of the TRQs. Paragraph 116 however relates to the *administration* of the TRQs as a whole. Consequently, while China acknowledges that the description of the Basic Criteria needs to be updated to better reflect the nature of NDRC's assessment,[38] this does not mean that China's system of TRQ administration is inconsistent with Paragraph 116.[39]

24. As the United States acknowledged in its first written submission, "China's administration of its TRQs relates to all aspects of its execution, or carrying out, of those TRQs".[40] Accordingly, even if the Panel were to conclude that any of the specific aspects challenged by the United States are inconsistent with the obligations in Paragraph 116, the Panel would have to then evaluate whether the inconsistency of those specific aspects with Paragraph 116 is a sufficient basis upon which to conclude that the administration of the TRQs as a whole is inconsistent with Paragraph 116.

25. In referring to its TRQ administration "as a whole", China is referring to its system of TRQ administration in its entirety. China's system of TRQ administration includes, *inter alia*, the six

---

In our view, the fact that two provisions have a different "scope and content" does not, in and of itself, imply that a panel must address each and every claim under those provisions. Indeed, if this were so, then only in the rarest of circumstances would a panel be able to exercise judicial economy on a claim. Ibid.

[37] See China's first written submission, paras. 85-87.

[38] See China's oral statement to the Panel at the first meeting, para. 14.

[39] See China's response to Panel question No. 26, para. 73.

[40] See United States' first written submission, para. 67.

specific aspects challenged by the United States − the Basic Criteria; Allocation Principles; public comment process; public notice requirements; usage requirements and penalties; and administration of the STE and non-STE portions of the TRQs. China's system of TRQ administration also includes aspects not challenged by the United States, such as the application forms for TRQ allocations and reallocations utilized by NDRC; the applicant categories and application periods specified by NDRC in the annual Allocation Notice; the public inquiry process; the TRQ FAQs and TRQ Guidelines issued by NDRC; NDRC's reliance on the first-come, first-served method at the reallocation stage; the process by which NDRC and the local authorized agencies inform recipients that they have received allocations and reallocations; and the designation of COFCO as the sole STE authorized to import grains.[41]

26. Under a holistic analysis, no single administrative measure or practice is determinative of whether China's administration is consistent with Paragraph 116. To illustrate, access to information relating to allocation and reallocation is facilitated through the right of any entity (applicant or non-applicant) to submit any inquiry relating to the grains TRQs to local authorized agencies and NDRC. The inquiry feature interacts with all of the other features of China's TRQ system, including the Basic Criteria, to further the administration of the TRQs on a transparent, predictable, and fair basis, using clearly specified procedures and requirements that do not inhibit the filling of each TRQ. Any entity could submit an inquiry to NDRC requesting further details as to the operation of the public comment procedure. The question of the consistency or inconsistency of China's administration with Paragraph 116 thus is not decided by any one aspect.[42]

27. The contents of Paragraph 116 affirm that a holistic analysis is appropriate. None of the requirements set forth in Paragraph 116 pertain to specific aspects of TRQ administration, such as when and how to provide public notice of permitted imports or the mechanisms to use in determining allocation and reallocation amounts and recipients. Rather, they pertain to the administration of the TRQs regime as a whole. China also considers that the Agreement on Import Licensing Procedures ("ILP Agreement") suggests such a holistic approach is appropriate when evaluating China's administration of the TRQs.[43] Article 3.2 of the ILP Agreement requires non-automatic licensing procedures to be "no more administratively burdensome than absolutely necessary to administer the measure". China notes that the Members had this standard in mind with respect to China's TRQ administration.[44] It is well-established that evaluating the necessity of a measure entails a holistic analysis that involves weighing and balancing a series factors not limited to the measure itself.[45] China considers that the holistic evaluation of the administration of non-automatic licensing procedures under the ILP Agreement indicates that a similar evaluation should be undertaken with respect to the administration of TRQ licensing procedures under Paragraph 116.

28. China thus requests that the Panel reach a conclusion on the consistency of China's administration with Paragraph 116 that rests on China's system of TRQ administration as a whole.

2. The United States Has Not Demonstrated that the Basic Criteria Are Inconsistent with Article X:3(a) of the GATT 1994

29. The United States argues that the inclusion of "vague" or "undefined" Basic Criteria is inconsistent with China's obligation to administer its TRQs in a "reasonable manner" under Article X:3(a) of the GATT 1994. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Basic Criteria under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Basic Criteria

[41] See China's response to Panel question No. 60(b), para. 41.
[42] See China's second written submission, para. 59.
[43] See China's second written submission, para. 60.
[44] See *Working Party Report*, para. 112 ("…members asked that China ensure that its TRQ arrangements be no more administratively burdensome than absolutely necessary…").
[45] See, e.g. Appellate Body Report, *EC − Seal Products*, para. 5.169, referring to Appellate Body Reports, *Korea − Various Measures on Beef*, para. 164, *US − Gambling*, para. 306, and *Brazil − Retreaded Tyres*, para. 182.

necessarily leads to an unreasonable administration of the grains TRQs,[46] and because the United States has failed to "support its claim with solid evidence".[47]

30. In evaluating whether the United States has in fact demonstrated that the Basic Criteria necessarily lead to the unreasonable administration of the grains TRQs, the specific factual circumstances in which the Basic Criteria are applied must be examined in light of their objective.[48] There is no evidence that similarly situated applicants are being treated differently in NDRC's evaluation, or that the requirements have in fact caused prejudice to the United States or other Members.[49] China acknowledges that a showing of trade effects is not required to establish inconsistency with Article X:3(a). China recalls however, that "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world" and that this "can involve and examination of whether there is a "possible impact on the competitive situation due to…unreasonableness in the application" of the measure.[50]

31. When the "real effect" of the Basic Criteria is examined, it is evident that China's administration of the Basic Criteria is consistent with Article X:3(a). The "real effect" is that all applicants are subject to the same *pro forma* screening before their applications are forwarded to NDRC for substantive review. There is no evidence that grains traders operating in China are being negatively impacted by an unreasonable application of the Basic Criteria. Furthermore, the "possible impacts'' alleged by the United States are based on a misunderstanding of the function of the Basic Criteria in the TRQ administration process.

32. The United States emphasizes that the Basic Criteria are "insufficiently specified to permit applicants to properly understand and subsequently meet the criteria."[51] However, the Basic Criteria are met as soon as an applicant signs the application, passes the standard background check, and is confirmed not to have violated the *2003 Provisional Measures*.[52] What an applicant must properly understand are the requirements to provide certain operational data and to sign the application form − requirements which are clearly specified in the form itself. The descriptions of each of the Basic Criteria have no bearing on this aspect of the application process. The United States also theorizes that the Basic Criteria "prevent applicants from correcting or improving their applications in the future."[53] As China explained in its first written submission, any applicant whose form is rejected by a local agency is informed as to the reason for the rejection and provided an opportunity to complete and resubmit the form.[54] The application of the Basic Criteria therefore cannot "have caused, [n]or are likely to cause", this outcome.[55]

---

[46] See Appellate Body Report, *EC − Selected Customs Matters*, para. 201.

[47] See Panel Report, *Thailand − Cigarettes*, para. 7.874, quoting Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews,* para. 217. The Appellate Body stated:

> We observe, first, that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.
>
> Ibid.

[48] See Panel Report, *US − COOL*, para. 7.851 (finding that "whether an act of administration can be considered reasonable within the context of Article X:3(a) entails a consideration of factual circumstances specific to each case" and "an examination of the features of the administrative act at issue in light of its objective, cause or the rationale behind it"). See also Panel Report, *Thailand − Cigarettes*, para. 7.921. The Panel found that the Appellate Body's "clarification of the principles underlying the chapeau of Article XX provide guidance on the analysis of the reasonableness requirement under Article X:3(a)" and noted that "for example…the rationale that can explain [the measure at issue] is also relevant to evaluating the question of whether it is an administrative process that leads to unreasonable administration".

[49] See Panel Report, *Thailand − Cigarettes*, para. 7.969 (finding a violation of Article X:3(a) where proven delays under Thailand's customs review process tended "to show prejudice caused to other Member governments and traders").

[50] See Panel Report, *Argentina − Hides and Leather*, para. 11.77 (emphasis added).

[51] See United States' first written submission, para. 233.

[52] See China's first written submission, para. 35.

[53] See United States' first written submission, para. 238.

[54] See China's first written submission, para. 38.

[55] See Panel Report, *China − Raw Materials*, para. 7.705, quoting Appellate Body Report, *EC − Selected Customs Matters*, para. 225. The Appellate Body stated:

33. In relation to the U.S. argument that authorized agencies may be providing divergent interpretations of the Basic Criteria, the United States misunderstands the role that authorized agencies play in the administration of China's TRQs. Authorized agencies do not conduct substantive reviews of applications. The role of authorized agencies is explained in Articles 8, 11 and 12 of the *Provisional Measures*. The role of the authorized agencies pursuant to these provisions is simply to check the applications for completeness and forward applications to NDRC for review. The authorized agencies do not interpret the Basic Criteria, and if they receive a question that is not answered by the TRQ FAQs or TRQ Guidelines, they forward such questions to NDRC. Accordingly, there is no opportunity for "divergent interpretations" or "inequitable application" of the eligibility criteria.[56]

34. The reasonableness of the Basic Criteria must also be evaluated in light of their objective, which is to ensure that all TRQ applicants are accountable for the information they submit and are acting in accordance with the law, so as to ensure that the administration of each TRQ is "uniform, fair, just, predictable and non-discriminatory".[57] This objective is both reasonable and reconcilable with China's administration of the Basic Criteria.[58] When considered in conjunction with the fact that the Basic Criteria are applied uniformly and impartially, and that only NDRC is authorized to conduct a substantive review of each application, it is evident that China's measures are consistent with its obligations under Article X:3(a).[59]

35. Finally, the reasonableness of the Basic Criteria must be evaluated with due regard to China's right, and the right of all Members, to deploy the manner of administration that each considers "most appropriate in the particular circumstances in which it is situated".[60] China developed a preliminary screening step in order to efficiently ensure that the hundreds of applicants for TRQ allocations reviewed by NDRC are complete. China reasonably assessed that it would not be an efficient use of NDRC's limited resources to both confirm completeness and conduct substantive reviews of each application.[61]

36. For these reasons, the United States has failed to demonstrate that the inclusion of the Basic Criteria necessarily leads to an unreasonable administration of the grains TRQs, and the U.S. claim under Article X:3(a) must fail.

