CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING

June 5, 2018

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Exhibit Number	**Exhibit Name**
Exhibit US-107	Sinograin Profile Excerpts
Exhibit US-108	Northeast News, *Sinograin Heilongjiang Subsidiary Takes the Lead to Purchase Corn, Daily Average of 100,000 Tons Entering Granaries* (April 7, 2017)

1. The United States appreciates this opportunity to comment on the responses of China to the Panel's questions following the second Panel meeting. Many of the points that China raises have already been addressed by the United States in its prior written and oral submissions or are not relevant to the claims raised by the United States and the Panel's resolution of this dispute. In the comments below, the United States focuses principally on points that China raises that may be pertinent and have not been addressed in prior U.S. submissions. The absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response.

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.

2. In its responses to Panel Question 52, China attempts to present Exhibits US-101 through US-103 as evidence of internal communication and monitoring documents issued by a market actor. As demonstrated in the U.S. responses to these questions, China's explanation is not supported by the text of Exhibits US-101 through US-103. China erroneously argues that Sinograin acted as a market player and issued multiple price notices throughout the 2016 harvest period adjusting the purchase price to reflect market conditions. However, as demonstrated in prior submissions and again below, Sinograin is a state-owned enterprise directed by the State Council to actively enter the corn market and make purchases at amounts not lower than the prior year.[1] Moreover, the documents placed on the record by China (Exhibits CHN-111-B – CHN-127-B) have little probative value given their general nature and lack of indicia of authenticity. Thus, there is nothing indicating the prices announced in Exhibit US-101 were not administratively applied throughout the purchasing period.

3. In general, Sinograin is entrusted by the State Council with the specific responsibility for "operating and managing China's central grain reserves, and at the same time, is entrusted by the nation to implement grain and oil purchasing, sales, transfer, and storage, and other duties of regulation and control . . . "[2] Sinograin's website states that "since 2005, [Sinograin] has been the primary implementing entity for the minimum purchase price and national temporary purchase and reserve policies [and] has completed relatively well a series of duties for policy-type grain and oil purchasing and storage, selling-off, and relocation, effectively playing the role of the main force for regulation and control."[3] In addition, China's State-run news outlet, *People's Daily*, describes Sinograin "[a]s an important carrier of the national government's macro-control of grain . . . [and] [i]n accordance with the overall requirements of 'always in the market, making balanced purchases' set forth by the State Council, Sinograin actively participates in the inter-departmental coordinating mechanism for corn purchase and storage

[1] *2016 Northeast Region Corn Purchase Notice*, Article I (Exhibit US-87).
[2] Sinograin Profile Excerpts, available: http://www.sinograin.com.cn/aboutZCL.html?navId=47&navPid=9 (Exhibit US-107).
[3] Sinograin Profile Excerpts, available: http://www.sinograin.com.cn/aboutZCL.html?navId=47&navPid=9 (Exhibit US-107).

system reform."[4] It is clear that Sinograin has a central role in implementing China's corn policies and programs.

4. Additionally, China's *2016 Northeast Region Corn Purchase Notice* is addressed to the "China Grain Reserve Corporation" or Sinograin,[5] and provides that relevant regions must "comprehensively organize the branches of central government-owned enterprises under jurisdiction and local backbone grain enterprises to lead the way in entering the market for purchasing."[6] The 2016 instrument further directs central government-owned enterprises, including Sinograin, to "launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role."[7] All of this is to "prevent the occurrence of farmers having 'difficulties in selling grain.'"[8]

5. With regard to the *2016 Inner Mongolia Corn Purchase Notice* (Exhibit US-101) placed on the record by the United States, despite China's assertions, there is no indication that Sinograin subsequently "adjusted its prices" to reflect market prices.[9] Nothing in the documents presented by China[10] indicates that Exhibit US-101 did not implement mandatory purchases at pre-set prices, or that this announcement was "replaced" with subsequent notices. Rather, the

[4] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), p. 1, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[5] *2016 Northeast Region Corn Purchase Notice*, preamble (Exhibit US-87).
[6] *2016 Northeast Region Corn Purchase Notice*, Article I (Exhibit US-87).
[7] *2016 Northeast Region Corn Purchase Notice*, Article I (Exhibit US-87).
[8] *2016 Northeast Region Corn Purchase Notice*, Article VII, preamble (Exhibit US-87).
[9] China Responses to Panel Questions, Question 52a, para. 21.
[10] *See 2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarter, 3 November 2016 (English translation), (Exhibit CHN-111-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarter, 15 November 2016 (English translation), (Exhibit CHN-112-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 16 November 2016 (English translation), (Exhibit CHN-113-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 22 November 2016 (English translation), (Exhibit CHN-114-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 30 November 2016 (English translation), (Exhibit CHN-115-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 7 December 2016 (English translation), (Exhibit CHN-116-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 14 December 2016 (English translation), (Exhibit CHN-117-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 21 December 2016 (English translation), (Exhibit CHN-118-B) and *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 28 December 2016 (English translation), (Exhibit CHN-119-B);*2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Inner Mongolia branch, 16 November 2016 (English translation), (Exhibit CHN-120-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Inner Mongolia branch, 22 November 2016 (English translation), (Exhibit CHN-121-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Inner Mongolia branch, 30 November 2016 (English translation), (Exhibit CHN-122-B). *See* also, *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Heilongjiang branch, 7 December 2016 (English translation), (Exhibit CHN-123-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Heilongjiang branch, 14 December 2016 (English translation), (Exhibit CHN-124-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Heilongjiang branch, 21 December 2016 (English translation), (Exhibit CHN-125-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Heilongjiang branch, 29 December 2016 (English translation), (Exhibit CHN-126-B).

