CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE PANEL MEETING

February 13, 2018

TABLE OF CONTENTS

TABLE OF REPORTS

SHORT FORM	**FULL FORM**
EC – Approval and Marketing of Biotech Products (Panel)	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	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
EC – Export Subsidies on Sugar (AB)	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Export Subsidies on Sugar (Australia) (Panel)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
China – Raw Materials (AB)	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
China – Raw Materials (Panel)	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / Add. 1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Korea – Various Measures on Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001

Korea – Various Measures on Beef (Panel)	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
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Sugar (GATT Panel)	GATT Panel Report, United States – Restrictions on Imports of Sugar, L/65/14, adopted 22 June 1989
US – Wool Shirts and Blouses (AB)	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

TABLE OF EXHIBITS

Exhibit Number	**Exhibit Name**
US-65 (Corrected)	Calculation of Fixed External Reference Price 1986-88
US-93	Ministry of Agriculture, Press Release, April 24, 2017
US-94	Corn Prices 2012-2017
US-95	People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html
US-96	Calculation of 2016 Product-Specific AMS
US-97	National Bureau of Statistics of China, China Rural Statistical Yearbook (2017)
US-98	China's State Administration of Grain, Standard & Quality Center, *Quality Survey Reports 2010-2016*
US-99	China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2016)

1. Terms of Reference

For Both Parties:

Question 1: What is the likelihood of reintroducing corn purchases at a minimum procurement price in the relevant Chinese provinces, in light of China preserving the overall legal framework allowing introduction of minimum purchase prices by the State Council, together with other Chinese authorities? Please substantiate the response with evidence.

Response:

1. As described in response to question 2 below, China has not demonstrated that China has in fact *ceased* to provide market price support in 2016.[1] Therefore, the Panel need not determine the extent to which such a program could be reintroduced at a later time.

2. The matter referred to the DSB in this dispute is China's provision of domestic support at levels that breach Articles 3.2, 6.3 and 7.2(b) of the Agriculture Agreement in 2012, 2013, 2014 and 2015. China has failed to demonstrate that it no longer provides market price support to corn producers. Furthermore, China's future compliance under the continuing application of its current, or a future, program, whatever that may be, is not prejudiced by findings made with respect to the years 2012 through 2015. Therefore, the Panel need not assess or pass judgment on China's current corn program – including issues of reintroduction. In particular, the issue of reintroduction raises hypothetical questions or perceptions regarding whether a Member is likely to act inconsistently again – rather than concerns related to the matter squarely before a panel. Determinations based on perceptions of potential reintroduction could lead to different outcomes for similarly situated WTO Members.

3. Conversely, failing to make findings on the U.S. claims would prejudice the United States' rights to DSB recommendations on the matter referred by the DSB to the Panel were China to continue to provide support for corn at levels that exceed its domestic support obligations, despite the United States having raised its claims at the earliest possible opportunity. Given that China has not demonstrated that it has discontinued the provision of domestic support to corn at levels that exceed its commitment level, including through the potential continuing use of market price support mechanisms, the Panel must make findings and recommendations with respect to the U.S. claims to fulfil its duties under the DSU – in particular, to make recommendations under DSU Article 19.1 on any measure found to be inconsistent with the Agriculture Agreement.[2]

---

[1] United States Comments on China's Challenge to the Panel's Terms of Reference paras. 32-50.

[2] *See e.g., EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.1309. That panel relied on the DSU to find that, to "determin[e] whether to make findings on a measure no longer in existence on the date of establishment of a panel, panels should notably take account of the object and purpose of the dispute settlement system." The panel explained that pursuant to Article 3.7 of the DSU, the aim of dispute settlement "is to secure a positive solution to the dispute." The panel reasoned that even if a particular instrument ceased to exist, if the respondent acted

4. The United States is not asking the Panel to make findings on expired measures. However, the United States asks the Panel to take similar account of the objectives of the dispute settlement system in interpreting the U.S. panel request and in making the requested findings under the relevant provisions of the Agriculture Agreement. If China believes that it has now come into compliance with its domestic support commitments through withdrawal of the Corn MPS Program and its implementation of a new program, it should have no concern if the Panel issues the mandatory recommendation under DSU Article 19.1 (as did the panel in *EC – Approval and Marketing of Biotech Products*).[3] Presumably, upon adoption by the DSB of that recommendation, China would declare that it has come into compliance, and the parties would likely need to consult on that claim of compliance in order for the United States to determine whether a solution to the dispute has been found. This is not, however, a matter for this Panel to decide.

5. To the extent the Panel wishes to examine the extent to which China could impose a market price support program with respect to corn in any year after 2015, as China has explained, there is no specific underlying authority for the market price support program for corn. Rather, it was implemented on a "temporary" or *ad hoc* basis at the behest of China's State Council. As such, no new regulation exists to delimit the type or scope of support China may provide for corn. Further, pursuant to the *2004 Grain Regulation*, which covers corn, as well as wheat and rice, Article 27 also authorizes the implementation of a market price support program for corn at any time.[4] It is therefore clear that there is no impediment to China continuing to maintain a market price support (MPS) program for corn.

Question 2: The United States suggests, in its submission of 12 December 2017, that the minimum price support ("MPS") for corn was still in place at the time of the panel request.

a. Could the parties indicate whether there is any evidence that the minimum procurement price has been applied to corn in practice since the alleged expiry of TPRP in 2016? If so, what would be the applied administered price that is necessary to determine China's support to agricultural producers in the years following its alleged expiry in 2016?

b. Please provide any evidence that the purchases that were made after the expiry of the 2015 TPRP were made at market price and, conversely, does the United States have any evidence that the purchases were at any price other than market price?

Responses to (a) and (b):

6. Based on the information publically available to the United States at the time of the December 5, 2016 panel request, and now, the status and content of the 2016 corn purchase program is not clear. The United States has identified information indicating that China

inconsistently with its WTO obligations, a panel should issue findings on the expired instrument in order to secure a positive solution to the dispute.

[3] *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.1309.

[4] *See 2004 Grain Regulation*, Articles 2, and 27 (Exhibit US-12).

continued to purchase significant volumes of corn, including in the northeast region, during the 2016/17 harvest period, and that while prices for corn in China have declined, they remain above international benchmark corn prices.

7. Specifically, China's *2016 Northeast Region Corn Purchase Notice* directs state-owned enterprises, such as Sinograin, COFCO, and AVIC, to enter the market during the harvest season and actively purchase newly harvested corn. During an April 2017 press conference, China's Ministry of Agriculture noted that these entities had procured a combined 30.5 million metric tons of corn during 2016/17.[5] This is a third of all corn produced in the northeast region during the 2016/17 harvest.[6]

8. Additionally, domestic prices for corn in China remain above international corn benchmark prices. Specifically, China's domestic price for corn, while having declined, remains at all times above the price of potential imports from the United States or Ukraine.[7] Similarly, China's domestic corn prices remain above the price of imported substitutes such as dried distillers grain (DDGs), sorghum, and barley.[8] However, the United States was not able to find information regarding the prices at which these corn purchases by state owned enterprises were made, and China declined to provide such information to the Panel during the first meeting.

9. The United States notes that while a number of factors impact government purchases and domestic corn prices, these indicators suggest significant continuing government price support for corn producers in the northeast region well after the U.S. panel request.

10. Furthermore, the information China provided in its First Written Submission regarding the "new" corn program similarly fails to demonstrate that China has *ceased* to provide market price support to producers of corn. Instead, that evidence shows that: (1) China has consistently stated that the market price support program for corn is to be "reformed," rather than terminated; (2) China issued a 2016 instrument regarding corn purchases in the northeast region that is similar to the prior Corn MPS Program, including providing for significant state purchases of corn; (3) while the 2016 instrument does not include a purchase price for corn, it does provide significant indications that price-based interventions will continue; and finally, (4) contemporaneous descriptions of China's 2016 corn purchasing program similarly reflect uncertainty regarding the scope and operation of the program. We will discuss each of these points in detail below.

[5] Ministry of Agriculture, Press Release, April 24, 2017 (Exhibit US-93).
[6] China Rural Statistical Yearbook, 2017 (Exhibit CHN-89).
[7] Corn Prices 2012-2017 (Exhibit US-94).
[8] The United States understands that the vast majority of corn produced in China is used for animal feed (60 percent) or industrial uses such as alcohol, corn starch, and chemicals (30 percent). *See* Nowakowski, *Why Corn – Not Rice – Is King in China* (Exhibit US-50). Thus, while China maintains high domestic corn prices, imports of other common, lower cost animal feeds have increased. USDA GAIN Report, *China – Grain and Feed Annual: Wheat and Rice Supplants Corn Area* (April 4, 2017), at 27-28 (Exhibit CHN-84).

11. First, the policy statements to which China cites consistently indicate, in general terms, that the corn purchasing program will be "*reformed*;" they do not state that the provision of market price support would be terminated. In particular:

- *2016 Document No. 1*: In January 2016, the Central Committee of China's Communist Party (CCCP) and the State Council issued its annual agricultural policy document which stated that China is to "*[r]eform and perfect* mechanisms for setting prices and systems for the purchasing and storage of grain and other important agricultural products," including by "[f]ollowing the 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*."[9]

- *March 2016 News Article*: In March 2016, the Xianhua News Agency reported that corn policy would be adjusted to a "Market Oriented Purchase" plus "Direct Subsidy" policy. An NDRC official was quoted as stating that "[t]o promote the smooth implementation of the *reform* of corn procurement and reserve system, the government will take comprehensive measures, such as . . . credit support . . . and reasonably reducing inventory."[10]

- *May 20, 2016, Ministry of Finance Opinion on Establishing the Subsidy System for Corn Producers*: In May 2016, the Ministry of Finance issued an opinion stating that "[a]ccelerating the establishment of the subsidy system for corn producers is (1) an effective support for the implementation of the corn purchase and reserve system reform,"[11] and that its intention is to "actively and steadily pursue the corn purchase and reserve system reform."[12]

- *September 19, 2016, Notice on Earnestly Completing This Year's Work of Corn Purchasing in the Northeast China Region* ("*2016 Northeast Region Corn Purchase Notice*"): Finally, on September 19, 2016, China issued a notice directing entities including provincial governments, Sinograin, COFCO, AVIC and the Agricultural Development Bank of China to play a continued role in the purchase of corn produced in Inner Mongolia, Liaoning, Jilin, and Heilongjiang.[13] Specifically, this *Notice* states that "[t]his year is the first year of the reforms," and stresses that for this reason "properly handling corn purchasing work under these new mechanisms is extremely important." To that end the *Notice* demands that relevant entities "conscientiously and properly do

[9] *2016 Document Number 1*, para. 22, page 15 (Exhibit US-91) (emphasis added).
[10] Xianhua News Agency, *2016 Corn Temporary Purchase and Reserve Policy Shifted to 'Market Oriented Purchase' and 'Direct Subsidy*, March 28, 2016 (Exhibit CHN-74-B) (emphasis added). The United States notes that China's objection to the translation of "adjusted" appears to be related to China's understanding of the contents of the document, and not the term used in Chinese. *See* China First Written Submission, fn. 302. This term can be translated as "adjust" or "revise."
[11] *Ministry of Finance Opinion on Establishing the Subsidy System for Corn Producers,* (Cai jian [2016] No. 278, May 20, 2016), Section I (Exhibit CHN-73-B).
[12] *Ministry of Finance Opinion on Establishing the Subsidy System for Corn Producers,* (Cai jian [2016] No. 278, May 20, 2016), Section II(1) (Exhibit CHN-73-B).
[13] *2016 Northeast Region Corn Purchase Notice*, page 4 (Exhibit US-87).

> the work of corn purchasing, and ensure the steady and orderly advancement of reforms."[14]

China relies on this series of documents to establish that at some point in early 2016 its MPS Program for corn was terminated,[15] but these documents simply to do not support this conclusion. Moreover, if a "fundamental change" occurred in China's support programs for corn, as argued by China,[16] China should have promptly notified this change to the Committee on Agriculture.[17]

12. Second, while China seeks to reform its corn purchasing policies, and appears now to provide both a direct subsidy to corn producers and to continue its government purchases, the underlying 2016 corn purchasing instrument reveals more similarities to the 2015 TPRP instruments than differences. Specifically, the *2016 Northeast Region Corn Purchase Notice* and its prior *Notices on Purchases of Corn* both contain the following directions:

- Both instruments direct government entities to go into the market and purchase corn. The 2016 instrument states that "{r}elevant central government-owned enterprises such as COFCO and AVIC must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role."[18] Similarly, the 2015 MPS instrument stated that "COFCO, Chinatex, and AVIC, as the supplemental forces for the China Grain Reserves Corporation, are entrusted by China Grain Reserves Corporation to undertake purchasing and storage tasks," and as such, they will "will make open purchases of farmers' surplus grain and will prevent the occurrence of farmers' 'difficulty selling grain.'"[19]

- Both instruments direct the Agricultural Development Bank of China to provide loans to fund the purchases of corn. The 2016 instrument states that "[t]he Agricultural Development Bank of China must . . . according to the corn purchasing loan demand, proactively provide support to large-sized central government-owned grain enterprises and local state-owned and their majority share controlled enterprises."[20] The 2015 MPS instrument states that "[t]he Agricultural Development Bank of China, in accordance with the relevant policy regulations, will arrange for national temporary reserve grain loans

[14] *2016 Northeast Region Corn Purchase Notice*, page 4 (Exhibit US-87).
[15] China First Written Submission, paras. 297-296.
[16] China First Written Submission, para. 314.
[17] Agriculture Agreement, Article 18(3) (requiring the "prompt[]" notification of "any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed").
[18] *2016 Northeast Region Corn Purchase Notice*, page 1 (Exhibit US-87); *see also 2015 Notice on Purchases of Corn*, Article II(1) (Exhibit US-55).
[19] *2015 Notice on Purchases of Corn*, Article II(1) (Exhibit US-55).
[20] *2016 Northeast Region Corn Purchase Notice*, Section II, page 2 (Exhibit US-87); *see also 2015 Notice on Purchases of Corn*, Article III (Exhibit US-55).

(including purchasing expenses and simple and open-air storage facility construction expenses) promptly and in full."[21]

- Both the 2015 and 2016 instruments direct relevant regional entities to ensure sufficient storage capacity is available and appropriately distributed throughout the northeast region. For instance, the 2016 instrument states that "[a]ll relevant regions must quickly find out the situation of the storage dimension, regional distribution, and types of storage, as soon as possible properly prepare for purchasing storage capacity, accelerate the advancement of new storage facility construction, and strive to put [storage facility] to use for new grain resources purchasing."[22] Correspondingly, the 2015 MPS instrument provides for the identification of available storage facilities and notes that "the purchasing and storage capacities of the purchasing and storage depots within each county shall be linked to the forecast volume of temporary reserve corn purchases in that locality."[23]

Thus, while the *2016 Northeast Region Corn Purchase Notice* does not publically provide an explicit applied administered price, it provides that the government and its state-owned grain purchasing entities will continue to play a "guiding" role in the market through corn purchases. [24]

13. Third, while the 2016 instrument does not provide an explicit applied administered price, a lack of transparency does not indicate that purchases at intervention or support prices have ceased. Rather, the *2016 Northeast Region Corn Purchase Notice* suggests that price-based or non-market oriented interventions will continue to prevent difficulties for corn farmers in the northeast region. For instance, the *2016 Notice* provides that the "branches of central enterprises shall take the market trends and main purchase situation of other market players into comprehensive account, reasonably seize the purchase opportunities *and make sure they are always available in the market for a balanced purchase*."[25] The *Notice* goes on to state that action should be taken to "actively resolve any problem in order to ensure the corn owned by farmers can be sold on time *at reasonable market price*, and resolutely avoid case where it is difficult for famers to sell their grain."[26] Thus, while the *2016 Notice* suggests that government purchases must take market conditions into account – just as the *2004 Grain Opinion* and *2004 Grain Regulation* had – it also provides for the active and guiding role of state-owned enterprises in the corn market, again, as the prior instruments did.

14. Statements by entities engaged in grain purchases also support the understanding that the government may have continued to provide a floor price for corn during the 2016/17 harvest.

---

[21] *2015 Notice on Purchases of Corn*, Article III (Exhibit US-55).
[22] *2016 Northeast Region Corn Purchase Notice*, Section IV, page 2 (Exhibit US-87); *see also 2015 Notice on Purchases of Corn*, Article II(3) (Exhibit US-55).
[23] *2015 Notice on Corn Purchases*, Article II(3), (Exhibit US-55).
[24] *2016 Northeast Region Corn Purchase Notice*, Section VII (Exhibit US-87); *2015 Notice on Corn Purchases*, Article II(1) (Exhibit US-55).
[25] *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, at Article I (hereinafter, "*2016 Notice on Proper Handling of Corn in Heilongjiang*") (Exhibit CHN-86-B).
[26] *2016 Notice on Proper Handling of Corn in Heilongjiang*, Article I (Exhibit CHN-86-B).

Sinograin, the state-owned enterprise charged with most of the corn procurement during the 2016/17 harvest,[27] reported that "[i]n circumstances where purchasing entities have decreased, the strength of the market is insufficient, and there is downward pressure on prices, [Sinograin headquarters] *does not push prices even lower*; it actively enters the market to expand the number of depots and accelerate the rate of purchasing to send a strong signal to stabilize and guide market expectations."[28] Further, Sinograin reports that "[d]uring the process of forming a corn purchase market mechanism, [Sinograin] headquarters pays close attention to and safeguards the interests of grain-growing farmers, actively realizes the idea of people-centric development, and promptly gives play to Sinograin's support and safeguard roles in regions where there is no willingness to undertake marketized purchases, compensating for the insufficient strength of the market."[29] Thus, Sinograin reports that it not only purchases grain where no buyers are available to avoid difficulty in selling, but Sinograin actively engages in purchasing that will "compensat[e] for the insufficient strength of the market."[30] Sinograin's statements thus suggest that it does not limit its interventions to purchases made at market prices.