[W]e may conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non- uniform application of the legal instrument at issue.

Ibid.

[56] See United States' first written submission, para. 230. See also China's second written submission, paras. 21-27.

[57] See *2003 Provisional Measures*, Article 1 (CHN-5).

[58] See Panel Report, *Thailand – Cigarettes*, fn 1573 (discussing the Appellate Body's holding in *US – Shrimp* that one of the bases for its conclusion that a measure resulted in unjustifiable discrimination was the difficulty of reconciling the application of the measure with its stated objective).

[59] See Panel Report, *Thailand – Cigarettes*, paras. 7.922 and 7.929. The Panel found as follows in examining the Philippines' claims under Article X:3(a):

[G]ranting dual function officials the power to make customs and fiscal decisions concerning cigarettes, both imported and domestic, as well as access to confidential information on imported cigarettes would appear to constitute an act of inappropriate and/or not sensible administration *unless there is a particular rationale that can explain the concerned act*. … In conclusion*, given the rationale behind it*, and considered in conjunction with safeguards in the system, we find that the Philippines has not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X:3(a).

Ibid (emphasis added).

[60] See Panel Report, *Thailand – Cigarettes*, para. 7.925.

[61] See China's first written submission, para. 42.

B. Allocation Principles

1. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Paragraph 116 of the *Working Party Report*

37. The United States claims that the Allocation Principles are inconsistent with Paragraph 116 of the *Working Party Report*, because the Allocation Principles are not transparent, predictable, fair, or clearly specified.

38. In China's view, transparent, predictable, fair, and clearly specified TRQ administration does not require that an applicant know precisely how NDRC weighs the factors identified by the Allocation Principles. China submits that it is sufficient for applicants to know that TRQs will be allocated "in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operations) and other relevant commercial standards". China also submits that applicants can easily discern from China's measures that there are different categories of applicants, and that NDRC takes an applicant's category into account in applying the Allocation Principles.[62]

39. The United States further claims that the content of the category "other relevant commercial criteria" in the Allocation Principles is not defined, and that this also renders the Allocation Principles not "transparent", "predictable", "fair", or "clearly specified" within the meaning of Paragraph 116. China does not believe that the use of a residual category renders the Allocation Principles inconsistent with Paragraph 116 of the *Working Party Report*. The use of residual categories like "other relevant commercial criteria" is common practice in the administrative regulations of WTO Members.[63] Such categories are purposefully broad in order to preserve the administering authority's ability to take into account all relevant information.

40. China's method of distributing allocations is not automatic, and China does not suggest otherwise. China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process. China submits that it is responsibly exercising "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[64] In this case, China wants to utilize the expertise of NDRC officials to the maximum extent possible by granting them latitude to make sufficiently individualized decisions with respect to applications.[65] China's view that this is the most transparent, predictable, and fair way to achieve full utilization of the TRQ should not be "second guess[ed]", even if there are other methods of allocation that might achieve this objective.[66] China also notes that the United States has presented no evidence that any applicants are actually confused by the Allocation Principles.

2. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Article X:3(a) of the GATT 1994

41. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Allocation Principles under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQs.

---

[62] See China's oral statement to the Panel at the second meeting, paras. 14 and 15.

[63] See China's first written submission, para. 54 (quoting the U.S. sugar TRQ regulations).

[64] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel found:

> A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions.

Ibid.

[65] See Panel Report, *Thailand – Cigarettes*, para. 7.924.

[66] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel determined that it was "not in a position to second guess the specific needs of the Thai government in assigning selected customs and tax officials with a dual role as a director of a state enterprise, TTM" and "therefore recognize[d] that the Thai government officials…may indeed be well equipped to apply their expertise in laws and regulations relating to customs and internal taxes to the management of TTM".

42. In relation to the argument that applicants must be able to understand how NDRC evaluates "actual production and operating capacity", China repeats that reasonable administration does not require that the measures provide a detailed understanding of the basis upon which NDRC evaluates each application.

43. In relation to the inclusion of "other relevant commercial criteria", the United States similarly fails to demonstrate that this necessarily leads to unreasonable administration. As China has explained, this residual category is a commonly used mechanism for preserving a necessary element of discretion in administrative decision-making processes. As China has also explained, including a reasonable element of discretion as part of its allocation process is permissible. Thus, the Panel should reject the United States' argument that China fails to administer its TRQs for wheat, rice, and corn in a reasonable manner due to the alleged vagueness of the Allocation Principles.

C. Administration of STE vs. Non-STE Portions of the TRQs

1. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Paragraph 116 of the *Working Party Report*

44. The United States alleges in relation to the STE vs. non-STE allocation process that China does not administer its TRQs on a transparent or predictable basis and that it does not use administrative procedures that are clearly specified. In support of these allegations, the United States repeatedly emphasizes that the *2017 Allocation Notice* does not address how NDRC determines which applicants will receive allocations from the STE versus non-STE portions of each TRQ, nor do the Allocation Principles distinguish or refer to the STE portion specifically.[67]

45. The *2017 Allocation Notice* does not provide this information and the Allocation Principles do not otherwise distinguish the STE portion because applicants do not receive allocations from the STE portion of each TRQ. The entire STE portion of each TRQ is allocated to COFCO.

46. The United States also argues that it is not transparent or predictable to deny an applicant the opportunity to specify whether the applicant is requesting an allocation under the STE or non-STE portion of the TRQs and whether the applicant would accept an STE allocation, if granted.[68] Applicants are not given this opportunity because applicants are not granted allocations under the STE portion of the TRQs.

47. The fact that applicants are not granted allocations from the STE portion also moots the United States' argument that because end-users with such allocations would need to seek approval from NDRC to import directly in the event that the STE does not secure a contract to import the full amount of the allocation by August 15, the TRQ holder "*may not be able to* import the full amount of TRQ allocation received."[69] No TRQ Certificate holder is ever required to seek approval from NDRC for the right to import directly because no TRQ Certificate holder other than COFCO is ever granted an STE allocation in the first instance. No TRQ Certificate holder is therefore ever in a position where they "have just thirty days to contract for importation."[70] For this reason, the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process.

48. The United States' argument that applicants allocated an amount from the STE portion of the TRQ "cannot be certain they will be able to import the full amount within the specified timeframes, and thus be eligible to apply for a reallocation, if desired, and avoid any penalties associated with failing to import" is also moot.[71] The United States' proposed hypothetical category of applicants granted STE allocations does not exist. All non-STE applicants receive the same type of allocation. All non-STE applicants can therefore easily predict whether they will be able to import the amounts allocated within specified time periods.

[67] See United States' first written submission, paras. 91 and 92, 130-132, 172.
[68] See United States' first written submission, paras. 92, 132.
[69] See United States' first written submission, para. 147 (emphasis original).
[70] See United States' first written submission, para. 148.
[71] See United States' first written submission, para. 145.

49. The United States' arguments in relation to the use of administrative procedures that would not inhibit the filling of each TRQ largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of the entire STE portion of the TRQ to COFCO.[72] In arguing that the STE vs. non-STE distinction inhibits the filling of the TRQ, the United States elaborates on the alleged inability of applicants to request a particular allocation type.[73] As explained, however, applicants do not have the ability to choose which allocation type to apply for because the STE portion is only available to COFCO.

50. The United States also reiterates that applicants do not have information regarding the STE vs. non-STE allocation process. Again, because no applicants receive state trading allocations, there is no need for applicants to understand the basis on which that hypothetical determination would be made. Furthermore, there are no "costs, time constraints, and administrative burdens" that are distinct to "each type of importation process" which result in "uncertainty" that "makes it more difficult to negotiate with potential exporters" because there is only one type of importation process for all TRQ applicants other than COFCO – direct importation.[74]

51. In sum, China's administration of its TRQs is not inconsistent with its obligations under Paragraph 116 of the *Working Party Report* because the administration of both the STE and non-STE portions of the TRQ is transparent, predictable, uses administrative procedures that are clearly specified, and does not inhibit the filling of each TRQ.

2. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article X:3(a) of the GATT 1994

52. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should find that China administers the STE and non-STE portions of the TRQs consistently with Article X:3(a).

53. The United States claims that because China administers a "single application process", applicants are less able "to anticipate and commercially plan for the allocated TRQ amounts they receive."[75] As China has explained, the use of a "single application process" does not create uncertainty because there is only a single type of allocation granted to non-STE applicants. The United States also claims that "TRQ Certificate holders can receive state trading, non-state trading, or a mixed allocation. However, no guidance is provided regarding how NDRC determines the allocation."[76] This outcome is not possible. Mixed allocations cannot be granted because NDRC grants only one type of allocation to non-STE applicants.[77] It follows that since no mixed allocations are granted, there is no risk that each portion of a mixed allocation will not be granted in commercially viable amounts and that this will "further increase risks and costs associated with importation, compounding an already unreasonable process."[78] The United States' claim under Article X:3(a) relating to the administration the STE vs. non-STE portions of the TRQs should therefore be rejected.

3. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article XI:1 of the GATT 1994

54. The United States argues that "[t]he use of a single application for the state trading and non-state trading TRQ allocations constitutes a 'restriction' on importation of wheat, rice, and corn within the meaning of Article XI:1 of the GATT 1994" because the United States argues that "differing requirements and commercial consideration of state trading and non-state trading TRQ allocation,

[72] See United States' first written submission, paras. 190-205.
[73] See United States' first written submission, para. 197.
[74] See United States' first written submission, para. 201.
[75] See United States' first written submission, paras. 230, 255-260.
[76] See United States' first written submission, para. 242.
[77] The United States points out that the sample TRQ Certificate annexed to the *2003 Provisional Measures* indicates that an applicant may be allocated a certain amount categorized as "state-trading". See United States' first written submission, para. 258. In practice, TRQ Certificates do not allocate amounts of this type because, as explained above, there is only one type of allocation available to non-STE applicants.
[78] See United States' first written submission, para. 259.

when combined with applicants' inability to decide or predict which allocation they will receive" creates uncertainty that discourages applicants from applying for allocations.[79]

55. The U.S. claim under Article XI:1 of the GATT 1994 is unfounded. First, as China will explain in Part F below, TRQs, including measures necessary for their administration, are not "restrictions… on the importation of any product" within the meaning of Article XI:1.[80] Second, as China has explained above, all non-STE applicants receive non-STE allocations that present the same requirements and implicate the same commercial considerations, therefore there is no "uncertainty" introduced into the administrative process via the allocation of the non-STE and STE portions of the TRQs.

