WORLD TRADE ORGANIZATION

WT/DS511/R/Add.1

28 February 2019

(19-1134)

Original: English

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS511/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

RAW DATA

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 11 AUGUST 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant an extension to this deadline. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its
..... submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If China chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

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

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. Each party's integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

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

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When

the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. Each year, the People's Republic of China ("China") provides a significant level of domestic support to its agricultural producers through a variety of subsidy programs and other measures. This dispute addresses a single means of agricultural support, "market price support" ("MPS"), which China utilizes to support farmer incomes and increase production for basic agricultural products, including wheat, Indica rice, Japonica rice, and corn. Through this form of support alone, China has provided support far in excess of its WTO commitments. The level of domestic support China provided to its agricultural producers in 2012, 2013, 2014, and 2015 exceeded the level set out in Section I of Part IV of China's Schedule of Concessions on Goods ("CLII"). China's level of domestic support in favor of agricultural producers has therefore breached Articles 3.2 and 6.3 of the *Agreement on Agriculture* ("Agriculture Agreement") for the years 2012, 2013, 2014, and 2015.

2. China's MPS programs announce on an annual basis an applied administered price that will be available to farmers either immediately upon initiation of each year's program, as for corn, or when market prices drop below the applied administered price, as for wheat, Indica rice, and Japonica rice. This applied administered price is provided or furnished to farmers in the major producing provinces during the period immediately following harvest. By guaranteeing farmers an established price for their commodities, China's MPS programs for wheat, Indica rice, Japonica rice, and corn ensure that commodity prices in the relevant provinces are maintained at the Chinese government's chosen support level.

I. CHINA'S IMPLEMENTATION OF MARKET PRICE SUPPORT PROGRAMS

3. Per the annual policy direction in the *Document Number 1* and regulatory framework provided by the *2004 Grain Distribution Regulation*, China issued annual announcements of minimum prices for wheat, Indica rice (early season and mid-to-late season), and Japonica rice, and implementation plans for purchasing those grains harvested in 2012, 2013, 2014, and 2015 at the established prices. Together these instruments form the wheat, Indica rice, and Japonica rice MPS Programs. China has also maintained similar MPS Programs for corn announced through an annual notice in the years 2012, 2013, 2014, and 2015.

A. China's Wheat Market Price Support Program

4. Wheat is China's second most prevalent crop, after rice, and China is one of the world's top wheat producers. Between 2005 and 2015, wheat production in China increased by 25 percent, with production in 2015 reaching 130.19 million metric tons ("MT") annually.

5. China issues two documents each harvest year to implement the MPS Program for wheat. First, prior to the planting of winter wheat, China announces the annual "minimum purchase price" in a *Notice on Raising the Wheat Minimum Purchase Price* or *Notice on Announcing the Wheat Minimum Purchase Price* ("*Wheat MPS Notices*"). This is China's applied administered price for wheat. China's National Development and Reform Commission ("NDRC"), Ministry of Finance ("MoF"), Ministry of Agriculture ("MoA"), State Administration of Grain, and the Agricultural Development Bank of China jointly issue the annual *Wheat MPS Notice*s.

6. The *Wheat MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agricultural departments (bureaus, commissions, offices), grain bureaus, and Agricultural Development Bank of China branches in all provinces, autonomous regions, and municipalities directly under the central government." The *Wheat MPS Notices* state that "each locality is required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *2015 Wheat MPS Notice* states that "[i]n order to protect the interests of farmers and prevent 'low grain prices hurting farmers,'" the *Notice* is provided to "guide farmers to plant rationally, and promote the stable development of grain production."

7. Second, the NDRC, MoF, MoA, State Administration of Grain, Agricultural Development Bank, and China Grain Reserves Corporation ("Sinograin") publish a *Notice on Issuing the Wheat and Rice*

Minimum Purchase Price Implementation Plan, "in order to implement and fulfill the spirit of the [*2015 Document Number 1*]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Wheat MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*]."

8. The annual *Wheat MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Wheat MPS Notices*, noting that this is "the at-depot price of direct purchases [of wheat] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Wheat MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying wheat, (3) relevant timeframe, (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

9. Each year to implement the Wheat MPS Program, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots" in each affected province. These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

10. Under the Wheat MPS Program, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, . . . including the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

11. The *Wheat MPS Implementations Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard;" "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

12. Purchase and administration costs under the MPS Program for wheat are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Further, ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The wheat held by the entrusted purchasing and storage depots will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

13. The Chinese instruments setting out the MPS Programs for wheat instruct central and provincial government officials to initiate a program of wheat purchases on an annual basis. The MPS Programs ensure that farmers in the six major wheat producing provinces are able to make sales of qualifying wheat at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. As described below, the MPS Programs for Indica rice and Japonica rice operate in a similar manner.

B. China's Indica Rice and Japonica Rice Market Price Support Programs

14. China is the world's largest rice market, accounting for nearly a third of global production and consumption. Between 2005 and 2015, total rice production in China increased by 15 percent, with production in 2015 reaching 208.23 million MT annually.

15. China issues two documents each harvest year to implement the MPS Programs for Indica rice and Japonica rice. China first issues an annual *Notice on Raising the Rice Minimum Purchase Price* or *Notice on Announcing the Rice Minimum Purchase Price* ("*Rice MPS Notices*") each year, which defines the "minimum purchase price" or applied administered price for three products: early-season Indica rice, mid-to-late season Indica rice, and Japonica rice. NDRC, MoF, MoA, State Administration of Grain, and the Agricultural Development Bank jointly issue the annual *Rice MPS Notices.*

16. The *Rice MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agriculture departments (bureaus, commissions, and offices), grain bureaus, and Agricultural Development Bank of China branches of all provinces, autonomous regions, and municipalities directly under the central government." The *Rice MPS Notices* are issued in January or February, which is well in advance of planting. The *Rice MPS Notices* state that "[a]s it is currently the middle of the preparatory spring plowing period, all localities are required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *Rice MPS Notices* continue that the announced price is to "guide farmers to plant rationally, and promote the stable development of grain production."

17. Second, the NDRC, in conjunction with the MoF, MoA, State Administration of Grain, Agricultural Development Bank of China, and Sinograin, publish an annual *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan,* "in order to implement and fulfill the spirit of the [2015 Document Number 1]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Indica Rice and Japonica Rice MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*].

18. Typically, the early Indica rice Implementation Plan is released first, and a joint mid-to-late Indica rice and Japonica rice plan follows during the later planting season. In other instances, the *Indica Rice and Japonica Rice MPS Implementation Plans* are announced in the same document as the *Wheat MPS Implementation Plan,* as was the case for 2015.

19. The annual *Indica Rice and Japonica Rice MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Rice MPS Notices*, noting that this is "the at-depot price of direct purchases [of rice] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Indica Rice and Japonica Rice MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying Indica rice or Japonica rice, (3) relevant timeframe, and (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

20. Each year to implement the Indica Rice and Japonica Rice MPS Programs, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots." These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

21. When the Indica Rice and Japonica Rice MPS Programs are activated, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, [this information] will include the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

22. The *Indica Rice and Japonica Rice MPS Implementation Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard," "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

23. Purchase and administration costs under the MPS Program for rice are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The Indica rice and Japonica rice held by the entrusted purchasing and storage depots, will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

24. The Chinese instruments setting out the MPS Programs for Indica rice and Japonica rice instruct central and provincial government officials to initiate a program of Indica rice or Japonica rice purchases on an annual basis. The MPS Programs ensure that farmers in the identified major rice producing provinces are able to make sales of qualifying rice at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. The MPS Program for corn operates in a similar manner.

C. China's Corn Market Price Support Program

25. China is the world's second largest producer of corn. Since 2005, China's corn production has increased 38 percent. Corn is primarily grown in northern and northeastern China.

26. As described in China's *Document Number 1*, the measures related to corn procurement are part of a "temporary" program to procure and store corn. To implement market price support for corn, China issues a single document titled the *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region* (the "*Notice on Purchases of Corn*"). The *Notices on Purchases of Corn* are issued jointly by NDRC, the State Administration of Grain, MoF, and Agricultural Development Bank of China, and provide details on the available applied administered price, geographic scope, timing, and requirements of the Corn MPS Program.

27. The Corn MPS Programs provide that the applied administered price is to be available in three Northeast provinces – Liaoning, Jilin, and Heilongjiang – and the Inner Mongolia Autonomous Region. The *Notices on Purchases of Corn* for 2012 through 2015 provide the applied administered prices in the referenced provinces and autonomous region. This price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots."

28. The Corn MPS Program operates from when the *Notice on Purchases of Corn* is issued typically in late November or early December until April 30 of the following calendar year. This is the period immediately following the corn harvest in northeastern China.

29. The Corn MPS Program provides that the applied administered price is for "domestically produced corn produced in 2015, meeting the quality standards for national at-grade product," or "Grade 3" corn. The applied administered price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots." Corn that meets a lower or higher grade may also be purchased and "[p]rice differences between adjacent grades will be controlled at 0.02 yuan per *jin* [half kilogram]."

30. Sinograin is "entrusted by the state to act as the primary policy implementation entity," and in particular "will make open purchases of farmers' surplus grain and prevent the occurrence of farmers' 'difficulty selling grain.'" Aspects of the work are also delegated to the provincial governments who may issue their own implementing measures.

31. The *Notices on Purchases of Corn* further provide that "COFCO, Chinatex, and [Aviation Industry Corporation of China ("AVIC")], as the supplemental forces for [Sinograin], are entrusted by [Sinograin] to undertake purchasing and storage tasks, and will independently take on loans from the Agricultural Development Bank of China." Other warehouses and granaries may be designated as "purchasing and warehouse sites" by joint decision of local subsidiaries of Sinograin, and the Agricultural Development Bank of China, as well as local grain administration authorities. Further, permanent and temporary storage facilities may be built by Sinograin and provincial officials where there is determined to be a need for additional storage.

32. Each identified "purchasing and warehouse site" throughout the Northeast region is "required to openly post and purchase in accordance with stipulated prices." Further, they must "ensur[e] that grain standards and quality and price policies are posted and standard sample products are displayed." While assuring that these requirements are followed, the sites will also "make open purchases of farmers' surplus grain and will prevent the occurrence of 'difficulty selling grain' among farmers."

33. The Chinese instruments setting out the MPS Programs for corn instruct central and provincial government officials to initiate a program of corn purchases on an annual basis. The MPS

Programs ensure that farmers in the northeast provinces are able to make sales of qualifying rice at the announced applied administered price, once notice of the program has been issued.

II. CHINA MUST MAINTAIN DOMESTIC SUPPORT EXPRESSED AS CURRENT TOTAL AMS AT LEVELS BELOW CHINA'S FINAL BOUND COMMITMENT LEVEL WHEN CALCULATED IN ACCORDANCE WITH THE AGRICULTURE AGREEMENT

34. China may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member's fixed commitment levels. The basic obligations in the Agriculture Agreement regarding domestic support are set forth as follows: (1) Article 3.2 states that: "[s]ubject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule;" (2) Article 6.3 states that: "[a] Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule"; and (3) finally, Article 7.2(b) states that: "[w]here no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6."

35. The Agriculture Agreement thus frames a WTO Member's obligation to limit domestic support: first, the Member's individual commitment recorded in Section I of Part IV of the Member's Schedule, and second, the *de minimis* level of support that may be provided by a Member to its producers of basic agricultural products, without including the value of that product-specific AMS in the calculation of Current Total AMS.

36. China scheduled a "Final Bound Commitment Level" of "nil" in Section I of Part IV of its Schedule of Concessions on Goods ("China's Schedule CLII"). China's consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support (Current Total AMS), which is the sum of the Aggregate Measurement of Support (AMS) provided to each basic agricultural product.

37. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" for a given year refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific agreement measurements of support and equivalent measurements of support for agricultural products." Pursuant to Article 6.4 of the Agriculture Agreement, a Member's Current Total AMS does not include product-specific AMS values that are less than or equal to the relevant *de minimis* level of support. For China, the *de minimis* level of support equals 8.5 percent of the total value of production of a basic agricultural product during the relevant year.

38. Therefore, to determine China's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural commodity, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a particular basic agricultural product exceeds China's *de minimis* level of 8.5 percent, the full value of the product-specific AMS would be included in China's Current Total AMS. Because China has committed to a level of domestic support of "nil" or zero, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 8.5 percent, China will have breached Articles 3.2 and 6.2 of the Agriculture Agreement.

Market Price Support

39. Annex 3 of the Agriculture Agreement identifies support that "shall" be included in a Member's AMS calculation. It states that "an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving *market price support*, non-exempt direct payments, or any other subsidy not exempted from the reduction

commitment ("other non-exempt policies")." Thus, the Agriculture Agreement states that "market price support" in favor of basic agricultural products is a form of non-exempt domestic support and must be included in a Member's AMS calculation.

40. The Agriculture Agreement does not expressly define the term "market price support;" it is useful to consider the ordinary meaning of the constituent terms of "market price support" to understand the scope of domestic support programs contemplated by this term. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "Support" is defined as "the action of holding up, keeping from falling, or bearing the weight of something" or "the action of contributing to the success of or maintaining the value of something."

41. Relevant to the consideration of the term "market price support," the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines "market price" as "the current price which a commodity or service fetches in the market." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

42. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that "market price support" is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for "each basic agricultural product" includes the provision of assistance in holding up or maintaining a market price for that agricultural product.

43. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute – market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible* to receive the applied administered price." The paragraph goes on to provide that "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

44. Thus, the calculation of market price support is based on the price gap between the "applied administered price" identified in the domestic support measure and the "fixed external reference price," multiplied by the quantity of eligible production.

Applied Administered Price

45. The Agriculture Agreement does not define the term "applied administered price". It is therefore necessary to evaluate the ordinary meaning of the constituent terms of "applied administered price." Specifically, "applied" is defined as to "put to practical use; having or concerned with practical application." This definition suggests an actual or real life action. With respect to "administered," "administer" is defined as to "carry on or execute (as office, affairs, etc.)," to "execute or dispense," or to "furnish, supply, give (orig. something beneficial to)." Finally, as described above, "price" is defined as "a sum in money or goods for which a thing is or may be bought or sold" or its "value or worth."

46. Considering these definitions, the "applied administered price" is the price a Member dispenses or furnishes to support a particular basic agricultural product. Paragraph 8 also refers to "the" applied administered price, suggesting that this price is known and discernable. The applied administered price is thus price set or established by the government and is, as such, distinguishable from a prevailing domestic market price. The "applied administered price" is the price the Chinese government *provides* for each of the basic agricultural products and is *identified* for each product and each year in the Chinese legal instruments implementing the program (Relevant data available at U.S. First Written Submission, Table 6; Exhibits US-20 – US-23, US-39 – US-42, US-52 – US-55).

Fixed External Reference Price

47. The "fixed external reference price" is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price "shall be based on the years 1986 to 1988" and "may be adjusted for quality differences as necessary." These fixed external reference

prices can be determined using official Chinese customs data from these years (Relevant data available at U.S. First Written Submission, Table 7; Exhibit US-65).

Eligible Production

48. The third element of the market price support calculation methodology contained in Annex 3, paragraph 8, of the Agriculture Agreement directs that the established price gap be multiplied "by the quantity of production eligible to receive the applied administered price." The ordinary meaning of the terms indicates that "eligible production" is all of the production entitled or permitted to receive the administered price. Specifically, the ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc." Thus, the "quantity of production eligible" is a portion or amount of the commodity produced that is entitled to receive the applied administered price. It is the amount of agricultural production that has the rightful claim to receive the applied administered price, whether or not that amount of production actually received the specified applied administered price.

49. The Appellate Body in *Korea – Beef* considered the meaning of the phrase "quantity of production eligible to receive the applied administered price" and reached a similar understanding. The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually purchased.'" The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen." It noted that "a government is able to define and limit 'eligible' production," and that "[p]roduction actually purchased may often be less than eligible production." Thus, "eligible production" within the meaning of Annex 3, paragraph 8 of the Agriculture Agreement is production, which is fit or entitled to receive the administered price, whether or not the production was actually purchased.

50. Because under China's programs all production in identified provinces is fit or entitled to receive the applied administered price, the "quantity of production eligible" is drawn from China's National Bureau of Statistic and Ministry of Agriculture official wheat, rice, and corn production volumes (Relevant data available at U.S. First Written Submission, Table 8; Exhibits US-18, US-73 – US-75).

III. CHINA'S MPS PROGRAMS FOR WHEAT, INDICA RICE, JAPONICA RICE, AND CORN PROVIDE GREATER THAN DE MINIMIS LEVELS OF DOMESTIC SUPPORT AND THUS RESULT IN CHINA EXCEEDING ITS DOMESTIC SUPPORT COMMITMENT FOR 2012, 2013, 2014, AND 2015

51. China's MPS Programs for wheat, Indica rice, Japonica rice, and corn are "market price support" measures as contemplated by Annex 3 of the Agriculture Agreement. As a preliminary matter, China has notified its Wheat and Rice MPS Programs on the "Product Specific Aggregate Measure of Support: Market Price Support" supporting table "DS:5" of its annual notification. These programs are notified as "product-specific." Therefore, China itself has stated that the MPS Programs for wheat, Indica rice, and Japonica rice operate as product-specific "market price support" and has characterized these programs as such to WTO Members.

52. Further, China's MPS Programs for wheat, Indica rice, Japonica rice, and corn constitute "market price support" within the meaning of Annex 3, because each Program exhibits an "applied administered price" and "quantity of production eligible." Specifically, China announces for each MPS Program the "minimum procurement price" at which designated state-owned enterprises will purchase wheat, Indica rice, Japonica rice, and corn. This annually announced "minimum procurement price" constitutes an "applied administered price," because it is the known or discernable price China dispenses or furnishes for each basic agricultural product, regardless of the price that would be otherwise determined by the market. This offers price support to Chinese farmers in the designated regions.

53. China's MPS Programs also each establish a "quantity of eligible production." The MPS Programs specify that production in designated provinces is eligible for support, and in those provinces the state-owned enterprises will purchase all proffered product. Therefore, the portion or amount of the commodity produced that is entitled to receive the administered price is identified in the MPS Programs as all production produced in the identified provinces.

54. For these reasons, China's MPS Programs for wheat, Indica rice, Japonica rice and corn are "market price support" programs for the purposes of the Agriculture Agreement and must be evaluated per the methodology set forth in Annex 3.

55. As described above, Annex 3, paragraph 8, of the Agriculture Agreement provides the calculation methodology for market price support as:

*(Applied Administered Price – Fixed External Reference Price) * Quantity of Production Eligible = AMS*

56. Based on the values for each element of the "market price support" calculation, as well as the "total value of production" data, China has provided support in excess of its *de minimis* level for each of wheat, Indica rice, Japonica rice, and corn solely through its market price support programs for the years 2012, 2013, 2014, and 2015. Accordingly, China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement on the basis of the level of domestic support provided through China's market price support measures in favor of wheat, Indica rice, Japonica rice, and corn, viewed separately or collectively. Therefore, the United States requests that the panel issue the mandatory recommendation for China to bring its measures into conformity with the Agriculture Agreement.

EXECUTIVE SUMMARIES OF THE U.S. COMMENTS ON CHINA'S CHALLENGE TO THE PANEL'S TERMS OF REFERENCE, U.S. ORAL STATEMENTS AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL, AND THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

57. [Summaries of the U.S. comments on China's challenge to the Panel's terms of reference, the U.S. oral statements at the first substantive meeting, and the U.S. Responses to the Panel's First Set of Questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. DOMESTIC SUPPORT PROVIDED BY CHINA TO ITS CORN PRODUCERS IN 2012 THROUGH 2015 IS PROPERLY WITHIN THE PANEL'S TERMS OF REFERENCE

58. During this panel proceeding, China has not denied that it provided domestic support to corn producers from 2012 through 2015 in excess of its Final Bound Commitment Level. Instead, China erroneously argues that the Panel is precluded from examining and making findings and recommendations on China's provision of domestic support to its corn producers from 2012 through 2015. China argues that the annual legal instruments through which China provided domestic support to its corn producers in 2015 have "expired," and on that basis the provision of domestic support provided to Chinese corn producers from 2012 through 2015 is outside the Panel's terms of reference.

59. China's arguments misunderstand "the matter" at issue in this dispute, and the nature of domestic support challenges generally, which necessarily relate to past action by a responding Member. As explained below, the United States properly identified the matter at issue in its panel request – the only matter as of the date of panel establishment that would permit an examination, and a finding of WTO-inconsistency. The DSU thus requires the Panel to examine and make findings and a recommendation regarding China's provision of domestic support during the relevant years. The expiration of annually-issued legal instruments through which China provided such support in the relevant years does not alter the Panel's terms of reference. Moreover, China's non-transparency prevents it from demonstrating that China ceased to provide domestic support to its corn producers in excess of its commitment level prior to the establishment of the Panel.

60. The "matter" to be resolved is that described in Article 7.1 of the DSU. This provision states that a panel's terms of reference are "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), *the matter referred to the DSB* by the [United States] in [its panel request] …, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreements". With respect to Article 7.1 of the DSU, the Appellate Body has stated: "[a] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will

have the authority to make findings." Accordingly, the matter that the DSB places within a panel's terms of reference for its examination is defined by the complaining Member's panel request.

61. Thus, as set out in the U.S. panel request and explained in prior submissions, the United States has challenged China's provision of domestic support to its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's Final Bound Commitment Level of "nil" and in breach of Articles 3.2 and 6.3 of the Agriculture Agreement. The panel request describes four measures at issue: the "domestic support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015. It also describes eight affirmative claims, i.e., the United States challenges that the levels of domestic support provided for each of the four years exceeds China's final bound commitment level in breach of Article 3.2 and of Article 6.3 of the Agriculture Agreement. These four measures and eight claims constitute the "matter" that the DSB has charged the Panel with examining through its terms of reference.

62. In addition to identifying the "matter," the U.S. panel request also includes additional information that previews the main arguments the United States will advance in its First Written Submission to demonstrate its claims. Prior panels and the Appellate Body have explained that there is a significant difference between the claims identified in a panel request, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and clarified progressively in the written and oral submissions. The United States has identified both in its panel request.

63. The U.S. panel request is best understood by parsing the constituent parts of the three sentences in the U.S. panel request. The italicized language identifies the measures, the bolded language identifies the claims, and the underlined language previews the arguments put forward by the United States.

> The United States considers that **China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement because the level of** *domestic support provided by China* **exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII**. In particular, *China's domestic support in favor of agricultural producers*, expressed in terms of its current Total Aggregate Measurement of Support ("Total AMS"), **exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015** on the basis of domestic support provided to producers of, *inter alia*, wheat, Indica rice, Japonica rice, and corn. The United States further considers that, **to the extent applicable,** *these measures* **are inconsistent with China's obligation under Article 7.2(b) of the Agriculture Agreement because, in 2012, 2013, 2014, and 2015,** *China provides domestic support* for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific de minimis level of 8.5 percent for each product.

64. The first sentence includes the measures and claims. The second sentence previews that the claims will be demonstrated on the basis of a specific argument. The third sentence includes an alternative claim and argument. As the Appellate Body recognized in *EC – Selected Customs*, "nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims." Accordingly, the U.S. panel request includes both the matter referred to the DSB under Article 7 of the DSU, and a preview of the arguments supporting those claims that the United States advanced progressively in its written and oral submissions.

65. Therefore, contrary to China's claims that the Panel is precluded from examining China's provision of domestic support to its corn producers in 2012, 2013, 2014, and 2015, the Panel's function pursuant to Article 11 of the DSU is to make an objective assessment of "the matter" before it – the same "matter" that the DSB has put within the Panel's terms of reference. In this dispute, in light of the U.S. panel request and Article 7.1 of the DSU, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years exceeded China's commitment level and thereby breached its commitments under the Agriculture Agreement.

A. China's Rebuttal Arguments Do Not Establish that the Measures and Claims Identified in the U.S. Panel Request Fall Outside the Panel's Terms of Reference

66. In China's Response to the Panel's Questions, China makes a number of false statements and advances arguments unsupported by the DSU and the Agriculture Agreement. First, China argues that "domestic support" and the "level of domestic support" are not measures but a "legal concept," and therefore are insufficient to present the problem clearly under Article 6.2 of the DSU. In supporting its argument, China tries to draw a parallel between "domestic support" covered by the Agriculture Agreement and "subsidies" disciplined under the SCM Agreement. Further, it argues that the "level of domestic support" is not a measure, but an unspecified reference to a numerical value that fails to "identify the specific measures that are alleged to have contributed to the level of domestic support." China's arguments are in error and must fail principally because the United States properly identified the measure at issue in its panel request.

67. The United States has not identified the measure in its panel request as simply the "level of domestic support" or "domestic support." China has failed to provide the complete and accurate identification of the measure included in the U.S. panel request. As stated repeatedly, the measure at issue is "China's domestic support in favor of agricultural producers" (also expressed as the "domestic support provided by China"), and the panel request then lists legal instruments through which that support is provided. The measure is therefore neither a numerical value, nor a legal concept but *action* by China. As China itself noted in its answer, the measure at issue in a dispute may be any act or omission attributable to the responding Member. The United States, indeed, identified the measure as "China's domestic support in favor of agricultural producers" and "domestic support provided by China." Thus, the United States identified a specific measure at issue – an act attributable to China – in its panel request.

68. Moreover, contrary to China's argument, a comparison between domestic support under the Agriculture Agreement and a subsidy under the SCM Agreement does not support China's position that the provision of domestic support by China is insufficient to identify the specific measure at issue. Unlike the Agriculture Agreement, the SCM Agreement prohibits Members from providing certain types of subsidies, known as prohibited subsidies, and seeks to neutralize adverse trade effects on the interests of another Member, through serious prejudice actions and authorizing the use of countervailing measures. Conversely, the Agriculture Agreement neither prohibits any specific form of domestic support, nor seeks to counter any negative effects of the provision of support. The Agriculture Agreement simply seeks to limit the amount of domestic support provided by a Member and requires that the Member calculate and notify the amount of support given in accordance with certain methodologies.

69. In addition, China seems to conflate terms of reference issues with issues to be resolved on the merits. The question of whether the measures identified in the panel request can breach an obligation under a covered agreement is a substantive issue to be addressed and resolved on the merits. China's argument that "domestic support" and "level of domestic support" are legal concepts not only misstates the U.S. identification of the measure, but asserts that these "concepts" *cannot* breach the Agriculture Agreement themselves. The Panel should examine whether the measure identified by the United States (the provision of domestic support by China) breaches the Agriculture Agreement as part of its review of the merits.

70. In a final attempt to persuade the Panel, China baselessly argues that the right to challenge "domestic support" or the "level of domestic support" would deprive the respondent of its due process rights to know the case it must answer, result in uncertainty about the steps it must take to bring its measure into conformity, and permit a complaining Member to inappropriately broaden the scope of any compliance proceeding. China's concerns are unfounded. First, as explained above, the United States did in fact identify the specific measure at issue. Second, the concern China advances is not present in this dispute. The U.S. panel request, in addition to identifying "China's domestic support in favor of agricultural producers," also sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products). Thus, China's concern may apply to another dispute and another panel request, but the circumstances China concerns itself with are not present here. Typically, original panels do not dictate to respondents how to bring their measures into conformity; rather, a panel's recommendation is simply to bring

measures into conformity with the covered agreement. Respondents have the flexibility to choose how to comply with a panel's recommendation. Therefore, despite China's arguments, the U.S. identification of "China's domestic support in favor of agricultural producers," including domestic support to China's corn producers, is not contrary to the DSU and would not permit challenges to unidentified measures.

71. Second, China mischaracterizes the nature of a domestic support challenge. To overcome an objection that its terms of reference argument renders domestic support unchallengeable, China goes so far as to argue that a complaining Member could bring an AMS claim *before* the necessary data is available to prove a breach. China's statement reflects a fundamental misunderstanding of WTO AMS commitments and would, indeed, render such commitments beyond challenge. A Member's domestic support commitments, in terms of their Final Bound Commitment Level, apply with respect to domestic support provided over a full calendar, marketing, or financial year. Therefore, the question of whether a WTO Member is in breach of its domestic support commitments necessarily involves a retrospective examination of the level of domestic support, calculated as Current Total AMS provided over a period of time. Where a challenge involves market price support programs, the complaining party must produce, among other things, data related to a country's total annual production volume and average farm-gate prices for the full years at issue in order to establish the level of domestic support provided and then compare that support to a Member's AMS commitments.

72. With respect to the market price support at issue in this dispute, data for both annual production and prices for each product were necessary for the United States to examine whether China had exceeded its Final Bound Commitment Level. And, importantly, the United States and other WTO Members do not have access to the necessary data until *China itself* releases it to the public. The complete data required for the United States to analyze China's compliance with WTO rules for the year 2015 were not publicly available *until November 2016* – nearly a year after the end of the relevant time period. Therefore, the United States filed its request for establishment of a panel as soon as was feasible, on December 5, 2016, less than a month after the complete data became available.

73. Under these circumstances, China's argument that the United States is precluded from challenging China's provision of domestic support to its corn producers for 2012-2015 would, indeed, frustrate the ability of the United States or any other WTO Member to challenge China's provision of domestic support in excess of its WTO commitments. If the Panel were precluded from examining past provisions of domestic support simply because a program has allegedly changed, given the retrospective nature of domestic support obligations, simple changes to a legal instrument would preclude challenges to a Member's domestic support without the Member having achieved conformity of its support with its WTO obligations. The Panel should not endorse a legally erroneous approach that would also open such a loophole in WTO rules. Instead, consistent with the DSU and the Agriculture Agreement, the Panel should consider China's domestic support provided through annual legal instruments during the years at issue, as set out in the U.S. panel request and therefore within the Panel's terms of reference.

74. Such an analysis is exactly what the panel and Appellate Body did in *Korea – Beef*. Specifically, in *Korea – Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively, and the panel was established on May 26, 1999. The panel and Appellate Body issued findings concerning domestic support provided in 1997 and 1998 – that is, the two years *prior to* the complaining parties' requests for panel establishment. Moreover, in examining whether Korea's provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the DSB established the panel to examine the matter raised in the requests for panel establishment.

