

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

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

May 15, 2018

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<i>China – Electronic Payment Services</i>	Panel Report, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/R and Add.1, adopted 31 August 2012
<i>China – Publications and Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
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<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Korea – Various Measures on Beef (Panel)</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
<i>Peru – Agricultural Products (AB)</i>	Appellate Body Report, <i>Peru - Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R, adopted 31 July 2015
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005

TABLE OF EXHIBITS

Exhibit Number	Exhibit Name
US-104	<i>2016 Heilongjiang Corn Purchase Notice</i> (November 10, 2016)
US-105	Selected Entries from <i>Shorter Oxford English Dictionary</i> (1993)
US-106	Response to Annex A

1. Terms of Reference

For Both Parties:

Question 52: Please address the relevance of Exhibits US-101 through US-103 submitted by the United States and in particular US-101.

1. China has argued that its provision of domestic support to corn producers from 2012 through 2015 is outside the Panel’s terms of reference because the annual legal instruments through which the domestic support was provided “expired” prior to the Panel’s establishment. As we have explained previously, China is wrong because the United States is not challenging a measure that had expired prior to panel establishment, but rather is challenging the domestic support provided by China. The “matter” raised in the U.S. panel request, and which the DSB established the Panel to examine, is China’s provision of domestic support in favor of agricultural producers in breach of Articles 3.2 and 6.3 of the *Agreement on Agriculture* (“Agriculture Agreement”) in 2012, 2013, 2014 and 2015.¹ The expiration of annually-issued legal instruments through which China provided such support in the relevant years does not change the “matter” before the Panel or alter the Panel’s terms of reference. China has not demonstrated that any other “matter” existed and could have been examined as of the date of the Panel’s establishment by the DSB, nor that its market price support program for corn had “expired” by the time of the Panel’s establishment, nor that it ceased to provide domestic support for corn in excess of its commitment level in 2016.

2. China erroneously asserts that its Temporary Purchase and Reserve Policy (“TPRP”) program for corn has expired because the legal instruments pertaining to its 2016 corn domestic support program “do not reveal the existence of an applied administered price.”² However, the evidence presented by the United States in its Opening Statement at the second substantive panel meeting shows that China has not in fact ceased to make corn purchases at administered prices. Exhibits US-101 through US-103 demonstrate that China has failed to establish that it has ceased purchasing corn at administratively determined prices during the 2016/17 harvest.

3. Despite China’s statements regarding the transition to the use of a “market price” for government purchases of corn in 2016, the United States has identified, in Exhibit US-101, a notice of administered prices issued by Sinograin to certain purchasing locations in Inner Mongolia on October 16, 2016.³ Entitled *Notice on Activating 2016 Autumn Grains Corn Purchase Work* (“2016 Inner Mongolia Corn Purchase Notice”), Exhibit US-101 announces the prices at which government purchases will be made, and directs local grain depots to display or post the available prices for new, standard grain corn in that area. This announcement establishes a similar government purchase process to that established under the 2012, 2013, 2014, and 2015 Corn Market Price Support Programs.

¹ The United States also challenged, in the alternative, the provision of domestic support under Article 7.2(b) of the Agriculture Agreement.

² China Second Written Submission, para. 137.

³ Notice on Activating 2016 Autumn Grains Corn Purchase Work (October 16, 2016) (“2016 Inner Mongolia Corn Purchase Notice”) (Exhibit US-101).

4. Exhibit US-102, entitled *Jilin Notice on Further Proper Handling of Corn Purchases and Sales Work* and issued on February 3, 2017, shows that China’s provincial governments implemented national policy by directing Sinograin and other state-owned enterprises located in the Jilin Province to enter the corn market in 2016 and make government purchases of corn similar to the government corn purchasing activities in 2015. The Notice was issued by the Jilin Province Grain Bureau, a provincial branch of the State Administration of Grain. The Notice directs municipal governments, Sinograin, the Agricultural Development Bank of China, as well as other state-owned enterprises to enter the corn market and make corn purchases, in order to counteract negative market trends, including falling corn prices. The Notice states that:

during the most recent phase, market prices for grain have been dropping quite sharply, purchasing entities have been entering the market cautiously, purchasing volumes have to varying degrees seen a decline over 2016 and the preceding period, and farmers’ willingness to sell grains has clearly been increasing, [such that] new circumstances, new contradictions, and new problems have emerged, and the pressure on purchases and sales has gradually increased.⁴

5. The notice requires Sinograin and other state-owned enterprises to take action to supervise and implement corn purchasing and storage actions. Specifically, “Sinograin is required to accelerate the pace of purchases, establish additional purchase and storage depots, extend purchase hours, and exploit its purchasing potential to the greatest possible extent.”⁵ In addition to requiring Sinograin and other government entities to make corn purchases, the Notice directs these entities to “continue to carry out the dissemination and public opinion guidance” of the central government by “explain[ing] the national government’s purchasing policies and advance measures that guarantee grain purchases and sales, and to promptly publicize purchasing information and grain price changes within [each locality’s] jurisdiction, guiding farmers to grasp trends in market prices, form rational expectations, and sell grains at an adequate time and at adequate prices.”⁶ This Notice illustrates continued efforts by the central and sub-central government to direct Sinograin and other state-owned enterprises to enter the corn market and make purchases.

6. Exhibit US-103 is a transcript of a live broadcast interview of Jilin Province Grain Bureau Vice Director Zhang Yangguang on May 3, 2017, about three months after the Jilin Province Grain Bureau issued its notice directing Sinograin and other government entities to enter the corn market and make purchases. The Vice Director explains the status of Jilin province’s implementation of the corn purchase and storage work. Specifically, the Vice Director explains that he and the Bureau coordinated with Sinograin to establish additional purchase and storage depots and extend purchase hours. The Vice Director also stated that, “according to the guidance prices of Sinograin headquarters, [Sinograin’s Jilin province

⁴ Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), preamble, p. 1 (Exhibit US-102).

⁵ Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), Article III, p. 2 (Exhibit US-102).

⁶ Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), Article VIII, pp. 3-4 (Exhibit US-102).

subsidiary] has consulted market prices and adjusted purchase prices once per week to release positive market signals.”⁷ He further stated that in the “process of corn purchase and storage system reform, Sinograin’s Jilin province subsidiary has given full play to its role of macro-control and as a ‘stabilizing instrument’ and ‘ballast’, making the contributions it should to push forward our province’s corn purchase and storage system reform.”⁸

7. Based on the information reflected in Exhibits US-101 – US-103, China has not demonstrated that it has ceased to make corn purchases at administered prices in 2016. Rather, these exhibits show that China continues to direct state-owned enterprises, such as Sinograin, to enter the corn market and actively purchase corn at administered prices. Therefore, China’s claim that the Panel cannot make findings on the provision of market price support for corn in 2012, 2013, 2014 and 2015 because China’s corn MPS program ceased to exist prior to the Panel’s establishment must fail.

With regard to Exhibit US-101 specifically:

- a. Does the text in heading three refer to a specific purchase price for corn in the Inner Mongolia region?**

Response:

8. Section 3 lists individual prices for all of the regions in Inner Mongolia. Hulun Buir, Hinggan League, Tongliao, Chifeng, and Xilingol League and the regions to its west cumulatively cover all of Inner Mongolia. Accordingly, Exhibit US-101 provides prices for all of the regions in Inner Mongolia.

- b. What is the authority or the legal basis for issuing such a document by Sinograin and where can such authority or legal basis be found?**

Response:

9. It is not clear from the text of the *2016 Inner Mongolia Corn Purchase Notice* under what authority it was issued. As noted previously by the United States, the *2004 Grain Distribution Regulation* provides authority for China to implement market price support for corn, as well as for wheat and rice.⁹

10. The phrase “smooth purchase work” and similar iterations appear no fewer than a combined total of eight times in the national market price support plans for wheat and rice, as well as in the *2016 Northeast Region Corn Purchase Notice*.¹⁰ These similarities suggest the

⁷ Report on Purchasing Activities in Jilin (May 3, 2017), p. 1 (Exhibit US-103).

⁸ Report on Purchasing Activities in Jilin (May 3, 2017), p. 1 (Exhibit US-103).

⁹ *2004 Grain Distribution Regulation*, Article 2 (“[t]he term ‘grain’ . . . refers to wheat, rice, corn. . .”), Article 27 (“the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions for important grain varieties that are in short supply”) (Exhibit US-12).

¹⁰ 2016 Notice on Pragmatically Handling This Year’s Corn Purchase Work in the Northeast Region (“2016 Northeast Region Corn Purchase Notice”), Article VII, p. 2 (Exhibit US-87), 2012 Wheat MPS Plan, para. 1 (Exhibit US-23); 2013 Wheat MPS Plan, para. 1 and Art. 7; (Exhibit US-25); 2014 Wheat and Early Indica Rice

market price support programs for wheat, Indica rice, Japonica rice, and corn have similar purposes and may have been implemented pursuant to the same legal authority.

11. The *2016 Northeast Region Corn Purchase Notice* also may provide authority for the *2016 Inner Mongolia Corn Purchase Notice*. The reference to “safeguard[ing] the smooth execution of 2016 autumn grains corn purchase work” could suggest that the *2016 Inner Mongolia Corn Purchase Notice* was executing the 2016 autumn grains corn purchase work, as set out in the *2016 Northeast Region Corn Purchase Notice*. As explained previously, the *2016 Northeast Corn Purchase Notice* detailed the corn purchasing activities for corn during the 2016 harvest period.

- c. Please explain to what "to safeguard the smooth execution of 2016 autumn grains corn purchase work" in Exhibit US-101, refers?**

Response:

12. See answer to Question 52b above.

- d. How often would Sinograin issue such a notice? Would Sinograin, taking into account fluctuations in the market, issue one notice at the start of the harvesting period or would they issue a number of notices as the price fluctuates? Is Sinograin a private or a state-owned company?**

Response:

13. Exhibit US-101 was issued at the start of the harvest period and the United States is not aware of another notice issued during the harvest period in Inner Mongolia.

14. The Secretariat’s Trade Policy Review report for China describes Sinograin as state-owned,¹¹ and in response to the Panel’s question at the second panel meeting, China stated that Sinograin was state-owned.

- e. Are the Parties aware of similar notices issued by other public or private companies? If so, please provide examples for years 2012 through 2017.**

Response:

15. The United States identified a *2016 Heilongjiang Corn Purchase Notice* issued by Chinatex’s Heilongjiang province subsidiary.¹² The notice is similar in format and content to Exhibit US-101. The notice announces that Chinatex is launching “corn purchase work”

MPS Plan, p. 1 and Article 7 (Exhibit US-26); 2015 Xinjian Wheat Purchase Plan, part VIII, para. 4 (Exhibit US-28); 2012 Early Season Indica Rice MPS Plan, para. 1 and Art. 7 (Exhibit US-44); 2012 Mid Late Season Rice MPS Plan, para. 1 and Art. 7 (Exhibit US-45); 2013 Early Season Indica Rice MPS Plan, para. 1 and Art. 7 (Exhibit US-46); 2014 Mid Late Rice MPS Plan, p. 1 and Art. 7 (Exhibit US-48); and 2015 Corn MPS Heilongjiang, Article IV(6), p. 10 (Exhibit US-63).

¹¹ China Trade Policy Review, Report by the Secretariat (April 26, 2010) (WT/TPR/S/230), p. 75, para. 30.

¹² *2016 Heilongjiang Corn Purchase Notice* (November 10, 2016) (Exhibit US-104).

“starting November 10, 2016” in Heilongjiang Province.¹³ Chinatex is one of the state-owned enterprises entrusted to make purchases under both the wheat and rice market prices support programs and the corn TPRP program in 2015.

f. What is the temporal scope of application of this notice?

Response:

16. The *2016 Inner Mongolia Corn Purchase Notice* was published on October 16, 2016 and issued to all directly affiliated depots. The notice states that all depots will promulgate public notices on purchasing and activate autumn grains corn purchases as of October 16, 2016.

17. The notice also limits the scope of purchases to grain newly-produced in 2016, which suggests that the notice may not apply to grain produced after 2016. We note that in previous years, corn purchasing activity took place during the harvest period for a particular crop year, typically November to April.

Question 53: Please provide monthly average corn producer market prices in 2016 and 2017 in the main corn-producing regions in China.

Responses:

18. The United States is unable to locate a complete set of publically available monthly average corn producer market prices for 2016 and 2017 in the main corn-producing regions in China. China’s lack of transparency underscores the United States’ position that there was no other “matter” that could have been examined by the United States or the Panel as of the date of panel establishment.

Question 54: Are the Parties aware of any other documents identical or similar to Exhibit US-101, issued for the remaining main corn-producing regions in China by any public or private companies? If so, please provide such documents for years 2012 through 2017 for these main corn-producing regions.

Response:

19. See answer to Question 52e.

Question 55: Please compare the content of the 2012-2015 TPRP notices with Exhibit US-101, read together with the Notice on Properly Handling This Year's Corn Purchase Work in the Northeast Region (Exhibits CHN-80/US-87).

20. The *2016 Inner Mongolia Corn Purchase Notice* (Exhibit US-101) read together with the *2016 Northeast Region Corn Purchase Notice* (Exhibit US-87) (collectively, the *2016 Corn Purchasing Instruments*) are very similar in form and content to the *2012-2015 Northeast Region*

¹³ *2016 Heilongjiang Corn Purchase Notice* (November 10, 2016) (Exhibit US-104).

*Corn Purchase Notice (TPRP Notices or Exhibits US-52 – US-55).*¹⁴ The similarities between the *2015 TPRP Notice* and *2016 Corn Purchasing Instruments* are best understood by comparing:

- 1) the entities to whom the notice is directed;
- 2) the purchasing and pricing requirements;
- 3) the policy objectives identified;
- 4) the announcement and display requirements;
- 5) the lending requirements; and
- 6) the storage requirements.

21. First, the *2015 TPRP Notice* and *2016 Corn Purchasing Instruments* are directed to the same entities. The 2015 TPRP notice was issued “[t]o the development and reform commissions (price bureaus), grain bureaus, and finance departments of the provinces and autonomous regions of Inner Mongolia, Liaoning, Jilin, and Heilongjiang; branches of the Agricultural Development Bank of China in the provinces and autonomous regions of Inner Mongolia, Liaoning, and Jilin, and Heilongjiang; and China Grain Reserves Corporation, China National Cereals, Oils and Foodstuffs Corporation (COFCO), Chinatex Corporation (Chinatex), and Aviation Industry Corporation of China (AVIC).”¹⁵

22. Similarly, Exhibit US-87 was issued to “[t]he People’s Governments of Inner Mongolia, Liaoning, Jilin, and Heilongjiang Province (or district), China Railway Corporation, Agricultural Development Bank of China (ADBC), China Grain Reserves Corporation, China National Cereals, Oils and Foodstuffs Corporation (COFCO), and Aviation Industry Corporation of China (AVIC).”¹⁶ Exhibit US-101 further transmits this message to “all directly affiliated depots [of Sinograin].”¹⁷

23. Second, the *2015 TPRP Notice* and *2016 Corn Purchasing Instruments* direct the relevant entities to purchase corn at pre-set prices. The *2015 TPRP Notice* states that “China Grain Reserves Corporation [(Sinograin)], entrusted by the state to act as the primary policy implementation entity, will assume national temporary purchasing and storage tasks on this occasion, and via its directly affiliated enterprises and entrusted purchasing and storage depots, will make open purchases of farmers’ surplus grain and will prevent the occurrence of farmers’ ‘difficulty selling grain.’”¹⁸ Moreover, the *2015 TPRP Notice*, including the provincial notices

¹⁴ Exhibit US-101 and Exhibit US-87 are collectively referred to as the “2016 Corn Purchase Instruments”. For purposes of comparing the 2012-2015 TPRP notices to Exhibit US-101 and Exhibit US-87, the United States used the TPRP Notices from 2015. However, similar comparisons could be made about the 2012, 2013, and 2014 TPRP notices. The United States notes that 2012 – 2015 Corn MPS program was implemented through both the Northeast Regional legal instruments, as well as through provincial legal instruments such as those promulgated by Jilin (2012, 2014, 2015), and Heilongjiang (2012-2015). The United States notes that Inner Mongolia and Liaoning likely also published implementing instruments for 2012 through 2015, but these are not publically available.

¹⁵ *2015 Northeast Region Corn Purchase Notice*, preamble (Exhibit US-55).

¹⁶ *2016 Northeast Region Corn Purchase Notice*, preamble (Exhibit US-87).

¹⁷ *2016 Inner Mongolia Corn Purchase Notice*, Article I, (Exhibit US-101).

¹⁸ *2015 Northeast Region Corn Purchase Notice*, Article II, (Exhibit US-55).

all list a pre-set set price.¹⁹ Similarly, as part of the *2016 Corn Purchasing Instruments*, Exhibit US-87 states that provincial governments will “plan as a whole for properly doing the corn purchasing work within the jurisdiction, ensure having someone to purchase grain, having the money to purchase grain, and having the warehouses to take in [or storage] grain, prevent the occurrence of farmers having ‘difficulties in selling grain.’”²⁰ Exhibit US-87 further directs Sinograin and other similar entities to enter the market to make corn purchases,²¹ and Exhibit US-101 lists a pre-set purchase price.²² In addition to Exhibit US-101 listing a pre-set purchase price, the newly presented *2016 Heilongjiang Corn Purchase Notice* also provides a pre-set purchase price for corn for the 2016 harvest period.²³

24. Third, the *2015 TPRP Notice*, including the provincial TPRP notice for Heilongjiang, and the *2016 Corn Purchasing Instruments* reference domestic support policy decisions regarding support for corn producers. The *2015 TPRP Notice* states, “[u]pon approval by the State Council, in 2015, the state will continue to implement the temporary purchasing and storage policy for corn in the three Northeast provinces and Inner Mongolia Autonomous Region.”²⁴ The *2015 Heilongjiang Corn Purchase Notice* states that “[i]n accordance with the spirit of the National Development and Reform Commission, State Administration of Grain, Ministry of Finance, and Agricultural Development Bank of China *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region for 2015* [] and of the China Grain Reserves Corporation *Notice on Proper Handling of the National Temporary Reserve Corn Purchasing Work for 2015* [], notice is hereby given regarding the proper handling of 2015 national temporary reserve corn purchasing work in this province as follows...”²⁵

25. Likewise, the *2016 Corn Purchasing Instruments* state in Exhibit US-87 that: “[f]or the purposes of proactively yet prudently advancing corn purchasing and storage system reform and pragmatically handling this year’s work of corn purchasing in the Northeast region, upon approval by the State Council, the following notice is provided for related matters”.²⁶ Moreover, Exhibit US-101 states that, “[i]n order to better serve grain selling farmers and to safeguard the smooth execution of 2016 autumn grains corn purchase work ... notice of relevant matters is hereby given as follows.”²⁷

26. Fourth, the *2015 TPRP Notice* and *2016 Corn Purchasing Instruments* require public announcements and displays of the prices and purchasing. The *2015 TPRP Notice* provides that “[e]ach purchasing and storage depot is required to publicly post and purchase in accordance with stipulated prices and strictly implement the purchasing rules []ensuring that grain standards

¹⁹ *2016 Northeast Region Corn Purchase Notice*, Article 1, p. 1 (Exhibit US-87); *2015 Jilin Corn Purchase Notice*, Article 1, p. 1 (Exhibit US-62); *2015 Heilongjiang Corn Purchase Notice*, Article 1, p.1 (Exhibit US-63).