4. The United States Has Not Demonstrated that the Allocation of the STE Portions of the TRQs Entirely to COFCO Is Inconsistent with Paragraph 116 of the *Working Party Report* or Articles X:3(a) and XI:1 of the GATT 1994

56. With respect to Paragraph 116, China disagrees that it is not transparent, predictable, or fair for China's measures and practices to distinguish between STEs and non-STEs. STEs and non-STEs are different entities and China's measures expressly distinguish between them. It is therefore easily discernible, predictable, and fair that non-STEs and STEs are subject to different requirements.[81]

57. Specifically, in China's view, there is nothing inherently unfair in NDRC's decision to allocate the STE portions of the TRQs entirely to COFCO without applying the Basic Criteria and Allocation Principles. The STE portions of the TRQs may be allocated only to those STEs authorized to import grains. As China has explained, COFCO is the only STE authorized to import grains.[82] Applying the Basic Criteria and the Allocation Principles to COFCO would therefore not make sense.

58. As China has explained, COFCO is not an end-user as defined in China's written measures. COFCO is therefore not required to return its unused amounts for reallocation.[83] Requiring the only STE authorized to import grains to return unused grains would not make sense because no other STE would be eligible to apply for COFCO's unused amounts at the reallocation stage.[84]

59. For the same reason, penalizing COFCO at the initial allocation stage for failing to utilize its entire allocation would not make sense. The amounts not allocated to COFCO could not be allocated to any other STE because COFCO is the only STE authorized to import grains. Reducing COFCO's annual allocation would therefore guarantee that part of the STE portion of each TRQ would not be utilized. In contrast, by allocating the entire STE portion of each TRQ to COFCO each year, NDRC preserves the opportunity for the STE portions to be fully utilized.[85]

60. With respect to Article XI:1, the United States has failed to demonstrate that allocating the entire STE portion of each TRQ to COFCO exerts a "limiting effect" on imports independent of the underlying TRQ and is therefore inconsistent with Article XI:1. In its responses to questions from the Panel, China provided data with respect to the allocation of the STE and non-STE portions of the TRQ. This data confirms that both the non-STE and STE portions of the TRQs are fully allocated. Specifically, the data confirm that each year, the STE portions of the TRQs have been fully allocated to COFCO. When there is full allocation, allocation is not operating as an aggregate limitation on in-quota imports. Thus, China's practice of allocating the entire STE portion to COFCO is not exerting a limiting effect on imports independent of the underlying TRQ.[86]

[79] See United States' first written submission, paras. 292, 301.
[80] See, e.g. Appellate Body Report, *EC – Bananas (21.5)*, para. 335.
[81] See China's response to Panel question No. 63, para. 44.
[82] See China's response to Panel question No. 5(a), para. 12.
[83] See China's second written submission, para. 30.
[84] See China's response to Panel question No. 66, para. 46.
[85] See China's response to Panel question No. 66, para. 47.
[86] See China's second written submission, paras. 88 and 89.

D. Public Comment Process

1. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Paragraph 116 of the *Working Party Report*

61. The U.S. claims under Paragraph 116 relate to the fact that the process for evaluating and verifying public comments is not spelled out in the relevant measures. In practice, all of the U.S. concerns are unfounded. Applicants are informed of comments, they are provided with an opportunity to rebut comments, and comments are only taken into account if the information provided is verified. The United States believes that the procedures for evaluating the comments need to be described on the face of the measures, but the United States has presented no evidence that any applicant is in fact confused about the public comment process. Nor has the United States presented any evidence that an applicant has sought clarification concerning the public comment process from NDRC, and such clarification has not been provided.

62. The United States acknowledges that "it is clear on the face of the *Announcement of Applicant Enterprise Data*" that this procedure exists.[87] The United States therefore concedes that it is clear from China's measures that a public comment process is part of China's system of TRQ administration. The United States' desire for more information regarding precisely how this procedure works in practice is not determinative of whether in fact this aspect is "clearly specified". The fact that the existence of the public comment process is easily discerned from China's measures and that further details can be acquired by interested entities using the public inquiry process is sufficient to comply with Paragraph 116.

2. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Article X:3(a) of the GATT 1994

63. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a) relating to the public comment process. Even if the Panel proceeds to examine the U.S. claim, it should reject it because the United States largely repeats the arguments that it presents in relation to Paragraph 116, which provide no basis for arguing that the public comment process necessarily leads to the unreasonable administration of the grains TRQs.

E. Information Concerning TRQ Allocation and Reallocation

1. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994

64. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claims that Paragraph 116 and Article X:3(a) require China to publish the total amounts actually allocated, returned, and reallocated.[88] Even if the Panel proceeds to examine the United States' claims concerning the publication of this information under Paragraph 116 and Article X:3(a), for the reasons China explained in its first written submission, the United States has failed to establish that either Paragraph 116 or Article X:3(a) requires China to publish this information.[89] China also explained in its submissions and responses to Panel questions that neither Paragraph 116 nor Article X:3(a) require China to publish the identities of TRQ recipients and the individual amounts actually allocated to each recipient.[90] China notes that the European Union agrees with China that no requirement to publish the identities of the recipients of TRQ allocations and reallocations can be derived from the text of Paragraph 116 or Article X:3(a).[91]

[87] See United States' response to Panel question No. 9, para. 33.
[88] See Section III.B, *supra*.
[89] See China's first written submission, paras. 61-82.
[90] See China's first written submission, paras. 66 and 67.
[91] See China's oral statement to the Panel at the first meeting, para. 28, citing European Union's third party submission, paras. 103 and 104.

2. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Article XIII:3(b) of the GATT 1994

65. Properly interpreted, Article XIII:3(b) requires only the publication of the total TRQ quantities for wheat, rice, and corn, as provided in China's Schedule CLII. Article XIII:3(b) refers to "import restrictions involving the fixing of quotas". "To fix" means to "settle definitely" or to "determine".[92] Article XIII:3(b) therefore refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows − "which will be permitted to be imported" − must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.

66. Under the plain meaning of the terms of Article XIII:3(b), the scope of this provision is therefore limited to the total quota quantities set forth in China's Schedule CLII. It does not extend to the specific quantities later permitted to be imported in connection with individual import licenses issued to particular entities.

67. The requirement to give public notice of "any change in such quantity or value" must also be interpreted in relation to the "fixing of quotas". It follows that the "change" referred to can only be a change to the quotas that are initially "fixed". As noted above, in China's case, these are the quotas provided in China's Schedule CLII. Thus, the "change" that must be notified would be "any change" to those scheduled quotas − not "any change" to the specific quantities allocated from those quotas, whether at the time unused quotas are returned or at the time of reallocation. China notes that Canada agrees with China that these terms require only publication of the total amount that a Member decides will be permitted to be imported at the within-quota rate in a quota year, and any subsequent change to that amount.[93]

68. The fact that total TRQ amounts may also be provided in a Member's schedule does not render the public notice requirements of Article XIII:3(b) "useless".[94] As China explained in its responses to questions from the Panel, the TRQ information in a Member's schedule will not always satisfy the specific public notice requirements set out in Article XIII:3(b), such as where the specific dates of the quota period are not provided in the schedule.[95] The public notice requirements in Article XIII:3(b) are also necessary to ensure that importers do not mistakenly equate an announcement that a Member intends to eliminate a scheduled TRQ through formal negotiations for a decision to halt administration of that TRQ during the quota period.[96] Article XIII:3(b) is also necessary to ensure notice continues to be provided in relation to quota periods that open between when a Member negotiates a change to its TRQ commitments pursuant to Article XXVIII and publishes an updated schedule.[97] Additionally, in the event that a Member will not be administering a scheduled TRQ during the quota period because better access conditions will be applied than scheduled, Article XIII:3(b) would ensure a Member provided public notice of that information.[98]

69. The existence of Article XXVIII of the GATT 1994 similarly does not render redundant the obligation in Article XIII:3(b) to publish any change in quantity or value. Article XXVIII requires a Member to inform other Members if it wishes to withdraw or modify any concession embodied in its schedule as a formal matter. This is not the same as notifying the public of an increase in the amount of a TRQ over and above the amount specified in a schedule for a given year. If China were to decide to increase the amounts of its TRQs beyond the amounts specified in its Schedule CLII during the

[92] See *New Shorter Oxford English Dictionary*, Vol. 1, p. 962.

[93] See China's oral statement to the Panel at the first meeting, para. 22, citing Canada's third-party submission, paras. 34 and 35.

[94] See European Union's third-party submission, para. 95.

[95] See China's response to Panel question No. 36, para. 90.

[96] See Notification of Brazil in Document G/AG/N/BRA/44 of 22 February 2018.

[97] See, e.g. Notification by the European Union in Document G/AG/N/EU/40, of 15 November 2017 (noting where applicable "[q]uantity updated with effect from 1 January 2017, pursuant to the result of negotiations under Articles XXIV:6 and XXVIII GATT relating to the accession of Croatia to the European Union.").

[98] See, e.g. Notification of Mexico in Document G/AG/N/MEX/35 of 2 February 2018.

quota period, it would be required by the terms of Article XIII:3(b) to publish this change. China would not be required to inform other Members of this change pursuant to Article XXVIII of the GATT 1994, and so the obligation in Article XXVIII does not render the obligation in Article XIII:3(b) redundant.

70. China's decision to publish only the total aggregate amounts available for importation under each TRQ specified in China's Schedule CLII is therefore consistent with its obligations under Article XIII:3(b) of the GATT 1994.

F. End-Use Requirements and Penalties for Non-Use

1. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Paragraph 116 of the *Working Party Report*

71. China disagrees with the United States that its end-use requirements and penalties inhibit the filling of the TRQs. In China's view, the United States' claim concerning these components of China's TRQs fails on three related grounds.

72. First, the United States has challenged China's end-use requirements and penalties under a requirement listed in the first sentence of Paragraph 116, which addresses the *administration* of China's TRQs. For the reasons China explains in Part 2, China's end-use requirements and penalties are not *administrative* in nature, but instead are *substantive* rules that form part of the TRQ itself. Consequently, these components of the TRQ are not subject to challenge under the requirement to administer TRQs in a manner that would not inhibit the filling of the TRQs.

73. Second, even if end-use requirements and penalties could be properly evaluated under Paragraph 116, the United States has not demonstrated that end-use requirements and penalties inhibit the filling of the TRQs. In China's view, these measures cannot inhibit the filling of the TRQs because they do not exert a limiting effect on the quantity of in-quota imports. China elaborates on this point in Part 2.