75. The U.S. approach in this dispute is the same as that taken in *Korea – Beef*, the only prior WTO dispute addressing market price support programs. In both, a complaining party seeks to demonstrate a Member's breach of its domestic support commitments through the domestic support provided through the legal instruments capable of examination. Accordingly, the Panel should approach the domestic support China confers, and the time-bound legal instruments it employs, no differently than did the panel and Appellate Body in *Korea – Beef*. Failing to do so would ignore the fact that Current Total AMS is determined annually, as well as ignore the annual nature of market price support programs in China.

B. China's Rebuttal Arguments Do Not Establish that the Panel Is Precluded From Making Findings and Recommendations On the Measures Identified in the U.S. Panel Request

76. The United States has explained that it is not challenging a measure that had expired prior to panel establishment, but rather is challenging the domestic support provided by China. China has not alleged or demonstrated that the legal instruments through which it provided domestic support in 2016 had removed any WTO-inconsistency as of the date of panel establishment. Therefore, the replacement of the annual 2015 corn legal instrument with another instrument for 2016 is not relevant. To the extent the 2015 corn support legal instrument is considered to have "expired," it would be appropriate for the Panel to make findings and recommendations in light of the Panel's terms of reference and the DSU provision (Article 19.1) requiring a recommendation for any measure within the panel's terms of reference found to be WTO-inconsistent.

77. The Appellate Body reports in *China – Raw Materials* demonstrate that expiry of an annual legal instrument should not deprive the complaining party of a finding and recommendation on a WTO-inconsistent measure within a panel's terms of reference. The situation in this dispute is similar to that in *China – Raw Materials*, which also dealt with a series of annual Chinese measures. The Appellate Body held that with respect to annual instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by annual legal instruments that may have been superseded in the course of the dispute. In so doing, both the panel and Appellate Body examined the measure *as it existed at the time of panel establishment*. The Appellate Body noted that if complainants were precluded from challenging measures of an annual nature that may have expired during the course of the panel proceedings, it would create a loophole in the system. Complainants could find themselves 'taking aim' at 'appearing and disappearing targets,' and responding parties could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.

78. In the present dispute, China argues that *Raw Materials* is not applicable because the annual legal instruments that implement the provision of domestic support for corn in 2015 allegedly expired before panel establishment. However, as explained above, China is incorrect that the expiration of an annual legal instrument for a particular year prevents a panel from making findings on the domestic support provided through that instrument in the relevant year – the U.S. panel request sets out the only "matter" that existed and demonstrated China's WTO-inconsistent support as of that date. Moreover, in the context of domestic support, China's argument creates the very loophole the panel and Appellate Body in *Raw Materials* sought to avoid.

79. Most of the instruments identified in the U.S. panel request are annual in nature – both for corn and for wheat and rice. China has indicated that it does not argue that the market price support programs for wheat or rice have expired. As China explained at the first panel meeting and in its answers to the Panel's questions, the rice and wheat programs essentially operate in the same way the export duties and quotas in *Raw Materials* operated – *i.e.*, they consist of an ongoing legislative framework and a series of annual measures that identify the specific applied administered price and implementation plans for each year in which the MPS program operates. However, China has not explained why the Panel should view the instruments for corn any differently, or why the differences between the annual legal instruments for corn in 2015 and 2016 mean that the expiration of the 2015 legal instruments extinguishes the Panel's authority with respect to the provision of support during 2012-2015.

80. Specifically, China does not dispute that all of the annual legal instruments for rice and wheat issued in 2012 through 2015 in fact expired prior to the establishment of the panel. Therefore, China appears to suggest that the continued existence of the ongoing legal framework measures, including the 2004 Grain Distribution Regulation, preserves the Panel's authority to make findings regarding the provision of domestic support for rice and wheat in the relevant years. But China's argument does not support finding that corn domestic support has "expired", for two reasons.

81. First, the *2004 Grain Distribution Regulation* provides authority for China to implement market price support for corn, as well as for wheat and rice. The annual legal instruments for each product covers one year (and therefore could be argued to "expire" with that year). There is no logical basis to distinguish rice and wheat from corn, then, and to think that the authorizing framework that applies to the three products provides a basis for the Panel's terms of reference for rice and wheat,

but not for corn. China's approach would lead to the very "disappearing target" dilemma the panel and Appellate Body in *Raw Materials* warned against.

82. Second, China's argument apparently relies on the absence of a regulatory framework pursuant to which the corn instruments were enacted. But, if the mere absence of an ongoing legal framework meant that the expiration of annual instruments precluded a panel from making findings, this again would allow the same "disappearing target" danger – a constantly moving target that required a complainant to continually update its analysis in hopes of keeping up with the changing measures. Moreover, such a finding would encourage Members to reduce the level of transparency in their systems and instead rely on annual, and even *ad hoc*, legal instruments alone – a development that would only add to a complainant's difficulty in bringing a successful challenge.

83. As the United States has explained previously (and again in the next section of this submission), the fact is we do not know – and the Panel therefore cannot properly evaluate – the factual and legal situation in China in 2016. Under such circumstances, and given the nature of challenges to a Member's AMS, to avoid prejudicing U.S. rights to meaningful findings and recommendations with respect to the provision of domestic support in 2012-2015, including through support for corn, the Panel must make findings on the matter as articulated in the U.S. panel request. That the specific legal instruments upon which those findings would be based may have expired does not alter the matter at issue or exclude the relevant measures from the Panel's terms of reference.

84. In addition to being required to examine the "matter" before it, if the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement. Pursuant to Article 11, therefore, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years is in excess of its commitment level and thereby breaches China's commitments under the Agriculture Agreement. If the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement.

85. Thus, a panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and such a recommendation is the right of a complainant under the DSU. Therefore, if this Panel finds that China has provided domestic support in excess of its AMS commitments for any of the relevant years, the Panel must recommend that China bring the measure(s) into compliance with its obligations.

C. China Has Not Demonstrated That Its Market Price Support Program for Corn "Expired," or That It Ceased to Provide Domestic Support for Corn in Excess of Its Commitment Level in 2016

86. As explained in the preceding section, the matter at issue before the Panel is whether China's provision of domestic support to its agricultural producers from 2012 through 2015 is inconsistent with its domestic support commitments. Based on the U.S. panel request and the nature of AMS disputes, the expiration of specific legal instruments through which the United States has demonstrated that China has breached its Final Bound Commitment Level does not preclude the Panel from making findings on this matter. For completeness, however, the United States also explains in this section why China also has failed to show that its market price support program for corn had "expired" by the time of the Panel's establishment, or that it ceased to provide domestic support for corn in excess of its commitment level in 2016.

87. First, China asserts at some length that after the "expiry" of the 2015 corn market price support instrument, it moved to a system of "market-oriented purchase" by "market players," where all types of entities may decide to make purchases "on their own initiative." According to China, the 2016 corn purchasing instruments are "*seeking* to achieve a market-based price discovery." China supports this assertion with the text of the 2016 corn purchasing instruments. However, the market-based aspirations espoused in the *2016 Northeast Region Corn Purchase* are simply not sufficient to demonstrate that China no longer provides domestic support for corn in excess of its commitments. The United States notes that *seeking* market-based price discovery is not the same as *eliminating* price support policies for corn, and "reform" of the price support program is not the same as

termination. On its face, then, the instrument China identifies does *not* support its assertion that market-price support had "expired" or been withdrawn.

88. The aspirations and policy "reform" reflected in the *2016 Northeast Region Corn Purchase Notice* and other 2016 policy statements are in fact similar to those identified in the *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, pursuant to which China's market price support for wheat and rice are implemented. For instance, the *2004 Grain Distribution Regulation* states that the "state encourages market entities of various forms of ownership to engage in grain business operations, so as to promote fair competition" and that the "grain price is formed principally by market supply and demand." But the *2004 Grain Distribution Regulation* also provides that, "to protect the interests of grain farmers, the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions." In this manner, though China's *2016 Northeast Region Corn Purchase Notice* calls for "advancing corn purchasing and storage system reform," this reform is similar to the "marketization reform in grain purchasing and sales" pursued in 2004.

89. This dichotomy between encouraging "market-oriented purchases" and maintaining government control also is apparent on the face of the 2016 corn purchasing instruments and reflected in China's responses to the Panel's Questions. The *2016 Northeast Region Corn Purchase Notice* cites as its goal facilitating a situation where farmers "sell corn according to the fluctuating market price," and that "market entities of all types [are] independently entering the market to make purchases." However, China's *2016 Northeast Region Corn Purchase Notice* simultaneously provides that relevant regions must "comprehensively organize the branches of central government-owned enterprises under jurisdiction and local backbone grain enterprises to lead the way in entering the market for purchasing." The 2016 instrument further states that "[r]elevant central government-owned enterprises such as COFCO and AVIC must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role." All of this is to "prevent the occurrence of farmers having "difficulties in selling grain.'" Therefore, while the 2016 measure does encourage "all types" of entities to enter the market, it *also* recognizes and provides for the continuing role of state-owned enterprises tasked with ensuring the market operates properly to compensate farmers and avoid difficulty selling corn by purchasing substantial volumes of newly harvested corn. Thus, direction towards increased "marketization" does not, and has not in the past, meant that the Chinese government cannot continue to engage in the provision of domestic support through government purchasing, including at support prices.

90. The provincial implementation measure from Heilongjiang, the *2016 Notice on Proper Handling of Corn in Heilongjiang*, similarly recognizes the separate roles of private actors beginning to "marketize" the corn market, and state-owned enterprises tasked with driving the market by making purchases at levels similar to prior years. For instance, the regional implementing instrument states that "all types of entities can enter the market to purchase the corn as they wish." To that end, the provincial government is both "encouraging multiple market players to actively purchase and sell corn in the market," and "mak[ing] overall plans on coordinating the branches of central enterprises and major local grain enterprises in the administrative regions to take the lead to purchase corn in the market." Specifically, the instrument provides that "[a]ssociated branches of central enterprises, such as COFCO, Chinatex Corporation, Aviation Industry Corporation of China, etc. shall make full use of their own advantages and channels to carry out the market-oriented purchase, work harder to ensure the purchase volume [is] no less than that of the policy-based purchase last year, and play a leading role in stabilizing the market and guiding the expectations." Thus, while the instrument released at the provincial level by Heilongjiang suggests a desire for private enterprises to enter the market and purchase corn, it also recognize the need for state-owned enterprises to guide the market through continuing purchasing activities and ensuring that farmers are able to sell their corn.

91. Second, China argues in its responses to Panel Question 2(b) that prices for corn are now determined by the market and "reflect[] the market forces of supply and demand." To support this assertion, China cites to an NDRC press release reporting that "[c]orn prices are based on the market," and reflect "reasonable price differences resulting from regional differences and corn quality differences." The United States notes that the press release was published on June 23, 2017, *seven months* after the U.S. panel request. The NDRC press release contains *no* citations or data, and therefore consists of a series of unsubstantiated assertions. This new exhibit provides no information that is pertinent to the Panel's assessment of "the matter" as of the date of panel establishment.

92. Moreover, that China permitted prices for corn to decline from artificially high levels does not demonstrate that China has instituted a "market-based price discovery mechanism," or that Chinese corn prices have "linked up with the international market." To the contrary, Chinese corn prices have remained above international prices for corn throughout 2016 and 2017 as illustrated by Exhibit US-94. Further, the GAIN Reports cited by China further illustrate the continuing differential between Chinese domestic prices for corn and international prices. According to the GAIN Reports, the "spot market" for corn in early December 2016 provided a price of 1,681 RMB or $244 per ton. The Report compares these Chinese port prices to the U.S. corn import price in December 2016 which "landed at Chinese ports is about 1,500 RMB per ton ($218)," and other competing grain imports such as U.S. sorghum, which costs 1,690 RMB or $205. Thus, the lack of an applied administered price communicated to private market actors and farmers does not mean that the domestic price is market-based, or that the purchases made by state-owned enterprises were not done at support prices.

93. Third, China makes a number of other erroneous assertions regarding its 2016 corn purchasing instruments and activities. In particular, China states that that the 2016 instruments "are *not* designating enterprises to purchase corn." As the United States described in its response to Panel Question 2(a)-(c), the central and provincial level instruments implemented in 2016 mirrored prior corn market price support instruments in all relevant policy and logistical elements – including the designation of state-owned enterprises, such as Sinograin, COFCO, and AVIC, to purchase corn. Like in prior years, private entities may also purchase corn, but designated state-owned enterprises have a "guiding and driving role." These state-owned enterprises "must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year." Further, both the 2015 and 2016 corn purchasing instruments also provide for financing through the Agricultural Development Bank of China, and making available storage for purchased grain.

94. Next, China erroneously asserts that "there is no purchase of corn by government entities after 30 April 2016," and that "the Chinese government does not have statistics" regarding purchases after the expiry of the TRPR. However, as described in the response of the United States to Panel Question 2(a)-(c), Sinograin, a state-owned enterprise also charged with making purchases between 2012 and 2015, reported that it purchased 21.41 million metric tons of corn during the 2016/17 harvest through 743 Sinograin depots in the northeast region. According to Sinograin, this was 21 percent of the production in northeast China and 70 percent of the volume procured by state-owned enterprises. Describing its activities, Sinograin further reported that "[i]n circumstances where purchasing entities have decreased, the strength of the market is insufficient, and there is downward pressure on prices, [Sinograin headquarters] *does not push prices even lower*; it actively enters the market to expand the number of depots and accelerate the rate of purchasing to send a strong signal to stabilize and guide market expectations." Moreover, in addition to the statistics kept by state-owned enterprises, such as Sinograin, the 2016 corn purchasing instruments direct certain recordkeeping and reporting activities. The *2016 Northeast Region Corn Purchase Notice,* states that "[a]ll relevant regions must . . . strengthen situation analysis and evaluation, closely track market changes, regularly announce information such as grain purchasing progress and market price trends." Thus, it appears that records regarding purchasing and pricing activity are held by the Chinese government through its provinces and state-owned enterprises.

95. Finally, the United States notes that it is China that argues that its market price support for corn "expired" in 2016, and therefore it is for China to demonstrate that this claim is supported by the record facts. To make this argument China must demonstrate that as of the date of panel request it had ceased to provide support for corn in excess of its commitments. China has made this assertion, but as described above and in the U.S. response to the Panel's Question 2, it was not clear at the time of panel request and it is not clear now that China has ceased to provide support prices to Chinese corn farmers, or that it no longer provides support in excess of its commitment levels.

II. CHINA HAS FAILED TO REBUT THE UNITED STATES' CLAIM THAT CHINA BREACHED ITS DOMESTIC SUPPORT COMMITMENTS

96. China attempts to rebut the U.S. showing that China has exceeded its permitted levels of domestic support by arguing that it is permitted to use an alternative approach to the computation of the product-specific AMS. Specifically, China argues that the methodology contained in Annex 3 of the Agriculture Agreement is only a "fallback" option, and that the Supporting Tables attached to

Part IV of its Schedule of Concessions contain agreed China-specific methodologies that supplant the methodology required by the Agriculture Agreement. However, China's position is unsupported by the text and structure of the relevant covered agreements, including China's Protocol of Accession.

97. China, like all WTO Members, committed to abide by the rules outlined in the Agriculture Agreement, as well as maintain a level of domestic support at or below its Final Bound Commitment Level of "nil." Paragraph 1.3 of China's Protocol of Accession specifically states: "*[e]xcept as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force." The Agriculture Agreement is one of the listed Multilateral Trade Agreements annexed to the WTO Agreement, and with which China has agreed to comply.

98. Consistent with Paragraph 1.3 Members also agreed in China's Accession Protocol to certain modifications of the calculation methodology for Current Total AMS. Specifically, pursuant to paragraph 235 of China's Working Party Report, incorporated by reference into China's Protocol of Accession, China agreed that, for purposes of Article 6.4, it would maintain product-specific domestic support at or below a *de minimis* level of 8.5 percent of the total value of production for each basic agricultural product and that China would not have recourse to Article 6.2.

99. In contrast to Paragraph 235, Paragraph 238 of the Working Party Report records that Members did not agree with all elements of the methodology and policy classifications used in China's Supporting Tables. Specifically, Members asked China to clarify methodological issues contained in its Supporting Tables, and, China agreed to clarify the methodological issue in the context of its notification obligations under the Agriculture Agreement. This demonstrates that WTO Members did not view China's Supporting Tables as reflecting new rights or obligations of China to which they were "agreeing."

100. Therefore, for China, as for other Members, Paragraph 8 of Annex 3 of the Agriculture Agreement mandates the methodology for calculating the value of the type of domestic support at issue in this dispute – market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible to receive* the applied administered price."

101. China has argued that the Panel can look to information contained in its Supporting Tables to identify China-specific methodologies for identification of the fixed external reference price and the quantity of eligible production, and that these methodologies supplant the "fallback" obligations contained in Annex 3 of the Agriculture Agreement. Specifically, China argues that "Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* … specifically designate the 'constituent data and methodology' as the elements from the supporting tables that give rise to domestic-support-related rights and obligations in the calculation of Current (Total) AMS." China relies on the Appellate Body report in *Korea – Beef* to argue that there is no hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology. China's arguments misunderstand the relationship between the Agriculture Agreement and a Member's Schedule of Concessions and Supporting Tables, as well as the role and status of information contained in Supporting Tables under the Agriculture Agreement.

102. The Agriculture Agreement provides the ways in which the information contained in a Member's Supporting Tables may be used in the calculation of a Member's Current Total AMS, but it does not give rise to domestic-support related rights and obligations in the calculation of Current Total AMS. The Agriculture Agreement directs the reliance of a Member's Supporting Table to provide Member-specific factual information used to understand a Member's agricultural sector. Specifically, Article 1(b) states that "basic agricultural product" "is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material." Similarly, the definition of "year" provided by the Agriculture Agreement in Article 1(i) "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member." Thus, the Agriculture Agreement directs the use of a Member's Supporting Table to glean Member-specific factual information for purposes of identifying the basic agricultural products in the Member's territory and definition of year for a particular program; it does not create independent rights and obligations.

103. Where the Agriculture Agreement does not expressly direct recourse to information contained in the Supporting Tables, the information may be used only as provided in Articles 1(a) and 1(h). Specifically, Article 1(a)(ii) of the Agriculture Agreement states that the product-specific AMS must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products." For a given year, the "Current Total AMS" must be calculated *in accordance with* the provisions of this Agreement, including Article 6, *and with* the constituent data and methodology used in the supporting material."

104. The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted "consistent with" the methodology provided in Annex 3. Conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" that information. This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

105. Contrary to China's argument, the Appellate Body report in *Korea – Beef* supports this understanding. In that dispute, the Appellate Body noted the distinction reflected in the text of Article 1(a)(ii) between the phrases "in accordance with" and "taking into account," and found that the ordinary meaning of the phrases suggests a hierarchy attributing a "more rigorous standard" to Annex 3, than to constituent data and methodology. The Appellate Body did not limit this statement regarding the supremacy of Annex 3 to those circumstances in which *no* constituent data and methodology were provided by a Member; nor would the text of the Agriculture Agreement have supported such a view. Rather, the text of the Agriculture Agreement suggests that, when performing the calculation of AMS for a particular product pursuant to Annex 3, the data and methodology contained in the supporting material may provide additional information relevant to the calculation of support for the specific product at issue, but it does not permit Members to use alternative methodologies in its Supporting Table.

106. When discussing how a panel should treat a conflict between Annex 3 and a Member's constituent data and methodology, China states that "the Appellate Body in *Korea – Beef* did not resolve the question of any hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology . . . the Appellate Body therefore explicitly left open the question of a hierarchy, and even entertained the possibility that the hierarchy could be in favor of the constituent data and methodology." Contrary to China's argument, the Appellate Body in *Korea – Beef* did address the apparent hierarchy between Annex 3 and a Member's constituent data and methodology, and did not find that Article 1(a)(ii) permitted a panel to favor a Member's constituent data and methodology.

A. The Legal Status of a Member's Supporting Table Is the Same regardless of When the Member Joined the WTO

107. China also argues that the constituent data included in a Member's Supporting Tables has a different legal status depending on whether the Member is an original Member or a recently acceding Member. Specifically, China argues that, "for each original Member of the WTO, . . . based on the incorporation by reference of a Member's supporting tables into that Member's Schedule of Concessions, the supporting tables constitute an integral part of the GATT 1994." However, in contrast to original WTO Members, China argues that for "later-acceded Members . . . the supporting tables are an integral part of the terms of that Member's accession to the WTO, under Article XII:1 of the Marrakesh Agreement." This is false, and China's argument must fail for two reasons.

108. First, China's Schedule of Concessions, including Part IV, does not form part of China's Accession Protocol. Rather, as stated in Part II, paragraph 1 of China's Protocol of Accession: "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994." This is consistent with the treatment of other WTO Members' Schedules of Concessions, which also form part of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Thus, it is clear that China's Schedule of Concessions is not part of the Accession Protocol, but the GATT 1994.

109. Second, Article 21, paragraph 1 of the Agriculture Agreement clarifies the relationship between the Agriculture Agreement and the GATT 1994. It states that the "provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the other provisions of this *Agreement*." In other words, where there is a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail.

110. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume," but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture." This echoed prior statements by a GATT 1947 panel in *US – Sugar* suggesting that a "Schedule[] of Concessions" is for Members to "incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement." Therefore, where, as here, a Member's Schedule conflicts with the obligations of the Agriculture Agreement, the provisions of that Schedule must fail, and the Panel must apply the applicable provisions of the Agriculture Agreement instead.

111. We note that the European Union relies on *EC – Export Subsidies on Sugar* to suggest that a Member may deviate from agreements found in the covered agreement in its Schedule where the deviation "does not 'reduce' *per se* the commitments of the newly acceded Members under the Agriculture Agreement." That is, the European Union suggests that a panel must evaluate the apparent change to the Member's commitment to determine whether it in fact "reduces" the commitment, or only alters it. However, the European Union fails to provide the legal basis for such a position, much less explain how or why in practice such a rule could operate. Similar to China's arguments, the European Union's argument would mean that every WTO Member could in theory be bound by as-of-yet unknown commitments, different from those reflected in the texts of the covered agreements as agreed by WTO Members, and different from the commitments of every other WTO Member.

112. The only vehicle through which China could accede to a commitment not consistent with the obligations of the Agriculture Agreement was its Accession Protocol, including any paragraphs of the Working Party Report incorporated by reference into that Protocol. Absent such a commitment, China must comply with the obligations of the Agriculture Agreement like any other WTO Member must, including the methodological obligations contained in Annex 3 with respect to the calculation of market price support. For these reasons, the Supporting Tables thus do not, and could not, themselves set out any legally permissible deviation from the Agriculture Agreement.

113. Even aside from the fact that China may not alter an Agriculture Agreement commitment through its Schedule or Supporting Table, we note that China's Supporting Tables contain no reference to an article in the Agriculture Agreement, nor any express language indicating that the Membership agreed to alter a commitment specifically for China. Compare the language included in China's Supporting Table to the language used in China's Working Party to deviate from the *de minimis* amount outlined in Article 6.4 of the Agriculture Agreement.

114. When WTO Members agreed to provide China with an obligation different from the Agriculture Agreement, they clearly referenced the legal obligation to be modified by name. The Working Party Report thus clearly evinces that WTO Members *agreed* to provide China with a different *de minimis* than that provided for in the Agriculture Agreement, and *agreed* that China would not have recourse to Article 6.2 of the Agriculture Agreement. In contrast, China's Supporting Table contains no similar reference. On the face of the Supporting Table, there is no indication that the WTO Members agreed to modify *any* legal obligation (because there was no agreement), and there is no reference to Annex 3 or any other provision in the Agriculture Agreement. Accepting China's argument would create a situation where, again, Members would not know what other Members' obligations are, because numerous implicit methodologies could be drawn from the data and descriptions provided in a Member's Supporting Tables. Such an interpretation lacks any legal basis and would lead to absurd and unworkable results.

115. This dilemma becomes apparent when looking more closely at China's arguments regarding the quantity of eligible production. China argues that the Panel should use the procurement amounts for purposes of calculating MPS for the programs at issue here, because it used procurement for the programs in existence when it calculated its base AMS. However, the description provided in the Supporting Table does not make clear how the China's market price support programs operated,

including whether the programs limited purchases to a specific amount. Were the latter to be true, total production would not have been the appropriate value to use for eligible production.

116. China argues that any differences between the programs does not matter, because constituent data and methodology apply to products, and not measures. However, China fails to explain how this view supports its arguments. With respect to eligible production, for example, China argues that the Panel must calculate market price support based on the calculation of the market price support program (measure) in its Supporting Tables. China therefore appears to suggest that while the methodology in the Supporting Tables relates to a particular program, the methodology now must necessarily be used with respect to all market price support measures for the same product regardless of the differences between the market price support programs at issue. However, if constituent data and methodology apply to products and not measures, then the more logical consequence of this view would be that China's use of an alternative methodology with respect to the calculation of a particular program simply does not reflect the type of constituent data and methodology the Panel must take into account in determining China's current product-specific AMS for the relevant products. Regardless, as the United States has explained, China may not rely on constituent data and methodology where the methodology is inconsistent with the requirements of the Agriculture Agreement.

117. Moreover, not knowing how a program described in China's Supporting Tables works, it is unclear on what basis the Panel would be able to determine that the values used in that calculation reflect the intention by the Members to alter the market price support methodology for purposes of calculating China's product-specific and Current Total AMS. That is, the Panel cannot determine based on the record before it whether the calculation provided in the Supporting Table is consistent with Annex 3 or not. Therefore, based on the vague factual descriptions provided in the Supporting Table alone, China asks the Panel to assume an intention on the part of the WTO Membership to amend an obligation under the Agriculture Agreement as it applied to China only.

118. The situation regarding the fixed external reference price is no different. China used a value in its Supporting Tables for purposes of calculating Base Total AMS and now asks the Panel to derive from that usage an intention by the Members to alter the terms of China's accession. Not only would such an exercise be inconsistent with the terms of China's Accession Protocol, it would create significant uncertainty with respect to Members' obligations, not only under the Agriculture Agreement, but under the *General Agreement on Trade in Services* ("GATS") and any number of other Agreements.

119. The second concern raised by China's argument is the disparity it would create between original and acceding Members to the WTO. Without a clear indication in the legal texts, a Member like China acceding to the WTO six years after the conclusion of the Uruguay round would have been able to do so on terms significantly more production- and trade-distorting than original Members. That is, were China able to use a quantity of eligible production limited only to the quantity actually procured, China's freedom to distort would be compounded, as the effect of such support might be provided to total production, but the calculation would only need to reflect a small portion of that support. China thus could have an identical program to another Member like India, but, unconstrained by the same obligations as those other Members, be able to provide significantly more support to its producers, increasing consequent production and trade effects. China has provided no argumentation that would allow such an interpretation in the absence of the clear, and legally confirmed intention of WTO Members, and the Panel should reject China's arguments accordingly.

120. Accordingly, the Panel should reject China's interpretations of the relevant Agreements, because they lack any legal basis and would give rise to serious concerns regarding the status and content of the WTO commitments of all Members.

B. China Has Not Demonstrated the Existence of a Subsequent Practice or Subsequent Agreement Regarding the Use of an Alternative Fixed External Reference Price For Newly Acceding WTO Members

121. In addition to its argument that both its quantity of eligible production and its fixed external reference price were modified by virtue of information contained in its Supporting Table, China has now argued in its responses to questions that the "practice of Members to use, for later-acceded Members, a different base period, including for the fixed external reference price, constitutes a

subsequent practice in the application of the treaty, within the meaning of Article 31 of the Vienna Convention."

122. The use of post-1986-1988 fixed external reference prices by recently acceding Members does not fit within the definition of subsequent practice or subsequent agreement per Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT"). Article 31(3) of the VCLT provides, in relevant part, that with respect to the general rule of interpretation "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

123. That is, Article 31(3) directs that a panel shall take into account that subsequent practice "which establishes the *agreement of the parties* regarding [the] *interpretation*" of the treaty. Therefore, for the practice of WTO Members to be relevant to the Panel's interpretive exercise, the practice must relate to the interpretation of a relevant provision of the Agriculture Agreement. In this dispute, the Panel is charged with interpreting and applying China's obligations under Article 3.2 and 6.3 of the Agriculture Agreement regarding Current Total AMS. The Agriculture Agreement provides instructions for the calculation of each of China's product-specific AMSs, and then its Current Total AMS, in Articles 1(a)(ii) and 1(h)(ii), and by extension in Annex 3 and Article 6.

124. The heart of the interpretative concern is Annex 3, paragraph 9 of the Agriculture Agreement, which states the "fixed external reference price shall be based on the years 1986 to 1988." The text of Annex 3 is clear in requiring Members to calculate market price support for purposes of product-specific AMS using a fixed external reference price of 1986-1988. Customary rules of interpretation do not permit an interpreter to use context, or a subsequent practice or agreement, to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the treaty. Rather, these sources of interpretation must be used to determine the particular meaning of the terms as used in the relevant provision.

125. The Appellate Body in *EC – Bananas (Article 21.5)* made a similar finding with respect to subsequent agreements. It noted that Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied;" the term does not connote the creation of new or the extension of existing obligations. Therefore, a subsequent practice, like a subsequent agreement, cannot have the legal effect of changing the obligation set out in a covered agreement.

126. China has shown no subsequent agreement regarding the interpretation of Annex 3, paragraph 9, because it has pointed to no text in any supporting table that even refers to that provision and it has pointed to no "agreement" that speaks to an "interpretation" of that provision. Moreover, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some Members only, and not to other Members. China appears to suggest that the alleged subsequent practice would support *different meanings* of the text of the Agriculture Agreement for different Members. But while a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an illogical result, whereby each Member may be subject to potentially very different obligations.

