WORLD TRADE ORGANIZATION

WT/DS511/R

28 February 2019

(19-1108)

Original: English

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION 13
1.1 Complaint by the United States 13
1.2 Panel establishment and composition 13
1.3 Panel proceedings 13
1.3.1 General 13
1.3.2 United States' request for partially open meetings 13
1.3.3 Terms of reference 14
2 FACTUAL ASPECTS 14
2.1 Measures at issue 14
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 14
4 ARGUMENTS OF THE PARTIES 15
5 ARGUMENTS OF THE THIRD PARTIES 15
6 INTERIM REVIEW 15
7 FINDINGS 18
7.1 United States' request for partially open Panel meetings with the parties 18
7.1.1 Procedural background 18
7.1.2 Introduction 19
7.1.3 Panel's analysis 20
7.1.3.1 Introduction 20
7.1.3.2 Article 18.2 of the DSU 20
7.1.3.3 Prior disputes addressing open or partially open hearings 22
7.1.3.4 Concluding considerations 25
7.2 The measures challenged in this dispute and China's claim relating to the expiry of one of the measures 27
7.2.1 The measures challenged by the United States 27
7.2.2 China's terms of reference claim raised with regard to the corn measure 31
7.2.2.1 Whether the corn measure has expired 34
7.2.2.2 Whether the Panel should make findings on the otherwise expired corn measure 39
7.2.3 Main characteristics of the wheat and rice measures 43
7.2.3.1 General framework 43
7.2.3.2 Market price support programmes for wheat and rice 43
7.2.3.3 Entities involved 45
7.2.3.4 Geographical scope 46
7.2.3.5 Temporal scope 46
7.2.3.6 Quality requirements 47
7.3 Claims brought by the United States and Panel's order of analysis 47
7.4 Claims under Articles 6.3 and 3.2 of the Agreement on Agriculture 48
7.4.1 Introduction 48

7.4.2 Domestic support obligations as set out in Articles 3.2 and 6.3 of the Agreement on Agriculture 49
7.4.3 Calculation of AMS and Current Total AMS under the Agreement on Agriculture 52
7.4.4 Preliminary considerations in relation to China's domestic support commitments 59
7.4.4.1 Tables of supporting material and Member-specific domestic support-related commitments 59
7.4.5 Issues relating to the definition and calculation of the variables of the MPS formula 61
7.4.5.1 Applied Administered Price 61
7.4.5.2 Fixed external reference price 62
7.4.5.2.1 FERP contained in China's tables of supporting material 64
7.4.5.2.2 Other Members' tables of supporting material 67
7.4.5.2.3 Consistency in the calculations of Base Total AMS and Current Total AMS 71
7.4.5.2.4 The FERP that should be used in the present dispute 77
7.4.5.3 Quantity of production eligible to receive the AAP 82
7.4.5.3.1 Geographical scope of the programme 88
7.4.5.3.2 Temporal scope of the programme 88
7.4.5.3.3 Activation and de-activation of the programme 89
7.4.5.3.4 Minimum grain quality requirements 89
7.4.5.3.5 Consumption of grain on small-scale farms 91
7.4.5.3.6 Conclusion 91
7.4.5.4 Processing-level adjustment 91
7.4.5.4.1 Which variable should be adjusted 93
7.4.5.4.1.1 Basic agricultural product 93
7.4.5.4.1.2 Point of first sale 95
7.4.5.4.2 Adjustment rate to be used in this case 97
7.4.5.4.3 Conclusion on the processing-level adjustment 99
7.4.6 Calculation of China's Current Total AMS 99
7.4.7 MPS Calculations 100
7.4.7.1 Wheat 100
7.4.7.2 Rice 102
7.4.7.2.1 Total value of production of rice 102
7.4.7.2.2 Volume of production of rice per province 103
7.4.7.2.3 Weighted average AAP 104
7.4.7.2.4 Conclusion on these issues 105
7.4.7.2.5 Japonica rice 105
7.4.7.2.5.1 Japonica rice (United States' approach) 105
7.4.7.2.5.2 Japonica rice (China's approach) 107
7.4.7.2.6 Indica rice (United States' approach) 109
7.4.7.2.6.1 Early-season Indica rice 109
7.4.7.2.6.2 Mid-Late-Season Indica rice 111
7.4.7.2.6.3 Total Indica rice MPS calculation 112

7.4.7.2.7 Indica rice (China's approach) 113
7.4.8 Conclusion on the calculation of China's Current Total AMS 114
7.5 Claim under Article 7.2(b) of the Agreement on Agriculture 115
8 CONCLUSIONS AND RECOMMENDATIONS 115

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A	Working Procedures of the Panel	4

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the United States	10
Annex B-2	Integrated executive summary of the arguments of China	35

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	62
Annex C-2	Integrated executive summary of the arguments of Brazil	65
Annex C-3	Integrated executive summary of the arguments of Canada	67
Annex C-4	Integrated executive summary of the arguments of Colombia	71
Annex C-5	Integrated executive summary of the arguments of Ecuador	72
Annex C-6	Integrated executive summary of the arguments of the European Union	74
Annex C-7	Integrated executive summary of the arguments of India	76
Annex C-8	Integrated executive summary of the arguments of Indonesia	78
Annex C-9	Integrated executive summary of the arguments of Japan	80
Annex C-10	Integrated executive summary of the arguments of Kazakhstan	83
Annex C-11	Integrated executive summary of the arguments of the Russian Federation	86

ANNEX D

RAW DATA

Contents		Page
Annex D	Raw data as presented by the parties	90

ABBREVIATIONS USED IN THIS REPORT

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

CASES CITED IN THIS REPORT

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

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

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

LIST OF EXHIBITS FREQUENTLY REFERRED TO IN THIS REPORT

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

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

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

1 INTRODUCTION

1.1 Complaint by the United States

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

1.2. Consultations were held on 20 October 2016.

1.2 Panel establishment and composition

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

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

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

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

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

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

1.3 Panel proceedings

1.3.1 General

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

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

1.3.2 United States' request for partially open meetings

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

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

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

1.3.3 Terms of reference

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

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

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

2 FACTUAL ASPECTS

2.1 Measures at issue

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

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

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

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

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

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

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 FINDINGS

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

7.1.1 Procedural background

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

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

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

7.1.2 Introduction

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

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

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

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

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

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

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

7.1.3 Panel's analysis

7.1.3.1 Introduction

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

7.1.3.2 Article 18.2 of the DSU

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

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

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

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

7.10. Article 18.2 provides as follows:

Article 18

Communications with the Panel or Appellate Body

…

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

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

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

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

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

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

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

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

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

7.1.3.3 Prior disputes addressing open or partially open hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.1.3.4 Concluding considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.1 The measures challenged by the United States

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

[79] See paragraph 1.22. above.

[80] China's first written submission, paras. 278-282.

[81] United States' opening statement at the first meeting of the Panel, para. 48; United States' comments on China's challenge to the Panel's terms of reference, para. 15.

[82] United States' comments on China's challenge to the Panel's terms of reference, para. 8.

[83] United States' opening statement at the first meeting of the Panel, para. 50; United States' comments on China's challenge to the Panel's terms of reference, para. 26.

[84] United States' opening statement at the first meeting of the Panel, para. 50; United States' comments on China's challenge to the Panel's terms of reference, para. 26.

[85] United States' comments on China's challenge to the Panel's terms of reference, para. 14; United States' second written submission, para. 14.

[86] United States' second written submission, paras. 15-16. United States' response to Panel question No. 23, paras. 95-99.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[98] See also Article 7.1 of the DSU.

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

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

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

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

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

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

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

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

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

[100] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10.

[101] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120.

[102] Appellate Body Reports, *EC – Selected Customs Matters*, para. 152; and *US – Carbon Steel*, para. 126.

[103] Appellate Body Report, *US – Continued Zeroing*, para. 168.

[104] Appellate Body Reports, *China – HP-SSST (Japan)*, para. 5.13; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[105] Appellate Body Reports *US – Carbon Steel*, para. 127; *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *US – Countervailing Measures (China)*, para. 4.20.

[106] United States' request for the establishment of a panel, p. 1. (footnote omitted)

[107] United States' request for the establishment of a panel, p. 1.

[108] United States' request for the establishment of a panel, pp. 1-6.

[109] United States' request for the establishment of a panel, p. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[116] United States' first written submission, para. 1. (footnote omitted) (emphasis added)

[117] United States' first written submission, para. 14.

[118] United States' first written submission, para. 10.

[119] We note that in its submissions subsequent to the first written submission, the United States refers to a different measure, namely China's domestic support to agricultural producers. However, such references may have been influenced by China's claim relating to the expiry of the measure relating to corn, raised in China's first written submission. The Panel thus approaches such references with caution, in line with the Appellate Body's guidance that a panel may consult "in particular the first written submission of the complaining party […] in order to confirm the meaning of the words used in the panel request". Appellate Body Report, *US – Carbon Steel*, para. 127.

[120] The data serving as the basis for our assessment can be found in Annex D.

[121] China submits that it would be appropriate for the Panel to consider the 2016 data in the assessment of consistency of China's measures. However, the United States' claims relate to years 2012, 2013, 2014 and 2015, for which the evidence was available at the time of the request for the establishment of a panel. We will thus limit our assessment to the operation of the measures during these years.

[122] China's first written submission, paras. 337-338.

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

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

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

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

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

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

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

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

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

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

---

[137] United States' comments on China's challenge to the Panel's terms of reference, para. 38.

[138] United States' comments on China's challenge to the Panel's terms of reference, paras. 42-48; United States' second written submission, paras. 50-52; United States' response to Panel question No. 2

[139] United States' second written submission, para. 54.

[140] 2016 Sinograin Corn Price Announcement, (Exhibit USA-101/CHN-107B); 2016 Heilongjiang Corn Purchase Notice, (Exhibit USA-104).

[141] United States' comments on China's responses to Panel question Nos. 52 and 56 (second substantive meeting).

[142] United States' response to Panel question No. 55 (second substantive meeting).

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

[144] China's response to Panel question No. 52 (second substantive meeting).

[145] China's response to Panel question No. 52 (second substantive meeting).