74. Third, China's Schedule CLII indicates that imposing end-use requirements and penalties is consistent with Paragraph 116. As China explained in its responses to Panel questions, penalties for non-use are expressly required by Schedule CLII, at paragraph 6(D).[99] Had the Members felt that the imposition of penalties, whether alone or in conjunction with end-use requirements, serves to inhibit rather than encourage the filling of TRQs, it is reasonable to presume that they would not have been included in China's Schedule.

75. Similarly, Schedule CLII specifies that China may take into account "production capacity" in determining allocations.[100] Grains imported into China are typically processed prior to sale. Taking an enterprise's capacity to produce processed grains into account is only logical if enterprises are required to process grains in their own facilities. Absent this end-use requirement, there would be no purpose for collecting and considering production capacity data. As China explained in its first written submission, requiring production of processed grains in the applicant's own facilities is a reasonable means of ensuring efficient allocation of the TRQs.[101] To interpret Paragraph 116 as prohibiting measures explicitly or implicitly contemplated by Schedule CLII is to preclude a harmonious interpretation of China's obligations.

76. For these reasons, the Panel should reject the United States' challenge under Paragraph 116 to these components of China's TRQs.

[99] See China's response to Panel question No. 27, para. 77.
[100] See China's response to Panel question No. 27, para. 78.
[101] See China's first written submission, para. 126.

2. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Article XI:1 of the GATT 1994

77. The United States alleges that China's end-use requirements and penalties for non-use are inconsistent with Paragraph 116 of the *Working Party Report* because they inhibit the filling of each TRQ.[102] The United States also alleges that these end-use requirements and penalties are prohibited under Article XI:1 of the GATT 1994. The United States challenges the end-use requirements in combination with penalties and the end-use requirements *per se*.

78. China submits that its end-use requirements, whether separately or in combination with penalties for non-use, are not inconsistent with Article XI:1. First, TRQs are not subject to Article XI:1. A TRQ is not a prohibited "quantitative restriction" because it does not restrict the quantity of imports. A TRQ limits the volume of imports that may take advantage of the lower in-quota rate, but it imposes no limit on the total volume of imports that may enter once the in-quota volume is filled; out-of-quota imports are simply subject to the higher, out-of-quota rate. The Appellate Body has previously considered and rejected the proposition that TRQs are subject to Article X1:1. TRQs are "duties" subject to Article II of the GATT 1994, not "quantitative restrictions" prohibited under Article XI:1.[103]

79. Second, the end-use requirements and penalties are not subject to Article XI:1 because they are substantive conditions on access to the TRQ and therefore form part of the TRQ itself. TRQs are stepped tariffs, consisting of a lower in-quota rate and a higher out-of-quota rate. To access the in-quota rate, importers will typically need to comply with certain *administrative* procedures, such as completing and submitting applications. In addition, access to a TRQ may also be limited by certain *substantive* conditions.

80. The distinction between the substantive content of a measure of general application and its administration has been clearly drawn by the Appellate Body in the context of interpreting the scope of Article X:3(a).[104]

81. In China's view, end-use requirements and penalties are substantive rules. These measures condition access to the TRQ in the same manner that customs classification rules condition access to certain duties. As substantive rules, these measures form part of the TRQ and fall outside the scope of Article XI:1.

82. Substantive conditions of access include conditioning access based on the country of origin of the imports. For example, Members may reserve a portion of a TRQ for imports from a designated country or countries.[105] If no imports originate from a designated country, the portion of the quota reserved for that country may not be available for importation. In this way, the condition contributes to defining the amount of the quota that is available − it does not address how that quota will be administered. The consistency of this type of reservation with a Member's WTO obligations could be

[102] See United States' first written submission, para. 192.

[103] See Appellate Body Report, *EC − Bananas (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 335 (explaining that "[i]n contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I [i.e. on an MFN basis]" and that "Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions.").

[104] Appellate Body Reports, *EC − Bananas III*, para. 200 and *EC − Poultry*, para. 115.

[105] See Notification by Canada in Document G/AG/N/CAN/116, of 12 March 2018 (Conditioning access to cheese and curd by specifying that "allocation to supplying: 69.9% of the tariff rate quota (TRQ) is reserved for imports from the EU, 30.1% for imports from all other sources."); see also Notification by the United States in Document G/AG/N/USA/120, of 28 March 2018 (noting where the tariff quota quantity "does not include quantities reserved for Mexico under NAFTA"); Notification by the United States in Document G/AG/N/USA/117, of 29 September 2017 (distinguishing between "Canada and all others" with respect to country import arrangement for "[s]ugar containing products (articles containing over 10% dry weight of sugars)"). Countries may also condition access by scheduling unlimited access for particular importers. See Notification by Thailand in Document G/AG/N/THA/84 of 10 February 2017 (specifying entities that may receive unlimited quantities of "[s]oya beans, edible and inedible, whether or not broken" and "soya bean cake").

properly analysed under Article II of the GATT 1994. Another type of substantive condition of access is the specification of certain end-uses for imports. This practice is common among Members.[106]

83. End-use requirements are substantive because they define the parameters of the quota itself; if imports will not be used for the specified purpose, they will not be accessible for importation regardless of whether the applicant submits an application or complies with any other administrative procedural requirement. China considers that a useful point of reference for distinguishing substantive conditions on access from administrative procedural requirements is whether the conditions in question are set forth in the Member's schedule. For example, China's Schedule CLII provides for the imposition of penalties and also of end-use requirements, through taking account of capacity to produce processed grains.

84. The conclusion that the substantive elements of a TRQ must be examined under Article II is even stronger when, as in this case, the challenged aspects of the TRQ are set forth in the responding Member's schedule. As China discussed in its responses to Panel questions, the usage requirements and penalties for non-use are contemplated by China's Schedule CLII (and, in the case, of the penalties for non-use, are expressly required).[107] The usage restrictions and penalties for non-use therefore form part of the quota described in China's Schedule. However one defines the distinction between substance and procedure, and between which elements of a TRQ form part of the "quota" that is excluded from Article XI:1 and which do not, certainly those elements that are set forth in the Member's schedule are outside the purview of Article XI:1. Otherwise the "treatment" that a Member is *allowed* to provide under its schedule in accordance with Article II could be found to constitute a prohibited "quantitative restriction" under Article XI:1

85. In contrast to substantive conditions on access, administrative procedures pertaining to import licensing could be subject to Article XI:1. However, the question of whether evaluation under Article XI:1 is appropriate in light of the applicability of the ILP Agreement, which specifically addresses this subject, is unsettled. Past statements by the Appellate Body suggest that administrative procedures used to administer TRQs should be examined under the ILP Agreement, at least in the first instance.[108] Acknowledging the applicability of the ILP Agreement to administrative measures and the applicability of Article II to TRQs avoids the conflict between Article II and Article XI:1 that necessarily results from the United States' overly broad interpretation of Article XI:1.

86. Even if end-use requirements and penalties were properly subject to Article XI:1, the United States has not demonstrated that these requirements have a "limiting effect" on imports separate from the limiting effect of the quota itself. Such an effect must be demonstrated to establish a breach of Article XI:1.[109]

87. In *Argentina – Import Measures*, the Appellate Body observed that "not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so."[110] To violate Article XI:1, "the challenged measures themselves must limit the importation of products, and the limitation caused by other measures should not be attributed to them."[111] If elements such as the usage restrictions and penalties for non-use do not themselves "limit the

[106] See China's second written submission, para. 77.
[107] See China's response to Panel question No. 27.
[108] See Appellate Body Report, *EC – Bananas III*, para. 204. The Appellate Body explained that:
> Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

Ibid. See also China's response to Panel question No. 38, paras. 97-99.
See also Panel Report, *Turkey – Rice*, para. 7.38. The Panel held that:
> In contrast to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the provisions of the Import Licensing Agreement invoked by the United States and Articles X:1 and X:2 of the GATT 1994 deal with the administration or application of trade measures rather than with the substantive content of such measures *per se*.

Ibid. See also China's response to Panel question No. 38(a), para. 96.
[109] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[110] Appellate Body Report, *Argentina – Import Measures*, para. 5.243.
[111] Appellate Body Report, *Argentina – Import Measures*, para. 5.244 (emphasis added).

importation of products independently of the limiting effect of another restriction", then those elements "cannot be said to produce the limiting effect and, thus, [they] will not amount to a 'restriction' captured by the prohibition in Article XI:1."[112]

88. The United States has not demonstrated that the usage restrictions and penalties for non-use have a limiting effect on imports separate from the limiting effect of the quota itself. The United States offers nothing but speculation about how the existence of usage restrictions and penalties for non-use might affect the import behaviour of an individual importer.[113] In the context of a TRQ, however, the limiting effect on trade results from the aggregate limitation on imports at the in-quota tariff rate. Unless the usage restrictions and penalties for non-use cause import levels to fall below the TRQ volume, they cannot have a limiting effect on trade that is independent of the TRQ itself. The United States has presented no evidence that this is the case. Moreover, China has confirmed that the non-STE portion of each TRQ was fully utilized in 2016 and 2017, with one exception in the case of short- and medium-grain rice (which is not subject to usage restrictions and is therefore irrelevant in this context). It is therefore evident that the usage restrictions and penalties for non-use do not have an independent limiting effect on imports.

89. These considerations illustrate why the United States' reliance on cases such as *India – Quantitative Restrictions* and *Indonesia – Import Licensing* is misplaced.[114] Those disputes did not concern TRQs. In the context of a TRQ, and even accepting that TRQs can be examined under Article XI:1, the complainant must demonstrate that the challenged aspects of the TRQ have an independent limiting effect on trade. The United States has failed to do so.

V. CONCLUSION

90. For the reasons set forth in its submissions, China respectfully requests that the Panel reject the United States' claims.

_____

[112] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[113] See, e.g. United States' first written submission, para. 306.
[114] See, e.g. United States' first written submission, para. 307.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	51
Annex C-2	Integrated executive summary of the arguments of Brazil	54
Annex C-3	Integrated executive summary of the arguments of Canada	56
Annex C-4	Integrated executive summary of the arguments of Ecuador	60
Annex C-5	Integrated executive summary of the arguments of the European Union	63
Annex C-6	Integrated executive summary of the arguments of Japan	65
Annex C-7	Integrated executive summary of the arguments of Ukraine	67

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. As a major agricultural exporter,[1] Australia has a significant interest in ensuring a transparent and predictable global trading system − including the transparent and predictable operation of tariff rate quotas (TRQs) for agricultural products. This dispute raises a number of interpretative questions regarding the interaction between the administration of TRQs and: (i) paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol; as well as (ii) a number of provisions of the General Agreement on Tariffs and Trade 1994.