15. And finally, Global Agricultural Information Network (GAIN) Reports submitted by China to demonstrate the elimination of the MPS Program instead further highlight the level of uncertainty surrounding the continuation of China's government purchases of corn.[31] Specifically, the GAIN Report from Spring 2016 states that the Chinese "government did not disclose any details on how the 'marketized purchases' would operate," and noted that "{o}ther officials suggested that enterprises designated by the government may receive subsidies to purchase corn if farmers have difficulty selling their grain."[32] A GAIN Report from April 2017, *four months after* the U.S. panel request, provided little more clarity, stating that "[e]ven though the central government has signaled a move towards a market-oriented corn policy, reforms will not take effect immediately. Officials will continue to administer local, provincial, and central government interventions in the near-term to partly compensate producers for lower revenues, support prices, and offset the costs of switching production to other crops with relatively lower

[27] Sinograin reports that it purchased 21.41 million metric tons of corn (21 percent of the production in northeast China and 70 percent of the volume produced by state-owned enterprises). Sinograin further notes that these purchases occurred through 743 Sinograin depots in the northeast region. People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[28] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95) (emphasis added).
[29] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[30] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[31] *See e.g.*, China January 12, 2018 Submission, para. 67; China First Written Submission, para. 340. The U.S. Department of Agriculture (USDA) in-country or in-region specialists periodically issue GAIN Reports, providing contemporaneous information on the agricultural economy, products and issues in foreign countries.
[32] USDA GAIN Report, *China – Grain and Feed Annual: China's Decision to End Corn Floor Price Shakes Grain and Feed Market* (April 8, 2016), at page 1 (Exhibit CHN-83). The information was caveated with the statement that this report is "based on what limited information was available at the time of writing, and may change significantly over the next few months as the government releases more information." *Id*.

producer margins."[33] The GAIN Reports thus reflect significant uncertainty regarding China's continued provision of corn support prices, as well as an expectation that support of corn prices would continue for the foreseeable future.

16. For these reasons, China has not demonstrated that China has in fact *ceased* to provide market price support at the time of the panel request or in fact today.

Question 3: Please comment on China's assertion that the lack of announcement of procurement prices means that there is no applied administered price?

Response:

17. Failure to publish an applied administered price does not indicate that one is not being utilized by responsible state-owned enterprises to purchase corn in the northeast region.

18. China in stating that no applied administered price exists points to the *2016 Northeast Region Corn Purchase Notice;* however, this instrument does not indicate how the government determined the prices for purchases made in these provinces.[34] The instrument states the program would follow the "*principle* of letting the market determine prices;" but the *2004 Grain Regulations* and *2004 Grain Opinions* governing the MPS programs for grains contain similar statements.[35] Without more, the nature of the "new" programs is not clear.

19. China is correct that ideally an applied administered price would be reflected in public legal instruments. But the absence of such a public price is not conclusive of the nature of the program absent greater transparency than exists here.[36] Nor does the mere passage of time past the date of application of the 2015 market price support instrument for corn demonstrate that China ceased to provide such support for producers of corn as of the date of panel establishment or permanently.

20. Whatever the status of China's current programs may be, it is important to remember that the United States is not requesting that the Panel make findings with respect to China's 2016 domestic support levels. Therefore, the Panel need not assess or pass judgment on China's current corn program. This dispute is about China's provision of domestic support in the years 2012, 2013, 2014 and 2015. China's future compliance under the continuing application of its current, or a future, program, whatever that may be, is not prejudiced by findings made with

[33] USDA GAIN Report, *China – Grain and Feed Annual: Wheat and Rice Supplants Corn Area* (April 4, 2017), at page 1 (Exhibit CHN-84).
[34] *2016 Northeast Region Corn Purchase Notice*, (Exhibit US-87, Exhibit CHN-80-B).
[35] *See 2004 Grain Opinion*, Section II, paragraph 5 (Exhibit US-10); *2004 Grain Regulation*, Article 4 (Exhibit US-12).
[36] China itself purports to take significant actions under its domestic support programs without making those actions public. In paragraphs 76 to 80 of China's First Written Submission, it describes in detail official communications between various levels of government regarding the "activation" and "deactivation" of government purchases at administered prices. China does not indicate in its citations the public source for these documents, and the United States was unable to locate them online.

respect to the years 2012 through 2015. If China maintains support levels within its commitment levels, no further recourse would be available to the United States.

Question 4: During the first substantive meeting with the Panel, both parties referred to prior panel and Appellate Body reports dealing with annually renewed measures.

a. Please elaborate on which findings in the past reports are relevant to the Panel's assessment of the measures challenged in this case and the Panel's terms of reference and explain why.

b. Referring to the Appellate Body report in *China – Raw Materials* specifically, please comment on the Appellate Body's findings in para. 264 that a panel is not precluded from ruling on a measure where certain legal instruments have expired. Please compare the situations before the Panel and Appellate Body in *China – Raw Materials* with the one in the case at hand, in particular the existence of a "'series of measures' comprised of basic framework legislation and implementing regulations". Please do so with regard to the measures challenged for each of wheat, rice and corn.

Response:

21. In any domestic support dispute, a panel would unavoidably have to make findings in relation to a situation that has passed by the time of the panel request. A dispute challenging the conformity of a Member's domestic support with its domestic support commitments necessarily involves a retrospective analysis. By the time a year has concluded and the necessary information to calculate the support provided has been obtained, a Member will be providing support for a new year / crop. And so, a retrospective analysis is exactly what the panel and Appellate Body did in *Korea – Beef* – they issued findings concerning provisions of domestic support that ended prior to the request for panel establishment.

22. Specifically, in *Korea – Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively. The panel and Appellate Body issued findings concerning domestic support provided in 1997 and 1998 – that is, the two years *prior to* the complaining parties' requests for panel establishment.[37] Moreover, in examining whether Korea's provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the request for panel establishment.[38]

23. In order to calculate Korea's Current Total AMS for 1997 and 1998, the panel relied on government press statements that announced the applied administered price the Korean government would purchase the cattle in one calendar year. The Korean Ministry of Agriculture and Forestry issued a press statement, in 1997 and 1998, announcing the applied administered price for cattle, similar to the annual legal instruments announcing China's applied administered

[37] *Korea – Various Measures on Beef* (Panel), para. 844; *Korea – Various Measures on Beef* (AB), paras. 126-128.
[38] *Korea – Various Measures on Beef* (Panel), paras. 829, 837-838.

price for corn in 2012 through 2015.[39] The panel in *Korea – Beef* relied on those annual press statement and made findings concerning Korea's consistency with its domestic support commitments.[40] China's argument in the present dispute that the Panel is precluded from making findings and recommendations on the provision of domestic support to corn producers in 2012 through 2015 simply because the legal instruments through which the domestic support was provided were time-bound -- i.e., only applicable for the year that the domestic support was provided – is directly contrary to the approach of the panel and Appellate Body in *Korea – Beef*.

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

25. The United States has explained that it is not challenging a measure that had expired prior to panel establishment, but rather is challenging the support provided by China (and China has not demonstrated that it had withdrawn or modified its support so as to come within its domestic support commitments for corn by the time of panel establishment). And to the extent the 2015 corn support legal instrument is considered to have "expired," it would be appropriate to make findings and recommendations in any event. Reasoning similarly, the panel in *EC –Approval and Marketing of Biotech Products* found it not only necessary to make findings concerning an expired measure, but also necessary to make a recommendation to secure a positive solution to the dispute. The panel found that, in a situation where a measure ceased to exist, a "recommendation [by the Panel] would safeguard and preserve the rights and interests of all Parties and hence would be consistent with the aim of securing a positive solution to the dispute referred to the Panel".[41] The panel reasoned that, even if a particular instrument ceased to exist, if the respondent acted inconsistently with its WTO obligations, a panel should issue findings and recommendations on the expired instrument in order to secure a positive solution to the dispute.[42]

26. Similarly, the Appellate Body in *China – Raw Materials* addressed issues concerning legal instruments that expired during the course of the panel proceedings. The Appellate Body held that with respect to annually recurring instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by legal instruments that may have been superseded in the course of the dispute. In so doing, the panel and Appellate Body examined the matter as of the time of panel establishment. The Appellate Body noted that if complainants were precluded from challenging expired measures of an annual nature, it would create a loophole in the system whereby complainants

[39] *Korea – Various Measures on Beef* (Panel), paras. 468, 476, 483, 829.
[40] *Korea – Various Measures on Beef* (Panel), para. 485.
[41] *EC – Approval and Marketing of Biotech Products* (Panel), para. 7.1318.
[42] *EC – Approval and Marketing of Biotech Products* (Panel), paras. 7.1311, 7.1318.

could find themselves 'taking aim' at 'appearing and disappearing targets', and whereby WTO Members could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.[43]

27. In the present dispute, China is advocating for the same result that the panel and Appellate Body in *China – Raw Materials* tried to guard against, i.e., the inability of a complainant to obtain findings and a recommendation based on the expiration of annually issued legal instruments. China is suggesting that the Panel not make findings concerning the provision of domestic support provided to corn producers in 2012 – 2015 simply because the 2016 legal instruments through which China provided domestic support in that subsequent year are different than the legal instruments in place in 2012 – 2015. In other words, China is arguing that the rationale articulated in *Raw Materials* would only apply where the annually issued measures were identical for each year. China misreads these reports, as well as their applicability in the present dispute.

28. The United States did not know at the time of panel establishment, and we do not know now, the precise content of the 2016 domestic support program for corn. Therefore, the Panel cannot determine whether the substance of that program is the same as the substance of the 2015 TPRP program, or whether China has changed the appearance of that program only through a change in legal instruments and in the level of public information provided. If China accepts that the 2015 rice and wheat programs can be challenged because the legal instruments for those products in that year are the same as the 2016 legal instruments, it is evident that China's arguments would only create a loophole in which it is impossible to challenge domestic support for a given year if the instruments enacted for a *later* year change. Accepting China's argument not only risks creating the same endlessly moving target that the panel and Appellate Body rejected in *China – Raw Materials*, it suggests that domestic support might never be successfully challenged unless a Member chooses to impose that support through an instrument covering multiple years at a time.

29. Finally, China relies on several prior panel and Appellate Body reports, including *EC – Chicken Cuts*, *EC – Selected Customs Matters*, *and India – Agricultural Products*, in an effort to convince the Panel that it is prohibited from issuing a finding on the provision of domestic support for the years 2012 – 2015 simply because China announced that it would reform its domestic support in the year 2016. These reports correctly find that a panel is to examine the matter referred to it by the DSB as of the date of panel establishment, and post-panel establishment evidence is relevant to the extent it speaks to the legal situation as of that date. But as the United States has explained, the "matter" that is relevant for this Panel's examination – the only "matter" that the United States could refer to the DSB and that could be referred to the Panel – is the inconsistency of China's domestic support for the years 2012 – 2015, the most recent period that could be analyzed as of the panel's establishment. Therefore, China's attempt to rely on these reports to prevent the Panel from examining the matter in the context of this dispute is misplaced. None of those cited reports addressed domestic support or AMS; nor do they contradict the findings in *Raw Materials* with respect to annually changing measures.

[43] *China – Raw Materials* (AB), paras. 144 (referring to the United States' other appellant's submission, paras. 60 and 61). *China – Raw Materials* (Panel), para. 7.33.

Domestic support challenges are inherently retrospective, and are based on the examination of the legal and factual situation during a year or set of years that necessarily has ended, requiring the use of past data in order to prove a breach. China has presented no rationale, under the DSU or otherwise, that would prevent the Panel from making findings on the U.S. claims in such a situation.

Question 5: Please comment on China's assertion in paragraph 87 of its opening statement, that "were the United States correct that its panel request identified only "the level of domestic support" in 2012-2015 as the measures at issue, that panel request would fail to meet the specificity requirement, under Article 6.2 of the DSU."?

Response:

30. China's assertion is incorrect. Article 6.2 of the DSU provides that the matter to be examined by the DSB comprises the specific measures at issue and the brief summary of the legal basis of the compliant. Consistent with Article 6.2, the United States identified in its panel request the measures at issue in this dispute: the provision of domestic support by China to its agricultural producers in 2012, 2013, 2014, and 2015. The panel request also provided a brief summary of the legal basis of the complaint, namely, that the provision of domestic support exceeded China's AMS commitment level of "nil" in breach of Articles 3.2 and 6.3 of the Agriculture Agreement, or in the alternative, Article 7.2(b). Together, the measures and legal basis for the complaint in these claims constitute "the matter" that the DSB has charged the Panel with examining through its terms of reference.[44] Accordingly, the matter referred to the DSB in this dispute includes China's provision of domestic support at levels that breach Articles 3.2, 6.3 and 7.2(b) of the Agriculture Agreement in 2012, 2013, 2014, and 2015.

31. China asserts that the measures at issue must be limited to the specific legal instruments referenced in the U.S. panel request with respect to the years 2012 to 2015, and that the U.S. panel request would fail under Article 6.2 if the United States attempted to challenge anything beyond this.

32. As explained in our submissions to the Panel on this issue, the corn program or TPRP is not itself a measure at issue identified in the U.S. panel request; rather, it is one of a series of legal instruments, issued annually, and *through which* China provided "domestic support in favor of [corn] producers" during each of the relevant years.[45] The United States does not seek a finding that any particular legal instrument (or support program), such as the TPRP, is in breach of China's commitments.[46] This is because the existence or maintenance of a market price support program or any other legal instrument would not itself necessarily lead to the breach of a domestic support commitment.[47]

33. As the United States explained in its First Written Submission, under WTO rules, Members are permitted to provide various kinds of domestic support, including market price

[44] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 14.
[45] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 15.
[46] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 25.
[47] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 25.

support such as that provided by China through the TPRP, so long as the level of that support does not exceed the Member's Final Bound Commitment Level.[48] Thus, the United States as complaining party put as "the matter" before the DSB whether the level of domestic support provided during each of the relevant years was in excess of China's final bound commitment level. That is the matter the DSB has charged the Panel with examining.

34. This understanding is consistent with the objectives of the WTO dispute settlement system, as well as the scope and nature of Members' AMS commitments. Article 3.7 of the DSU provides in relevant part that: "…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." That is, withdrawal is relevant to the extent that the measure can be found to produce an inconsistency with a covered agreement. Article 4.6 of the DSU goes on to provide that consultations may concern "any representations made by another Member concerning *measures affecting the operation of any covered agreement*." Here, again, the DSU is concerned with situations in which a measure may be inconsistent with a covered agreement. It is critical, therefore, to consider *which measure* of China *could be inconsistent* with its commitments under the Agriculture Agreement.

35. Further, disputes challenging a Member's domestic support commitments effectively involve a retrospective analysis due to the nature of the commitments expressed and calculated under the Agriculture Agreement. A complaining party must demonstrate a breach of a domestic support commitment by producing evidence comparing the calculated product-specific AMS for a basic agricultural product to the total value of production for that agricultural product in the relevant year.[49] In the case of market price support, in order to determine the product-specific AMS and the total value of production for an agricultural product in a given year, the complainant needs a full year of production and pricing data, namely, total and provincial production volume and farmgate prices. In the case of China, China does not publically release the data necessary to calculate the total value of production for corn until nearly one year after the corn purchase period.[50] For 2015, China did not publish the data related to production volume and farmgate prices until September and November, respectively, of the following year, 2016. China has still has not notified to the Committee on Agriculture any information regarding its domestic support beyond the year 2010, including value of productions – and China has never notified its market price support programs for corn.[51] A panel cannot make findings on such a matter without all the necessary data to perform the calculations; accordingly, challenges to domestic support commitments are necessarily made with respect to actions that occurred during a defined period of time prior to the date of panel establishment.

[48] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 25.
[49] Year is defined by the Agriculture Agreement as "calendar, financial or marketing year specified in the Schedule relating to that Member." Agriculture Agreement, Article 1(i).
[50] Timeline pertaining to China's Temporary Purchase and Reserve Policies, (Exhibit US-92).
[51] *See China's Notification (1999-2001)* (Exhibit US-1); *China's Notification (2002-2004)* (Exhibit US-2); *China's Notification (2005-2008)* (Exhibit US-3); and *China's Notification (2009-2010)* (Exhibit US-4).

36. Hence, the aforementioned identification of the measures at issue is consistent with Article 6.2 of the DSU, the objectives of the WTO dispute settlement system, and the nature and scope of Members' AMS commitments.

For Both Parties:

Question 6: If the Panel understands correctly, during the course of the first substantive meeting with the Panel, the United States appears to have emphasised that it was challenging China's "level of domestic support" and referred to the market price support for wheat, rice and corn as examples of such domestic support.

a. Referring to the United States' request for establishment of the Panel, please specify which forms of domestic support, if any, other than market price support the US was challenging? How does the United States' approach fit with the fact that it cited in the panel request only legal instruments relating to market price support?

b. How does the United States' approach fit with the statement in its first written submission that:

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. [52]

Response:

37. As set out in the U.S. panel request and explained in the U.S. submissions, the United States has challenged China's provision of domestic support in favor of its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's domestic support commitments.[53] Specifically, the panel request describes four measures at issue: the "domestic support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015.[54]

38. With respect to the products at issue, the United States indicated in its panel request that these measures breached China's AMS commitments "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."[55] The United States then listed several legal instruments through which China provided support for the four products identified.

39. A Member's domestic support obligations relate to the total value of non-exempt support provided in favor of its agricultural producers. Therefore, in theory the United States could have attempted to quantify all such support provided by China for all agricultural products subject to

[52] United States First Written Submission, para. 1.
[53] United States Panel Request (Exhibit US-9); United States Opening Statement, para. 52.
[54] United States Panel Request (Exhibit US-9).
[55] United States Panel Request (Exhibit US-9).

its domestic support obligations. However, because China's AMS commitment is zero, support provided for *any* product in excess of 8.5 percent of the total value of production for that product would constitute a breach. As a result, the United States chose four exemplary products and calculated the support provided through a single type of program – market price support.

40. Thus, while the breach relates to China's provision of domestic support, the evidence the United States put forward, in the form of various legal instruments and production and other data, relates to market price support concerning these four products. As the United States demonstrated in its submissions, evidence relating to these products and programs alone is sufficient to demonstrate a breach of China's obligations.

Question 7: Referring to the panel report in *China – Raw Materials*, please comment on that Panel's decision to take into account the later 2010 measures in order to determine whether these measures had the same essence as the challenged 2009 measures (Panel Report, *China – Raw Materials*, para. 7.33 (b)).