[146] 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 3 November 2016 (English translation), (Exhibit CHN-111B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 15 November 2016 (English translation), (Exhibit CHN-112B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 16 November 2016 (English translation), (Exhibit CHN-113B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 22 November 2016 (English translation), (Exhibit CHN-114B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 30 November 2016 (English translation), (Exhibit CHN-115B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 7 December 2016 (English translation), (Exhibit CHN-116B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 14 December 2016 (English translation), (Exhibit CHN-117B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 21 December 2016 (English translation), (Exhibit CHN-118B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 28 December 2016 (English translation), (Exhibit 119B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 16 November 2016 (English translation), (Exhibit CHN-120B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 22 November 2016 (English translation), (Exhibit CHN-121B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 30 November 2016 (English translation), (Exhibit CHN-122B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 7 December 2016 (English translation), (Exhibit CHN-123B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 14 December 2016 (English translation), (Exhibit CHN-124B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 21 December 2016 (English translation), (Exhibit CHN-125B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 29 December 2016 (English translation), (Exhibit CHN-126B); 2016 New Corn

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

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

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

7.2.2.1 Whether the corn measure has expired

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

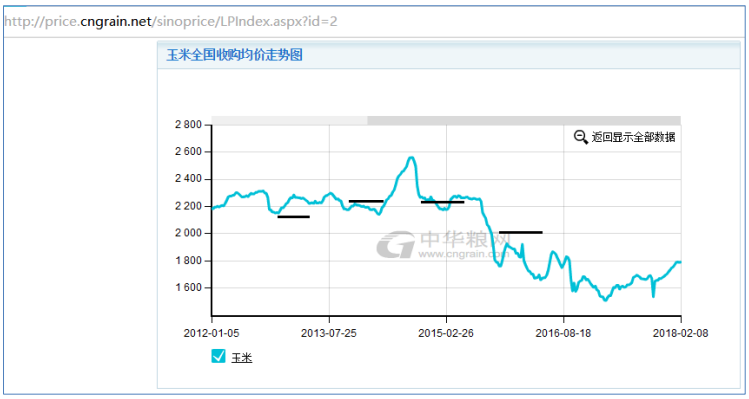
[187] United States' comments on China's responses to Panel question Nos. 52 and 53.

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

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

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

Figure 1: Corn prices, January 2012 – February 2018



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

Figure 2: Corn prices, 2012 – 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[197] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

[198] China's comments on United States' response to Panel question No. 70 (second substantive meeting), fn 167 (citing Appellate Body Report, *EU – PET (Pakistan)*, para. 5.38).

[199] As noted by the Appellate Body, "the DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue". Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 270; See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1650; and *Chile – Price Band System* para. 7.514, fn 683.

[200] See Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.182.

[201] China's first written submission, paras. 324-327; second written submission, paras. 74-77, citing the Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[202] Appellate Body Report, *EC – Chicken Cuts*, para. 151; Panel Report, *EC – Chicken Cuts*, para. 7.25.

[203] See section 7.2.1 above.

[204] Appellate Body Report, *US – Upland Cotton*, para. 272.

[205] China's response to Panel question No. 22.

[206] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

[207] Panel Report, *China – Electronic Payment Services*, para. 7.224.

[208] Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35.

[209] Panel Reports, *Turkey – Rice*, para. 7.180; *US – Wool Shirts and Blouses*, para. 6.2; and *Indonesia – Autos*, para. 14.9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[225] See para. 7.76 above.

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

7.2.3 Main characteristics of the wheat and rice measures

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

7.2.3.1 General framework

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

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

7.2.3.2 Market price support programmes for wheat and rice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2.3.3 Entities involved

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

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

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

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

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

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

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

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

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

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

7.2.3.4 Geographical scope

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

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

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

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

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

7.2.3.5 Temporal scope

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

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

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

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

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

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

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

[251] Article 6 of the Implementation Plans.

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

[253] Liaoning, Jilin, Heilongjiang Provinces.

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

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

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

7.2.3.6 Quality requirements

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

7.4.1 Introduction

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

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

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

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

---

[264] United States' first written submission, para. 1.

[265] We recall that as discussed in Section 7.2.2.2 above, the Panel has decided not to assess the corn measures.

[266] United States' first written submission, para. 9.

[267] China's first written submission, para. 89.

[268] China's first written submission, para. 89 (referring to United States' first written submission, para. 93).

[269] China's first written submission, para. 89.

[270] We recall that China has requested that the Panel should additionally examine market price support for these products for 2016 (even though support in 2016 was not challenged by the United States) alleging that this will also be found to be below the 8.5% *de minimis* level (China's first written submission, para. 89). For the reasons set out in paragraph 7.52 above, we will limit our analysis to the years 2012-2015.

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

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

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

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

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

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

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

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

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

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

Article 3

Incorporation of Concessions and Commitments

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

7.121. Article 6.3 of the Agreement on Agriculture provides:

Article 6

Domestic Support Commitments

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

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

SECTION I - Domestic Support: Total AMS Commitments

BASE TOTAL AMS	Final bound commitment levels
- 0 -	Nil

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where:

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[311] China's first written submission, para. 129.

[312] China's first written submission, para. 130 (referring to Panel Report, *Korea – Various Measures on Beef*, para. 812).

[313] China's first written submission, para. 130 (referring to Panel Report, *Korea – Various Measures on Beef*, para. 813).

[314] China's first written submission, para. 130.

[315] United States' response to Panel question No. 62 (second substantive meeting).

[316] United States' response to Panel question No. 62 (second substantive meeting) (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 111 (*citing* The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15)).

[317] United States' response to Panel question No. 62 (second substantive meeting).

[318] United States' response to Panel question No. 62 (second substantive meeting) (referring to *Shorter Oxford English Dictionary*, "with," vol. II, p. 3703-04 (ed. 1993)).

[319] United States' response to Panel question No. 62 (second substantive meeting).

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

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

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

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

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

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

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

[320] United States' response to Panel question No. 62 (second substantive meeting).

[321] United States' response to Panel question No. 62 (second substantive meeting) (referring to China's second written submission, paras. 296-305; China's first written submission, paras. 135-139).

[322] United States' response to Panel question No. 62 (second substantive meeting).

[323] China's comments on United States' response to Panel question No. 62 (second substantive meeting).

[324] China's first written submission, para. 130.

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4.5.1 Applied Administered Price

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

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

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

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

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

---

[346] Annex 3 of the Agreement on Agriculture, para. 8; United States' first written submission, para. 93.

[347] United States' first written submission, para. 96 (referring to *Shorter Oxford English Dictionary*, "applied," p. 100 (ed. 1993), *Shorter Oxford English Dictionary,* "administer," p. 28 (ed. 1993), *Shorter Oxford English Dictionary*, "price," p. 2349 (ed. 1993), (Exhibit USA-64)).

[348] United States' first written submission, para. 97.

[349] United States' first written submission, para. 97.

[350] United States' first written submission, para. 106.

[351] United States' first written submission, para. 106.

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

[353] China's first written submission, para. 190.

[354] China's first written submission, para. 191 (referring to Oxford English Dictionary, OED Online, "administered, adj.", available at: http://www.oed.com/view/Entry/2532? (last viewed 26 October 2017), (Exhibit CHN-60)).

[355] China's first written submission, para. 193 (referring to Oxford English Dictionary, OED Online, "applied, adj.", available at: http://www.oed.com/view/Entry/9713? (last viewed 26 October 2017), (Exhibit CHN-61)).

[356] *The New Shorter Oxford English Dictionary*, definition of "applied", "apply" Vol. 1, 1993, p. 100-101.

[357] Oxford English Dictionary Online, definition of "administered, adj", available at: <http://www.oed.com/view/Entry/2532>, accessed 27 July 2018).

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

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

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

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

7.4.5.2 Fixed external reference price

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

7.4.5.2.1 FERP contained in China's tables of supporting material

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[378] United States' response to Panel question No. 89.

[379] China's response to Panel question No. 89.

[380] The United States has argued that there is another difference relating to whether the prices are a result of a three-year average. We will address this below.

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

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

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

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

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

7.4.5.2.2 Other Members' tables of supporting material

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

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

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

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

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

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

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

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

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

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

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

Table 6: Factual findings on non-original Members

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

[386] United States' response to Panel question No. 90.

[387] United States' response to Panel question No. 90 (referring to Bulgaria's Supporting Table, G/AG/AGST/Vol.5, p. 7).

[388] United States' response to Panel question No. 90.

[389] This column describes the time-period used by Members to report information relative to agricultural subsidies. It is not limited to market price support measures.

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

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

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

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

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

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

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

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

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

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

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

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

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

[396] China's second written submission, para. 298.

[397] United States' response to Panel question No. 71 (first substantive meeting).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

7.234. We now assess China's second argument.

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

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

[411] China's comments on the United States' response to Panel question No. 62 (second substantive meeting).

[412] United States' response to Panel question No. 102.

[413] China's second written submission, para. 300 (referring to United States' response to Panel question No. 71 (first substantive meeting), paras. 184-188).

[414] China's second written submission, para. 301.

[415] China's second written submission, para. 301.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4.5.2.4 The FERP that should be used in the present dispute

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

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

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

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

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

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

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

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

[433] See para. 7.204.

[434] See para. 7.214.

[435] See para. 7.251.

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

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

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

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

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

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

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

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

---

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

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

[441] See paragraph 7.165.

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

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

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

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

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

---

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

[444] See paragraph 7.214.

[445] The Appellate Body has stated the following:

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

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

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

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

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

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

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

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

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

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

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

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

[450] See para. 7.243.

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

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

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

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

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

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

7.4.5.3 Quantity of production eligible to receive the AAP

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[465] See Section 7.4.5.1 above.

[466] Oxford English Dictionary Online, defintition of "receive", available at: <http://www.oed.com/view/Entry/159411?rskey=Q2we63&result=2#eid>, accessed 22 July 2018.

[467] See *The New Shorter Oxford English Dictionary*, definition of "fit", Vol. 1, 1993, p. 960, which is defined as "be suited to or appropriate for; Meet the requirements of".

[468] China's first written submission, paras. 189-195; United States' first written submission, paras. 96-97.

[469] Second recital of the Preamble to the Agreement on Agriculture.

[470] China's first written submission, paras. 196-203; China's second written submission, para. 358-375.

[471] China's second written submission, para. 362.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[485] See para. 7.100 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4.5.3.1 Geographical scope of the programme

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

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

7.4.5.3.2 Temporal scope of the programme

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

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

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

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

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

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

7.4.5.3.3 Activation and de-activation of the programme

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

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

7.4.5.3.4 Minimum grain quality requirements

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

7.4.5.3.5 Consumption of grain on small-scale farms

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

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

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

7.4.5.3.6 Conclusion

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

7.4.5.4 Processing-level adjustment

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

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

---

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

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

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

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

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

[532] The United States explains that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[541] China's first written submission, para. 228 (referring to United States Department of Agriculture, World Agricultural Supply and Demand Estimates, August 2017, U.S. Rice Supply and Use (Rough Equivalent of Rough and Milled Rice), (Exhibit CHN-66)).