2. In these proceedings, Australia has focused on the interaction between the administration of TRQs and the disciplines set out in paragraph 116 of China's Working Party Report.

II. PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT, INCORPORATED INTO CHINA'S ACCESSION PROTOCOL

3. Paragraph 116 of the Working Party Report is incorporated into China's Accession Protocol and therefore contains binding obligations on China.[2] As recognised by both the panel and Appellate Body in *China − Measures Affecting Imports of Automobile Parts*, the commitments China made in these accession documents are enforceable as an integral part of the WTO Agreement.[3] China is therefore bound to administer TRQs in accordance with the commitments made in that paragraph, namely to:

> … ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ. China would apply TRQs fully in accordance with WTO rules and principles and with the provisions set out in China's Schedule of Concessions and Commitments on Goods.[4]

4. In Australia's view, China's commitments in paragraph 116 address three distinct but interrelated aspects of TRQ administration:

(i) the *basis* on which TRQs are administered ("on a transparent, predictable, uniform, fair and non-discriminatory basis");

(ii) the *manner* in which TRQs should be administered ("using clearly specified timeframes, administrative procedures and requirements"); and

(iii) the *outcome* of TRQ administration ("[to] provide effective import opportunities … [to] reflect consumer preferences and end-user demand and … [to] not inhibit filling of each TRQ").

[1] In particular, Australia is one of the leading global exporters of wheat, and the largest exporter of wheat to China. In 2017, China imported AUD$551 million HS 1001 (Wheat and meslin). Australia has been the top import source in this category since 2014: China Customs Data.

[2] See paragraph 1.2 of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"). The paragraphs listed for incorporation are contained in paragraph 342 of the Report on the Working Party of the Accession of China (WT/ACC/CHN/49) ("Working Party Report"). Paragraph 116 is listed as one of these paragraphs and is therefore incorporated into China's Accession Protocol. See also United States' first written submission, paras. 57-69.

[3] Panel Report, *China − Auto Parts*, paras 7.740-7.741; Appellate Body Report, *China − Auto Parts*, paras. 213-214.

[4] Paragraph 116, Working Party Report.

5. As treaty text, these commitments must be interpreted using principles of international treaty interpretation[5] in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties 1969* − that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[6]

(i) "ensure TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis"

6. The first tranche of commitments in paragraph 116 relates to the basis on which TRQs are administered. The ordinary meaning of the verb "to administer" is "manage as a steward; carry on or execute (an office, affairs etc.)".[7] The breadth of this term − and the lack of any textual qualification − indicates that it encompasses the full spectrum of activities associated with the administration of TRQs.

7. With respect to object and purpose, Australia observes that TRQs and the disciplines placed upon them arose from the commitment of Members in the Uruguay Round to phase out non-tariff barriers, such as quantitative restrictions, in favour of "tariffication". In this way, TRQs are permitted under WTO rules because they are recognised as a tool for Members to move towards greater trade liberalisation. However, to function as a tool for liberalisation, Members must administer TRQs consistently with the relevant prescribed disciplines. The commitments in paragraph 116 of China's Working Party Report were included to require China to undertake an express "commitment to administer TRQs in a simple, timely, predictable, uniform, non-discriminatory and non- trade restrictive manner, and in a way that would not cause trade distortions".[8]

8. In Australia's view, the breadth and context of the term "to administer", together with the object and purpose of the disciplines governing the administration of TRQs − and of paragraph 116 in China's Working Party Report − indicates that the commitments in this paragraph apply to *all* administrative actions and legal instruments associated with the allocation and reallocation of TRQs.[9]

9. A "basis" is "a determining principle; a set of underlying or agreed principles".[10] In Australia's view, this term indicates that all actions and legal instruments within the broad scope of "administration" (discussed above) must be *determined by* transparency, predictability, uniformity, fairness and non-discrimination.

10. The object and purpose of the disciplines governing TRQ administration and of paragraph 116 of China's Working Party Report in particular (discussed above) further support this interpretation.

11. Australia considers that any aspects of TRQ administration not based on or determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination, or that contradict these determining principles, would therefore not be consistent with this commitment.

(ii) "using clearly specified timeframes, administrative procedures and requirements"

12. The second tranche of commitments in paragraph 116 relates to the manner in which TRQs must be administered − that is, by having the relevant timeframes, administrative procedures and requirements associated with the allocation and reallocation of TRQs "clearly specified". The ordinary meaning of "clearly" is "distinctly; plainly; manifestly, obviously".[11] The verb "to specify" is defined as "mention or name (a thing, that) explicitly; state categorically or explicitly".[12] These terms indicate that the timeframes, administrative procedures and requirements associated with TRQ administration must be stated plainly and explicitly.

[5] In accordance with Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.
[6] Article 31(1), Vienna Convention on the Law of Treaties 1969.
[7] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 29.
[8] Paragraph 112, Working Party Report.
[9] United States' first written submission, paras. 66-69.
[10] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 194.
[11] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 427.
[12] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 2, 2007, page 2944.

13. In Australia's view, in light of the object and purpose of the disciplines governing TRQ administration and of paragraph 116, the requirement to "clearly specify" these aspects of TRQ administration is to ensure that the audience that relies on this information can both obtain that information *and* understand what is required.

14. Australia considers that this commitment therefore requires that information on TRQ timeframes, administrative procedures and requirements must be explicit, accessible and comprehensible for the intended audience.

(iii) *"that would provide effective import opportunities; that would reflect consumer preferences* and end-user demand and that would not inhibit filling of each TRQ"

15. The third tranche of commitments in paragraph 116 makes clear that the administration of TRQs, in accordance with the prescribed basis and manner, should ensure outcomes that, among other things, do not inhibit the filling of each TRQ.

16. The ordinary meaning of "inhibit" is to "restrain, prevent";[13] and "fill" means to "make or become full".[14] In Australia's view, this indicates that a Member's administration of TRQs *must not prevent* the TRQ from being "full" − that is, from being fully exhausted.

17. In Australia's view, taken together, the individual prescribed commitments in paragraph 116 therefore create a broad and comprehensive obligation for China to administer TRQs on a specific basis, in a specific manner, to ensure specific outcomes.

18. Applying the relevant legal framework to the context of this dispute, Australia considers that the Panel will need to determine whether not complying with any one of the commitments in paragraph 116 amounts to a breach of China's obligation. In particular, Australia observes that the facts before the Panel indicate China's TRQs for wheat, corn and rice have been underfilled over several years.[15] Australia considers that the Panel will therefore need to examine:

- whether the mere underfilling of a TRQ alone determines that China's TRQ administration has inhibited the filling of each TRQ;
- whether inhibiting the filling of each TRQ alone amounts to a breach of paragraph 116; or
- whether a breach of paragraph 116 is only established if the specific basis and/or the specific manner in which China administers its TRQs has inhibited the filling of each TRQ.

III. CONCLUSION

19. In summary, Australia submits that China's distinct but interrelated commitments in paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol, create a broad and comprehensive obligation for China to ensure all actions and legal instruments associated with the allocation and reallocation of TRQs are administered:

- on a specific basis (determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination);
- in a specific manner (making explicit, accessible and comprehensible the information on TRQ timeframes, administrative procedures and requirements); and
- to ensure specific outcomes (including to ensure the filling of TRQs is not prevented).

20. We thank the Panel for the opportunity to submit these views.

[13] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 1384.
[14] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 962.
[15] United States' first written submission, paras. 42-51.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. Brazil interprets the overall object and purpose of the set of different obligations under Paragraph 116 of China's Working Party Report as aiming for the reduction of the additional burden imposed on exporter Members by Tariff Rate Quotas (TRQs). Conforming to Article XIII:2 of the GATT, in applying import restrictions, Members "shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".

2. Moreover, Brazil understands that Paragraph 116 determines different types of obligations, which should be addressed separately on its own terms. The reason for this approach is that the violation of even one of these obligations will most likely affect both the overall transparent, predictable and fair basis of the TRQ's administration and its final outcome. In this sense, even if in practice the totality of the TRQ is filled, there may still be a violation of the different obligations set out in the provision, as the competitive opportunities of exporters would be nevertheless affected. Brazil thus believes that the Panel should analyze each obligation on its own terms. Some of those obligations are commented below.

a. TRANSPARENCY

3. Brazil believes that the definition of "transparency" as the "ease of assessment of information" should provide useful guidance in the present case. Brazil thus understands that the test to be applied by the Panel should comprise the prompt availability of information to an exporter and the ease of understanding how the domestic authorities implement the rules of administration of the TRQs. In that sense, it is Brazil's view that the obligation to readily publicize detailed information about the amounts allocated under the TRQs and the legal/administrative reasoning justifying the actual distribution of the quotas are an integral part of the obligation of administering TRQs in a transparent manner.

b. PREDICTABILITY

4. Paragraph 116 of the Working Party Report establishes China's obligation of administering its TRQs in a "predictable" manner. As defined by the United States, "the term 'predictable', in context, supports an interpretation that China must administer its TRQs through a process or system of rules or procedures such that applicants can easily predict or anticipate *how* decisions regarding TRQ administration, including allocation and reallocation, will be made". Brazil agrees that this is a useful test for the Panel to apply when assessing the conformity of China's administration of its grains TRQs under the predictability obligation provided by Paragraph 116.

5. Brazil does not believe that the obligations enshrined in Paragraph 116 imply "the elimination of any element of discretion from the allocation process". Such discretion, however, is not unbounded, as it must be subject to an obligation that the administration of −in the present dispute − TRQs is performed in a uniform, impartial, reasonable manner and, in the present case, in a way that is transparent, predictable and fair.

c. EFFECTS OF THE ADMINISTRATION OF TRQs

6. As regards the effects resulting from the absence of transparency and predictability in Members' domestic rules for the importation of agricultural products, Brazil notes that the system of tariff quotas imposes transaction costs to the exporter. Therefore, the principles of transparency, predictability, uniformity, fairness and non-discrimination should be duly respected by the Members who utilize TRQs so as to avoid the imposition of additional burdens over Members that export agricultural products.

II. APPLICATION OF ARTICLE XI OF THE GATT TO THE ADMINISTRATION OF TRQs

7. Brazil believes that Article XI:1 of the GATT encompasses a broad range of measures, for in accordance with said provision no Member shall institute or maintain prohibitions or restrictions other than duties, taxes or other charges "whether made effective through quotas, import or export licenses *or other measures*". Therefore, Brazil does not see why *a priori* these measures could not fall within the scope of Article XI:1.