127. Therefore, the Panel should reject China's argument that the use of an alternative fixed external reference price for newly acceding WTO member amounts to a subsequent practice or subsequent agreement under the VCLT.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENTS AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

I. CHINA ERRS IN CLAIMING THAT THE PANEL MUST CALCULATE CHINA'S CURRENT AMS CONSISTENT WITH CHINA'S BASE AMS

128. Throughout this dispute, China has argued that China's "Current Total AMS" for subsequent years must be calculated consistently with the calculation of its "Base Total AMS," as set out in its Supporting Tables. China asserts that "the same constituent data and methodology, including the same fixed external reference prices and the same methodology for determining eligible production,

must be used to calculate both *Base* (Total) AMS and *Current* (Total) AMS." While China insists that the Agriculture Agreement and its Supporting Tables can be interpreted harmoniously, it is clear that China is suggesting that a Member's Supporting Table can supplant the calculation requirements provided in the Agriculture Agreement for calculation of AMS and Current Total AMS with country-specific methodologies. This would both contradict the Agriculture Agreement and significantly expand China's ability to provide domestic support while other WTO Members are subject to different rules. The text of the WTO Agreements simply does not support this understanding.

129. The Agriculture Agreement defines the terms "AMS," "Base Total AMS," and "Current Total AMS," and sets out specific instructions and methodologies for the calculation of "AMS" and "Current Total AMS." The Agriculture Agreement does not impose specific requirements on the calculation of AMS during a base period or Base Total AMS. Indeed, Base Total AMS is not relevant as an obligation of a Member; rather, that calculation provided a basis for the Annual and Final Bound Commitment Levels that are the subject of a Member's commitments under Article 3.2 and 6.3. Naturally, then, the Agriculture Agreement nowhere requires "consistency" between the calculation of Current Total AMS and the calculation of Base Total AMS.

130. First, turning to AMS, it is described in Article 1(a). AMS is the annual level of non-exempt domestic support, expressed in monetary terms, provided to the producers of the basic agricultural product or non-product-specific support provided in favor of the agricultural producers generally. Romanette (i) of Article 1(a) states that AMS "with respect to support provided during the base period" is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule." From the plain text, it is clear that Article 1(a)(i) does not set out or mandate any calculation for AMS during the base period, but rather identifies where the value of such support is recorded for the base period. Romanette (ii) addresses AMS "with respect to support provided during any year of the implementation period and thereafter." As we described earlier, Article 1(a)(ii) does require a calculation. Each product-specific AMS in a subsequent year will be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule."

131. Thus, Article 1(a)(ii) provides a calculation requirement for AMS in the subsequent years, while Article 1(a)(i) provides no such requirement for AMS provided during the base period. Nothing in the Agreement suggests that the method a Member used to calculate AMS in the base period would have the effect of nullifying the obligation to calculate AMS in the subsequent years "in accordance with" Annex 3, and "taking into account" constituent data and methodology. As previously explained, "taking into account" does not require calculation consistent with or in conformity with information contained in the Supporting Tables. Rather, it requires a Panel to give consideration to country-specific "constituent data and methodology" – including the types of basic agricultural products grown in that Member's territory, the "year" relevant for domestic support, or whether supported products have unique attributes that affect the calculation of support such as multiple growing seasons, processing practices or requirements, or issues of quality – when calculating AMS.

132. The AMS or AMSs described in Article 1(a) are discrete component parts of a Member's Total AMS. Specifically, if individual AMSs exceed the *de minimis* level when calculated in accordance with Article 6 of the Agriculture Agreement, each such product-specific AMS (and if applicable a non-product specific AMS) must be included in the "Total AMS." Total AMS refers to a different stage in the computation of domestic support – namely, the summing of component parts. Article 1(h) defines Total AMS as the "sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products."

133. The definition of Total AMS informs the definition of both "Base Total AMS" and "Current Total AMS." Specifically, Article 1(h)(i) states that Base Total AMS, all domestic support provided in favor of agricultural producers in the "base period," is "as specified in Part IV of a Member's Schedule."

134. Critically, again, Article 1(h) does not provide a calculation methodology for determining the value of Base Total AMS; it indicates where the value of such support can be found. As the Appellate Body observed in *Korea – Beef*, "Base Total AMS, and the commitment levels resulting or derived

therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned."

135. Separately, in romanette (ii), Article 1(h) provides the definition and calculation directions for "Current Total AMS." Current Total AMS is "the sum of all domestic support provided in favour of agricultural producers . . . actually provided during any year of the implementation period and thereafter." The Current Total AMS is "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." Thus, Article 1(h)(ii) provides both a definition of Current Total AMS and instructions for the calculation of Current Total AMS.

136. Nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations that may (or may not) be contained in a Member's Supporting Tables can supplant the rules in Article 1(h) to calculate "Current Total AMS." Because no particular calculation or rules for such a calculation is required to establish Base Total AMS, naturally, the Agreement nowhere suggests that consistency is required between the calculations. Rather, constituent data and methodology reflected in these documents may provide country-specific data and methodologies to inform, but not alter, the calculation requirements set out in Article 1(h).

137. China's proposed methodology is not consistent with the calculations contained in its supporting tables. Not only do China's arguments regarding "consistency" between the calculations of Base Total AMS and Current Total AMS fail because they are legally unfounded, but China's proposed market price support calculations are not in fact "consistent" with the calculations actually utilized in its Supporting Tables. This is a critical point, and fatal to China's case. Recall that China has been asserting that its Current Total AMS must be calculated using the *same* methodology as in its Schedule. But, on closer inspection, China *did not in fact use* a "fixed external reference price" based on the years 1996 to 1998 for wheat, Indica rice, Japonica rice, and corn in its original Base Total AMS. To recall, China asserts that the "*fixed external reference price* for wheat is 1698.1 Yuan per ton, as set out in Appendix DS 5-3 to Rev.3." Similarly, citing an appendix to DS-5 of its Supporting Tables, China provides a "fixed external reference price of 2343.0 yuan per ton for Indica rice and a fixed external reference price of 3290.6 yuan per ton for Japonica rice. China broadly notes "China's FERP for corn may be found in Rev.3." China further clarifies in its second written submission that "Rev.3 . . . includes FERPs for China that apply to certain products," and that "[t]hese FERPS are (i) based on a *three-year* base period of 1996-1998; (ii) based on China's status, during that period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*."

138. However, China's calculation of its Base Total AMS *was not* based on a "fixed external reference price" or the values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. Instead, China's market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual "external reference price[s]" corresponding to each year of the base period. The fifth column in China's Support Table is labeled "external reference price" – not "fixed" external reference price; and the values contained in that column reflect three different prices, one for each year. According to footnotes 17 and 18 to the Supporting Table, these "external references prices" were calculated based on CIF prices for wheat, and on FOB prices for Indica rice, Japonica rice, and corn. Rather than use a *fixed* external reference price covering 1996-1998, as China has asserted to the Panel, China's market price support calculations thus compared a 1996 applied administered price to a 1996 external reference price, a 1997 applied administered price to a 1997 external reference price, and a 1998 applied administered price to a 1998 external reference price. The values of market price support calculated in these tables were included in China's DS 4 Table calculating its Base Total AMS. To illustrate, in the row covering wheat, for each year from 1996-1998, there is a separate price. So, it is not the same average price that would reflect a fixed external reference price.

139. Thus, Table DS 5, which contain the actual calculations of market price support for wheat, Indica rice, Japonica rice, and corn, reveals that the calculation of market price support during the base period did not utilize a "fixed" external reference price at all. Rather, the calculation appears to reflect an evaluation of market price support using the price gap between an applied administered price and the average FOB or CIF unit value for the basic agricultural product *in the specific year in question*.

140. Were this methodology applied to the calculation of market price support in this dispute, China's support would be determined based on the gap between the applied administered price for wheat in 2015, for example, and the average CIF prices for Chinese wheat imports *in 2015*, and similar external reference prices would be needed for each year from 2012 to 2014. China does not argue that a Panel may calculate market price support in this way, and Annex 3, which requires the use of a "fixed external reference price . . . based on the years 1986 to 1988," does not permit such a calculation methodology.

141. China draws its proposed "fixed external reference price" for each product, not from the Supporting Tables that informed its market price support (DS 5) and Base Total AMS (DS 4) calculations, but from a separate appendices included in its Rev. 3 containing values that appear not to have been used in the original calculation process. These appendices provide the underlying calculation for China's year-by-year external reference price calculation, including the import/export volumes, import/export values, CIF/FOB prices, and calculated CIF/FOB unit prices. The charts also contain an average of these values, but this is not utilized elsewhere in the document, and in particular to calculate the AMS for each product for each year.

142. For this reason, China's demand for consistency between the Base Total AMS and Current Total AMS seems misplaced. First, nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations contained in a Member's Supporting Tables can replace the binding commitments in the Agreement to calculate "Current Total AMS" in accordance with Annex 3. Second, in any event, China's own Supporting Tables did not use the data or methodology suggested by China in its actual calculation of market price support and Base Total AMS. Rather, the Agriculture Agreement sets forth the requirements for calculating Current Total AMS in subsequent years and this includes recourse to country-specific data and methodology reflected in a Member's Supporting Tables to the extent that it informs, but does not alter, the calculation requirements.

II. CHINA HAS NOT ESTABLISHED THAT THE PANEL IS PRECLUDED FROM ISSUING FINDINGS AND RECOMMENDATIONS CONCERNING CHINA'S PROVISION OF DOMESTIC SUPPORT TO CORN PRODUCERS IN 2012 THROUGH 2015

143. China has not demonstrated that its Corn MPS Program had "expired" prior to the Panel's establishment; nor has China shown that it ceased to purchase corn at administratively determined prices during the 2016/17 harvest. First, the introduction of a direct payment program for corn producers does not demonstrate that China no longer purchases corn at an administratively determined price. Second, while China asserts that its *2016 Northeast Region Corn Purchasing Notice* provides for "market-oriented" purchases by "market players," where all types of entities may decide to make purchases on their own initiative, the *2016 Notice* directs the same state-owned enterprises who were engaged in corn purchases in prior years to "striv[e] not to go lower than the policy-based purchasing amount of the previous year."

144. Although not required in order to satisfy the obligations of Article 6.2 of the DSU, the United States has continued to seek additional information and instruments related to China's 2016-17 corn purchase programs for the Panel's reference. The additional information found suggests that China had not ceased to provide market price support in 2016. First, despite China's statements regarding the transition to the use of a "market price" for government purchases of corn in 2016, the United States has identified a notice of administered prices issued by Sinograin to certain purchasing locations in Inner Mongolia on October 16, 2016. Entitled, *Notice on Activating 2016 Autumn Grains Corn Purchase Work* (Exhibit US-101), this document – released one month after the "reformed" purchasing instruments – announces the prices at which government purchases will be made, and directs local grain depots to display or post the available prices for new, standard grain corn in that area. This announcement read together with the 2016 Northeast Region Corn Purchase Notice (Exhibit US-87) are very similar in form and content to the 2012 – 2015 Corn MPS Programs.

145. Second, Exhibit US-102, entitled *Jilin Notice on Further Proper Handling of Corn Purchases and Sales Work* issued by the Jilin Province Grain Bureau, a provincial branch of the State Administration of Grain, directs Sinograin and other state-owned enterprises to enter the corn et and make corn purchases, in order to counteract negative market trends, including falling corn prices.

146. Third, Exhibit US-103, a May 2017 transcript of a live broadcast interview of the Jilin Province Grain Bureau Vice Director confirms that Sinograin's Jilin province subsidiary has given full play to its role of macro-control and as a 'stabilizing instrument' and 'ballast.'" Taken together, these documents suggest that China has not "ceased" government purchases of corn at pre-set prices.

U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

Summary of U.S. Response to Panel Question 74

147. Generally, other Member's Supporting Tables may be considered "context" in instances where they assist in the interpretation as directed by Article 31 of the VCLT.

148. We also note that while other Members' Schedules may be looked to as context, they are only one source of context. Typically, interpreters look first to the "immediate context" of a term or provision, including for instance the rest of the particular provision at issue, the other provisions of the relevant WTO Agreement, other similar provisions in other Agreements, and the overall structure of the Agreement, which may be considered along with the Agreement's object and purpose.

149. Contrary to China's arguments, customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement. Importantly, when China points to certain other Members' Supporting Tables as context, it does not and cannot assert that those Supporting Tables provide context for the calculation of current AMS and Current Total AMS. Rather, it can only point to certain other Members' use of a different time period for purposes of calculating *base AMS*. Thus, to the extent these Supporting Table provide context, they do not provide *relevant* context – that is, context for the understanding of the particular calculation as described in the provision of the Agreement on Agriculture in question.

150. More relevant context is provided by China's Accession Protocol and Working Party Report. The clear intention to alter the calculation methodology for China for future years, including a China-specific *de minimis* support level, was recorded in paragraph 235 of the Working Party Report and incorporated into China's Accession Protocol. This demonstrates *how* WTO Members altered a WTO obligation when they *intended* to alter that obligation. Paragraph 235 does not contain any alteration to the Article 1(a)(ii) or Annex 3 current AMS obligations. China's Supporting Table is not the appropriate vehicle to alter a WTO obligation and contains no text suggesting an intention to alter an obligation.

Summary of U.S. Response to Panel Question 75

151. China has no reduction commitments and has an ongoing Final Bound Commitment Level of "nil." China is obligated to maintain Current Total AMS, when calculated in accordance with Annex 3 and Article 6 of the Agriculture Agreement, at a zero level.

U.S. COMMENTS ON CHINA'S RESPONSE TO THE PANEL'S SECOND SET OF QUESTIONS

Summary of U.S. Comments on China's Response to Panel Question 52

152. China erroneously argues that Sinograin acted as a market player and subsequently "adjusted its prices" to reflect market prices reflected in Exhibits CHN-111-B – CHN-127-B. However, Sinograin is a state-owned enterprise directed by the State Council to actively enter the corn market and make purchases at amounts not lower than the prior year. Moreover, nothing in the documents presented by China indicates that Exhibit US-101 did not implement mandatory purchases at pre-set prices, or that this announcement was "replaced" with subsequent notices. Rather, the documents placed on the record by China appear to be internal price monitoring documents devoid of any indication of its authenticity and status, rather than directions to purchase at a particular price as provided for in Exhibit US-101.

Summary of U.S. Comments on China's Response to Panel Question 83

153. China asserts that constituent data and methodology "must be used consistently, where pertinent, for the calculation of that Member's Base (Total) AMS and Current (Total) AMS."

154. China misstates the requirements of Articles 1(a) and 1(h) of the Agriculture Agreement. Articles 1(a) and 1(h) prioritize consideration and use, not of what data and methodology were used to evaluate different programs at the time of accession, but rather the calculation requirements provided by the text of the Agriculture Agreement. This is made explicit by the hierarchy provided in Article 1(a)(ii). Article 1(a)(ii) does not use the same language or instruction to describe both elements of calculation, as suggested by China. Rather, it specifies Members are to calculate the value of AMS "in accordance with the provisions of Annex 3 of this Agreement," and that Members are to calculate AMS "taking into account the consistent data and methodology used in the tables of supporting material." Article 1(h)(ii) governing the calculation of Current Total AMS in subsequent years presents a similar hierarchy.

155. Articles 1(a)(ii) and 1(h)(ii) do not limit the application of constituent data "to the same measures that already existed during the base year." Instead, the text limits the application by first plainly stating that the calculation in subsequent years must be consistent with the text of the Agriculture Agreement. The subsequently used data and methodology may not be not inconsistent with the requirements of the Agriculture Agreement. The reference to constituent data and methodology does not, as suggested by China, permit the use of a methodology that was accurate for a program in the base period (such as the using a pre-set maximum procurement volume as the quantity of eligible production) to calculate the value of support provided through a different program that requires a different evaluation pursuant to the requirements of Annex 3.

156. In support of the application of "methodology" used to evaluate *different* domestic support measures that operated under *different* legal requirements and parameters, China again falls back on its demand for "consistency." China suggests that a calculation not based on this historic methodology used to evaluate a different program would "involve substantial distortions," and "would become a meaningless apples-to-oranges comparison." China's argument is again without merit.

157. Consistency from year-to-year and, crucially, amongst Members is provided by observing the requirements of the Agriculture Agreement, including Annex 3 and Article 6, regardless of the domestic support program, agricultural product, or Member at issue. Consistency with the requirements of the Agriculture Agreement with regard to quantity of production eligible to receive the applied administered price and with regard to the fixed external reference price is what ensures a meaningful evaluation, and is the basis for evaluating the value of domestic support provided in any year after accession.

158. Finally, with regard to the statements of the panel and the Appellate Body in *Korea – Beef*, China suggests that the Appellate Body "shared the panel's understanding of . . . the need for consistency with Base AMS." The United States does not share China's reading the Appellate Body's statements. Specifically, the Appellate Body's footnote citing to the panel report in *Korea – Beef* appears to indicate that while the panel and Appellate Body both agreed they did not need to reach the issue of how to address constituent data and methodology, the Appellate Body *disagreed* with the panel's broad statements regarding consistency between the calculation of Base Total AMS and Current Total AMS. Specifically, the Appellate Body asserted that a hierarchy exists between the text of the Agreement and a Member's constituent data and methodology, and this would appear to directly refute China's proposed blanket requirement for "consistency."

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. This dispute arises against the background of the complexity and special characteristics of the agricultural sector of the People's Republic of China ("China"). It concerns the nature and scope of China's right to provide domestic support for its wheat, rice and corn farmers. It also raises important systemic issues regarding the interpretation and application of the methodology for the calculation of aggregate measurement of support ("AMS"), under the terms of both (i) Annex 3 of the *Agreement on Agriculture* and (ii) a Member's negotiated and agreed "constituent data and methodology", as found in the Member-specific Supporting Tables incorporated by reference in Part IV of each Member's Schedule. For Members that have acceded to the World Trade Organization ("WTO") subsequent to the Uruguay Round, such as China, these "constituent data and methodology" are of particular relevance because they are also part of those Members' terms of accession, and a basis upon which China and other later-acceded Members have undertaken their domestic support reduction commitments.

2. In its submissions to the Panel, China has rebutted U.S. claims, under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*, that China's AMS from market price support for wheat, indica rice and japonica rice exceeds China's domestic support reduction commitments. China has also demonstrated that alleged market price support for corn, under China's Temporary Purchase and Reserve Policy ("TPRP"), expired prior to panel establishment, and is thus outside the Panel's terms of reference. Accordingly, the Panel is precluded from making any findings or recommendations with respect to the TPRP for corn.

II. RELEVANT BACKGROUND

3. China's past and present domestic support policies for its agricultural sector, and the direction in which they are evolving, can be understood only against the background of the particular challenges facing China. First and foremost amongst those is the unique challenge of ensuring a sufficient, stable, reliable and affordable supply of food for China's population of 1.38 billion people, the largest in the world. In meeting the challenge of ensuring food security, consistent with its WTO obligations, China employs a variety of agricultural policy measures, including public stockholding.

4. While China imports large volumes of grains – in 2016, 167 million tons – the bulk of China's food requirements is supplied by China's domestic agricultural sector. That sector is dominated by small-scale family farms, relying predominantly on family labor, and other smallholder farms. Indeed, for a large part of China's population, these small-scale household farms constitute the main source of both income and other means to support their livelihood, including through the consumption of agricultural commodities grown on their family farms. To appreciate the importance of China's agricultural policies, China notes that, in 2016, its rural population accounted for 590 million people. Of that rural population, many are involved in the production of wheat, rice and corn, the agricultural products at issue in this dispute. Thus, China's agricultural policies necessarily affect the well-being of a significant proportion of its population, and accordingly have an important impact on the stability and the sustainable development of China's society and economy.

5. These complex and important policy considerations are enshrined in China's regulation of the marketing and distribution of basic agricultural products, including for wheat, rice and corn. At the same time, China's agricultural policies for wheat, rice and corn are moving towards a comprehensive opening of those grain markets.

6. China's unique agricultural challenges stand in sharp contrast to the situation in the United States and other large agricultural commodity-exporting countries, where agricultural production is dominated by very large and highly mechanized farm operations. Indeed, the average size of a U.S. farm is several hundred times larger than the average size of a farm in China. The advantage of large-sized U.S. farms is further enhanced by the United States' USD 19.1 billion AMS entitlement.

Together, scale and substantial amounts of domestic support have enabled U.S. farmers to produce large volumes of agricultural products, and to sell them cheaply. As a result, the United States is a net *exporter* of agricultural products, including for corn and wheat. By contrast, China is a net *importer* of grains.

7. China and the WTO Membership negotiated and agreed China's domestic-support-related commitments under the *Agreement on Agriculture* against this background. China's objective in those negotiations was to ensure it retained the flexibility to provide domestic support for food security purposes, and to encourage Chinese farmers to remain on their farms to grow the staple crops, including wheat, rice and corn, necessary to feed China's large population.

8. Like most developing countries, China was not in the position to declare a Base Total AMS for its 1996-1998 base period. Accordingly, China accepted a domestic support reduction commitment of "nil", limiting domestic support to levels below its *de minimis* threshold. China was further required to accept a *de minimis* threshold of 8.5% of the value of production of each basic agricultural product, instead of the 10% level for developing countries, provided for under Article 6.4 of the *Agreement on Agriculture*. In exchange, China secured agreement to use "the amount purchased" as the measure of "eligible production" in the context of market price support measures. In addition, China uses fixed external reference prices from its 1996-1998 base period. These agreed commitments, which are included in China's "constituent data and methodology" in its Supporting Tables in WT/ACC/CHN/38/Rev.3, or "Rev.3", are incorporated in China's Accession Protocol.

9. Since its accession to the WTO in 2001, China has relied on, *inter alia*, the negotiated and agreed constituent data and methodology in Rev.3 to devise its agricultural policies consistent with its domestic support reduction commitments. Specifically, in 2004, China implemented reform of its agricultural policies, adopting a market-oriented grain policy, with direct government intervention into the market authorized only in exceptional circumstances to protect farmers from the effects of significant fluctuations in supply and demand. For example, under the minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice, which apply in certain provinces, purchases occur only when market prices fall below the established MPP level. The MPP program is not available when prices are above that level. Moreover, prior to 2016, China implemented the TPRP for corn in four northeast provinces/regions, designed to meet food security purposes. In 2016, China reformed the TPRP and enacted market-based reforms. China's new corn measures involve the use of direct payments to farmers growing corn, with the amount of payments determined by historic benchmarks. The measures further seek to limit the production of corn.

III. THE MEASURES AT ISSUE UNDER THE PANEL'S TERMS OF REFERENCE

10. The United States' panel request defines the Panel's terms of reference. It identifies as the specific measures at issue, pursuant to Article 6.2 of the DSU, the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) TPRP for corn. Consistent with its identification of the measures at issue, the United States presented arguments and evidence in its First Written Submission.

11. However, upon China's showing, in its own First Written Submission, that the TPRP for corn had expired prior to panel establishment, and was, thus outside the Panel's terms of reference, the United States attempted to re-define the "measures at issue" in this dispute as the "levels of domestic support", or "domestic support" in each of the years 2012-2015.

12. The Panel must make its own objective assessment of its terms of reference, and of the measures at issue. In so doing, the Panel must reject the United States' attempt to unilaterally re-define, following establishment of the Panel and its terms of reference, the "measures at issue" in these proceedings. As explained in the next section, the Panel must also find that the expired TPRP for corn is outside its terms of reference.

A. The United States' challenge in this dispute is limited to alleged market price support under the MPP for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn

13. The starting point of any WTO dispute is the identification of an act or omission by a Member as a specific "measure at issue", within the meaning of Article 6.2 of the DSU. It is *that* measure which is the object of claims of inconsistency with one or more of the provisions of the covered agreements. And it is *that* measure that may, if found to be inconsistent, become subject to recommendations, under Article 19.1 of the DSU.

14. Accordingly, the core requirements that any panel request must fulfill, consistent with Article 6.2, are the identification of the specific "measures at issue" and the claims raised. These requirements "serve the due process objective of notifying the parties and third parties of the nature of a complainant's case".[1]

15. China has established that, properly construed, the U.S. panel request identifies the legal basis of the complaint, *i.e.*, the claims at issue as follows: "[t]he level of domestic support China provides is in excess of its commitment level of 'nil'", resulting in an alleged inconsistency with Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.[2]

16. The U.S. panel request then proceeds to identify the specific measures at issue. It explains that "*[t]he legal instruments through which China provides domestic support* in favor of agricultural producers, including support in favor of producers of wheat, indica rice, japonica rice, and corn, operating collectively or separately, include, but are not limited to"[3] a list of individually specified legal instruments. These legal instruments permit the identification of the following specific measures at issue: the MPP programs for wheat, indica rice and japonica rice and the (albeit expired) TPRP for corn.

17. Thus, the U.S. panel request identifies as the measures at issue the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. Contrary to the U.S. assertion, the MPP and TPRP measures identified do not constitute mere "additional information", "argument" or "evidence" to provide a preview of the U.S. case – they comprise and delimit the specific "measures at issue".

18. Indeed, while the United States erroneously parses out the text of the U.S. panel request into alleged "measures", "claims" and "arguments", the United States is forced to accept that its panel request

> sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It[s panel request] further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products).[4]

Thus, the United States accepts that its case is limited to alleged market price support provided by the MPP programs for wheat and rice and the (albeit expired) TPRP for corn, as the specific measures under its panel request. Not surprisingly, these are also the sole measures for which the U.S. submissions assert, based on argument and evidence, alleged inconsistencies with the covered agreements.

19. The United States further attempts to support its erroneous argument that its panel request covers "domestic support", by arguing that that it "does not seek a finding that any particular legal instrument … is in breach of China's commitments … because the existence or maintenance of a market price support program or any other legal instrument would not itself necessarily lead to the breach of a domestic support commitment".[5] Yet, the U.S. argument does not support its position.

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[1] Appellate Body Report, *US – Carbon Steel*, para. 126.

[2] United States, first written submission, para. 15, *citing* WT/DS511/8, p. 1 (second substantive paragraph) (underlining added).

[3] WT/DS511/8, p. 1 (second substantive paragraph) (emphasis added).

[4] United States, second written submission, para. 27.

[5] United States, response to Panel Question 5, para. 32.

Instead, the U.S. argument is a mere reflection of the fact that the U.S. claims are of an "as applied" nature, rather than "as such". As the Appellate Body explained in *US – Continued Zeroing*, "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement".[6] Thus, the U.S. clarification that it is challenging certain measures "as applied", as opposed to "as such", has no bearing on the identification of the measures at issue, and certainly does not establish that the measure at issue must be "domestic support".

B. Identification of "domestic support" as the specific measure at issue would fail to meet the "specificity requirements" of Article 6.2 of the DSU

20. In any event, the U.S. identification of "domestic support" as the measure at issue would fail to meet the specificity requirements under the DSU. As the Appellate Body explained in *US – Continued Zeroing*, "the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request".[7]

21. China has explained that the reference to the legal concept of "domestic support" cannot be used to identify a specific measure. Instead, it *characterizes* an otherwise specifically identified measure under WTO law. This is consistent with the fact that the legal concept of "domestic support" itself covers many different forms of domestic support, including: different forms of "amber box", "blue box", and "green box" domestic support measures. The United States is forced to recognize that domestic support does not specifically identify any particular measure at issue. It explains that "the Agriculture Agreement gives WTO Members the flexibility to provide domestic support *in various forms*".[8] In these circumstances, a mere reference to "domestic support" is insufficient to meet the specificity requirements under Article 6.2 of the DSU.

22. While the Appellate Body has accepted that "there may be circumstances in which a party describes a measure in a more generic way", the Appellate Body nonetheless required that such generic characterization "allow[] the measure to be discerned".[9] Indeed, the inability of the legal concept "domestic support" under the *Agreement on Agriculture* to allow the measure at issue to be discerned is similar to that of the legal concept of a "subsidy", under the *SCM Agreement* – both of which are used to characterize a specific measure under the substantive provisions at issue, but are insufficient to identify a specific measure under Article 6.2.

23. Finally, in re-defining "domestic support" as the "measure at issue", the United States reduces the specifically identified and enumerated legal instruments in its panel request to mere "evidence". As mere evidence of an alleged breach (and not identifications of the measures at issue), the Panel would be precluded to rely on that evidence to inform the meaning and scope of the U.S. reference to "domestic support" as the alleged measure at issue. That is, the Panel cannot rely on that evidence to inform its understanding of the meaning and scope of the term "domestic support" in a manner that permits that term to meet the specificity requirements under Article 6.2. In those circumstances, The Panel would have to find that the U.S. panel request, in its entirety, fails to meet the specificity requirements.

24. The United States does not address any of China's arguments set out above. Instead, it simply asserts that "domestic support" can be a measure at issue because it fulfills one relevant requirement – namely that it constitutes *action* by China. Yet, to constitute a "measure at issue", any challenged "act or omission" by a Member must, additionally, be identified in a panel request with the required level of specificity.

25. In short, if the Panel were to find that the U.S. panel request identified "domestic support" as the "measure at issue", that request would fail to meet the specificity requirement under Article 6.2, and the Panel would have to deny the U.S. claims in this dispute. By contrast, the Panel would be able to consider the particular measures and claims that an objective assessment of the U.S. panel request reveals, as set out above. This is a further reason on which the Panel should reject the United States' post-hoc rationalization of its panel request, which the United States only adopted following China's demonstration that the U.S. panel request inappropriately challenges the

[6] Appellate Body Report, *US – Continued Zeroing*, para. 179.
[7] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[8] United States, second written submission, para. 28 (emphasis added).
[9] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.

expired TPRP for corn.

C. Permitting claims against a measure identified as "domestic support" raises serious systemic concerns

26. Moreover, accepting "domestic support" as the "measure at issue" raises due process concerns. Under Article 19.1 DSU, a panel may make recommendation only with respect to "measures at issue", and it is with respect to those measures that an implementing Member is required to achieve compliance. Thus, the scope of any recommendation is constrained by the specific measures identified in a panel request.