[542] China's first written submission, para. 235 (referring to Conversion rate applied in WT/ACC/CHN/38/, (Exhibit CHN-64)).

[543] See China's response to Panel question No. 38, para. 170, where China states that the use of a volume-based conversion rate is also reasonable and appropriate for the price-based conversion required here, and consistent with an objective assessment of the facts.

in China[544] and that the calculated adjustment rate of milled to unmilled rice in China is 60%.[545] This 60% price conversion rate was developed by comparing published prices of milled rice to unmilled rice and calculating an average rate for the 12 year period of available data.[546] Any adjustment to a price within the equation, according to the United States, should be made at a rate of 60%.

7.322. We agree with the parties that a processing-level adjustment is necessary to avoid a mathematically inappropriate comparison. However, and as mentioned above, we observe two issues which must be resolved before applying such an adjustment: (i) the variable or variables which should be adjusted; and (ii) the rate of the adjustment.

7.4.5.4.1 Which variable should be adjusted

7.323. With respect to the question of which variables should be adjusted, we consider that it is appropriate to first determine whether the Agreement on Agriculture provides any guidance in this regard.

7.324. The starting point of our analysis is the text of the Agreement on Agriculture. In this regard, there are two relevant sections: (i) Paragraph 7 of Annex 3 states that the AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned"; and (ii) Article 1(b) of the Agreement on Agriculture provides that that ""basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material".

7.325. These provisions furnish some guidance in our determination of the most appropriate variable to be adjusted. However, they do not, in themselves, set out a mandatory rule as to the variable that should be adjusted.

7.326. We now turn to assess the possible guidance afforded by the Agreement on Agriculture in order to be able to calculate China's AMS for the most appropriate rice product at a level closest to the point of first sale.

7.4.5.4.1.1 Basic agricultural product

7.327. Article 1(b) of the Agreement on Agriculture states that ""basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material". The phrase is also relevant in Annex 3: Paragraph 1 states "subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support"; Paragraph 7 provides that "[t]he AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products"; and Paragraph 9 indicates that "[t]he fixed external reference price … shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country … in the base period."

7.328. The plain meaning of the phrase "basic agricultural product" is important for our purposes. "Basic" is defined as "[o]f, pertaining to, or forming a base"[547] and "constituting or serving as the

[544] United States' first written submission, para. 115.

[545] United States' first written submission, paras. 115-116 (referring to the Agreement on Agriculture, paragraph 9 of Annex 3; Panel Report *Korea – Various Measures on Beef*, para. 828 (stating that "the fixed external reference price must be at (or converted to) the same stage in the processing chain as the applied administered price for the basic agricultural product(s) concerned")).

[546] See China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2006), (Exhibit USA-69); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2008), (Exhibit USA-70); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2012), (Exhibit USA-71); 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2016), (Exhibit USA-99).

[547] Oxford English Dictionary Online, defintition of "basic", available at: <OED Online, http://www.oed.com/view/Entry/15848>, accessed on 22 July 2018.

basis or starting point".[548] A "product" is "[a]n object produced by a particular action or process"[549] while "agricultural" is "[o]f, relating to, or used in agriculture"[550] which is "the practice of growing crops, rearing livestock, and producing animal products".[551] As such, a "basic agricultural product" in the current case would be an object produced through the practice of growing crops which forms a base or starting point for potential further processing.

7.329. China argues that the phrase "as close as practicable to the point of first sale" is used in the context of identifying the basic agricultural product. This phrase allegedly emphasizes that the basic agricultural product specified in a Member's schedule is not simply an identification of the product variety, but also an identification of the processing level of the product. According to China, the key to identifying the basic agricultural product lies in the phrase "as specified in a Member's Schedule and in the related supporting material" which suggests that the basic agricultural product, or more specifically, the processing level of the basic agricultural product, can be found in a Member's schedule and supporting material. In this regard, China states that "Rev.3 … specified the processing level for [Indica rice and Japonica rice], which is "semi-milled or wholly milled rice, whether or not polished or glazed".[552]"[553]

7.330. The United States argues that "for Indica and Japonica rice, there is no indication of the type of rice, either for the external reference prices or the AAPs. China asks the Panel to infer a chosen point of sale and a type of "basic agricultural product" based on the comparison on various draft Supporting Tables, none of which contains any explicit written reference to this point of sale, and the recollection of China's negotiators[554]".[555]

7.331. Indica rice and Japonica rice were net export products in China's 1996-1998 base period and thus their external reference prices were determined by the f.o.b. prices, on the basis of China's Customs statistics.[556]

7.332. The Panel considers that the reference in Paragraph 9 of Annex 3 to "the average f.o.b. unit value for the basic agricultural product concerned ..." requires that the AAP and the FERP must both be for the "basic agricultural product". This reasoning is reinforced by Paragraph 7, discussed further below, which states that AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned".

7.333. In addition, as pointed out by the United States, the inclusion of the phrase: "measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products" in Paragraph 7 of Annex 3 reinforces the understanding that product-specific AMS should be calculated so as to measure the benefit at the first point of sale, which typically would involve the producers.[557] According to China, the United States' approach here ignores the purpose of this part of Paragraph 7, which China alleges is to eliminate (from the AMS calculation) measures that do not constitute domestic support because they are not provided "in favour of domestic producers" or "in favour of agricultural producers".[558] We disagree. The Panel is required to holistically interpret the relevant provisions. In this case, this means interpreting the meaning of "basic agricultural product" in light of the specific exclusion of measures directed at

[548] Merriam-Webster Online, definition of "basic", available at: < https://www.merriam-webster.com/dictionary/basic>, accessed on 22 July 2018 .

[549] Oxford English Dictionary Online, defintition of "product", available at: <OED Online, http://www.oed.com/view/Entry/151988>, accessed on 22 July 2018.

[550] Oxford English Dictionary Online, defintition of "agricultural", available at: OED Online, <http://www.oed.com/view/Entry/4178>, accessed on 22 July 2018.

[551] Oxford English Dictionary Online, defintition of "agriculture", available at: OED Online, <http://www.oed.com/view/Entry/4181>, accessed on 22 July 2018.

[552] See the fixed external reference prices for Indica rice and Japonica rice in Table DS5 of Rev.3, which exactly match the fixed external reference prices for Indica rice and Japonica rice in Appendix DS 5-4 of Rev.3. See also Conversion rate applied in WT/ACC/CHN/38/, (Exhibit CHN-64), which indicates that the data for the applied administered price and the eligible production for Indica rice and Japonica rice contained in DS5 of Rev.3 had been adjusted to reflect milled rice data.

[553] China's response to Panel question No. 99, para. 317. (footnote original)

[554] Conversion rate applied in WT/ACC/CHN/38, (Exhibit CHN-64).

[555] United States' response to Panel question No. 99, para. 179. (footnote original)

[556] See WT/ACC/CHN/38/Rev.3, endnote 17(2), and Appendix DS 5-4, (Exhibit USA-43).

[557] United States' response to Panel question No. 99, para. 176.

[558] China's comments on the United States' response to Panel question No. 99, para. 247 (referring to Agreement on Agriculture, Article 3.2, 6.1, 6.3, 7.1 and 7.2(a).

agricultural processors from the AMS calculation, unless those measures benefit agricultural producers.

7.334. What the Panel has to determine in this part of its analysis, therefore, is the particular basic agricultural product in this case. Importantly, while the definition of "basic agricultural product" in Article 1(b) of the Agreement on Agriculture includes a reference to a Member's schedule, Paragraph 7 of Annex 3 refers only to the "point of first sale" of the agricultural product concerned.

7.335. The United States may be correct in its assertion that China's tables of supporting material do not explicitly set out the level of processing of each of the rice products at issue here, contrary to China's argument. However, China's tables of supporting material do refer to HS Code 10063000 for Japonica rice and 10063000 for Indica rice, in Appendix DS 5-4: "f.o.b. Prices for Corn, Japonica Rice and Indica Rice". These HS Codes refer to "semi-milled or wholly-milled rice, whether or not polished or glazed". We consider that while China is able to specify the basic agricultural product in its Schedule, this may not necessarily extend to specifying the level of processing, especially for the purposes of calculating AMS. In this regard, while China has included the HS code of milled rice variants to which a reader can refer, it has identified each of "Indica rice" and "Japonica rice" by name.

7.336. The product included in the tables of supporting material (which, in this particular instance, is milled rice) has an f.o.b. price to determine the FERP. We understand that milled rice is included for the purposes of demonstrating an f.o.b. price as required by Paragraph 9 (as unmilled rice is generally not exported or imported to any significant degree). This product does not necessarily accord with the overarching requirement that AMS should be calculated as close as practicable to the point of first sale, as further discussed below. We see a fundamental disconnect between China's specification of the "basic agricultural product" in its tables of supporting material, and the "point of first sale" of rice. It is not necessary to decide which of these would prevail in the abstract. Our task here is to calculate the AMS for each relevant product. This is to be done as close as practicable to the point of first sale.

7.337. The Panel needs to determine the basic agricultural product here for the purposes of properly calculating China's AMS. There is no obligation to determine the basic agricultural product on the basis of China's tables of supporting material alone, and we will also consider the "point of first sale" which would accord most with the ordinary meaning of "basic agricultural product", as defined above. We understand that the relevant product in China's tables of supporting material has been specified as "Indica rice" and "Japonica rice". We turn to examine the point of first sale of such rice, as specifically directed by Paragraph 7 of Annex 3.

7.4.5.4.1.2 Point of first sale

7.338. Paragraph 7 of Annex 3, concerned with the AMS calculation itself, states that the AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned".[559]

7.339. The United States argues that the phrase "point of first sale" indicates that "the AMS is to be calculated in relation to the first instance the commodity is sold" and that "[t]he relevant point of first sale in this dispute is when Chinese farmers in the relevant provinces sell their wheat, Indica rice, [or] Japonica rice, … to the Chinese government or entities purchasing at the direction of the Chinese government".[560] Specifically in regard to rice, the United States submits that the first sale defined in this way would be on an unmilled rice basis and that therefore the FERP for rice must be converted to an unmilled rice equivalent value.

7.340. China, for its part, argues that the phrase "as close as practicable to the point of first sale" emphasizes that the basic agricultural product specified in the Schedule is not simply an identification of the product variety, but also an identification of the processing level of the product.[561] For China,

[559] See also Agreement on Agriculture, Article 1(b) which defines "basic agricultural product" in relation to domestic support commitments … as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material".

[560] United States' response to Panel question No. 99.