²⁰ *2016 Northeast Region Corn Purchase Notice*, Article VII, p. 3-4 (Exhibit US-87).

²¹ *2016 Northeast Region Corn Purchase Notice*, preamble, p. 1 (Exhibit US-87).

²² *2016 Inner Mongolia Corn Purchase Notice*, Article III (Exhibit US-101); *2016 Heilongjiang Corn Purchase Notice*, Article 1, p. 1 (Exhibit US-104).

²³ *2016 Heilongjiang Corn Purchase Notice* (Exhibit US-104).

²⁴ *2015 Northeast Region Corn Purchase Notice*, preamble (Exhibit US-55).

²⁵ *2015 Heilongjiang Corn Purchase Notice*, preamble (Exhibit US-63).

²⁶ *2016 Northeast Region Corn Purchase Notice*, preamble (Exhibit US-87).

²⁷ *2016 Inner Mongolia Corn Purchase Notice*, preamble (Exhibit US-101).

and quality and price policies are posted and standard sample products are displayed.”²⁸ Exhibit US-101 similarly states that “all directly affiliated depots are required to display, according to the content described above, public announcements regarding the public notices on purchasing, on large electronic screens, public notice boards, or other prominent locations in the area of the depot.”²⁹

27. Fifth, both the *2015 TPRP Notice* and *2016 Corn Purchasing Instruments* in Exhibit US-87 direct the Agricultural Development Bank of China to provide loans to fund the purchases of corn. The *2015 TPRP Notice* states that “[t]he Agricultural Development Bank of China, in accordance with the relevant policy regulations, will arrange for national temporary reserve grain loans (including purchasing expenses and simple and open-air storage facility construction expenses) promptly and in full.”³⁰ Exhibit US-87 similarly 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.”³¹

28. Finally, the *2015 TPRP Notice* and the *2016 Corn Purchasing Instruments* in Exhibit US-87 both direct relevant regional entities to ensure sufficient storage capacity is available and appropriately distributed throughout the northeast region. For instance, the *2015 TPRP Notice* 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.”³² Correspondingly, Exhibit US-87 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.”³³

29. Accordingly, there are numerous similarities between the content of the *2015 TPRP Notice* and the *2016 Corn Purchasing Instruments* as described in Exhibits US-87 and US-101.

Question 56: Should the fact that a state-owned enterprise, rather than the relevant local or central authorities, stipulates a purchase price affect the Panel's assessment of a claim under Article 3.2 of the Agreement on Agriculture? If so, please explain how.

30. As explained in our First Written Submission, pursuant to the *Wheat and Rice Implementation Plans* and the *Notices on Purchases of Corn*, China utilizes various entities, including state-owned enterprises, to implement the wheat, rice, and corn market price support

²⁸ *2015 Northeast Region Corn Purchase Notice*, Article IV, p.7 (Exhibit US-55).

²⁹ *2016 Inner Mongolia Corn Purchase Notice* Article IV (Exhibit US-101).

³⁰ *2015 Northeast Region Corn Purchase Notice*, Article III, p. 4 (Exhibit US-55).

³¹ *2016 Northeast Corn Purchase Notice*, Article II, p. 2 (Exhibit US-87).

³² *2015 Notice on Corn Purchases*, Article II(3), p. 3 (Exhibit US-55).

³³ *2016 Northeast Region Corn Purchase Notice*, Article IV, p. 2 (Exhibit US-87); *see also 2015 Notice on Purchases of Corn*, Article II(3), p. 3 (Exhibit US-55).

programs. China’s utilization of these entities is evident on the face of the 2012 – 2015 legal instruments and continues to be present in the 2016 legal instruments.

31. The *2015 Wheat and Rice MPS Notice* is directed to China’s “development and reform commissions, grain bureaus, finance departments (bureaus), agriculture departments (commissions, bureaus), price bureaus, Agricultural Development Bank of China branches, and China Grain Reserves Corporation [Sinograin] subsidiaries concerned of each province, autonomous region, and municipality directly under the central government.”³⁴ The *2015 Wheat and Rice MPS Notice* states that “to properly carry out this year’s wheat and rice purchase work, stabilize market prices, and conscientiously protect farmers’ interests, upon approval by the State Council, the *Wheat and Rice Minimum Purchase Price Implementation Plan for 2015*” “[e]ach relevant locality, department, and organization concerned is required to pay great attention [to this Plan], and according to the requirements of this Plan, make detailed arrangements; deploy carefully and work closely in tandem; and earnestly and properly carry out all work items relating to organization and implementation of this year’s wheat and rice implementation plan.”³⁵

32. Similarly, the *2015 TPRP Notice* is directed to China’s “development and reform commissions (price bureaus), grain bureaus, and finance departments of the provinces and autonomous regions of Inner Mongolia, Liaoning, Jilin, and Heilongjiang; branches of the Agricultural Development Bank of China in the provinces and autonomous regions of Inner Mongolia, Liaoning, and Jilin, and Heilongjiang; and China Grain Reserves Corporation (Sinograin), China National Cereals, Oils and Foodstuffs Corporation (COFCO), Chinatex Corporation (Chinatex), and Aviation Industry Corporation of China (AVIC).”³⁶ The *2015 TPRP Notice* further clarifies that:

China Grain Reserves Corporation [(Sinograin)], entrusted by the state to act as the primary policy implementation entity, will assume national temporary purchasing and storage tasks on this occasion, and via its directly affiliated enterprises and entrusted purchasing and storage depots, will make open purchases of farmer’ surplus grain and will prevent the occurrence of farmers’ ‘difficulty selling grain.’ 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 will independently take on loans from the Agricultural Development Bank of China. The China Grain Reserves Corporation [(Sinograin)] is required to sign entrusted purchasing and storage agreements with COFCO, Chinatex, and AVIC prior to October 20, 2015, specifying the obligations, rights, and duties of both parties. The entrusted purchasing and storage agreements are required to be examined by and filed with the Ministry of Finance, the State Administration of Grain, and the head office of the Agricultural Development Bank of China. The scale of purchasing and storage by COFCO, Chinatex, and AVIC will be assigned based

³⁴ *2015 Wheat and Rice MPS Notice*, preamble, p. 1 (Exhibit US-27).

³⁵ *2015 Wheat and Rice MPS Notice*, preamble, p. 1 (Exhibit US-27).

³⁶ *2015 Northeast Region Corn Purchase Notice*, preamble, p. 1 (Exhibit US-55).

on each enterprise’s warehouse storage capacity, administrative capabilities [and other factors].³⁷

33. As described in response to Question 55, a similar direction was given by China to state-owned enterprises in 2015 for the wheat, rice, corn programs to continue in 2016. For instance, the *2016 Northeast Corn Purchase Notice* is directed to “[t]he People’s Governments of Inner Mongolia, Liaoning, Jilin, and Heilongjiang Province (or district), China Railway Corporation, Agricultural Development Bank of China (ADBC), China Grain Reserves Corporation [(Sinograin)], China National Cereals, Oils and Foodstuffs Corporation (COFCO), and Aviation Industry Corporation of China (AVIC).³⁸ To implement the 2016 Document No. 1, the *2016 Northeast Corn Purchase Notice* directs Sinograin and other similar entities to enter the market to make corn purchases.³⁹

34. It is clear that the Chinese government has directed state-owned enterprise to enter the wheat, rice, and corn markets and make purchases. Moreover, the United States has shown through various legal instruments that those purchases were made pursuant to an applied administered price for wheat, rice and corn purchases in 2012, 2013, 2014, and 2015. And, in response to China’s argument that it has ceased providing support at pre-set prices to corn producers in 2016, the United States has presented evidence of announced prices for corn producers in Inner Mongolia and Heilongjiang province issued by Sinograin and Chinatex, respectively.

Question 57: Please comment on the information contained in Exhibit US-103.

Response:

35. See response to Question 52.

For the United States:

Question 58: The United States’ opening statement at paragraph 48 mentions "four measures and eight claims [which] constitute the matter which the DSB has charged the Panel with examining". The reference there is to four measures, while the United States’ response to advance question 52 identified *one* measure. Could the United States please clarify this?

Response:

36. In the U.S. panel request, the United States described in narrative form that it was challenging China’s provision of domestic support to its agricultural producers, including for wheat, rice and corn, in the years 2012, 2013, 2014, and 2015, as embodied in dozens of legal instruments. That is, the matter consists of four measures: the domestic support provided by China (or “China’s domestic support in favor of agricultural producers”) in each of the years

³⁷ *2015 Northeast Region Corn Purchase Notice*, Article II, p. 2 (Exhibit US-55).

³⁸ *2016 Northeast Region Corn Purchase Notice*, preamble, p. 1 (Exhibit US-87).

³⁹ *2016 Northeast Region Corn Purchase Notice*, preamble, p. 1 (Exhibit US-87).

2012, 2013, 2014, and 2015; and eight affirmative claims: the United States challenges that the levels of domestic support provided for each of the four years exceeds China’s final bound commitment level in breach of Article 3.2 and of Article 6.3 of the Agriculture Agreement. Thus, there is one “matter” that the DSB has charged the Panel with examining through its terms of reference, and that one “matter” consists of four measures and eight affirmative claims.

37. As noted in the U.S. response to Question 71 from the Panel, China’s policies of support for agricultural producers have not changed over the period reviewed, and it would also be accurate to describe China’s provision of domestic support as an ongoing policy or program.

Question 59: Is the United States suggesting that its panel request could cover issues other than market price support? If so, would the United States be seeking a recommendation, if the Panel were to find a violation, that China bring its *domestic support* into conformity, with no reference to the market price support on which the United States has concentrated its case, including the legal instruments and evidence?

Response:

38. If the Panel finds that China has provided domestic support in excess of its AMS commitments in any of the relevant years, the United States requests that the Panel recommend that China bring its measures into compliance with its obligations under the Agreement on Agriculture. With respect to the finding requested, the United States has identified the measures at issue in its panel request. The panel request identifies the specific measures at issue through a narrative description of the measures (second paragraph) and the legal instruments through which the support is provided (in the enumerated list of items 1 – 46). Thus, the four challenged measures on which the United States requests the Panel make findings of breach would be (as set out in the panel request) the domestic support provided by China in favor of agricultural producers, including support in favor of producers of wheat, Indica rice, Japonica rice, and corn, in each of the years 2012, 2013, 2014, and 2015, as provided through legal instruments 1 – 46.⁴⁰

39. Having made findings on those four measures, DSU Article 19.1 provides that where the panel “concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” The Panel need not include a further characterization of the measures in its recommendation. If the Panel finds the measures to be inconsistent with China’s obligations, and therefore makes the required recommendation, it will then be for China to determine how it will comply with the Panel’s recommendation. It is to be hoped that the parties would be able to confer and reach agreement during the implementation period on bringing China’s support policies into conformity with WTO rules.

Question 60: Please address the USDA Grain reports, allegedly acknowledging a termination of the TPRP policy for corn in China. For example, the March 2017 update (Exhibit CHN-

⁴⁰ The United States has provided evidence and argumentation to demonstrate that each of the four measures (domestic support in favor of agricultural producers in each of the specified years) breaches China’s obligations through the market price support provided in relation to four identified agricultural products.

99) reads on page 1 "This is the first full crop year since the removal of the temporary reserve program for corn and implementation of "supply-side structural reforms in 2016.""

Response:

40. The USDA Global Agricultural Information Network (GAIN) Reports submitted by China do not demonstrate that the corn TPRP program ended; rather, they highlight the level of uncertainty surrounding the continuation of China's government purchases of corn.⁴¹ 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."⁴² This report also indicated that it was "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."⁴³

41. 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 producer margins."⁴⁴ Therefore, while the quotation in the Panel's question reflects an expectation that a new program would emerge, the information provided in the GAIN Reports indicates significant uncertainty regarding China's continued provision of corn support prices, as well as an understanding that government interventions in the market would continue for the foreseeable future.

For China:

Question 61: Please comment on the United States' reliance on the Appellate Body report in *EC – Selected Customs Matters* in para. 19 of the United States' second written submission in the context of a distinction between the measures identified in a panel request and anticipation of a Party's substantive arguments.

2. General Issues

For Both Parties:

⁴¹ 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.

⁴² 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).

⁴³ 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).

⁴⁴ USDA GAIN Report, *China – Grain and Feed Annual: Wheat and Rice Supplants Corn Area* (April 4, 2017), at page 1 (Exhibit CHN-84).

Question 62: Please elaborate on the differences and similarities between: (i) AMS, (ii) Total AMS, (iii) Current Total AMS, and (iv) Base Total AMS. In the Parties' view, what is the role of each of these concepts in assessing domestic support commitments?

Response:

42. Below we discuss the definitions and relationship between each of these terms, as well as the calculation methodologies applicable to the assessment of China’s domestic support commitments in this dispute.

Definitions:

AMS

43. AMS or Aggregate Measurement of Support is defined in Article 1(a) of the Agriculture Agreement. Article 1(a) provides that AMS is “the annual level of support, expressed in monetary terms,” provided either “for an agricultural product in favor of the producers of the basic agricultural product,” or “non-specific support provided in favour of agricultural producers in general.” It does not include support provided under programs that are exempt under Annex 2 of the Agriculture Agreement.

44. Additional information regarding the scope and content of each AMS calculation is contained in paragraph 1 of Annex 3, which states that “an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment (‘other non-exempt policies’).”⁴⁵ Paragraph 1 further states that “[s]upport which is non-product specific shall be totaled into one non-product-specific AMS in total monetary terms.” Thus, Annex 3 indicates that AMS(s) include product-specific quantifications of domestic support provided with respect to a particular basic agricultural product, as well as the one non-product-specific quantification of non-product-specific support provided to agricultural producers.

45. Romanettes (i) and (ii) of Article 1 provide further detail regarding AMS(s) in the base period and in all subsequent years.

46. Article 1(a)(i) states that AMS “provided during the base period” is “*specified* in the relevant tables of supporting material.”⁴⁶ Thus, the Agriculture Agreement provides that the AMS is “specified” – that is, mentioned or named, explicitly⁴⁷ – and that it is specified in a Member’s Supporting Tables for the base period. But the Agreement does not provide a specific

⁴⁵ Agriculture Agreement, Annex 3, paragraph 1.

⁴⁶ Agriculture Agreement, Article 1(a)(i) (emphasis added).

⁴⁷ The definition of “specify” as a verb is “mention or name (a thing, *that*) explicitly; state categorically or particularly.” *Shorter Oxford English Dictionary*, “specify,” vol. II, p. 2973 (ed. 1993) (Exhibit US-105).

calculation methodology.⁴⁸ AMS during the base period is thus historical and static, as recorded in the relevant tables of supporting material.

47. Article 1(a)(ii) discusses AMS for subsequent years. It states that AMS is the annual level of support, which is:

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.

Article 1(a)(ii) thus provides that support in every year after implementation is calculated,⁴⁹ not specified, and it is determined according to prescribed rules – “in accordance with the provisions of Annex 3.” Further, the Agreement provides the additional source of information that must be “taken into account” – “constituent data and methodology used in the tables of supporting material.” AMS for subsequent years is thus a value that must be calculated for each year after implementation in a specified manner.

Total AMS

48. Article 1(h) provides that Total AMS is “the sum of all domestic support provided in favour of agricultural producers.” It is “calculated as the sum of all aggregate measurements of support [(AMS(s))] for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products.”⁵⁰

49. Thus, the calculated AMSs for a particular year and specific basic agricultural products (calculated in accordance with Article 1(a)) are the discrete component parts of a Member’s Total AMS. Total AMS is the “sum” of these parts, meaning that all product-specific AMS for basic agricultural products receiving support (and if applicable, a non-product specific AMS) must be added together to make up the Total AMS.

50. The definition of Total AMS, describing the summation of each product-specific AMS and non-product specific AMS, contributes to romanettes (i) and (ii) addressing Base Total AMS and Current Total AMS.

Base Total AMS

⁴⁸ *Korea – Various Measures on Beef* (AB), para. 115 (stating that “Article 1(a)(i) of the Agreement on Agriculture dealing with AMS states that ‘with respect to support provided during the base period’, a treaty interpreter needs only to go to ‘the relevant tables of supporting material incorporated by reference in Part IV of a Member’s Schedule’”).

⁴⁹ The dictionary definition of “calculate” as a verb is “estimate or determine by arithmetical or mathematical reckoning.” *Shorter Oxford English Dictionary*, “calculate,” vol. I, p. 318 (ed. 1993) (Exhibit US-105).

⁵⁰ Agriculture Agreement, Article 1(h).

51. Per Article 1(h)(i), Base Total AMS is the sum of all domestic support provided in favor of agricultural producers in the “base period.” This value is “as specified in Part IV of a Member’s Schedule.”⁵¹ Thus, as with individual product and non-product specific AMS during the base period, Article 1 provides the location of the Base Total AMS value, but does not provide a specific procedure for calculating this value. Base Total AMS too is thus a historical and static amount, as recorded in the relevant tables of supporting material.

52. As observed by the Appellate Body in *Korea – Beef*, “Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned.”⁵²

Current Total AMS

53. Addressed in Article 1(h)(ii), Current Total AMS is the sum of all domestic support (i.e., the sum of all AMSs, as indicated in Article 1(h)) “actually provided during any year of the implementation period and thereafter.” It is calculated “in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule.”⁵³ The relevant provisions from Article 6 include the directions of excluding *de minimis* levels of support.⁵⁴

54. As described in Article 6.3, Current Total AMS is used to determine whether a Member’s level of domestic support in a particular year is consistent with (e.g., equal to or less than) its Final Bound Commitment Level.⁵⁵

Calculations Required in this Dispute:

55. With regard to the calculation of product-specific AMS and Current Total AMS, the Agriculture Agreement provides separate directions for different stages in the calculation process. The product-specific AMS calculation in Article 1(a)(ii) addresses the evaluation of domestic support provided on a product by product basis, and can include calculation of market price support, non-exempt direct payments, and other forms of non-exempt domestic support.⁵⁶ The Current Total AMS described in Article 1(h)(ii) is the summing of all product-specific

⁵¹ Agriculture Agreement, Article 1(h)(i). See also *Korea – Various Measures on Beef* (AB), para. 115 (stating that “Article 1(h)(i) dealing with Total AMS, states that ‘with respect to support provided during the base period (i.e., the ‘Base Total AMS’) and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the ‘Annual and Final Bound Commitment Levels)’ , a treaty interpreter needs only to go to what is ‘specified in Part IV of a Member’s Schedule ...’ . (emphasis added)”).