Response:

41. The Appellate Body in *China – Raw Materials* upheld the panel's approach of making findings and recommendations on annually recurring measures, as they existed through (time-bound) legal instruments as of the date of the panel establishment. The Appellate did not find it necessary for the panel to have examined the "essence" of the 2010 instruments as the complainants sought to make out their claims on the basis of the 2009 instruments within the panel's terms of reference. The Appellate Body noted that a panel is required, under Article 7 of the DSU to examine the "matter" referred to the DSB by the complainant in the panel request and make such findings as will assist the DSB in making recommendations.[56]

42. To recall, the matter before the Panel is whether the provision of domestic support provided during 2012 through 2015, the most recent years in which data was available, was in excess of China's final bound commitment level of nil. With respect to China's argument that the 2016 corn instruments should be taken into account in assessing whether China has breached its domestic support commitments concerning corn, the Panel need not address China 2016 provision of domestic support to its corn producers. Similar to the complainants in *China – Raw Materials*,[57] the United States is not seeking findings concerning domestic support provided in any period after that identified in the U.S. panel request, the "matter" referred by the DSB to the Panel for examination.

43. Moreover, the 2016 corn instruments do not demonstrate that the TPRP has expired (or that the "essence" has changed). As explained in the U.S. answer to the Panel's questions 2 and 3, while the information released by Chinese authorities does not permit us to know the full scope of the 2016 corn program, we know that it too continues to provide significant levels of purchasing. In addition, while the information released by Chinese authorities does not permit us to know at what price the government is purchasing corn, we also do not know that it is *not* a

[56] *China – Raw Materials* (AB), para. 251.
[57] *China – Raw Materials* (AB), para. 253.

government supported price. Without the full facts as to the nature and scope of the 2016 corn program, it is not possible to determine whether China has breached its AMS commitments for 2016 through continuing market price support.

44. If findings of inconsistency are made, then a recommendation must also be made, which will operate prospectively and apply to any later-in-time measures, whether implemented in 2016 or 2020.[58] Accordingly, the Panel need not determine if the 2016 corn program is of the same "essence" as the 2015 TPRP.

Question 8: In its submission of 12 December 2017, the United States argues that China continues to engage in activities relating to the 2012 through 2015 TPRP for corn, such as storing, transporting and auctioning of corn.[59] Please explain further how these activities are relevant to the continuing existence of the measures, which the United States has identified as domestic price support for Chinese agricultural producers? In particular, please explain how the said activities allegedly impair compliance by China with the obligation set forth in Article 6.3 AoA.

Response:

45. China's First Written Submission argues that the termination of the Corn MPS Program (or TPRP) occurred in early 2016.[60] As described in the response of the United States, a number of significant activities – including storage, transport, and auction of held corn – demonstrate that activities related to the 2015 MPS Program have not terminated and the 2015 instrument has not expired.[61] China asserts that the expiry of the 2015 instrument should operate to preclude the Panel from making findings upon U.S. claims as they relate to corn.[62] This is inaccurate as neither the 2015 instrument, nor the larger policy of providing support prices to producers of corn in northeast China has terminated.

46. Additionally, the matter referred to the DSB in this dispute is China's provision of domestic support at levels that breach Articles 3.2, 6.3 and 7.2(b) of the Agriculture Agreement in 2012, 2013, 2014, and 2015. As described in response to question 2, China has failed to demonstrate that it no longer provides market price support to corn producers. Furthermore, China's future compliance under the continuing application of its current, or a future, program is not prejudiced by findings made with respect to the years 2012 through 2015. Therefore, the Panel need not assess or pass judgment on China's current corn program. Conversely, failing to make findings on the U.S. claims would prejudice the United States' rights to DSB recommendations on the matter referred by the DSB to the Panel.

[58] United States Opening Statement, paras. 63, 65; United States Comments on China's Challenge to the Panel's Terms of Reference, para. 4.
[59] United States Comments on China's Challenge to the Panel's Terms of Reference, para. 38.
[60] China First Written Submission, para. 297.
[61] United States First Written Submission, paras. 42-50.
[62] China First Written Submission, para. 340.

Question 9: Is it the United States' assertion that China bears the burden of providing evidence that it is *not* using an AAP in the allegedly new corn measure?

Response:

47. In this dispute, China asserts that the 2015 corn instruments challenged by the United States ceased to exist, and thus China no longer imposed market price support at the time of the panel's establishment. China further asserts the alleged expiry of China's 2015 market price support program for corn precludes the Panel from making findings upon U.S. claims as they relate to corn.[63]

48. It is the party asserting a particular fact, claim, or defense that bears the burden of providing sufficient evidence to illustrate that the assertion is true.[64] Thus, if China seeks to have this Panel find that China no longer provided market price support during 2016, China must demonstrate this to be true.

49. As the United States has explained in other of the Panel's questions, the evidence presented by China regarding the 2016 corn support program does not demonstrate that China has ceased providing market price support.[65] Nor has China shown that in 2016 China no longer provided support for corn in 2016 that resulted in a product-specific AMS for corn in excess of China's *de minimis* level.

50. Additionally, China's attempt to argue that expiration of the 2015 corn instruments affects the Panel's terms of reference is in any event incorrect. As described in questions 4 and 5 above, the United States challenges China's provision of domestic support to agricultural producers in each of the relevant years. Therefore, the Panel is charged with determining the domestic support provided by China through the programs in place during those years. Expiration of any particular instrument thereafter cannot alter the matter before the Panel.

Question 10: Please comment on the following statement by China:

> **With almost all 2016 data for wheat and rice available at present (and with all data available as of early 2018), it is appropriate, however, for the Panel to evaluate also data from 2016, the most recent year for which data is available. Doing so demonstrates that, contrary to the U.S. assertions, China's domestic support for wheat and rice is *consistent* with its domestic support commitments not only in 2012-2015, but also in 2016 and today.[66]**

Response:

[63] China First Written Submission, para. 340.
[64] *US – Wool Shirts and Blouses* (AB), page 16.
[65] Please refer to Questions 1 and 2.
[66] China First Written Submission, para. 217 (footnotes omitted).

51. As described in the consultation request,[67] panel request,[68] and First Written Submission of the United States, the matter referred to this Panel is whether China's provision of domestic support to its agricultural producers exceeded its domestic support commitments in the years 2012, 2013, 2014, and 2015. The Panel need not evaluate China's provision of support in 2016 in order to resolve the matter before it.

52. The data (including volume of production, and domestic pricing data) needed to complete the annual product-specific AMS and Current Total AMS analysis becomes available nearly one calendar year after the completion of the year for purposes of China's domestic support obligation. For that reason, at the time of the U.S. panel request – December 5, 2016 – the most recent year of available data was 2015. Domestic support provided by China during the year 2016 does not form part of the matter before the Panel, and the Panel therefore should not make findings in this respect.

53. In the event that such information is useful to the Panel, however, the United States notes that data is now available to calculate the value of market price support for wheat and rice in 2016. When calculated correctly, China's market price support levels are comparable, or even higher, than the levels in previous years, and therefore remained well in excess of the *de minimis* level of support for all three products.[69] The 2016 AMS calculations presented by China in Exhibit CHN-88 continue to rely on erroneous methodologies not consistent with its WTO obligations – in particular with respect to "quantity of production eligible to receive the applied administered price" and the "fixed external reference price."

Question 11: If the Panel were to find that the minimum price support for corn identified in the panel request had expired prior to the panel request:

a. Would there be any circumstances justifying or requiring the Panel to nevertheless make findings regarding the measure's consistency with the relevant provisions of the AoA?

b. What considerations would permit or require the Panel to eventually make recommendations in this respect?

c. Please explain whether and how a ruling on the allegedly expired corn measure would secure a positive solution to the dispute, pursuant to Article 3.7 of the DSU? Please take into account, as you deem relevant, the decision in *EC – Approval and Marketing of Biotech Products*, for example, where the panel held that despite expiry of a measure by the time of the panel request, securing a positive solution to the dispute pursuant to Article 3.7 of the DSU required the panel to nevertheless assess the inconsistency of the measure with the relevant WTO Agreements.[70]

[67] United States Consultations Request (Exhibit US-8).
[68] United States Panel Request (Exhibit US-9).
[69] Calculation of 2016 Product-Specific AMS (Exhibit US-96); *see also* National Bureau of Statistics of China, *China Rural Statistical Yearbook* (2017) (Exhibit US-97).
[70] *EC – Approval and Marketing of Biotech Products* (Panel), paras. 7.1309-7.1310.

Response:

54. If the Panel finds that the 2015 annual MPS instruments expired prior to the establishment of the Panel, the Panel would still be required to make findings regarding the consistency of the measures at issue with China's WTO obligations, namely, the provision of domestic support by China for each of the years 2012 through 2015. If findings of inconsistency are made, the Panel also would be required to issue a recommendation to bring that measure into compliance under Article 19.1 of the DSU.

55. Article 7.1 of the DSU requires a Panel to examine the matter referred to the DSB by the complainant in its panel request. Article 6.2 provides that the matter to be examined by the DSB consists of the specific measures at issue and the brief summary of the legal basis of the compliant. Pursuant to DSU Article 6.2, the United States identified in its panel request the measures at issue in this dispute, which included the provision of domestic support by China to its agricultural producers in 2012, 2013, 2014, and 2015. The panel request also provided a brief summary of the legal basis of the complaint – that the provision of domestic support exceeded China's AMS commitment level of nil in breach of Articles 3.2 and 6.3 of the Agriculture Agreement.

56. Thus, the United States as complaining party put as "the matter" before the DSB whether the provision of domestic support provided during the most recent period years was in excess of the Member's final bound commitment level. The United States refers to the legal instruments identified in its panel request as evidence on which the Panel may make findings in examining the challenged measures. The alleged expiry of a legal instrument does not change the matter the DSB put within the Panel's terms of reference, nor does it make another matter susceptible to examination by the Panel.

57. As we explained in the U.S. oral statement, the matter identified by the United States in its panel request was the *only* matter, which the United States, or any other Member, could have brought to the DSB in relation to China's domestic support commitments. That is, it is only the domestic support provided by China through 2015 for which the information was available to claim a WTO-inconsistency. If the United States had brought a claim on the support provided in 2016, there would not have been sufficient facts to permit the necessary legal analysis to be completed by either the United States or the Panel. Therefore, the only "matter" (the measures and legal basis supporting claims of WTO-inconsistency) that could have been brought forward is precisely the matter identified by the United States.

58. With respect to the Panel's recommendation, the DSU is clear. Where a panel (or the Appellate Body) "concludes that a measure is inconsistent with a covered agreement," Article 19.1 states that "it *shall recommend* that the Member concerned bring the measure into conformity with that agreement." Thus the panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and as a complainant, the United States has a right to a recommendation under the DSU. If the Panel finds that China has provided domestic support in excess of its AMS commitments in any of the relevant years, it must recommend that China bring those measure(s) into compliance with its obligations.

59. We note that a recommendation is required even where certain legal instruments supporting the Panel's findings may have expired. The requirement for a recommendation attaches based on the finding of inconsistency, not the status of a legal instrument or a panel's view of the actions needed to bring a measure into compliance. For example, in *China – Raw Materials* – which also dealt with annual Chinese measures – the Appellate Body found that, "it was appropriate for the Panel . . . to have recommended that the DSB request China to bring its measures into conformity with its WTO obligations", including any expired measures on which the Panel's findings were based.[71] The Appellate Body explained that "if complainants were precluded from challenging expired measures of an annual nature, it would create a loophole in the system whereby. . .WTO Members could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.[72]

60. Therefore, not only does the DSU require the panel to make a recommendation whenever a finding of inconsistency is made, the nature of the measures or commitments at issue demonstrate the harm that may come from the lack of a recommendation, that is, allowing a responding Member to evade its obligations simply by changing (annually or otherwise) the legal instruments through which it maintains a WTO-inconsistent measure.

61. While the United States does not request that the Panel make findings on an expired measure in this dispute, as noted in the U.S. oral statement, the rationale articulated by the panel in *EC – Approval and Marketing of Biotech Products* certainly has relevance to the situation before this Panel. That panel relied on the DSU in finding that, to "determin[e] whether to make findings on a measure no longer in existence on the date of establishment of a panel, panels should notably take account of the object and purpose of the dispute settlement system."[73] The panel explained that pursuant to Article 3.7 of the DSU, the aim of dispute settlement "is to secure a positive solution to the dispute."[74] The panel further reasoned that, even if a particular instrument ceased to exist, if the respondent acted inconsistently with its WTO obligations, a panel should issue findings on the expired instrument in order to secure a positive solution to the dispute.[75]

62. The Panel should take similar account of the objectives of the dispute settlement system in interpreting the U.S. panel request and in making the requested findings under the relevant provisions of the Agriculture Agreement. As explained, to succeed in a domestic support challenge, a complainant must base its claims on a full year's data, but the data needed to make such a demonstration will not become available until many months after the conclusion of that year. Given that the instruments through which China provides domestic support to its agricultural producers are issued annually, the failure of a panel to make findings with respect to the provision of domestic support through a subsequently expired instrument would preclude a complainant from ever bringing a successful, and meaningful challenge. Such an outcome

[71] *China – Raw Materials* (AB), paras. 264-265.
[72] *China – Raw Materials* (AB), para. 144 (referring to the United States' other appellant's submission, paras. 60 and 61). *China – Raw Materials* (Panel), para. 7.33.
[73] *EC – Approval and Marketing of Biotech Products* (Panel), para. 7.1309.
[74] *EC – Approval and Marketing of Biotech Products* (Panel), para. 7.1309.
[75] *EC – Approval and Marketing of Biotech Products* (Panel), para. 7.1311.

would frustrate the aim of the dispute settlement mechanism of securing "a positive solution to the dispute," as provided for in Article 3.7 of the DSU.

For China:

Question 12: Regarding government purchases subsequent to the expiry of the 2015 TPRP, the United States alleged during the course of the first substantive meeting with the Panel that "corn continues to be purchased by the same state-owned entities that engaged in purchases under the corn MPS programme, and at similar levels." Please comment on this assertion, and if this is indeed the case, please explain under which authority these purchases were made. Please indicate the government entities involved in the procurement process, as well as quantities and actual prices at which the procurement of corn has taken place, including relative to the market price, after the alleged expiry of the TPRP

Response:

Question 13: Assuming that the Panel finds that the United States panel request identifies only "the level of domestic support" in 2012-2015 as the measure(s) at issue, is China requesting a ruling in this regard to the effect that the panel request fails to meet the specificity requirements under Article 6.2 of the DSU?

Response:

2. General Issues

For Both Parties:

Question 14: With reference to paragraph 34 of China's first written submission, please comment on the legal or other value, if any, of the *Handbook on Accession to the WTO*.

Response:

63. The *Handbook on Accession to the WTO* is a source of reference for officials from acceding governments, WTO Members, and the general public to generally understand the accession process. It is not a covered agreement listed in Appendix 1 to the DSU. It forms no part of any covered agreement. Therefore, it is not legal text under the WTO Agreement that may delimit or affect the rights and obligations of WTO Members.

64. The Handbook itself contains a disclaimer, which states: "This guide has been prepared to assist public understanding of the process of accession to the WTO. The WTO Ministerial Conference and the General Council have the exclusive right to adopt interpretations of the Marrakesh Agreement Establishing the WTO and its Multilateral Trade Agreements. This guide is not intended to, and does not provide, a legal interpretation of WTO provisions."[76]

[76] See *Handbook on Accession to the WTO*, available: https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/preface_e.htm.

65. Therefore, as the disclaimer explains, the Handbook does not provide nor purport to provide a legal interpretation of WTO provisions. Nor could any information contained in the Handbook provide context for the Panel's interpretive exercise that could support the non-textual interpretations China proposes in its submission.

66. In any event, China appears to refer to the Handbook to emphasize the fact that there was an expectation that multiple versions of China's supporting tables would be produced, including to take account of the comments from other Members. The statements to which China refers are factual statements, and it is not clear that, regardless of the status of the document, they provide useful information to the Panel regarding the interpretation of the WTO provisions at issue in this dispute.

Question 15: How should the Panel interpret China's commitment of "nil" in its Schedule CLII?

Response:

67. As the Panel's question indicates, China included a Final Bound Commitment Level of "nil" in Part IV of its Schedule of Concessions. "Nil" is defined in legal terms as "nihil," Latin for "nothing" or "naught."[77] Therefore, "nil" should be interpreted as committing China to maintain a level of "nothing," or zero domestic support to agricultural producers when calculated in accordance with the text of Agriculture Agreement and the China-specific 8.5 percent *de minimis* level provided in China's Accession Protocol.

For the United States:

Question 16: To the extent that determining the consistency of measures with Article 6.3 AoA requires a retrospective analysis, what type of recommendation should the Panel issue if it were to find that such measures were in violation of that provision but no longer in force?

Response:

68. Article 19.1 of the DSU states that, where a measure is found to be inconsistent with a Member's obligations under the covered agreements, a panel "*shall recommend* that the Member concerned bring the measure into conformity with that agreement." Thus, a panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and such a recommendation is the right of a complainant under the DSU. Therefore, if this Panel finds that China has provided domestic support in excess of its AMS commitments for any of the relevant years, the Panel must recommend that China bring the measure(s) into compliance with its obligations.

69. As explained by the Appellate Body, "while a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the

[77] *Shorter Oxford English Dictionary*, "nil" (Exhibit US-64).

sense that it has an effect on, or consequences for, a WTO Member's implementation obligations."[78] Thus, the Panel's recommendations concerning the challenged measures have prospective effect with respect to actions taken in the future, and are not limited in application to the specific measures subject to the complainant's panel request.[79] Nor does a panel's recommendation relate to its views regarding the relevant Member's current or future compliance with the DSB's recommendations. Compliance with that recommendation would be judged on the basis of the measures taken to comply, as of the end of the reasonable period of time taken to comply. The relevant measures at that time may be set out in instruments generations removed from those through which the challenged measures were maintained at the time of panel establishment and that were at issue in the original dispute. Therefore, the need for a recommendation as required by Article 19.1 does not change simply because the panel's evaluation of a measure requires a retrospective analysis and may include findings made on expired instruments or measures.