27. In these proceedings, the United States appears to seek a recommendation that China bring its "domestic support" into conformity, without limiting that recommendation to those market-price-support-related measures that have been the sole focus of the United States' case before the Panel. Specifically, the United States argues that the recommendation should cover "domestic support", and that "[t]he Panel need not include a further characterization of the measures in its recommendation".[10]

28. The United States errs. Under Article 3.7 of the DSU, WTO dispute settlement must contribute to a "positive solution to the dispute". This objective requires a panel to inform a respondent, through specific findings, of the particular measures that have resulted in particular WTO inconsistencies. Pursuant to a recommendation under Article 19.1 of the DSU, a respondent is then under an obligation to remedy the WTO inconsistencies identified, by bringing the measures found to have resulted in the WTO inconsistencies into conformity with its WTO obligations. The particular findings of WTO inconsistencies that form the basis for a recommendation are framed with reference to the specific arguments and evidence provided by the parties, and cannot relate to specific measures or claims not covered by the parties' arguments and evidence. Otherwise, recommendations could cover specific measures that may potentially fall under the umbrella of "domestic support", but for which the respondent has not had a chance to defend itself. This would violate the respondent's due process rights.

29. Accordingly, a panel's recommendation must identify, and must be limited to, the particular measures (amongst those properly before a panel) that the panel has found to have resulted in particular WTO inconsistencies, based on the parties' arguments and evidence.

D. Conclusion

30. The U.S. panel request reflects a deliberate choice to challenge the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. That choice has consequences – China's due process rights and the jurisdiction of the Panel mean that the United States cannot, belatedly, broaden the scope of the measures at issue.

IV. THE TPRP FOR CORN EXPIRED PRIOR TO PANEL ESTABLISHMENT AND IS THEREFORE OUTSIDE THE PANEL'S TERMS OF REFERENCE

31. China has further established that its TPRP for corn expired prior to panel establishment, and is therefore outside the Panel's terms of reference. Yet, the United States asserts, erroneously, that the expiry of the TPRP for corn prior to panel establishment did not affect the Panel's terms of reference, and that, in any event, the TPRP continues to exist.

A. Factual background

32. From 2012 to 2015, China's Central Government provided for a TPRP for corn in Liaoning, Jilin, and Heilongjiang Provinces and in the Inner Mongolia Autonomous Region. The TPRP for corn was established through annual TPRP Notices issued by several national-level government authorities. These TPRP Notices set out the geographic and temporal scope of the TPRP, and determined the TPRP price at which designated entities offered to purchase corn during a defined period of time. For example, the 2015 TPRP Notice set a TPRP purchase price of RMB 1 yuan per jin for "grade 3" corn offered for purchase at certain purchasing and storage depots in the Jilin, Liaoning,

[10] United States, response to Panel Question 59, para. 39.

Heilongjiang Provinces and the Inner Mongolia Region. This price was available for a purchasing period that lasted from 1 November 2015 to 30 April 2016.

33. In announcing the discontinuation of the TPRP for corn, on 28 March 2016, the deputy director of the National Development and Reform Commission of the People's Republic of China ("NDRC") explained that the TPRP for corn had encountered "prominent problems", including a "heavy financial burden".[11] Similarly, a *Ministry of Finance ("MOF") Opinion* explained that "the corn temporary purchase and reserve system does not fit into the current situation".[12] Starting with the 2016 harvest, China "has made the reform of the [TPRP], pursuant to the principle of 'Price formed by market and decoupling of price and subsidy'", involving the expiry of the TPRP and the introduction of "'market-oriented purchase' plus ' direct subsidies'".[13] Such direct payments are available to producers of corn in the four provinces/region, subject to certain requirements to limit production.

B. Under Article 6.2 of the DSU, measures that have expired prior to panel establishment generally fall outside a panel's terms of reference

34. Under Article 6.2 of the DSU, the general rule is that a measure that no longer exists at the time of panel establishment is outside a panel's terms of reference. For example, in *EC – Chicken Cuts*, the Appellate Body noted that a measure at issue must be "in existence at the time of the establishment of the panel".[14] Likewise, in *China – Raw Materials*, the panel noted that "the date of a panel's establishment is critical in deciding which measures may be included in a panel's terms of reference".[15] And in *EC – Biotech*, the panel held that "the question [that this panel] is mandated to answer is whether on the date of its establishment, … the European Communities applied a general *de facto* moratorium on approvals".[16]

35. China explained that, for expired measures, there is one notable exception to the general rule that a measure at issue, under Article 6.2, must exist at the time of panel establishment. Specifically, a measure that has expired prior to panel establishment may be properly before a panel where it is demonstrated that it continues to affect the operation of a covered agreement. The burden of prove to establish that the expired measure continues to affect the operation of a covered agreement falls on the complaining Member. Here, the United States has not even attempted to meet that burden.

36. Instead, the United States simply ignores the well-established case law in favor of asserting that failure to make a recommendation on the matter that the DSB referred to the Panel would deprive the United States of its rights under the DSU. In particular, the United States argues that "[t]he alleged expiry of a legal instrument does not change the matter the DSB put within the Panel's terms of reference, nor does it make another matter susceptible to examination by the Panel".[17] In short, the United States argues that, since the "matter" referred to this Panel includes the expired TPRP measure, the Panel must review that measure. Yet, while the United States may have *intended* to place an expired measure before the Panel, its expiry before panel establishment means that that measure was never properly part of the matter referred to the Panel by the DSB. The case law is clear – a measure that has expired at the time of panel establishment is *not* properly before a panel.

37. In its Second Written Submission, the United States appears to have recognized the existence of the general rule, when referring to situations where an expired measure has been replaced by a new measure that is of the "same essence". The United States argues that "a panel should make findings on a *recurring* measure".[18] Indeed, consistent with the case law on expired measures, a "recurring" measure could be properly before a panel in a situation where a specifically listed measure has expired prior to panel establishment, but where that measure has been replaced

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

[12] MOF Opinion, May 2016, **(Exhibit CHN-73-B)**, Section I.

[13] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), **(Exhibit CHN-80-B)**, p. 1.

[14] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[15] Panel Report, *China – Raw Materials*, para. 7.19.

[16] Panel Report, *EC – Biotech*, para. 7.1301 (underlining added).

[17] United States, response to Panel Question 11, para. 56.

[18] United States, second written submission, para. 39 (emphasis added).

by is a new measure that is of the "same essence" as the expired measure. In fact, in those circumstances, the measure at issue has not truly expired. Yet, on the facts of this case, the United States has not, and cannot, demonstrate that the TPRP for corn has been replaced by a measure that is of "the same essence". China turns to these factual issues in the next section.

38. The United States also argues that domestic support cases are somehow unique, allegedly because "a dispute challenging the conformity of a Member's domestic support with its domestic support commitments necessarily involves a retrospective analysis".[19] In making this argument, the United States confuses the distinction between the existence of a measure, and the existence of evidence necessary to show a WTO inconsistency.

39. With respect to the existence of a *measure*, there is nothing inherently different about claims involving domestic support measures compared to claims involving other measures. That is, nothing warrants a carve-out from the case law on expired measures. In particular, domestic support measures do not necessarily involve annual measures that would always have expired, as the United States initially argued. In fact, domestic support measures often involve long-standing programs supporting agriculture through payments or other support. Annual measures may also form part of an ongoing program. This was precisely the situation in *US – Upland Cotton* where the United States provided annual marketing loan payments pursuant to a multi-year marketing loan program.

40. Moreover, with respect to the evidence, China explained that domestic support measures are not the only type of measure for which an assessment of their WTO consistency may involve consideration of historic evidence. Indeed, while a domestic support *measure* must exist at the time of panel establishment, its WTO consistency may be assessed in light of (i) evidence predating panel establishment, (ii) evidence contemporaneous with panel establishment, or (iii) the most recent evidence, depending on their availability. These considerations apply across many types of measures and disputes. Yet, the need for evidence that may predate panel establishment, to enable assessing the WTO consistency of a measure, does not remove the requirement for the measures to exist at the time of panel establishment.

41. Finally, systemic concerns arise were the Panel to accept the U.S. argument that panels are required to make findings and recommendations on expired measures. Accepting the U.S. argument would result in purely declaratory judgments. Yet, WTO dispute settlement is not designed to deliver declaratory judgments.[20] Rather, it is designed to secure a positive solution to the dispute. The Panel must, thus, avoid a declaratory judgment.

42. Contrary to the U.S. assertions, this would not prejudice the United States. This is because the United States has no right to purely declaratory judgment. To recall, in *US – Certain EC Products*, the Appellate Body held that panels may not make recommendations with respect to expired measures. It explained that this rule exists because there is an "obvious inconsistency" between, on the one hand, a finding that a measure has expired, and, on the other hand, a panel's recommendation that such expired measure be brought into conformity with the applicable WTO obligations, including through its withdrawal.[21]

43. The United States' reliance on the panel report in *EC – Biotech* and the Appellate Body report in *China – Raw Materials* does not change that finding. Indeed, the United States mischaracterizes *EC – Biotech* as standing for the proposition that panels may make recommendations on expired measures. In fact, the opposite is true. The panel in *EC – Biotech* made recommendations with respect to an unwritten general *de facto* moratorium on the approval of biotech products – *which it found existed at the time of panel establishment*. In the face of uncertainty whether the measure continued to exist, or had subsequently ceased to exist during the panel proceedings, as the European Communities asserted, the panel made a recommendation "to the extent that[] that measure ha[d] not already ceased to exist".[22] This is evidently different from the situation here, where the evidence demonstrates that the TPRP for corn has *expired prior to panel establishment*.

44. With respect to *China – Raw Materials*, the United States fails to appreciate that the concern to which it referred, involving an "endlessly moving target" loophole, is resolved through the case

[19] United States, response to Panel Question 4, para. 21.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.
[21] Appellate Body Report, *US – Certain EC Products*, para. 81.
[22] Panel Report, *EC – Biotech*, para. 8.16.

law, including *China – Raw Materials* itself. That case law permits challenges of, and eventually recommendations on, measures (including programs and "series of measures") *that continue to exist at the time of panel establishment or measures that have "replaced" them, where they are of the "same essence"*. However, contrary to the U.S. assertions, neither the case law in general, nor *China – Raw Materials* in particular, stand for the proposition that a panel must, or even may, make recommendations with respect to measures (i) that did not exist at the time of panel establishment or (ii) that expired during panel proceedings, in situations where those measures have not been "replaced" by new measures that are of the "same essence". In other words, *China – Raw Materials* does not permit, let alone require, panels to make recommendations with respect to expired measures.

45. In these circumstances, the Panel should conclude that the TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

C. The evidence demonstrates that the TPRP for corn has expired

46. As noted above, the TPRP for corn expired prior to panel establishment. China has established that, in its place, and starting with the 2016 harvest, China began providing direct payments to producers of corn in the four provinces/region, subject to certain requirements to limit production, and established a market-based price discovery mechanism, with prices reflecting the supply-demand relationship.

47. Initially, the United States asserted that the 2012-2015 TPRP for corn continues to exist because China allegedly had merely "reformed" its corn policy. The United States errs. In China, a policy "reform" generally refers to a fundamental change in that policy, resulting in the discontinuation of the previously existing policy. Indeed, the *MOF Opinion* that announced the new corn measures described these measures as a "reform of market economy system, emphasizing the decisive role of the market in the allocation of grain resources and better performing the role of government".[23] Indeed, the fundamental "reform" that occurred in China's domestic support for its corn producers was to abolish the previous fixed TPRP prices and introduce a new direct payment program for producers of corn. As the NDRC official announcing the reform explained, it would result in a "price formed by the market and decoupling of price and subsidy"[24] – *i.e.*, the absence of an applied administered price, under "the principle of 'Price formed by market and decoupling of price and subsidy'".[25]

48. Outside this litigation, the United States fully agrees. Indeed, since early 2016, the United States Department of Agriculture ("USDA") has consistently explained, in report after report, that China abandoned the TPRP. Even in this litigation, the United States admits that purchases under the TPRP ended on 30 April 2016.[26]

49. Nonetheless, the United States makes vague allegations about the existence of an applied administered price for corn during 2016 and beyond. Confusing the question before the Panel further, the United States also asserts that it is China's burden to "demonstrate that it had withdrawn or modified its support so as to come within its domestic support commitments for corn by the time of panel establishment".[27] That U.S. assertion reflects a misunderstanding of the general principle on the burden of proof. Since the United States, and not China, asserts that there continues to exist an applied administered price in the new corn measures, the United States carries the burden to provide evidence to substantiate this assertion. Absent such evidence, there is no legal basis for the United States to claim that the Panel must make findings and recommendations regarding the TPRP.

50. In fact, evidence from before panel establishment demonstrates that the key elements of the reform consisted of three major new components: (i) the establishment and operation of a direct

[23] MOF Opinion, May 2016, **(Exhibit CHN-73-B)**, Section I.

[24] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), **(Exhibit CHN-74-B)**; MOF Opinions, May 2016, **(Exhibit CHN-73-B)**, Section I.

[25] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), **(Exhibit CHN-80-B)**, p. 1.

[26] United States, 12 December 2017 comments, para. 35.

[27] United States, responses to Panel Questions 4 and 9, paras. 25, 48-49.

payment program for eligible Northeast corn producers based on historic areas planted to corn, and not connected to the price for corn; (ii) the establishment and implementation of a series of measures designed to limit production of corn in the provinces/region adopting the new corn measures; and, (iii) the implementation of policies seeking to achieve a market-based price discovery mechanism for corn, resulting from a market with diversified purchasers and sellers, and multi-channel distribution, of corn.

51. The USDA recognized the production-limiting effects of the new corn direct payment program, as implemented in China's Northeast region, noting a drop in corn harvested area and expectations of further decline. Similarly, price developments in China's corn market since the 2016 introduction of the production-limiting direct payment program are consistent with a market-based price discovery mechanism and the absence of market price support.

52. The United States also argued that the TPRP for corn continued to exist based on allegedly significant *similarities* between the *2015 TPRP Notice* and a *2016 Northeast Region Corn Purchase Notice*. Issued following the expiry of the TPRP for corn, the *2016 Notice* requires provincial/regional governments to *encourage* market participants to purchase corn and to collaborate in the orderly purchasing, financing, storage, and warehousing of corn in the Northeast region. That is, the *2016 Notice* sets out government tasks to support the new market-based price discovery mechanisms.

53. Crucially, while mischaracterizing the alleged policy objective of the *2016 Notice* as involving purchase work similar to that under the TPRP price, the United States ignores entirely the absence of any applied administered price from the *2016 Notice*. Instead, the United States asserts irrelevant similarities. Yet, there are fundamental differences between the *2015 TPRP Notice* and the *2016 Notice* that reflect the core of the fundamental reform in China's TPRP for corn, which resulted in the absence of a Government-determined TPRP price at which designated entities purchase corn. For example, while the United States highlights that, under the *2015 TPRP Notice*, China Grain Reserves Corporation ("SinoGrain") was "entrusted by the State"[28] to perform purchases at the TPRP price, it remains silent regarding the absence of any such entrustment under the *2016 Notice*. Indeed, the new corn measures established a *market-based price discovery mechanism*, and the *2016 Notice* repeatedly references criteria and elements to be adopted to create and sustain that mechanism. These references are found throughout the *2016 Notice*, but are entirely absent from the *2015 TPRP Notice*. In these circumstances, the *2016 Notice* contradicts the U.S. assertion of a continued existence of the TPRP for corn.

54. Late in the proceedings, the United States then purported to have found evidence of China's alleged continued application of an applied administered price for corn. As support, the United States produced a notice by SinoGrain's Inner Mongolia Branch to its depots in Inner Mongolia, communicating prices at which to purchase corn.

55. The United States errs in asserting that it has identified an applied administered price for corn. In fact, the document identified by the United States consists of a set of different, *market-based purchase prices* at which SinoGrain's Inner Mongolia Branch offered, on 14 October 2016, to purchase corn at various of its depots in the Inner Mongolia Region. That is, rather than constituting evidence of an applied administered price, the document identified by the United States involved an *offer*, *at a particular point in time*, to purchase corn at *varying market-based prices* in different locations in the Inner Mongolia Region.

56. Moreover, China has established that this offer by one of many purchasers of corn in China (SinoGrain) was superseded by later market-based offers from the same entity to purchase corn at different market-based prices. Specifically, the evidence demonstrates that SinoGrain's market-based price offers change from time to time, and reflect changing *market prices* in line with *market developments*. Indeed, after 30 April 2016, SinoGrain had no mandate from the Chinese Government to purchase corn at an applied administered price. Thus, and contrary to the U.S. assertion, the SinoGrain branch notice identified by the United States is not based on any authority or legal basis flowing from the *2016 Notice*.

57. By way of background, the evidence demonstrates that SinoGrain headquarters issues, from time to time, notices with guidance prices for corn purchases to its provincial/region branches. Those guidance prices take into account market price information observed, collected and published by

[28] United States, response to Panel Question 55, para. 23.

China's State Administration of Grain, similarly to the manner in which U.S. corn traders take into account information on corn prices continuously published by the USDA. Moreover, these guidance prices are not determinative of prices offered by each SinoGrain depot. Instead, each of the four SinoGrain's branches in China's Northeast region enjoys discretion to set, through consecutive branch notices, the prices at which its local depots offer, from time to time, to purchase corn, based on local market conditions. Each SinoGrain depot in these four provinces/region then offers to purchase corn at the market-based price set for it in the most recent branch notice. That is, depending on evolving market conditions, one set of prices offers will be superseded by a later set of prices offers, adjusted either upwards or downwards, reflecting market developments. In short, China has established that SinoGrain's purchase price offers are consistent with local *market prices*.

58. While SinoGrain has, at present, no mandate from the Chinese Government to purchase corn *at an applied administered price*, purchasing corn remains one of its core business activities. Consistent with the fact that, after 30 April 2016 and under the new corn measures, the Chinese corn market is characterized by a market-based price discovery mechanism, SinoGrain follows a market-based process to purchase corn at market prices. Indeed, the evidence demonstrates that, in making fluctuating price offers, SinoGrain follows a common and well-established practice that is consistent with that adopted by large commodity traders worldwide. Like SinoGrain, those traders inform potential sellers of corn of the price at which they would, from time to time, purchase corn. Specifically, China demonstrated that other major purchasers of corn in China similarly publish price offers to purchase corn, and that those price offers fluctuate based on market developments. China further established that it is a common practice in the United States for small and large purchasers of corn to publish announced prices at which they will purchase corn.

59. Thus, China demonstrated that the announcement of offered purchase prices by SinoGrain and other corn purchasers in China is a completely *normal*, *expected*, and *necessary* element of a functioning price-discovery mechanism. That announcement does not establish the existence of an applied administered price, as the United States argues. With SinoGrain's prices indistinguishable from market prices, the United States cannot show the existence of an applied administered price. Accordingly, it cannot show that the TPRP for corn continues to exist.

D. Conclusion

60. In sum, the Panel should conclude that the 2012-2015 TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

V. THE UNITED STATES FAILED TO DEMONSTRATE THAT CHINA'S DOMESTIC SUPPORT FOR WHEAT AND RICE VIOLATES ARTICLES 3.2, 6.3, AND 7.2 OF THE *AGREEMENT ON AGRICULTURE*

A. Factual background on China's MPP for wheat and rice

61. Pursuant to China's *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, China implemented market price support in the form of minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice for each of the years 2012-2016. These programs are established through annual MPP Notices that are adopted jointly by a number of different entities, including the NDRC, MOF, Ministry of Agriculture ("MOA"), and State Administration of Grain ("SAG"). The annual MPP Notices set the annual level of the MPP for wheat, indica rice and japonica rice of particular quality grades, with MPP prices defined for a standard Grade 3 and adjusted for Grades 1-2 and 4-5.

62. The same entities that adopt the MPP Notice also introduce annual MPP Implementation Plans. These Implementation Plans inform implementing authorities[29] of, *inter alia*, the geographic scope, relevant timeframe, rules on the activation and deactivation of the MPP programs, and the characteristics of qualifying wheat and rice.

63. With respect to the geographic scope of the MPP programs in 2012-2016, the MPP program for wheat covered six wheat-producing provinces (Hebei, Jiangsu, Anhui, Shandong, Henan and Hubei); the MPP programs for indica rice and japonica rice covered (i) five early-season indica rice

[29] These include the provincial Development and Reform Commissions, Price Bureaus, Departments (Bureaus) of Finance, Agriculture Departments (Bureaus, Commissions, Offices), Administrations of Grain, and autonomous regions and municipalities.

producing provinces (Anhui, Jiangxi, Hubei, Hunan and Guangxi); and, (ii) eleven mid-to-late season indica and japonica rice producing provinces (Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi and Sichuan).

64. Under the MPP Implementation Plans, the time period during which the MPP programs may be implemented during the applicable year is limited. For example, purchases of wheat under the MPP program may take place between May 21 to September 30 of each applicable year; MPP purchases of early-season indica rice may take place between 16 July and September 30 of each applicable year; and for purchases of mid-to-late season indica rice and japonica rice, the timeframes differ depending on the province. For Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, and Sichuan Provinces, the MPP program is implemented between mid-September and 31 January, and for Liaoning, Jilin, Heilongjiang Provinces, it is implemented between October/November and February/March.

65. Moreover, purchases under the MPP programs are not activated during the entirety of the implementation period. The MPP Implementation Plans provide that purchases at the MPP are activated only "when the grain market price drops to the minimum procurement price stipulated by the government".[30] Purchases are deactivated when the market price rises again above the MPP. It follows that the MPP programs retain, as the guiding principle, market-based price discovery and purchases by market actors, and intervene only where market prices drop below the MPP. Thus, and consistent with the *2004 Grain Opinion* and *2004 Regulation on Grain Distribution*, the grain price is formed principally by supply and demand, except when a "material change occurs in the relationship between supply and demand of grain".[31] Thus, the actual application of the MPP program is further limited to (i) the *timeframe* during which prices are found to fall below the MPP; and (ii) *areas* within its geographic scope where prices were found to have fallen below the MPP price.

66. As noted above, the MPP applies to wheat, indica rice and japonica rice of particular qualities. Specifically, only purchases of in-grade grains may occur – *i.e.*, wheat or rice that is of Grades 1 to 5 of China's National Grain Standard. Out-of-grade grains – *i.e.*, wheat and rice that is of a quality lower than Grade 5 – may not be purchased under the MPP programs.

67. Despite the existence of the MPP programs, the vast majority of wheat and rice is sold on the market. Indeed, purchases under the wheat MPP program did not exceed 25% of total production in the covered provinces (or 22% of total production in China), and purchases under the rice MPP programs did not exceed 20% of total rice production in the covered provinces (or 16% of total production in China).

68. As an important background fact, China further notes that, similarly to the situation in many other developing countries, small-scale farms in China typically consume a significant portion of the staple foods that they produce, including wheat and rice. It follows that the total amount of wheat and rice available to be sold by farmers on the market or under the MPP programs is smaller than the total amount of wheat and rice actually produced. Based on data from China's *Rural Statistical Yearbook*, between 9-18% of total wheat production in China in 2012-2015, and between 17-22% of total rice production was consumed or retained by Chinese farmers, and not available for purchase in the marketplace.

B. Legal argument

69. Contrary to the U.S. claims, China's market price support, under its MPP programs for wheat, indica rice and japonica rice, is consistent with its domestic support commitments under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.

70. Under Articles 3.2 and 6.3, Members shall not provide overall annual domestic support for their agricultural producers, calculated as Current Total AMS, in excess of their Member-specific domestic support reduction commitments, as set out in Part IV of their Schedules. Those domestic support reduction commitments, in turn, result from a Member-specific calculation of Base Total AMS – *i.e.*, Total AMS during each Member's base period. Article 7.2(b) further clarifies that, where

[30] *See, e.g.,* 2015 Wheat & Rice Implementation Plan, **(Exhibit CHN-28-B)**, Article 6; 2016 Wheat & Rice Implementation Plan, **(Exhibit CHN-32-B)**, Article 8.

[31] *Regulation on the Administration of Grain Distribution*, 2004 (English translation), **(Exhibit CHN-9-B)**, Article 27.

a Member's domestic support reduction commitment is "nil", as in the case of China, that Member shall not provide domestic support in excess of its *de minimis* level. For China, paragraph 235 of its Working Party Report, as incorporated into China's Accession Protocol, sets that *de minimis* level at 8.5% of the total value of production of each basic agricultural product.

71. As summarized below, the United States has failed to establish that China's Current AMS, calculated for each of its market price support measures for wheat, indica rice and japonica rice, exceeds China's *de minimis* support level of 8.5% of the total value of production of each of these products. Accordingly, the United States has failed to establish that China's Current Total AMS exceeds China's "nil" domestic support reduction commitment. Below, China first summarizes its arguments regarding general concepts for the calculation of AMS, in particular the role of a Member's constituent data and methodology, before turning to the AMS calculation for market price support at issue here, and any applicable conflict rules. China then provides the resulting AMS calculations.

1. The role of a Member's constituent data and methodology in the calculation of Current AMS

72. China has established that, in calculating Current AMS and Current Total AMS under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, the United States errs by relying *solely* on the provisions of Annex 3. Pursuant to Articles 1(a)(ii) and 1(h)(ii), that calculation must consider both (i) the framework for the calculation of AMS set out in Annex 3 of the *Agreement on Agriculture*, *and* (ii) China's constituent data and methodology, included in its Supporting Tables in Rev.3. Consideration of, additionally, China's constituent data and methodology has important consequences for two key variables in the calculation of Current AMS from China's market price support for wheat and rice. As discussed in more detail below, these variables are (i) China's fixed external reference prices for these products, taken from China's Member-specific 1996-1998 base period, and (ii) China's methodology for the determination of the amount of "eligible production" as "amount purchased", both as detailed in China's Supporting Tables in Rev.3.

73. Under customary rules of treaty interpretation, it is well-established that "a treaty should be interpreted as a whole",[32] and that a treaty interpreter must not read out entire aspects of a treaty. Moreover, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[33] Application of the *Vienna Convention* rules on treaty interpretation also requires a treaty interpreter to avoid, where possible, reading two provisions of the same treaty as conflicting. As set out below, a holistic and harmonious reading of Annex 3 and China's constituent data and methodology is possible. Nonetheless, below, China also addresses the applicable conflict rule.

a. *Articles 1(h)(ii) and 1(a)(ii) of the Agreement on Agriculture require a holistic and harmonious interpretation*

74. The requirement to interpret a treaty holistically and harmoniously, and not to read out entire aspects of that treaty, applies with even greater force where, as here, the treaty requires that two provisions be considered together. As noted, the starting point of the interpretive exercise determining the applicable calculation rules for Current AMS and Current Total AMS are Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, which define Current AMS and Current Total AMS. For purposes of their calculation, Articles 1(a)(ii) and 1(h)(ii) direct a treaty interpreter to consider and give meaning to *two sources of treaty text*: (i) Annex 3; and, (ii) a Member's "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Thus, the Panel must attempt to adopt a holistic and harmonious interpretation that gives meaning to both.

b. *The meaning of "constituent data and methodology" in Articles 1(a)(ii) and 1(h)(ii)*

75. China considers it useful to begin by exploring the meaning of the phrase "constituent data and methodology". That phrase covers those data and methodologies in a Member's Supporting Tables that are *characteristic*, *formative*, *essential*, and *integral* for the calculation of both *Base* and

[32] Appellate Body Report, *Korea – Dairy*, para. 81.

[33] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (emphasis in original).

Current AMS and *Base* Total AMS and *Current* Total AMS. Under Articles 1(a)(i) and 1(h)(i) both "constituent data" and "constituent methodology", applied together with other elements of the Supporting Tables, gave rise to a Member's *Base* AMS and *Base* Total AMS (collectively referred to as "Base (Total) AMS"), and, thus, that Member's domestic support reduction commitments. Under Articles 1(a)(ii) and 1(h)(ii), both remain relevant for, and must be applied in, the calculation of a Member's *Current* AMS and *Current* Total AMS (collectively referred to as "Current (Total) AMS"). That is, *Base* (Total) AMS and *Current* (Total) AMS are calculated by reference to the same Member-specific constituent data and methodology in a Member's Supporting Tables.

76. In this respect, China explained that "constituent data and methodology" must be able to constitute an unchanging element (either a data point or a methodology) that carries over from the calculation of *Base* (Total) AMS to the calculation of *Current* (Total) AMS. As detailed below, for China's market price support for wheat and rice, the term (i) "constituent data" applies to: (a) the numerical value of the fixed external reference prices based on data from the 1996-1998 base period, and (b) the conversion rate of 70% for paddy-rice-based data into milled-rice-based data. In turn, (ii) "constituent methodology" applies to: (a) the methodology for the determination of eligible production as "amount purchased", and (b) the methodology for converting paddy-rice-based data into milled-rice-based data.

77. Although, the Parties provided similar definitions of "data", "methodology" and "constituent", and agreed that "constituent" qualifies "data" and "methodology", the U.S. interpretation of "constituent data and methodology" effectively fails to give any meaning to the phrase. Fundamentally, the United States takes the flawed view that "constituent data and methodology" are only of historical, and/or factual interest, and not relevant for the calculation of Current (Total) AMS. While the United States provides a few examples of what it considers to be constituent data and methodology, these examples are largely covered under other provisions. For example, the United States refers to the definition of the "basic agricultural product" and the "year" for which AMS is to be calculated. Yet, both are covered separately by Articles 1(b) and 1(i) of the *Agreement on Agriculture*.

78. If the role of constituent data and methodology were, as the United States argues, either non-existent or extremely limited, there would have been no need for Articles 1(a)(ii) and 1(h)(ii) to refer to them as one of two elements necessary for, and relevant to, the calculation of Current (Total) AMS from present domestic support. Accordingly, the U.S. position effectively reduces the references to "constituent data and methodology" to nullity, contrary to the customary rules of treaty interpretation, and Article 3.2 of the DSU.

c. The ordinary meaning of "in accordance with" and "taking into account" in Articles 1(h)(ii) and 1(a)(ii)

79. Articles 1(a)(ii) and 1(h)(ii) also speak to the relationship between the framework for the AMS calculation in Annex 3 and a Member's constituent data and methodology. That relationship must be determined based on the ordinary meaning of the terms "in accordance with" and "taking into account" in Articles 1(a)(ii) and 1(h)(ii), in their context, and in light of the object and purpose of the *Agreement on Agriculture*. In addition, there is limited guidance from the findings of the panel and the Appellate Body in *Korea – Beef* – although on the facts of that dispute, Korea had no relevant constituent data and methodology for beef.