⁵² *Korea – Various Measures on Beef* (AB), para. 115.

⁵³ Agriculture Agreement, Article 1(h)(ii).

⁵⁴ Agriculture Agreement, Article 6.4.

⁵⁵ Agriculture Agreement, Article 6.3 (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”).

⁵⁶ See also Agriculture Agreement, Annex 3, paragraph 1.

AMS(s) (and if applicable, a non-product specific AMS), after considering whether relevant *de minimis* criteria and other considerations set out in Article 6 have been met.

56. China asserts that “context” and proximity suggest that these terms should be interpreted to provide the same direction with regard to calculation of AMS and Current Total AMS,⁵⁷ but this interpretation is not supported by the text of Articles 1(a) and 1(h) as understood applying customary rules of interpretation (Articles 31-32 of the Vienna Convention on the Law of Treaties (“VCLT”). Rather, the text of each subparagraph contains similarities and important differences, which must be respected.

AMS

57. As we have discussed at length in this dispute, Article 1(a)(ii) specifies that for support provided in any year after implementation, product-specific AMS is “calculated *in accordance* with the provisions of Annex 3 of this Agreement.”⁵⁸ Article 1(a)(ii) continues that, in addition to complying with Annex 3, AMS is calculated “*taking into account* the constituent data and methodology used in the tables of support material.”⁵⁹

58. 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 3.⁶⁰ This language permits no deviations.⁶¹ Conversely, the use of the phrase “taking into account” in reference to constituent data and methodology requires a panel to “take into consideration, [or] notice” that information.⁶² This indicates that a lesser degree of consideration is accorded to any constituent data and methodology. Therefore, the plain text of Article 1(a)(ii) of the Agriculture Agreement clarifies that the directions provided in Annex 3 must be followed, and the constituent data and methodology found in a Member’s supporting materials may provide supplementary guidance specific to the agricultural sector of that Member.⁶³

Current Total AMS

⁵⁷ China Second Written Submission, paras. 296-305; China First Written Submission, paras. 135-139.

⁵⁸ Agriculture Agreement, Article 1(a)(ii).

⁵⁹ Agriculture Agreement, Article 1(a)(ii).

⁶⁰ *Korea – Various Measures on Beef* (AB), para. 111. See also United States Second Written Submission, paras. 64-68.

⁶¹ China erroneously inverts the relationship between Annex 3 and the supporting materials by indicating that the text of the Agreement is merely a “fallback option.” China First Written Submission, para. 106. China’s interpretation plainly unsupported by the textual obligations contained in the Agriculture Agreement. See U.S. Responses to Questions, Question 19, paras. 91-94; U.S. Second Written Submission, paras. 64-71.

⁶² *Korea – Various Measures on Beef* (AB), para. 111 (citing *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15).

⁶³ *Korea – Various Measures on Beef* (AB), para. 112. In this manner, Article 1(a)(ii) provides instructions how to treat any apparent conflict between Annex 3 and the constituent data and methodology.

59. After a panel has calculated the various product-specific AMSs for a particular year as directed by Article 1(a)(ii) – in this dispute for wheat, Indica rice, Japonica rice, and corn – it is directed to turn to aggregating these constituent parts to calculate the Current Total AMS.

60. Article 1(h) clarifies that in all instances Total AMS is “calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products.” Thus, it is the process of adding the values identified under Article 1(a)(ii). Article 1(h)(ii) further provides that Current Total AMS is “calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule.”

61. The first phrase of Article 1(h)(ii), “in accordance with the provisions of this Agreement, including Article 6,” indicates that the calculation must be consistent with the binding commitments in the Agriculture Agreement, and highlights Article 6, which provides information on *de minimis* levels and other exemptions as relevant. As noted when considering Article 1(a)(ii), the inclusion of the text “in accordance with” indicates a requirement of “conformity” with the requirements of the Agriculture Agreement, including Article 6.⁶⁴

62. Article 6 of the Agriculture Agreement provides directions regarding the exclusion of individual AMS from the Current Total AMS calculation, when they do not exceed a *de minimis* level.⁶⁵ The *de minimis* evaluation requires consideration of the calculated product-specific AMS compared to “that Member’s total value of production of a basic agricultural product during the relevant year.”

63. The second direction in Article 1(h)(ii) states that Current Total AMS is “calculated . . . with the constituent data and methodology.” “With” in this context can mean “by use of (a thing) as an instrument or means . . . by means of.”⁶⁶ This is a less demanding requirement than “in accordance with.”

64. Contrary to China’s arguments, the phrase “in accordance with,” which is applicable to the first phrase, does not extend to the second phrase. Grammatically, “in accordance with” and “with” are separate and distinct prepositions. If “in accordance with” was intended to apply to both objects (the Agreement and the constituent data and methodology), the second “with” would be superfluous.⁶⁷ But even were this phrase to be understood as “in accordance with” the constituent data and methodology, this would refer to constituent data and methodology for purposes of Article 1(h)(ii) – that is, calculation of Current Total AMS. The “constituent” data

⁶⁴ *Korea – Various Measures on Beef* (AB), para. 111. Article 6 of the Agriculture Agreement provides directions regarding the exclusion of AMS, which does not exceed a *de minimis* level. It also discusses the treatment of production-limiting direct payments, and certain programs for developing countries.

⁶⁵ Agriculture Agreement, Article 6.4. Noting that Article 6 also discusses the treatment of production-limiting direct payments, and certain programs for developing countries.

⁶⁶ *Shorter Oxford English Dictionary*, “with,” vol. II, p. 3703-04 (ed. 1993) (Exhibit US-105).

⁶⁷ The phrase would have read “*calculated in accordance with the provisions of this Agreement . . . and the constituent data and methodology.*”

and methodology would only be that relevant to the operation in question – the consideration of *de minimis* levels and summing of current product-specific AMS and non-product-specific AMS, as appropriate. China has not even attempted to argue that its Supporting Tables contain data and methodology relevant to that specific operation (rather than the calculation of product-specific AMS, an Article 1(a) operation).

Question 63: Regarding the measurement of domestic support, and in relation to the task of the Panel in the present dispute,

- a. How is the Panel supposed to assess the numerical calculations presented by the Parties? To what extent can, or should, the Panel re-calculate the measurements presented by the Parties?**
- b. How should the Panel treat any discrepancies in the data presented by the Parties?**

Responses to (a) and (b):

65. The Panel should review the numerical calculations, along with the relevant source material underlying these calculations, to calculate China's AMSs and Current Total AMS in accordance with the Agreement on Agriculture.

66. The Panel should seek to resolve any discrepancies in the calculations by recourse to the source material. If the Panel finds discrepancies in the source materials provided by the parties, the Panel should, as the trier of fact, evaluate the respective pieces of evidence to determine their reliability and probative value and weigh the evidence accordingly.

Question 63: Do the United States' supporting tables refer to a Fixed External Reference Price or an External Reference Price?

- a. Are the Parties aware of any other countries' supporting tables referring to a "Fixed External Reference Price", as opposed to an "External Reference Price"?**

Response:

67. The United States in its Supporting Tables appears to have used an average reference price based on the years 1986 through 1988 to calculate the value of its market price support. The Supporting Tables use various terms to refer to this value. For instance, in relation to a single market price support program, the U.S. Supporting Table uses the terms "1986-88 reference price,"⁶⁸ "fixed reference price,"⁶⁹ and "reference price."⁷⁰ At the time of the Uruguay Round, the United States maintained a variety of market price support that required evaluation by reference to a fixed external reference price.

⁶⁸ See e.g. United States Supporting Table, G/AG/AGST/USA, page 40 (note 1), 41 (note 1) (discussing market price support for peanuts).

⁶⁹ United States Supporting Table, G/AG/AGST/USA, page 41 (note 6).

⁷⁰ United States Supporting Table, G/AG/AGST/USA, page 42.

68. The United States notes that all Members, including the United States, whether they participated in the Uruguay Round or acceded to the WTO at a later date are obligated to comply with the provisions of the Agriculture Agreement. Specifically, while there is no particular obligation to calculate a Member’s AMS during the base period or Base Total AMS in a particular manner, the calculation of AMS in the current year and Current Total AMS is explicitly governed by the Agriculture Agreement.⁷¹ To that end, regardless of what value is noted in a Member’s Supporting Table, the Fixed External Reference Price used to calculate market price support in subsequent years must be consistent with Annex 3. For this reason, a value that is not consistent with Annex 3, could not be utilized in U.S. calculations even if it appeared in the Supporting Table of the United States.

69. With regard to the Supporting Tables of other Members, a variety of calculation practices, formats, and nomenclature appear to be used. Many use the term “external reference price” in charts reflecting the value of market price support, but other terms like “reference price,” “fixed reference price,”⁷² and “external price” are also used.⁷³

For the United States:

Question 65: In relation to the statement below, please respond to the following question:

Thus, the Agriculture Agreement directs the use of a Member's Supporting Table to glean Member-specific factual information for purposes of identifying the basic agricultural products in the Member's territory and definition of year for a particular program; it does not create independent rights and obligations.⁷⁴

- a. **What is the Panel, in concrete terms, supposed to glean from the tables of supporting materials?**
- b. **How does this statement give effect to the term "... methodology used in the tables of supporting materials" contained in Articles 1(a)(ii) and 1(h)(ii)?**

Response (a):

70. The constituent data and methodology is information used in the calculation of AMS during the base period and Base Total AMS – including Member-specific numerical information, processes, and procedures regarding agricultural production in the Member’s territory. According to Article 1(a)(ii), this information must be “taken into account” in calculating product-specific AMS. Article 1(h)(ii) provides that the Current Total AMS must be calculated “with” the constituent data and methodology.

71. Moreover, to be relevant the constituent data or methodology is information actually “used” in the calculation of a Member’s product-specific AMS and Base Total AMS. For both

⁷¹ Agriculture Agreement, Articles 1(a) and 1(h).

⁷² Australia’s Supporting Table, G/AG/AGST/AUS, page 19 (describing wheat market price support program).

⁷³ Iceland’s Supporting Table, G/AG/AGST/ISL, page 6.

⁷⁴ United States’ second written submission, para. 65.

product-specific AMS and Current Total AMS, however, calculations must also be done “in accordance with” the provisions of the Agriculture Agreement. Therefore, constituent data and methodology may not be used where its use would result in a calculation not consistent with the relevant provisions of the Agriculture Agreement.

72. Constituent data and methodology may include:

- The types of “basic agricultural products” grown in that Member,⁷⁵ including whether the Member subdivides crops by species for example.⁷⁶ This information may be useful both in calculating product-specific AMS, and in determining whether a product exceeds the Member’s *de minimis* level under the Current Total AMS analysis.
- The “year” relevant to a Member’s agricultural support programs.⁷⁷ In some instances, a Member may have designated support for certain crops on a marketing year basis, and for others on a calendar year or fiscal year basis, depending on the relevant domestic support programs and growing seasons. In these instances, the methodology provided in the Supporting Tables may be used to ensure the individual AMS calculations correspond to the appropriate “year” for the Current Total AMS calculation. This information may be useful both in calculating product-specific AMS, and in determining whether products exceed a *de minimis* level under the Current Total AMS analysis.
- Product-specific information regarding stage of production, processing, or quality, including any methodologies regarding adjustments that need to be made to the fixed external reference price to ensure an apples-to-apples comparison, for example.⁷⁸ This information is useful when considering the calculation of product-specific AMS.
- Program-specific methodologies used for the calculation of support provided by non-exempt programs that continue to be maintained.⁷⁹
- Data and methodologies regarding specific products, for instances whether support is divided amongst component parts of the crop,⁸⁰ or whether the crop has more than one season within a calendar year allowing farmers to collect support twice or more.

⁷⁵ Agriculture Agreement, Article 1(b).

⁷⁶ See e.g., China’s Supporting Table, WT/ACC/CHN/38/Rev.3 (July 19, 2018) (describing Indica and Japonica rice as separate basic agricultural products in China); Costa Rica’s Supporting Table, G/AG/AGST/CRI (describing “maiz blanco” and “maiz Amarillo” as separate basic agricultural products in Costa Rica).

⁷⁷ Agriculture Agreement, Article 1(i). See e.g., Australia’s Supporting Table, G/AG/AGST/AUS, page 14 (indicating whether basic agricultural products were evaluated on a marketing year or financial year basis).

⁷⁸ For instance, India’s Supporting Tables provide a conversion of the international price of sugar to a price for sugar cane, the supported product. See India’s Supporting Tables, G/AG/AGST/IND, page 29.

⁷⁹ For instance, Armenia’s Supporting Tables describes certain seed loan programs under which part of the farmers debt was forgiven, and the calculation used to calculate support provided by these programs. See Armenia’s Supporting Tables, WT/ACC/SPEC/ARM/4/Rev.2 (May 6, 2002).

⁸⁰ For instance, Australia’s Supporting Tables describe its evaluation of dairy support utilizing a methodology that breaks the per ton price into the four primary product lines related to milk – butter/skim milk powder, butter/casein, whole milk powder, and cheese. Australia’s Supporting Tables, G/AG/AGST/AUS, page 23.

- Relevant information for identifying country-specific sources and responsible government entities for information on volume of production, domestic and international prices, and budgetary outlays.⁸¹

73. The United States emphasizes that the direction to take into account constituent data and methodology in Article 1(a)(ii) applies not just to an analysis of market price support, which Annex 3 sets out detailed calculation requirements, but also to calculations related to “non-exempt direct payments, or any other subsidy not exempt from the reduction commitment” The calculation requirements for which may be less clear.⁸²

Question 66: We recall the United States' statements during the second substantive meeting with the Panel regarding the calculation of Base Total AMS, and particularly that there is "no calculation methodology" for the Base Total AMS calculation. Is the United States suggesting that China had unbounded discretion to come up with its final Base Total AMS number? If not, please elaborate on the rules that China had to adhere to in calculating its Base Total AMS.

Response:

74. As described above, neither Article 1(a), nor Article 1(h) provides a calculation methodology for AMS in the base period or Base Total AMS. Moreover, China, as a non-Member at the time its Base AMS was calculated, could not have had any obligation to calculate its AMS and Base Total AMS in a particular manner – both because no such obligation exists in the text of the Agriculture Agreement, and because China, as a non-Member, was under no obligations to that effect at the time. That said, China, like all Member acceding to the WTO, whether during the Uruguay Round or later, was asked to submit information regarding its domestic support programs to facilitate accession negotiations. The information was to be used to support the negotiated domestic support and export subsidy commitments.⁸³

75. Specifically, the description and estimation of the value of China’s domestic support programs was determined by the Membership to be sufficient to support the agreed term of accession – a Final Bound Commitment Level of “nil.” In fact, the Working Party Report reflects the use of China’s calculations as support for its scheduled commitments. In the context of raising concerns regarding “issues” with China’s Supporting Tables, the Working Party Report states that “members of the Working Party noted that . . . WT/ACC/CHN/38/Rev.3 did provide a basis for supporting the commitments in China’s Schedule.”⁸⁴ Thus, the information was sufficient to support the commitment of nil, but did not itself provide any additional

⁸¹ See generally, Australia’s Supporting Tables, G/AG/AGST/AUS; United States Supporting Tables, G/AG/AGST/USA.

⁸² Agriculture Agreement, Annex 3, paragraph 1; see also Annex 3, paragraph 13 (regarding other non-exempt measures).

⁸³ China submitted its Draft Supporting Tables in communications under the header “Information on the Trade Regime of China for the Purposes of Transparency.”⁸³ See WT/ACC/CHN/5 (Feb. 23, 1997), WT/ACC/CHN/8 (May. 23, 1997), and WT/ACC/CHN/9 (Jul. 23, 1997). Subsequent versions of the Supporting Tables were submitted in preparation for meetings of the Working Party.

⁸⁴ China’s Working Party Report, para. 238 (Exhibit US-7).

commitments or concessions. Further, this statement reflects the understanding that any relevant “commitments” were reflected in China’s Schedule and not contained within China’s Supporting Tables. This is consistent with Article 3.1 of the Agriculture Agreement, which states that “[t]he domestic support and export subsidy commitments in Part IV of each Member’s Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.”

76. In providing information regarding agricultural support provided during a base period, an acceding Member may, and likely should, consult the text of the Agriculture Agreement. Where a Member commits to reduction commitments, Annex 3, paragraph 5 indicates that the “base level for the implementation of the reduction commitment on domestic support” AMS would be “calculated as outlined [in Annex 3].”⁸⁵ Not having made reduction commitments, this provision did not apply to China; but in any event, this paragraph does not provide an ongoing obligation, but rather describes what should have happened at the time of accession.

77. Additionally, the Secretariat has issued a Technical Note to provide acceding Members with guidance during the negotiation process. While useful in guiding discussions, as previously explained, such notes are not legally binding on Members and do not set out binding interpretations of the Agriculture Agreement.⁸⁶ A Technical Note cited by China, titled “*Information to be Provided on Domestic Support and Export Subsidies in Agriculture*,” for example, 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.”⁸⁷ It continues “[a]ccordingly, the description of any measures maintained by acceding governments should be sufficiently detailed to enable Members to make a judgement as to the relationship between each of the measures in question and the relevant criteria of the Agreement on Agriculture.”⁸⁸ This is similar to the Uruguay Round where Supporting Tables were submitted to facilitate interpretation and verification of a Member’s proposed Schedule of Concessions.⁸⁹

For China:

Question 67: Please comment on the following statement by the United States:

The Agriculture Agreement provides the ways in which the information contained in a Member's Supporting Tables may be used in the calculation of a

⁸⁵ Agriculture Agreement, Annex 3, paragraph 5.

⁸⁶ See also United States Answers to Questions, Question 46, paras. 128-130.

⁸⁷ Technical Note by the Secretariat, *Information to be Provided on Domestic Support and Export Subsidies*, WT/ACC/4 (March 18, 1996), para. 1.

⁸⁸ Technical Note by the Secretariat, *Information to be Provided on Domestic Support and Export Subsidies*, WT/ACC/4 (March 18, 1996), para. 3.

⁸⁹ Some countries contain notes in their Supporting Tables indicate that the Supporting Tables have “been provided to facilitate interpretation and verification of [the Member’s] Draft Final Schedule of agriculture concessions and commitments.” They also state that “[t]his document and its contents do not form any part of [the Member’s] Draft Final Schedule of such concessions and commitments.” See Japan’s Supporting Table, G/AG/AGST/JPN; Iceland’s Supporting Table G/AG/AGST/ISL; New Zealand’s Supporting Table, G/AG/AGST/NZL.