70. Failing to make findings on the U.S. claims, however, would prejudice the United States' right to DSB recommendations on the matter referred by the DSB to the Panel. As the United States has explained, China has not demonstrated that it ceases to provide market price support with respect to corn, or that its provision of domestic support in 2016 was within its commitment levels. Were China to continue to provide support for corn at levels that exceed its domestic support obligations in the future, despite the United States having raised its claims at the earliest possible opportunity, the Panel will have deprived the United States of its rights to pursue those issues further under the DSU. Therefore, consistent with Article 19.1 of the DSU, and with the findings of the panel in *EC – Approval and Marketing of Biotech Products*, the Panel must issue a recommendation in the event China's measures are found to be inconsistent with its obligations under the Agriculture Agreement.

71. If China believes that it has now come into compliance with its domestic support commitments through withdrawal of the TPRP and its implementation of a new program, it should have no concern if the Panel issues the mandatory recommendation under DSU Article 19.1, as did the panel in *EC – Approval and Marketing of Biotech Products*. Presumably, upon adoption by the DSB of that recommendation, China would declare that it has come into compliance. The parties would likely need to consult on that claim of compliance in order for the United States to determine whether a solution to the dispute has been found; but that is a matter for the parties to deal with at the appropriate time. That is not a matter that this Panel must decide now.

Question 17: Please comment on the following statement by China: "An important *quid pro quo* that China negotiated, and the Membership agreed, is China's right to apply, in calculating AMS, the constituent data and methodology incorporated by reference in Part IV of its Schedule, within the overall framework set out in Annex 3 of the *Agreement on Agriculture*".[80]

[78] *China – Raw Materials* (AB), para. 260.
[79] *China – Raw Materials* (AB), paras. 261, 265.
[80] China First Written Submission, para. 41.

Response:

72. The United States disagrees with China's statement. China seems to suggest that it negotiated an 8.5 percent *de minimis* level in exchange for being able to alter the calculations required by the Agriculture Agreement. However, nothing in China's Accession Protocol or Working Party Report reflects a deviation agreed by all WTO Members for China from the calculation methodology required in the Agriculture Agreement.

73. For an acceding Member, the legal mechanism for altering a commitment contained in a WTO covered agreement is the acceding Member's protocol of accession. Paragraph 1.2 of China's Accession Protocol states that "[t]he WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession."[81] Further it states that, "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."[82] Paragraph 1.3 of China's Protocol of Accession states:

> *Except as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.[83]

74. Thus, the mechanism for legally altering express commitments contained in the Multilateral Trade Agreements annexed to the WTO, which include the Agriculture Agreement, was China's Accession Protocol, including through paragraphs of the Working Party Report that were incorporated by reference into that Protocol.

75. The specific *de minimis* level that Members and China agreed would apply to China was included in paragraph 235 of China's Working Party Report and expressly incorporated into China's Accession Protocol. This confirms that when Members and China agreed as part of China's accession to the WTO that a different right or obligation would apply than that provided for in one of the covered agreements, this right or obligation was memorialized through explicit language in the Accession Protocol.[84] However, with respect to the claimed alterations to the calculation methodology for product-specific AMS, neither China's Accession Protocol, nor a provision of the Working Party Report incorporated into the Accession Protocol memorialize such an agreed departure from the calculation methodology required by Annex 3 of the Agriculture Agreement.

76. Further, inclusion of alternative methodologies and data in China's Supporting Tables does not and cannot constitute an agreement amongst Members to permit China to deviate from

[81] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5).
[82] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5).
[83] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5) (emphasis added).
[84] Similarly, whether China would have recourse to Article 6.2 was also explicitly recorded in the Working Party Report at paragraph 235 and memorialized in China's Accession Protocol.

the calculation methodology required by the Agriculture Agreement. China suggests that the constituent data included in its Supporting Tables, which was incorporated by reference into Part IV of China's Schedule of Concessions, alters the requirements in the Agriculture Agreement. This is false, and China's argument must fail for two reasons.

77. First, China's Schedule of Concessions, including Part IV and any attached documents, does not form part of China's Accession Protocol. Rather, as stated in Part II, paragraph 1 of China's Protocol of Accession, "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994."[85] This is consistent with the treatment of other WTO Members' Schedules, which also form part of the GATT 1994.[86]

78. Article 21.1 of the Agriculture Agreement states that the "provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the other provisions of this Agreement.[87] In other words, where there is a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail. Therefore, to the extent a Member's Schedule conflicts with the obligations of the Agriculture Agreement, the commitments in the Agriculture Agreement must prevail.[88]

79. Therefore, the only vehicle through which China could accede to a commitment not consistent with the obligations of the Agriculture Agreement was its Accession Protocol, including any paragraphs of the Working Party Report incorporated by reference into that Protocol. Absent such a commitment, China must comply with the obligations of the Agriculture Agreement just as any other WTO Member must, including Article 21.1. This means that inconsistent calculations included in China's Supporting Table cannot prevail over the calculations required by the Agriculture Agreement.

80. Second, leaving aside information attached to a Schedule of Concessions in a factual Supporting Table, panels and the Appellate Body have found that a Member's Schedule of Concessions is not a vehicle for derogating from the obligations set out in the WTO Agreements. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume,"[89] but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture."[90] This echoed prior statements by a GATT 1947 panel in *US – Sugar* suggesting that a "Schedules of Concessions" is for Members to "incorporate . . . acts yielding

[85] China's Protocol of Accession, Part II, paragraph 1.
[86] *See* Article II:7 of the GATT 1994.
[87] Agriculture Agreement, Article 21.1.
[88] *See e.g., EC – Export Subsidies on Sugar* (AB), paras. 221-222
[89] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157 (referring to *EC – Bananas III (AB)*, para. 154, *EC – Poultry (AB)*, para. 98, *Chile – Price Band System* (AB), para. 272, *US – Sugar* (GATT Panel), paras. 5.3 and 5.3).
[90] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157; *see also EC – Export Subsidies on Sugar* (AB), para. 213.

rights under the General Agreement but not acts diminishing obligations under that Agreement."[91]

81. For these reasons, the Supporting Tables thus do not, and could not, themselves set out any agreed deviation from the Agriculture Agreement. This legal conclusion is further confirmed by the text of Paragraph 238 of the Working Party Report, which records that Members did not agree with all elements of the methodology and policy classifications used in China's Supporting Tables.[92] Members asked China to clarify methodological issues contained in its Supporting Tables,[93] and, China agreed to clarify the methodological issue in the context of its notification obligations under the Agriculture Agreement.[94]

82. This contemporaneous statement demonstrates that WTO Members did not view China's Supporting Tables as reflecting new rights or obligations of China to which they were "agreeing." To the contrary, the language in Paragraph 238 confirms that Members *did not agree* that each of the specific methodologies used in China's Supporting Table had the legal effect China now asserts, or even that they were correct or appropriate.

83. Finally, setting aside the legal reasons why Supporting Tables cannot change an obligation in the Agriculture Agreement, practically it is obvious why Supporting Tables are not the appropriate legal vehicle to change an obligation. China's Supporting Tables contain no reference to an article in the Agriculture Agreement, nor an express reference that the Membership agreed to alter a commitment specifically for China. Compare the language included in the supporting table to the language used in China's Working Party to deviate from the *de minimis* amount outlined in Article 6.4 of the Agriculture Agreement.

84. When WTO Members wanted to provide China with an obligation different from the Agriculture Agreement, they clearly referenced the legal obligation to be modified by name. The Accession Protocol thus clearly evinces that WTO Members *agreed* to provide China with a different *de minimis* than that provided for in the Agriculture Agreement, and *agreed* that China would not have recourse to Article 6.2 of the Agriculture Agreement.[95] In contrast, China's Supporting Table contains no similar reference. On the face of the Supporting Table, there is no indication that the WTO Members agreed to modify *any* legal obligation (because there was no agreement), and there is no reference to Annex 3 or any other provision in the Agriculture Agreement. Accepting China's argument would create a situation where Members do not now what other Members' obligations are.

85. Accession Protocols are drafted in a manner that make it clear what commitments the acceding member has made and have been accepted by the WTO membership. It is critical that a

[91] *US – Sugar* (GATT Panel), para. 5.2.
[92] China's Working Party Report, para. 238.
[93] China's Working Party Report, para. 238.
[94] China's Working Party Report, para. 238.
[95] China's Working Party Report, para. 235.

Panel avoid reading commitments into an accession protocol that were not multilaterally agreed and do not exist.

Question 18: If the Panel were to decide that there is an *apparent conflict* between the provisions of Annex 3 of the AoA and China's CDM, what role would Article 21 of the AoA play, given that the concept of CDM is mentioned in Article 1 of the AoA?

Response:

86. As explained in the previous answer, upon accession, Part IV of China's Schedule of Concessions, which incorporated China's Supporting Tables, legally became the "Schedule of Concessions and Commitments annexed to the GATT 1994," as provided by Part II, paragraph 1 of China's Protocol of Accession.

87. Further, Article 21 of the Agriculture Agreement clarifies that the "[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement" and "[t]he Annexes to this Agreement are hereby made an integral part of this Agreement". The Appellate Body in *EC – Export Subsidies on Sugar* determined that "Members explicitly recognized that there may be conflicts between the *Agriculture Agreement* and the GATT 1994, and explicitly provided, through Article 21 that the *Agriculture Agreement* would prevail to the extent of such conflicts.[96]

88. Therefore, should there be a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail. Therefore, even had China's Supporting Tables contained information suggesting a different calculation should be made, that information could not operate to alter the terms of the Agriculture Agreement, which takes precedence.

89. For similar reasons, Article 1 of the Agriculture Agreement itself addresses any conflict between the provisions of Annex 3 and constituent data and methodology. The definition of "AMS", as provided in Article 1(a)(ii), states that for support provided in any year after implementation it is "calculated *in accordance* with the provisions of Annex 3 of this Agreement."[97] This language permits no deviations. Thus, neither the information provided in an original Supporting Table, nor a newly proposed domestic support measure, permit a Member to depart from this established methodological framework. The definition of "AMS" further clarifies this order of authority by stating that the AMS is calculated "*taking into account* the *constituent* data and methodology used in the tables of support material."[98]

90. 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.[99] 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" of that

[96] *EC – Export Subsidies on Sugar* (AB), para. 221.
[97] Agriculture Agreement, Article 1(a)(ii).
[98] Agriculture Agreement, Article 1(a)(ii).
[99] *Korea – Various Measures on Beef* (AB), para. 111.

information.[100] This indicates that a lesser degree of consideration is accorded to any constituent data and methodology. Therefore, the plain text of Article 1 of the Agriculture Agreement also instructs how to treat any apparent conflict between Annex 3 and the constituent data and methodology.[101]

Question 19: China asserts that the panel in *Korea – Beef* considered "the *exclusive application* of the methodology set out in Annex 3 as only a *fallback option* to calculate product-specific AMS in situations where a product was *not* included in Part IV of a Member's Schedule."[102]

a. Please comment on China's interpretation of the panel's statements.

b. In the event that constituent data and methodology *are* available for the relevant products (arguably distinct from the facts of *Korea – Beef*) please explain in what situations these should be taken into account, if at all, when calculating Current AMS, in light of the decisions of the panel and Appellate Body in that dispute.

Response:

91. China's statement is wrong and unsupported by both the text of the Agriculture Agreement and the *Korea – Beef* panel report. Nowhere in the Agriculture Agreement or the panel report is Annex 3 described as a "fallback option."

92. China uses the phrase "fallback option" in an attempt to invert the relationship between Annex 3 and the supporting material, such that a Member's constituent data and methodology serves as the binding commitment and the Agriculture Agreement text serving only to fill in any gaps. China's interpretation turns the Panel's interpretive task upside down, and leads to an absurd result, whereby every Member with a supporting table may have its own separate set of domestic support obligations, with only those whose Schedule does not contain such information incurring the textual obligations contained in the Agriculture Agreement.

93. The United States notes that the text of the Agriculture Agreement describes instances where it is appropriate to rely on materials found in a Member's Supporting Table. Specifically, Article 1(b) states that "basic agricultural product" "is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material." Thus, the Agriculture Agreement directs the use of Member-specific factual information. Similarly, the definition of "year" provided by the Agriculture Agreement in Article 1(i) "year" refers to "year" as specified in the Member's Schedule.

94. This suggests that there may be particularities with respect to agricultural production in a Member's territory that should be considered by a panel in identifying the relevant data necessary to complete the calculations prescribed in Annex 3. For instance, the United States

[100] *Korea – Various Measures on Beef* (AB), para. 111 (*citing* The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15).
[101] *Korea – Various Measures on Beef* (AB), para. 112.
[102] China First Written Submission, para. 106 (referring to *Korea – Various Measures on Beef* (Panel), para. 811).

has looked to China's Supporting Tables to identify Indica rice and Japonica rice as relevant basic agricultural products.[103] Similarly, as set out in Annex 3, paragraph 13, there might be non-exempt support measures (other than direct payments), such as input subsidies or other measures such as marketing-cost reduction measures, the calculation of domestic support for which one might refer to the constituent data or methodology set out in a Member's Schedule.[104]

For China:

Question 20: Without prejudice to any Panel decision on its terms of reference, please provide data and relevant calculations for domestic support for corn over the 2012-2015 period.

Response:

Question 21: Please provide the legal instrument(s), if any, terminating the TPRP for corn in 2016.

Response:

Question 22: Please comment on paragraph 55 of the United States' opening statement, in particular, the statement that "[t]o succeed in a domestic support challenge, a complainant must base its claims on a full year's data", which does "not become available until many months after the conclusion of that year."

Response:

3. Measures At Issue

For Both Parties:

Question 23: The Panel notes that both parties have provided their views on what constitutes the measure at issue with regard to corn. Please elaborate on the specific measures at issue in this dispute, taking into account the time-frame of the challenged measures as well as the types and sub-types of agricultural products specified in the panel request. Please provide justification.

Response:

95. As explained in the U.S. answer to the Panel's questions 5 and 6, the United States has challenged China's provision of domestic support in favor of its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's domestic support commitments. Specifically, the panel request describes four measures at issue: the "domestic

[103] United States First Written Submission, footnote 91.
[104] Agriculture Agreement, Annex 3, paragraph 13.

support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015.

96. With respect to the products at issue, the United States indicated in its panel request that these measures breached China's AMS commitments "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."[105] The United States then listed several legal instruments through which China provided support for the four products identified.

97. A Member's domestic support obligations relate to the total value of non-exempt support provided in favor of its agricultural producers. Therefore, in theory the United States could have attempted to quantify all such support provided by China for all agricultural products subject to its domestic support obligations. However, because China's AMS commitment is zero, support provided for *any* product in excess of 8.5 percent of the total value of production for that product would constitute a breach. As a result, the United States chose four exemplary products and calculated the support provided through a single type of program only – market price support.

98. While the breach relates to China's provision of domestic support, the evidence the United States put forward, in the form of various legal instruments and production and other data, relates to market price support concerning these four products only. As explained, the United States is not claiming that the legal instruments themselves breach China's WTO obligations. Market price support programs are not, in and of themselves, WTO-inconsistent. The WTO inconsistency arises when a Member provides domestic support in excess of one's AMS commitments, regardless of the particular type of support on the basis of which that occurs.

99. With respect to the time-frame of the challenged measures, China's AMS commitments relate to full calendar years. Consequently, the United States must demonstrate that China exceeded its AMS through domestic support provided over the course of a full year. As explained in our prior submissions, the calculation of market price support requires Chinese farmgate prices and China's total production value for each product – information which China does not publish until the end of the following calendar year – many months after the domestic support was provided to agricultural producers.[106] Therefore, it would be impossible for a Member to evaluate a breach of an AMS commitment during the year for which an AMS level is challenged. This means that a Member who wishes to challenge China's provision of domestic support to its agricultural producers must wait to bring its challenge until after both the relevant AMS year, and the relevant provision of support, have concluded. As explained in the U.S. answer to the Panel's question 16, the United States filed its panel request immediately after the relevant information was available for 2015.

Question 24: What is the legal relevance of the "Opinions of the Central Committee of the Chinese Communist Party and the State Council on Accelerating the Promotion of Agricultural Science and Technology Innovation and Continuing to Strengthen the

[105] United States Panel Request (Exhibit US-9).
[106] *See e.g.*, Timeline Pertaining to China's Corn MPS Program (Exhibit US-92).

Capacity to Guarantee Agricultural Product Supplies" documents (Exhibits USA-13 - USA-16), and to what extent do they need to be taken into account by Chinese authorities responsible for implementing the minimum procurement price policy?

Response:

100. China's Document Number 1s are annual instruments through which China's Central Committee of the Communist Party (CCCP) and the State Council set a framework policy for the agriculture sector, generally, and provision of domestic support to agricultural producers, specifically. They are issued at the beginning of each calendar year.

101. This annual document directs the Chinese government authorities to implement policies and issue instruments in support of the CCCP and State Council's stated goals.[107] As described in paragraphs 21 and 22 of the United States First Written Submission, every year from 2012 to 2015 the annual Document Number 1s publically directed the Chinese government to implement market price supports for wheat, rice, and corn.[108] As such, the United States views the Document Number 1s as among the instruments through which China provided agricultural domestic support to producers of wheat, rice, and corn.

Question 25: The MPS Implementation Plans do not seem to expressly exclude any specific quality of grain from the procurement programme. In particular, the Implementation Plans seem to refer to a minimum procurement price for non-standard product. Does this mean that grain of a quality inferior to grades 1-5 is subject to the minimum procurement price policy?

a. What is the lowest quality of grain that would be accepted for purchase and what quality grain would be rejected?

Response:

102. Based on the text of the relevant Chinese instruments, Grade 5 is the lowest grade accepted for purchase at an applied administered price under the Wheat, Rice, or Corn MPS Programs. For instance, the *2015 Wheat and Rice MPS Implementation Plan*, and the *2015 Notice on Purchases of Corn* indicate that the applied administered price is based on a "national

[107] *See e.g., 2015 Wheat and Rice Implementation Plan* (Exhibit US-27); *2016 Northeast Region Corn Purchase Notice* (Exhibit US-87).