80. Article 1(a)(ii) provides that Current AMS is "calculated *in accordance with* the provisions of Annex 3 …, and *taking into account* the constituent data and methodology". Article 1(h)(ii) uses only the phrase "in accordance with", providing that Current Total AMS shall be "calculated *in accordance with* the provisions of this Agreement, including Article 6 [which includes Annex 3], *and with* the constituent data and methodology". China has established that, contrary to the U.S. view, the term "in accordance with" applies to both sources of treaty text referenced. The dictionary meaning of "in accordance with" is "in agreement or harmony with, in conformity to, according to".[34] That is, under Article 1(h)(ii), Current Total AMS must be calculated "in agreement or harmony with" *both* (i) the framework of Annex 3 and (ii) "the constituent data and methodology". The same requirement flows from Article 1(a)(ii), which also uses the phrase "in accordance with" when referring to Annex 3. Indeed, in *Korea – Beef*, the Appellate Body confirmed the meaning of the term "in accordance with",

[34] Oxford English Dictionary, OED Online, "in accordance with, n.", pp. 2-3, available at: http://www.oed.com/view/Entry/1170? (last viewed 26 October 2017), **(Exhibit CHN-53)**.

and also recognized that Article 1(h)(ii) attributes equal importance to both sources of treaty text.[35]

81. Article 1(a)(ii) uses the phrase "taking into account" when referring to "the constituent data and methodology". The meaning of "to take into account" is "to include something in an account or reckoning".[36] Thus, similarly to Article 1(h)(ii), Article 1(a)(ii) also emphasizes the role of "the constituent data and methodology" in calculating AMS.

82. In short, Articles 1(a)(ii) and 1(h)(ii) require the Panel to give meaning to both Annex 3 and the constituent data and methodology, in a holistic and harmonious manner. Contrary to the U.S. arguments, they are not conflict rules that give, in all circumstances, precedence to Annex 3 over a Member's constituent data and methodology. In any event, questions of hierarchy become relevant only where a conflict existed between Annex 3 and a Member's constituent data and methodology, which does not arise on the facts of this dispute.

d. Current AMS and Current Total AMS are part of the same overall calculation

83. The relationship between Annex 3 and a Member's constituent data and methodology is also defined by the fact that Articles 1(a)(ii) and 1(h)(ii) are part of the same overall calculation. They do not involve different assessments, as the United States argues in an attempt ultimately to remove China's constituent data and methodology from the calculation of Current AMS. Instead, Annex 3 and a Member's constituent data and methodology must each be given the same meaning and the same weight in the calculation of both AMS and Total AMS.

84. As China has explained, the notion of AMS, which expresses domestic support in monetary terms, is built into each of the concepts of AMS, Total AMS, Current Total AMS and Base Total AMS. As the panel in *Korea – Beef* held, "all these concepts, e.g. domestic support, AMS, Current Total AMS, and total domestic support and the provisions of Articles 1(a), 1(h), 3.2, 6.4, and 7.2 are organically and inextricably linked".[37] It follows that AMS must be calculated in the same manner for purposes of both AMS and Total AMS. This requirement flows also from the fact that Total AMS is defined, in Article 1(h), as the sum of the AMS calculations for each basic agricultural product (along with non-product-specific AMS), subject only to *de minimis* exclusion rules under Article 6.4. In the summing-up that results in Total AMS, each AMS component remains unaltered, however, and is *not* re-calculated, demonstrating that calculating both AMS and Total AMS is part of the same overall calculation.

85. Indeed, both AMS and Total AMS, whether calculated for the base period or for current domestic support, are elements of the same overall calculation of a level of domestic support. In the case of *Base* AMS and *Base* Total AMS, the AMS components are part of the calculation that yielded a Member's Base Total AMS and the resulting annual and final bound commitment levels, including where the reduction commitment is "nil". And, in the case of *Current* AMS and *Current* Total AMS, they are part of the calculation that assesses whether a Member's domestic support in any year after the base period has exceeded that Member's domestic support reduction commitments, in violation of Articles 3.2 and 6.3.

86. Thus, contrary to the U.S. assertions that both are separate exercises, there is no basis to require one set of calculations for Current AMS, under Article 1(a)(ii), and another set of calculations for the same Current AMS that is summed up into Current *Total* AMS, under Article 1(h)(ii) (subject only to *de minimis* exclusions).

e. *The relevant context, and object and purpose of the Agreement, reflecting the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS*

87. Further illuminating the role of a Member's constituent data and methodology in the calculation of Current AMS and Current Total AMS is the need for consistency in the calculation of (i) Base (Total) AMS and (ii) Current (Total) AMS. That need for consistency flows from relevant

[35] Appellate Body Report, *Korea – Beef*, footnote 111.

[36] Oxford English Dictionary, OED Online, "to take account of, n.", pp. 21-22, available at: http://www.oed.com/view/Entry/1194? (last viewed 26 October 2017), **(Exhibit CHN-54)**.

[37] Panel Report, *Korea – Beef*, para. 813.

context and the object and purpose of the *Agreement on Agriculture*. The need for consistency is an important element in the Panel's consideration of the role, in calculating Current AMS from China's market price support for wheat and rice, of China's constituent data and methodology in Rev.3. Specifically, it is relevant for the identification of the appropriate fixed external reference prices sources from data reflecting the China's 1996-1998 base period; the methodology for the determination of eligible production as "amount purchased"; and, the methodology for converting paddy-rice-based data into milled-rice-based data, reflecting a conversion rate of 70%.

88. Beginning with *context*, Articles 1(a)(i) and 1(h)(i) refer to AMS and Total AMS during the base period "as specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule" and "as specified in Part IV of a Member's Schedule", respectively. Thus, they refer to the *same* Member-specific Supporting Tables that, pursuant to Articles 1(a)(ii) and 1(h)(ii) include constituent data and methodology as elements of the calculation of Base AMS and Base Total AMS.

89. The calculations of Base (Total) AMS in those Supporting Tables reflect the framework in Annex 3 and Member-specific constituent data and methodologies. Indeed, paragraph 5 of Annex 3 explains that Annex 3 also served as a framework for the calculation of the Base (Total) AMS, as recorded in a Member's Supporting Tables. Paragraph 5 stipulates that "[t]he AMS calculated as outlined below [*i.e.*, in paragraphs 6-13 of Annex 3] for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support". As a result, a Member's Base (Total) AMS will generally reflect the framework set out in Annex 3. Accordingly, the United States errs in arguing that *Base* AMS calculations occurred in a legal vacuum, allegedly because "the Agreement does not provide a specific calculation methodology".[38] Instead, Base AMS calculations were guided by the framework in Annex 3 (as set out in paragraph 5 thereof) and included Member-specific constituent data and methodology (as noted in Articles 1(a)(ii) and 1(h)(ii)).

90. China also rebutted the related, and equally erroneous, U.S. argument that there is no requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS because the former is of historical interest only. As set out above, the U.S. position is contradicted by the *Agreement on Agriculture*. Articles 1(a)(ii) and 1(h)(ii) signify that the choices Members made in the calculation of Base (Total) AMS have consequences in the calculation of Current (Total) AMS. Specifically, while *Base* AMS and *Current* AMS differ with respect to the time period for which they are calculated, they are calculated using the *same* calculation framework under Annex 3 and the *same* constituent data and methodology. Thus, contrary to the U.S. assertion, they are "inextricably linked",[39] and the constituent data and methodology from the calculation of Base (Total) AMS remain relevant for the calculation of Current (Total) AMS.

91. Further relevant context is provided by the domestic support provisions in the *Agreement on Agriculture* – *i.e.*, Articles 6.1, 6.3, 7.1, 20, title of Annex 2, paragraph 1 of Annex 3. They each refer to domestic support *reduction* commitments. Similarly, recital 3 of the *Agreement's* preamble provides that the object and purpose of the *Agreement*, with regard to domestic support, is to achieve "progressive reductions in agricultural support".

92. Consistency with the objective to reduce domestic support requires that compliance with a Member's domestic support reduction commitments is assessed in a meaningful manner – *i.e.*, in a manner that permits drawing conclusions about a Members' *reduction* of its domestic support. This requires consistency in the calculation of *Base* (Total) AMS (which reflects domestic support during the base period and served as the basis for a Member's domestic support reduction commitments) and *Current* (Total) AMS (which reflects current domestic support). A lack of consistency in the calculation of both would undermine the usefulness of the Current (Total) AMS calculation as a proxy for the level of current domestic support, relative to a Member's domestic support reduction commitments, which flow from *Base* (Total) AMS. Indeed, the panel in *Korea – Beef* explicitly recognized this need for consistency.[40] The Appellate Body found no error in the panel's findings.[41]

93. As China has shown, failure to use, where pertinent, consistently the *same* constituent data

[38] United States, response to Panel Questions 62, para. 46.
[39] Panel Report, *Korea – Beef*, para. 813.
[40] Panel Report, *Korea – Beef*, para. 811.
[41] Appellate Body Report, *Korea – Beef*, paras. 113-114 (footnote 49), and 118.

and methodology together with the framework of Annex 3 leads to substantial distortions in the calculation of *Current* (Total) AMS, relative to *Base* (Total) AMS. Specifically, if constituent data and methodology used for the calculation of *Current* (Total) AMS *differed* from those used for the calculation of *Base* (Total) AMS, AMS calculations would become meaningless *apples-to-oranges* comparisons that reveal nothing about actual reductions in domestic support. Variations in the constituent data and methodology mean that one cannot know whether, for example, a Member's compliance with its reduction commitments results from (i) actual reductions in its domestic support, or (ii) simply from the use of *different* constituent data and methodology.

94. Importantly, where *different* constituent data and methodology are used, a reduction in AMS may be found, and may mask actual levels of domestic support that either remain unchanged or have even increased. These distortions are illustrated by the exaggerating effect on China's *Current* AMS of the United States' application of (i) entirely new fixed external reference prices for wheat and rice, based on 1986-1988 (rather than 1996-1998) data; and, (ii) a different methodology for the determination of "eligible production".

95. While the United States, at times, recognized these distortions, and argued that constituent data and methodology may be used where a Member continues to apply *the same program*, there is no basis for that narrow reading of the consistency requirement. In any event, the United States appears to have abandoned that argument.

96. In short, the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS that flows from the text and context in Articles 1(a) and 1(h), the context of paragraph 5 of Annex 3, and the design and architecture of the *Agreement on Agriculture*. It follows that the framework in Annex 3 and a Member's constituent data and methodology must be used consistently in the same manner when a Member continues more broadly to use certain forms of domestic support for a basic agricultural product for which its Supporting Tables include relevant constituent data and methodology. The United States' negation of the need for such consistency is without a basis in the *Agreement on Agriculture*.

97. Finally, and contrary to the U.S. assertion, China has established that the need for consistency applies irrespective of whether a Member has a "positive" or a "nil" domestic support reduction commitment. Under the terms of the *Agreement on Agriculture*, and contrary to the U.S. assertions, both constitute reduction commitments. Thus, China's commitment level of "nil" is an ongoing domestic support "*reduction*" commitment. Indeed, absent a *reduction* commitment, the domestic support disciplines of Articles 3.2 and 6.3 of the *Agreement on Agriculture* would not apply to China.

f. Constituent data and methodology are an important basis for a Member's domestic support reduction commitments

98. The considerations above highlight that a Member's domestic support reduction commitments arise, in important part, from its Member-specific constituent data and methodology. Ignoring those constituent data and methodology in assessing compliance with individually negotiated and Member-specific domestic support reduction commitments, as the United States does, would be tantamount to re-writing that Member's commitments. Moreover, using different constituent data and methodology would undermine the utility of Current AMS calculations as a means to assess compliance with Member-specific domestic support *reduction* commitments.

i. For later-acceded Members their constituent data and methodology are also part of their Accession Protocols

99. The implications of the United States' attempt at reading out a Member's constituent data and methodology are aggravated for later-acceded Members, such as China. For those Members, their constituent data and methodology are not only part and parcel of their domestic support reduction commitments, but also of their "terms of accession", under Article XII:1 of the Marrakesh Agreement. Contrary to the U.S. assertions, China's Supporting Tables in Rev.3, which include its constituent data and methodology, are *part of* China's Accession Protocol. Specifically, Annex 8 thereto includes China's Schedule of Concessions and Commitments on Goods ("Schedule"), which incorporates Rev.3. Indeed, China's Schedule notes that it "result[ed] from the negotiations between the People's Republic of China and WTO Members [*and that it*] *is annexed to the Protocol of Accession*

of China".[42] As part of China's Accession Protocol, Rev.3 enjoys the same legal status as the Accession Protocol.

100. The United States further errs in arguing that China's Schedule, including Rev.3, lost its status as part of China's Accession Protocol because it became annexed to the GATT 1994. The legal status of Rev.3 as part of China's Accession Protocol is not affected by its integration into the GATT 1994. As noted, Schedules of Concessions in an accession protocol form part of the "terms of accession", under Article XII:1 of the Marrakesh Agreement. They are an integral part of the package of rights and obligations under which that Member acceded to the WTO, and can never lose their status as "terms of accession".

ii. The constituent data and methodology give rise to China's domestic support commitments

101. China's constituent data and methodology gave rise to binding commitments, as part of China's domestic support reduction commitments. Contrary to the U.S. assertions, they do not "alter" or "supplant" those commitments. Instead, they are themselves China's negotiated and agreed "terms of accession". China has explained that the U.S. position rests on an erroneous understanding of the relationship between an Accession Protocol and the *Agreement on Agriculture.* When a new Member accedes to the WTO under Article XII:1 of the Marrakesh Agreement, it does not agree to undertake pre-existing commitments in the *Agreement on Agriculture*, as those commitments stood prior to its accession. Instead, it accedes to the *Agreement on Agriculture* subject to individually negotiated and agreed commitments that are set out in the "terms of accession" under the Accession Protocol.

102. For China, this is confirmed by paragraphs 1.2 and 12.1 of China's Accession Protocol. Paragraph 1.2 confirms that the Accession Protocol, including the domestic-support-related commitments, "shall be an integral part of the WTO Agreement". Paragraph 12.1 then stipulates that "China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture". Thus, China is required to implement the provisions of the *Agreement on Agriculture* subject to the terms of its Accession Protocol. That is, China's Accession Protocol does not "alter" domestic support reduction commitments; it gives rise to those commitments.

103. Moreover, China has rebutted the U.S. arguments that aim to invalidate the binding nature of China's constituent data and methodology. First, China has demonstrated that paragraph 1.3 of China's Accession Protocol does not speak to the question of substantive commitments China allegedly undertook as those commitments stood prior to its accession. Instead, it relates to potential transition periods, and explains that, unless specifically stated, China is not entitled to them. Second, China explained that paragraph 238 of China's Working Party Report does not reflect a disagreement between China and its negotiating partners as to China's constituent data and methodology that would invalidate them. Rather, paragraph 238 records concerns regarding certain policy classification of certain "green box" support unrelated to China's domestic support reduction commitments. Finally, China has explained that the case law from *EC – Sugar* regarding the role of schedules in undertaking commitments is inapposite. This is because Rev.3 is part of China's Accession Protocol, and because, in any event, the scheduling rules for export subsidy and domestic support commitments are very different in light of the Member-specific nature of domestic support reduction commitments, including the ability to use Member-specific constituent data and methodology that give rise to these commitments.

2. The appropriate methodology to calculate Current (Total) AMS for China's market price support measures for wheat and rice

104. Having set out the general interpretative framework, and the need for consistency in the calculation of Base (Total) AMS and Current (Total) AMS, China turns to demonstrating the importance of using its own constituent data and methodology, where relevant. Specifically, China now turns to the AMS calculations required for market price support pursuant to paragraph 8 of Annex 3, and identifies on the basis of a holistic and harmonious interpretation the data and

[42] WT/ACC/CHN/49/Add.1 (emphasis added).

methodologies to be used in those calculations.

105. To begin, AMS from market price support is to be calculated on the basis of the difference between the fixed external reference price ("FERP") for the product at issue and its applied administered price ("AAP"), multiplied by the quantity of eligible production. Most of these input factors have been the subject of intense debate.

a. The appropriate fixed external reference prices based on data from 1996-1998

106. China has demonstrated that its FERPs must be sourced from its 1996-1998 base period. This result flows from a holistic and harmonious interpretation, consistent with the customary rules of treaty interpretation, of all relevant provisions of the *Agreement on Agriculture*, in light of relevant context and the object and purpose of the treaty.

107. By contrast, the United States takes the view that China's FERPs must be identified reflecting a 1986-1988 base period. For the United States, this flows from the alleged clarity and plain meaning of a few words in paragraph 9 of Annex 3, ignoring the rest of the *Agreement on Agriculture* and China's constituent data and methodology in Rev.3. The United States errs, and bases its interpretation on only a subset of relevant materials. China established that the case law provides numerous examples where consideration of all relevant text, context and the objective and purpose of the treat result in interpretations of a provision, or select words in a provision, that go beyond the alleged clarity of those words.

108. Thus, in approaching the interpretative task of identifying the relevant base period for Chinas' FERPs, the Panel's first task is to identify *what* it is being called upon to interpret. Only then is it meaningful to discuss *how* that interpretative exercise must proceed. Contrary to the U.S. assertion, the Panel is not called upon to interpret a few words in paragraph 9 of Annex 3 in clinical isolation from all the other provisions of the *Agreement on Agriculture*.

109. Instead, the Panel is required to interpret, holistically and harmoniously, all provisions of the *Agreement* that deal with the determination of the base period for the FERPs, in the light of relevant context and the object and purpose of the *Agreement*. This involves consideration of Articles 1(a) and 1(h), as well as paragraphs 5 and 9 of Annex 3, and additionally China's constituent data and methodology in Rev.3, along with the context from other Members' Supporting Tables, as included in those Members' Schedules, and the need to ensure consistency in the calculation of Base (Total) AMS and Current (Total) AMS, which flows from the design and architecture of the *Agreement on Agriculture*.

110. Following the correct interpretative approach, China has established that the proper, holistic and harmonious interpretation of these provisions establishes a single rule regarding the identification of the applicable base period for Members' domestic support commitments, including for their FERPs. That single rule requires each Member to use a three-year base period for establishing its domestic support reduction commitments, including for the identification of the applicable FERPs to be used in the calculation of Base (Total) AMS and Current (Total) AMS. *Under that single rule, the three-year base period must be sufficiently proximate to the time of the Member's accession*.

111. Consistent with the context provided by Members' Supporting Tables, this single rule is implemented through different modalities. For original Members, the base period proximate to the time of the creation of the WTO is generally 1986-1988, as memorialized in paragraph 9 of Annex 3 and in those Members' Supporting Tables. For each of the 36 later-acceded Members, there are Member-specific three-year base periods that are each proximate to the time of accession of the later-acceded Member concerned, as agreed in the relevant accession protocol between that Member and the WTO, and as memorialized in each of those later-acceded Members' Supporting Tables. Specifically, of the 36 Members that acceded to the WTO after the conclusion of the Uruguay round, all[43] used a three-year base period for the calculation of Base (Total) AMS that was proximate to their accession, and later than 1986-1988. And all 10 later-acceded Members that maintained market price support measures during their Member-specific base periods drew their FERPs from the same base period used to calculate Base (Total) AMS. For China specifically, that base period is 1996-1998, as indicated in its Supporting Tables, which are also part of its Accession Protocol. Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used the most recent three-year time period, and none used 1986-1988. No Member objected to this approach.

112. Thus, the context provided by other Members' Supporting Tables reinforces the interpretation of the relevant treaty provisions that China has advanced in these proceedings, whereby (i) original Members were generally required to use a 1986-1988 base period, including for their fixed external reference prices, while (ii) later-acceded Members were required to use a later base period, including for their fixed external reference prices, that was proximate to the time of their accession. That is, for Members that acceded after the Uruguay Round, including China, this context supports the conclusion that they are not required to calculate their FERPs on the basis of a 1986-1988 base period; instead, they must use the base period in their respective Schedules – *i.e.*, for China, 1996-1998, as set out in Rev.3. China considers that the Panel should give significant weight to this context.[44]

113. Moreover, the object and purpose of the *Agreement on Agriculture* demonstrates the error in the United States' treatment of the 1996-1998 base period, resulting from the above interpretative exercise, as relevant only for the calculation of Base (Total) AMS, but not Current (Total) AMS. This U.S. argument ignores the role and purpose of FERPs and the requirement for consistency in the *Agreement*. To recall, a FERP acts as a benchmark to permit an assessment of a Member's Current AMS from market price support relative to its Base AMS from market price support, in line with that Member's domestic support reduction commitments. A WTO Member must calculate its Current (Total) AMS consistently by using the same constituent data and methodology it used to calculate its Base (Total) AMS, including the same FERPs. Otherwise, it would be subjected to AMS commitments it did not undertake, in violation of Article 3.2 of the DSU.

114. The existence of the single rule that the three-year base period, including for the FERPs, must be sufficiently proximate to the time of the Member's accession is consistent with a 2010 Technical Note by the WTO Secretariat, which explains that, "[w]hereas a fixed period (1986-1988) was established for commitments on domestic support and export subsidies undertaken in the Uruguay Round, the base periods for Members acceding under Article XII of the WTO Agreement have been determined on an individual basis".[45] Indeed, for later-acceding Members, a 1996 Technical Note from the WTO Secretariat on the accession process emphasizes that acceding governments should calculate an "external reference price" from data "normally for *each of the last three years*".[46]

115. China further notes that forcing each of the 36 later-acceded Members, including China, to calculate, going forward, Current AMS using different FERPs has important systemic consequences. During none of the accession negotiations did the United States, or any other Member, suggest that

[43] There is one exception, Bulgaria, which arose from the particular factual situation regarding its accession.

[44] China also notes that, alternatively, the Panel could perhaps view the Schedules of later-acceded Members as evidence of a common, concordant and consistent "subsequent practice" relating to the interpretation of the relevant provisions of the *Agreement on Agriculture.* The Panel's conclusions under both approaches would remain unchanged. Indeed, resort to subsequent practice merely confirms, and does not in any way modify, the meaning that results from a holistic and harmonious interpretation employing other tools of treaty interpretation.

[45] WT/ACC/10/Rev.4, p. 25.

[46] WT/ACC/4, pp. 3-4 (emphasis added).

a 1986-1988 base period had to be used, including for the FERPs. Doing so now forces later-acceded Members to comply with commitments not undertaken, in violation of not only Article 3.2 of the DSU, but also each of their respective accession protocols. Moreover, for several of these Members, there may be no 1986-1988 data from which to draw FERPs, given that several countries at issue did not even exist in 1986-1988. Rather than using proxy data, as the United States suggests, under the proper interpretation, those Members should simply use their own FERPs in their Supporting Tables.

116. Finally, the United States errs in arguing that China's three-year average FERPs were not "used" in its Supporting Tables, and must therefore be ignored when calculating Current AMS. China's FERPs appear in Rev.3 as the three-year average of external references prices during China's 1996-1998 base period. Moreover, in calculating Base AMS, China used the data for the external reference prices for each of the three years of its 1996-1998 base period. Specifically, for each year of the 1996-1998 base period, China used the external reference price from the year at issue. Thus, the U.S. allegation that "China did not 'use' these data points (or methodologies) in the calculation of its market price support"[47] is unavailing.

117. Indeed, China's approach is consistent with the need to use constituent data and methodology for the calculation of both *Base* (Total) AMS and *Current* (Total) AMS. China calculated Base AMS using annual 1996-1998 external reference prices. It continues to calculate *Current* AMS using FERPs that reflect the average of those *same* external reference prices. This ensures consistency as China's FERPs are *fixed* and serve as external reference prices situated in the 1996-1998 base period.

b. The appropriate applied administered prices

118. The dictionary meaning of an "administered price" refers to a price "determined not by market forces but by administrative action".[48] The dictionary meaning of "applied" includes "brought to bear, made effective, acting at a point or place".[49] Thus, the AAP refers to the price, as set or established by a government, at which a Member effectively provides market price support for the producers of a basic agricultural product. Similarly, the United States observed that an AAP must be "known and discernible", and that it is a "price set or established by a government and …, as such, *distinguishable from a prevailing market price*".[50]

119. The requirement for a comparison between the AAP and the FERP means that "both the FERP and the AAP must be calculated at an equivalent stage of processing or converted accordingly".[51] As paragraphs 8 and 9 of Annex 3 require the FERP to be *fixed* – limiting permissible adjustment to those for quality differences – any adjustment to make the required price/product comparison must be made to the AAP. Thus, the United States errs in adjusting the FERP. Instead, as China has demonstrated that relevant adjustments must be made to the AAP and the amount of eligible production. China addresses the Parties' debate regarding the appropriate conversion factor in the context of identifying the basic agricultural product, below.

c. The appropriate methodology for determining eligible production

120. Under paragraph 8 of Annex 3, calculating AMS from market price support requires that the difference between the FERP and the AAP be multiplied by the quantity of eligible production. In the case of China's market price support for wheat and rice, the methodology to determine that amount is included as a constituent methodology in its Supporting Tables. Specifically, in calculating Base AMS for wheat and rice, China determined "eligible production" as the "amount purchased".

[47] *See* United States, response to Panel Question 79, para. 136.

[48] Oxford English Dictionary, OED Online, "administered, adj.", available at: http://www.oed.com/view/Entry/2532? (last viewed 26 October 2017), **(Exhibit CHN-60)**.

[49] Oxford English Dictionary, OED Online, "applied, adj.", available at: http://www.oed.com/view/Entry/9713? (last viewed 26 October 2017), **(Exhibit CHN-61)**.

[50] United States, first written submission, para. 97 (emphasis added).

[51] Panel Report, *Korea – Beef*, para. 828.

121. By way of background, Rev.3 records the "amount purchased" methodology as having been used for both market price support measures that China maintained during the base period for wheat and rice. Specifically, it explains that "*eligible production* for State Procurement Price" refers to "*the amount purchased* by state-owned enterprises from farmers at state procurement price for the food security purpose", and that "*eligible production* for Protective Price" refers to "*the amount purchased* by state-owned enterprises from farmers at protective price in order to protect farmer's income".[52] Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used this methodology for the determination of the amount of eligible production. Throughout the 14 working party meetings and numerous informal consultations, there is no record of any WTO Member disputing this methodology. Instead, the use of purchased amounts to determine eligible production is part of the custom-made package that China and all Members agreed to as part of China's "terms of accession".

122. Contrary to the erroneous U.S. argument, China's methodology for the determination of "eligible production" is not only of historical interest since it was applied to the measures that existed during the 1996-1998 base period. Instead, it remains relevant as a constituent methodology under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* for the calculation of China's Current AMS and Current Total AMS from market price support for wheat and rice. Moreover, and contrary to the U.S. assertions, it is a constituent *methodology* because it sets out a method for the determination of eligible production that applies consistently across the two different market price support measures that China maintained at the time for wheat and rice. Thus, and contrary to the U.S. assertions, it was not tied to, and applicable for, only those specific measures.

123. The U.S. error in concluding that China's constituent methodology in Rev.3 may be ignored results in the U.S. reliance on solely the dictionary definition of the term "eligible". For that, the United States points to the findings of Appellate Body in *Korea – Beef*, arguing on that basis that "eligible" refers to the total amount of production in the geographic area where a market price support measure operates.

124. The United States errs. Exclusive reliance on an undefined term in Annex 3 could only be warranted in situations in which there is no relevant constituent data and methodology for the product at issue. That was precisely the situation in *Korea – Beef*, where Korea's Schedule did not contain relevant constituent data and methodology for beef. By contrast, market price support for wheat and rice was included in China's calculation of its Base Total AMS, and there are relevant constituent data and methodology. Indeed, unlike the situation in *Korea – Beef*, the constituent data and methodology incorporated in China's Supporting Tables contains a specific methodology for the determination of the amount of eligible production for the products at issue.

125. In these circumstances, the Panel must consider the text in paragraph 8 and China's constituent methodology, relevant context and the object and purpose of the treaty. Adopting this approach, WTO panels and the Appellate Body consistently look *beyond* a few words considered in isolation in one provision, and consider relevant context and the object and purpose of the treaty to arrive at a meaning that may qualify or depart from the literal meaning of those few words used, when considered alone.

126. Indeed, unlike the United States' interpretative approach (which is based solely on the text of paragraph 8 and ignores all other elements of the interpretative exercise), China's interpretation is arrived at by appropriately considering, in a holistic and harmonious manner, all elements of the interpretive exercise under Article 31 of the *Vienna Convention – i.e.*, all applicable text, the context and the object and purpose of the *Agreement on Agriculture*.

127. To begin, paragraph 8 refers to "the quantity of production eligible to receive the applied administered price". As the Appellate Body held in *Korea – Beef*, the dictionary meaning of "eligible" is "fit or entitled to be chosen".[53] To recall, in that dispute, the Appellate Body focused its interpretation on the dictionary meaning of the term "eligible", because Korea had no constituent data and methodology for beef. Thus, where there is no further relevant text or context – and in particular in the absence of relevant constituent data and methodology – "eligible" production may be determined based on production that is "fit or entitled to be chosen". It is against that legal

[52] WT/ACC/CHN/38/Rev.3, note 19.
[53] Appellate Body Report, *Korea – Beef*, para. 122.

standard then that the specific facts surrounding the measure at issue must be assessed.

128. Thus, the United States misunderstands the Appellate Body in *Korea – Beef*. Contrary to the U.S. assertions, the Appellate Body did not find that, where a Member's market price support measures do not declare any quantity of production as "eligible" to receive the applied administered price, the default "interpretation" requires use of "total production" as "eligible production", when calculating market price support under paragraph 8 of Annex 3. Instead, the legal standard in the absence of any relevant constituent data and methodology continues to be production that is "fit or entitled to be chosen".