Member's Current Total AMS, but it does not give rise to domestic-support related rights and obligations in the calculation of Current Total AMS. The Agriculture Agreement directs the reliance of a Member's Supporting Table to provide Member-specific factual information used to understand a Member's agricultural sector.⁹⁰

Question 68: In light of what the United States has noted in its responses to questions - that China uses "external reference price" in its supporting tables, rather than "fixed external reference price" - what has been the practice of China in subsequent notifications relating to domestic support? Has China used the term "fixed external reference price" or has that been a moving target?

Question 69: In terms of China's alleged use of an average to arrive at the FERP, has that been a consistent practice in China's notifications of using the same fixed external reference price?

3. Measures at Issue

For Both Parties:

Question 70: In its written submissions, China referred to the "2012-2015 temporary purchase and reserve policy ('TPRP')".⁹¹ Please explain what this policy consisted of and how it related to adopting the "TPRP Notices".

Response:

78. The market price support program for corn (MPS Program) was one of several market price support policies that China implemented in 2012, 2013, 2014, and 2015. Consistent with these policies, China issued various annual instruments to administer its market price support programs for corn, as well as its programs for wheat and rice.

79. The *2004 Grain Opinion* and *2004 Grain Distribution Regulations* establish the regulatory framework applicable to “the purchase, sale, storage, transportation, processing, import and export” of “wheat, rice, corn, miscellaneous grains, and their finished grain products” in China.⁹² The *2004 Grain Distribution Regulation* provides broad authority for “macro control” of the Chinese grain markets and authorizes the utilization of “multiple economic measures,” including “reserve grain taking in and sending out, entrusted purchasing and grain imports and exports.”⁹³ The *2004 Grain Distribution Regulation* further directs the adoption of “necessary administrative measures, such as price intervention . . . to strengthen control of the grain market, thereby maintaining . . . basic stability of grain prices across the nation.”⁹⁴

⁹⁰ United States' second written submission, para. 65.

⁹¹ China's first written submission, paras. 284-285; second written submission, paras. 3 and 13.

⁹² *2004 Grain Distribution Regulation*, Chapter I, Article 2 (Exhibit US-12).

⁹³ See generally, *2004 Grain Distribution Regulation*, Chapter III (Exhibit US-12).

⁹⁴ *2004 Grain Distribution Regulation*, Chapter III, Article 25 (emphasis added) (Exhibit US-12).

80. Each year, China also issued *Document Number 1s*, which provided guidance and direction on priorities and strategies for a wide variety of activities to “strengthen[] reform and innovation, and accelerate[] agricultural modernization,” in China. The 2012 through 2015 *Document Number 1s* directed the Chinese government to “adopt targeted control measures, ensuring the effective supply and market stability of agricultural products, and maintaining prices at a reasonable level.”⁹⁵ Together, the *Document Number 1s*, *2004 Grain Opinion*, and *2004 Grain Distribution Regulation* provide the authority and framework for implementing China’s MPS Programs for corn, as well as wheat and rice. These instruments also provide the policy direction for increasing or maintaining domestic prices on each basic agricultural product.

81. To that end, in each of the relevant years 2012-2015, China issued a document titled the *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region* (the “*Notice on Purchases of Corn*” or *TPRP Notices*). These *2012 – 2015 TPRP Notices* were issued jointly by the NDRC, the State Administration of Grain, the Ministry of Finance, and the Agricultural Development Bank of China, and provide details on the available applied administered price, geographic scope, timing, and requirements of the Corn MPS Program.

For the United States:

Question 71: In response to Panel question No. 5 (para. 37), the United States explains that they have identified "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."⁹⁶ In the second written submission, however, the United States refers to "China's domestic support in favor of agricultural producers" as the relevant measure(s).⁹⁷ Years 2012, 2013, 2014 and 2015 are mentioned in the context of the claims (bolded text), rather than measures (italicized text).⁹⁸ Likewise, the United States refers to annual legal instruments rather than annual measures in certain other sections of its second written submission (paras. 40-45). Without prejudice to the Panel's exact characterization of the measure at issue, could the United States please clarify whether the challenged measures are annual in nature, or do they constitute (a) continuing policy(ies) that are implemented through annual legal instruments?

Response:

82. The “matter” the United States has placed before the DSB and referred by the DSB to the Panel is whether the domestic support China provided to its agricultural producers, including of wheat, Indica rice, Japonica rice, and corn in the years 2012, 2013, 2014, and 2015 through

⁹⁵ *2012 Document Number 1*, p. 14, Section IV, para. 23 (Exhibit US-13); *2013 Document Number 1*, p. 4, Section I, para. 4 (Exhibit US-14); *2014 Document Number 1*, p. 3, Section I, para. 2 (Exhibit US-15); *2015 Document Number 1*, p. 7, Section II, para. 10 (Exhibit US-16).

⁹⁶ United States' response to Panel question no. 5, para. 37. See also United States' Comments on China's Challenge to the Panel's Terms of Reference, para. 14.

⁹⁷ United States' second written submission, para. 18.

⁹⁸ United States' second written submission, para. 18.

various legal instruments is in excess of China’s commitment level of “nil” and inconsistent with its obligations pursuant to Article 3.2 and 6.3 of the Agreement on Agriculture.⁹⁹

83. It is not entirely clear what is meant by whether a measure is “annual in nature.” The United States does not consider that China’s provision of domestic support is “annual in nature” in the sense of only extending to a particular year. However, the support China provides to agricultural producers of a particular product, such as market price support, is provided to producers for a particular year as agricultural production tends to be yearly.

84. As already discussed in response to Panel Question 70 above, China’s policies concerning domestic support for agricultural producers, including for wheat, rice, and corn, are articulated in the *2004 Grain Distribution Regulation* and *2004 Grain Opinion*, which are still in force. Further policy guidance is contained in the *Document Number Is* each year, and the specific purchasing instructions for wheat, rice and corn are contained in China’s annual purchase notices. Thus, it was through these instruments that China operationalized its policy to provide domestic support in each year that the U.S. has challenged – 2012, 2013, 2014, and 2015. Accordingly, it would be accurate to characterize the measures challenged by the United States as continuing policies applied through annual legal instruments.

85. Review of the legal instruments included in the U.S. panel request reveal that they cite to and are on their face pursuant to China’s domestic support policies, thus making it accurate to note that there is annual implementation of an overarching policy of providing domestic support in favor of wheat, rice and corn producers. With respect to rice and wheat, China has acknowledged that the *2004 Distribution Regulation* and *2004 Grain Opinion* provided the legal basis for implementation of its wheat and rice MPS programs in 2012 – 2015, and that they continued to do so for 2016 and beyond.¹⁰⁰ With respect to corn, China contends that the 2012-2015 MPS programs were not implemented pursuant to the 2004 legal instruments.

86. However, as the United States has explained, the *2004 Grain Opinion* and *2004 Grain Distribution Regulation* provide authority for the implementation of market price support (“minimum purchase prices”) for corn and the policy statements included in the Corn Purchase Notices are very similar to those identified in the *2004 Grain Opinion* and *2004 Grain Distribution Regulation*. The *2004 Grain Distribution Regulation*, for instance, provides that, “to protect the interests of grain farmers, the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions.”¹⁰¹ Therefore, pursuant to the *2004 Grain Distribution Regulation*, which covers corn as well as wheat and rice, Article 27 authorizes the implementation of a market price support program for corn at any time.¹⁰²

87. To implement market price support for corn as contemplated in the *2004 Grain Opinion* and the *2004 Grain Distribution Regulations*, China issues a document titled the *Notice on Issues*

⁹⁹ The United States also challenged, in the alternative, the provision of domestic support under Article 7.2(b) of the Agriculture Agreement.

¹⁰⁰ China Responses to Panel Questions, Question 1, para. 5.

¹⁰¹ *2004 Grain Distribution Regulation*, Article 27 (Exhibit US-12).

¹⁰² See *2004 Grain Regulation*, Articles 2, and 27 (Exhibit US-12).

Relating to National Temporary Reserve Purchases of Corn in the Northeast Region (the “*Notice on Purchases of Corn*”).¹⁰³ The *2015 Northeast Region Corn Purchase Notice* provides that “upon approval by the State Council [] the state will continue to implement the temporary purchasing and storage policy for corn.”¹⁰⁴

88. Similarly, China’s *2016 Northeast Region Corn Purchase Notice* calls for “advancing corn purchasing and storage system reform.” The “reform” referenced in the *2016 Northeast Region Corn Purchase Notice* and other 2016 policy statements¹⁰⁵ is in fact similar to those identified in the *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, pursuant to which China’s market price support for wheat and rice are implemented.¹⁰⁶ For instance, the *2004 Grain Distribution Regulation* states that the “state encourages market entities of various forms of ownership to engage in grain business operations, so as to promote fair competition”¹⁰⁷ and that the “grain price is formed principally by market supply and demand.”¹⁰⁸ But the *2004 Grain Distribution Regulation* also provides that, “to protect the interests of grain farmers, the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions.”¹⁰⁹ In this manner, though China’s *2016 Northeast Region Corn Purchase*

¹⁰³ *Notice on Issues Relating to National Temporary Reserve Purchases of Corn for 2012* (State Administration of Grain and Other Departments, Guo Liang Tiao [2012] No. 212, issued November 15, 2012) (“*2012 Notice on Corn Purchases*”) (Exhibit US-52); *Notice on Issues Relating to National Temporary Reserve Purchases of Corn and Soybeans in the Northeast Region for 2013* (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao [2013] No. 265, issued November 22, 2013) (“*2013 Notice on Corn Purchases*”) (Exhibit US-53); *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region for 2014* (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao [2014] No. 254, issued November 25, 2014) (“*2014 Notice on Corn Purchases*”) (Exhibit US-54); *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region for 2015* (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao [2015] No. 169, issued September 17, 2015) (“*2015 Notice on Corn Purchases*”) (Exhibit US-55) (collectively, the “*Notices on Corn Purchases*”).

¹⁰⁴ *2015 Northeast Region Corn Purchase Notice*, preamble, p. 1 (Exhibit US-55).

¹⁰⁵ United States Responses to Panel Questions, Question 2(a)-(c), para. 11 (citing *2016 Document Number 1*, para. 22, page 15 (Exhibit US-91); Xinhua News Agency, *2016 Corn Temporary Purchase and Reserve Policy Shifted to ‘Market Oriented Purchase’ and ‘Direct Subsidy*, March 28, 2016 (Exhibit CHN-74-B); *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); *2016 Northeast Region Corn Purchase Notice*, Article VIII, p. 4 (Exhibit US-87)).

¹⁰⁶ *2004 Grain Distribution Regulation*, Article 4 (Exhibit US-12); *2004 Grain Opinion*, page 1, preamble, p. 1 (Exhibit US-10). In response to Panel Question 1, China asserts that “neither Article 27 of the 2004 Grain Distribution Regulation, nor any other provision of the 2004 Grain Distribution Regulation authorizes the adoption or maintenance of the TPRP for corn.” China Response to Panel Question 1, para. 5. The 2004 Grain Regulation does however cover corn and therefore such a program would be permitted under Article 27. *2004 Grain Regulation*, Article 2 (Exhibit US-12).

¹⁰⁷ *2004 Grain Distribution Regulation*, Article 3 (Exhibit US-12).

¹⁰⁸ *2004 Grain Distribution Regulation*, Article 4 (Exhibit US-12).

¹⁰⁹ *2004 Grain Distribution Regulation*, Article 27 (Exhibit US-12).

Notice calls for “advancing corn purchasing and storage system reform,”¹¹⁰ this reform is similar to the “marketization reform in grain purchasing and sales” pursued in 2004.¹¹¹

89. One key aspects of the temporary purchasing and storage policies for corn in 2012 – 2015 was an applied administered price. The *2015 Northeast Region Corn Purchase Notice*, the *2015 Jilin Corn Purchase Notice*, and the *2015 Heilongjiang Corn Purchase Notice* all announced a posted purchase price for corn beginning on November 1, 2015.¹¹² Similarly, the *2016 Inner Mongolia Corn Purchase Notice* as well as the *2016 Heilongjiang Corn Purchase Notice* announced a posted purchase price for corn beginning on November 10, 2016.¹¹³

90. Moreover, the 2016 provincial corn purchase notices concerning Inner Mongolia and Heilongjiang province include other similar elements as the *2015 Northeast Region Corn Purchase Notice*. Specifically, it provides that grains purchased by the state-owned enterprise, Sinograin and Chinatex, respectively, must be moist grain newly-produced in 2016 and include quality and pricing policies, namely that the purchased corn will be national standard at medium grade or above at a set price.¹¹⁴ The Inner Mongolia notice also requires directly affiliated depots to display publically the price and quality standards on large electronic screens, public notice boards, or other prominent locations in the area of the depot.¹¹⁵

91. Therefore, China’s legal instruments reflect an overarching policy of providing domestic support in favor of wheat, rice and corn producers; that policy is implemented annually through a series of notices and other instruments instructing relevant entities on the specific support activities to be taken for each product in that year.

For China:

Question 72: Without prejudice to the Panel's decision on the terms of reference, please explain whether and, if so, why the Panel should consider the minimum purchase price programme for wheat and rice as a single measure, or should the Panel consider as separate measures minimum purchase price programmes for each of wheat, Indica rice and Japonica rice? What relevance does the difference between the products covered by the minimum purchase price programmes have for the nature of the specific measures to be assessed by the Panel?

4. Constituent Data and Methodology (CDM)

For Both Parties:

¹¹⁰ *2016 Northeast Region Corn Purchase Notice*, page 1, preamble (Exhibit US-87).

¹¹¹ *2004 Grain Opinion*, preamble (Exhibit US-10).

¹¹² *2015 Northeast Region Corn Purchase Notice* Article 1, p. 1 (Exhibit US-55); *2015 Jilin Corn Purchase Notice*, Article I, p. 1 (Exhibit US-62); *2015 Heilongjiang Corn Purchase Notice*, Article I, p. 1 (Exhibit US-63).

¹¹³ *2016 Heilongjiang Corn Purchase Notice* (Exhibit US-104); *2016 Inner Mongolia Corn Purchase Notice* (Exhibit US-101).

¹¹⁴ *2016 Heilongjiang Corn Purchase Notice* (Exhibit US-104).

¹¹⁵ *2016 Inner Mongolia Corn Purchase Notice*, Article IV (Exhibit US-101).

Question 73: In relation to Articles 1(a)(ii) and 1(h)(ii) and the terms "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", please respond to the following questions:

- a. **What is the ordinary meaning of the term "constituent data and methodology"? What is the difference between "data" and "methodology"?**
- b. **Regarding the grammatical structure of the term "constituent data and methodology", and, in particular, the presence of an "and" and the absence of any comma, should the Panel interpret that the correct breakdown of the phrase should be:**
 - i. **"constituent data" and "constituent methodology"; or**
 - ii. **"constituent data" and "methodology"?**
- c. **Does the wording of the mentioned Articles suggest that there are parts of the "tables of supporting material" that do not contain any "constituent data and methodology"? In the context of the present dispute, what is the relevant "constituent data and methodology" contained in Rev.3? Which parts of Rev.3, if any, do not contain any "constituent data and methodology"**

Responses to (a) and (b):

92. The ordinary meaning of the terms “data,” “methodology,” “constituent,” and “constituent data and methodology” support the understanding that the “constituent data and methodology used in tables of supporting material” provides supplementary country-specific numerical facts and procedures regarding the domestic support programs and agricultural sector at the time of accession.

93. As discussed in response to Question 65, constituent data and methodology may include the types of basic agricultural products grown in a particular Member, the Member’s understanding of “year,” and other Member-specific information, facts, procedures, or considerations relevant to the base period – such as whether crops are subject to double growing seasons, processing required before export, or quality concerns.

94. With regard to the ordinary meaning of the individual terms.

- “data” is defined as “[f]acts, *esp.* numerical facts, collected together for reference or information. . . .”¹¹⁶
- “method,” is defined as “[a] mode of procedure; a (defined or systematic) way of doing

¹¹⁶ *Shorter Oxford English Dictionary*, “data,” vol. I, p. 594 (ed. 1993) (Exhibit US-105) (stating that “data” is “1. Things given or granted; things known or assumed as facts, and made up the basis of reasoning or calculation . . . 2. Facts, *esp.* numerical facts, collected together for reference or information. . . .”). The New Oxford English Dictionary, vol. 1, “data” at 594.

things,”¹¹⁷ and “methodology” is defined as “[a] body of methods used in a particular branch of study or activity.”

Thus, both data and methodology suggest a reflection of facts or information, which provide a reference or reflect a way of doing something.

95. “Constituent” is defined as “[t]hat makes a thing what it is,” or is “characteristic.”¹¹⁸ It can also be defined as “[t]hat goes to make up; *esp.* that jointly constitute a whole.”¹¹⁹

96. Given the ordinary meaning of the terms, “the constituent data and methodology” includes the country-specific facts, information, modes, or procedures that are characteristic of domestic support and the agriculture sector of the Member at the time of accession. This information is found in tables of supporting materials used to support or explain the basis for a Members’ proposed Final Bound Commitment Level.

97. With regard to the Panel’s grammatical question, based on the presence of an “and” and the absence of any comma, the adjective “constituent” modifies both nouns, “data” and “methodology.” Thus, the phrase could also be read: “the constituent data and the constituent methodology used in the tables of supporting material.” Conversely, if there was a comma, as suggested by the question, the adjective “constituent” would only apply to “data” (*e.g.*, the constituent data, and methodology).

Response to (c):

98. The United States notes that both Articles 1(a) and 1(h) identify “constituent data and methodology,” as information “used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule.” Therefore, “constituent data and methodology” would not include all of the information provided in a Member’s supporting material, but rather the information “used” in the tables setting out domestic support calculations. That is information or methodology actually utilized, applied, or employed to figure out a Member’s product-specific AMS under Article 1(a)(ii) or its Current Total AMS under Article 1(h)(ii).

99. For this reason, the question of what data and methodology should be considered constituent when calculating product-specific AMS and Current Total AMS in later years is a fact specific inquiry – depending on what was “used” in the original tables, and whether that information is still relevant given the nature of the domestic support programs currently in place. Considering the question of what information is relevant to the subsequent calculation of

¹¹⁷ *Shorter Oxford English Dictionary*, “method,” “methodology,” vol. I, p. 1759 (ed. 1993) (Exhibit US-105) (stating that “method” is “1. The branch of knowledge that deals with method and its application in a particular field. Also the study of empirical research or techniques employed in it . . . 2. A body of methods used in a particular branch of study or activity,” and “methodology,” relates to “method,” and is defined as “a mode of procedure; a (defined or systematic) way of doing things”).

¹¹⁸ *Shorter Oxford English Dictionary*, “constituent,” vol. I, p. 488 (ed. 1993) (Exhibit US-105) (stating that “constituent” is an adjective meaning “1. That makes a thing what it is; characteristic. . . 2. That goes to make up; *esp.* that jointly constitute a whole. (Foll. by of) . . .”).

