CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

CLOSING STATEMENT

OF THE UNITED STATES OF AMERICA

AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

April 25, 2018

1. The United States thanks the Chairman and the Panelists for their attention and their patience in this meeting. The exchanges have been useful and have sharpened the points on which the parties differ. Before the meeting closes, the United States wishes to highlight a few, critical points, including where the Panelists have asked specific questions.

2. First, we discuss the debate we have had on terms of reference, an issue China has also raised. It strikes us, reflecting on the exchanges yesterday, that the positions of parties on the specific measures at issue in the U.S. panel request are not too dissimilar. In the course of our discussion, China agrees that a measure can be identified in substance and through a narrative description. China agrees that legal instruments in a panel request can support the identification of a measure at issue. CN even agrees that agricultural policies can be embodied in legal instruments. And, China agrees that domestic support for agricultural producers is identified in the panel request, at least in the form of market-support for wheat, rice, and corn.

3. The difference seems to be that China considers the U.S. identification of: provision of domestic support by China for agricultural producers, including for wheat, rice, and corn, in four specific years, and as embodied in dozens of named legal instruments, including those legal instruments that embody China's policy to provide domestic support, is not specific enough.

4. The United States considers that description adequate and that we have identified the specific measures at issue. And, recalling an exchange yesterday, if the Panel were to make findings on the measures as identified in the US panel request – that is, through both the narrative description and the listed legal instruments through which that support is provided – China would have no doubt as to the inconsistencies found and the resulting recommendation.

5. Reflecting on a second exchange with China yesterday, we want to emphasize that China's position on the terms of reference, and what measure could be identified and challenged as part of this dispute, is a trap – and creates a moving target that could never be hit.

6. On the one hand, China said that, if a Market Price Support Notice for corn had been announced for 2016, then the Market Price Support measure exists and could have been challenged in the U.S. panel request that we put forward in December 2016. But the United States couldn't determine whether the support provided in 2016 was WTO-consistent until the relevant data became available in 2017, or even later. China itself said in its first written submission that the data *were not available to China* even as of the time it filed that submission on October 31, 2017.[1]

7. So, China would apparently consider that it is *acceptable* under the DSU for the United States to assert that China has engaged in WTO-inconsistent action by China *without any legal basis* for making that assertion. We disagree that is acceptable under the DSU, and we seriously doubt China would agree to that position outside of this panel proceeding.

8. We also consider that when the DSB establishes the panel to consider "the matter" set out in the U.S. panel request, the DSB is tasking the panel to consider that matter as of the date the terms of reference under DSU Article 7.1 are set – not a legal situation that could only arise at some subsequent date.

9. Now, on the other hand, China says that, if the Market-Price Support Notice for corn has *not* been announced for 2016, then no Market-Price Support measure exists. And as we've discussed, because of the nature of WTO domestic support commitments, any new domestic

[1] China's First Written Submission, para. 217 (indicating all data to evaluate the 2016 instruments would be available in early 2018).

support could not be evaluated for 1-2 years after the support begins to be provided. That means domestic support provided in relation to corn can *never* be evaluated and demonstrated to be WTO-inconsistent – at least so long as a WTO Member has the flexibility to announce a change or allegedly new form of support in a subsequent year.

10. China's position would therefore convert the WTO dispute settlement system, at least in relation to domestic support, into a *shield* from multilateral scrutiny rather than a mechanism to assist the parties in resolving their disputes.

11. We think the solution to this issue is found in the DSU. As we have discussed, the term used in the DSU – "the matter" raised in the panel request -- can be understood in the context of this dispute to result in examination by the Panel of the *only* combination of measures and claims susceptible of review as of the date the DSB established this Panel's terms of reference. We urge the Panel not to permit China to create, not through actual DSU text but through its litigation goals, a moving target that can never be hit in relation to domestic support.

12. The United States will next address China's legal arguments. In searching for an adjective to describe our perception of China's arguments, we thought China would not find it unfair if we used the same words as in China's opening statement: we find China's arguments to be irrational, contradictory, overreaching.[2]

13. We would like to touch on three issues on which the Panel has asked questions. First, the issue of notifications by WTO Members. Second, the accession process. And third, fairness, which is a theme underlying some of the back-and-forth in this discussion.

14. First, on notifications. The Panel asked whether the United States has raised concerns with notifications by other Members that may have used non-1986 to 1988 data. We will look

[2] China's Opening Oral Statement at the Second Panel Meeting, para. 2.

into this as a factual matter, but we would like to underline that there is no obligation on any WTO Member to raise objections or concerns with respect to notifications submitted by other WTO Members. There is no prerequisite to raise an issue in a committee before bringing it to dispute settlement.

15. It is important to recall that if a notification is made with an error as to a particular term, this is not in itself a breach of the Agreement on Agriculture. Article 18 does not say that notifications must be in conformity with a Member's WTO commitments. Although we would hope notifications reflect those commitments, a notification is not a statement by a Member interpreting a provision of the Agreement. Not raising a concern or objection to a notification is not meaningful or determinative here.