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

the words "as close as practicable" indicate that the basic agricultural product is not necessarily the product at the beginning of the processing chain sold at the point of first sale, but rather, that it can be a further processed product. China argues that it has specified in its tables of supporting material that the processing level for the two varieties of rice is "semi-milled or wholly milled rice, whether or not polished or glazed", and subsequently that *this* is the basic agricultural product related to rice.[562]

7.341. We believe that the relevant point of first sale of the basic agricultural product would be the point at which Chinese *producers* of rice in the relevant provinces sell their product to the government or its relevant purchasing entities. This is because, as outlined in Paragraph 7 of Annex 3, the calculation of AMS is aimed at assessing measures which benefit producers of basic agricultural products. In other words, it is the point at which the measure acts to benefit the producers that is relevant here (that is, the point at which the rice producers sell their rice at the AAP). In addition, the plain meaning of "point of first sale" indicates that AMS is to be calculated in relation to the first instance the commodity is sold.[563] The price at the point of first sale for rice would be the "farm-gate", "paddy" or "unmilled" price of both Indica and Japonica rice.

7.342. Mindful of this, and interpreting the term "basic agricultural product" holistically in the context of the Agreement on Agriculture, we consider that the basic agricultural product, as close as practicable to the point of first sale, is unmilled (Indica and Japonica) rice.

7.343. The Panel notes that, mathematically, there is no difference in the resulting MPS when only the FERP is adjusted to reflect an unmilled equivalent level, or when both the AAP and QEP are adjusted to reflect milled equivalent levels if the price and quantity conversion rates applied are the same (that is, for example, if both price and quantity are adjusted at a rate of 70%). The United States argues in this regard that the correct rate to use for adjusting price, based on its calculations, is not 70%, but 60%.[564]

7.344. Adjustment rate: r for quantities and prices

Calculating MPS at a **milled** level:

$$MPS = \left(\frac{AAP}{r} - FERP\right) * rQ = \frac{rQ * AAP}{r} - rQ * FERP = (\boldsymbol{AAP} - \boldsymbol{rFERP}) * \boldsymbol{Q}$$

Calculating MPS at an **unmilled** level:

$$MPS = (\boldsymbol{AAP} - \boldsymbol{rFERP}) * \boldsymbol{Q}$$

7.345. Finally, China contends that adjustment of the *fixed* external reference price is not legally permissible. China submits that if any price needs to be adjusted for purposes of calculating AMS, so as to permit a proper comparison of prices for the same product at the same level of processing and trade, then the AAP must be adjusted, because that price is not "fixed".[565]

7.346. The Panel does not find this argument convincing. As noted by the United States, Paragraph 9 of Annex 3 states explicitly that "the fixed reference price may be adjusted for quality differences as necessary".[566] This indicates that China's argument regarding the immutable nature of the reference price due to the inclusion of the word "fixed" is misplaced. Clearly, on the wording of Paragraph 9 itself, the Agreement on Agriculture allows for the adjustment of the FERP and thus the word "fixed" would not act to prevent the adjustment of the FERP if the Panel considers this necessary or appropriate.

7.347. In light of the above, we consider that in order to properly calculate the relevant AMS for Indica and Japonica rice we will adjust the FERP downwards to a level equivalent to unmilled rice.

[562] China's response to Panel question No. 99, para. 317.
[563] As noted by the United States. See United States' response to Panel question No. 99, para. 176.
[564] United States' first written submission, para. 116.
[565] China's first written submission, para. 246.
[566] United States' second written submission, paras. 97-98.

This approach ensures calculation of the relevant AMS as close as practicable to the point of first sale of the basic agricultural product.

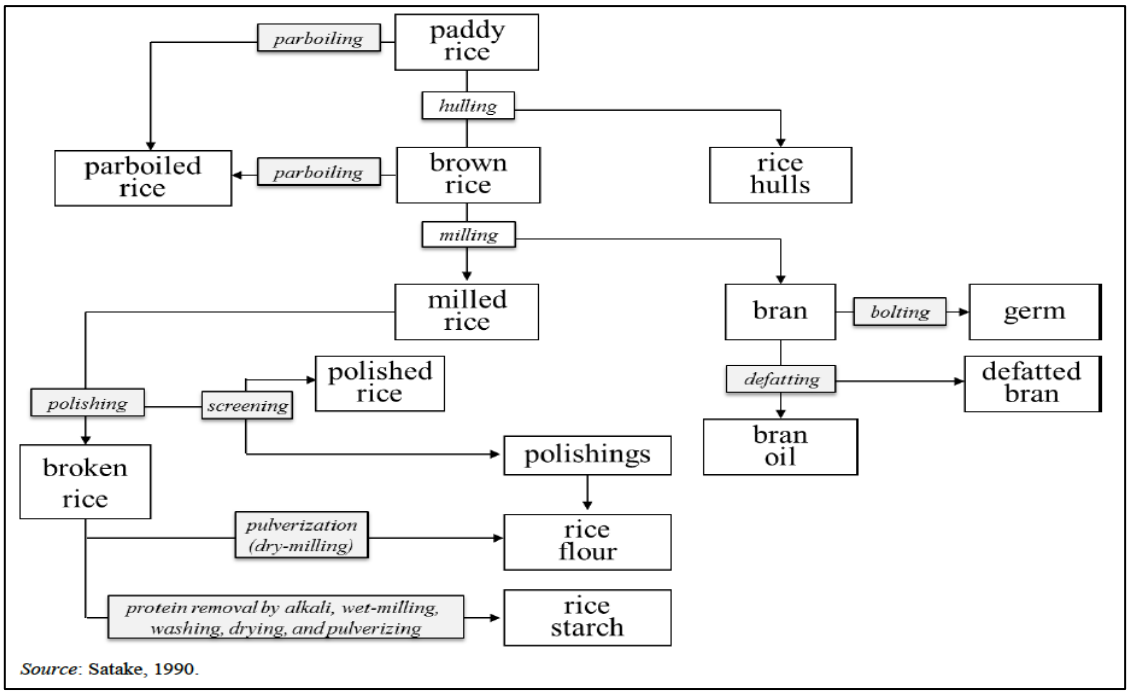
7.4.5.4.2 Adjustment rate to be used in this case

7.348. We have determined that the FERP will be adjusted to reflect an unmilled equivalent level. We now move to determine the most appropriate rate at which to adjust the FERP. As noted previously there are two potential options presented by the parties here: a rate of 60%, which the United States argues must be applied to the FERP (or to any price-based adjustment)[567], or a rate of 70% which China initially argues should apply to both the QEP and the AAP (originally a quantity-based adjustment, identically applied to price).[568] China has stated, however, that "to adjust downwards the fixed external reference prices to reflect the processing level of paddy rice, … the conversion rate should again be 70%, such that the milled rice fixed external reference price would have to be multiplied by 0.7".[569] China has provided data for the adjusted FERP in this regard.[570] The ability to use either of these adjustment rates depends, first, on the availability of suitable data provided by the parties to the Panel.

7.349. A major point of contention between the parties is the use, by the United States, of "polished long-grained non-glutinous rice and polished round-grained rice" in determining its price-based adjustment rate. This rate allegedly results from an incorrect product comparison, according to China.[571] China argues that the necessary adjustment rate is one that flows from a comparison between: (i) the rice products exported by China in 1996-1998 (and on which the FERP is based); and (ii) unmilled rice to which the minimum procurement price applied in 2012-2015. For China, the product on which the 1996-1998 FERP is based is "semi-milled or wholly milled rice, whether or not polished or glazed", which is a broad category of rice and includes cheaper semi-milled rice and broken rice, as well as more expensive forms of rice, such as polished rice with broken rice removed. China contends that the United States has assumed that the product to use as the proxy for the external reference price is the highest quality product – "polished long-grained non-glutinous rice and polished round-grained rice", which is naturally the most expensive.[572] As the 1996-1998 FERP was based on "semi-milled or wholly milled rice, whether or not polished or glazed", it would be incorrect to compare the price used there with only polished rice (the highest quality product) in the current calculations, China argues. The United States, on the other hand, in its second written submission, argues that China's contention that polished rice is a significantly more refined product than milled rice is inaccurate, as polished rice is milled rice.[573] China's contention appears to be confirmed by Figure 5 of China's first written submission, an OECD overview of rice at various stages of processing, reproduced below.[574] This problem is exacerbated, according to China, as the 60% rate is based on the use of Chinese *retail* prices for polished long-grained and polished round rice[575] while the external reference price set out in Rev.3 is a *wholesale* f.o.b. export price.[576]

[567] United States' response to Panel question No. 101.
[568] China's response to Panel question No. 101.
[569] China's response to Panel question No. 101.
[570] China's response to Panel question No. 101, table 14.
[571] China's response to Panel question No. 38.
[572] China's first written submission, para. 248 (referring to 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72)).
[573] United States' second written submission, para. 103.
[574] China's first written submission, para. 240, Figure 5.
[575] China's first written submission, para. 250 (referring to 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72)).
[576] China's first written submission, para. 250.

Figure 3: OECD overview of rice at various stages of processing



Source: China's first written submission, Figure 5.[577]

7.350. As correctly noted by China, the wholesale f.o.b. export price, as set out in Rev.3, covers both polished rice, and unpolished, or broken rice.[578] Restricting that product category to polished rice, as the United States suggests, would result in taking as the basis for adjustment the most expensive type of rice, leaving out the unpolished or broken rice. This approach is, in our view, incorrect, because it would fail to take into account prices of less expensive types of rice that are covered by the wholesale f.o.b. export price mentioned in Rev.3. The so-derived conversion rate of 60% would thus be distorted and we cannot use it as the basis for our calculations.

7.351. China argues that, under these circumstances, the use of a volume-based conversion rate would be appropriate where no better price-based conversion rate is available.[579] We agree that in the absence of more accurate price-based data for the conversion, we can complete our calculations based on a less-preferable, but equally valid, volume-based conversion rate.[580]

7.352. We thus conclude that because of the absence of appropriate price-based conversion data, we will make the adjustment to the FERP using the volume-based conversion rate of 70%.

[577] OECD Environment Directorate, Revised Consensus Document on Compositional Considerations for New Varieties of Rice (Oryza sativa): Key Food and Feed Nutrients, Anti-nutrients and Other Constituents, 2016, (Exhibit CHN-65).

[578] The United States relied on data attributable to the "rural free market," which it considers may underestimate the differential between paddy rice prices and export milled or semi-milled rice prices because they do not account for the transportation, bagging or packaging, and other costs associated with export. United States' second written submission, para. 103.

[579] China's response to Panel question No. 38, para. 171.

[580] While we agree with China's suggestion to use the volume-based conversion rate of 70%, this conclusion should not be read as endorsing China's argument that the determination of the adjustment rate should be consistent with the contents of Rev.3. See China's first written submission, paras. 234-235, 243-251, China's response to Panel question No. 100. While certain elements of China's CDM found within Rev.3 could be relevant for Panel's determination of current AMS, we do not consider the fact that China had purportedly utilized an identical conversion rate in Rev.3 to be binding or determinative when adjusting the variables at this stage of our assessment.