¹¹⁹ *Shorter Oxford English Dictionary*, “constituent,” vol. I, p. 488 (ed. 1993) (Exhibit US-105).

product-specific AMS, both the panel and Appellate Body in the *Korea – Beef* dispute indicated, for example, that constituent data and methodology related to other commodities was not relevant to the calculation of product-specific AMS for beef.¹²⁰

100. Moreover, the use of any constituent data or methodology drawn from the Supporting Tables must not result in an AMS calculation not consistent with the methodology set out in the Agriculture Agreement, including Annex 3 and Article 6, as both Articles 1(a)(ii) and 1(h)(ii) require that AMS and Current Total AMS calculations be done “in accordance with” these provisions.

Question 74: Article 31 of the VCLT refers to subsequent practice, as the Parties have noted; it also refers to context. The Appellate Body has stated that schedules of commitments of other Members are context when interpreting a Member's own schedule.¹²¹ The tables of supporting materials of China and other Members are incorporated into China's and other Members' schedules respectively.

- a. Do the Parties agree that other Members' supporting tables are context for the matters of this dispute?
- b. How could the context provided by other Members' tables, of not using the years 1986-1988 for the FERP, be used in this dispute?

Response:

101. Generally, other Member’s Supporting Tables may be considered “context” in instances where they assist in the interpretation as directed by Article 31 of the VCLT.

102. Other Member’s Schedules have been used as “context” to interpret the disputed text within a Member’s Schedule of Concessions – particularly in the context of the General Agreement on Trade in Services (“GATS”).¹²² In those disputes, the Schedules of other Members was looked to in order to understand the scope and nature of a particular “service.”¹²³

¹²⁰ *Korea – Various Measures on Beef (Panel)*, para. 812; *Korea – Various Measures on Beef (AB)*, para. 114.

¹²¹ “There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members.

...

Both participants, as well as the Panel, accepted that other Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule. As the Panel pointed out, this is the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are “an integral part” of the GATS. We agree. At the same time, as the Panel rightly acknowledged, use of other Members' Schedules as context must be tempered by the recognition that “[e]ach Schedule has its own intrinsic logic, which is different from the US Schedule.” Appellate Body Report, *US – Gambling*, paras. 178 and 182 (original footnotes omitted).

¹²² *US – Gambling (AB)*, para. 182; *China – Electronic Payment Services*, paras. 7.104, 7.189-7.193; *China – Audiovisual Products (AB)*, paras. 381- 385.

¹²³ For example, in *US – Gambling* the panel was tasked with interpreting the phrase “other recreational services (except sporting)” in the U.S. GATS Schedule, (*US – Gambling (Panel)*, paras. 6.34, 6.51-6.61, 6.72-6.78), and in

Where other Members’ Schedules are looked to, we agree with the cautionary note of the Appellate Body in *US – Gambling* that “[e]ach Schedule has its own intrinsic logic,”¹²⁴ such that it may be “of limited utility in elucidating the meaning of the entry to be interpreted” in another Member’s Schedule.¹²⁵

103. We also note that while other Members’ Schedules may be looked to as context, they are only one source of context. Typically, interpreters look first to the “immediate context” of a term or provision, including for instance the rest of the particular provision at issue, the other provisions of the relevant WTO Agreement, other similar provisions in other Agreements, and the overall structure of the Agreement, which may be considered along with the Agreement’s object and purpose.¹²⁶

104. In this dispute, the United States has set out an interpretation of Annex 3, paragraph 9 based on the text and context of that provision. Specifically, the United States has explained that the plain meaning of this provision reflects a mandatory obligation to use the specific years indicated – 1986 to 1988 – when calculating the value of market price support.¹²⁷ China appears to argue that the use of a later “base period” in China and other Members’ Supporting Tables is “context” that has the effect of nullifying the plain meaning of this provision – transforming a mandatory obligation into no obligation at all.¹²⁸

105. Contrary to China’s arguments, customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement.¹²⁹ Importantly, when China points to certain other Members’ Supporting Tables as context, it does not and cannot assert that those Supporting Tables provide context for the calculation of current AMS and Current Total AMS. Rather, it can only point to certain other Members’ use of a different time period for purposes of calculating *base AMS*.

China – Audiovisual the panel was tasked with determining the scope of activities included in “sound recording distribution services” in China’s GATS Schedule (*China – Publications and Audiovisual Products* (Panel), para. 7.1147, 7.1173, 7.1204-1218).

¹²⁴ *US – Gambling* (AB), para. 182.

¹²⁵ *China – Publications and Audiovisual Products* (AB), para. 383.

¹²⁶ See e.g., *US – Gambling* (AB), para. 178 (noting the consideration of “(i) the remainder of the United States’ Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; a – *Electronic Payment Services* (Panel), paras. 7.104 (noting the consideration of “(i) the rest of subsector (d); (ii) the headings in the sector at stake; (iii) market access, national treatment and additional commitments in the sector at stake; (iv) the structure of the GATS; (v) the GATS Annex on Financial Services; and (vi) the schedules of other WTO Members”); see also *EC-Chicken Classification (Brazil)* (Panel), para. 7.244 (noting that “[t]o the extent that the terms of the relevant concessions in other WTO Members’ schedules are identical to the terms of the concession contained in [the EC’s Schedule], we do not consider that [other Member’s Schedules] can assist us any further in the analysis we have undertaken thus far”).

¹²⁷ United States First Written Submission, paras. 98-100.

¹²⁸ China First Written Submission, paras. 172-176; China Second Written Submission, paras. 327-344.

¹²⁹ *Peru – Agricultural Products* (AB), para. 5.94 (“While context is a necessary element of an interpretative analysis under Article 31 of the Vienna Convention, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered ‘together with the context.’”).

Thus, to the extent these Supporting Table provide context, they do not provide *relevant* context – that is, context for the understanding of the particular calculation as described in the provision of the Agreement on Agriculture in question.

106. More relevant context is provided by China’s Accession Protocol and Working Party Report. The clear intention to alter the calculation methodology for China for future years, including a China-specific *de minimis* support level, was recorded in paragraph 235 of the Working Party Report and incorporated into China’s Accession Protocol.¹³⁰ This demonstrates *how* WTO Members altered a WTO obligation when they *intended* to alter that obligation. Paragraph 235 does not contain any alteration to the Article 1(a)(ii) or Annex 3 current AMS obligations. China’s Supporting Table is not the appropriate vehicle to alter a WTO obligation and contains no text suggesting an intention to alter an obligation.¹³¹

107. China’s arguments also appear to suggest that a relevant “practice” of using a fixed external reference price based on years other than 1986 to 1988 has developed. But China has shown no such practice relevant to the interpretive question before the Panel – what is the relevant time period for the fixed external reference price when calculating current AMS and Current Total AMS. 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.

That is, Article 31(3) directs that a panel shall take such information into account if there is (1) a subsequent *practice* in the application of the treaty, (2) which establishes the *agreement of the parties*, and (3) that agreement is regarding [the] *interpretation* of the treaty.¹³²

108. Therefore, for the subsequent 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

¹³⁰ China’s Accession Protocol, Part I, Section 15, para. 2 (incorporating commitments referred to in paragraph 342 of the Working Party Report) (Exhibit US-5); China’s Working Party Report, para. 342 (listing paragraph 235 among commitments incorporated) (Exhibit US-7).

¹³¹ And this is even aside from the fact that China in its Supporting Tables did not use the data it now argues must be used and did not use the AMS calculation methodology that it now argues must be used.

¹³² See e.g., *US – Gambling (AB)*, para. 192 (noting that for a practice to be established “(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision”).

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).

109. China asserts that there is a “subsequent practice” exhibited by Members’ Supporting Tables that establishes an alternative text for Annex 3, paragraph 9, for the purpose of calculating market price support specific to acceding Members, and which departs from the ordinary meaning of that provision.¹³³ However, there is neither a discernible subsequent practice in Members’ supporting tables related to the application of Annex 3, nor an agreement regarding its interpretation.

110. First, regarding whether there is a “subsequent practice in the application of the treaty,” the facts of this dispute do not demonstrate a subsequent practice with regard to calculating product-specific AMS or Current Total AMS in subsequent years pursuant to Annex 3. During China’s accession, China used a “base period” of 1996-1998 to provide the Membership with a calculation of the amount of domestic support actually provided to its agricultural producers at the time of its accession. Other acceding Members utilized various base periods in their Supporting Tables.¹³⁴ However, an alleged “practice” of selecting base years other than 1986-1988 does not establish a practice for the application of Annex 3 in calculating product-specific AMS *in subsequent years*, much less a practice with respect to the application of the “fixed external reference price” as defined in paragraph 9.

111. Second, we emphasize for the Panel that, to calculate the value of market price support during its base period, China utilized external reference prices reflecting the annual average FOB or CIF commodity price for 1996, 1997, and 1998, individually.¹³⁵ That is, China’s calculation of its Base Total AMS was not based on a “fixed external reference price” or the average values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. Instead, China’s market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual “external reference price[s]” corresponding to each year of the base period.¹³⁶ China did *not* establish a single, fixed, reference price that it used in calculating market price support for every year.

112. China asserts that it should be able to utilize a reference price drawn from the data from Appendix DS 5-3 and Appendix DS 5-4 because this represents a common subsequent practice amongst WTO Members.¹³⁷ However, as explained above, China did not use the external reference price identified in this table in its market price support calculations or Base Total AMS

¹³³ China Second Written Submissions, para. 332 (stating that “[t]his subsequent practice in the application of paragraph 9 of Annex 3 constitutes objective evidence of the understanding of the parties as to the meaning of the provision. It establishes the agreement of WTO Members that there is scope in paragraph 9 for later-acceded Members to use a base period, including for the FERPs, other than the “1986-1988” period stipulated in paragraph 9”).

¹³⁴ See China First Written Submission, para. 176, Table 6. The United States notes however that where China has indicated “N/A” or calendar year for the base periods of Ecuador, Bulgaria, Mongolia, and Latica. It should be noted that Bulgaria used a base period of 1986 to 1988, Latica used a base period for 1994 to 1996, and Georgia used a base period of 1996-1998; Ecuador and Mongolia did not provide any Supporting Tables.

¹³⁵ China’s Supporting Table, WT/ACC/CHN/38/Rev.3, page 9-10.

¹³⁶ United States Oral Statement, Second Panel Meeting, para. 30.

¹³⁷ China First Written Submission, paras. 222, 225, and 269.

calculations. Therefore, China would have the Panel take a value that was included in its supporting materials, but not actually used in the calculation of any AMS, and use it to derive a “practice” in the “application” of Annex 3. Not only would this value not reflect the application of Annex 3, but China did not even “apply” its proposed alternative value in its Supporting Tables.

113. Third, the Supporting Tables of certain WTO Members, now acceded, do not and could not demonstrate agreement among WTO Members regarding the interpretation of Annex 3, paragraph 9. When the tables were submitted, those now-Members had no WTO obligations. Therefore, the submission of supporting materials by them reflecting a purported interpretation of a WTO provision could not itself reflect agreement *of WTO Members*. With respect to then-existing WTO Members, neither the Protocol nor the Working Party Report reflect any such agreement regarding the interpretation of Annex 3, paragraph 9. Therefore, regardless of the content of China’s or other acceding Members’ supporting tables, absent a clear “agreement” by all WTO Members with respect to the interpretation of a particular provision, no “subsequent practice” can be taken into account.

Question 75:

- a. **In relation to paragraph 71 of the United States' second written submission, which mentions reduction commitments: do the Parties consider that China has an ongoing "reduction" commitment of nil?**
- b. **To clarify, is the United States' position that China has no "reduction" commitment, but they have an ongoing commitment to maintain a zero level of Current Total AMS?**

Response:

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

For the United States:

Question 76: Please provide comments on the following statement contained in paragraph 252 of China's second written submission:

As established above, text, context, object and purpose and negotiating history of Rev.3 and paragraph 238 all support the conclusion that the "policy classification" issue mentioned in paragraph 238 related to China's green box classification in Supporting Table DS:1. Indeed, a green box classification issue is also capable of being addressed through subsequent notifications of a particular measure as either "green box" or "amber box" domestic support.

Response:

115. In making this statement, China focuses on a particular discussion of policy classification contained in the negotiating history of this paragraph. However, nothing in the exhibit China submitted indicates that the concerns expressed by Members in paragraph 238 were limited to green box classifications. Rather, the text of Paragraph 238 reflects disagreement concerning elements of China's Supporting Tables, as well as the fact that no modifications were made to the Supporting Tables to address these concerns. This is consistent with the legal interpretation explained by the United States that the Supporting Tables do not reflect rights or obligations agreed between WTO Members and China, as opposed to the commitments they did set out in China's Accession Protocol.

116. In any event, contrary to the suggestions in China's discussion of this paragraph, the United States does not rely on paragraph 238 to show that China's Supporting Tables did not alter its obligations with respect to the calculation of market price support. Rather, as we have explained in prior submissions, the Supporting Tables cannot themselves serve to alter these obligations. Where such an alteration was intended, it must have been set out expressly in China's Accession Protocol. China's arguments regarding paragraph 238 are thus based on its flawed legal argument that the Panel can derive alternative binding obligations from information contained in China's supporting materials without more, and can therefore be rejected for the same reasons.

Question 77: Please provide comments on the following statement contained in paragraph 260 of China's second written submission:

Significantly, in April 1997, the United States also posed questions about China's draft Supporting Table DS:5, asking about the methodology used to calculate the fixed external reference price and the sources of the data used. China responded in May 1997 by providing a revised Table DS:5, and stating that it followed the provisions of the *Agreement on Agriculture* in using the CIF price for products for which it was a net importer (using data from the baseline period of 1993-1995) and FOB price for products for which it was a net exporter during the same period, and that it now used the figures provided by the Customs General Administration of China in the revised Supporting Tables. (original footnotes omitted)

Response:

117. Contrary to China's statement in paragraph 260, the documentation provided by China does not indicate that the United States or other WTO Members agreed to modify Annex 3 through China's Supporting Tables.

118. First, the United States notes that China's statement in paragraph 260 does not accurately reflect what is included in the documentation provided. China states that in April 1997, the United States posed questions about China's draft supporting table DS:5 and asked about the methodology used to calculate the fixed external reference prices and the sources of data used; however, the document does not indicate what questions the United States asked. It simply provides China's response.

119. Second, in response to an unknown question, China asserted that:

The external reference price is calculated according to the Agreement on Agriculture. The external reference price for net imported goods, i.e. CIF price, is equal to the imported value divided by imported volume; while the external reference price for net exported goods, i.e. FOB price, is equal to the export value divided by export volume. The figures used in the tables in WT/ACC/CHN/5 are taken from the Almanac of China's Foreign Economic and Trade, while we now use the figures provided by the Customs General Administration of China in the revised supporting tables. These two set of figures may differ due to different statistical methods applied.¹³⁸

It is clear from its response that China considered its external reference price (not fixed external reference price) to be consistent with the Agriculture Agreement. Further, in examining the Table DS 5 under review by Members (provided in a "Communication from China" WT/ACC/CHN5¹³⁹), the Tables indicate that China was using a base period of 1993 to 1995, but did not specify the years used to determine the external reference price.¹⁴⁰ Based on the response provided by China, Members could have assumed those value were consistent with Annex 3. In any event, this exchange does not reflect an intention by China to alter the obligation contained in Annex 3, paragraph 9, much less an agreement by WTO Members that this would be done.

Question 78: Please provide comments on the following statement contained in paragraph 294 of China's second written submission:

Finally, while the United States acknowledges that both Articles 1(a)(ii) and 1(h)(ii) provide "instructions" for the calculation of product-specific AMS and Current Total AMS, the United States does not mention even once such instructions in Article 1(h)(ii), and the wording used therein to describe the relationship between Annex 3 and a Member's constituent data and methodology. Article 1(h)(ii) explains that Current Total AMS is to be "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting materials incorporated by reference in Part IV of the Member's Schedule". (original footnotes omitted)

Response:

¹³⁸ Working Party on the Accession of China, China's Responses to Questions raised by Members following the Third Meeting of the Working Party on China's Accession to the World Trade Organization, April 1997, page 2-3, 31 (Exhibit CHN-15).

¹³⁹ See Communication from China, WT/ACC/CHN/6. The draft Supporting Table was submitted to the Working Party in a Communication from China under the header "Information on the Trade Regime of China for the Purposes of Transparency." This further shows that China understood the document to provide information to WTO Members on China's trade regime, and not to propose or reflect specific commitments or concessions.

¹⁴⁰ See Communication from China, WT/ACC/CHN/6. The footnote to the external reference price states: "[e]xternal reference price: recalculated based on *Foreign Economic and Trade Yearbook of China*."

120. As explained in response to Question 62 above, Articles 1(a) and 1(h) of the Agriculture Agreement address separate parts of the annual domestic support calculation. Article 1(a) addresses product-specific AMS(s) and in romanette (ii) provides specific calculation instructions with regard to product-specific AMS in the current year. Article 1(h) addresses Total AMS and in romanette (ii) provides specific calculation instructions with regard to Current Total AMS, which consists of the summing of the individual product-specific AMSs exceeding the *de minimis* level. The United States has explained in detail above the differences between these two provisions.

121. Thus, while Articles 1(a)(ii) and 1(h)(ii) utilize similar terms, they address different parts of the domestic support calculation. China has not explained the basis upon which the Panel may ignore the ordinary meaning of the text of each provision, or read into one provision text that simply does not appear.

Question 79: Please provide comments on the following statement contained in paragraph 296 of China's second written submission:

In its interpretative exercise, the United States also largely ignores the need for consistency in AMS calculations. Indeed, the United States asserts that a Member's constituent data and methodology only "made up its Base Total AMS and informed its Final Bound Commitment Level", and that "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'". (original footnotes omitted)

Response:

122. The Agriculture Agreement does not require “consistency” between a Member’s base period AMS(s) and Base Total AMS calculations, and its subsequent calculation of current AMS(s) and Current Total AMS. Rather, the “need” identified by the Agriculture Agreement is for calculations completed in subsequent years, for the purposes of assessing compliance with domestic support commitments, to be completed “in accordance with” the provisions of the Agriculture Agreement.

123. China’s assertion that the Agriculture Agreement requires “consistency” is without support.¹⁴¹ Neither the text of the Agriculture Agreement, nor China’s own Supporting Tables, sustain China’s argument for “consistency.”

Agriculture Agreement Does not Require Consistency

124. First, the text of the Agriculture Agreement does not mandate “consistency” with a Member’s Base Total AMS calculations and its later Current Total AMS calculations. Rather, in

¹⁴¹ China Second Written Submission, paras. 296-305 (directing the panel to the text of Articles 1(a) and 1(h), suggests that the “scope of a domestic support commitment . . . is found in a Member’s . . . Supporting Tables,” and refers to the object and purpose of the Agriculture Agreement).

both Articles 1(a) and 1(h), the Agriculture Agreement assigns a specific degree of consideration to the text of the Agreement and a Member’s constituent data and methodology.