129. In the circumstances of this dispute, the Panel must also take into account China's constituent methodology in Rev.3, determining the amount of "eligible production" as "the amount purchased". China has established that, contrary to the U.S. position, a holistic and harmonious interpretation of (i) paragraph 8 of Annex 3 and (ii) the constituent data and methodology in Rev.3 is possible. Indeed, paragraph 8 does not prescribe in detail how "eligible production" must be identified, and does not specify a singular methodology for doing so.

130. China's interpretation that eligible production for its market price support for wheat and rice must be determined based on "the amount purchased" flows, in particular, from the context and object and purpose of the *Agreement on Agriculture*, which require consistency in the calculation of Base (Total) AMS and Current (Total) AMS – *i.e.*, a proper apples-to-apples comparison in assessing compliance with China's domestic support reduction commitments. Indeed, and contrary to the U.S. assertion, China's interpretation of "eligible production" ensures that China is held to the domestic support reduction commitments that it agreed with the Membership, and recorded in its Accession Protocol.

131. In short, and as China has explained in detail, considering all the elements of the interpretative exercise – *i.e.*, the texts and context of Articles 1(a) and 1(h), as well as paragraphs 5 and 8 of Annex 3, and, China's constituent methodology in Rev.3, and in light of their context and the object and purpose of the *Agreement on Agriculture* – the proper interpretation of the methodology for the determination of the amount of "eligible production" for China's market price support for wheat and rice is "amount purchased". Thus, when calculating AMS from China's market price support for wheat and rice, it is necessary to apply a methodology for determining eligible production based on the "amount purchased".

132. The United States also sought to support its arguments for a methodology to determine "eligible production" as "total production" based on alleged market effects of market price support measures. Yet, the United States finally recognized that the *Agreement on Agriculture* does not "seek[] to counter any negative effects of the provision of support".[54] This confirms China's position that the calculation of AMS from market price support is not linked to, and does not measure, the "effects" of such measures. Indeed, reading an "effects" test into the rules on the calculation of a Member's AMS would be inconsistent with the *Agreement's* definition of AMS as a measure of a Member's "annual level of support, *expressed in monetary terms*" under Article 1(a).

d. The relevant basic agricultural products

133. For each calculation of Current AMS, it is necessary to identify the relevant basic agricultural product, for which that calculation must be undertaken. The United States argues that, pursuant to paragraph 7 of Annex 3, AMS must be calculated at the "point of first sale" of an *agricultural commodity – i.e.*, for the product that leaves the farm.

134. Yet, as China has explained, Article 1(b) and paragraph 7 of Annex 3 require AMS to be calculated for "the *product as close as practicable* to the point of first sale *as specified in a Member's Schedule and in the related supporting material*".[55] Thus, as the United States accepts elsewhere, Article 1(b) of the *Agreement on Agriculture* defines the basic agricultural product, for which AMS is to be calculated, by reference to a Member's Supporting Tables, as included in its Schedule. There is no requirement that the "basic agricultural product" "specified" in a Member's Supporting Tables is the product at the beginning of the processing chain, as sold at the point of first sale. Rather, that product is simply as specified in a Member's Supporting Tables, and may be processed. It is that

[54] United States, second written submission, para. 25.
[55] Emphasis added.

product, for which data need to be sourced as close as practicable to the point of its first sale.

135. In these proceedings, issues regarding the identification of the relevant basic agricultural product have arisen principally in the context of rice. The United States erroneously calculated Current AMS for each of *paddy* indica rice and *paddy* japonica rice. By contrast, China's Supporting Tables in Rev.3 identify the basic agricultural rice products as *milled* indica rice and *milled* japonica rice. Specifically, for both types of rice, China's FERPs in Rev.3 are expressed in terms of HS10063000 – *i.e.*, "semi-milled or wholly milled rice, whether or not polished or glazed". Similarly, China's Base AMS in Supporting Table DS:5 was calculated for *milled* indica rice and *milled* japonica rice. Pursuant to Articles 1(b) and paragraph 7 of Annex 3, China's Current AMS must, therefore, similarly be calculated on the basis of *milled* indica rice and *milled* japonica rice.

136. As noted, where certain variables for the calculation of AMS from market price support are reported for a form of processing other than that of the basic agricultural product, these variables need to be converted to represent the basic agricultural product. Relevant conversion rates may be included in a Member's constituent data and methodology in their Supporting Tables.

137. As relevant to these proceedings, China's AAPs and amounts of eligible production are reported in terms of *paddy* rice. To convert these price and volume data into *milled* rice equivalents, China's Supporting Tables in Rev.3 used a single 70% conversion rate, which is derived from volume-based data. As constituent data, the Panel should apply this same conversion rate. This conversion rate is, moreover, reasonable, appropriate, and consistent with an objective assessment of the facts. It reflects a milling rate applicable between paddy rice and milled rice and is acknowledged and accepted, including by the OECD and the USDA. Use of a volume-based conversion rate is self-evidently reasonable and appropriate for a volume-based conversion, such as for the amount of eligible production. Use of that same conversion rate is also reasonable and appropriate for the price-based conversion for the AAP, where precise data is unavailable, as the United States accepts. Indeed, the volume/quantity effect of further processing rice is the predominant factor affecting the price of rice at different levels of processing.

138. By contrast, the United States uses a 60% price conversion rate for its conversion of FERPs into *paddy* rice data. It derived this conversion rate from a ratio between (i) the retail price for *paddy* rice and (ii) the price of *polished* rice in the Chinese retail market. Using polished rice, the United States selected the most processed product, with the highest price, among the varieties of rice falling under HS10063000, thereby distorting the applicable conversion rate. The U.S. proposed conversion rate is further inappropriate, because it adjusts not only the level of processing, but also the level of trade of the data concerned.

139. In sum, the Panel should use the 70% conversion rate included in China's constituent data and methodology to convert data on the AAP and the eligible production, and to ensure that both data are expressed at the equivalent level of processing as the rice FERPs in Rev.3.

e. China's de minimis level

140. Under paragraph 235 of China's Working Party Report, which is incorporated in China's Accession Protocol, China is entitled to a *de minimis* level of 8.5% of the total value of production for each basic agricultural product, instead of the 10% that apply for other developing Members under Article 6.4 of the *Agreement on Agriculture*. Thus, as long as China's product-specific domestic support for a basic agricultural product is equivalent to, or less than, 8.5% of the total value of production of that product, China is not required to include such support in its Current Total AMS under Articles 3.2 and 6.3 of the *Agreement*, and complies with its domestic support reduction commitments, including under Article 7.2(b).

f. Total value of production of a basic agricultural product

141. China's *de minimis* assessment requires calculating AMS as a percentage of the total value of production for the basis agricultural product at issue. As noted above, pursuant to Article 1(b), the relevant basic agricultural product is identified in a Member's Supporting Tables. Paragraph 7 of Annex 3 further provides that "AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned". Similarly, the total value of production of the basic agricultural product must be calculated "as close as practicable to the point of first sale" of the

product concerned. Thus, the total value of production for wheat and rice should be calculated by multiplying the total amount of wheat, *milled* indica rice and *milled* japonica rice produced in China with the producer price for these products, determined as the weighted average of market prices and government administered prices. This approach is consistent with the manner in which total value of production is determined in Rev.3.

3. In case the Panel finds a conflict, the Accession Protocol, including Rev.3, prevails over the *Agreement on Agriculture*

142. If the Panel were to disagree that a harmonious interpretation of Annex 3 and China's constituent data and methodology in Rev.3 is possible, and were to find a conflict for any of the data or methodologies to be used, China has explained that its constituent data and methodology in Rev.3 prevail to the extent of that conflict. To recall, China's constituent data and methodology in Rev.3 are part of its Accession Protocol and, thus, the Marrakesh Agreement. Accordingly, when resolving a conflict between China's constituent data and methodology in Rev.3 and the provisions of the *Agreement on Agriculture*, the applicable conflict rule is that in Article XVI:3 of the Marrakesh Agreement. Article XVI:3 provides as follows: "In the event of a conflict between a provision of this Agreement [*i.e.*, the Marrakesh Agreement] and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict". Accordingly, in the event of a conflict, Rev.3 would prevail over the *Agreement on Agriculture*, to the extent of that conflict.

143. The United States recognizes that application of this conflict rule means that precedence must be given to the Accession Protocol. Indeed, it properly relies on the same mechanism to support its argument that the applicable *de minimis* support level for the calculation of China's Current Total AMS is 8.5%, rather than the 10% otherwise applicable under Article 6.4(b) of the *Agreement on Agriculture*. According to the United States, this result flows from paragraph 235 of China's Working Party Report, as included in China's Accession Protocol, which prevails to the extent of its conflict with Article 6.4(b).

144. China further rebutted all three alleged conflict rules that the United States considers apply so as to displace China's constituent data and methodology in Rev.3. First, China explained that the alleged hierarchy in Article 1(a)(ii) of the *Agreement on Agriculture* does not exist, and that, in any event, Article 1(a)(ii) does not constitute a conflict rule. Second, China explained that Article 21.1 of the *Agreement on Agriculture* is applicable only to conflicts between the GATT 1994 and the *Agreement on Agriculture*. It does not apply in case of conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*. For later-acceded Members, Article XVI:3 of the Marrakesh Agreement, as a higher level conflict rule, takes priority over any other conflict rule in the covered agreements. Indeed, to the extent that a conflict rule in a Multilateral Trade Agreement, such as Article 21.1, were to suggest a different conflict resolution from that dictated by Article XVI:3, that rule would itself be in conflict with Article XVI:3, which would prevail. Third and finally, China explained that, likewise, the case law from *EC – Sugar* regarding conflicts between a Schedule and a covered agreement does not apply in case of a conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*.

4. Conclusion

145. In sum, either through a holistic and harmonious interpretation, or on the basis of the applicable conflict rule, the Panel must recognize the role of China's constituent data and methodology, and use them, as identified above, in the calculation of China's Current (Total) AMS for wheat and rice.

C. China's AMS calculation for market price support for wheat and rice

1. China's domestic support for wheat for 2012-2016 is within its 8.5 percent *de minimis* commitment level

146. Having identified the legal errors in the U.S. approach to calculating AMS from market price support for wheat, provided under the MPP for wheat, China then set out the accurate calculations. Specifically, in its AMS calculations, China used the appropriate *1996-1998* FERP for wheat, as included in Rev.3, rather than the flawed FERP used by the United States, based on 1986-1988 data.

Moreover, like the United States, China sourced the AAP for wheat from the annual wheat MPP measures for each of the years 2012-2016. Finally, and again consistent with Rev.3, China used as the amount of eligible production the amount of wheat that was actually purchased under the MPP program in each of years 2012-2016, instead of the, legally incorrect, total amount of wheat production in the MPP provinces, as used by the United States.

147. China demonstrated that its AMS from market price support for wheat in each of these years was less than 8.5% of the total value of wheat production in China. Specifically, China's product-specific AMS from market price support for wheat, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, is 3.02%, 1.54%, 5.51%, 4.54%, and 6.56, respectively.[56] Each of these values is below the *de minimis* level of 8.5% of the total value of China's wheat production. Thus, China's market price support for wheat is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

2. China's domestic support for indica rice and japonica rice for 2012-2016 is within its 8.5 percent *de minimis* commitment level

148. As explained above, the United States advanced an incorrect interpretative approach to the identification of many of the relevant elements of the calculation of AMS from market price support for indica rice and japonica rice. Accordingly, the United States' AMS calculations are seriously flawed, reflecting the flawed legal bases on which they are built.

149. To begin, the United States calculated AMS for the wrong basic agricultural rice product – *i.e.*, for *paddy* indica rice and *paddy* japonica rice. Yet, a proper interpretation of Articles 1(b) and paragraph 7 of Annex 3, along with Rev.3, compels the conclusion that, for China, AMS for rice must be calculated for each of *milled* indica rice and *milled* japonica rice. Accordingly, the Panel should rely on China's AMS calculations for these products.

150. Correcting for further U.S. errors, China calculated AMS using the appropriate *1996-1998* FERPs for *milled* indica rice and *milled* japonica rice, as included in Rev.3. These FERPs replace the flawed FERPs used by the United States, which are, erroneously, converted into *paddy* indica rice and *paddy* japonica rice, and based on *1986-1988* data, rather than data from China's 1996-1998 base period. Like the United States, China sourced the AAP for paddy indica rice and paddy japonica rice from the annual MPP indica rice and japonica rice measures for each of the years 2012-2016. However, China converted these values into *milled* indica rice and *milled* japonica rice values, using the appropriate 70% conversion rate. Finally, and consistent with Rev.3, China used as the amount of eligible production the amount of indica rice and japonica rice that was actually purchased under the MPP programs in each of years 2012-2016, instead of the total amount of indica rice and japonica rice production in the MPP provinces, as used by the United States. Again, China converted the amount of *paddy* indica rice and *paddy* japonica rice purchased into *milled* indica rice and japonica rice equivalents, using the appropriate 70% conversion rate.

151. On the basis of the appropriate calculations, China's product-specific AMS from market price support for *milled indica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.02%, 5.52%, 4.08%, 3.91%, and 3.00%, respectively.[57] Moreover, China's product-specific AMS from market price support for *milled japonica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.99%, 4.74%, 6.95%, 7.84% and 8.26, respectively.[58] Each of these values is below the *de minimis* level of 8.5% of the total value of China's milled indica rice and milled japonica rice production. Thus, China's market price support for indica rice and japonica rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

152. In the alternative, China also calculated AMS from market price support for indica rice and japonica rice combined. China's product-specific AMS from market price support for rice, as a percentage of the total value of rice production in 2012, 2013, 2014, 2015, and 2016 is 0.36%, 4.87%, 4.82%, 5.00%, and 4.55%, respectively.[59] Each of these values is below the *de minimis* level of 8.5% of the total value of China's rice production. Again, China's market price support for

[56] China, first written submission, para. 273 (Table 22) and Exhibit CHN-88 (Table 22).
[57] China, first written submission, para. 261 (Table 17) and Exhibit CHN-88 (Table 17).
[58] China, first written submission, para. 261 (Table 18) and Exhibit CHN-88 (Table 18).
[59] China, first written submission, para. 264 (Table 19) and Exhibit CHN-88 (Table 19).

rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

VI. CONCLUSION AND REQUEST FOR RELIEF

153. For the summarized above, and set out in detail in its submissions, China requests the Panel to find as follows:

- For wheat, indica rice and japonica rice, China requests the Panel to find that the United States has failed to establish that China provided domestic support in excess of its *de minimis* commitment level of 8.5% of the value of production, and therefore has failed to establish that China acted inconsistently with Articles 3.2, 6.3, and 7.2(b) of the *Agreement on Agriculture*.

- For corn, since the TPRP expired in 2016, and thus before panel establishment, China requests that the Panel find that this measure falls outside the Panel's terms of reference.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia's submissions in this dispute have focused on the relationship between a Member's Schedule and obligations in WTO Agreements; as well as the legal interpretation of key provisions in the Agreement on Agriculture, including the methodology used to calculate market price support, the meaning of "production eligible" in Annex 3, and the reference period for the "fixed external reference price".

2. In Australia's view, the Agreement on Agriculture provides clear and precise direction for calculating market price support, including the reference period to be used for a fixed external reference price. In *Korea – Beef*,[1] the WTO Appellate Body has also provided clear and unambiguous guidance on what is meant by the term "production eligible" in Annex 3.

3. As relevant context for interpreting the provisions at issue, it is important to recall that the Agreement on Agriculture provides "a framework for the long-term reform of agricultural trade and domestic policies, with the aim of leading to fairer competition and a less distorted sector".[2] The Agreement not only places *rules* and *limitations* on domestic agricultural support by Members, it also aspires to *reduce* domestic support. The Agreement on Agriculture recognises Members' long term objective of "provid[ing] for substantive progressive *reductions* in agricultural support"[3] and contains commitments by Members to continue reforms to *reduce* support.[4]

4. Accordingly, Australia is of the view that any outcome in this dispute that would effectively allow Members, including China, to *increase* levels of domestic support would be in direct conflict with the object and purpose of the Agreement on Agriculture.

II. Relationship between a Member's Schedule and obligations in WTO Agreements

5. Much of China's legal argument in this dispute centres on the status of WT/ACC/CHN/38/Rev.3 (hereafter referred to as 'Rev. 3') a document included as a reference under the heading "Relevant Supporting Tables and document" in Part IV of China's Schedule. China argues that the document should be considered treaty level text.

6. In Australia's view, Rev. 3 is not in itself a Schedule, it is merely a reference in a Schedule which provides an illustration of domestic support in China at the time of its accession.

7. Even if the Panel were to take a different view on the status of Rev.3, Australia observes that Members cannot use Schedules to unilaterally modify their obligations under the WTO Agreements.[5] In particular, information in a document referenced in one Member's Schedule cannot be used to override legal obligations in the Agreement on Agriculture.

III. Calculating market price support

8. In Australia's view, the Agreement on Agriculture provides clear and unequivocal guidance for calculating market price support. It provides that AMS should be "calculated *in accordance with* the provisions of Annex 3" and "*taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of a Member's Schedule".

9. In this dispute, the US has put forward its estimations of China's market price support using the provisions of Annex 3, whereas China argues that the "constituent data and methodology" in Rev. 3 is the more relevant authority. While both of these sources are *valid* for calculating market

[1] Appellate Body Report, *Korea – Various Measures on Beef*.
[2] WTO, "Agriculture gateway" available online at https://www.wto.org/english/tratop_e/agric_e/agric_e.htm, accessed on 19 January 2018.
[3] Preamble, Agreement on Agriculture.
[4] Article 20, Agreement on Agriculture.
[5] Appellate Body Report, *EC – Export Subsidies on Sugar,* paras. 212-213 and 220.

price support, the Agreement on Agriculture makes clear that their status under the WTO Agreement is not *equal*.

10. The phrase "in accordance with" indicates that the calculation of domestic support *must comply with* the provisions of Annex 3. By contrast, the phrase "taking into account" requires that *consideration be given* to a Member's Schedule, without specifying the weight such consideration should be accorded. This interpretation has been affirmed by the Appellate Body in *Korea – Various Measures on Beef*.[6]

11. In Australia's view, two points are therefore clear: (i) reference to Annex 3 is mandatory; and (ii) the relevance of a Member's Schedule is of a lesser nature and, at the very least, subsidiary to Annex 3. As such, there is no direct obligation on the Panel to *accept* or *apply* the constituent data and methodology in China's Schedule. The Panel is only required to "*consider*" it. However, in any event, the requirements of Annex 3 override any methodology contained in a Member's Schedule (or contained in a reference within a Member's Schedule).

IV. The meaning of "production eligible"

12. In Australia's view, the Appellate Body's findings in *Korea – Beef* make clear that, absent exceptional circumstances, "production eligible" is all production *"fit or entitled"* to be purchased and will generally equate to total production.[7]

13. Accordingly, in applying the text of the WTO Agreement to the facts in this dispute, Australia considers that the relevant values to be used for "eligible production" in the calculation for market price support should be the value of total production of each given commodity in the identified provinces.

14. China submits that this definition of "production eligible" does not apply and the Panel should instead rely on the definition of "eligible production" in Rev. 3.[8] The Rev. 3 definition limits eligible production to "the amount *purchased* by state-owned enterprises from farmers".

15. China's alternative definition of "eligible production" – which seeks to limit eligible production to the amount *actually purchased* – cannot be accepted for three reasons.

16. First, the definition does not reflect the economic impact of market price support programs, which provides producers with the "assurance that their products can be marketed at least at the support price".[9] Given this assurance, the price distorting effect of market price support takes place the moment a product is *eligible* to be purchased by the government.

17. Second, the definition is contrary to the terms of Annex 3 of the Agreement on Agriculture, as interpreted and applied by the Appellate Body in *Korea –Beef*.[10] Since a Member cannot use its Schedule to reduce or modify commitments under WTO Agreements, China's proposed alternative definition is not legally valid – even if Rev. 3 had the status of a Schedule.

18. Third, limiting eligible production to the actual amount purchased would permit Members to underreport the level of domestic support they provide and, as a consequence, effectively allow Members to *increase* such support. Any outcome that would lead to increased levels of domestic support would undermine the object and purpose of the Agreement on Agriculture to not only *limit* domestic support but also to *reduce* it.

V. The reference period for the "fixed external reference price"

[6] Appellate Body Report, *Korea – Various Measures on Beef*, para. 111.

[7] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120. The Panel in *Korea – Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea – Various Measures on Beef*, para. 827.

[8] China's first written submission, paras. 196-203.

[9] Panel Report, *Korea – Various Measures on Beef*, para. 827.

[10] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120. The Panel in *Korea – Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea – Various Measures on Beef*, para. 827.

19. The methodology for calculating market price support is set out in paragraph 8 of Annex 3 of the Agreement on Agriculture. One of the figures to be inserted into the formula is the "fixed external reference price".

20. Paragraph 9 of Annex 3 specifies that "the fixed external reference price shall be based on the years 1986 to 1988". The text in the Agreement on Agriculture is mandatory and unambiguous.

21. In this dispute, China asserts that an alternative reference period – namely, the years 1996-1998 – applies in calculating China's market price support. China argues this on the basis that: this is the period used in Rev. 3 (the supporting material referenced in China's Schedule); WTO Members accepted this period as one of the terms of China's accession to the WTO; this approach would be in accordance with a technical note by the WTO Secretariat for acceding Members[11]; and all accessions since the establishment of the WTO in 1995 have used base periods other than 1986-88.

22. In Australia's view, the text of the Agreement is clear. The Agreement on Agriculture specifies that the fixed external reference price *shall* be based on the years 1986 to 1988; and neither China's Accession Protocol nor its Working Party Report specifies that an alternative reference period to 1986-88 must be used. While the documents and practice put forward by China in support of an alternative reference period highlight key *policy* considerations, they do not constitute a *legal* basis on which to apply a later reference period.

23. In Australia's view, if WTO Members determine that a new reference period should apply for acceding Members this should be provided for explicitly – either through amendment of the Agreement on Agriculture or express provision in relevant Accession Protocols.

[11] (WT/ACC/4, pp3-4) which provides that "in order to calculate a product-specific AMS for these products, relevant tables from Supporting Tables DS:5 and DS:7 should be used" and that an "external reference price" is to be calculated from data "normally for each of the last three years"

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S CLAIM REGARDING THE TPRP CORN MEASURE (ARTICLES 6.2 AND 7.1 OF THE DSU)

1. China argues that the Temporary Purchase and Reserve Policy ("TPRP") for corn, which was applied between 2012 and 2015, does not constitute a "measure at issue" under Article 6.2 of the DSU because the TPRP had been terminated by the time the United States requested the establishment of the Panel, and would thus fall outside the Panel's terms of reference under Article 7.1 of the DSU[1].

2. Brazil understands, however, that if a measure no longer in effect is still relevant to the dispute, the Panel should exercise caution before deciding to exclude it from its terms of reference. An excessively restrictive interpretation of the measures considered to be within the terms of reference could undermine the ability of the dispute settlement system to bring about a positive solution to the dispute, in conformity with Article 3.7 of the DSU. Brazil notes that, in the present case, the parties do not seem to dispute that the TPRP was in force between 2012 and 2015 and that such market price support subsidy was used to calculate China's Current Total AMS for those years. Thus, Brazil understands that the TPRP should be considered by the Panel for a proper assessment of this case.

II. CALCULATION METHODOLOGY ON CHINA'S DOMESTIC PRICE SUPPORT MEASURES FOR WHEAT, CORN AND RICE

3. In Brazil's view, the Panel in the present dispute is challenged to set a proper balance regarding the relation between Annex 3 and a Member's "data and methodology", on the basis of Article 1(a)(ii) of the Agreement on Agriculture (AoA). Brazil considers that the analysis by the Panel concerning the calculation of China's market price support should focus separately on the concepts of FERP and eligible production.

4. With regard to the FERP, Brazil recalls China's argument about the principle set out in WTO Document WT/ACC/4 (a WTO Secretariat note providing guidance for acceding Members), which provides that "[i]n order to calculate a product-specific AMS, an 'external reference price' is to be calculated from data 'normally for each of the last three years'"[2]. As China accession to the WTO occurred in 2001, the base period of 1996-1998 instead of 1986-1988, as disposed in paragraph 9 of Annex 3 of the AoA, could be considered acceptable. Besides, utilizing the most recent data available for the calculation of the FERP consists of a common practice among Members that have joined the WTO after 1995.

5. About the calculation of eligible production, China claims its constituent data and methodology set out in its schedule should be "taken into account". In accordance with that document, China's eligible production for wheat and rice should be "the amount purchased" by state owned enterprises. This proposed methodology, however, conflicts with the established definition of "eligible production", which comprises the whole set of production that could potentially be purchased by the government as defined by the Member's municipal rules. In that sense, the Appellate Body found in *Korea – Beef* that "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 has a different meaning in ordinary usage than "production actually purchased"[3].

6. Brazil notes that any disposition on a Member's data and methodology regarding eligible production cannot modify its obligations under the AoA, in line with the findings by the Appellate

[1] China's First Written Submission, para. 323.
[2] China's First Written Submission, para. 48.
[3] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

Body in *EC – Export Subsidies on Sugar*: "we find no provision under the AoA that authorizes Members to depart, in their Schedules, from their obligations under that Agreement"[4].

7. In conclusion, Brazil views that, in order to maintain a harmonious interpretation of the covered agreements, the concept of "eligible production" cannot have different meanings depending on the Members' Schedules. A Member could, however, insert elements of clarification in its data and methodology regarding its understanding of "eligible production" only to the extent it is commensurate with the established definition of said term.

[4] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada presents its views on three issues in this case. First, it is an accepted custom that acceding Members use more recent reference years than 1986 to 1988. Second, for the definition of eligible production, the text of the Agreement on Agriculture must take priority over the supporting tables where there is any contradiction. Third, the proper methodology for determining eligible production for market price support is to use the amount "fit or entitled" to be purchased, which can be the total production of the product if no limitations are imposed.

II. ACCEDING MEMBERS MAY USE A MORE RECENT REFERENCE PERIOD FOR THE FIXED EXTERNAL REFERENCE PRICE

2. While paragraph 9 of Annex 3 of the Agreement on Agriculture refers to the years 1986 to 1988 for the reference period, this does not prevent Members acceding to the WTO under Article XII of the Marrakesh Agreement from using a more recent base period. It is fair and reasonable to use more recent and up-to-date information for acceding countries, as data going back to 1986 may not be available, and acceding countries may not have been formally independent or even existed at that time. Members have consistently and uniformly applied the practice of Article XII acceding Members using the three most recent years in reporting the fixed external reference price. As such, this constitutes an international custom in the context of Paragraph 9 of Annex 3.

3. Article 3.2 of the DSU requires the DSB to resolve disputes in accordance with the customary rules of interpretation of public international law. The Appellate Body has on numerous occasions recognized the relevance and application of customary international law in WTO dispute settlement[1].

4. In this instance, the WTO Membership has applied a consistent practice over the course of thirty-six post-Uruguay Round accessions. Every acceding Member that reported data in its constituent data and methodology used a more recent base period with respect to Supporting Table DS:5. In all of the supporting tables of all acceding Members, the only acceding Member that ever used a 1986 to 1988 base period in its supporting tables was Bulgaria, which is explained by the fact that it acceded so soon after entry into force of the WTO Agreement as the second newly acceding Member. However, even Bulgaria provided data up to 1990 where it was available for one table. The first acceding Member, Ecuador, did not report any support programs and therefore had no data in supporting tables.

5. Thus, in every instance of accession following the conclusion of the Uruguay Round over more than 20 years, there has been a consistent and uniform practice among Members. All Members were aware of this practice and consented to it, or at the very least acquiesced to this practice. During the thirty-six accession processes, no Member has objected to the use of the three most recent reference years.

6. Moreover, the recognition by the Membership that this practice was required under the Agreement on Agriculture is demonstrated by Members' consistent use of the Technical Note by the *Secretariat on Information to be Provided on Domestic Support and Export Subsidies in Agriculture* in accessions[2]. Members have consistently referred to this document during accession processes and the requirement to use the three most recent years of available data and concluded thirty-six accessions with no stated objection to the use of those reference years. The uniform, consistent use of the three most recent years for the relevant reference period following the conclusion of the

[1] See e.g. Appellate Body reports, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 301-316; *EC – Hormones*, paras. 120-125; *US – Line Pipe*, para. 259.

[2] Information to be provided on Domestic Support and Export Subsidies in Agriculture – Technical Note by the Secretariat, WT/ACC/4.

Uruguay Round shows that Members considered this practice to be consistent with the Agreement on Agriculture.

7. During the Uruguay Round itself, the years 1986 to 1988 were chosen as three recent representative years in order for the fixed external reference price to reflect the actual extent of support provided as accurately as possible[3]. The continued use of the three most recent years by acceding Members represents the application of that same principle.

8. This consistent and uniform practice of every WTO Member in every accession process, accompanied with the *opinio juris* of Members that this practice was consistent with the Agreement on Agriculture, shows that Members have adopted a customary rule of using the three most recent years for the reference period for acceding Members. This custom applies only with respect to Members acceding under Article XII of the Marrakesh Agreement. Paragraph 9 of Annex 3 remains applicable to original Members under Article XI of the Marrakesh Agreement.

III. THE TEXT OF THE AGREEMENT ON ELIGIBLE PRODUCTION TAKES PRIORITY OVER CHINA'S SUPPORTING TABLES

9. There is an apparent contradiction between the supporting tables and the text of Annex 3 in respect of China's use of production actually purchased in China's supporting tables rather than the quantity of production eligible to receive the applied administered price as required under paragraph 8 of Annex 3. However, in this case there is no consistent, uniform practice that implies that all WTO Members intended to allow for China to employ a methodology for calculating eligible production in a manner different from Annex 3 and different from the requirements for other WTO Members. As such, there is no customary norm with respect to eligible production that could modify the obligation under the Agreement on Agriculture.