7.4.5.4.3 Conclusion on the processing-level adjustment

7.353. To summarize the conclusions that we have arrived at in this section on the processing level adjustment, we will (i) adjust the FERPs for Indica and Japonica rice, which is the only variable at a higher level of processing than "unmilled", and (ii) make the adjustment using the volume-based conversion rate of 70%, due to the absence of appropriate price-based conversion data.

7.4.6 Calculation of China's Current Total AMS

7.354. We have resolved the issues before us relating to the definition and calculation of each of the variables of the MPS formula. Briefly, the AAP is the minimum purchase price identified in the annual Wheat MPP Notices[581] and Rice MPP Notices[582] (at Grade 3).[583] The FERP to be used in this case is based on the same years used to calculate China's Base Total AMS, i.e. 1996-1998. For Indica and Japonica rice, the FERP will be adjusted downward at a rate of 70% to reflect the level of unmilled rice used in the AAP and QEP. The QEP to receive the AAP is the entire volume of production in the relevant specified provinces, less any out-of-grade grain. Furthermore, the total value of production for the various products is calculated by multiplying the total amount of wheat (or rice) produced in China in a certain year by the producer price (or farm gate price) of wheat (or rice) for that year.[584]

7.355. These legal and technical considerations will guide our calculation of China's Current Total AMS.

7.356. In this section, we will assess the parties' arguments regarding the prices and quantities that should inform the calculation of China's domestic support in the form of market price support for rice and wheat, in the years 2012-2015. After doing so and having established the appropriate figures to be used, we will proceed to make our own calculations of the market price support component of China's AMS and Current Total AMS for the commodities and in the years at issue. We will conclude by assessing whether China is in compliance with its relevant domestic support obligations.

7.357. We begin by addressing the general framework we will use to review the numbers and supporting evidence that have been presented over the course of these proceedings. In this regard, we note that in contrast to the findings in the previous sections in relation to the legal definition of the AAP, the FERP and the QEP, the present assessment is mainly factual in nature.

7.358. In this connection, we asked the parties how the Panel is to assess the calculations presented by them, including the extent to which we can or should re-run the numbers presented by the parties. We also asked them how we should treat any discrepancies or inconsistencies in the data presented by them. For the United States, the Panel should review the calculations, along with the relevant source material underlying these calculations. The United States also argues that the Panel should seek to resolve any discrepancies in the calculations by recourse to the source material, and that, as the trier of fact, the Panel should seek to resolve any discrepancies by evaluating the respective pieces of evidence to determine their reliability and probative value.[585] China generally agrees with the United States and posits that in its role as trier of fact, the Panel may make factual

[581] 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B), p. 1; 2013 Wheat Annual Notice (Exhibit USA-21/CHN-93B) p. 1; 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B), p. 1; 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B), p. 1.

[582] 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B), p. 1; 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B), p. 1; 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B), p. 1; 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B), p. 1.

[583] These figures were multiplied by 20 in order to derive a price per ton.

[584] Both the United States and China use the same source to determine the producer price (or farm gate price) for wheat and rice. China's Farm Gate Prices 1995 to 2015, (Exhibit USA-79), Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67); China National Development and Reform Commission, Compilation of Materials on Agricultural Product Cost and Returns (2016), (Exhibit USA-81/CHN-67). Prices are available for early-, mid-, and late-season Indica rice, and Japonica rice. It appears that the United States has used the producer price for mid-season Indica rice only as the producer price for mid- to late-season Indica rice in its calculations, as noted by China. China's comments on the United States' response to Panel question No. 96.

[585] United States' response to Panel's question No. 63 (second substantive meeting).

findings that differ from those advocated by the parties, provided that the Panel's findings have an evidentiary basis in the record, and they are otherwise consistent with the requirement to make an objective assessment. In addition, China argues that the Panel's mandate extends to an objective assessment of any discrepancies in the data, and to making factual findings that resolve any such discrepancies.[586]

7.359. We note that under Article 11 of the DSU, we are directed to make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. In our view and in the context of this case, this implies that we should not accept the calculations and numbers presented by the parties before carefully examining their accuracy and reliability. In addition, our task allows us to resolve any inconsistencies or discrepancies that we find by resorting to the original sources of the data and by running our own calculations on the basis of the available evidence in the record. In this vein, we asked the parties several questions that sought to clarify certain inconsistencies in the numbers presented in the parties' written submissions.[587] The parties clarified that most of these inconsistencies were due to differences in the units of measurement used, the number of decimal places, rounding, and some errors in the transposition of numbers when aggregating them across different tables.

7.360. After carefully assessing each of these issues and the evidence before us, we decided to standardize the metrics to be used into millions of tons, for quantities, and renminbi per ton, for prices. We also decided to work with all the decimal places available so as to avoid any inaccuracies resulting from rounding. Finally, we ran our own calculations to either confirm or correct the ones presented by the parties. After doing so, we presented the parties with a table that summarized our assessment regarding the different figures needed for the calculations of China's Total AMS and Current Total AMS.[588] The parties agreed with most of the numbers presented but, in some instances, they submitted additional corrections or revisions. We have taken due note of these.

7.361. The tables below present the resulting information.

7.4.7 MPS Calculations

7.4.7.1 Wheat

7.362. Table 9 sets out all the variables required to run the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, namely the AAP, the FERP, the QEP and the total value of production. First, we multiply the **total national production** of wheat by the **producer price** for each year, to calculate the **total value of production** of wheat.

7.363. The table then determines the QEP. This is done by (i) setting out the **volume of production** of wheat in each of the covered provinces and then (ii) subtracting the **out-of-grade production** from each of these provinces. The **QEP per province** is then totalled to determine the final **QEP**.

7.364. The **AAP** is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.365. The **FERP** is the average of three external reference prices for the years 1996-1998, set out in Appendix DS 5-3 of China's tables of supporting material.

7.366. To calculate an MPS value, first the FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the **total value of production** above to arrive at a **percentage** which is then compared to China's 8.5% *de minimis* level.

[586] United States' response to Panel's question No. 63 (second substantive meeting).
[587] See United States' response to Panel's question Nos. 72-74 (first substantive meeting).
[588] See United States' response to Panel's question No. 96. See also (Exhibit CHN-88).

Table 9: Calculation of MPS for wheat from 2012-2015

Wheat MPS Calculation	Units	2012	2013	2014	2015
Total national production[589]	million tons	121.023	121.926	126.208	130.185
Producer price[590]	¥/ton	2,166.20	2,356.20	2,411.80	2,328.60
Total value of production	**million ¥**	**262,160.02**	**287,282.04**	**304,388.45**	**303,148.79**
Volume of production by covered province[591]					
Hebei	million tons	13.377	3.872	14.299	14.350
Jiangsu	million tons	10.488	11.013	11.604	11.740
Anhui	million tons	12.940	13.320	13.936	14.110
Shandong	million tons	21.795	22.188	22.638	23.466
Henan	million tons	31.774	32.264	33.290	35.010
Hubei	million tons	3.708	4.168	4.216	4.209
Total	**million tons**	**94.082**	**96.825**	**99.983**	**102.885**
Out-of-grade percentage[592]					
Hebei	percentage	0.0	1.0	0.0	0.0
Jiangsu	percentage	2.0	1.0	0.3	1.0
Anhui	percentage	1.0	0.0	0.0	1.7
Shandong	percentage	0.0	1.0	0.2	0.0
Henan	percentage	1.0	0.0	0.0	0.0
Hubei	percentage	8.0	0.0	0.0	0.0
QEP per provinces					
Hebei	million tons	13.377	13.733	14.299	14.350
Jiangsu	million tons	10.278	10.903	11.569	11.623
Anhui	million tons	12.811	13.320	13.936	13.870
Shandong	million tons	21.795	21.966	22.593	23.466
Henan	million tons	31.456	32.264	33.290	35.010
Hubei	million tons	3.411	4.168	4.216	4.209
MPS Calculation					
QEP	**million tons**	**93.128**	**96.354**	**99.903**	**102.528**
AAP[593]	**¥/ton**	**2,040.00**	**2,240.00**	**2,360.00**	**2,360.00**
Average 1996-1998 FERP (c.i.f price)[594]	**¥/ton**	**1698.13**	**1698.13**	**1698.13**	**1698.13**
Wheat MPS = (AAP-FERP)*QEP	**million RMB**	**31,837.83**	**52,211.49**	**66,122.74**	**67,860.03**

[589] China's first written submission, para. 87, Table 4. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; United States' first written submission, para. 122; United States' response to Panel question Nos. 72-73; China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75) China's Rural Statistical Yearbook (2016), Table 7-17 (Exhibit USA-76/CHN-33).

[590] China's first written submission, para. 272, Table 21; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[591] United States' response to Panel Question No. 73, Table 8 (first substantive meeting). China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[592] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[593] China's first written submission, para. 270, Table 20; 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B); 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised); 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B); 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B). United States' first written submission, para 111, Table 6; 2013 Wheat Annual Notice (Exhibit USA-21/CHN-93B).

[594] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

Wheat MPS Calculation	Units	2012	2013	2014	2015
MPS / Total value of production	**percentage**	**12.14**	**18.17**	**21.72**	**22.39**

7.4.7.2 Rice

7.367. The calculations for rice (Japonica, early-season Indica and late-season Indica) are relatively more complex. This is mainly due to differences in the mathematical approaches taken by the parties and differences in the data submitted by the parties responding to the mentioned mathematical differences.

7.368. There are three discrete issues in this regard: (i) the different ratios used by the United States (31.6%) and China (33.3%) to determine the proportion of Japonica rice that makes up the national production of rice in China; (ii) differences between the data submitted by the parties, or lack thereof, regarding the provincial breakdown of Japonica and Indica rice in the covered provinces in order to determine the QEP; and (iii) China's use of a weighted average to determine the AAP for Indica rice that was used in the calculation of the MPS Formula.

7.369. We explore each of these issues below.

7.4.7.2.1 Total value of production of rice

7.370. China's Statistical Yearbook annually provides information on total "rice" production by province[595], and as noted by both parties, China's Rural Statistical Yearbooks[596] do not distinguish between Indica and Japonica rice.[597] Though both parties agree on the total volume of national rice production, they have differing views on the proportions of national rice production which constitute Japonica and Indica rice.