125. To that end, Article 1(a) provides in romanette (i) that “with respect to support provided during the base period,” AMS is “specified in the relevant tables of supporting materials incorporated by reference in Part IV of a Member’s Schedule.” This indicates *where* country-specific reference information regarding the annual level of support in favor of basic agricultural producers in the base period may be found. It does not prescribe a calculation methodology for either the “base period” or for later years.

126. Article 1(h) provides a similar formulation. It states in romanette (i) that Base Total AMS is the sum of all “support provided during the base period.” Romanette (i) further specifies where information may be found – this time in Part IV of the Member’s Schedule – rather than the supporting materials. This language does not propose a particular calculation methodology for either the base period or for a subsequent period.

127. In both Article 1(a) and 1(h), romanette (i) is juxtaposed with romanette (ii) which provides specific directions for calculating the respective components of the domestic support analysis “during any year of the implementation period and thereafter.”¹⁴² Thus, contrary to China’s suggestion, Articles 1(a) and 1(h) do not “require that Base (Total) AMS and Current (Total) AMS be calculated including by reference to the same Member-specific constituent data and methodology.”¹⁴³ Rather, the text of the Agriculture Agreement provides that constituent data and methodology characteristic of that Member as “used” by the Member in the calculation of Base Total AMS should be taken into account or considered when calculating current product-specific AMS or Current Total AMS.

128. As noted by China, the panel in the *Korea – Beef* dispute broadly stated that constituent data and methodology “has an important role to play in ensuring” consistency with support calculated during the base year,¹⁴⁴ before concluding that it did not need to evaluate the role of constituent data and methodology in that dispute.¹⁴⁵ This statement, and those of the Appellate Body in the same dispute, do not however suggest that the role of constituent data and methodology in ensuring consistency could supersede the obligations set out in Annex 3.

129. In fact, the Appellate Body rejected Korea’s argument that “[u]sing one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results.”¹⁴⁶ In doing so, the Appellate Body found that the agreement definitions provide a specific “methodology for calculating Current AMS and Current Total AMS,” but “do not provide for any particular mode of calculation of the ‘Base Total AMS’, from which figure the commitment levels for particular years of the implementation period are

¹⁴² See also *Korea – Various Measures on Beef* (AB), para. 115 (“The treaty definitions of both AMS and Total AMS, set out in Articles 1(a) and 1(h) respectively, do provide a specific methodology for calculating Current AMS and Current Total AMS in respect of a particular year during the implementation period.”).

¹⁴³ China Second Written Submission, para. 298 (underlining original).

¹⁴⁴ *Korea – Various Measures on Beef* (Panel), para. 811.

¹⁴⁵ *Korea – Various Measures on Beef* (Panel), para. 812.

¹⁴⁶ *Korea – Various Measures on Beef* (AB), para. 115.

arithmetically derived.”¹⁴⁷ The Appellate Body also suggested that the “apparent hierarchy as between ‘the provisions of Annex 3’ and the ‘constituent data and methodology’” reflects a different structure and analysis than the panel’s focus on consistency.¹⁴⁸

130. The Appellate Body thus concluded that “Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned.”¹⁴⁹ It continued by stating that “[a]s 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.”¹⁵⁰

131. This analysis is consistent with the text of the Agriculture Agreement, which requires that each product-specific AMS be calculated “in accordance with” the provisions of Annex 3, and “taking into account” any constituent data and methodology used in the tables of supporting materials.

China’s Proposed Methodology is Not Consistent with its Supporting Tables

132. Further, and ironically given this is one of China’s principal arguments, China’s proposed market prices support calculations are not even “consistent” with the methodology “used” in its Supporting Tables.¹⁵¹ Both China’s “consistency” argument,¹⁵² and China’s broader superseding treaty text argument hinge on the use of the fixed external reference price it asserts is appropriate in its Supporting Tables.¹⁵³ But, simply put, China did not calculate its Base Total AMS using the fixed external reference prices it now seeks to utilize to calculate its Current Total AMS.¹⁵⁴

133. China states that “Rev.3 . . . includes FERPs for China that apply to certain products,” and that “[t]hese FERPs are (i) based on a *three-year* base period of 1996-1998; (ii) based on

¹⁴⁷ See also *Korea – Various Measures on Beef* (AB), para. 115.

¹⁴⁸ *Korea – Various Measures on Beef* (AB), para. 113, fn 49 (contrasting, the panel’s opinion regarding consistency, with its indication that there was no constituent data and methodology, and the Appellate Body’s statement regarding the plain language of Article 1(a)(ii)).

¹⁴⁹ *Korea – Various Measures on Beef* (AB), para. 115.

¹⁵⁰ *Korea – Various Measures on Beef* (AB), para. 115.

¹⁵¹ China First Written Submission, Tables 17, 18, and 22, paras. 222, 229, 230, 269 (describing the use of a FERP drawn from appendices DS 5-3 and 5-4 in China’s Supporting Tables); China Second Written Submission, para. 299 (referring to Section IV of China’s Second Written Submission, which broadly refers to its Supporting Tables as treaty text which supersedes the text of the Agriculture Agreement); see also China Second Written Submission, para. 324 (noting that “a FERP can play that benchmark role only where it remains unchanged from the FERP used in the base period.”)

¹⁵² China Second Written Submission, para. 299.

¹⁵³ China Second Written Submission, Section IV.

¹⁵⁴ China Second Written Submission, para. 324 (noting that “a FERP can play that benchmark role only where it remains unchanged from the FERP used in the base period”). If China had utilized the “fixed external reference prices” (i.e., the averaged CIF or FOB prices for wheat, Indica rice, Japonica rice and corn for 1996-1998) in its DS 5 table, it would have calculated a different level of Base Total AMS than identified in its Supporting Table.

China’s status, during that base period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*.”¹⁵⁵ To this end, China asserts that:

- the “fixed external reference price for wheat is 1698.1 Yuan per ton;”¹⁵⁶
- the “average of the 1996-1998 FOB price derived for indica rice was 2343.0 Yuan per ton,” and this “constitutes the FERP for indica rice;” and
- the “average of the 1996-1998 FOB price derived for japonica rice was 3290.6 Yuan per ton,” and this “constitutes the FERP for japonica rice.”¹⁵⁷

China utilizes these values to calculate its version of current AMS for wheat, Indica rice, and Japonica rice in Tables 22, 17, and 18 of its First Written Submission.

134. However, China’s calculation of its Base Total AMS in the context of its accession did not utilize those fixed external reference price(s) reflecting the years 1996-1998. Rather, China’s calculation of market price support, which was included in its Total Base AMS evaluation, was based on annual “external reference price[s]” separately calculated for 1996, 1997, and 1998, and applied for each year of the base period, as illustrated by the fifth column in the below excerpt from China’s Supporting Tables.

¹⁵⁵ China Second Written Submission, para. 318.

¹⁵⁶ China First Written Submission, para. 269.

¹⁵⁷ China First Written Submission, paras. 229-230.

Supporting Table DS: 5

DOMESTIC SUPPORT: People's Republic of China
REPORTING PERIOD: 1996-1998

Product-Specific Aggregate Measurement of Support: Market Price Support

Description of basic products	Calendar year	Measure type (s)	Applied administered price ¹⁶ (RMB yuan/ton)	External reference price ^{17&18} (RMB yuan/ton)	Eligible production ¹⁹ (1000 tons)	Associated fees / levies (million RMB yuan)	Total market price support (million RMB yuan)	Data sources
1	2	3	4	5	6	7	8=(4-5)*7	9
a) Wheat	1996	State Procurement Pricing	1480.0	1885.0	15000		-6075	See notes
	1997	State Procurement Pricing	1480.0	1629.6	15000		-2244	
		Protective Price System	1340.0	1629.6	31002		-8979	
	1998	State Procurement Pricing	1420.0	1579.8	15000		-2397	
		Protective Price System	1260.0	1579.8	12956		-4144	
average								
b) Japonica Rice	1996	State Procurement Pricing	2200.0	3682.9	5250		-7785	See notes
	1997	State Procurement Pricing	2200.0	2862.1	5250		-3476	
		Protective Price System	1971.4	2862.1	6452		-5746	
	1998	State Procurement Pricing	2114.3	3326.9	5250		-6366	
		Protective Price System	1914.3	3326.9	3290		-4647	
average								
c) Indica Rice	1996	State Procurement Pricing	2142.9	3082.1	10500		-9862	See notes
	1997	State Procurement Pricing	2142.9	2033.0	10500		1153	
		Protective Price System	1885.7	2033.0	12903		-1901	
	1998	State Procurement Pricing	1931.4	1913.9	10500		184	
		Protective Price System	1734.3	1913.9	6580		-1182	
average								

Description of basic products	Calendar year	Measure type(s)	Applied administered price (RMB yuan/ton)	External reference price (RMB yuan/ton)	Eligible production (*000 tons)	Associated fees / levies (million RMB yuan)	Total market price support (million RMB yuan)	Data sources
1	2	3	4	5	6	7	8=(4-5)*7	9
d) Corn	1996	State Procurement Pricing	1120.0	1581.4	12500		-5767	See notes
	1997	State Procurement Pricing	1240.0	1075.8	12500		2052	
		Protective Price System	1100.0	1075.8	14422		349	
	1998	State Procurement Pricing	1180.0	939.2	12500		3010	
		Protective Price System	1060.0	939.2	26174		3161	
average								
e) Cotton	1996	State Procurement Pricing	14000.0	15306.3	4203		-5491	See notes
	1997	State Procurement Pricing	14000.0	14708.6	4602		-3261	
	1998	State Procurement Pricing	12350.0	13736.5	4501		-6241	
	average							

135. When providing information regarding its base period, China appears to have used a different calculation entirely for market price support, one that relies on neither the data, nor methodology, it now asserts is appropriate. That is, China’s calculation of market price support for each year of its base period compares an applied administered price for 1996 to an external reference price for 1996, an applied administered price for 1997 to an external reference price for 1997, and an applied administered price for 1998 to an external reference price for 1998.¹⁵⁸ However, an annual market price support calculation utilizing annual and concurrent external reference prices is not the same as the calculation of market price support based on a fixed external reference price using an average of three years.

136. The United States notes that China calculated an “Average of 1996-98” reference price for each identified basic agricultural product in the “calculation details” provided in Appendices

¹⁵⁸ These values are further incorporated into China’s DS:4 Table calculating China’s “Base Total AMS.”

DS 5-3 and DS 5-4 of its Supporting Tables.¹⁵⁹ However, as just described, China did not “use” these data points (or methodologies) in the calculation of its market price support. Therefore, these values were not even “constituent data and methodology” for purposes of establishing the Base AMS or Base Total AMS. Nor did China ever refer to these data points as “fixed external reference prices” or suggest they might be used for calculating current AMS under Article 1(a)(ii) and Annex 3. For this reason, it is difficult for the United States to understand how China proposes distinguishing between the unused information in the Appendices and the data or methodology actually used in Table DS 5.

137. The United States notes that with regard to quantity of eligible production, China similarly suggests Members are able to pick and choose between inconsistent statements within a Supporting Table. To that end, China declares that some text represents binding commitments and while other text is simply “factual information.”¹⁶⁰ This approach, like China’s arguments regarding the fixed external reference price, is neither supported by the text of the Agreement, nor a rational understanding of the use of the Supporting Tables.

138. For this reason, China’s argument regarding the requirement of “consistency” between the Base Total AMS calculation during its accession process, and the Current Total AMS calculation in subsequent years is without support.

Consistency with Constituent Data and Methodology Does Not Support Objectives of Agreement

139. Finally, China argues that “consistency” is required by the object and purpose of the Agreement on Agriculture,¹⁶¹ and in particular, “the goal of achieving ‘reductions’ of domestic support under the domestic support commitments requires *consistency* in the calculation of Base (Total) and Current (Total) AMS.”¹⁶² China however seeks to use deviations from the requirements of the Agriculture Agreement to grant itself significant increases in the amount of trade-distorting domestic support provided to its farmers, while similarly situated WTO Members are obligated to design agricultural domestic programs in a manner consistent with the Agreement and their reduction commitments.

140. The preamble to the Agriculture Agreement states “that commitments under the reform programme should be made in an equitable way among all Members.”¹⁶³ An equitable imposition of commitments “among all Members” requires the applicable rules set forth in the Agriculture Agreement to be imposed equally on all Members, unless there is clear evidence of an agreement to deviate, such as in China’s Working Party Report. This is not undermined by recourse to constituent data and methodology, which per the text of Articles 1(a) and 1(h) is available to support Member-specific calculation concerns, but not rewrite or supplant the text of the Agreement.

¹⁵⁹ China’s Supporting Tables, WT/ACC/CHN/38/Rev.3, pages 26-28.

¹⁶⁰ China Second Written Submission, para. 379.

¹⁶¹ China Second Written Submission, para. 302.

¹⁶² China Second Written Submission, para. 301 (footnote omitted).

¹⁶³ Agriculture Agreement, preamble.

141. The goal set forth in the preamble is further illustrated by Article 18 of the Agriculture Agreement, which discusses the “Review of the Implementation of Commitments” through “notifications submitted by Members,”¹⁶⁴ descriptions of “any new domestic support measure, or modification of an existing measure,”¹⁶⁵ and the space for discussions on implementation of commitments provided by the Committee on Agriculture.¹⁶⁶ Such a review requires a common understanding and common calculation of product-specific AMS and Current Total AMS. For this reason, all Members, including China, should apply the same basic rules, as set forth primarily in Annex 3 and Article 6 of the Agriculture Agreement, allowing for an across-the-board evaluation of the level of supporting being provided on an annual basis.

142. China’s interpretation of fixed external reference price and quantity of eligible production permit a far more permissive calculation of market price support, essentially allowing greater levels of amber box support than other similarly situated Members. By China’s own assessment, this is much more trade-distorting support than it provided at the time of its accession.¹⁶⁷ The objective of “reduction” cited by China does not support this vast increase in domestic support; rather, the Agriculture Agreement sought to channel Members into increasing use of the kind of non-price and non-production distorting “green box” programs described in Annex 2 of the Agriculture Agreement.

143. To the extent that China is permitted to provide a particular level of trade-distorting domestic support, this is reflected by China’s agreed Final Bound Commitment Level and the identified *de minimis* allowance. It is not granted on the basis of alleged data or methodology utilized in China’s Supporting Tables. To permit otherwise would render China’s level of domestic support opaque as compared to every other Member providing domestic support.

Question 80: In paragraph 66 of the United States' second written submission, the United States refers to the fact that Article 1(a)(ii) of the AoA states that the product-specific AMS must be calculated *in accordance with* the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member’s Schedule, and that Article 1(h) provides that "Current Total AMS" must be calculated *in accordance with* the provisions of the AoA, including Article 6, and with the constituent data and methodology used in the supporting material. In paragraph 67, the United States goes on to state that:

The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted "consistent with"¹⁶⁸ 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

¹⁶⁴ Agriculture Agreement, Article 18.2.

¹⁶⁵ Agriculture Agreement, Article 18.3.

¹⁶⁶ Agriculture Agreement, Article 18.5-18.7.

¹⁶⁷ China Second Written Submission, para. 4.

¹⁶⁸ *Korea – Various Measures on Beef* (AB), para. 111 (citing The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15).

"take into consideration, [or] notice" that information.¹⁶⁹ This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

The United States, however, does not mention the language of Article 1(h)(ii) which sets out that "Current Total AMS" must be calculated in accordance with the provisions of the AoA, including Article 6, and with the constituent data and methodology used in the supporting material.

- a. Is the language of Article 1(h)(ii) indicating that the Panel may accord any relevant constituent data and methodology at least an equal degree of consideration to that information as it does to the methodology in Annex 3?**
- b. How does the interpretation offered by the United States in the mentioned paragraph 67 give effect to the language in both Article 1(a)(ii) and Article 1(h)(ii)?**

Response (a):

144. As described above, Article 1(h)(ii) governs a different part of the mathematical calculation than Article 1(a)(ii), and China has not explained the basis upon which the Panel may simply disregard the textual differences between these two provisions.

145. With regard to Article 1(h)(ii) specifically, as described in response to Question 62, Article 1(h)(ii) requires Current Total AMS to be "calculated in accordance with the provisions of the Agreement," and "calculated . . . with the constituent data and methodology." Grammatically, "in accordance with" and "with" are separate and distinct prepositions. If "in accordance with" was intended to apply to both objects (the Agreement and the constituent data and methodology), the second "with" would be superfluous.¹⁷⁰

146. For this reason, the relevant preposition relating to the constituent data and methodology in Article 1(h)(ii) is "with." "With" in this context can mean "by use of (a thing) as an instrument or means . . . by means of."¹⁷¹ This is a less demanding requirement than "in accordance with." Thus, suggesting a lesser degree of consideration for material in the Supporting Tables and providing a similar "hierarchy" as the definition in Article 1(a)(ii).

147. For this reason, the United States does not view Article 1(h)(ii) as requiring an equivalent level of consideration for the constituent data and methodology, as for the provisions of the Agriculture Agreement, including Article 6.

¹⁶⁹ *Korea – Various Measures on Beef* (AB), para. 111 (citing *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15).

¹⁷⁰ The phrase would have read "calculated in accordance with the provisions of this Agreement . . . and the constituent data and methodology."

¹⁷¹ *Shorter Oxford English Dictionary*, "with," vol. II, p. 3703-04 (ed. 1993) (Exhibit US-105).

148. Additionally, the United States emphasizes that the evaluation and mathematical computation contemplated in Article 1(h)(ii), including the determinations related to total value of production of each basic agricultural product, the analysis of *de minimis* levels, and the summing of all AMSs that exceed the *de minimis* level, are not activities addressed in Annex 3. Rather, the Panel's assessment under Annex 3 relates to the calculation of the product-specific AMSs for wheat, Indica rice, Japonica rice, and corn – calculation governed by Article 1(a)(ii).

Response (b):

149. Given that 1(a) and 1(h) address two separate steps in the calculation of AMS, the analysis in paragraph 67 of the U.S. Second Written Submission regarding 1(a)(ii) is not intended to "give effect to" the language in Article 1(h)(ii). Nor, for the same reason, should it do so. In collapsing the requirements of these two provisions, China attempts to read into Article 1(a)(ii) text that simply is not there. For the reasons explained above, the Panel should reject China's arguments, and base its own calculations on the text of the provisions as written.

Question 81: Please comment on the following statement by the Panel in *Korea – Beef*:

Article 1(h)(ii) provides for two things: that the "Total AMS" is the "sum" of all the AMS sub-components; and that the Current Total AMS is calculated "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." Article 1(a)(ii), in turn, provides that in any given year the AMS shall be calculated "in accordance with Annex 3, 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". In the calculations of product specific support the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period.¹⁷² (underline added)

Could the United States please explain whether and how this statement was addressed by the Appellate Body?