16. Finally, we would hope that a panel would not suggest WTO Members must express concerns or objections with respect to any element of a notification that raises concerns. This would negatively affect the functioning of the Agriculture Committee, but a Member may also be raising concerns as a bilateral issue, and we don't think China or any other Member would want a panel to suggest that Members should raise every issue, in every committee, in every matter so as not to have the lack of an objection held against them.

17. The critical legal issue is whether Members have agreed to a deviation from Article 1(a)(ii) and Annex 3 of the Agreement on Agriculture. The Panel asked a question whether, in the course of China's accession process, it was discussed that data in China's Supporting Tables would not be used for purposes of calculating Total AMS going forward. But because the WTO rule on calculating current support is clear, we think the question actually arises from the opposite perspective – was it discussed and agreed as part of the accession process that the clear WTO rule would *not* be applied for calculating future support?

18. We are not aware that China raised this issue as part of its accession process. And we do not think such a deviation was agreed between WTO Members. Here, a very important piece of context is the China-specific *de minimis* level that is reflected in China's Accession Protocol. This *de minimis* level is *different* from the values in the Agreement on Agriculture; it is applied *specifically* to China; and it was discussed, negotiated, and agreed in *clear text* in the Accession Protocol. This important context shows how a deviation from a clear rule was achieved in the course of China's accession process.

19. That process and result is very different from China's argument in this proceeding. China is trying to achieve the same result of deviating from a WTO rule through arguments about "taking into account," and context, and an alleged practice, not through any written agreement. None of these Chinese arguments are sufficient or reflect an agreement by WTO Members to revise the Agriculture Agreement. Thus, we urge you to consider the *de minimis* level as a key piece of context on this issue.

20. Our final point is the fairness issue underlying a lot of the discussion at this meeting.

21. China has been asserting that it is somehow unfair that it submitted 1996-1998 data at the end of its accession process, but now is being told that its market-price support should be calculated using a 1986-1988 fixed external reference price that's set out explicitly in the agreement.

22. Different time periods can look unfair if just viewed in the abstract, but in this case, there is no unfairness at all.

23. First, we're only arguing that China should apply the Agriculture Agreement. The rule in Annex 3, paragraph 9, is clear. We would assume that China read and would have been aware

of that rule when it acceded. And, we're not aware of any multilaterally agreed statements by WTO Members that paragraph 9 would *not* apply to China.

24. Second, as we've discussed, China does not need to comply today with Base Total AMS. China like all Members is complying with a negotiated Final Bound Commitment Level. As China pointed out, that number was subject to negotiation, and multilaterally agreed. So China's arguments about being held accountable for a different time period for calculating Base Total AMS demonstrate *no unfairness* to being held accountable to calculate Current Total AMS under normal WTO rules.

25. Third, we're only arguing that China should *apply the same rules* as every other WTO Member to calculate its support. We all want to understand, in one number, calculated according to WTO rules, how much trade-distorting support each WTO Member is providing. China's approach, of special, China-specific rules, would frustrate that important function for AMS across WTO Members.

26. Fourth, we're only arguing that China should *be subject to the same rules* as every other WTO Member. In terms of this notion of fairness, we would ask: Why would WTO Members, in permitting China to accede to the WTO, have wanted to give to it special, and apparently less stringent, calculation rules, in relation to market-price support?

27. In other words, why would WTO Members have wanted to effectively permit China to provide more trade-distorting market-price support than another Member with identical support policies?

28. To answer these questions, it's important to recall some important facts. China is not a minor agricultural producer -- its policies have huge influence on agricultural markets and producers worldwide.

29. China is the world's number one wheat producer.

30. China is the world's number two corn producer.

31. China is the world's number one rice producer.

32. And, if you look at the total value of production for all products, China is the number one producer in the world, and India is number two – and it's not even close in terms of the numbers. China's value of production in 2014 was nearly 3 times larger than that of India – $918 billion (according to FAOSTAT) compared to $315 billion for India. And India similarly has a zero commitment level for Total AMS.

33. So, does it really make sense that WTO Members agreed that China should be able to provide more trade-distorting market-price support than India (having the same zero commitment level)? And *not* by virtue of a higher Final Bound Commitment Level, or of an *explicit* provision changing the fixed external reference price of Annex 3, but rather through a "taking into account" of some *but not other* data, and some *but not other* constituent methodology, set out in a Supporting Table, when that data *wasn't even used* in the calculation in that Table, and was not even identified in that supporting table as being for use in future calculations of current support?

34. No, it's not credible to assert Members agreed to that. And we do not think that is fair, either.

35. The United States has enjoyed interacting with the Panel and thanks the Panel, and the Secretariat assisting you, for your engagement and efforts during this panel meeting.