7.371. The United States argues that Japonica rice makes up 31.6% of China's rice production and that the total volume of production of Japonica is thus determined by multiplying the total national rice production by 0.316.[598] China argues that "[r]eflecting the reality of Chinese agricultural production, japonica rice makes up one third of China's total rice production."[599] China notes that this proportion has been used in a number of its notifications.[600]

7.372. We have carefully reviewed the evidence presented by the parties to support their respective assertions. Regarding the United States' position, we note that the process by which the United States arrives at 31.6% is not itself entirely clear as we could not identify the precise origin of the data within the exhibits referenced by the United States. Upon examination of the portion of China's Statistical Yearbook (2016) submitted by the United States[601], we note that it contains multiple years detailing several stages of the production of rice as well as a breakdown of production of these products per province, without indicating the year (or years) to which the breakdown refers to. Without a reference to those years for each province, it is unclear as to whether the 31.6% ratio is meant to apply uniformly to the years 2012-2015. We were thus unable to replicate precisely the results obtained by the United States. Regarding China's arguments, we observe that the 1:2 ratio is supported by notifications that China has made to the WTO Committee on Agriculture. These, however, do not explain the calculation process used to arrive at this figure or provide any statistical data on the production of Japonica vs. Indica rice in China.

---

[595] China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10, (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[596] China's Rural Statistical Yearbook (2013), (Exhibit CHN-49); China's Rural Statistical Yearbook (2015), (Exhibit CHN-50); China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33).

[597] United States' first written submission, para. 120; China's response to Panel question No. 97, para. 305; China's comments on the United States' response to Panel question No. 97, para 239.

[598] United States' first written submission, fn. 244.

[599] China's first written submission, para. 257.

[600] *See* China's Notification (2002-2004), G/AG/N/CHN/17 (24 March 2010), (Exhibit USA-2); China's Notification (2005-2008), G/AG/N/CHN/21 (13 October 2011); and China's Notification (2009-2010), G/AG/N/CHN/28 (6 May 2015).

[601] China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18).

7.373. We note that both parties agree on the fact that Japonica rice production is (roughly) one third of national rice production.[602] Additionally, the difference in the overall results obtained using each of the two approaches is minimal, as will be discussed below.

7.4.7.2.2 Volume of production of rice per province

7.374. According to the United States, additional information regarding crop production by season is available in China's Rural Statistical Yearbook and Agricultural Statistical Reports regarding production volume by province for early season rice, mid-to-late or single season rice, and late season rice.[603] In this regard, the United States argues that nearly all early season and late season rice is Indica rice, while middle season single crop rice is Japonica rice.[604]

7.375. In order to determine the production of early-season Indica rice, mid-late-season Indica rice and Japonica rice on a provincial basis, the United States attempts to identify those provinces that primarily or only grow Japonica or Indica rice. Accordingly, the United States submits that almost all of the rice reported as early-season rice is Indica rice.[605] The United States goes on to state that in the more temperate northeast provinces of Liaoning, Jilin, and Heilongjiang, farmers grow primarily Japonica rice, and the measures for Japonica rice operate only in those three provinces.[606] The southern provinces of Jiangxi, Henan, Hubei, Hunan, Guangxi Zhuang and Sichuan primarily grow Indica rice[607], and Jiangsu and Anhui provinces grow both Indica rice and Japonica rice.[608] For the provinces which grow both mid-late-season Indica rice and Japonica rice[609], the total rice volume has been subdivided by the United States to reflect the portion of production estimated to be attributed to each species.[610]

7.376. China disagrees with the data provided by the United States concerning the division of Indica and Japonica rice production in the MPP provinces, as "the United States' division is not based on any official source".[611] As a result, China characterises the production data provided by the United States for the different types of rice per province as being a rough estimation by the United States, based on elements from three reports, dated 2001[612], 2006[613] and 2011[614], respectively. In addition, China argues that the United States does not appear to have applied the percentage that it had itself

[602] See United States' first written submission, fn. 244.

[603] United States' first written submission, para. 120.

[604] United States' first written submission, fn. 234.

[605] China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77) pp. 5, 11, 19.

[606] United States' first written submission, para. 121; China's Rural Statistical Yearbook (2016), Table 7-17, and 7-18, (Liaoning, Jilin, and Heilongjiang reporting no early (Indica) rice production, and only a single season of mid-late-season rice), (Exhibit USA-76/CHN-33); see also Funing, *et al*., *Alternative Approach to Measure Comparative Advantage in China's Grain Sector* (2001), p. 7, (Exhibit USA-35) and Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 2 (2006) (discussing three northeast provinces and Jiangsu), (Exhibit USA-36).

[607] United States' first written submission, para. 121; China's Rural Statistical Yearbook (2016), Table 7-17, and 7-18 (2016), (Exhibit USA-76/CHN-33); Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 4 (2006) (noting the difficulty of the southern provinces switching to Japonica rice) (Exhibit USA-36); see also Hansen, et al., *China's Japonica Rice Market*, 32 (2002) (Exhibit USA-34).

[608] United States' first written submission, para. 121.

[609] According to the United States, Anhui and Jiangsu both grow both Japonica and mid-late-season Indica rice, however in different proportions. Jiangsu is a major producer of Japonica and 86 percent of its production is estimated to be Japonica. Anhui is a lesser producer of Japonica and 19 percent of its production is estimated to be Japonica. United States' first written submission, fn. 231; See Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7 (Exhibit USA-78), compare with China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77).

[610] United States' first written submission, para. 121; Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7, (Exhibit USA-78). Compare with China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77).

[611] China's response to Panel question No. 96, para. 305; China's comments on the United States' response to Panel question No. 97, paras. 239-240.

[612] Funing, *et al*., *Alternative Approach to Measure Comparative Advantage in China's Grain Sector* (2001), p. 7 (Exhibit USA-35)

[613] Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 2 (2006) (Exhibit USA-36)

[614] Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7 (Exhibit USA-78)

identified from the three reports[615], for the data it submitted to the Panel.[616] China thus states that it is not in a position to confirm the accuracy of these data, let alone to agree with them.

7.377. We agree with China that China's Statistical Yearbooks do not distinguish between Indica and Japonica rice when reporting production values. We also agree with China that the evidence provided by the United States does not refer to the years at issue in this dispute, i.e. 2012-2015, and that it is not sourced from official reports. In this connection, we have not been able to determine how the United States has arrived at its proportions of Japonica rice in various provinces from the evidence provided – the relevant information to do this does not seem to be present in the exhibits provided by the United States. We note, however, that China did not submit any evidence to support its contention of the inaccuracy of the United States' calculation, nor did it provide any alternative proportions to be used by the Panel. The evidence on the record does not contain any other source with more recent or official data on the breakdown of the two types of rice by province.

7.378. Given the above, particularly the differences between the parties' approaches when determining the total proportion of Japonica rice produced in China, the Panel will conduct two sets of calculations: one set will broadly follow the United States' approach, using the data provided by the United States, where available, for the volumes of rice used to determine the total value of production and the QEP, and the other set of calculations will broadly follow China's approach and will use the data provided by China, where available, for the volumes of rice used to determine the total value of production and the QEP.

7.4.7.2.3 Weighted average AAP

7.379. The third and final issue relates to the use of a weighted average to calculate one single AAP value for Indica rice when running the MPS Formula.

7.380. China argues that, given there are separate AAPs for early-season and mid-late-season Indica rice, a weighted average AAP should be determined for Indica rice as a whole.[617] The weight China assigns to each type of rice for each year is the actual purchased amount in the respective year.[618]

7.381. We agree with China that its measures provide for two separate AAP values: one for early-season and the other for mid-late-season Indica rice. However, we are not persuaded that a weighted average is the best approach. This is so because China bases its weighting of the AAP on the amount of rice purchased, and not the QEP as defined by the Panel.[619] In our view, a simple average of the two AAPs is suitable to determine an AAP for Indica rice as a whole. Thus, the Panel will not use China's weighted average approach for the AAPs for Indica rice. It will instead use a simple average where necessary.

---

[615] Hansen, et al., *China's Japonica Rice Market*, p. 38 (2002), (Exhibit USA-34); Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 7 (2006), (Exhibit USA-36), Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7, (Exhibit USA-78).

[616] China's comments on the United States' response to Panel question No. 97, para. 240.

[617] China's first written submission, para. 237, Table 10.

[618] China's first written submission, para. 237.

[619] In any event, if the Panel were to consider that China had meant for the weight to derive from a variable QEP (however defined), rather than a static "amount purchased", the Panel notes that the results would be mathematically equivalent in this case, if the other data inputs remained constant. See the formula below:

Summed MPS for early- and mid-late-season Indica rice:

$$MPSind = MPSe + MPSml = (AAPe - FERPind) * QEPe + (AAPml - FERPind) * QEPml$$

China uses the following weighted average AAP in its calculation of MPS for Indica rice:

$$MPSind = \left(\frac{AAPe * QEPe + AAPml * QEPml}{QEPe + QEPml} - FERPind\right) * (QEPe + QEPml)$$

Both methodologies used in this case are mathematically equivalent.

$$MPSind = MPSe + MPSml = (AAPe - FERPind) * QEPe + (AAPml - FERPind) * QEPml$$
$$= AAPe * QEPe + AAPml * QEPml - FERPind * (QEPe + QEPml)$$
$$= \left(\frac{\boldsymbol{AAPe * QEPe + AAPml * QEPml}}{\boldsymbol{QEPe + QEPml}} - \boldsymbol{FERPind}\right) * (\boldsymbol{QEPe + QEPml})$$

7.4.7.2.4 Conclusion on these issues

7.382. For the reasons outlined above, we will conduct two sets of calculations:

a. In the first set of calculations, we broadly follow the United States' approach. This involves using the United States' national breakdown of Japonica and Indica rice (at a 31.6% ratio), as well as the United States' breakdown in the covered provinces. For the calculation of MPS for Indica rice, specifically, we will calculate two different MPS values, one for early-season and the other for mid- late-season, using the two separate AAPs in China's measures. Finally, we will add them up to arrive at an MPS for Indica rice as a whole. This MPS value is then divided by the total value of production of all Indica rice in China (a sum of early- and mid-late-season based on the United States' 31.6% ratio).

b. In the second set of calculations, we broadly follow China's approach. This involves using China's national breakdown of Japonica and Indica rice (at a 33.3% ratio), as well as a proxy breakdown of rice production in the covered provinces. For the calculation of MPS for Indica rice, specifically, we will calculate one MPS value for Indica rice, using a simple average of the early- and mid-late-season AAPs. This MPS value is then divided by the total value of production of all Indica rice in China (based on China's 33.3% ratio).