Response:

150. See response to Question 79 above.

Question 82: What interpretation and legal value should the Panel attach to the following statement by the Appellate Body in *Korea – Beef*?

On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any

¹⁷² Panel Report, *Korea – Beef*, para. 811. (underline added)

given product is calculated in subsequent years consistently with support calculated in the base period.¹⁷³

Response:

151. See generally response to Question 79 above.

152. This footnote citing to the panel report in *Korea – Beef* appears to indicate that while the panel and Appellate Body both agreed they did not need to reach the issue of how to address constituent data and methodology, the Appellate Body disagreed with the panel's broad statements regarding consistency between the calculation of Base Total AMS and Current Total AMS.¹⁷⁴ As discussed above and previously, the Appellate Body found that the text of Article 1(a)(ii) provided "a more rigorous standard" for considering compliance with Annex 3 of the Agriculture Agreement than for the constituent data and methodology.¹⁷⁵ This hierarchy applies regardless of any inconsistent calculation methods that may have been used in the supporting materials.

153. The Panel is not bound by the prior findings of the Appellate Body in this report. Rather, the Panel may look to this or any other statement in a prior panel or Appellate Body report, and may rely on such interpretations where they are persuasive. In this respect, we note that the interpretation set out by the Appellate Body in *Korea – Beef* is consistent with that set out by the United States in its submissions, and with the customary rules of international law regarding interpretation as reflected in Articles 31 and 32 of the VCLT.

For China:

Question 83: In relation to the following statement, please elaborate further on the legal sources that support the underlined argument below:

The choices Members made with regard to the constituent data and methodology in a Member's Accession Protocol and Schedule are binding for that Member's future calculation of its annual level of domestic support. Contrary to what the United States suggests, they apply regardless of what domestic support program that Member had in place at the time of its accession (as recorded in its Supporting Tables) and what domestic support programs it has in place at the time of the assessment of the adherence to its domestic support commitments.¹⁷⁶

Question 84: There are different ways of providing market price support. When a measure changes to the extent, for example, that it does not include government procurement or the

¹⁷³ Appellate Body Report, *Korea – Beef*, fn. 49, referring to Panel Report, *Korea – Beef*, para. 811.

¹⁷⁴ *Korea – Various Measures on Beef* (AB), fn 49.

¹⁷⁵ *Korea – Various Measures on Beef* (AB), para. 112; see also U.S. Answers to Questions, Question 45, paras. 119-121.

¹⁷⁶ China's second written submission, para. 189.

purchasing of products by the government, what implication would that have for the definition of the quantity of eligible production in China's tables of supporting materials?

Question 85: In relation to the following statement, please elaborate on whether there are any previous examples where a panel or the Appellate Body has come to a similar conclusion, and how would those conclusion(s) be applicable in this case:

While the text of paragraph 9 is styled as a mandatory rule, the applicable context, relevant subsequent practice and the object and purpose of the *Agreement on Agriculture* support a more flexible interpretation that gives room for later-acceded Members to agree with the WTO, upon their accession, FERPs from a base period other than 1986-1988.¹⁷⁷ (original footnotes omitted)

Question 86: Please elaborate on how, from a legal standpoint, the mandatory nature of an obligation can be reduced, as indicated in the quote below. Please provide any relevant examples of such situation under WTO law:

This suggests that, in situations where a Member's Schedule has calculated AMS on the basis of FERPs calculated for years other than 1986-1988, that may reduce the mandatory nature of the obligation contained in the term "shall" in paragraph 9 of Annex 3, which would otherwise suggest use of the 1986-1988 base period.¹⁷⁸

Question 87: In relation to the following statement, please elaborate on previous examples where a panel or the Appellate Body has come to a conclusion similar to the one noted below:

In this context, China recalls that subsequent practice has previously been used to clarify the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, including where, on its face, the treaty sets out what appears to be a mandatory rule.¹⁷⁹ (original footnotes omitted)

Question 88: Taking into account the ordinary meaning of the term "constituent data and methodology" contained in Article 1 of the AoA, please elaborate on why, according to China, the definition of the quantity of eligible production is a *methodological* matter.

5. Fixed External Reference Price (FERP)

For Both Parties:

Question 89: Please explain what the Parties believe to be the difference between a 'base period' as used in the Agreement on Agriculture (Articles 1(a) and 1(h), and Annex 3) and

¹⁷⁷ China's second written submission, para. 320.

¹⁷⁸ China's second written submission, para. 321.

¹⁷⁹ China's second written submission, para. 333.

the years used in a "fixed external reference price". Can these two periods be different? If not, why not?

Response:

154. “Base period,” in the context of domestic support, is not explicitly defined in the text of the Agriculture Agreement. The usage of this phrase in the Agriculture Agreement suggests a different meaning in different circumstances.¹⁸⁰ For instance, Annex 2, paragraph 6, discussing decoupled payments to farmers, suggests a generic “fixed base period” determined by the Member.¹⁸¹ The text of Article 9.2(b)(iv) regarding export subsidies describes a base period of 1986 to 1990.¹⁸² Generally, “base period” describes the period of time for which an acceding or negotiating Member provides information as to its form and level of domestic support to agricultural producers.

155. Base period is distinct from the “fixed external reference price,” which is one component of the calculation for market price support as set out in Annex 3. The period relevant to the fixed external reference price is specifically defined in Annex 3, paragraph 9, which provides that this value “shall be based on the years 1986 to 1988.” The language of Annex 3, paragraph 9 is mandatory and does not permit deviations.¹⁸³

156. If an acceding Member seeks the right to use an alternative methodology for establishing its fixed external reference price for the purposes of future calculations, this would need to be specifically identified and committed to in its Accession Protocol. If, as China suggests, such a deviation were not required to be explicitly memorialized, Members would be able to extrapolate as new commitments any number of calculation methodologies contained in their supporting materials, even if inconsistent with the text of the Agriculture Agreement. This would result in a system where it would be nearly impossible to identify other Members’ specific commitments, undermining certainty and undercutting the objective of establishing “a fair and market-oriented agricultural trading system” that implements reforms “in an equitable way among all Members.”¹⁸⁴

¹⁸⁰ See Agriculture Agreement, Article 1(a)(i) (regarding support “provided during the base period”), Article 1(d)(i) (regarding support “provided during the base period”); Article 1(h)(i) (regarding support “provided during the base period”); Article 5.6 (regarding special safeguard provisions and “corresponding periods in the base period”); Article 9.2(b)(i)-(iv) (discussing “the 1986-1990 base period levels”); Annex 2, paragraph 6 (discussing decouple support tied to a “fixed base period”); Annex 2, paragraph 11 (describing structural adjustment assistance “in any year after the base period”); Annex 2, paragraph 13 (describing regional assistance “in any year after the base period”); Annex 3, paragraph 5 (describing the calculation of AMS for “the base period”); Annex 5 (explicitly defining “the base period 1986-1988 (“the base period)”) for the purposes of the Special Treatment with Respect to Paragraph 2 of Article 4).

¹⁸¹ Agriculture Agreement, Annex 2, paragraph 6.

¹⁸² Agriculture Agreement, Article 9.2.

¹⁸³ Further, the fact that Uruguay Round Members’ typical base period coincided with the period used for the fixed external reference price does not alter this assessment.

¹⁸⁴ Agriculture Agreement, preamble.

157. Given that no explicit requirement with regard to the base period in the context of domestic support exists, the United States understands that acceding Members can utilize a “base period” other than 1986 to 1988 when they provide domestic support information as recorded in Articles 1(a)(i) and 1(h)(i). This being the case, there is similarly no reason to reference the chosen base period in an acceding Member’s Working Party Report or Accession Protocol, as this choice would not represent a departure from WTO obligations.

158. In its supporting materials, China used a base period for purposes of domestic support of 1996-1998; China also used external reference prices based on those years. As set out in Exhibit US-66, China exceeds its prescribed *de minimis* level for all of the relevant products at issue in this dispute even using an external reference price based on these more recent years. The United States does not consider there to be a legal basis to find that these years are appropriate for use in the calculation of China’s product-specific AMSs. However, we recall that China exceeds its Final Bound Commitment Level of “nil” if it exceeds the *de minimis* level of 8.5 percent for any product – the amount of support provided over this level would not affect the Panel’s finding of inconsistency in this respect. And the United States has demonstrated that China exceeds its *de minimis* level, using either the 1986-1988 fixed external reference price or China’s asserted 1996-1998 reference price, for each of four separate basic agricultural products. Therefore, regardless of the reference price used, the Panel may conclude that China has exceeded its *de minimis* level for these products.

For the United States:

Question 90: In its second written submission, the United States (referring to China's Table 6 in its first written submission) asserts that "[w]hile 36 newly acceding Members used alternative base periods, only 10 used alternative fixed external reference prices."

- a. Please list each of the 10 Members who have allegedly used alternative fixed external reference prices.**

Response:

159. Ten of the newly acceded Members listed in Table 6 of China’s First Written Submission reported maintaining market price support measures at the time of accession. These Members are Saudi Arabia, Jordan, Croatia, Lithuania, China, Chinese Taipei, Vietnam, Russia, Lao, and Kazakhstan.

160. Nine of these Members compared applied administered prices to annual external reference prices for the same year – that is, they did not calculate and apply an average external reference price for a time period to compare to the applied administered price for a given year. One acceding Member, Chinese Taipei, utilized an average external reference price based on years other than 1986-1988 in its Table DS 5.

161. The United States notes that Bulgaria also maintained market price support at the time of accession, but utilized an external reference price based on the years 1986 to 1988 in its Total

AMS calculations.¹⁸⁵ This review provides yet further evidence that there is neither context in Members’ Schedules, nor a “practice,” that supports the use of a time period other than that set out in Annex 3, paragraph 9, for purposes of calculating current AMS and Current Total AMS.

- b. The above statement seems to suggest that the United States believes that there is a separation between the fixed external reference price and the base period, and that Members can use a different fixed external reference price if the Member concerned so specifies. Is this the case? Additionally, must such use of a 'different' fixed external reference price be explicitly noted to be valid?**

Response:

162. See response to Question 89 above.

Question 91: Given the discussion on the difference between the external reference price for the base AMS and the fixed external reference price for current total AMS, did any Party to any accession negotiations raise the issue of the alleged difference between which years a Member could use in their base and current AMS calculations?

Response:

163. With regard to China, any agreement among the Members regarding the calculation of Current Total AMS in subsequent years was explicitly identified in China’s Working Party Report.¹⁸⁶ With respect to other acceding Members, the United States has not identified any discussion suggesting an agreement among the Members regarding the interpretation or application of Annex 3, paragraph 9 with respect to market price support calculation in subsequent years.¹⁸⁷

164. As noted in response to Question 77 above, the evidence provided in Exhibit CHN-15 and discussed at paragraph 260 of China’s Second Written Submission does not demonstrate otherwise. According to Exhibit CHN-15, Members may have inquired as to the external reference price calculation.¹⁸⁸ The United States also notes that China’s response related to its “Supporting Tables Relating to Domestic Support Measures in Accordance with the Format Contained in WT/ACC/4.”¹⁸⁹ This document was submitted to the Working Party in a Communication from China under the header “Information on the Trade Regime of China for the Purposes of Transparency.”¹⁹⁰ This further shows that China understood the document to provide

¹⁸⁵ Bulgaria’s Supporting Table, G/AG/AGST/Vol.5, page 7.

¹⁸⁶ China’s Working Party Report, para. 235 (Exhibit US-7).

¹⁸⁷ With regard to other accession negotiations, as has already been established, several acceding Members used base periods other than the years 1986-1988. During a number of these accessions, the choice of “base period” appears to have been discussed by Members.

¹⁸⁸ See China’s Second Written Submission, para. 260. Contrary to China’s assertions, we have identified no evidence in China’s Exhibit CHN-15 clarifying the dates used to develop the external reference price.

¹⁸⁹ Communication from China, WT/ACC/CHN/5 (Feb. 23, 1997).

¹⁹⁰ See WT/ACC/CHN/5 (Feb. 23, 1997), WT/ACC/CHN/8 (May. 23, 1997), and WT/ACC/CHN/9 (Jul. 23, 1997) providing details on China’s domestic support during a 1993 to 1995 base period. Subsequent versions of the Supporting Tables were submitted nearly three years later in preparation for meetings of the Working Party.

information to WTO Members on China’s trade regime, and not to propose or reflect specific commitments or concessions.

Question 92: Did the United States realise that each of these 10 Members, and indeed all 36 Members, had been using a different base period during the accession negotiations? And, if so, how would the United States explain that they and other Members allowed those Members to use those different base periods to calculate their AMS?

Response:

165. Based on accessions documents, the United States was aware that information was submitted on this basis and that Base Total AMS was calculated on this basis. As noted above, however, the United States does not view use of an alternative “base period” to provide information on an acceding Member’s current domestic support regime as inconsistent with the Agriculture Agreement.

- a. We understand that during the accession negotiations it may not have been clear that these Members used a different period but in every subsequent notification, each of these Members identified a different base period in every meeting of the Committee on Agriculture. Did the United States raise questions about this or realise that this practice may create an inconsistency?**

Response:

166. The United States is not aware of any Member having raised a question during a Committee on Agriculture meeting regarding China’s use of a later fixed external reference price. However, the failure to raise an issue in the Committee on Agriculture would not indicate agreement with another Member’s legal interpretation or prevent an issue from being raised in dispute resolution. A panel must base its assessment of the matter at issue on a proper interpretation of the legal provisions at issue and the proper application of those provisions to the facts before it.

6. Quantity of Eligible Production

For Both Parties:

Question 93: In the tables below, please provide the proportion, or its best estimate, of "out-of-grade" or "other" grain that does not meet the relevant quality requirements and would not be subject to government procurement at a minimum price or a reserve purchase price (for corn).

Wheat

	2012	2013	2014	2015
Hebei				
Jiangsu				

Anhui				
Shandong				
Henan				
Hubei				

Early-season Indica rice

	2012	2013	2014	2015
Anhui				
Jiangxi				
Hubei				
Hunan				
Guangxi				

Mid- to late-season Indica rice

	2012	2013	2014	2015
Jiangsu				-
Anhui			0.8% (US-98, PAGE 40)	0% (US-98, PAGE 28)
Jiangxi			0% (US-98, PAGE 40)	0% (US-98, PAGE 28)
Henan			2.2% (US-98, PAGE 41)	1.1% (US-98, PAGE 29)
Hubei			0.7% (US-98, PAGE 41)	0% (US-98, PAGE 29)
Hunan			0.0% (US-98, PAGE 41)	1.7% (US-98, PAGE 29)
Guangxi			0.0% (US-98, PAGE 41)	0% (US-98, PAGE 29)
Sichuan			1.3% (US-98, PAGE 41)	1% (US-98, PAGE 29)

Japonica rice

	2012	2013	2014	2015
Liaoning			0% (US-98, PAGE 42)	0% (US-98, PAGE 30)
Jilin			0% (US-98, PAGE 42)	0% (US-98, PAGE 30)
Heilongjiang			0% (US-98, PAGE 42)	0.3% (US-98, PAGE 30)

Jiangsu			0% (US-98, PAGE 42)	1.5% (US-98, PAGE 30)
Anhui			0% (US-98, PAGE 42)	0% (US-98, PAGE 30)

Corn

	2012	2013	2014	2015
Heilongjiang			0% (US-98, PAGE 36)	0% (US-98, PAGE 22)
Jilin			0% (US-98, PAGE 34)	0% (US-98, PAGE 21)
Liaoning			0% (US-98, PAGE 34)	0% (US-98, PAGE 21)
Inner Mongolia			0% (US-98, PAGE 34)	0% (US-98, PAGE 21)

Response:

167. The United States refers the Panel to our response to Question 25 after the first substantive panel meeting and Exhibit US-98 describing the negligible level of production graded as “other” or “off grade” in any particular year. The surveys identified by the United States suggest not only that a negligible amount of production each year is graded as “other” or “off grade,” but that much of each year’s production is graded as Grade 3 and above. Noting that China’s market price support programs provide a higher applied administered price for Grades 1 and 2, a market price support calculation based on the Grade 3 applied administered price, as submitted by the United States, likely underestimates the actual value of support provided by China under each of its market price support programs.

168. We have provided in the charts above a specific rate of “other” or “off grade” products for the year and provinces under consideration where that information was available in the Chinese survey data contained in Exhibit US-98. We were unable to locate any information regarding the products and provinces for which no amount is listed in the charts. If useful to the Panel’s analysis, we note that the average of the “other” or “off grade” rates provided in Exhibit US-98 for the years 2010 through 2016 on a per product basis are as follows: 1.14 percent for wheat, 0.23 percent for early-season Indica rice, 0.79 percent for mid-to-late season Indica rice, 0.99 percent for Japonica rice, and 0.0 percent for corn.

For the United States:

Question 94: Please confirm the Panel's understanding that the geographical scope of the measures has been taken into account in the calculation of the quantity of eligible production in the data previously provided by the Parties, by using only the wheat, Japonica rice, Indica rice and corn production numbers from the relevant producing provinces?

Response:

169. As described in paragraphs 117-121 of the U.S. First Written Submission, the United States has only included production for the provinces where the market price support programs operate in its calculation of market price support.

For China:

Question 95: Endnote 19 in Rev.3 provides as follows:

Eligible Production:

(1) Eligible production for grain:

(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).

(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.* (emphasis and underline added)

- a. We understand China's position to be that endnote 19 in Rev.3 sets out a *definition* of what is to be understood by "quantity of eligible production" for purposes of calculating AMS. Could this create a disconnect between the "quantity of eligible production" under Rev.3 and the "quantity of eligible production" as embodied in the Chinese legal instruments governing market price support at any given moment in time? What is the textual basis in the tables of supporting material to argue that this alleged definition also applies to future calculations of Current Total AMS for programs other than those referred to in Rev.3?
- b. Please elaborate on why China is contending that this endnote sets out a definition for purposes of the calculation of AMS and Total AMS.
- c. What interpretation should be given to the text which could suggest that its scope would only be applicable to (i) State Procurement Price "for the food security purpose (see Endnote 10 of Supporting Table DS 1)", and to "Protective Price ... in order to protect farmer's income."

Response:

7. Calculations and Methodology

For Both Parties:

Question 96: Please refer to Annex A to this document. In this connection, please could the Parties confirm the accuracy of the data sourced from their respective submissions and

contained within these tables and provide comments, corrections or missing data where relevant. These data will be considered comprehensive by the Panel and may be used in various calculations where necessary.

Response:

170. Please see Exhibit US-106.

Question 97: Please provide unconverted data (that is, data which has not been subject to a conversion factor) for rice, where applicable, for the AAP, FERP (i.e. prices used for each of the three years), and QEP. If the data previously provided were unconverted and not subjected to a price or quantity conversion, there is no need to resubmit that data. Please include specific references to relevant material or exhibits.