8. While the TRQs can be considered duties and thus not covered by Article XI:1 of the GATT, a measure unrelated to the TRQ itself, which restricts access to a lower tariff bound in the schedule can be considered a "restriction on the importation of a product" within the meaning of the provision, as importers would have their access to the market hindered. Such measures restrict access much in the same way of other requirements which have been found to be inconsistent with Article XI:1 of the GATT, such as the requirements in the panel in *India − Quantitative Restrictions* where an import measure that required goods to be imported only by the "actual user" violated Article XI:1 and the prohibitions on importers from trading and/or transferring imported products in *Indonesia − Import Licensing* likewise.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute raises issues on the interpretation of provisions under the GATT 1994 and China's Protocol of Accession regarding the administration of tariff rate quotas (TRQs). Canada appreciates the opportunity it has had to provide its views on these issues and provides the following summary of its key arguments.

II. INTERPRETATION UNDER ARTICLE X:3(A) OF THE GATT 1994

2. Article X:3(a) requires that a Member administer its "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" in a manner that is uniform, impartial and reasonable[1]. There are three key elements that should direct the Panel's analysis in assessing a claim under Article X:3(a).

3. First, the Panel must consider whether the matter at issue involves measures described in Article X:1 and therefore fall within the scope of Article X:3(a). Article X:1 describes a broad range of measures relevant to trade including those "pertaining to … rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports." In Canada's view, Article X:3(a) applies to the administration of a wide range of measures, including requirements for importation, that could affect trade and traders.

4. Second, the Panel must focus its analysis on assessing the Member's "administration"[2] of the relevant legal instruments. Article X:3(a) focuses on the manner in which Members administer or apply the legal instruments rather than disciplining the substantive content of the measure[3].

5. Nonetheless, as clarified by the Appellate Body in *EC – Selected Customs Matters*, it is possible to challenge under Article X:3(a) "the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1"[4]. To the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1"[5].

6. Third, the Panel must examine whether the respondent administers the legal instruments in a manner that is uniform, impartial or reasonable. These terms represent legally independent obligations[6]; a failure to comply with one or more of these obligations will result in an inconsistency with Article X:3(a).

7. Canada notes that Article X:3(a) does not prescribe in detail how a Member must administer its trade measures in order to meet its requirements. Article X:3(a) allows some discretion for the Member to administer its trade measures "in the manner it deems fit", although such discretion must be exercised in a way that respects "certain minimum standards for transparency and procedural fairness" [7]. The Panel must ultimately "exercise a balanced judgment" between the "traders' fundamental right" to minimum standards of transparency and procedural fairness, and the

[1] Panel Reports, *US – COOL*, para. 7.812.
[2] The Appellate Body has described "administration" as "putting into practical effect, or applying, a legal instrument of the kind described in Article X:1." See Appellate Body Report, *EC – Selected Customs Matters*, para. 224.
[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 199.
[4] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.
[5] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873.
[6] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.867.
[7] Panel Reports, *US-COOL*, para. 7.861.

"sovereign right" afforded to Members to manage the manner in which they administer domestic measures[8].

8. Previous panel reports provide some guidance. For example, a vague application criterion, which was interpreted by numerous departments, without any guidance, has been found to necessarily lead to an unreasonable administration inconsistent with Article X:3(a)[9] because applications with equal descriptions could succeed or fail based on interpretations applied by officials[10].

9. Other panels have noted that if the measures were applied in a way that negatively affects traders' commercial interests, for example through a procedure that "inherently contains the possibility of revealing confidential business information", this may support a finding of inconsistency with Article X:3(a)[11].

10. Finally Canada notes that while the scope of Article X:3(a) is broad, bringing a claim under Article X:3(a) should be undertaken cautiously and it must be supported by "solid evidence" in reflection of the "gravity of the accusations" inherent in the claim under Article X:3(a)[12].

11. In Canada's view, China's administration of the TRQs falls within the scope of Article X:3(a) and therefore the panel should follow the guidance provided in previous panel reports in assessing whether, based on the evidence before it, the application criteria are unreasonable due to vagueness and application by numerous departments and agencies without guidance and whether the administration of the State Trading Portion of the TRQ is unreasonable on the basis that it negatively affects the competitive situation of the applicant.

III. INTERPRETATION OF THE OBLIGATION UNDER PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT

12. In Canada's view, the obligations under paragraph 116 of China's Working Party Report can be divided into three key elements: (1) the TRQ must be administered on a basis that is transparent, predictable and fair; (2) the timeframes, administrative procedures and requirements must be clearly specified; and (3) these clearly specified timeframes, administrative procedures and requirements must provide for effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit filling of the TRQ. Within each of these three elements are specific obligations that must be met.

13. Under the first element, China must fulfil all three requirements - to administer the TRQ on a transparent, predictable and fair basis; a failure to fulfil any one of these requirements will result in a failure to comply with the obligation under paragraph 116.

14. Canada notes that there is some overlap between the obligations under the first element of paragraph 116, which requires China to administer the TRQ on a transparent, predictable and fair basis, and Article X:3(a) of the GATT 1994, which requires a Member to administer its laws, regulations, decisions and rulings of general application in a manner that is uniform, impartial and reasonable. As such, the legal standard adopted under Article X:3(a) can provide guidance with respect to the legal standard applied under the first element of paragraph 116.

15. Under the second element of paragraph 116, China is required to set out timeframes and administrative procedures in a manner that is explicit and understandable to the traders that are required to follow and use these procedures.

16. With respect to the third element of paragraph 116, this requires ensuring that the clearly specified timeframes and administrative procedures and requirements are conducive to effective

[8] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.874.
[9] Panel Reports, *China – Raw Materials*, paras. 7.744-7.746.
[10] Panel Reports, *China – Raw Materials*, para. 7.743.
[11] Panel Report, *Argentina – Hides and Leather*, para. 11.94.
[12] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

import opportunities under the TRQs, reflect consumer preferences and end-user demand, and do not inhibit filling of the TRQs.

17. A failure to meet the specific obligations in any one of these three elements would result in a failure to meet the obligations under paragraph 116.

IV. INTERPRETATION OF ARTICLE XIII:3(B)

18. Article XIII:3(b) contains a publication requirement that requires a Member applying a quota, or by virtue of Article XIII:5 a TRQ, to publish the quantity or value of the products that will be permitted for import and any change to this figure.

19. In Canada's view, with respect to a TRQ, this provision requires Members to publish the total quantity or value of the goods that the Member is permitting to be imported at a within-quota rate for a specified future period, and if there is any change to the quantity or value that is being permitted to be imported, the Member must publish the revised number.

20. In Canada's view, the obligation under Article XIII:3(b) goes beyond publishing the TRQ quantities set out in the Member's schedule and publishing any changes made to the schedule with respect to these quantities, as this would be of limited utility and is already effectively covered under the Decision on the Procedures for the Modification and Rectification of Schedules.

21. However, in Canada's view the obligation under Article XIII:3(b) does extend as far as requiring that the Member continually publish or notify each time an allocation is granted, returned or reallocated. Reading in this requirement would be more prescriptive than what is contemplated under Article XIII:3(b).

22. Canada also notes that the specific information that needs to be published or notified will depend to some extent on the TRQ regime and system of allocation. The outcome required under Article XIII:3(b) is that the relevant traders can obtain information on the amount of quota available for allocation each year.

V. INTERPRETATION OF GATT ARTICLE XI

23. Canada recognizes that TRQs are not prohibited by Article XI:1, as noted by the Appellate Body in *EC − Bananas III (Article 21.5 − US)* and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I[13]. In addition, TRQs must be consistent with Article II of the GATT 1994 such that "in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff must not fall short of the scheduled amount"[14].

24. In Canada's view, to the extent that the TRQ is subject to conditions or requirements set out in the Member's schedule, those conditions are permitted; however, the implementation or administration of the TRQ and related conditions are subject to other applicable provisions of the GATT 1994 such as Article XI:1 and other relevant WTO agreements such as the Import Licensing Agreement. TRQ administration, which involves granting of approval to import at a lower duty rate, is a type of import licensing within the meaning of Article XI:1.

25. Therefore, the administration of the TRQs − separate from the underlying TRQs which are permissible − is still governed by the disciplines of Article XI:1 and Members are required to refrain from administering their TRQs in a way that could restrict imports.

26. Article XI:1 disciplines measures, whether considered individually or taken together, that have a limiting effect on importation or exportation. Thus, a panel could find that a single specific measure is inconsistent with Article XI:1 or that the effect of a number of measures, taken together, results in a quantitative restriction.

[13] Appellate Body Reports, EC − Bananas III *(Article 21.5 − US)*, para. 335.
[14] Ibid.

A. State-Trading portion of TRQs

27. In Canada's view, the Panel should, in assessing whether China's TRQ administration is consistent with Article XI:1, consider whether it has a "limiting effect on importation by negatively affecting the competitive opportunities available"[15]. In conducting this analysis, Canada invites the Panel to consider the guidance found in the panel's report in *Argentina − Import Measures*. While Canada recognizes that *Argentina − Import Measures* did not involve TRQ administration, both that case and this matter involve administrative procedures that can be characterized as an import licensing system as defined in paragraph 1 of Article 1 of the Import Licensing Agreement.

28. In Canada's view, the Panel should consider whether, based on the evidence before it, China's administration of the state-trading portion of the TRQs cumulatively restricts imports contrary to Article XI:1 by i) creating uncertainty regarding the applicant's ability to import the full share of the quota that it has been assigned; ii) imposing a significant burden on the applicants that is unrelated to their normal importing activity; and iii) restricting market access for imported products by preventing the applicants from importing as much as they desire or need.

B. User Requirements

29. The United States argues that China imposes user requirements which require the applicant to self-use its share of the TRQ allocation; to process the imported goods itself; and in the case of an enterprise that owns multiple processing plants, to require each processing plant to apply for and use the TRQ in its own name[16]. The applicant could be subject to penalties for non-use of its allocated share of the TRQ[17].

30. In *Indonesia − Import Licensing Regimes*, the panel found that the requirements that forced the importers "to either use all the products they import for processing or find alternative ways to dispose of unused products that do not involve selling or transferring them" constituted a restriction that had a limiting effect on importation contrary to Article XI:1[18]. In Canada's view, if the Panel finds that the applicants are subject to the user requirements as described by the United States, the Panel could reach a similar conclusion in this case.