[108] *See 2012 Document Number 1*, p. 14, Section IV, para. 23 (Exhibit US-13) (stating that the Chinese government should "continue raising the minimum purchase price for wheat and rice, and initiate temporary purchasing and storage of corn, soybeans, rapeseed, cotton, and sugar at the appropriate time); *2013 Document Number 1*, p. 4, Section I, para. 4 (Exhibit US-14) (stating the that Chinese government should "continue raising the minimum purchase price for wheat and rice, and initiate temporary purchasing and storage of corn, soybeans, rapeseed, cotton, and sugar at the appropriate time"); *2014 Document Number 1*, p. 3, Section I, para. 2 (Exhibit US-15) (stating the that Chinese government should "continue to implement rice and wheat minimum purchase price policies and the corn, rapeseed, and sugar temporary purchasing and storage policy"); and *2015 Document Number 1*, p. 7, Section II, para. 10 (Exhibit US-16) (stating that Chinese government should "[c]ontinue to implement the rice and wheat minimum purchase price policy, and perfect the temporary purchasing and storage policy for important agricultural products").

standard Grade 3" product; but also clarify that an applied administered price is available to grain of both a superior quality (Grades 1 and 2), and inferior quality (Grades 4 and 5).[109] The 2015 instruments state that "[t]he price difference between adjacent grades will be 0.02 yuan per jin."[110]

b. How much grain is rejected relative to what is produced, what is offered to the procuring authorities, and to what is accepted?

Response:

103. As the relevant measure of volume for a market price support measure is what is "fit" or "entitled" to receive the market price support in a particular year, all production of the relevant grains in the identified provinces is production eligible to receive the applied administered price. China's MPS Programs provide applied administered prices for all grade-able grain. If 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. No farmer intends to grow "off grade" product.[111] Thus, the quality distinctions, while helpful for storage and subsequent resale, do not operate to meaningfully limit the amount of production that is eligible for purchase under the program.

104. As noted above, China's wheat, rice, and corn national standards have five grades. All of these grades (Grades 1 through 5) are eligible for purchase. Each of China's national standards also provide for an "other" or "off grade" category.[112] China does not appear to track or publish information regarding the amount of "off grade" grain produced each year. However, according to periodic State Administration of Grain surveys of grain quality, the average percentage volume of "other" or "off grade" grain is reported to be very low.[113]

China's State Administration of Grain Survey Data				
Year	**Grain**	**Provinces surveyed**	**Grade 3 or higher[114]**	**Off-Grade Samples**
2016	Wheat	Hebei, Shanxi, Jiangsu, Anhui, Shandong, Henan, Hubei, Sichuan and Shaanxi	90.3%	1.4%
2016	Wheat	Henan (Shangqiu Townships and Districts)	95.7%	0.0%

[109] *2015 Wheat and Rice MPS Implementation Plan*, Article 4, Exhibit US-27; *2015 Notice on Purchases of Corn*, Article I(2) (Exhibit US-55).
[110] *2015 Wheat and Rice MPS Implementation Plan*, Article 4, Exhibit US-27; *2015 Notice on Purchases of Corn*, Article I(2) (Exhibit US-55).
[111] Off grade or other grade product appears to be primarily determined by the weight or yield of the wheat, rice, or corn, while other factors such as levels of impurities or foreign objects, and normal color and odor appear to also play a role. *See* "Quality Requirements," *National Wheat Standard of China* (Exhibit US-29); *National Rice Standard of China* (Exhibit US-48); and *National Corn Standard of China* (Exhibit US-56).
[112] *National Wheat Standard of China* (Exhibit US-29); *National Rice Standard of China* (Exhibit US-48); and *National Corn Standard of China* (Exhibit US-56).
[113] China's State Administration of Grain, Standard & Quality Center, *Quality Survey Reports 2010-2016* (Exhibit US-98).
[114] In addition to "grades" the quality survey data reports on aspects such as average percentage of incomplete kernels, hardness, milling yield, starch content, mixed products, and other wheat, rice, or corn specific quality aspects.

2016	M/L Indica	Anhui, Jiangxi, Henan, Hubei, Hunan, Guangdong, Guangxi, and Sichuan	93.2%	0.7%
2016	Early Indica	Anhui, Jiangxi, Hubei, Hunan, Guangdong, and Guangxi	96.4%	0.3%
2016	Corn	Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, Heilongjiang, Shandong, Henan, Shaanxi,	99.6%	0.0%
2015	Wheat	Inner Mongolia, Ningxia, Xingjiang	100.0%	0.0%
2015	M/L Indica	Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Guangdong, and Sichuan	96.4%	0.5%
2015	Japonica	Liaoning, Jilin, Heilongjiang, Anhui, Jiangsu	96.5%	0.5%
2015	Corn	Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, Heilongjiang, Shandong, Henan, and Shaanxi	99.3%	0.0%
2014	M/L Indica	Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Sichuan and Guangdong	95.0%	0.7%
2014	Japonica	Liaoning, Jilin, Heilongjiang, Jiangsu and Anhui	98.5%	0.2%
2014	Corn	Hebei, Shanxi, Inner Mongolia, Liaoning, Jilin, Heilongjiang, Shandong, Henan, and Shaanxi	99.3%	0.0%
2011	M/L Indica	Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Sichuan, and Guangdong Province	91.0%	2.0%
2011	Japonica	Heilongjiang, Jilin, Liaoning, Jiangsu and Anhui	96.0%	0.0%
2011	Corn	Jilin, Heilongjiang, Liaoning, Inner Mongolia, Shandong, Hebei, Henan, Shanxi, and Shaanxi,	97.0%	0.0%
2011	Wheat	Hebei, Shanxi, Jiangsu, Anhui, Henan, Shandong, Hubei, Sichuan and Shaanxi	93.0%	0.0%
2011	Early Indica	Jiangxi, Hunan, Guangxi, Guangdong, Hubei, and Anhui	89.0%	1.0%
2010	Early Indica	Jiangxi, Hunan, Hubei, Anhui, Guangdong, and Guangxi	87.0%	0.0%

105. Based on these reports, it appears that only a negligible level of production is graded as "other" or "off grade" in any particular year. Moreover, because the vast majority of grain is graded Grade 3 and above, the market price support calculation submitted by the United States, which uses only the standard Grade 3 applied administered price, likely underestimates the actual value of support provided by China under each of the programs.

Question 26: Please provide statistics for the quantity of grain procured by quality category (i.e. for each grade as well as for qualities inferior to grades 1-5 if procured), for 2012-2015. Please provide procurement prices (i.e. administered prices) used for each quality category for 2012-2015.

Response:

106. The United States is not aware of published statistics on the grade of grain purchased by China under the MPS Programs. The United States notes that the MPS Programs impose extensive data collection and reporting requirements on grain purchasing entities, and thus this information should be available to the Chinese government.[115]

[115] *See e.g., 2015 Wheat and Rice MPS Implementation Plan*, Article 12 (noting "the China Grain Reserves Corporation and the province-level grain bureaus concerned will compile a summary, every five days, of the

Question 27: Please provide any official documents announcing the minimum procurement price in advance of the corn planting season in the relevant Chinese provinces.

Response:

107. As noted in paragraphs 21 through 22 of the U.S. First Written Submission, China's annual Document Number 1s signal the continuing implementation of the Corn MPS Programs.[116] The Document Number 1s are traditionally the first document issued by the CCCP and State Council each year, issued December 31st through February 1st, and are thus provided well before the planting season for corn. Additional, statements by Chinese officials made each year may reinforce this message.

Question 28: Under the TPRP for corn, has any procurement of corn taken place at a price other than the minimum procurement price? If so, please indicate when, at what price and the quantity procured at that price and, where available, please provide supporting evidence.

Response:

108. The United States is not aware of any government corn purchases made in 2012-2015 at prices other than those provided in the TPRP instruments.[117]

Question 29: Please specify the dates of the planting seasons for wheat, early season Indica rice, mid-to-late season Indica rice, Japonica rice and corn in each of the years 2012-2015.

Question 30: Please specify the annual harvest periods for wheat, early season Indica rice, mid-to-late season Indica rice, Japonica rice and corn in each of the years 2012-2015.

Responses to Questions 29 and 30:

109. As described in paragraphs 27, 44, and 61 of the First Written Submission of the United States, the planting and harvesting timeframes are as follows:[118]

Crop	Planting	Harvesting
Winter wheat	September - October	May - June
Spring wheat	March - April	July - August
Early season Indica rice	February - March	July - August

varieties and quantities of grain purchased at the minimum purchase price by China Grain Reserves Corporation subsidiaries and local grain reserves administration companies (or units), whereupon they will issue a report to the State Administration of Grain"). *See also id*. at Article 13 (stating that "it is necessary to establish records of quality for the entrusted purchasing and storage depots, and to carry out dedicated warehouse storage that separates varieties and separates grades").

[116] *2012-2015 Document Number 1s* (Exhibits US-13 – US-15).

[117] *2012-2015 Notices on Corn Purchases* (Exhibit US-52 – US-55.

[118] See *USDA Wheat Map* (Exhibit US-19); *USDA Rice Map* (Exhibit US-30); *FAO Rice Report* (2004) (Exhibit US-38); and *USDA Corn Map* (Exhibit US-51).

Mid-to-late season Indica	March - May	August - October
Japonica rice	June - July	October - November
Corn	summer months	late fall

Question 31: Please provide the average monthly market prices for early season Indica rice, mid-to-late season Indica rice, and Japonica rice for each processing level (e.g. paddy, semi-milled and milled rice) for 2012-2015.

Response:

110. In Exhibits US-69 through US-72, the United States provided copies of the *Yearbook of Agricultural Price Survey* released by China's National Bureau of Statistics. This source provides data on Indica (called "long grain") and Japonica (called "round or short grain") rice for the years 2000 through 2014. The data is provided at the paddy rice stage and at the milled stage. This source does not provide data distinguishing early-season and mid-to-late season Indica rice, or semi-milled and milled rice.

111. The 2015 data has now been published in the *2016 Yearbook of Agricultural Price Survey* which is available in hardcopy in China.[119]

Question 32: The 2016 Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (Exhibit CHN-80) states that:

> **Relevant regions are required to take effective measures and coordinate and organize the branches of central enterprises and major local grain enterprises within the areas to actively purchase the corn, encourage and guide multiple market players to enter the market and mobilize and protect the enthusiasm of enterprises.**

a. Please describe the "effective measures" taken by the relevant regions to implement the new corn purchase policy and provide any available evidence, regardless of whether these were written or unwritten measures (administrative decisions, practice, etc.).

Response:

112. It is not clear based on the information publicly available to the United States how the 2016 corn purchasing program was implemented in the northeast region. The *2016 Northeast Region Corn Purchase Notice* (Exhibit CHN-80) appears to be implemented in Heilongjiang, at least in part, through the *Notice on Proper Handling of the Corn Purchase and Sale Work in*

[119] China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2016) (Exhibit US-99).

Heilongjiang Province.[120] Additional provincial, and even county, level implementation instruments likely exist, but are not published in a transparent manner.[121]

113. The United States notes that the 2012-2015 Corn MPS Program also were implemented through provincial level instruments, such as those promulgated by Jilin (2012, 2014, 2015), and Heilongjiang (2012-2015).[122]

For Both Parties:

Question 33: Is the United States' position, in its communication dated 12 December 2017, that the measures at issue are the price support for all of the relevant products (wheat, Indica rice, Japonica rice and corn) in each individual year?[123] How does this fit with the distinction among different agricultural products that the United States seems to be making in the panel request?

Response:

114. Please refer the U.S. answer to the Panel's question 6.

For China:

Question 34: The Panel understands from China's explanations during the first meeting that there is no specific authority authorising adoption of the TPRP for corn and that the State Council has a general mandate to implement China's grain policy. Is the Panel's understanding correct that the State Council can legally decide, at any time, to reintroduce corn purchases at a minimum price?

---

[120] *Notice on Proper Handling of the Corn Purchase and Sale Work in Heilongjiang Province*, Hei Zheng Ban Fa [2016] No. 119 (Oct. 25, 2016) ("Notice on Proper Handling of Corn in Heilongjiang"), (Exhibit CHN-86B and CHN-82B).

[121] It appears likely that the *2016 Northeast Region Corn Purchasing Notice* was implemented through provincial and county level instruments. Other corn domestic support instruments have been implemented in this manner. For instance, China provided in its First Written Submissions provincial level instruments for each of the northeast provinces implementing the new corn producer's subsidies. *See Notice on Issuing the Implementation Plan for the Establishment of Subsidy System for Corn Producers in Jilin Province* (Ji Cai Liang [2016] No. 522), 24 June 2016 (Exhibit CHN-76B); *Notice on Issuing the 2016 Implementation Plan for the Establishment of Subsidy System for Corn Producers in Heilongjiang Province by the General Office of the People's Government of Heilongjiang Province*, (Hei Zheng Ban Fa [2016] No. 82), 29 July 2016 (Exhibit CHN-77-B); *Implementation Plan of Financial Department of Inner Mongolia Autonomous Region on the Establishment of Subsidy System for Corn Producers (Nei Cai Mao [2016] No. 986)*, 19 July 2016 (Exhibit CHN-78-B); and *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 (Exhibit CHN-79-B).

[122] *2012 Notice on Corn Purchases, Jilin Province*, Exhibit US-57; *2012 Notice on Corn Purchases, Heilongjiang Province*, Exhibit US-58; *2013 Notice on Corn Purchases, Heilongjiang Province*, Exhibit US-59; *2014 Notice on Corn Purchases, Jilin Province*, Exhibit US-60; *2014 Notice on Corn Purchases, Heilongjiang Province*, Exhibit US-61; *2015 Notice on Corn Purchases Work, Jilin Province*, Exhibit US-62; and *2015 Notice on Corn Purchases, Heilongjiang Province*, Exhibit US-63. The United States notes that Inner Mongolia and Liaoning likely also published implementing instruments for 2012 through 2015, but these are not publically available.

[123] United States' comments on China's challenge to the Panel's terms of reference, para. 14.

Response:

Question 35: During the Panel meeting, China stated that the so called "Document 1" (Communist Party of China Central Committee and State Council Several Opinions on Reforming and Completing the Pricing Formation Mechanism and Purchase Storage System for Grain and Other Important Agricultural Products) has no legal relevance. Yet, the 2016 Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (Exhibit CHN-80) states as its objective "to effectively implement the [Document 1]." Please explain the relation between both types of documents.

Response:

Question 36: Please provide the Panel with specific instances where the price of a given product fell *below* the minimum procurement price and the implementation programme was *not* activated, since the introduction of this programme following 2004.

Response:

Question 37: Is adoption of an Annual Notice and an Implementation Plan necessary to trigger grain buyout, or would the purchase of grain still take place whenever the price falls below the minimum level established in the previous year? Please explain.

Response:

Question 38: China has used a 70% average "milling rate" or "milling yield" to convert both the purchased amount of paddy rice and the applied administered price for paddy rice into the purchased amount of "semi-milled or wholly milled rice" and the applied administered price for "semi-milled or wholly milled rice". As a "milling rate" or "milling yield" is usually used to convert the quantity of paddy rice into milled rice, please indicate the reasons for using it also in the conversion of the price? Could China also provide a price-based conversion factor and the corresponding supporting data?

Response:

115. Annex 3, paragraph 7 of the Agriculture Agreement provides that AMS should be calculated "as close as practicable to the point of first sale." Therefore, calculation of market price support (per Annex 3, paragraph 8), product-specific AMS (Article 1(a)), and Current Total AMS (Article 1(h)) should all be completed as close as practicable to point of first sale, so as to put the calculation as close as possible to the same level or point of production. In the case of early season Indica rice, mid-to-late season Indica rice, and Japonica rice, this first point of sale is the sale of paddy rice by farmers to responsible purchasing and storage depots at the applied administered price.[124]

[124] *See e.g., 2015 Wheat and Rice Implementation Plan*, Article 4 (Exhibit US-27) (noting that "'minimum purchase price' refers to the at-depot price of direct purchases from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price").

116. For this reason, there is no need to convert the applied administered price to a milled rice price, or to convert the volume of eligible paddy rice to a volume of eligible milled rice as suggested by China. Instead, as described by the United States in paragraph 116 of its First Written Submission, it is appropriate to convert the fixed external reference price – which as an export price reflects milled rice – to a value for the underlying paddy rice.[125] Utilizing this conversion will permit all relevant data points (applied administered price, fixed external reference price, volume of eligible production, total volume of production, and farm gate prices) to reflect the same type of rice – paddy rice – which is the point of first sale.

117. In any event, it is inappropriate to use a *quantity* based milling rate to convert the *price* of rice from unmilled to milled rice. A volume based milling rate reflects only the physical transformation of the rice – e.g., the physical removal of the hull, germ and bran – and are not a suitable measure of the price differential between paddy rice and milled rice. The price differential or paddy-to-milled rice price ratio reflects additional factors including the costs associated with the physical milling of the paddy rice, the added value associated with the transportation of rice from the field to mill to market and onwards to ports, as well as labor, bagging costs, etc. The ratios are thus not the same.[126]

Question 39: The Implementation Plans refer to "the expected amount of grain purchased at the minimum procurement price" (e.g., CHN-30-B, p.4).

a. What does the phrase "expected amount" mean?

b. Are there any estimations of such expected amount made before the purchase of grain under the MPS programme? If so, please share with the Panel.

Response:

Question 40: Please explain how storage capacity affects the amount of grain that could be purchased by the relevant authorities? What is China's policy when grain purchases exceed existing storage capacity?

Response:

Question 41: If the market price for one of the relevant products collapsed and remained at levels below the minimum procurement price for an extended period of time, what would be the considerations preventing the Chinese government (and local governments) from buying all or nearly all of the production, if it were presented to them for purchase?

Response:

[125] *See also Korea – Various Measures on Beef* (Panel), 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").
[126] *See* United States First Written Submission, para. 116; *see also* Calculation of Rice Price Conversion, (Exhibit US-68).

Question 42: What is the role of the Agricultural Development Bank of China and Sinograin in adoption of the Annual Notices and the Implementation Plans?

Response:

Question 43: Are there any budgetary limitations on the loans provided by the Agricultural Development Bank of China to finance the minimum procurement price programmes? Please provide documents spelling out any such limitations.

Response:

Question 44: Please confirm the Panel's understanding of China's statement during the first meeting with the Panel that there are no limitations on the number and amounts of loans, which the Agricultural Development Bank of China can provide to Sinograin for the purchase of grain, except for those relating to the financial stability of the bank.