10. The text of Article 1(a) of the Agreement on Agriculture sets out the meaning of Aggregate Measurement of Support or AMS. Article 1(a)(ii) specifies that support shall be calculated in accordance with Annex 3, which is an integral part of the Agreement. It also provides that the constituent data and methodology incorporated by reference into the Member's schedule must be taken into account when calculating AMS. In defining Total AMS, Article 1(h)(ii) also makes reference to the constituent data and methodology, stating that Total AMS shall be calculated "in accordance with" the Agreement on Agriculture and the constituent data and methodology.

11. The Appellate Body in *Korea – Various Measures on Beef* examined these provisions and found that the relationship between Annex 3 and the constituent data and methodology was one of an "apparent hierarchy"[4]. It found that the provisions of Annex 3 take priority over the constituent data and methodology used in a Member's supporting tables[5].

12. In Canada's view, this approach is reasonable. Annex 3 of the Agreement on Agriculture provides an explicit requirement for how market price support is to be calculated. As per Article 21.2, Annex 3 is an integral part of the Agreement on Agriculture. The supporting material incorporated by reference in Part IV of a Member's Schedule, however, is not an integral part of the Agreement.

13. A Member cannot use its Schedule to reduce its commitments nor to depart from its obligations under the Agreement[6]. Logically, this principle also applies to supporting tables incorporated by reference into a Member's Schedule. China, like all other WTO members, must abide by the terms of the treaty, including paragraph 8 of Annex 3. Upon its accession to the WTO, China agreed to comply with the entire WTO Agreement, including the Agreement on Agriculture. China cannot reduce its obligations or commitments under the Agreement on Agriculture or any other agreement through the supporting tables incorporated by reference into its Schedule. As the Appellate Body found in *EC – Export Subsidies on Sugar*, "we find no provision under the Agreement on Agriculture that authorizes Members to depart, in their Schedules, from their obligations under that Agreement."[7] Thus, China cannot justify departing from its obligations under Annex 3 of the

[3] See e.g. GATT documents MTN.GNG/NG5/TG/W/12, para. 11 (Exhibit CAN-1); MTN.GNG/NG5/TG/W/15, para. 11 (Exhibit CAN-2); and MTN.GNG/NG5/TG/W/16, para. 4 (Exhibit CAN-3).

[4] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 112-113.

[5] Appellate Body Report, *Korea – Various Measures on Beef*, para. 114.

[6] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 217-220.

[7] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220.

Agreement on Agriculture on the basis of an endnote to a supporting table incorporated by reference into its Schedule.

14. China's commitment in paragraph 238 of the Working Party Report to provide "further methodological clarification" to its supporting tables ("Rev.3") supports these tables must be of a lower precedence than Annex 3 of the Agreement on Agriculture. A document that is expressly acknowledged as containing methodological issues that require further clarification cannot have the same status as binding treaty text. Paragraph 238 of the Working Party Report notes China's commitment that the issues requiring methodological clarification "would be addressed in the context of China's notification obligations under the Agreement on Agriculture". However, any subsequent unilateral notification made by China on applicable methodology cannot have the power to modify China's treaty obligations. Therefore, contrary to China's argument that Rev.3 must be considered as having equal value to the treaty text[8], the reference to Rev.3 in paragraph 238 of the Working Party Report clearly supports Canada's argument that this should not be the case.

15. Of course, Members are required to take the supporting tables into account, as required by Article 1(a)(ii). However, in the event of a contradiction between the Agreement and the supporting material incorporated by reference in a Member's Schedule, the text of the Agreement must take priority.

IV. ELIGIBLE PRODUCTION MEANS PRODUCTION "FIT OR ENTITLED" TO RECEIVE THE APPLIED ADMINISTERED PRICE

16. The definition of eligible production must be the same for all Members. The provisions of the covered agreements must be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously[9]. Having an interpretation that would allow for a different definition of eligible production for China alone would be inconsistent with this principle. Moreover, it would result in an inconsistent application of market price support disciplines.

17. In examining the meaning of eligible production, the Appellate Body in *Korea – Various Measures on Beef* found the following: under paragraph 8 of Annex 3, "production eligible to receive the applied administered price" means "production that is 'fit or entitled' to be purchased rather than production that was actually purchased"[10]. "Production actually purchased may often be less than eligible production"[11].

18. While in *Korea – Various Measures on Beef*, the measure in question applied to a fixed, announced quantity of production that was eligible for purchase, the findings and principles from that case remain applicable in the present dispute. The object and purpose of the Agreement on Agriculture includes the objective of providing for "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time resulting in correcting and preventing restrictions and distortions in world agricultural markets"[12]. The panel in *Korea – Various Measures on Beef* noted specifically that the purpose of disciplining the provision of market price support related to "the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that measure borne by government"[13].

19. This is because the distortive effect produced by a market price support measure occurs when the applied administered price is announced. The existence of a minimum support price provides economic guarantees to producers, which affects the market. The effect continues to exist as long as producers of the product benefit from the assurance of the minimum support price. As a result, the quantity of production actually purchased may have no relevance to these distortive effects.

20. This is why the reasoning in *Korea – Various Measures on Beef* is applicable to the present dispute. If, as in the facts of *Korea – Various Measures on Beef*, a government limits the quantity of production eligible for purchase at the applied administered price to a fixed quantity, then the distortion of the market for that product will be limited in scope to that quantity. As the Appellate

[8] China's first written submission, paras. 104-158.
[9] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.
[10] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.
[11] Ibid.
[12] Agreement on Agriculture, Preambular para. 3.
[13] Panel Report, *Korea – Various Measures on Beef*, para. 827.

Body found, "in establishing its program for future market price support, a government is able to define and limit 'eligible' production"[14]. However, if the government does not set *any* limitations, then the signal to the market is that *all* production is "fit or entitled" to receive the applied administered price. Thus it is reasonable and appropriate in this situation that *all* production should be reported as eligible production.

21. The Appellate Body's interpretation of eligible production, meaning production "fit or entitled" to be purchased, allows for a logical and harmonious application to different factual circumstances of any given market price support program. The facts related to the particular measure establish how eligible production is determined. For example, if there is an announcement that the administered price will be applied only to a given quantity, then that defines the production eligible to receive that price for the purposes of paragraph 8 of Annex 3. As another example, if the measure operates only in certain regions, then the quantity of eligible production may be limited to production in those regions.

22. However, the amount of grain used by farmers for their own consumption is irrelevant to the quantity of production eligible to receive the applied administered price. Farmers consuming their own products are not isolated from the market or from the market price support program. If there are no limitations on the amount of production eligible to receive the applied administered price, then the government has distorted the market in a way that affects all production. If the applied administered price is high enough, a farm household could sell part or all of their production and then buy cheaper alternative foodstuffs. The fact that some production might not have been sold or that some farmers might consume some of their own production is irrelevant to the distortions caused by the market price support program, which is what the Membership negotiated these provisions of the Agreement on Agriculture to discipline.

23. The quantity of production consumed by farmers is thus not independent of the price policy. The quantity of eligible production is about *production*. There are no exceptions in the Agreement on Agriculture for production that is not sold, because all of the production can *potentially* be sold. The text of the Agreement is clear: all production eligible to receive the applied administered price shall be included in the calculation for market price support. All production eligible to receive the applied administered price is covered by the market price support program regardless of how or whether it is sold, and therefore it must be considered in calculating the product-specific AMS.

24. The disciplines in the Agreement on Agriculture seek to reduce and prevent restrictions and distortions in agricultural markets. The legal test is not whether an individual farmer would personally benefit from a market price support program by selling at a higher price. The question is whether the production is affected by the market distortions caused by the market price support program. The Agreement on Agriculture requires that all eligible production be considered in the calculation because the price distortions affect the entire market if no limit is imposed on the amount of production that is eligible to receive the applied administered price.

25. The question in each case is how to determine "the quantity of production eligible to receive the applied administered price". To ensure a harmonious interpretation of the covered agreements vis-à-vis each WTO Member, the core elements of eligible production need to be respected when it is being applied to particular measures, in accordance with the principles elaborated upon in *Korea – Various Measures on Beef*. Namely, the quantity of production must be considered "fit or entitled" to receive the applied administered price.

26. The reasoning and findings in *Korea – Various Measures on Beef* are consistent with the text of the Agreement on Agriculture and its object and purpose. Therefore, the Panel must examine how China has defined and limited eligible production in its market price support measures. If there are no limitations on purchases of a particular product, then the total quantity of production must be considered "fit or entitled" to receive the applied administered price, regardless of the actual purchases made by the government.

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

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1. The government of Colombia intervened in this case given its systemic interest in the application of several provisions of the Agreement on Agriculture. Therefore, Colombia provided its views on some of the legal claims discussed before the Panel.

2. While not taking a final position on the specific merits of this case, Colombia acknowledged the importance of the issues discussed for the clarification of the obligations under the Agreement on Agriculture presented by the Parties to the dispute. In particular, with respect to the issue of the methodology for calculating the amount of "market price support", Colombia encourage this Panel to carefully review the scope and clarify two important concepts: (i) the "fixed external reference price"; and, (ii) "eligible production", with respect to Paragraphs 9 and 8 of Annex 3 of the aforementioned Agreement.

3. With respect to the former, Colombia submitted that the "fixed external reference price" for China should be based on its Accession Protocol documented in the Working Party on the Accession of China, Document WT/ACC/CHN/38/Rev.3. of 19 July 2001. The average contained therein reflects the prices of 1996-98. Although this reference period may deviate from that specified in Paragraph 9 of Annex 3, reliance thereon appears relevant in the case at hand.

4. The principle of *lex specialis* prescribes that the law governing a specific subject matter takes precedence over a more general provision. Here, the conflict between China's Accession Protocol, constituting an integral part of its WTO obligations, and Paragraph 9 of Annex 3 may be resolved by reference to this principle. It appears that China's obligations concerning the establishment of a "fixed external reference price" would, thus, be governed by the more specific rule, its Accession Protocol. Furthermore, from a practical perspective, it is not feasible to necessarily rely on the period specified in Paragraph 9 concerning acceding members as opposed to original WTO members. Data for the period of 1986-88 may be may be incomplete or inaccessible for national authorities. Therefore, in the case of China, the reference period should be that of 1996-98.

5. Furthermore, Colombia submitted that the appropriate "fixed external reference price" should be adjusted taking into account the prices of goods at the same level of trade. Under Paragraph 9, this is contained within the wider formulation that "[t]he fixed external reference price may be adjusted for quality differences as necessary." In the case of rice, if the "applied administered price" was provided for unmilled rice by China, then the "fixed external reference price" should be adjusted to "unmilled rice", even though the accession document (Rev 3) does not reflect this difference.

6. Lastly, with respect the concept of "eligible production", Colombia submitted that, in the absence of a pre-announced limit on the quantity to be bought, all production is eligible to receive the applied administered price. In the case of China "eligible production", thus, includes all selected provinces where the measures of support are available.

7. The Panel's findings in *Korea-Various Measures on Beef* paragraph 827 support this approach. In that case it was stated that "eligible production (…) should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production that is actually purchased by a governmental agency may be relatively small or even nil". The Appellate Body confirmed this approach in Paragraph 120 of its Report. Hence, eligible production in the case at hand includes all the production fit to receive the support, whether actually bought or not, whether consumed on-farm or not.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL ISSUES

Ecuador considers that the specific calculations for certain products should be applicable to all equally, for example in the case of products that are not included in the Part IV of a Member's Schedule. The Appellate Body or the Panel reports which have been prepared after analysis and investigation, provide recommendations that should be taken into account as a kind of opinio juris and in turn be a guide on similar cases, therefore the panel in the case Korea - Beef has already ruled that the calculation method of Annex 3 should be applied only in cases where the product is not in Part IV of the Members' agenda.

2 QUANTITY OF ELIGIBLE PRODUCTION (QEP)

Ecuador considers that if a requirement was imposed on China to accede to the WTO and it was complied with, it is perfectly valid and applicable. The requirement imposed on China is what determines if it's eligible production on the basis of the quantity of production compared with a market price support measure, which is detailed in document WT / ACC / CHN / 38 / Rev.3, issued in September 2001. If China had the faculty to establish these measurement parameters, they should be taken into account at the time of calculations and not those parameters which are applicable to other countries. China must follow its obligations adopted as agreed while it was negotiating it's accession.

The issue that a certain amount of grain production is for it's own consumption is relevant since taking into account the size and the population of China it can be interpreted that the levels of measurement of their total production will be on a larger scale at the moment of making the calculation. However, by stating that a percentage does not go to the market, the situation may change because the calculations are not directly proportional when talking about the total production of grains versus grains destined for trade and for the market.

3 FIXED EXTERNAL REFERENCE PRICE (FERP)

In the document of Accession of China to the WTO WT / ACC / CHN / 38 / Rev.3 it is observed that the calculations are made in-the period 1996-1998, the accession document was approved, besides being used for references in other cases, so it is tacitly understood that the period that is used in the cases of China is the one mentioned above. It must be considered as well that no other Member and also Ecuador has expressed opposition to the period of time for reference, especially for those members who acceded to the WTO after 1995.

4 CALCULATIONS AND METHODOLOGY

The legal status of the document WT/ACC/CHIN/38/rev.3, when incorporated in the original list submitted by China as a list of concessions acquires the same legal status as the lists annexed to the its Accession Protocol.

Regarding the tables presented, Ecuador considers that they are not incompatible with the regulations, statements and of the Agreement on Agriculture. Therefore, the tables presented cannot modify the commitments made, nor can they be used as lists to modify agreements.

The *Agreement of Agriculture* on its Annex 3 determines that the market price support should be:

- Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS

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

Therefore, any methodology and trade measure under the Agreement of Agriculture should be based on Annex 3 definitions and calculations.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE RELATIONSHIP BETWEEN THE MEMBERS' SCHEDULES AND THE AOA

1. The commitments limiting subsidization undertaken by Members pursuant to the AoA are included in Part IV of each Member's Schedule and are an integral part of the GATT 1994. The Appellate Body addressed comprehensively the issue of the relationship between the commitments on subsidization included in a Member's Schedule and the provisions of the AoA in *EC – Export Subsidies on Sugar*. There, the Appellate Body confirmed that, just like under the GATT 1994, there is "no provision under the Agreement on Agriculture that authorizes Members to depart in their Schedules from their obligations under that Agreement"[1].

2. Therefoire, the domestic support commitments specified in the Schedules (including the supporting documents incorporated by reference in the Schedules, such as WT/AC/CHN/38/Rev. 3) must be in conformity with the provisions of the AoA and do not allow Members to depart from the obligations imposed by those provisions.

II. WHAT IS THE RELEVANT PERIOD FOR CALCULATING THE FIXED EXTERNAL REFERENCE PRICE?

3. The reference in paragraph 9 of Annex 3 to the years 1986-1988 does not prevent those Members acceding to the WTO after its establishment from specifying in their Schedules a more recent base period, agreed by all Members as part of the accession process. The calculation of the current AMS must "take into account"/be "in accordance with" such more recent base period, as required by Article 1(a)(ii) and Article 1(h)(ii) of the AoA. The reference in paragraph 9 of Annex 3 to the years 1986-1988 reflects the fact that this was the period which had been used by the participants in the Uruguay Round negotiations for the purposes of quantifying their base AMS in accordance with the Modalities Paper. For that reason, the requirement to use that period is addressed primarily to the original Members of the WTO.

4. In the EU's view, it would be unreasonable to require that the accession terms of new Members continue to be negotiated on the basis of data which, by now, are more than 30 years old. Moreover, the use of more recent data does not "reduce" *per se* the commitments of the newly acceded Members under the AoA, unlike in *EC – Export Subsidies on Sugar*. As observed by the Appellate Body in *Korea – Beef*, there is no reason why the FERP for a more recent period should be necessarily higher than the FERP for the years 1986-1989. Moreover, in the case of China, the same period has been used consistently for calculating both the applied administered price and the FERP for the base AMS and the FERP used in the current AMS.

5. For those reasons, the reference to the years 1986-1989 in paragraph 9 of Annex 3 must be understood dynamically. In other words, where a newly acceded Member has used a more recent period for calculating the base AMS in its Schedule, as agreed during the accession process, the current AMS must be based on that period, provided that such period has the same basic characteristics, in respect of that Member, as the years 1986-1988, in respect of the original Members. In particular, that period should pre-date as closely as possible to the date of accession and be sufficiently representative. This interpretation of paragraph 9 of Annex 3 of the AoA is comforted by well-established WTO practice. As pointed out by China, the Schedules of each and every one of the thirty-six Members that have acceded to the WTO since the establishment of the WTO specify base periods other than 1986-88 for the purposes of Supporting Table DS:5.

III. WHAT IS THE RELEVANT "ELIGIBLE PRODUCTION"?

6. For the reasons explained by the United States and not contested by China, the ordinary meaning of 'eligible production' is all of the production entitled or permitted to receive the administrative price, regardless of the quantity actually purchased by the Government. That reading

[1] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220

is confirmed by the fact that the words "production eligible" are followed in paragraph 8 by the words "to receive … " and not by other terms that would point to the quantities actually purchased, such as "that received …" or "actually receiving …". That reading, moreover, reflects the *rationale* or purpose of market price support policies (or of the various arrangements that governments may put in place to provide market price support to producers of basic agricultural products), which is to maintain the price of the whole production of a certain product at a desired level.

7. The Appellate Body explicitly confirmed these findings of the Panel by stating that:

> We share the Panel's view that the words "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production actually purchased ". The ordinary meaning of "eligible" is "fit or entitled to be chosen". Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.[2]

8. In essence, since the notion of 'market price support' seeks to gauge the effects of a government policy measure on agricultural producers of a basic product and, as a matter of fact, these effects depend on the production that may be purchased at the administered price (and not solely or necessarily on the quantity actually purchased), it follows that the notion of 'eligible production' must refer to production that is "fit or entitled" to be purchased, rather than production that was actually purchased,

9. As regards China's argument that it is entitled to calculate market price support by using actual purchases, because it used actual purchases in its calculations in the tables of supporting material in its Schedule, the European Union would note, first of all, that the meaning of footnote 19 to Rev. 3 is by no means unequivocal. More importantly, as indicated in paragraphs 237 and 238 of the Working Party Report on the Accession of China some Members raised concerns with regards to the Supporting Tables in Rev.3. Furthermore, if a Member were authorised to calculate market price support basing itself merely on the actual production purchased by the Government, it would almost systematically underestimate its AMS. Indeed, it is only where the quantity actually purchased tallies with the eligible production that that Member would not underestimate its AMS, whereas in all other frequent situations China's approach would allow a Member to underestimate its AMS, even though the support it provides benefits the marketable production as a whole.

10. It follows that China's line of defence would allow a Member not simply to clarify and qualify the commitments that it has undertaken at the moment of accession but rather "to reduce or conflict" with the obligations already imposed on it by the provisions of the AoA, and notably by paragraph 8 of Annex 3, as they result from their ordinary meaning, *rationale* and previous case law.

[2] Appellate Body Report, *Korea – Beef*, para. 120.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. India welcomes the opportunity to present its views to the Panel on certain systemic issues arising for interpretation under the Agreement on Agriculture ("AoA"). India's views in this submission are limited to the issue of assessment of "*production eligible to receive the applied administrative price"*, for the purposes of calculation of Aggregate Measurement of Support ("AMS") in the AoA.

2. India notes that the First Written Submission of the United States as well as the Third Party Written Submissions by Australia, Brazil, Canada and EU have relied on *Korea-Beef* to state that "production eligible to receive the applied administered price" has a different meaning in ordinary usage from "production actually purchased"[1] and that "eligible production" within the meaning of Annex 3, Paragraph 8 of the AoA is production which is fit or entitled to receive the administered price, whether or not the production was actually purchased.[2] Australia has further stated that *'production eligible' is all production 'fit or entitled' to be purchased and will generally equate to total production*."[3]

3. In India's view, these submissions, while relying on the findings of *Korea-Beef,* have not considered the facts and circumstances of that dispute, which provide context and rationale for the findings. The findings of the panel and the Appellate Body in *Korea-Beef* were specific to a circumstance when there was a declaration by Korea of an eligible quantity for purchase at the support price, which was held to be the "eligible production". The panel and the Appellate Body considered this declared quantity to constitute "eligible production", which was different from what Korea eventually procured under the facts of that dispute. In its reasoning, the Appellate Body relied on the ordinary meaning of "eligible" and explained that this referred to what is "fit or entitled to be chosen", and further that "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. This was in the context of the announcement made by Korea in the facts of that dispute, to purchase a specified quantity of cattle for the 1997 calendar year.[4]

4. In India's third-party submission, India has explained that there would be situations wherein there is no specification of any quantity; but a mere listing of crops that a government may or may not procure. Not all countries, for instance, pre-determine the quantity of production that may be procured, since this will be based on the needs and resources available, which may vary across time and geographical areas. The quantity eligible for procurement is therefore determined only at the time when such procurement is required and made.

5. Being a complex and sensitive issue, the manner in which to administer domestic support for agriculture is not always determined at the federal level in all countries, but often at the regional/ sub-federal levels, leading to wide variations in procurement models. Sometimes Members simply list crops/products, and not the quantities that would be procured, thereby leaving determination of quantity eligible for procurement to the time of such procurement, which may be done at the sub-federal level. There are also instances when numerous products are listed in a Member's listing of price support, but these may not be procured at all. In such situations, it is simply illogical to state that all quantities of the specific product that is produced, will be eligible for procurement. Such a proposition is absurd and unrealistic, since it may be virtually impossible to extend the price support to the entire production.

6. Australia argues that *"the price distorting effect of a product takes place the moment it is eligible to be purchased"* which is why *"any consideration of the product distorting effect of market*

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[1] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (AB), para. 120.

[2] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (Panel), para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").

[3] Para 22, Third Party Submission of Australia

[4] *Korea-Beef* (AB), para. 121

support must be taken at that point."[5] Clearly, in situations where the total production is never procured, and there is no expectation even among producers that the total production will ever be procured, there is no question of any price distorting effect arising from the market support till the time that procurement actually takes place. It would be highly incongruous to suggest, then, that the mere listing of crops would cause a price-distorting effect equivalent to the procurement of the entire quantity produced!

7. In India's view, it is crucial to recognise the multiplicity of political and economic realities underlying agricultural policies of various countries, especially developing countries, instead of assuming that there is one immutable "economic reality" that should inform all asessments of domestic support requirements.

8. The interpretation of "eligible production" in Korea-Beef cannot therefore be extended to be applied in the abstract in cases when there is no declaration of quantity of production to be procured. Such a reasoning is not only devoid of any basis in actual procurement practices of countries but could lead to an anomalous result of considering all production of a particular product in a Member's territory as "eligible production"- a proposition that can only be considered as fanciful for most Members.

9. India reiterates that the term "eligible production" necessitates the specification of a *quantity* that is eligible. The absence of any specification of a quantity for procurement cannot mean that the entire production of the listed crop would constitute 'eligible production'. Rather, the reality of the situation would be that what is eligible for procurement is determined *only at the time that a procurement needs to be made*.

10. In addition, it is significant to underscore that the term used in the AOA is '**production** eligible to receive the applied administered price' and not '**crops/ products** eligible to receive the applied administered price'. A mere listing of crops, which, if considered as eligible for procurement, would receive the applied administered price, cannot be interpreted to mean that *all production* of such crops would be eligible for procurement.

11. In conclusion, India would like to state that the reasoning in *Korea-Beef* should be viewed in light of the very specific context in which it arose – one where there is a difference between the Korean Government's declaration of an "intent" and its actual procurement of beef. The identification of such "intent" in other cases may require application of a more context-specific methodology where there is no declaration of intent by specifying eligibility in quantitative terms. It is important to take into consideration context-specific evidence such as the actual procurement practices of Members, and their notifications under Article 18 of the AoA. It follows that if there is no conflict between any declared quantity and *actual* procurement, and the price support is in effect available only for the quantities procured, then it follows that only what is *actually* procured is *entitled* to the price support.

12. India requests the panel to carefully scrutinize and consider the interpretive issues under the AoA which would benefit from further clarification in light of the present dispute.

[5] Para 28, Third Party Submission of Australia

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. Indonesia exercises its rights to participate as a third party in this case due to its systemic concern on the interpretation and application of the provisions of the covered agreement at issue in this dispute, in particular Paragraph 9 Annex 3 and Paragraph 8 Annex 3 of the Agreement on Agriculture ("**AoA**").

II. INTERPRETATION AND APPLICATION OF "FIXED EXTERNAL REFERENCE PRICE"

2. As indicated in Indonesia's third party statement, Indonesia highlights the interpretive issue of the terms which will clarify the obligation of WTO Member according to the AoA. In this case, Indonesia pays attention to the terms of: (1) "Fixed External Reference Price" as set out in the Paragraph 9 Annex 3; and (2) "Eligible Production" as indicated through Paragraph 8 of Annex 3 of the AoA.

3. In order to calculate the market price support provided by particular Member, the Annex 3 Paragraph 8 of the AoA provides that "market price support shall be calculated using the gap between a **fixed external reference price** and the applied administered price multiplied by the **quantity of production eligible** to receive the applied administered price....".

4. Consequently, the reference to the fixed external reference price provided under the Paragraph 9 of Annex 3 states that "the fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. **The fixed external reference price may be adjusted for quality differences as necessary**."

5. In their written submission, China has argued that the United States has erroneously referred to the fixed external reference price based on the prices of 1986-1988. Indonesia took note that China has relied on its Part IV of China's Schedule's notification (Rev.3) that the reference shall be the 1996-98 average of FOB and CIF prices given as export and import unit values.[1]

6. Indonesia is on the view that it is necessary for the Panel to analyze and pay to attention the methodology to execute the adjustability nature of the fixed external reference price as set out under the last sentence of Paragraph 9 of Annex 3. Consequently, Panel should also determine the conditions in order to deem the adjustment as "necessary" for the reference of Fixed External Reference Price. The interpretation itself will be the key element to examine the arguments provided by the Parties in this case.

III. INTERPRETATION AND APPLICATION OF "ELIGIBLE PRODUCTION"

7. In the calculation of Market Price Support, the term of "production eligible to receive the applied administered price" has also been the key component. Meanwhile, the AoA itself does not provide any particular definition to constitute the term. As the result of the uncertainty, the interpretation of the term has been varied among Members according to their own policies.

8. Indonesia highlighted the arguments of the United States derived from the Korea-Beef case on the methodology to interpret "eligible production". In the Appellate Body report, it is stated that the "quantity of production eligible to receive the applied administered price" was different from the "production actually purchased". In this regard, Indonesia requested for the Panel to put caution on applying the jurisprudence on this present case.

9. Indonesia would like to draw the attention on the nature of rulings made by the Appellate Body during the Beef case. In the case, the Korean government has declared specific quantities of the

[1] Communication from China. Working Party on the Accession of China, WT/ACC/CHN/38/Rev.3. 19 July 2001.

products to be purchased. Meanwhile, this may not be the case for all WTO Members. There are some conditions in which the government cannot make the declaration of quantity to be purchased at earlier stage due to certain reasons. On the other hand, WTO Members, especially those with large production and geographical coverage, may face a circumstance where the amount of production eligible for purchase in an administered price does not cover the total production of the product.

10. In this regard, Indonesia supported the argument in Paragraph 8 of India's Third Party Submission that "the interpretation of 'eligible production' in Korea-Beef cannot therefore be applied as a 'one size fits all' approach even in cases there is no declaration of quantity of production to be procured."

11. Accordingly, Indonesia requested the Panel to examine the interpretation of the aforesaid term, in order to clarify the WTO Members' obligation under the Paragraph 8 of Annex 3 of the AoA.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ORAL STATEMENT

A. The Status of Support Tables Referenced in China's Schedules

1. In this dispute, the United States and China appear to have a difference in opinion regarding the methodology for calculating China's aggregate measurement of support (or "AMS"), based on their different views on the relationship between the text of the *Agreement on Agriculture* and the document referenced to as "Relevant Support Tables" in China's Schedules. This difference in views raises the issue of the proper status of this document as "the constituent data and methodology" referenced to in China's Schedule.[1]

2. As a general matter, it is Japan's view that a Member's Accession Protocol, including the Working Party Report and Schedules, is "an integral part of the WTO Agreement"[2] and as such their meaning must be discerned and ascertained in accordance with "customary rules of interpretation of public international law."[3]

3. The Appellate Body in *EU – Computer Equipment* recognized that the underlying principle that accords this status to these Member's Schedules is that, "while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members."[4] Thus the terms contained in "the constituent data and methodology" incorporated in a Member's Schedule may be viewed as representing the agreement of *all* Members.

4. In the present case, however, there may not have been an agreement among all Members regarding the supporting tables that formed the basis of the commitments contained in China's Schedules. Specifically, as the EU pointed out in its third party submission, the Working Party Report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to policy classification," and that China would address this clarification in the context of its notification obligations under the *Agreement on Agriculture*.[5] It is not clear whether such clarification was made, or if it was, whether all Members concerned have agreed on the clarification offered by China.

B. Whether the Temporary Purchase and reserve Policy for Corn Forms Part of the Specific Measure at Issue that Falls Within the Terms of Reference

5. China contends that the TPRP for corn for the period 2012 to 2015 was terminated and replaced with another measure as of 2016, and therefore, is not a "measure at issue" under Article 6.2 of the DSU.[6] Accordingly, it is China's view that the measure falls outside of the Panel's terms of reference. The United States, on the other hand, argues that the TPRP is not itself a specific measure at issue, but rather, a series of legal instruments issued annually through which China provides domestic support to corn producers.[7] Moreover, according to the United States, the retrospective nature of agricultural domestic support commitments necessitates an examination of the level of domestic support provided over a period of time.[8] Thus, the Parties appear to disagree on whether the TPRP is itself a "measure" that was not in existence at the time of panel establishment, or part of a series of legal instruments that form the basis for the measure at issue.