Response:

Applied Administered Price

171. For early-season Indica rice, mid-to-late season Indica rice, and Japonica rice, the unconverted applied administered prices are available in the annual Rice MPS Notices and MPS Implementation Notices.¹⁹¹ The unconverted price is for paddy rice. The unconverted prices are

¹⁹¹ See 2012 Rice MPS Notice, Exhibit US-39; 2013 Rice MPS Notice, Exhibit US-40; 2014 Rice MPS Notice, Exhibit US-41; and 2015 Rice MPS Notice, Exhibit US-42. See also *Notice on Issuing the Early-Season Indica Rice Minimum Purchase Price Implementation Plan for 2012* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2012] No. 1943, issued July 2, 2012) (Exhibit US-44); *Notice on Issuing the Mid- to Late-Season Rice Minimum Purchase Price Implementation Plan for 2012* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2012] No. 2726, issued August 28, 2012) (Exhibit US-45); *Notice on Issuing the Early-Season Indica Rice Minimum Purchase Price Implementation Plan for 2013* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2013] No. 1281, issued July 2, 2013) (Exhibit US-46); *Notice on Issuing the Mid- to Late-Season Rice Minimum Purchase Price Implementation Plan for 2013* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2013] No. 1836, issued September 18, 2013) (Exhibit US-47); *Notice on Issuing the Wheat and Early-Season Indica Rice Minimum Purchase Price Implementation Plan for 2014* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2014] No. 1026, issued May 20, 2014) (Exhibit US-26); *Notice on Issuing the Mid- to Late-Season Rice Minimum Purchase Price Implementation Plan for 2014* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Fa Gai Jing Mao [2014] No. 2104, issued September 15, 2014) (Exhibit US-48); *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan for 2015* (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, China Grain Reserves Corporation, Guo Liang Tiao [2015] No. 80, issued May 18, 2015) (for the purposes of this section, “2015 Indica Rice and Japonica Rice MPS Implementation Plan”) (Exhibit US-27).

also provided at paragraph 48 and in the third column of Table 4 (“Rice MPS Notice Price”) of the U.S. First Written Submission, resubmitted below for the Panel’s convenience:

Table 4: Applied Administered Price for Indica Rice or Japonica Rice			
Year	Type	Rice MPS Notice Price	Price
<i>Unit</i>		<i>yuan/50 kilogram</i>	<i>yuan/ton</i>
2012	Early Indica	120	2,400
2012	Mid/Late Indica	125	2,500
2012	Japonica	140	2,800
2013	Early Indica	132	2,640
2013	Mid/Late Indica	135	2,700
2013	Japonica	150	3,000
2014	Early Indica	135	2,700
2014	Mid/Late Indica	138	2,760
2014	Japonica	155	3,100
2015	Early Indica	135	2,700
2015	Mid/Late Indica	138	2,760
2015	Japonica	155	3,100

Fixed External Reference Price

172. The United States obtained the unconverted data used to calculate a 1986 to 1988 fixed external reference price for Indica rice and Japonica rice from China’s 1986-1988 *Summary Surveys of China’s Customs Statistics*, which are provided in Exhibit US-67.¹⁹² The unconverted export prices are for milled rice. The calculation of the fixed external reference prices for Indica and Japonica rice is available in Exhibit US-65 (revised).

Quantity of Eligible Production

173. The relevant quantity of eligible production is the volume of Indica rice and Japonica rice grown in the provinces where the MPS Programs operate. China does not release data on rice production by species, but rather by growing season, and thus the United States has constructed the relevant volumes as described in the U.S. First Written Submission.¹⁹³ The unconverted volume provided in the Chinese sources is for paddy rice production volumes by province.

174. The unconverted data is available in the following Exhibits:

Sources of Unconverted Calculation Data
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¹⁹² Customs General Administration of P.R. China, *Summary Surveys of China’s Customs Statistics* (1986 – 1988), (Exhibit US-67).

¹⁹³ See United States First Written Submission, fn. 230.

Grain	Year	Quantity Data by Province
Indica Rice	2012	<i>China Agricultural Statistical Reports</i> (2012-2014), page 21 (Early-Season), pages 22-23 (Mid-to-late/Dual), Exhibit US-77
	2013	<i>China Agricultural Statistical Reports</i> (2012-2014), page 22 (Early), pages 23-24 (Mid-to-late/Dual), Exhibit US-77
	2014	<i>China Agricultural Statistical Reports</i> (2012-2014), page 21 (Early), pages 22-23 (Mid-to-late/Dual), Exhibit US-77; also available in <i>China’s Rural Statistical Yearbook</i> (2016), Table 7-18, Exhibit US-76
	2015	<i>China’s Rural Statistical Yearbook</i> (2016), Table 7-18, Exhibit US-76
Japonica Rice	2012	<i>China Agricultural Statistical Reports</i> (2012-2014), pages 22-23, Exhibit US-77
	2013	<i>China Agricultural Statistical Reports</i> (2012-2014), pages 23-24, Exhibit US-77
	2014	<i>China Agricultural Statistical Reports</i> (2012-2014), pages 22-23, Exhibit US-77; also available in <i>China’s Rural Statistical Yearbook</i> (2016), Table 7-18, Exhibit US-76
	2015	<i>China’s Rural Statistical Yearbook</i> (2016), Table 7-18, Exhibit US-76

Question 98: While it may be the case that China has not specified the level of processing in its supporting table, it is using FOB export prices for milled rice. Was China exporting paddy or milled rice at the time those tables were prepared?

Response:

175. As described in Exhibit US-67, between 1986 and 1988, China exported some “rice in husk or husked,” but a far greater volume of “rice semi-milled, milled.” The United States understands China’s applied administered price, however, to reflect paddy rice prices.

Question 99: What is the meaning of the phrase "as close as practicable to the point of first sale as specified in a Member’s Schedule and in the related supporting material".¹⁹⁴ (own emphasis)

- a. **Specifically, how should the concept of the point of first sale be applied to the facts of this case? For the products concerned, what is the point of first sale that the Panel should look to for the calculation of AMS?**

Response:

176. Paragraph 7 of Annex 3 says in full:

The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

That is, “point of first sale” indicates that the AMS is to be calculated in relation to the first instance the commodity is sold. The second sentence clarifies that the AMS is seeking to quantify measures that “benefit the producers of the basic agricultural product,” rather than

¹⁹⁴ Agreement on Agriculture, Article 1(b).

measures that benefit processors, traders or others involved in the agricultural sector, but do not extend a benefit to producers themselves. This also supports an understanding that product-specific AMS should be calculated so as to measure the benefit at the first point of sale, which typically would involve the producers.

177. As noted by China, the definition of “basic agricultural product” in Article 1(b) of the Agriculture Agreement further provides that “in relation to domestic support commitments [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.”

178. The relevant point of first sale in this dispute is when Chinese farmers in the relevant provinces sell their wheat, Indica rice, Japonica rice, or corn to the Chinese government or entities purchasing at the direction of the Chinese government.

179. Nothing in China’s supporting material suggests an intention to deviate from the obligation to calculate AMS at the point of first sale. In particular, for Indica and Japonica rice, there is no indication of the type of rice, either for the external reference prices or the applied administered prices. China asks the Panel to infer a chosen point of sale and a type of “basic agricultural product” based on the comparison on various draft Supporting Tables, none of which contains any explicit written reference to this point of sale, and the recollection of China’s negotiators.¹⁹⁵ However, neither China’s supporting materials nor the text of the Agriculture Agreement support China’s assertion. The Panel thus should base its calculation of market price support for rice on the text of Article 1(b), and paragraphs 7 and 9 of Annex 3, which require the calculation to be done at the point of first sale.

180. For the purposes of the evaluation of Indica and Japonica rice, the first sale would be on a paddy rice basis. Therefore, the fixed external reference price for rice must be converted to an unmilled or paddy rice equivalent value.

Question 100: In practical terms, when performing the calculation of AMS for a specific product, what is the difference between calculating AMS while taking constituent data and methodology into account; and calculating AMS in accordance with both Annex 3 and constituent data and methodology?

Response:

181. As explained in response to Question 62 above, Article 1(a)(ii) requires that product-specific AMS is “calculated *in accordance* with the provisions of Annex 3 of this Agreement,”¹⁹⁶ and “*taking into account* the constituent data and methodology used in the tables of support material.”¹⁹⁷ “In accordance with” requires conformity with the provisions of Annex 3, while “taking into account” is less rigorous and permits consideration or notice to be taken of the material. That is, the Panel must calculate AMS in conformity with Annex 3. In doing so, the

¹⁹⁵ Conversion rate applied in WT/ACC/CHN/38 (Exhibit CHN-64).

¹⁹⁶ Agriculture Agreement, Article 1(a)(ii).

¹⁹⁷ Agriculture Agreement, Article 1(a)(ii).

Panel also may take into account any constituent data and methodology contained in the tables of China’s supporting materials. As described in response to Question 65, such information may include the types of “basic agricultural product,” the relevant “year” and how various types of year are tied together into a Current Total AMS calculation, and product-specific processing or quality information necessary to the calculation of the value of support. Based on the text of Article 1(a)(ii), constituent data and methodology cannot provide *alternative* data and methodology for the calculation of domestic support, such as market price support, not consistent with the calculations set out in Annex 3.

182. In suggesting that the Panel must calculate product-specific AMS in conformity with both Annex 3 and its constituent data and methodology, China both misinterprets Article 1(a)(ii) by reading into it text that is not there, but also misunderstands what constituent data and methodology comprises. Under China’s interpretation, the Panel thus must apply to the calculation of AMS any information contained in China’s supporting materials, regardless of its nature or consistency with the Agriculture Agreement.

183. China’s interpretation produces an untenable result: elevating mere descriptive language or unused data in supporting materials that are inapt, and do not evidence Members’ agreement, to alter WTO obligations or to subvert the plain text of Agriculture Agreement such that it no longer applies at all.¹⁹⁸ For instance, with regard to quantity of eligible production, China’s submissions do not – and indeed could not – provide an interpretation considering *both* the language of Annex 3, paragraph 8 and its purported constituent data and methodology. Rather, to reach its desired result, China summarily declares that the Agriculture Agreement does not provide a definition or methodology for determining eligible production and thus it is appropriate to completely replace the plain language of the Agriculture Agreement with its own country-specific “definition.”¹⁹⁹ As the United States has explained, however, the language in Annex 3 is clear and, interpreted according to customary rules of international law, provides sufficient guidance for the Panel to determine the appropriate values to use in the market price support calculation.

184. Similarly, with regard to fixed external reference price, while China asserts that “a harmonious interpretation between (i) the methodology set out in paragraph 9 of Annex 3 and (ii) the constituent data and methodology in Rev.3 is possible,”²⁰⁰ its resulting interpretation again gives no meaning to the plain text of the Agriculture Agreement.²⁰¹ Specifically, China reads out the obligation that all Members’ fixed external reference prices “shall be based on the years 1986 to 1988.”

¹⁹⁸ China Second Written Submission, para. 359.

¹⁹⁹ China Second Written Submission, para. 365

²⁰⁰ China Second Written Submission, para. 319.

²⁰¹ See e.g., China Second Written Submission, paras. 321-348. See also US First Written Submission, paras. 101-03.

185. Under a proper interpretation of Article 1(a)(ii), the Panel can calculate product-specific AMS both consistently with Annex 3 and taking into account any constituent data and methodology used in the tables of China’s supporting materials.

Question 101: Regarding the possible adjustment that would be needed to compare the variables at the same stage of processing, if a conversion rate of x is used to adjust either the FERP, or the AAP and the QEP, the result seems to be identical from a mathematical standpoint (see below).

Could China and the United States provide alternative calculations adjusting the variables that were not adjusted (i.e. China adjusting only the FERP and the United States adjusting the AAP and QEP). Could China please provide its reasons for calculating the MPS at milled level, rather than at paddy level, given that the result seems to be unchanged regardless of the level converted?

Conversion factor: x for quantities and prices

Calculating MPS at milled level:

$$MPS = \left(\frac{AAP}{x} - FERP \right) xQ = \frac{xQ * AAP}{x} - xQ * FERP = (AAP - xFERP) * Q$$

Calculating MPS at unmilled level:

$$MPS = (AAP - xFERP) * Q$$

Response:

186. The United States notes that this question assumes that the price conversion rate (applied by China to the applied administered price) and the quantity conversion rate (applied by China to the quantity of eligible production) are the same (here a conversion factor of x). The price and quantity conversion rates are not the same and thus the equation suggested by China’s arguments is not accurate.²⁰²

187. As discussed in prior U.S. submissions,²⁰³ it is inappropriate to use a *volume*-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 – to reflect the change in volume between hulled and paddy rice. Such a conversion is 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,

²⁰² China First Written Submission, paras. 243, 254.

²⁰³ United States Responses to Panel Questions, Question 38, paras. 115-117.

bagging costs, etc. The conversion ratios therefore necessarily must reflect different factors, and using the same ratios will necessarily lead to inaccurate results.²⁰⁴

188. The United States agrees that a volume conversion rate for quantity of 70 percent is an industry standard. There is no industry standard for price conversion rates, but Exhibit US-68 – which is based on China’s own reported prices for paddy and milled rice – provides an appropriate price conversion rate based on the factors described above.

For the United States:

Question 102: The United States asserts in its answers provided during the substantive meeting that the Base AMS and Base Total AMS do not have a calculation methodology. Paragraph 5 of Annex 3 of the AoA provides as follows:

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

Similarly, Articles 1(a)(i) and 1(h)(i) of the AoA provide respectively as follows:

...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... (Underline added)

... with respect to support provided during the base period (i.e. the "Base Total AMS")... (Underline added)

- a. Is the term "base period" in the cited provisions referring to the same measurement of domestic support? If not, to what other "base period" are each of these provisions referring?**
- b. If the Panel were to find that the "base period" contained in Paragraph 5 of Annex 3 of the AoA refers to the Base Total AMS, would this imply that the rules set out in the paragraphs following paragraph 5 of Annex 3 apply to the calculation of such type of AMS? If not, to what other type of AMS is paragraph 5 supposed to apply?**

Response:

189. “Base period” in relation to domestic support is not defined by the Agriculture Agreement.²⁰⁵ The “base period” referred to in Articles 1(a) and 1(h), as well as Annex 3, paragraph 5, is likely the same or similar base period used by a Member to disclose the types of

²⁰⁴ See United States First Written Submission, para. 116; *see also* Calculation of Rice Price Conversion, (Exhibit US-68).

²⁰⁵ Agriculture Agreement, Annex 5, paragraph 1(a) does define base period with regard to special treatment as 1986 through 1988, and Article 9.1(b)(iv) describes the “1986-1990 base period levels” in relation to export subsidies.

support provided and calculate the value of support in their Supporting Tables.²⁰⁶ However, as indicated in the text of those provisions, this value is an historical value set out in a Member’s supporting materials or Schedule.

190. In the context of Annex 3, paragraph 5, the support provided in the “base period” calculated as described in Annex 3 generally “constitute the base level for the implementation of the reduction commitment on domestic support.” That is, this is the point or figure from which calculation of or negotiation of reduction commitments should occur.²⁰⁷

191. In this regard, the United States would make two points.

192. First, Annex 3, paragraph 5 refers to the base level for implementation of “reduction commitments.” China did not make any reduction commitments in its Schedule or Accession Protocol, and therefore paragraph 5 would not appear to have applied to China at any point. In any event, the Panel need not evaluate China’s consistency with any reduction commitments for purposes of this dispute.

193. Second, paragraph 5 does not contain any ongoing commitment regarding the calculation of the level of domestic support during the base period. Even where an acceding Member should have calculated its Base Total AMS consistent with Annex 3, failure to comply with this requirement is of no consequence during subsequent years. Specifically, the binding commitments that China agreed to during its accession included its Final Bound Commitment Level of “nil,”²⁰⁸ its recourse to a 8.5 percent *de minimis* level, and its agreement to include support described in Article 6.2 in its AMS calculation.²⁰⁹ Therefore, the commitment to maintain levels of “domestic support in favour of agricultural producers expressed in terms of Current Total AMS [that] does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member’s Schedule,”²¹⁰ and to calculate product-specific AMS and Current Total AMS “in accordance with” the Agreement, including Annex 3 and Article 6,²¹¹ apply whether or not its Base Total AMS contained errors or was calculated inconsistently with Annex 3.

²⁰⁶ We note that for the purposes of providing Supporting Tables Members have used a variety of years depending on the availability of data, programs utilized at the time, and desire to provide the Membership with information regarding their domestic support programs. *See, e.g.*, Korea’s Supporting Tables, G/AG/AGST/KOR (providing data from 1989, 1990, 1991, and 1993); India’s Supporting Tables, G/AG/AGST/IND (providing data from 1986-89 based on marketing years for market price support); New Zealand’s Supporting Tables, G/AG/AGST/NZL (providing data from 1985-88 based on marketing years, and 1986-91 for green box measures).

²⁰⁷ The United States notes that Annex 3, paragraph 5 is a vestige of the “Modalities Papers” utilized by the participants in the Uruguay Round to complete their supporting tables, and which were used to facilitate the verification of Member’s Schedules of Concessions. *See* Note by the Chairman of the Market Access Group, Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, MTN.GNG/MA/W/24 (Dec. 20, 1993).

²⁰⁸ China’s Schedule CLII, (Exhibit US-6).

²⁰⁹ China’s Working Party Report, para. 233 (Exhibit US-7).

²¹⁰ Agriculture Agreement, Article 6.3.

²¹¹ Agriculture Agreement, Articles 1(a)(ii) and 1(h)(ii).

194. Nothing in Annex 3, paragraph 5, or Articles 1(a)(i) and 1(h)(i), addresses the method of calculating product-specific AMS or Current Total AMS in any year *after* the base period. Annex 3, paragraph 5 addresses what should have been done previously in calculating the Base Total AMS for certain Members. Articles 1(a)(i) and 1(h)(i) identify the location of static, historical information, and similarly do not create on-going calculation requirements or set out “formulae to be worked out.”²¹²

195. Thus, these provisions regarding the “base period” do not alter the obligations contained in Article 1(a)(i) and Annex 3 with respect to the calculation of current product-specific AMSs, or in Article 1(h)(ii) concerning calculating Current Total AMS.

For China:

Question 103: Please comment on the following statement contained in paragraph 71 of the United States' second written submission:

In determining whether the Member has complied with its reduction commitments, application of the same methodology to the same program as was calculated during the base period would be appropriate, as the Member's reduction commitments were directly tied to the level of support provided during the base period. However, the same cannot be said for the calculation of Current Total AMS where no reduction commitments were made or continue to operate.

Response:

Question 104: What interpretation and legal value should the Panel attach to the following statement by the Appellate Body in *Korea – Beef*?

Thus, for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule.²¹³

²¹² *Korea – Various Measures on Beef* (AB), para. 115 (stating that “for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member’s Schedule).

²¹³ *Korea – Various Measures on Beef* (AB), para. 115.