Response:

4. Constituent Data and Methodology (CDM)

For Both Parties:

Question 45: **Please comment on the following statement by the Appellate Body in *Korea – Beef*:**

> **Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation.[127]**

Response:

118. We agree with the conclusion reached by the Appellate Body in *Korea – Beef*, that the Agriculture Agreement does not permit a panel to give priority to constituent data and methodology over the text of Annex 3, particularly in light of the instruction provided in Article 1(a)(ii). Members, regardless of whether they submitted a Supporting Table in connection with a Base Total AMS calculation, are obligated to calculate product-specific AMS consistent with the requirements of Annex 3.[128]

119. The plain text of the Agriculture Agreement, as confirmed by the Appellate Body in *Korea – Beef*, provides a hierarchy attributing a "more rigorous standard" to Annex 3, than to

[127] *Korea – Various Measures on Beef* (AB), para. 114 (emphasis original).
[128] *Korea – Various Measures on Beef* (AB), para. 115.

constituent data and methodology when calculating product-specific AMS.[129] Article 1(a)(ii) of the Agriculture Agreement provides that the AMS for each basic agricultural product must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule."

120. 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" the methodology provided in Annex 3.[130] 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" of that information.[131] This indicates that a lesser degree of consideration is accorded to any constituent data and methodology.

121. Thus, consistent with the plain text of the Agriculture Agreement and the statements made by the Appellate Body in *Korea-Beef*, even where such data and methodology is available, as here, China could not argue that this methodology supplants that reflected in Annex 3. Rather, the Panel must use the methodology set out in Annex 3, while "taking account of" the data and methodology contained in China's Supporting Tables.

Question 46:

a. Please explain how, if at all, the use of post-1988 periods (in the FERP, for example) by Members who have acceded to the WTO subsequent to the conclusion of the Uruguay Round might fit within the definition of subsequent practice as per Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT")?

b. In this connection, please comment on any legal or other value of the Technical Note of the Secretariat. [132]

Response:

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

[129] *Korea – Various Measures on Beef* (AB), para. 112.
[130] *Korea – Various Measures on Beef* (AB), para. 111.
[131] *Korea – Various Measures on Beef* (AB), para. 111 (*citing* New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15).
[132] Technical Note by the Secretariat, *Information to be Provided on Domestic Support and Export Subsidies*, WT/ACC/4 (March 18, 1996).

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

124. During China's accession, China used a 1996-1998 FERP to calculate its Base Total AMS. The calculation of Base Total AMS is not the exercise in which the Panel is engaged for purposes of this dispute. In fact, the Agriculture Agreement does not require that Members use a particular set of years for its "base period." Therefore, to the extent acceding Members may have used post-1986-88 base period for purposes of calculating a Base Total AMS, it would not reflect a practice which establishes the agreement of WTO Members regarding the interpretation of the provisions of the Agriculture Agreement before the Panel here.

125. The United States also recalls that the text of Annex 3 is clear in requiring Members to calculate market price support for purposes of product-specific AMS using a fixed external reference price of 1986-1988. Customary rules of interpretation do not permit an interpreter to use context, or a subsequent practice or agreement, to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the treaty. Rather, these sources of interpretation must be used to determine the particular meaning of the terms as used in the relevant provision.

126. The Appellate Body in *EC – Bananas (Article 21.5)* made a similar finding with respect to subsequent agreements. It noted that Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied;" the term does not connote the creation of new or the extension of existing obligations.[133] Therefore, a subsequent practice, like a subsequent agreement, cannot have the legal effect of changing the obligation set out in a covered agreement.

127. Moreover, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some countries only, and not to others. China appears to suggest that the alleged subsequent practice would support *different meanings* of the text of the Agriculture Agreement for different Members. But while a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an absurd result, whereby each Member may be subject to potentially very different obligations. In the context of Accessions, as the United States described above in question 17, for China and WTO Members to have agreed to obligations not reflected in the Agriculture Agreement, those new obligations must have been reflected in China's Protocol of Accession. China's Accession Protocol does not contain any

[133] *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* (AB), para. 391.

provision altering the calculation of market price support, and therefore China agreed to the obligations as contained in the Agreement.

128. With regard to the Technical Note, we would note that it is unclear what "practice" the note reflects, as the Note is not a document to which Members agreed; rather, it is a document produced by the Secretariat to assist Members in preparing documentation for use during their accession negotiations. The Technical Note clarifies that the "purpose of this technical note is to allow acceding governments to present factual information on their domestic support and export subsidy measures actually in place in agriculture."[134] Paragraphs 12 through 14 describe some of the circumstances which would cause an acceding Member to need to provide information in Tables DS:5 through 7, including programs that "stabilize prices, trigger public intervention, trigger direct payments (e.g. deficiency payments) or provide minimum income levels, etc.," as well as programs that provide "product-specific fertilizer or transport subsidies."[135]

129. Paragraph 15 states that "for any domestic support measure that affects the producer price (normally for each of the last three years)" the following data points should be provided "the applied administered price; an external reference price, . . .; the amount of eligible production that receives the administered price."[136] This suggests that a more recent base period is to be utilized. The Agriculture Agreement does not prescribe a base period for calculating domestic support and thus this is not inconsistent with the covered agreements. Additionally, the "normally" can be understood to exempt the external reference price from this direction. This is particularly clear when read in conjunction with paragraph 13, which states that "[t]he calculation of the product-specific AMS is described in Annex 3 of the Agreement on Agriculture."[137] Thus, the reading that this provides for a departure from the clear text of the Agriculture Agreement is unsupported.

130. Even if the Technical Note clearly directed acceding Members to utilize an alternative FERP or stated that prior acceding Members had used a FERP other than 1986-1988, again this is not subsequent practice relevant to the application of the interpretation of the provisions at issue.

Question 47: Please comment on the following statement in Kazakhstan's opening statement:

> **Kazakhstan considers that in the context of the obligations and commitments of China acceded under Article XII Marrakesh Agreement, the Accession Protocol encompassing *inter alia* Schedules of Tariff Concessions (hereinafter – Schedule) and Report of the Working Party on Accession of China to the WTO must be regarded as <u>a later treaty</u> while the Marrakesh Agreement**

[134] Technical Note by the Secretariat, *Information to be Provided on Domestic Support and Export Subsidies*, WT/ACC/4 (March 18, 1996), para. 1.
[135] WT/ACC/4, paras. 12-14.
[136] WT/ACC/4, para. 15.
[137] WT/ACC/4, para. 13.

itself with its Annexes, including Agreement on Agriculture, must be treated as an earlier treaty within the meaning of Article 30 Vienna Convention.

Response:

131. We recall that Article 30 of the VCLT has not been recognized as a customary rule of interpretation under public international law. Article 3.2 of the DSU governs the interpretation of the WTO covered agreements. Article 3.2 of the DSU states:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

That is, Article 3.2 directs panels and the Appellate Body to interpret the WTO covered agreements using customary rules of interpretation of public international law, which have been understood to be reflected in Articles 31 and 32 of the Vienna Convention.[138]

132. Second, it is not the case the China's Accession Protocol is a later treaty as compared to the WTO Agreement. To the contrary, it is the WTO Agreement to which China acceded.[139] And the Accession Protocol, once agreed by WTO Members and China, is an integral part of the WTO Agreement, by its own terms.[140]

133. Moreover, even if China's Accession Protocol were viewed as a later treaty, the terms of the Protocol explain how it relates to the WTO Agreements, including the Agreement on Agriculture. As explained in question 17, above, where China acceded to the WTO Agreements on terms not consistent with those Agreements, such terms must have been memorialized in the Accession Protocol, including the paragraphs of the Working Party Report incorporated therein by reference. Members made no such change to the Agriculture Agreement in China's Accession Protocol, and therefore nothing in that later "treaty" could operate to alter the terms of the WTO Agreements. As written, the Protocol is consistent with the WTO Agreements. Therefore, Kazakhstan's reference to Article 30 of the Vienna Convention is misplaced both because this Panel may not apply this provision of the Convention under the DSU, and because it is simply not relevant to the Panel's task.

For the United States:

[138] *US – Gasoline* (AB), paras. 16–17, *Japan – Alcoholic Beverages II* (AB), para. 104.
[139] China's Accession Protocol, Part I, Section 1.1 ("Upon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.").
[140] China's Accession Protocol, Part I, Section 1.2 ("This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.").

Question 48: Is it possible that Members could negotiate, in good faith, an accession protocol where the acceding Member would rely on a different period than 1986-1988, and immediately after the accession other Members claim that the newly acceded Member is WTO-inconsistent because its AMS commitment level is exceeded when market price support is calculated using the FERP of the 1986-1988 period?

Question 49: What would be the systemic implications, if any, of utilising or not utilising a different base period than that provided for in Annex 3 of the AoA, for Members who have acceded to the WTO subsequent to the conclusion of the Uruguay Round?

Response to Questions 48, 49, and 50:

134. The United States understands from the Panel's questions that it is concerned with the practical implications of its decision regarding the appropriate fixed external reference price to be used in the calculation of China's market price support programs. China suggests that the Panel should review the systemic implications of *not* utilizing a different FERP based on the alleged practice of acceding members, implying that acceding Members may be prejudiced if the WTO Agreements were to apply as written.

135. As an interpreter and applier of the WTO Agreements, the Panel must consider the systemic, and practical, legal implications of any interpretation that would allow the Panel to make the findings China requests. Again, China asserts that the Panel may derive from factual and other information in its Supporting Tables *implied amendments* to the WTO Agreements that apply with respect to China only.[141] Such an outcome would give rise to two serious concerns.

136. First, were Members able to amend their WTO obligations through information provided by them in their Schedules, whether in Supporting Tables or otherwise, the status of every Member's WTO obligations essentially would be unknown. Again, China's Supporting Table does *not* say that the Members agree that for purposes of Articles 3.2 and 6.3 of the Agriculture Agreement, or of Annex 3, paragraph 8, the fixed external reference price for China shall be based on the years 1996-1998. Rather, China's Supporting Table simply uses that set of years for purposes of calculating support provided during a base period – that is, for multiple types of support, most of which do not even include the use of a fixed external reference price. Therefore, the task of the Panel under China's arguments would not only be to identify where in the Schedule or Supporting Tables a Member may have included information not consistent with the WTO obligation in question; the Panel would have to evaluate that information to determine the very content of that new, un-stated commitment.

137. This dilemma becomes clear when looking more closely at another issue involving the Supporting Tables before the Panel in this dispute: quantity of eligible production. In its Supporting Table, China calculated the support provided through a specific market price support

[141] As not all Members have used the same set of years as their base period, to the extent other recently acceded Member's Accession Protocols also did not contain an express change to the calculation of Current Total AMS, but did use a base period other than 1986-1988, each such Member's Supporting Tables would have to be viewed as also implying a Member-specific obligation.

program, *the content of which is unknown to the Panel*. That is, the Panel cannot determine based on the record before it whether the calculation provided in the Supporting Table is consistent with Annex 3 or not. But nevertheless, based on the vague factual descriptions provided in the Supporting Table alone, China asks the Panel to assume an intention on the part of the WTO Membership to amend an obligation under the Agriculture Agreement as it applied to China only.

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

139. The second concern raised by China's argument is the disparity it would create between original and acceding Members to the WTO. Without a clear indication in the legal texts, a Member like China acceding to the WTO six years after the conclusion of the Uruguay round would have been able to do so on terms significantly more production- and trade-distorting than original Members. That is, were its fixed external reference price for purposes of Current AMS to be based on more recent years than 1986-1988, in real, market terms China would be able to provide market price support at much higher levels than countries such as India, Turkey, or Thailand.

140. Similarly, were China able to use a quantity of eligible production limited only to the quantity actually procured, China's freedom to distort would be compounded, as the effect of such support might be provided to total production, but the calculation would only need to reflect a small portion of that support. China thus could have an identical program to another Member like India, but, unconstrained by the same obligations as those other Members, and be able to provide significantly more support to its producers, increasing consequent production and trade effects. China has provided no argumentation that would allow such an interpretation in the absence of the clear, and legally confirmed intention of WTO Members, and the Panel should reject China's arguments accordingly.

141. The United States also recalls that, where Members may agree now that a fixed external reference price other than that provided in the Agriculture Agreement should be used for purposes of certain countries, Members may enact such an agreement. If such an agreement is desired during a current accession process, the relevant change could be made explicitly in that Member's Accession Protocol. For Members that already have acceded, Members may amend the Agriculture Agreement to specify the scope and content of the new obligations under Article X of the WTO Agreement; or they may, acting as the General Council, consider an authoritative interpretation with respect to acceding Members under Article IX of the WTO Agreement.

142. Negotiations regarding such a change may be difficult, and Members may not be able to come to an agreement. But that should not lead the Panel to expand its own role to make such a

change on behalf of the Membership. The Panel does not assist Members in their role[142] as negotiators[143] and governors[144] of the WTO Agreement by determining in the context of a single dispute the outcome of significant policy issues – issues that may affect negotiations that are ongoing, including with respect to domestic support.

Question 50: There are practical consequences of using the 1986-1988 period, which go beyond legal questions. For example, as pointed out by some third-parties, data may not exist for the 1986-1988 period for the relevant products, and indeed, some countries were not in existence at that time. How should these practical concerns be resolved when deciding on which period should be used? How would the United States explain the practice of using a different period during negotiations, while Annex 3 was in existence?

Response:

143. Regarding the specific practical concerns identified in question 50 involving the lack of data or the non-existence of certain countries, we recall that the panel in *Korea – Beef* found that if data does not exist for the 1986-1988 period for the relevant products, then a Member can use proxy data to calculate the fixed external reference price. Specifically, the panel found that "Korea's objection that beef was not imported during that period and that it has no relevant import price data is not sustainable, since paragraph 9 of Annex 3 allows the use of proxy prices."[145] The panel further noted that the reference to "generally" in paragraph 9 of Annex 3 has been interpreted to allow countries to use proxy prices as Korea did for rice and two types of barley.[146] A similar exercise could be used to determine the reference price for countries not in existence in 1986-1988.

Question 51: Please comment on the following statement by China:

> **Much as the Appellate Body required Article XIX of the GATT 1994 and the provisions of the *Agreement on Safeguards* to "be read as representing an *inseparable package* of rights and disciplines which have to be considered"[147], so must this Panel read Annex 3 and the constituent data and methodology as**

[142] WTO Agreement, Article IV:1 ("There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect.").
[143] WTO Agreement, Article III:2 ("The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.").
[144] WTO Agreement, Article III:1 ("The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.").
[145] *Korea – Various Measures on Beef* (Panel), para. 830.
[146] *Korea – Various Measures on Beef* (Panel), footnote 436.
[147] *Argentina – Footwear (AB)*, para. 81.

"an inseparable package of rights and disciplines", giving meaning to each of them.[148]

Response:

144. The Safeguards Agreement explicitly incorporates Article XIX of the GATT 1994, meaning that the rights and disciplines outlined in Article XIX of the GATT 1994 are also found in the Safeguards Agreement. Specifically, Article 1 states that "the [Safeguards] Agreement establishes rules for application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." In contrast, the Agriculture Agreement does not treat Annex 3 and constituent data and methodology as equivalent. Rather, it clearly provides for a hierarchical relationship.

145. The relationship between constituent data and methodology and Annex 3 is described by Article 1(a)(ii) and Article 1(h). The Agriculture Agreement clearly describes how constituent data and methodology is used. Article 1(a)(ii) states that that the product-specific AMS must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Therefore, the calculation of current market price support provided to producers of a particular product must "take into account" any "constituent data and methodology" used in the Supporting Tables to calculate past levels of support.

146. The text of the Agriculture Agreement clearly treats Annex 3 and constituent data and methodology differently, not as an inseparable package of rights and disciplines. As this Panel is aware, a proper interpretation of the ordinary meaning of the text does not support this understanding. The inclusion of the phrase "in accordance with" in Article 1(a) indicates that a product-specific AMS calculation must be conducted "consistent with" the methodology provided in Annex 3. Conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" of that information. This indicates that a lesser degree of consideration is accorded to any constituent data and methodology.

147. As explained in our prior submissions, the Appellate Body report in *Korea – Beef* supports this understanding. That said, the Panel should not read Annex 3 and the constituent data and methodology as an inseparable package of rights and disciplines. Rather, than the panel should calculate product-specific AMS in accordance with Annex 3 and take into account the constituent data and methodology.

For the China:

Question 52: Could you please point to any prior Panel or Appellate Body reports, or any other WTO-related source, which support the contention that the lack of opposition to

[148] China First Written Submission, para. 119.

methodologies presented in the course of negotiations by Members constitutes an agreement?

Response:

Question 53: The Appellate Body in *Korea – Beef* states: "Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to "the provisions of Annex 3" than to the "constituent data and methodology". From the viewpoint of ordinary meaning, the term "in accordance with" reflects a more rigorous standard than the term "taking into account"."[149]

a. How should this more rigorous standard and difference in priority affect the incorporation of China's constituent data and methodology in the calculation of China's *Current* AMS in practice, with regard to each product?

Response:

5. Quantity of Eligible Production (QEP)

For Both Parties:

Question 54: What is the relevance, if any, of the amount of grain used by farmers for their own consumption, when calculating the quantity of eligible production? Please provide any relevant data or estimates to determine this amount.

Response:

148. "On farm" consumption is not relevant to the quantity of "eligible" production. As noted in the First Written Submission of the United States[150] and question 58, the relevant measure of eligible production is what is "fit" or "entitled" to be purchased, not what the farmer *actually* decides to sell or the government *actually* procures.

149. The determination of what a farmer sells is driven by economic factors including, but not limited to, the available applied administered price, the prevailing market price, the cost of alternative human or animal food sources (and milling or other processing costs associated with consuming home grown grains), the availability, quality and cost of seeds, and other available input subsidies affecting economic decisions. Individual farmers are in the best place to know what level of sales are economically advantageous and to act accordingly. This is however not relevant to the question of what is "eligible" to be sold to the government.

150. As noted by the panel in *Korea–Beef* "with market price support programmes, all producers of the products which are subject to the market price support mechanism enjoy the

[149] *Korea – Various Measures on Beef* (AB), para. 112.
[150] United States First Written Submission, paras. 101-103.

benefit of an assurance that their products can be marketed at least at the support price."[151] This assurance or support is available whether or not a particular farmer chooses to sell their product.

Question 55: In the situation where a new domestic support programme is implemented, (as was the case post-2004 in China) which operates differently from the previous programme, is it possible that the methodology as defined in the Supporting Tables related to the original programme would still be applicable under the new programme?