7.383. As will be seen below, in either set of calculations, the result is above China's 8.5% *de minimis* level for both Indica and Japonica rice, and the average difference between the United States' and China's alternatives is approximately 0.27 percentage points for Indica and 0.25 percentage points for Japonica. In our view, this difference is negligible and does not affect our final conclusion regarding China's compliance with its domestic support commitments.

7.4.7.2.5 Japonica rice

7.4.7.2.5.1 Japonica rice (United States' approach)

7.384. Table 10 sets out all the variables required to carry out the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, namely the AAP, the FERP, the QEP and the total value of production. First, it sets out the total national production of Japonica rice (the total national production of *all* rice in China multiplied by 0.316, which the United States argues is necessary to arrive at the correct proportion of Japonica). It goes on to multiply this **total national production** of Japonica rice by the **producer price** for each year, to calculate the **total value of production** of Japonica rice.

7.385. The table then determines the QEP. This is done by (i) setting out the **volume of production** of Japonica rice in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the **out-of-grade production** from each of these provinces. The **QEP per province** is then totalled to determine the final **QEP**.

7.386. The **AAP** is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.387. The **FERP** is the average of three external reference prices for the years 1996-1998, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this **FERP** downwards to the level of unmilled rice by multiplying it by 0.7, as discussed earlier.

7.388. To calculate an MPS value, the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the **MPS** for a specific year. Finally, this MPS is divided by the **total value of production** above to arrive at a **percentage** which can be compared with China's 8.5% *de minimis* level.

Table 10: Calculation of MPS for Japonica rice from 2012-2015 (United States' breakdown)

Japonica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[620]	million tons	64.539	64.341	65.256	65.760
Producer price[621]	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20
Total value of production	**million ¥**	**188,426.83**	**188,944.93**	**198,065.65**	**194,070.65**
Average 1996-1998 FERP (f.o.b. prices - milled)[622]	¥/ton	3290.63	3290.63	3290.63	3290.63
Volume of production by covered province[623]					
Liaoning	million tons	5.078	5.069	4.515	4.677
Jilin	million tons	5.320	5.633	5.876	6.301
Heilongjiang	million tons	21.712	22.206	22.510	21.997
Jiangsu	million tons	16.360	16.551	16.461	16.811
Anhui	million tons	2.422	2.364	2.431	2.592
Total	million tons	**50.892**	**51.823**	**51.793**	**52.378**
Out-of-grade percentage[624]					
Liaoning	percentage	0.0	0.0	0.0	0.0
Jilin	percentage	0.0	0.0	0.0	0.0
Heilongjiang	percentage	0.0	0.0	0.0	0.3
Jiangsu	percentage	0.0	0.0	0.0	1.5
Anhui	percentage	0.0	0.0	0.0	0.0
QEP per province					
Liaoning	million tons	5.078	5.069	4.515	4.677
Jilin	million tons	5.320	5.633	5.876	6.301
Heilongjiang	million tons	21.712	22.206	22.510	21.931
Jiangsu	million tons	16.360	16.551	16.461	16.559
Anhui	million tons	2.422	2.364	2.431	2.592
MPS Calculation					
QEP	**million tons**	**50.892**	**51.823**	**51.793**	**52.060**
AAP (unmilled)[625]	**¥/ton**	**2,800.00**	**3,000.00**	**3,100.00**	**3,100.00**
Average 1996-1998 FERP (unmilled equivalent)	**¥/ton**	**2303.44**	**2303.44**	**2303.44**	**2303.44**
Japonica MPS = (AAP-adjusted FERP)*QEP	**million RMB**	**25,270.76**	**36,097.66**	**41,256.06**	**41,468.62**
MPS / Total value of production	**percentage**	**13.41**	**19.10**	**20.83**	**21.37**

[620] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[621] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[622] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

[623] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[624] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[625] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B); United States' first written submission, para. 112, Table 6.

7.4.7.2.5.2 Japonica rice (China's approach)

7.389. Table 11 sets out all the variables required to run the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, broadly using China's approach. First, it sets out the total national production of Japonica rice (the total national production of *all* rice in China multiplied by 0.333, which China argues is necessary to arrive at the correct proportion of Japonica). It goes on to multiply this **total national production** of Japonica rice by the **producer price** for each year, to calculate the **total value of production** of Japonica rice.

7.390. The table then determines the QEP. While China does provide the percentage of **out-of-grade production** in each province, it did not provide data on **production by province**. Thus, in the case of Japonica rice, the table first sets out the data on the total **volume of production** of Japonica rice in all of the covered provinces, without any provincial breakdown. This value was arrived at by multiplying the total volume of production of all rice in the covered provinces by 0.333. The table then averages the percentages of **out-of-grade production** provided by China into a single figure. Calculating the QEP involves (i) setting out the total **volume of production** of Japonica rice in all of the covered provinces and then (ii) subtracting the **out-of-grade production** (calculated using the average of the out-of-grade percentages) from this total. The result is the final **QEP.**

7.391. The **AAP** is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.392. The **FERP** is an average of three external reference prices for the years 1996-1998, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this **FERP** downwards to the level of unmilled rice by multiplying it by 0.7.

7.393. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP to arrive at an **MPS** for a specific year, expressed as a monetary value. Finally, this MPS is divided by the **total value of production** above to arrive at a **percentage** which can be compared with China's 8.5% *de minimis* level.

Table 11: Calculation of MPS for Japonica rice from 2012-2015 (China's breakdown)

Japonica rice MPS Calculation (China)	Units	2012	2013	2014	2015
Total national production[626]	million tons	68.011	67.803	68.767	69.339
Producer price[627]	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20
Total value of production	**million ¥**	**198,563.71**	**199,109.69**	**208,721.09**	**204,633.04**
Average 1996-1998 FERP (f.o.b. prices - milled)[628]	¥/ton	3290.63	3290.63	3290.63	3290.63
Volume of production[629]					
Total in covered provinces	million tons	**53.059**	**53.309**	**53.966**	**54.659**
Out-of-grade percentage[630]					
Liaoning	percentage	0.0	0.0	0.0	0.0
Jilin	percentage	0.0	0.0	0.0	0.0
Heilongjiang	percentage	0.0	0.0	0.0	0.3
Jiangsu	percentage	0.0	0.0	0.0	1.5
Anhui	percentage	0.0	0.0	0.0	0.0
Average	percentage	**0.0**	**0.0**	**0.0**	**0.4**
MPS Calculation					
QEP	**million tons**	**53.059**	**53.309**	**53.966**	**54.462**
AAP (unmilled)[631]	**¥/ton**	**2,800.00**	**3,000.00**	**3,100.00**	**3,100.00**
Average 1996-1998 FERP (unmilled equivalent)	**¥/ton**	**2303.44**	**2303.44**	**2303.44**	**2303.44**
Japonica MPS = (AAP-adjusted FERP)*QEP	**million RMB**	**26,347.09**	**37,132.90**	**42,987.41**	**43,382.13**
MPS / Total value of production	**percentage**	**13.27**	**18.65**	**20.60**	**21.20**

[626] Production amount of Japonica rice = national total * 33.3%; See China's first written submission, Table 5; China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[627] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[628] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

[629] These figures were arrived at by taking the total production of rice in the provinces covered by the measures and multiplying this by 0.333. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[630] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[631] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B); United States' first written submission, para. 112, Table 6.

7.4.7.2.6 Indica rice (United States' approach)

7.4.7.2.6.1 Early-season Indica rice

7.394. Table 12 sets out all the variables required to run the MPS formula for early-season Indica rice following the United States' approach. First, it sets out the **total national production** of early-season Indica rice, provided exclusively by the United States. It goes on to multiply this **total national production** by the **producer price** for early-season Indica rice for each year, to calculate the **total value of production**.

7.395. The table then determines the QEP. This is done by (i) setting out the **volume of production** of early-season Indica in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the **out-of-grade production** from each of these provinces. The **QEP per province** is then totalled to determine the final **QEP**.

7.396. The **AAP** is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.397. The **FERP** is the average of three external reference prices for the years 1996-1998 for "Indica rice", as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this **FERP** downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.398. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the **MPS** for a specific year. Finally, this MPS is divided by the **total value of production** above to arrive at a percentage. This percentage, in the case of early-season and mid-late-season Indica rice, is for descriptive purposes only, as it is a total MPS percentage for Indica rice that we will compare against China's 8.5% *de minimis* value.

Table 12: Calculation of MPS for early-season Indica rice from 2012-2015 (United States' breakdown)

Early-Season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[632]	million tons	33.291	34.145	34.012	33.687
Early-season producer price[633]	¥/ton	2,622.00	2,603.20	2,681.60	2,687.40
Total value of production	**million ¥**	**87,289.00**	**88,886.26**	**91,206.58**	**90,530.44**
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	**2343.00**	**2343.00**	**2343.00**	**2343.00**
Volume of production by covered province[634]					
Anhui	million tons	1.320	1.308	1.283	1.092
Jiangxi	million tons	8.002	8.280	8.201	8.119
Hubei	million tons	2.089	2.228	2.387	2.523
Hunan	million tons	8.187	8.605	8.548	8.589
Guangxi Zhuang Autonomous Region	million tons	5.449	5.552	5.433	5.288
Total	million tons	**25.047**	**25.973**	**25.852**	**25.611**
Out-of-grade percentage[635]					
Anhui	percentage	0.0	0.0	0.0	0.0
Jiangxi	percentage	1.0	1.0	0.0	0.0
Hubei	percentage	0.0	0.0	0.0	0.0
Hunan	percentage	1.0	0.0	3.0	1.0
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	1.0	0.0
QEP per province					
Anhui	million tons	1.320	1.308	1.283	1.092
Jiangxi	million tons	7.922	8.197	8.201	8.119
Hubei	million tons	2.089	2.228	2.387	2.523
Hunan	million tons	8.105	8.605	8.292	8.503
Guangxi Zhuang Autonomous Region	million tons	5.395	5.496	5.379	5.288
MPS Calculation					
QEP	**million tons**	**24.831**	**25.835**	**25.541**	**25.525**
AAP (unmilled)[636]	**¥/ton**	**2,400.00**	**2,640.00**	**2,700.00**	**2,700.00**
Average 1996-1998 FERP (unmilled equivalent)[637]	**¥/ton**	**1640.10**	**1640.10**	**1640.10**	**1640.10**
Early-season Indica MPS = (AAP-adjusted FERP)*QEP	**million RMB**	**18,868.79**	**25,832.10**	**27,071.15**	**27,054.06**

[632] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[633] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[634] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77), pp. 5, 11, 19.