31. With respect to penalties for non-use, Canada notes that the right to impose these are set out in China's schedule and therefore the imposition of penalties for non-use is permitted as part of China's tariff schedule. However, any additional details relating to the administration of the penalties and usage requirements that are set out outside of China's tariff schedule[19] can constitute additional conditions and requirements that form part of the regime for administering the TRQ. These additional administrative procedures and requirements, which are not included in China's schedule but designed to implement the TRQ, are part of the administrative procedures or licensing regime subject to Article XI:1.

32. Further, in Canada's view, to the extent that the cumulative effect of more than one requirement of the import licensing regime results in a restriction in addition to the underlying TRQ, the requirements could collectively result in a violation of Article XI:1.

VI. CONCLUSION

33. Canada thanks the Panel for the opportunity to comment on the legal issues raised in this dispute.

[15] Panel Report, *Colombia − Ports of Entry*, para. 7.257.
[16] United States' first written submission, paras. 303 and 304.
[17] United States' first written submission, paras. 306 and 308.
[18] Panel Report, *Indonesia − Import Licensing Regimes*, paras. 7.198 - 7.200.
[19] See for example *2003 Provisional Measures*, Article 23 (Exhibit US-11); 2017 *Allocation Notice*, Article V (Exhibit US-15).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL

Ecuador considers that the Panel should take into account both the literal and teleological interpretation of the multilateral rules, as well as the references of the existing jurisprudence on the provisions in which the Complainant has based its allegations.

The Republic of Ecuador considers that this dispute has a high relevance for the country in terms of administration of tariff quotas and the treatment that other countries give to them in the international arena. Similarly, Ecuador strongly recommends and requests the Panel to review in detail the scope of application of the provisions invoked by the Claimant and Respondent, and the specific annotations provided within this submission.

Ecuador believes that the Panel should take into account previous cases which had set forth specific recommendations and findings regarding the application of tariff quotas, as well as the existing jurisprudence.

Ecuador recommends that the Panel should take into account while analyzing the submissions, regulations, and laws, the principle good faith, which is a fundamental principle of international law in general, and of international trade law in particular, thus, a basic tenant of the WTO´s Dispute Settlement System and in the light of its object, context, purpose and all of the rules of interpretation established in the Vienna Convention on the Law of the Treaties. In that regard, the Panel is in the need to assess such determinations by interpreting all the agreements cited in the request for consultations through the rules of general interpretation set out in the Vienna Convention on the Law of Treaties.

2 REGARDING VIOLATION OF PART I, PARAGRAPH **1.2 OF CHINA'S PROT**OCOL OF ACCESSION

1. Ecuador reaffirms that Dispute Settlement System (DSS) adopted by the WTO and all its Members is based upon one of the most important Principles in the International Law i.e. "Good Faith", therefore all the procedures under the DSS should be based considered by "Good Faith".

2. "Not only action but also the absence of action, and in particular the failure to inform about the applicable trade laws, regulations, procedures and practices, promptly and accurate, may constitute a formidable barrier to trade."[1] In this regard, the United States alleges that China violated Part I, para. 1.2 of the Protocol of Accession because the basis for China´s TRQ[2] is not (1) transparent; (2) predictable; or (3) fair; because its grains TRQs are not administered using (4) clearly specified administrative procedures, or (5) clearly specified requirements; this on behalf (6) using timeframes, administrative procedures, and requirements that would not inhibit the filling of each TRQ. Therefore the United States reaffirms that TRQs for corn, wheat, and rice are not fulfilling the statement from Part I, para 1.2 of the Protocol of Accession.

3. On the other hand, China disproves the claim held by United States by saying that China's method of distributing allocations is not automatic. "China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process."[3] China ensures certain obligations such as transparent, predictable, uniform, fair and non-discriminatory basis, clearly specified timeframes, administrative procedures and requirements. China also bases its argument in the Panel Report of Thailand –

[1] Van Den Bossche. The law and policy of the World Trade Organization. Cambridge. Second Edition. 2008.

[2] "a tariff rate quota involves the application of a higher tariff rate to imported goods after a specific quantity of the ítem has entered the country at a lower prevailing rate" – Panel Report, US- Line Pipe, para. 7.18.

[3] Para. 51. China's first written submission (DS517)

Cigarettes in order to exercise "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[4]

3 REGARDING VIOLATION OF ARTICLE X:3 (A) OF THE GATT 1994

1. The United States claims that China attempts to Article X:3(a) of the GATT 1994 because China's TRQ administration is not reasonable. China responded that the United States must demonstrate that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQ.

2. Article X:3 (a) of the GATT 1994 mentions "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

3. Regarding to the term "shall administer" the Panel in the case EC-Bananas III agreed that the text of the Article X:3(a) indicates that the requirements of uniformity, impartiality and reasonableness do not apply to the laws, regulations, decisions and rulings themselves but rather to the administration of those laws, regulations, decisions and rulings.[5] While in Argentina- Hides and Leather, the Panel found that there is no requirement in Article X:3(a) that it apply only to "unwritten" rules.[6] Furthermore, talking about the term "uniform" the jurisprudence agrees that uniform is understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision.[7]

4. On the same line, by "impartial" the jurisprudence alleges that "impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, [8]unbiased and unprejudiced manner."[9] Finally, by "reasonable" the case China- Raw Materials the Panel concluded that the lack of any definition, guidelines or standards poses a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

4 REGARDING VIOLATION OF ARTICLE XI:1 OF THE GATT 1994

1. The United States claims that China's administration of its TRQs for wheat, rice, and corn is inconsistent Article XI: 1 of the GATT 1994, because it imposes impermissible "restrictions" on the importation of wheat, rice, and corn. Article XI: 1 of the GATT 1994 bars prohibitions or restrictions on importation or exportation other than through duties, taxes, or other charges. The United States alleges that China's process administration creates commercial uncertainty limiting importation and its TRQ administration use restrictions on products imported under the TRQ.

2. China alleges that "no evidence of the quantification of the effects of a measure alleged to restrict imported products is required to demonstrate a limitation on the importation of products under Article XI:1. In determining whether a measure is inconsistent with Article XI:1"[10] and reaffirms that the restriction on the transfer of licenses, usage requirements, and penalties must be examined within the fact, as China assures, that they are designed and structured to increase competitive opportunities for imports and promote the filling of each TRQ.

3. It is a lot of jurisprudence in cases on the interpretation of the Article XI:1 of the GATT 1994. In the case Japan – Semi-conductors, the Panel established that non-binding measures, restricting the export of certain semi-conductors at below-cost were nevertheless restrictions.[11] However, the Panel in EEC- Minimum Import Prices established that in the case of automatic import licensing constituted a restriction of the type meant to fall under the purview of Article XI:1.[12] Nonetheless,

[4] Panel Report, *Thailand – Cigarettes*, para. 7.924. "A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions."

[5] Appellate Body Report EC-Bananas. para 200

[6] Panel Report. Argentina- Hides and leather. para. XI.739

[7] Appellate Body Report EC – Selected Customs Matters. para 224

[8] Panel Report China- Raw Materials. para. 7743

[9] Panel Report Thailand – Cigarettes. Para. VII.899

[10] Chinas first written submission (DS517) para. 144

[11] Panel Report. Japan-Semiconductors. Para 106.

[12] Panel Report EEC- Minimum Import Prices. Para. 4.1

the case Brazil- Retreaded Tyres the Panel concluded that "what is important in considering whether a measure falls within the types of measures covered by Article XI:1 is the nature of the measure.[13]

5 REGARDING VIOLATION OF ARTICLE XIII:3 (B) OF THE GATT 1994

1. The United States assure that China failed in providing "meaningful" information to the public regarding actual TRQ allocation at the time of allocation, at the time unused quota amounts are returned, and at the time of reallocation.[14] At last, the United States reaffirms that China maintains an import prohibition or restriction other than duties, taxes, or other charges, through administrative actions creating a limitation on importation, violating with the Article XIII:3(b) of the GATT 1994.

2. China refutes by saying that the article invoked refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows − "which will be permitted to be imported" − must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.[15]

3. It is no existent jurisprudence or related to the interpretation of Article XIII: 3(b).

[13] Panel Report Brazil – Retreaded Tyres. Para. 7.361
[14] Paraphrase. para. 56.United States first written submission (DS517)
[15] Paraphrase. Para 85. China's first written submission (DS517)

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. As a preliminary matter, the EU submits that the Panel's findings as regards Paragraph 116 of the Working Party Report, as incorporated into China's Protocol of Accession to the WTO will be sufficient to solve this dispute because Article X:3(a) of the GATT 1994 and Paragraph 116 impose broadly overlapping obligations and Paragraph 116 appears to be the more specific provision. Hence, the Panel should exercise judicial economy on the claims raised by the US concerning Article X:3(a).

2. Paragraph 116 concerns all actions or omissions by which China manages, runs, or carries out its TRQs regime, whether they concern concrete punctual actions or omissions, or the guiding principles of that regime, including the legal instruments that regulate the administration of the TRQs.

3. The various obligations contained in Paragraph 116 relate to the same matter, i.e. the administration of the TRQs regime and they all respond to the same concerns raised by WTO Members. It is logical to expect that these obligations may sometimes overlap and may impart meaning to each other.

4. With regard to the Basic Criteria, and the Allocation principles that must be fulfilled in order to receive an allocation under the TRQs at issue, as well as the and "public comment process", China's explanations tend to confirm that China does not administer these TRQs in compliance with Paragraph 116. Indeed, China has relied on how those criteria, principles and process are applied "in practice", but has not demonstrated that this practice is set out in a clear, transparent and predictable way. Rather, China has invoked the apparently unlimited latitude for the NDRC to change that practice as it sees fit.

5. Moreover, the EU has pointed to a rather manifest disconnect between various parts of China's schedule, which presuppose that the portions of the tariff-quota reserved for importation through STE should be allocated to different applicants, and China's defence in the present case, according to which the STE portions of the TRQs are allocated entirely to COFCO.

6. With regard to the Information concerning allocation and reallocation the EU considers that if some information must be published pursuant to paragraph 3(b), together with paragraph 5 of Articles XIII of the GATT 1994, then it is not necessary to examine if the same information requirement can also be derived by more general provisions.