Response:

151. The constituent data and methodology provided in a Member's Supporting Table, including the methodology used to calculate the support provided through a particular program, must be "taken into account" by a panel in calculating product-specific AMS in accordance with Annex 3. However, whether or not the program at issue is the same as that reflected in the Supporting Table, the methodology in the Supporting Table cannot provide an alternative calculation for market price support, or any other program, that is not consistent with the terms of Annex 3. Where the program is the same, the methodology used in the Supporting Table may be relevant and therefore useful or instructive for the panel in determining which products, values, or data should be used in completing the calculations contained in Annex 3. Where the program is different, it may be less relevant or helpful to the panel. In either situation, however, a panel may only use that information in a manner consistent with the Agriculture Agreement.

152. Hypothetically, if China now provided a single applied administered price for all rice regardless of season or species, it is the view of the United States that it would no longer be bound to calculate the value of market price support for Indica rice and Japoncia rice separately. This helpful description of China's prior definition of basic agricultural products need not apply if factually China's hypothetical new measure does not permit or provide a reason for distinguishing between Indica and Japonica rice. In this manner, the requirements of Annex 3 would continue to apply, but the "methodology" provided in China's Supporting Tables could be taken into account but ignored, if not consistent with Annex 3 or no longer relevant to the circumstances of China's hypothetical current domestic support measure.

For the United States:

Question 56: Please comment on paragraph 58 of China's first written submission:

> **Throughout the 14 working party meetings and numerous informal bilateral or plurilateral consultations, there is no record of any WTO Member disputing this methodology for determining eligible production. In short, the Membership agreed, as one of the terms of its accession to the WTO, that China would determine eligible production on the basis of the amount of production purchased under a market price support measure.[152]**

[151] *Korea – Various Measures on Beef* (Panel), para. 827.
[152] China First Written Submission, para. 58.

a. Has the United States commented on the above determination of eligible production either during the negotiation of China's accession or since, for example at meetings of the Committee on Agriculture? If so, please substantiate the response.

Response:

153. The United States strongly disagrees with China's suggestion that the silence of WTO Members during the accession process is sufficient to constitute agreement to a modification of the requirements of the Agriculture Agreement. Just as China has pointed to no instance of a Member objecting, nor has it pointed to a clear decision and agreement to deviate from the text of the Agreement. Rather, China suggests that the consent of the Members of the WTO can be divined from alleged silence during negotiations. This cannot be permitted.

154. Moreover, as China is aware Paragraph 1.2 of the Accession Protocol specifically states that "[t]he WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession."[153] Further, "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."[154] The Protocol continues in paragraph 1.3 to state:

> *Except as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.[155]

Thus, the method for legally altering the express commitments contained in the "Multilateral Trade Agreements annexed to the WTO," was as provided in the acceding Member's Accession Protocol (including through paragraphs of the Working Party Report that were incorporated by reference into that Protocol).

155. Nothing in WTO Agreements would suggest that commitments can be made by acquiescence through silence, in the context of an accession or otherwise. Nor is silence a source of interpretation from which the Panel may draw under customary rules of interpretation. Quite simply, silence cannot mean legal agreement.

156. Furthermore, the United States would reiterate that China's "final" Supporting Table provides inconsistent descriptions of the basis of eligible production for its 1996 to 1998 market price support programs. These descriptions, when read in light of prior versions of China's supporting tables, strongly suggest that "eligible" was determined on the basis of a pre-determined volume, and thus the calculation of eligible production provided in China's

[153] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5).
[154] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5).
[155] China's Accession Protocol, Paragraph 1.2 (Exhibit US-5) (emphasis added).

Supporting Tables may, depending on the requirements of the underlying measure, be consistent with China's WTO obligations. In particular:

- Note 10, page 17 states for wheat, rice, and corn "[s]tate-owned grain enterprises at provincial, county and township levels designated by the State purchase wheat, rice and corn at the government procurement prices *within the procurement amount predetermined by the System*," and that "*[t]he State sets government procurement amount* and government procurement prices of wheat, rice and corn, as shown in the AMS calculation of wheat, rice and corn in Supporting Table DS 5."[156]

- Note 1 to Table Appendix DS5-2 Market Price Support by State Protective Price Policies, page 25 states that "The protective price set up by the government is to safeguard farmers' income. The state-owned grain enterprises were designated to purchase farmers' grain at protective price and *pre-set amount*."[157]

- Footnote 19, page 26 states that "(a) 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*)," and "(b) Eligible Production for Protective Price refers to the amount purchased by state-owned enterprises from farmers at protective price in order to protect farmer's income."[158]

157. Prior iterations of this document circulated on September 14, 2000 (CHN/38), September 28, 2000 (CHN/38/Rev. 1), and July 2, 2001 (CHN/38/Rev.2) contain various versions of these statements. In particular, the original version stated that for "[w]heat rice and corn: the state stipulates government procurement quota and government procurement price of wheat, rice and corn, as shown in the AMS calculation of wheat, rice and corn in Supporting Table DS 5."[159] This suggests that in the discussion of the operation of China's market price support system the description of China's programs and applicable calculation remained consistent – eligible production was based on government determined pre-set volumes.

158. Nothing in these documents supports the understanding that China either utilized an alternative means of determining eligible production, or that WTO Members agreed to such a deviation from the text of Annex 3 of the Agriculture Agreement.

159. With regard to discussions between Members in the Committee on Agriculture, given the broad understanding of the definition of "eligible production" provided by the *Korea – Beef* dispute and to better understand the market price support measures introduced by China after its accession, the United States and others have asked for additional information regarding the

[156] China's Supporting Table, WT/ACC/CHN/38/Rev.3, page 17.
[157] China's Supporting Table, WT/ACC/CHN/38/Rev.3, page 25.
[158] China's Supporting Table, WT/ACC/CHN/38/Rev.3, page 26.
[159] China's Supporting Table, WT/ACC/CHN/38, page 18, endnote 16.

nature of China's measures, and the calculation of the value of these programs reflected in China's notifications.[160]

Question 57: With reference to paragraph 199 of China's first written submission, what is the legal value of the definition contained in Rev.3 of "eligible production"?

Response:

160. 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. This follows the guidance in the *Handbook on Accession to the WTO* cited by China in its First Written Submission. The *Handbook* highlights that the "discussions on agriculture commitments are based on *factual data* supplied by the applicant" in the Supporting Tables.[161] In its Supporting Tables, China provided factual statements regarding the operation of its programs, the available sources of data or information on agricultural production, and the nature and scope of its domestic support measures. The factual description regarding the operation of its market price support programs were used to buttress the calculations provided in Table DS:5 of the value of China's market price support during the base period.

161. For this reason, there is no underlying legal value to China's proposed alternative definition of "total amount purchased."[162] China attempts to drawn this definition from a factual description of prior market price support programs. Instead, China is obliged to comply with the requirements of Annex 3, paragraph 8, which require all production fit or entitled to be purchased to be considered in the market price support calculation.

Question 58: Please comment on the following statement by China:

[160] *See e.g.*, AG-IMS 59038 (Sept. 23, 2010) (US question); AG-IMS 59036 (Sept. 23, 2010 (Australia question); AG-IMS 59037 (Sept. 23, 2010) (EU question); AG-IMS 59037 (Sept. 23, 2010) (EU question); AG-IMS 77077 (June 6, 2015) (US question); AG-IMS 77056 (June 6, 2015) (EU question); AG-IMS 77025 (June 6, 2015) (Japan question); AG-IMS 78068 (Sept. 25, 2015) (US question); AG-IMS 78059 (Sept. 25, 2015) (EU question); AG-IMS 79013 (March 9, 2016) (US question); and AG-IMS 80040 (June 7, 2016) (US question).

[161] *See* 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 (Exhibit CHN-11). Similarly, WT/ACC/4 provides guidance regarding the Supporting Tables "to allow acceding governments to present factual information on their domestic support and export subsidy measures actually in place in agriculture . . . in a manner consistent with the notification requirements of the Agreement on Agriculture." *See* Technical Note by the Secretariat, *Information to be Provided on Domestic Support and Export Subsidie*s, WT/ACC/4 (March 18, 1996).

[162] Moreover, the China's extrapolation of permission to utilize "total amount purchased" is not actually supported by the text of the Supporting Tables. *See* China's Supporting Table, WT/ACC/CHN/38/Rev.3, page 17, 18, 25, and 26. *See* response to Question 56 above.

However, as set out above, exclusive reliance on an undefined term in Annex 3 could only be warranted in situations in which there is no relevant constituent data and methodology for the product at issue incorporated in Part IV of that Member's Schedule.[163]

Response:

162. In this dispute, China has proposed that the Panel determine the interpretation of "production eligible to receive" through reference to its Supporting Tables. However, a panel must interpret the terms of a treaty based on the text, in its context, and in light of the object and purpose of the agreement in question. Therefore, the interpretation of the phrase "production eligible to receive" the applied administered price must begin with the text itself.

163. The ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc."[164] Thus, the "quantity of production eligible" is the portion or amount of the commodity produced that is entitled to receive the applied administered price. "Eligible" production is not that amount of production actually purchased by the government at the specified applied administered price.[165]

164. The Appellate Body in *Korea – Beef* considered the meaning of the phrase "quantity of production eligible to receive the applied administered price" and reached a similar understanding.[166] The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually purchased.'"[167] The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen."[168] It noted that "a government is able to define and limit 'eligible' production," and that "[p]roduction actually purchased may often be less than eligible production."[169] Thus, "eligible production" within the meaning of Annex 3, paragraph 8 of the Agriculture Agreement is production, which is fit or entitled to receive the administered price, whether or not the production was actually purchased.[170]

165. Therefore, the basis for China's assertion – that the term "eligible" production is not defined in the Agriculture Agreement is inapposite. That an agreement does not provide an express definition does not prevent an interpreter from determining the appropriate meaning of

[163] China's first written submission, para. 203.
[164] *Shorter Oxford English Dictionary*, "eligible," p. 799 (ed. 1993) (Exhibit US-64).
[165] *See also Shorter Oxford English Dictionary*, "entitled," p. 830 (ed. 1993) ("Now (chiefly of circumstances, qualities, etc.) confer on (a person or thing) a rightful claim *to* something or a right *to do*." (emphasis original)); *Shorter Oxford English Dictionary*, "fit," p. 960 (ed. 1993) ("Be suited to or appropriate for;" "Meet the requirements of") (Exhibit US-64).
[166] *Korea – Various Measures on Beef* (AB), para. 120.
[167] *Korea – Various Measures on Beef* (AB), para. 120.
[168] *Korea – Various Measures on Beef* (AB), para. 120.
[169] *Korea – Various Measures on Beef* (AB), para. 120.
[170] *See also Korea – Various Measures on Beef* (Panel), para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").

the term based on the ordinary meaning and context of that term. Moreover, the understanding of this term as defined or undefined is not altered by whether or not a Member supplied a Supporting Table in association with its Schedule of Concessions.

166. Finally, in regard to China's suggestion that the Panel look to its Supporting Table to determine the content and scope of China's obligations with respect to market price support, as the United States has explained in questions 17, 18, and 48-51, the Agriculture Agreement provides for how any constituent data may be used in the calculation of a Member's product-specific AMS – such information must be taken into account, but cannot have the effect of altering the obligations contained in the Agriculture Agreement.

For China:

Question 59: Please address the interpretation of the 'quantity of eligible production' by the Appellate Body in *Korea – Beef* (where it was held that "[p]roduction actually purchased may often be less than eligible production" and that "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was "actually purchased").[171]

Response:

Question 60: With reference to paragraph 197 of China's first written submission, does the statement that "the absence of a specific definition of the term eligible production in Annex 3 leaves room for a Member-specific, negotiated and agreed approach to the scope of that term" mean that the definition of "eligible production" can be different for every Member? How is this consistent with a harmonious interpretation of the covered agreements?

Response:

Question 61: Please comment on the underlined portion of following statement made at the Committee on Agriculture meeting of 13 May 2016, where, in response to a question regarding China's Agriculture Policy by Canada (AG-IMS ID 79030), China stated that:

> **The minimum price procurement policy for wheat is a good example of [the national food security] strategy. Wheat is one of the two major staple food grains for Chinese people with fundamental importance, and thus, the most supportive measure of minimum price procurement was designed for this product, since it had been expected to effectively protect the farmers' incentive to produce wheat. … <u>However, with unfavourable market conditions in recent years, the market mechanism was distorted and the government became the only buyer in reality</u>, which led to high level of**

[171] *Korea – Various Measures on Beef* (AB), para. 120.

> **stockpiling and posed tremendous pressure and challenge for agricultural production.**

Response:

Question 62: Please comment on any potential systemic implications of a Panel ruling that the definition of the quantity of eligible production (a) requires the quantity only to be determined *ex-post* or (b) permits the quantity to be determined either *ex-ante* or *ex-post*.

Response:

6. Fixed External Reference Price (FERP)

For Both Parties:

Question 63: Please elaborate on the meaning of the word 'fixed' in the context of the "fixed external reference price". Further, please explain whether any adjustments could or should be made to the FERP, and what these adjustments would be, taking into account paragraph 9 of Annex 3, last sentence.

Response:

167. "Fixed" is defined as "definitely and permanently placed or assigned; stationary or unchanging in relative position; definite, permanent, lasting."[172] The definition indicates that the reference price therefore is fixed, or permanently placed or assigned to, the years specified in the Agriculture Agreement.

168. As noted by the Panel's question, the last sentence of paragraph 9 states that the "fixed external reference price may be adjusted to account for differences in quality." The United States views appropriate adjustments as including bringing the fixed external reference price to the same level of production as the applied administered price. Per paragraph 7 of Annex 3, the level of production should be "as close as possible to the first point of sale." In making similar adjustments, the panel in *Korea – Beef* stated, based on paragraphs 7 and 9 of Annex 3, 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."[173]

For Both Parties:

Question 64: Please comment on the following statements by China:

> **Significantly, Rev.3 uses the period 1996-1998 to establish the external reference price – not the period 1986-88. Indeed, at no time during its accession negotiations did China present any data or methodology in its draft or final supporting tables based on the period 1986-1988. In short, the**

[172] *Shorter Oxford English Dictionary*, "fixed," p. 962 (ed. 1993) (Exhibit US-64).
[173] *Korea – Various Measures on Beef* (Panel), para. 828.

> **Membership agreed that China would base its fixed external reference price on the period 1996-1998, as one of the terms of its accession to the WTO.**
>
> **…**
>
> **There is no record of any WTO Member insisting or even raising the point that China – and the entire working party itself – erred by not using the 1986-1988 period. Instead, the use of the 1996-1998 period was an agreed terms of China's accession to the WTO.**[174]

Response:

169. Please refer to the U.S. answer to the Panel's question 56 concerning eligible production. The same answer applies to the FERP. To the extent that China is arguing that negotiating history demonstrates a changing obligation and an agreement by a Member can be made based on silence during negotiations, the United States disagrees

Question 65: Please comment on paragraph 176 of China's first written submission:

> **The Panel should consider the systemic implications flowing from the evidence of a consistent practice, as reflected in the table above, when deciding whether newly acceding Members may apply a different base period for calculating AMS from market price support than the years 1986-1988 identified in Annex 3 to the *Agreement on Agriculture*.**[175]

Response:

170. Please refer to the U.S. answer to the Panel's question 46.

Question 66: Please comment on paragraph 37 of China's opening statement, in particular on the "systemic mismatch" mentioned.

Response:

171. China's statement ignores the general provisions included in every protocol of accession and the scope of the WTO Agreement, as well as reflects a misunderstanding of acceding Members' commitments. When a country accedes to the WTO via an Article XII accession, it agrees to undertake the commitments outlined in the WTO Agreement, including the multilateral trade agreements, such as the Agriculture Agreement, as well as particular Member-specific commitments contained in one's protocol of accession. As explained in U.S. answer to the Panel's question 17, this understanding is reflected in China's Protocol of Accession.

172. Accordingly, it is inappropriate for China to suggest that the Panel ignore the Agriculture Agreement and conclude that the Agreement to which China acceded does not apply to it for

[174] China's first written submission, paras. 51-52.
[175] China's first written submission, para. 176.

reasons devoid of any legal justification. The protocol of accession is clear that China agreed to accept the Agriculture Agreement and act in a manner consistent with the rules contained in that Agreement. Any systemic mismatch lies in China's request for the Panel to ignore China's Agriculture Agreement commitments.

173. Further, the hazard of accepting China's argument is that the Panel would be allowing any WTO Agreement to be derived from information contained in a Member's schedules – which would create uncertainty as to the legal obligations in both the goods and services context. For further information, the Unites States refers the Panel to the U.S. answers to Questions 48-50, addressing the systemic implications of accepting China's position, as well as the U.S. answer to Question 71 on Base Total AMS and Current Total AMS.

For China:

Question 67: If no conflict exists between Annex 3 of the AoA and China's CDM, as suggested by China in its opening statement, how can the text of paragraph 9 of the Annex 3 of the AoA, which speaks of 1986-1988, be applied at the same time as China's CDM, which refers to a different timeframe?

Response:

7. Total Value of Production

For the United States:

Question 68: Please comment on paragraph 168 of China's first written submission:

> **Since the *de minimis* assessment requires a comparison of a measurement of support and a percentage of the total value of production, China considers that the total value of production should similarly be calculated "as close as practicable to the point of first sale" of the product concerned.**

Response:

174. As a preliminary matter, the United States notes that the *de minimis* assessment is a comparison between the product-specific AMS and the total value of production of that basic agricultural product – where the product-specific AMS is divided by the total value of production and then multiplied by 100. This equation can be expressed, as follows:

(Product-Specific AMS / Total Value of Production of Product)*100.

Per the obligations established by Articles 3.2, 6.3, and 6.4 of the Agriculture Agreement and paragraph 235 of China's Working Party Report, this value must be equal to or less than 8.5 percent.

175. For the purposes of this calculation, the United States agrees that, in line with paragraph 7 of Annex 3, the value of total production should be calculated "as close as practicable to the

point of first sale." Therefore, calculation of market price support (per Annex 3, paragraph 8), product-specific AMS (Article 1(a)), and Current Total AMS (Article 1(h)) should all be completed as close as practicable to point of first sale, so as to put the calculation as close as possible to the same level or point of production. For this reason, China should not be permitted to calculate a product-specific AMS for "milled rice" and compare it to a Total Value of Production for "paddy rice."