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[1] China's First Written Submission, para. 90 (referencing U.S. First Written Submission, para. 90).
[2] Accession of the People's Republic of China, WT/L/432, p. 2.
[3] DSU Article 3.2
[4] Appellate Body Report, *EC – Computer Equipment*, para. 109 (emphasis in original); *see also* China's First Written Submission, para. 155.
[5] EU Third Party Written Submission, para. 37 and footnote 23.
[6] China's First Written Submission, paras. 286-289 and 325-342.
[7] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 15.
[8] Comments of the United States on China's Challenge to the Panel's Terms of Reference, paras. 8-10 and 17.

6. As noted by China, as a general rule, "the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel."[9]

7. However, Japan agrees with the United States that the specific nature of the obligations in question may affect the way that a measure's consistency with those obligations is analyzed. For example, in *India – Agricultural Products*, the Appellate Body observed that "the obligation in Article 6.1 [of the SPS Agreement] does not apply only at one specific point in time … but is, instead, an ongoing one." Given this ongoing nature of the obligation, the Appellate Body continued, SPS measures are required to "be adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics of the relevant areas."[10] Thus, when the obligation is one of an ongoing nature, an analysis of a measure's consistency with the obligations would necessarily require a dynamic – rather than a static – inquiry as to whether the measure has been "adjusted over time" to ensure the measure's "continued suitability."

8. Even where a legal instrument ceases to exist, an examination of the legal instrument may still be relevant to the resolution of the matter in issue in the dispute.[11] For example, the United States notes that "[t]he nature of domestic support commitments, including the need for data on the amount and value of production for purposes of calculating market-price support and the applicable *de minimis* exemption, necessitates a backward-looking analysis of data covering a previous time period."[12]

9. Thus, it is appropriate to examine the substance of the TPRP to the extent that the operation of the TPRP affects measures at issue which were identified in the United States' panel request.

II. RESPONSE TO PANEL QUESTIONS

10. First, as regards Annex 3 of the Agreement on Agriculture, Japan considers that "constituent data and methodology" is important in clarifying the methodology used to calculate product-specific AMS. However, as articulated in Article 21 of the Agreement on Agriculture, "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]." Therefore, Japan considers that the methodology set out in Annex 3 should not be regarded as only a fall back option.

11. Second, as regards the methodology for determining eligible production, paragraph 238 of the Working Party report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to the policy classification." Therefore, all WTO Members did not agree with all elements of the methodology and policy classifications. As eligible production is not explicitly excluded from this category, Japan considers it proper to include eligible production as part of the methodology and policy classification that required further clarification.

12. Third, Annex 3 of the Agreement on Agriculture provides a single definition of "eligible production" as "production eligible to receive the applied administered price." Moreover, the methodology for calculating market price support set out in paragraph 8 of Annex 3 does not differ for each country. Therefore, Japan does not believe that the definition of "eligible production" differs by country.

13. However, whether production consumed on the farm should be included in the calculation of the quantity of eligible production may differ based on the circumstances of each country, because the manner in which the numerical value of market price support is captured may be different for each country, given the differences in product characteristics, circumstances surrounding production and distribution, and the policy design of market price support in each country.

14. Fourth, when it comes to China's Schedule of Concessions, i.e. the legal instrument "Schedule CLII – People's Republic of China", "an agreed terms of China's accession to the WTO" is what is

[9] China's First Written Submission, para. 327 and footnote 340 (referencing Appellate Body Report, *EC-Chicken Cuts*, para. 156).

[10] Appellate Body Report*, India – Agricultural Products*, para.5.132.

[11] *See* China's First Written Submission para. 330 and footnote 343 (referencing Panel Report, *Argentina – Textiles and Apparel*, para. 6.13 and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19).

[12] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 2.

stated in Part II, paragraph 1, of China's Accession Protocol, which reads "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994". In other words, by having been annexed to China's Accession Protocol, China's Schedule was made "an integral part of" the GATT 1994. Assuming that the supporting table referenced in Section I of Part IV of China's Schedule which contains the use of the 1996 – 1998 period is a part of China's Schedule, then, the question is whether the terms of the GATT 1994 can prevail over, or modify, the terms of the Agreement on Agriculture.

15. The relationship between the Agreement on Agriculture and other multilateral trade agreements including the GATT 1994 is expressly regulated by Article 21 of the Agreement on Agriculture, which provides "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex A to the WTO Agreement shall apply subject to the provisions of this Agreement". As the Appellate Body explained,

> Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts.[13]

16. Thus, contrary to what China appears to posit, the supporting table referenced in China's Schedule cannot change, modify or replace the terms actually used in the relevant provisions of the Agreement on Agriculture, including the terms used in paragraph 9 of Annex 3.

17. This does not mean that the supporting tables referenced in a Member's Schedule have no interpretive value in ascertaining the meaning of provisions in the Agreement on Agriculture. Indeed, Article 1(a) (ii) of the Agreement of Agriculture expressly provides the AMS "during any year of the implementation period or thereafter" is "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables".

18. Japan further recalls that, in *Chile – Price Band System*, the Appellate Body stated that "[t]he Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the Vienna Convention."[14] Thus according to the Appellate Body, the scheduling activity or practice which "amounts to 'subsequent practice'" shall be taken into account, together with the context, in interpreting relevant provisions of covered agreements, including paragraph 9 of Annex 3. Japan notes, in this respect, that more than 30 accession Members have already used a base period other than 1986-1988, and it might be difficult for some new accession Members to obtain data from 1986-1988. Indeed, some countries were not in existence at that time.

19. Therefore, to the extent the use of a period other than 1986-1988 in the scheduling activity of newly acceding Members' Accession Protocols amounts to "subsequent practice" in the application of [Annex 3, paragraph 9, of the Agreement on Agriculture] which shows the common understanding of WTO Members, such practice is certainly relevant to the interpretation of that particular provision.[15]

[13] Appellate Body Report, *EC-Export Subsidies on Sugar*, para. 221.

[14] Appellate Body Report, *Chile-Price Band System*, para.272

[15] Paragraph 9 of Annex 3 provides "The fixed external reference price shall be *based on* the years 1986 to 1988 …". (emphasis added) Japan notes that, in interpreting Article 3 of the SPS Agreement, the Appellate Body observed "[a] thing is commonly said to be 'based on' another thing when the former 'stand' or is 'founded' or 'built' upon or 'is supported by' the latter" and "[a] measure … based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure." Appellate Body Report, *EC – Hormones*, para.163.

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KAZAKHSTAN*

Distinguished Chairman, Members of the Panel,

Kazakhstan appreciates the opportunity to express its view on certain aspect of systemic importance for Kazakhstan. In particular, we would like to present our view with respect to interpretation of accession terms of Members acceded to the WTO under Article XII of Marrakesh Agreement Establishing the World Trade Organization (hereinafter - Marrakesh Agreement) as applied to determination of base period for the purposes of calculation of market price support ((hereinafter - MPP), and specifically fixed external reference prices.

Article 3.2 of the Dispute Settlement Understanding (DSU) prescribes that the "covered agreements", i.e. WTO Agreements, should be clarified in accordance with the customary rules of interpretation of public international law. As we know, the customary rules of interpretation of public international law are codified in the relevant provisions of the *Vienna Convention on the Law of Treaties*[1] (hereinafter – "Vienna Convention"). We would like to turn the attention of the Panel to Article 30 of the Vienna Convention. Paragraph 2 of the Article stipulates that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. Article 30 sets out to resolve conflicts arising from successive treaties, i.e., an earlier and a later treaty both of which are in force. No distinction is made as to the types of treaties. Article 30 extends in its scope beyond the notion of conflicts and incompatibility by addressing more generally the rights and obligations of States parties to successive treaties relating to the same subject-matter and in particular the priority among them[2].

Kazakhstan considers that in the context of the obligations and commitments of China acceded under Article XII Marrakesh Agreement, the Accession Protocol encompassing *inter alia* Schedules of Tariff Concessions (hereinafter – Schedule) and Report of the Working Party on Accession of China to the WTO must be regarded as a later treaty while the Marrakesh Agreement itself with its Annexes, including Agreement on Agriculture, must be treated as an earlier treaty within the meaning of Article 30 Vienna Convention.

If the Panel agrees with this approach, two questions inevitably arise:

- What are the provisions of the two treaties, which could be found incompatible?
- Whether they are incompatible?

Kazakhstan further proposes its analysis in the context of determination of the base period for the purposes of calculation of MPP, including fixed external reference prices.

What are the provisions of the two treaties, which could be found incompatible?

Paragraph 9 Annex 3 of the Agreement on Agriculture prescribes that fixed external reference price shall be calculated based on the years of 1986 to 1988. Whereas in Part IV of China's Schedule, the fixed external reference price in calculation of MPP is based on the years of 1996 to 1998.

It is clear that there are two approaches contained in the documents pertaining to the same subject matter, i.e. China's agricultural domestic support commitments which could be found incompatible.

Whether they are incompatible?

After finding the two provisions, the most important question is whether they are incompatible? To answer this question we would like to turn the attention of the Panel to the ordinary meaning of the

* Kazakhstan requested that its oral statement be treated as its executive summary.
[1] Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
[2] Commentary on the 1969 Vienna Convention on the Law of Treaties, Mark E. Villiger, Brill Online Books and Journals, http://booksandjournals.brillonline.com/content/books/b9789004180796_036, page 402

word "incompatible". From the definitions suggested by online dictionaries[3] it can be drawn that the word "incompatible" implies that two or more things cannot coexist, i.e. cannot exist together or at the same time.

In the context of the present example, the question is whether the requirement to use fixed external prices based on 1986-1988, as required by Annex 3 of the Agreement on Agriculture, or those based on the years of 1996 to 1998, as applied in Part IV of China's Schedule. In order to be incompatible or to be incapable of coexisting, only one of these two parameters would be valid because of competing nature of their application.

Annex 3 explicitly points to the years of 1986 to 1988. This is straightforward. The question now is whether the WTO commitments of China stipulate that fixed external reference prices of 1996-1998 are equally valid to render period of 1986 to 1988 "incompatible".

With respect to this issue we would like to refer to the relevant case law developed by the WTO jurisprudence, in particular to the finding of the Panel in its Report "China — Measures Related to the Exportation of Various Raw Materials"[4] (hereinafter – "China - Raw Materials") and to the Report of the Appellate Body "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum" (hereinafter – "China - Rare Earth Metals")[5].

In "China — Raw Materials", in a finding not appealed by any party to the dispute, the Panel explained that the terms of accession protocols are integral parts of the WTO Agreement[6]:

> "Accession to the WTO is achieved through negotiation with other WTO Members. Pursuant to Article XII of the Marrakesh Agreement, accessions take place 'on terms to be agreed' between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents….
> WTO Members' accession protocols are considered to form integral parts of the WTO Agreement"[7].

The Appellate Body in "China - Rare Earth Metals" reaffirms the findings of the Panel:

> "In sum, Article XII:1 of the Marrakesh Agreement provides the *general* rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished on "terms" to be agreed between the acceding Member and the WTO, and its second sentence makes clear that such accession applies to the entire package of WTO rights and obligations, consisting of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto..."[8].

In both cases the adjudicators confirm that the accession package, i.e. Accession Protocol together with its Annexes shall be applied in its entirety forming integral parts of the WTO Agreement. Likewise, we assert that it cannot be true that one part of the accession terms applies and another part is not valid. In the context of this dispute, Part IV of China's Schedule indicates the level of its commitment with respect to Total Aggregate Measurement of Support (AMS). Part IV of China's Schedule refers to the document WT/ACC/CHN/38/Rev.3 (hereinafter – Rev.3). In this case, it is evident that the two base periods in Annex 3 of the Agreement on Agriculture and Part IV of China's Schedule are incompatible.

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[3] Online Oxford Dictionary: https://en.oxforddictionaries.com/definition/incompatible, Merriam-Webster Dictionary: https://www.merriam-webster.com/dictionary/incompatible

[4] Document WT/DS394/R, WT/DS395/R, WT/DS398/R of 5 July 2011.

[5] WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R of 7 August 2014.

[6] The explanation is drawn from the WTO Analytical Index — Guide to WTO Law and Practice: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm#articleXIIB1f

[7] Ibid para. 7.112

[8] Ibid para. 5.34

In the light of Article 30 of Vienna Convention and the logic of the WTO jurisprudence, WTO Members should find the base period for calculation of fixed external reference price of China in the same document, i.e. in Table DS:5 *"Product-Specific Aggregate Measurement of Support: Market Price Support"* of Rev. 3. Therefore, fixed external reference prices of China should be based on the years of 1996 to 1998.

In conclusion, Kazakhstan would like to call the attention of the Panel that the outcome of this dispute is of systemic importance and would affect the membership terms of more than 30 Members acceded under Article XII of Marrakesh Agreement since all these Members follow the same practice as China applies in its domestic support calculations, including Kazakhstan.

This concludes our statement.

Thank you!

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to present, as a third party in this dispute, the summary of its arguments that mostly relate to the issues concerning the determination of representative period used to calculate the fixed external reference price (FERP).

2. The Russian Federation would like to highlight the systemic nature of the issues raised in this dispute and their importance for those Members that acceded after the Uruguay Round with an AMS reduction commitment in their Schedules.

3. According to Article XII of the WTO Agreement "any State […] may accede to this Agreement, on terms to be agreed between it and the WTO". The terms of accession, contained in the Protocol of Accession, the Report of the Working Party, and the Schedules of commitments, including the Base Total AMS, constitute an integral part of the WTO Agreement.

4. During the accession process the same representative period is used to calculate the fixed external reference price, the level of market price support, product-specific AMS and the Base Total AMS. Such representative period, according to the WTO Secretariat[1], normally comprises the last three representative years. We would like to draw the attention of the Panel that the amount of the Base Total AMS depends on the level of market price support calculated during the accession process, and consequently on the fixed external reference price. It would be illogical and incoherent to first calculate the Base Total AMS using the last three representative years, and then, upon the accession and thereafter, to calculate Current Total AMS and market price support using another reference period. In such circumstances the amount of Current Total AMS cannot be compared with the amount of the Base Total AMS due to the fact that they were calculated on different terms and different basis. The situation of using different representative period to calculate the fixed external reference price, and as the result – Base Total AMS and Current Total AMS, could lead to the impairment of the right of a Member that acceded to the WTO after the Uruguay Round to provide the level of support within the agreed limits and based upon the terms it has agreed.

5. In its First Written Submission the United States claims that the fixed external reference price shall be based on the years 1986 to 1988 as it is set out in paragraph 9 of Annex 3 of the Agreement on Agriculture.[2]

6. In view of the Russian Federation the period of 1986 – 1988 referred to in paragraph 9 of Annex 3 of the Agreement on Agriculture was the basis for calculating fixed external reference price for the founding WTO Members due to the fact that this period was chosen during the Uruguay Round as the most recent representative period. For all Members (except one) that acceded to the WTO after 1995 the most recent representative period was the period other than 1986 – 1988 (for instance, for the Russian Federation this period was from 2006 to 2008, for China – from 1996 to 1998).

7. Article 31 of the Vienna Convention requires that the interpretation of a treaty shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". From the perspective of the Russian Federation, subsequent practice of calculating fixed external reference price demonstrates that all WTO Members during the accession processes agreed that for acceding Members the FERP could be based on the years other than 1986 to 1988. This is demonstrated by the supporting materials incorporated by reference in Part IV of Members' Schedules and, thereby, reflecting all WTO Members' agreement on all aspects of acceding Member's rights and obligations. Such subsequent practice is also reflected

[1] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014.

[2] The United States' First Written Submission, paras. 98, 113.

in the Technical Note of the WTO Secretariat on Procedures for Negotiations under Article XII[3], which says that the information on product-specific AMS measures, including the information on market price support, is normally used for each of *the last three years*. This document, as it was pointed out by the Secretariat, took into account the evolution of accession practices.[4] Notifications of the acceded WTO Members, including China, and review process within the work of the Committee on Agriculture on examination of those notifications also support this understanding.

8. Turning to practice, there were Members of the Working Party on the accession of the Russian Federation to the WTO (which consisted of 65 Members) that stated that the more recent reference period should be used to calculate the domestic support level as it is more adequate and statistically relevant. This common understanding was reflected throughout our accession process, *inter alia*, in some of the statements of the Working Party's Members. One Member of the Working Party expressed its view that "the base period used to establish commitments will need to be based on a recent three year period which reflects current agricultural support programs".[5] Moreover, other Member of the Working Party on the accession of the Russian Federation to the WTO said that "there is a general understanding that the Russian accession should be based on the methodology included in the WT/ACC/4 WTO document"[6] and that "it is intended that new Members initiate negotiations departing, at least, from figures based on volume and budgetary outlays related to the base period mentioned in the WT/ACC/4 WTO document"[7]. It should also be noted that in the document WT/ACC/4 the structure of methodology to calculate domestic support measure that affects the producer price implies that the fixed external reference price shall be provided for each of the last three years

9. The definition of Aggregate Measurement of Support set out in Article 1(a)(ii) of the Agreement on Agriculture clearly demonstrates that Annex 3 is not the only source for AMS calculation – "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" shall also be taken into account.

10. In the view of the Russian Federation, the logic used by the panel and the Appellate Body in *Korea – Various Measures on Beef* shows that if agricultural products were included in corresponding supporting materials incorporated in Member's Schedule, calculation of AMS shall be based not only on Annex 3 but also shall take into account "constituent data and methodology".[8] Since wheat and rice were included in China's supporting materials, the "constituent data and methodology" shall be considered in this dispute.

11. From the perspective of the Russian Federation, "constituent data and methodology" in this context refers to the period for calculation of the fixed external reference price. The Appellate Body in *Korea – Various Measures on Beef* examined the issue of determination of basic period for calculation of market price support for beef. According to the Appellate Body, since beef was not included in Korea's supporting materials, then the reference period for it shall be 1986 – 1988, and not 1989 – 1991 as for those agricultural products which were included in Korea's corresponding tables.[9] In a similar vein, since wheat and rice were included in China's supporting materials, the period of 1996 – 1998 shall be used to calculate the fixed external reference price for these products.[10]

12. Therefore, the Russian Federation believes that for Members acceded to the WTO after the Uruguay Round the basic period for fixed external reference price calculation should be the period

[3] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014, para. 15.

[4] Technical Note of the WTO Secretariat, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/4/Rev.1, 1 August 2014.

[5] WT/ACC/RUS/23/Add.1, p. 1.

[6] WT/ACC/RUS/17/Add.1, p. 13.

[7] WT/ACC/RUS/17/Add.1, p. 14.

[8] Panel Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 811-812, 830. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[9] Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[10] WT/ACC/CHN/38/Rev.3.

used in the tables of supporting materials incorporated by reference in Part IV of the Member's Schedule, rather than the period used in paragraph 9 of Annex 3 of the Agreement on Agriculture.

ANNEX D

RAW DATA

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RAW DATA

1.1. The following tables contain data for the products forming part of the United States' complaint, i.e. wheat, Indica rice, Japonica rice and corn, as presented by the parties[1], and revised in some cases by the Panel, where necessary.[2] This information is presented without prejudice to the Panel's findings in sections 7 and 8 of the Panel Report or of the calculations performed in tables 10-16 of the Panel Report.

1.1 Wheat

	Source	**Units**	**2012**	**2013**	**2014**	**2015**	**2016**[3]
Total national production	China	million tons	121.023	121.926	126.208	130.185	128.845
	US	million tons	121.024	121.926	126.208	130.185	-
Producer price	US/China	¥/ton	2,166.20	2,356.20	2,411.80	2,328.60	2,232.60
Production by province							
Hebei	US	million tons	13.377	13.872	14.299	14.350	14.333
Jiangsu	US	million tons	10.488	11.013	11.604	11.740	11.196
Anhui	US	million tons	12.940	13.320	13.936	14.110	13.859
Shandong	US	million tons	21.795	22.188	22.638	23.466	23.446
Henan	US	million tons	31.774	32.264	33.290	35.010	34.660
Hubei	US	million tons	3.708	4.168	4.216	4.209	4.282
Total	US	million tons	94.082	96.825	99.983	102.885	101.776
Out-of-grade percentage							
Hebei	China	percentage	0.0	1.0	0.0	0.0	0.0
Jiangsu	China	percentage	2.0	1.0	0.3	1.0	0.0
Anhui	China	percentage	1.0	0.0	0.0	1.7	0.0
Shandong	China	percentage	0.0	1.0	0.2	0.0	0.0
Henan	China	percentage	1.0	0.0	0.0	0.0	0.0
Hubei	China	percentage	8.0	0.0	0.0	0.0	0.0
AAP	US/China	¥/ton	2,040.00	2,240.00	2,360.00	2,360.00	2,360.00
1996-1998 FERP (c.i.f. price)	China	¥/ton	**1996-1998**			**Average 1996-1998**	
			1,885.00	1,629.60	1,579.80	1,698.13	
1986-1988 FERP (c.i.f. price)	US	¥/ton	431.11[4]				
Quantity procured under measures							
Hebei	China	million tons	0.774	0	0	0.591	3.1765
Jiangsu	China	million tons	5.319	3.61	6.708	5.474	4.0765
Anhui	China	million tons	4.126	2.9315	6.648	3.97	5.515

[1] See United States' response to Panel question No. 96, (Exhibit USA-106); China's response to Panel question No. 96, (Exhibit CHN-146).

[2] These revisions involved adjusting certain of the original figures presented by the parties to express them in a common unit (renminbi/ton and million tons), and to present quantities using the same number of decimal places (where useful).

[3] All 2016 data was provided by China.

[4] Only one value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016[3]
Shandong	China	million tons	1.769	0	0.032	1.242	3.109
Henan	China	million tons	9.815	0.698	10.423	8.948	12.1415
Hubei	China	million tons	1.369	0.939	1.534	0.559	0.492
Total amount procured	China	million tons	23.172	8.182	25.345	20.784	28.5105

1.2 Rice

	Source	Units	2012	2013	2014	2015	2016
Total national rice production	US/China	million tons	204.236	203.612	206.507	208.225	207.075
Total rice production in covered provinces	US/China	million tons	159.34	160.09	162.06	164.14	162.73

1.2.1 Japonica rice

	Source	Units	2012	2013	2014	2015	2016
Total national production	China	million tons	68.011	67.803	68.767	69.339	68.956
	US	million tons	64.539	64.341	65.256	65.760	-
Producer price	US/China	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20	2,935.40
FERP (f.o.b. prices - milled)	China	¥/ton	**1996-1998**			**Average 1996-1998**	
			3,682.90	2,862.10	3,326.90	3,290.63	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	546.62[5]				
Production by province							
Liaoning	US	million tons	5.078	5.069	4.515	4.677	-
Jilin	US	million tons	5.320	5.633	5.876	6.301	-
Heilongjiang	US	million tons	21.712	22.206	22.510	21.997	-
Jiangsu	US	million tons	16.360	16.551	16.461	16.811	-
Anhui	US	million tons	2.422	2.364	2.431	2.592	-
Total	US	million tons	50.892	51.823	51.793	52.378	-
Out-of-grade percentage							
Liaoning	China	percentage	0.0	0.0	0.0	0.0	-
Jilin	China	percentage	0.0	0.0	0.0	0.0	-
Heilongjiang	China	percentage	0.0	0.0	0.0	0.3	-
Jiangsu	China	percentage	0.0	0.0	0.0	1.5	-
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,800.00	3,000.00	3,100.00	3,100.00	3,100.00
Quantity of paddy rice purchased under the measures							
Liaoning	China	million tons	0	0.351	0.175	0	0
Jilin	China	million tons	0.057	0.713	0.58	1.1675	0.133
Heilongjiang	China	million tons	3.842	10.625	15.025	16.897	17.7745

[5] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016
Jiangsu	China	million tons	0	1.352	1.796	1.089	1.5765
Anhui	China	million tons	0.063	0.481	0.615	0.965	1.478
Hubei	China	million tons	0	0.019	0.02	0.018	0.0265
Total	China	million tons	3.962	13.541	18.211	20.137	20.989

1.2.2 Indica rice

1.2.2.1 Early-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	33.291	34.145	34.012	33.687	-
Producer price (early-season)	US/China	¥/ton	2,622.00	2,603.20	2,681.60	2,687.40	2,602.60
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton	**1996-1998**			**Average 1996-1998**	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[6]				
Production by province							
Anhui	US	million tons	1.320	1.308	1.283	1.092	-
Jiangxi	US	million tons	8.002	8.280	8.201	8.119	-
Hubei	US	million tons	2.089	2.228	2.387	2.523	-
Hunan	US	million tons	8.187	8.605	8.548	8.589	-
Guangxi Zhuang Autonomous Region	US	million tons	5.449	5.552	5.433	5.288	-
Total		million tons	25.047	25.973	25.852	25.611	-
Out-of-grade percentage							
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
Jiangxi	China	percentage	1.0	1.0	0.0	0.0	-
Hubei	China	percentage	0.0	0.0	0.0	0.0	-
Hunan	China	percentage	1.0	0.0	3.0	1.0	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	1.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,400.00	2,640.00	2,700.00	2,700.00	-
Quantity of paddy rice purchased under the measures							
Anhui	China	million tons	0.0000	0.0665	0.0870	0.0400	0.0215
Jiangxi	China	million tons	0.0000	3.3340	2.1450	1.4500	1.3065
Hubei	China	million tons	0.0000	0.0985	0.0600	0.0960	0.0485
Hunan	China	million tons	0.0000	2.2000	1.9420	1.4300	1.1890
Guangxi Zhuang Autonomous Region	China	million tons	0.0000	0.0360	0.0110	0.0000	0.0000
Total	China	million tons	0.0000	5.7350	4.2450	3.0160	2.5655

[6] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

1.2.2.2 Mid-late-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	106.406	105.136	107.239	108.739	-
Producer price (mid-season Indica)	US/China	¥/ton	2,697.40	2,627.20	2,658.00	2,601.60	2,603.40
Producer price (late-season Indica)	US/China	¥/ton	2,769.40	2,713.40	2,838.20	2,787.00	2,768.40
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton			**1996-1998**	**Average 1996-1998**	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[7]				
Production by province							
Jiangsu	US	million tons	2.641	2.672	2.658	2.714	-
Anhui	US	million tons	10.193	9.951	10.232	10.910	-
Jiangxi	US	million tons	11.758	11.760	12.051	12.153	-
Henan	US	million tons	4.926	4.858	5.286	5.315	-
Hubei	US	million tons	14.425	14.539	14.908	15.584	-
Hunan	US	million tons	18.130	17.011	17.792	17.859	-
Guangxi Zhuang Autonomous Region	US	million tons	5.971	6.010	6.228	6.090	-
Sichuan	US	million tons	15.354	15.490	15.261	15.526	-
Total		million tons	83.398	82.291	84.416	86.151	-
Out-of-grade percentage							
Jiangsu	China	percentage	0.0	0.0	0.0	0.0	-
Anhui	China	percentage	1.0	1.0	0.8	0.0	-
Jiangxi	China	percentage	1.0	0.0	0.0	0.0	-
Henan	China	percentage	0.0	3.0	2.2	1.1	-
Hubei	China	percentage	0.0	4.0	0.7	0.0	-
Hunan	China	percentage	0.0	1.0	0.0	1.7	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	0.0	0.0	-
Sichuan	China	percentage	0.0	0.0	1.3	1.0	-
AAP (unmilled)	US/China	¥/ton	2,500.00	2,700.00	2,760.00	2,760.00	-
Quantity of paddy rice purchased under the measures							
Jiangsu	China	million tons	0.0000	0.1565	0.1310	0.0985	0.0050
Anhui	China	million tons	0.0000	3.9235	2.8050	3.1585	1.9705
Jiangxi	China	million tons	0.0790	2.1660	1.3700	0.9480	0.6000
Henan	China	million tons	0.0000	1.8160	1.2480	1.4550	1.5695
Hubei	China	million tons	0.0000	2.5780	1.7800	2.9635	2.0895

[7] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Data provided by	Units	2012	2013	2014	2015	2016
Hunan	China	million tons	0.0000	1.3820	1.2630	0.9105	0.7965
Sichuan	China	million tons	0.0000	1.2970	1.0810	0.6540	0.4645
Total	China	million tons	0.079	13.319	9.678	10.188	7.4955

1.3 Corn

	Data provided by	Units	2012	2013	2014	2015
Total national production	US	million tons	205.614	218.489	215.646	224.632
Producer price	US/China	¥/ton	2,222.60	2,176.20	2,237.00	1,884.60
1996-1998 FERP (f.o.b. price)	China	¥/ton	**1996-1998**		**Average 1996-1998**	
			1581.40	1075.80 939.20	1,198.80	
1986-1988 FERP (f.o.b. price)	US	¥/ton	366.07[8]			
Production by province						
Heilongjiang	US	million tons	28.879	32.164	33.434	35.441
Jilin	US	million tons	25.788	27.757	27.335	28.057
Liaoning	US	million tons	14.235	15.632	11.705	14.035
Inner Mongolia	US	million tons	17.844	20.697	21.861	22.508
Total	US	million tons	86.746	96.250	94.335	100.041
Out-of-grade percentage						
Heilongjiang	US/China	percentage	0.0	0.0	0.0	0.0
Jilin	US/China	percentage	0.0	0.0	0.0	0.0
Liaoning	US/China	percentage	0.0	0.0	0.0	0.0
Inner Mongolia	US/China	percentage	0.0	0.0	0.0	0.0
AAP Heilongjiang	US	¥/ton	2,100.00	2,220.00	2,220.00	2,000.00
AAP Jilin	US	¥/ton	2,120.00	2,240.00	2,240.00	2,000.00
AAP Liaoning	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
AAP Inner Mongolia	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
Quantity of corn purchased under the measures						
Heilongjiang	China	million tons	0.326	6.205	8.369	21.897
Jilin	China	million tons	0.130	4.777	7.874	11.780
Liaoning	China	million tons	0.030	15.903	25.402	34.530
Inner Mongolia	China	million tons	2.334	16.353	23.047	57.149
Total	China	million tons	2.820	43.236	64.690	125.356

[8] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.