7. In keeping with the object and purpose of the GATT, Article XIII:3 must be interpreted as obliging the Member which administer a TRQ to give public notice of both the total amount of permitted imports (as initially fixed by that Member) and of any change in such amount. Thus, in the present case China should give public notice of the total amount authorized for import on the TRQ certificates issued to selected applicants during the allocation process, the amounts returned by 15 September and those authorized following the reallocation process.

8. On the other hand, the EU considers that neither Paragraph 116 nor Article X:3(a) of the GATT 1994 can be interpreted as requiring China to make public the identity of TRQ certificate holders, and the amount allocated or reallocated to each of them.

9. China's explanations concerning the allocation process for the state trading portion of the TRQs raise serious concerns that China's allocation system could be incompatible with its WTO obligations. First, the STE portion of each TRQ is allocated to COFCO according to undisclosed criteria, and therefore in violation of Paragraph 116. Second, the explanation provided by China seems to be at odds with China's commitments under paragraphs 6.A, 6.B, 6.C of Section I B and note 1of its Schedule.

10. With regard to the usage restrictions and penalties for non-use applied by China, the EU would like to stress that it agrees with China that the usage restrictions and penalties for non-use cited by the US fall outside the scope of Article XI:1 of the GATT 1994, because Article XI:1 of the GATT 1994 does not apply to TRQs. Indeed, TRQs are not "quantitative import restrictions" within the meaning of Article XI:1 of the GATT 1994, but tariff measures.

11. Many Members have bound in their Schedules TRQs or unlimited tariff concessions which are subject to an end-use condition. The possibility to provide for certain usage conditions may encourage Members to make concessions that they would not make otherwise. If Article XI:1 would apply to those usage restrictions, Members would be deterred from making further concessions.

12. Similarly, the processing requirement is not part of the "administration" of the TRQs within the meaning of Paragraph 116, but a substantive condition.

13. Finally, with regard to the penalties for the non-use of TRQs, the EU shares China's view that this type of measures may contribute to a more efficient and effective use of the TRQs and therefore comply with Paragraph 116, provided the penalties are not disproportionate or applied inconsistently. China has confirmed those penalties are not applied to COFCO with respect to the non-use of the STE portion of the TRQs, which is allocated to it.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. LEGAL NATURE OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. With respect to the legal nature of China's obligations under Paragraph 116 of the Working Party Report, Paragraph 116 provides that "China would ensure that TRQs were administered on a transparent, predictable, [… and] fair [...] basis using clearly specified timeframes, administrative procedures and requirements [...] that would not inhibit the filling of each TRQ." In the same paragraph, it is also provided that "China would apply TRQs fully in accordance with WTO rules and principles."

2. Paragraph 116 is incorporated into China's Accession Protocol, which, in turn, is incorporated into the WTO Agreement. Specifically, Paragraph 1.2 of the Protocol states that the Protocol "shall be an integral part of the WTO Agreement" and therefore contains binding obligations for China. Consequently, any failure by China to administer its TRQs in a manner consistent with its commitment under Paragraph 116 would constitute a breach of its WTO obligations.

3. In this dispute, the United States argues that China's administration of its grains TRQs is inconsistent with Paragraph 116 of the Working Party Report, as well as Articles X:3(a), XI:1, and XIII:3(b) of the GATT 1994.[1] While there may be overlapping obligations between Paragraph 116 and the relevant provisions of the GATT 1994, Japan observes that China's obligations under Paragraph 116 are not less stringent than those provided under the provisions of the GATT 1994. Thus, the Panel should examine if China meets the requirements stipulated under Paragraph 116 in order to examine whether China's administration of its grains TRQs is inconsistent with its obligations under the WTO agreements.

II. INTERPRETATION OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

4. With respect to the interpretation of China's obligations under Paragraph 116 of the Working Party Report, Japan is of the view that the three following considerations should be taken into account.

5. First, the United States argues that Paragraph 116 contains six "related but independent obligations" or "related but distinct commitments", and that "failure by China to administer TRQs consistent with any of these commitments represents a distinct breach."[2] In response to Panel's question No. 1, subparagraph (a), in Japan's view, the legal standard under each of the six obligations is particular to China's obligations regarding its administration of TRQs under Paragraph 116. Based on this understanding, Japan considers that the legal standards under the six obligations may rest on common elements such as "transparent basis", as "transparent basis" would be essential in examining other elements cited in Paragraph 116. At the same time, other elements may have differences with respect to the way evaluation is made of relevant aspects of China's TRQs administration. In response to the Panel's question No. 1, subparagraph (b), Japan is of the view that failure by China to administer its TRQs in a manner consistent with any of its commitments including those found in Paragraph 116 means that China is in breach of its WTO obligations.

6. Second, in response to the Panel's question No. 2, per paragraph cited by the Panel (para. 144), Japan recognizes that the European Union submits that "the processing requirement is not part of the 'administration' of the TRQs within the meaning of Paragraph 116 of the Working Party Report", and, as the Panel's question describes, that it is "therefore not susceptible to a challenge under Paragraph 116 of China's Working Party Report."[3] Japan also considers that the processing

[1] United States' first written submission, paras. 5-6.
[2] United States' first written submission, paras. 63-64.
[3] European Union's third party submission, para. 144.

requirement is not part of the administration of TRQs within the meaning of Paragraph 116, as argued by the European Union in its submission.

7. Third, as a general matter, Japan considers that TRQs are "import measures" rather than traditional "quantitative restrictions" such as quotas or bans. This is because they do not prohibit or restrict the quantity of imports, but they rather apply a lower tariff for a certain volume of imports and improve market access. In this regard, the Appellate Body stated in *EC − Bananas III* that "tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I".[4] Therefore, Japan is of the view that there may be differences among Member's import measures such as TRQs as there may be differences among Members in terms of their market structure, business practice and so on. However, such differences must remain within the confines of the WTO Agreements.

[4] Appellate Body Report, *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 - United States)*, para. 335.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

I. INTRODUCTION

Mr. Chairperson, distinguished Members of the Panel,

1. Ukraine welcomes this opportunity to present its views to the Panel concerning the administration of tariff rate quotas ("TRQs") for grains by the People's Republic of China ("China") and its correspondence with the relevant provisions of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

2. As a third party, Ukraine has a systemic and trade interest in a proper and consistent interpretation of the provisions of the World Trade Organization ("WTO") covered agreements, in particular the GATT 1994. Ukraine will focus on some key issues relating to the interpretation of Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 in its oral statement. Ukraine clarifies that it does not have any specific views on the factual aspects of the case.

II. ARGUMENTS

Article X:3(a) of the GATT 1994

3. In paras. 223-266 of its First Written Submission, the United States argues that China's administration of its TRQs for grains is incompatible with China's obligations under Article X:3(a) of the GATT 1994 because of numerous violations of reasonableness requirement of Article X:3(a).

4. In turn, China claims that the United States has not demonstrated that the alleged vagueness of eligibility criteria and principles for allocation necessarily results in an unreasonable administration of the grains TRQs.[1] Ukraine would like to highlight the following case law in this regard.

5. The panel in Thailand − Cigarettes (Philippines) stipulated that the administration under Article X:3(a) "includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation",[2] including administrative processes leading to administrative decisions. Thus, it is essential for the complainant to show how and why "certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument" provided in Article X:1.[3]

6. In Dominican Republic − Import and Sale of Cigarettes case, the panel stated that requirements of Article X:3(a) such as uniformity, impartiality, and reasonableness are not cumulative[4] which means that it is enough to demonstrate violation of one requirement to establish violation of Article X:3(a). On the other hand, in order to comply with Article X:3(a) it is necessary to fulfil all three requirements.[5]

7. The United States claims that China's administration of grains TRQs is not reasonable.[6] In this regard, in US − COOL, the panel stipulated that "reasonable" administration under Article X:3(a) "entails a consideration of factual circumstances specific to each case."[7]

8. Notwithstanding the above-mentioned reasoning of the panel regarding assessment on the case-by-case basis whether administration is reasonable, Ukraine believes that in any case "rigorous

* Ukraine has requested that its Oral Statement serve as Integrated Executive Summary.
[1] China's First Written Submission, para. 29.
[2] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.873.
[3] Ibid.
[4] Panel Report, *Dominican Republic − Import and Sale of Cigarettes*, para. 7.383.
[5] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.867.
[6] US' First Written Submission, para. 223.
[7] Panel Report, *US − COOL*, para. 7.851.

compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure"[8] and this is for the respondent to substantiate that the administration of the measure is conducted in uniform, impartial, and reasonable manner.

Article XIII:3(b) of the GATT 1994

9. Realizing that there is no interpretation of Article XIII:3(b) of the GATT 1994 up to date, Ukraine draws the Panel's attention to the customary rules of interpretation of public international law available under Article 3.2 of the Dispute Settlement Understanding ("DSU") which are codified in the Vienna Convention on the Law of Treaties, namely Articles 31-33 thereof.

10. Ukraine believes that special attention should be given to the interpretation of the phrases "notice of the total quantity or value of the product or products" and "any change in such quantity or value" of Article XIII:3(b), bearing in mind that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[9]

Article XI:1 of the GATT 1994

11. Article XI:1 of the GATT 1994 was already interpreted by the preceding panels and Appellate Body regarding application of TRQs.[10]

12. Nevertheless, panel reports are binding between the parties for the particular dispute[11] and the determination whether a measure constitutes a breach of member's obligations under the WTO Agreements should be made on a case-by-case basis,[12] taking account of all relevant facts.

13. In Article XI:1 the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests that the scope of Article XI:1 covers a measure through which a prohibition or restriction is produced or becomes operative.

14. Thus, the Panel in this case is not prevented from examining whether China's TRQs administration is a measure through which "impermissible restrictions on the importation"[13] produced or became operative. In Ukraine's view, the relevant guidance in this case is to establish whether China's TRQs administration "imposes a restriction or prohibition on importation."[14]

III. CONCLUSION

15. Mr. Chairperson, distinguished members of the Panel and representatives of the delegations, this concludes Ukraine's oral statement. We thank the Panel for its consideration of the views of Ukraine. We look forward to answering any questions that the Panel may have.

_____

[8] Appellate Body Report, *US − Shrimp*, para. 182.
[9] Vienna Convention on the Law of Treaties, Article 31.
[10] Appellate Body Report, *EC − Bananas III (Article 21.5 − US)*, para. 335.
[11] Appellate Body Report, *Japan − Alcoholic Beverages II*, page 14.
[12] Appellate Body Report, *China − Raw Materials*, para. 328.
[13] US' First Written Submission, para. 335.
[14] Panel Report, *Indonesia − Import Licensing Regimes*, para. 7.55.