8. Calculation and Methodology

For Both Parties

Question 69:

a. What is the legal status of the supporting tables to a Member's Schedule of Concessions (which in China's case are found in document WT/ACC/CHN/38/Rev.3), as a source of rights and obligations binding on that Member?

b. How, if at all, can these supporting tables modify obligations derived from the binding text of a treaty?

c. Should they be interpreted as a subsequent agreement or practice (as under Article 31(3) of the VCLT)? Or do they merely provide context for China's obligations? Or does the reference to constituent data and methodology in Article 1 AoA confer a particular legal status? Please explain.

Response:

176. The Agriculture Agreement explains the relationship between the Agreement and a Member's Schedule and Supporting Tables. For instance, with respect to the calculation of product-specific AMS, Article 1(a)(ii) states that that it must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Therefore, the calculation of current market price support provided to producers of a particular product must be done "consistent with" Annex 3, and "take into account" any "constituent date and methodology" used in the Supporting Tables.

177. Moreover, panels and the Appellate Body have found that a Member's Schedule of Concessions may not derogate from obligations in the WTO Agreements. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume,"[176] but they may not "reduce or conflict with obligations they have

[176] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157 (referring to *EC – Bananas III* (AB), para. 154, *EC – Poultry (AB)*, para. 98, *Chile – Price Band System* (AB), para. 272, *US – Sugar* (GATT Panel), paras. 5.3 and 5.3).

assumed under the GATT or WTO Agreement, including the Agreement on Agriculture."[177] This echoed prior statements by a GATT 1947 panel in *US – Sugar* suggesting that a "Schedules of Concessions" is for Members to "incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement."[178] Therefore, China's Supporting Tables cannot operate to modify the obligations contained in the Agriculture Agreement.

178. Finally, as explained in the U.S. answer to the Panel's question 46, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some countries only, and not to others. While a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an absurd result, whereby each Member may be subject to potentially very different obligations. In the context of Accessions, as the United States described above in question 17, for China and WTO Members to have agreed to obligations not reflected in the Agriculture Agreement, those new obligations must have been reflected in China's Protocol of Accession. China's Accession Protocol does not contain any provision altering the calculation of market price support, and therefore China agreed to the obligations as contained in the Agreement.

For the United States

Question 70: The United States, in its first written submission, references and relies on an 8.5 % *de minimis* threshold for China;[179] a number which arises from paragraph 235 of China's Working Party Report and is incorporated into China's Accession Protocol. As China notes, this is despite the fact that Article 6.4 of the AoA establishes that "for developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent".[180] At the same time, the United States relies on the years 1986-1988 when determining the FERP, dates which derive solely from Annex 3 of the AoA.

a. Please explain why the United States relies on the 8.5% threshold, while at the same time using the years 1986-1988 in the calculation of the FERP (which derives from Annex 3 of the AoA).

Response

179. Members agreed in the calculation of China's Current Total AMS to an 8.5 percent *de minimis* level under Article 6.4. This agreement was memorialized in paragraph 235 of China's Working Party Report, noted as an obligation in paragraph 342 of the Working Party Report, and incorporated into the Accession Protocol through paragraph 1.2. As such, the United States

[177] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157; see also *EC – Export Subsidies on Sugar* (AB), para. 213.
[178] *US – Sugar* (GATT Panel), para. 5.2.
[179] United States First Written Submission, para. 4.
[180] China First Written Submission, para. 179.

relies on China's 8.5 percent *de minimis* level as it is one of the explicit commitments enumerated in China's Accession Protocol.

180. As we explained in the U.S. answer to the Panel's question 17, for acceding Members, the legal mechanism for altering a commitment contained in a WTO covered agreement, which includes the Agriculture Agreement, is through the Accession Protocol, which includes paragraphs of the Working Party Report that were incorporated by reference into that Protocol.

181. Members did not agree for China to use a FERP other than 1986-1988. As we have stated before, a Member cannot amend or derogate from agreement obligations in its schedule or supporting table. Any new rights or obligations must be reflected in an acceding Member's WTO Protocol of Accession.

182. Again, as explained in the U.S. answer to the Panel's question 17, panels and the Appellate Body have found that a Member's Schedule of Concessions may not derogate from obligations in the WTO Agreements. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume,"[181] but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture."[182]

Question 71: Should there be any difference between the way the Base Total AMS and the Current Total AMS are calculated?

Response:

183. The Agriculture Agreement recognizes in both Article 1(a), "AMS," and 1(h), "Total AMS," a difference between the product-specific AMS or Total AMS present in the "base year" and the level of support calculated each year in the "implementation period and thereafter."[183]

184. With regard to the "Base Total AMS," this is an historical reflection of the Member's provision of domestic support at the time of the Uruguay Round or accession. Article 1(h)(i) states that it is "the sum of all domestic support provided in favour of agricultural producers . . . and which is 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"), as specified in Part IV of a Member's Schedule."[184] Thus, the Agriculture Agreement indicates that Members (both

[181] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157 (referring to *EC – Bananas III* (AB), para. 154, *EC – Poultry* (AB), para. 98, *Chile – Price Band System* (AB), para. 272, *US – Sugar (GATT Panel)*, paras. 5.3 and 5.3).
[182] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157; see also *EC – Export Subsidies on Sugar* (AB), para. 213.
[183] Agriculture Agreement, Articles 1(a) and 1(h).
[184] Agriculture Agreement, Article1(h). Article 1(a) similarly states that "with 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."

original and acceding) should provide no more domestic support than found in their Base Total AMS, though the specifics of individually-negotiated commitments and reduction obligations will be provided in Part IV of a Member's Schedule under the header "Final Bound Commitment Levels."[185]

185. The United States notes that for the purpose of domestic support commitments neither the Agriculture Agreement, nor the Marrakesh Agreement defines the "base period" for Uruguay Round or acceding Members. Per Table 6 in China's First Written Submission, numerous acceding Members have used more contemporaneous "base periods" to provide information on their domestic support measures. China provided factual descriptions in its Supporting Tables regarding the green and amber box programs it maintained between the years 1996 and 1998 to facilitate negotiations with the WTO Membership. This data made up its Base Total AMS and informed its Final Bound Commitment Level.

186. By contrast, "Current Total AMS" reflects an annual analysis with distinct instructions. Article 1(h)(ii) states that it is 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."[186] For the component, current product-specific AMS calculations, Article 1(a)(ii) states "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."[187] Thus, the "current" aspect of the calculation relies not on statements in Part IV of a Member's Schedule, but the methodology set out in the Agriculture Agreement itself and applies in every subsequent year.

187. The Agriculture Agreement expresses a Member's commitments in terms of a Member's Current Total AMS, stating 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."[188] Thus, it is the calculation of Current Total AMS and component current product-specific AMS which is the operative on going commitment.

188. As such the Agriculture Agreement has drawn a distinction between the sources of information relevant for determining the "Base Total AMS," "Final Bound Commitment Levels," and the "Current Total AMS." As noted in *Korea-Beef,* for the purposes of subsequent consideration of whether a Member is providing support consistent with its obligations, "Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves

[185] Agriculture Agreement, Article 1(h)(ii). Similarly, Annex 3, paragraph 5 states that "AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support."
[186] Agriculture Agreement, Article 1(a)(ii).
[187] Agriculture Agreement, Article 1(a)(ii).
[188] Agriculture Agreement, Article 3.2.

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."[189] For this reason, regardless of specific errors made during the calculation of a Member's Base Total AMS, it continues to be obligated to calculate its Current Total AMS consistent with the text of the Agriculture Agreement.

For the following three questions, please refer to Annex A to this document:

Question 72: It appears that there are a number of instances within Section C of the United States' first written submission where the values submitted by the United States as part of its 'final calculations' differ from those values provided previously in the first written submission (see section 1.1 "Discrepancies between results within the United States' first written submission" comparing Value 1 and Value 3). Please explain these differences.

Question 73: It also appears that there are a few instances where data provided by the United States in its first written submission[190] as a final sum of values for various products are different from the sum arrived at by the Panel when adding the original numbers (see section 1.1 "Discrepancies …" comparing Value 1 and Value 2). Please comment on why this may be the case.

Responses to Questions 72 and 73:

189. It appears that certain of the discrepancies identified by the Panel are the result of rounding done at certain points in the calculation. Specifically, the data related to production volumes is provided in "tens of thousands metric tons" in statistics reported by China's Statistical Bureau.[191] The United States converted this data into "millions of metric tons" resulting in data with three digits after the decimal place.

190. The discrepancies, particularly with regard to the summed provincial totals, appear to be the result of rounding or the dropping of decimal places during the transcription of calculations done in Excel spreadsheets to tables in the Word document of the United States' First Written Submission.

191. For instance, with regard to the discrepancy related to wheat, the United States used the complete (unrounded) number to calculate the total provincial production. This resulted in a slight discrepancy between the rounded individual province production data, and the rounded total. The most exact number is the value in the "Wheat Eligible Province Production" line of Table 8, and repeated in the calculations in Part C.1.

[189] *Korea – Various Measures on Beef* (AB), para. 115.
[190] United States First Written Submission, Table 8: Production in eligible provinces.
[191] *China's Statistical Yearbook* (2016) (Exhibit US-18); *China's Statistical Yearbook (2015)* (Exhibit US-73); *China's Statistical Yearbook (2014)* (Exhibit US-74); and *China's Statistical Yearbook (2013)* (Exhibit US-76).

192. We have also identified a couple of instances where values were erroneously transposed (for instance, the value of mid-to-late season Indica rice from Jiangxi province in 2015), or where the values reported in China's Annual Statistical Yearbooks appear to have been updated overtime (for instance, the national volume of wheat production for 2012 was reported as slightly higher in subsequent editions of the annual Statistical Yearbook). All efforts have been made to utilize the most recent Chinese reports to ensure the correct data is utilized and to complete the calculations with the complete values reported by China.

193. Below the United States provides revised Tables 8 and 9 reflecting (1) unrounded values, and (2) additional detail on the source of the data or the calculation methodology. The United States also provides an additional chart explaining the calculation of total volume of production of early season Indica rice, mid to late season Indica rice, and Japonica rice.

194. When the revised volume numbers are used throughout the MPS calculations the United States finds there are no alterations to the *de minimis* values calculated for wheat and corn. The *de minimis* values for Indica rice, and Japonica rice are altered slightly.

Revised De Minimis Values.		
	FWS	**Revised**
Indica – 2015	68.0%	68.1%
Japonica – 2013	67.4%	67.3%
Japonica – 2015	69.0%	68.9%

Revised Tables 8 & 9

Table 8: Wheat, Indica Rice, Japonica Rice and Corn Production in Eligible Provinces					
Unit: Million MT	**2012**	**2013**	**2014**	**2015**	**Source**
Wheat Eligible Province Production	**94.082**	**96.825**	**99.983**	**102.885**	Sum provincial totals
Hebei	13.377	13.872	14.299	14.350	Ex. US-18, 73-75
Jiangsu	10.488	11.013	11.604	11.740	Ex. US-18, 73-75
Anhui	12.940	13.320	13.936	14.110	Ex. US-18, 73-75
Shandong	21.795	22.188	22.638	23.466	Ex. US-18, 73-75
Henan	31.774	32.264	33.290	35.010	Ex. US-18, 73-75
Hubei	3.708	4.168	4.216	4.209	Ex. US-18, 73-75
Early Season Indica Rice Eligible Provinces	**25.047**	**25.973**	**25.852**	**25.611**	Sum provincial totals
Anhui	1.320	1.308	1.283	1.092	Early Rice Production Vol., Ex. US-76-77
Jiangxi	8.002	8.280	8.201	8.119	Early Rice Production Vol., Ex. US-76-77
Hubei	2.089	2.228	2.387	2.523	Early Rice Production Vol., Ex. US-76-77
Hunan	8.187	8.605	8.548	8.589	Early Rice Production Vol., Ex. US-76-77
Guangxi Zhuang Autonomous Region	5.449	5.552	5.433	5.288	Early Rice Production Vol., Ex. US-76-77

Mid/Late Season Indica Rice Eligible Provinces	**83.398**	**82.2291**	**84.415**	**86.151**	Sum provincial totals
Liaoning	minimal	minimal	minimal	minimal	
Jilin	minimal	minimal	minimal	minimal	
Heilongjiang	minimal	minimal	minimal	minimal	
Jiangsu	2.641	2.672	2.658	2.714	(Mid/Late vol. + Late vol.)– vol. Japonica below Ex. US-76-77
Anhui	10.193	9.951	10.232	10.910	(Mid/Late vol. + Late vol.) – vol. Japonica below Ex. US-76-77
Jiangxi	11.758	11.760	12.051	12.153	Mid/Late vol. + Late vol. Ex. US-76-77
Henan	4.926	4.858	5.286	5.315	Mid/Late vol. + Late vol. Ex. US-76-77
Hubei	14.425	14.539	14.908	15.584	Mid/Late vol. + Late vol. Ex. US-76-77
Hunan	18.130	17.011	17.792	17.859	Mid/Late vol. + Late vol. Ex. US-76-77
Guangxi Zhuang Autonomous Region	5.971	6.010	6.228	6.090	Mid/Late vol. + Late vol. Ex. US-76-77
Sichuan	15.354	15.49	15.261	15.526	Mid/Late vol. + Late vol. Ex. US-76-77
Japonica Rice Eligible Provinces	**50.892**	**51.823**	**51.795**	**52.378**	
Liaoning	5.078	5.069	4.515	4.677	Mid/Late vol. + Late vol. Ex. US-76-77
Jilin	5.320	5.633	5.876	6.301	Mid/Late vol. + Late vol. Ex. US-76-77
Heilongjiang	21.712	22.206	22.510	21.997	Mid/Late vol. + Late vol. Ex. US-76-77
Jiangsu	16.360	16.551	16.461	16.811	(Mid/Late vol. + Late vol.) *.192 Ex. US-76-77
Anhui	2.422	2.364	2.431	2.592	(Mid/Late vol. + Late vol.) *.861 Ex. US-76-77
Jiangxi	minimal	minimal	minimal	minimal	
Henan	minimal	minimal	minimal	minimal	
Hubei	minimal	minimal	minimal	minimal	
Hunan	minimal	minimal	minimal	minimal	
Guangxi Zhuang Autonomous Region	minimal	minimal	minimal	minimal	
Sichuan	minimal	minimal	minimal	minimal	
Corn Eligible Province Production	**86.746**	**96.250**	**94.335**	**100.041**	Sum provincial volumes
Heilongjiang	28.879	32.164	33.434	35.441	Ex. US-18, 73-75
Jilin	25.788	27.757	27.335	28.057	Ex. US-18, 73-75
Liaoning	14.235	15.632	11.705	14.035	Ex. US-18, 73-75

Inner Mongolia	17.844	20.697	21.861	22.508	Ex. US-18, 73-75

Table 9: Total Value of Production					
		2012	**2013**	**2014**	**2015**
Wheat	National Production (million MT)	121.024	121.926	126.208	130.185
	Farm Gate Prices (RMB/MT)	2,166.20	2,356.20	2,411.80	2,328.60
	Total Value of Production (million RMB) (*Production x Farm Gate Price*)	262,166.1888	287,282.0412	304,388.4544	303,148.7910
Early Indica Rice	National Production (million MT)	33.291	34.145	34.012	33.687
	Farm Gate Prices (RMB/MT)	2,622.00	2,603.20	2,681.60	2,687.40
	Total Value of Production (RMB) (*Production x Farm Gate Price*)	87,289.00	88,860.23	91,206.58	90,530.44
Mid/Late Indica Rice	National Production (million MT)	106.4064	105.1356	107.2388	108.7389
	Farm Gate Prices (RMB/MT)	2,697.40	2,627.20	2,658.00	2,601.60
	Total Value of Production (RMB) (*Production x Farm Gate Price*)	287,020.62	276,212.25	285,040.73	282,895.12
Total Indica Rice	Total Value of Production (million RMB) (*Early + Mid/Late Indica*)	374,309.6254	365,072.4803	376,247.3096	373,425.5660
Japonica Rice	National Production (million MT)	64.538576	64.341392	65.256212	65.75991
	Farm Gate Prices (RMB/MT)	2,919.60	2,936.60	3,035.20	2,951.20
	Total Value of Production (million RMB) (*Production x Farm Gate Price*)	188,426.83	188,944.93	198,065.65	194,070.65
Corn	National Production (million MT)	205.614	218.489	215.646	224.632
	Farm Gate Prices (RMB/MT)	2,222.60	2,176.20	2,237.00	1,884.60
	Total Value of Production (million RMB) (*Production x Farm Gate Price*)	456,997.67640	475,475.7618	482,400.1020	423,341.4672

Total Volume of Production – Rice, Early Indica Rice, Mid/Late Season Indica Rice, and Japonica Rice					
(million MT)	**2012**	**2013**	**2014**	**2015**	**Source**
Total Rice	204.236	203.612	206.507	208.225	Exhibits US-18
Japonica Rice	64.538576	64.341392	65.256212	65.7991	(Total Rice *.316)
Early Indica Rice	33.291	34.135	34.012	33.687	Exhibits US-76, US-77
Mid/Late Season Indica Rice	106.406424	105.135608	107.238788	108.7389	(Total Rice) minus (Japonica rice), minus (Early Indica)

195. Finally, in the course of reviewing the values submitted to the Panel, the United States noted that, inadvertently, only the first page of the spreadsheet contained in Exhibit US-65, Calculation of Fixed External Reference Price 1986 to 1988 was submitted. A corrected version of Exhibit US-65 is provided with this submission.

Question 74: There are a few discrepancies between Panel calculations and the United States' first written submission regarding Market Price Support expressed as a percentage for Indica rice and corn, arrived at using purportedly the same data (see section 1.2 "Discrepancies between results in the United States' first written submission and Panel calculations"). Please comment on any potential reasons for why these differences may have arisen.

Response:

196. With regard to the issues identified in Tables 1.2.1 and 1.2.2, the discrepancies may again relate at least in part to rounding, however when we "unround" the production values for Indica rice and corn we do not obtain the results described by the Panel. Therefore, we were unable to replicate the same percentage values identified by the Panel.