[635] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[636] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

[637] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

Early-Season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
MPS / National value of production of Indica	**percentage**	**21.62**	**29.06**	**29.68**	**29.88**

7.4.7.2.6.2 Mid-Late-Season Indica rice

7.399. Table 13 sets out all the variables required to run the MPS formula for mid-late-season Indica rice following the United States' approach. First, it sets out the total national production of mid-late-season Indica rice, which the United States asserts is calculated by subtracting the volume of early-season Indica and Japonica rice from the total volume of Chinese rice production. The table goes on to multiply this **total national production** by the **producer price** for an average of the mid- & late-season producer price for each year, to calculate the **total value of production**.

7.400. The table then determines the QEP. This is done by (i) setting out the **volume of production** of mid-late-season Indica rice in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the **out-of-grade production** from each of these provinces. The **QEP per province** is then totalled to determine the final **QEP**.

7.401. The **AAP** is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.402. The **FERP** is the average of three external reference prices for the years 1996-1998 for "Indica rice", as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this **FERP** downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.403. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the **MPS** for a specific year. Finally, this MPS is divided by the **total value of production** above to arrive at a percentage. This percentage, in the case of early-season and mid-late-season Indica rice, is for descriptive purposes only, as it is a total MPS percentage for Indica rice which is to be compared against China's 8.5% de minimis value.

Table 13: Calculation of MPS for mid-late-season Indica rice from 2012-2015 (United States' breakdown)

Mid-late-season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[638]	million tons	106.406	105.136	107.239	108.739
Average of Mid- & Late-season producer price[639]	¥/ton	2,733.40	2,670.30	2,748.10	2,694.30
Total value of production	**million ¥**	**290,851.32**	**280,743.61**	**294,702.91**	**292,975.22**
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	2343.00	2343.00	2343.00	2343.00
Volume of production by covered province[640]					
Jiangsu	million tons	2.641	2.672	2.658	2.714

[638] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[639] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79). It is prudent to use an average of the producer prices for mid- and late-season Indica rice. As an incorrect average of the producer price for mid-late-season rice was submitted by the United States, the calculation for this type of rice is performed using the correctly averaged producer price for mid-late-season Indica rice.

[640] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77), pp. 5, 11, 19.

Mid-late-season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Anhui	million tons	10.193	9.951	10.232	10.910
Jiangxi	million tons	11.758	11.760	12.051	12.153
Henan	million tons	4.926	4.858	5.286	5.315
Hubei	million tons	14.425	14.539	14.908	15.584
Hunan	million tons	18.130	17.011	17.792	17.859
Guangxi Zhuang Autonomous Region	million tons	5.971	6.010	6.228	6.090
Sichuan	million tons	15.354	15.490	15.261	15.526
Total	**million tons**	**83.398**	**82.291**	**84.416**	**86.151**
Out-of-grade percentage[641]					
Jiangsu	percentage	0.0	0.0	0.0	0.0
Anhui	percentage	1.0	1.0	0.8	0.0
Jiangxi	percentage	1.0	0.0	0.0	0.0
Henan	percentage	0.0	3.0	2.2	1.1
Hubei	percentage	0.0	4.0	0.7	0.0
Hunan	percentage	0.0	1.0	0.0	1.7
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	0.0	0.0
Sichuan	percentage	0.0	0.0	1.3	1.0
QEP per province					
Jiangsu	million tons	2.641	2.672	2.658	2.714
Anhui	million tons	10.091	9.851	10.150	10.910
Jiangxi	million tons	11.640	11.760	12.051	12.153
Henan	million tons	4.926	4.712	5.170	5.257
Hubei	million tons	14.425	13.957	14.804	15.584
Hunan	million tons	18.130	16.841	17.792	17.555
Guangxi Zhuang Autonomous Region	million tons	5.911	5.950	6.228	6.090
Sichuan	million tons	15.354	15.490	15.063	15.371
MPS Calculation					
QEP	**million tons**	**83.119**	**81.234**	**83.915**	**85.634**
AAP (unmilled)[642]	**¥/ton**	**2,500.00**	**2,700.00**	**2,760.00**	**2,760.00**
Average 1996-1998 FERP (unmilled equivalent)	**¥/ton**	**1640.10**	**1640.10**	**1640.10**	**1640.10**
Mid-late-season Indica MPS = (AAP-adjusted FERP)*QEP	**million RMB**	**71,473.84**	**86,099.90**	**93,976.52**	**95,901.15**
MPS / Value of Production	**percentage**	**24.57**	**30.67**	**31.89**	**32.73**

7.4.7.2.6.3 Total Indica rice MPS calculation

7.404. Table 14 sets out the **total value of production of all Indica rice** calculated by summing the value of production of early- and mid-late-season Indica rice, provided in Tables 12 and 13 above.

[641] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[642] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

Table 14: Total value of production for Indica rice from 2012-2015 (United States' breakdown)

	Units	2012	2013	2014	2015
Total value of production (all Indica rice)	**million RMB**	**378,140.32**	**369,629.88**	**385,909.49**	**383,505.66**

7.405. Table 15 sets out the **total MPS for Indica rice**, which is the sum of the MPS for early- and mid-late-season Indica rice, set out in Tables 12 and 13 above. This total MPS is divided by the **total value of production** of Indica rice (calculated in Table 14) to arrive at a **percentage** which can be compared with China's 8.5% *de minimis* level.

Table 15: Calculation of total MPS for Indica rice from 2012-2015 (United States' breakdown)

Total Indica rice MPS calculation	Units	2012	2013	2014	2015
Total MPS for Indica rice = early-season MPS + mid-late-season MPS)	**million RMB**	**90,342.63**	**111,931.99**	**121,047.67**	**122,955.21**
MPS / Total value of production Indica rice	**percentage**	**23.89**	**30.28**	**31.37**	**32.06**

7.4.7.2.7 Indica rice (China's approach)

7.406. Table 16 sets out all the variables required to run the MPS formula for Indica rice broadly following China's approach. First, it sets out the **total national production** of Indica rice, which China asserts is the amount of rice which is not Japonica rice (i.e. 66.7% of total national production).

7.407. The table goes on to multiply this **total national production** by the **producer price calculated as** an average of the early-, mid- & late-season producer prices for each year, to calculate the **total value of production**.

7.408. The table then determines the QEP. While China does provide the percentage of **out-of-grade production** in each province, it did not provide data on **production by province**. Thus, in the case of Indica rice, the table first sets out the data on the **volume of production** of Indica rice in all of the covered provinces. This is the total volume of production of all rice in the covered provinces, multiplied by 0.667. The table then averages the percentages of **out-of-grade production** provided by China into a single figure. Calculating the QEP involves (i) setting out the total **volume of production** of Indica rice in all of the covered provinces and then (ii) subtracting the **out-of-grade production** (calculated using the average out-of-grade percentage) from this total.

7.409. The **AAP** is an average of the early and mid-late prices set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.410. The **FERP** is the average of three external reference prices for the years 1996-1998 for Indica rice, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this **FERP** downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.411. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the **MPS** for a specific year. Finally, this MPS is divided by the **total value of production** above to arrive at a **percentage** which can be compared with China's 8.5% *de minimis* level

Table 16: Calculation of MPS for Indica rice from 2012-2015 (China's breakdown)

Indica rice MPS Calculation (China)	Units	2012	2013	2014	2015
Total national production[643]	million tons	136.225	135.809	137.740	138.886
Average of early-, mid- and late-season producer price	¥/ton	2,696.27	2,647.93	2,725.93	2,692.00
Total value of production	**million ¥**	**367,300.04**	**359,613.72**	**375,470.52**	**373,881.31**
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	2343.00	2343.00	2343.00	2343.00
Volume of production[644]					
Total in covered provinces	million tons	**106.278**	**106.778**	**108.095**	**109.481**
Out-of-grade percentage[645]					
Anhui	percentage	0.5	0.5	0.4	0.0
Jiangxi	percentage	1.0	0.5	0.0	0.0
Hubei	percentage	0.0	2.0	0.4	0.0
Hunan	percentage	0.5	0.5	1.5	1.4
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	0.5	0.0
Jiangsu	percentage	0.0	0.0	0.0	0.0
Henan	percentage	0.0	3.0	2.2	1.1
Sichuan	percentage	0.0	0.0	1.3	1.0
Average	**percentage**	**0.4**	**0.9**	**0.8**	**0.4**
MPS Calculation					
QEP	**million tons**	**105.879**	**105.777**	**107.250**	**109.009**
AAP average of Early & Mid-Late (unmilled)[646]	**¥/ton**	**2,450.00**	**2,670.00**	**2,730.00**	**2,730.00**
Average 1996-1998 FERP (unmilled equivalent)	**¥/ton**	**1640.10**	**1640.10**	**1640.10**	**1640.10**
Indica MPS = (AAP-adjusted FERP)*QEP	**million RMB**	**85,751.59**	**108,939.72**	**116,891.99**	**118,809.17**
MPS / Total value of production	**percentage**	**23.35**	**30.29**	**31.13**	**31.78**

7.4.8 Conclusion on the calculation of China's Current Total AMS

7.412. From the above calculations, we observe that China's product-specific AMS, as provided through market price support, for each of wheat, Indica rice and Japonica rice in the years 2012,

[643] Production amount of Indica rice = national total * (1-33.3%); See China's first written submission, Table 5; China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[644] These figures were arrived at by taking the total production of rice in the provinces covered by the measures and multiplying this by 0.667. No provincial breakdown is given due to insufficient data on the record. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[645] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[646] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

2013, 2014 and 2015, is above China's 8.5% *de minimis* threshold. For rice, this is so regardless of which of the variations in the calculations is employed to produce the AMS values, as discussed above. Therefore, an above-nil AMS value is to be included in China's Current Total AMS figures.

7.413. We thus find that China's level of support in favour of domestic producers is in excess of China's commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods (CLII). Therefore, China is not in compliance with its domestic support commitments pursuant to Articles 3.2 and 6.3 of the Agreement on Agriculture.

7.5 Claim under Article 7.2(b) of the Agreement on Agriculture

7.414. The Panel recalls that the United States made an alternative claim, to the extent that China's commitment level of "nil" were understood as not setting out any commitment, requesting the Panel to find that the challenged measures are inconsistent with China's obligation under Article 7.2(b) of the Agreement on Agriculture.[647] Given our findings under Articles 3.2 and 6.3 of the Agreement on Agriculture, we do not find it necessary to conduct an assessment of the United States' alternative claim.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. The Panel concludes that in the years 2012, 2013, 2014 and 2015, China provided domestic support, expressed in terms of its Current Total AMS, in the form of market price support to producers of wheat, Indica rice and Japonica rice in excess of its commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods CLII. As such, China acted inconsistently with its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the Agreement on Agriculture, they have nullified or impaired benefits accruing to the United States under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that China bring its inconsistent measures into conformity with its obligations under the Agreement on Agriculture.

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