documents placed on the record by China appear to be internal price monitoring documents not available to the public, rather than directions to purchase at a particular price.

6. The United States will address these factual misrepresentations in detail in its comments on China's responses to the subparts to this question below.

7. Regarding the relevance of China's 2016 activities generally, it is important to recall why the parties are discussing the issues raised in this response. China has failed to notify any domestic support it provided after calendar year 2010, and China has never notified domestic support related to its corn market price support programs. Due to this lack of transparency, China has deprived the WTO membership of pertinent factual and legal documents necessary to evaluate properly China's domestic support regime after 2010. Therefore, in order to understand China's domestic support activities, the United States had to independently search for the information necessary to assess China's regime – information that transparent Members make readily available to the public. Ironically, China is hiding behind its lack of transparency to argue that the United States is precluded from receiving findings concerning China's provision of domestic support to corn producers in 2012 through 2015 because China's corn program allegedly "expired" before the United States filed its panel request.

8. As the United States has explained, the complete data required for the United States to analyze China's compliance with WTO rules for the year 2015 were not publicly available *until November 2016* – nearly a year after the end of the relevant time period.[11] Therefore, the United States filed its request for establishment of a panel as soon as was feasible, on December 5, 2016, less than a month after the complete data became available. The United States has not claimed that China has provided domestic support in 2016 and 2017 at levels above its WTO commitments – the necessary data was not available at the time of the U.S. panel request. Under these circumstances, China's argument that the United States is precluded from challenging China's provision of domestic support to its corn producers for 2012-2015 would allow China to evade Panel scrutiny and frustrate the ability of the United States or any other WTO Member to challenge China's provision of domestic support in excess of its WTO commitments.

9. It important to note that the United States placed Exhibits US-101 through US-103 on the record to respond to China's argument that the legal instruments pertaining to its 2015 corn program "expired" and the legal instruments related to its 2016 corn domestic support program "do not reveal the existence of an applied administered price."[12] The United States notes that it is China that argues that its market price support for corn "expired" in 2016, and therefore it is for China to demonstrate that this claim is supported by the record facts. To make this argument China must demonstrate that as of the date of panel request it had ceased to provide support for corn in excess of its commitments. China has made this assertion, but as described previously it was not clear at the time of the panel request and it is not clear now that China has ceased to provide support prices to Chinese corn farmers, or that it no longer provides support in excess of its commitment levels.

[11] Timeline pertaining to China's Temporary Purchase and Reserve Policies (Exhibit US-92).
[12] China Second Written Submission, para. 137.

10. Finally, China has not alleged or demonstrated that the legal instruments through which it provided domestic support in 2016 had removed any WTO-inconsistency as of the date of panel establishment. In fact, China has not denied that it provided market price support in excess of its commitment levels to corn producers in 2012 through 2015.[13] Therefore, the replacement of an annual 2015 corn legal instrument with another instrument for 2016 is not relevant. However, to be responsive to China's assertion that it no longer purchases corn at an applied administered price, the United States submitted Exhibits US-101 through US-103 which show that China continues to direct stated-owned enterprises to enter the corn market and make purchases.

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:

11. China makes a number of factual misrepresentations regarding the *2016 Inner Mongolia Corn Purchase Notice* (Exhibit US-101) in an apparent attempt to present that announcement as an internal notification of market prices only. As the United States explained in its own response to this question, however, Exhibit US-101 reflects a policy instruction from Sinograin to its local branches to purchase corn from farmers at specified prices. That additional documents monitoring market prices may have been generated and circulated internally does not change the content or nature of Exhibit US-101.

12. At the outset, we note that China has presented certain documents that are marked as "internal" Chinese government documents.[14] These documents contain very limited amounts of information, and no related or corroborating documents that would provide context for their content. As "internal" documents, they apparently are not available online or to the public. Nor do they appear to contain any official seal, letterhead, or other marking reflecting their status or nature. Therefore, the probative value of such documents would appear to be very limited.

[13] *See* China Responses to Questions, Question 20, para. 85 and Table 1 (China's erroneous alternative methodology reveals breach of its domestic support commitments for 2013 through 2015).

[14] *See, e.g.*, *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 26 October 2016 (English translation), (Exhibit CHN-127-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 3 November 2016 (English translation), (Exhibit CHN-111-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 15 November 2016 (English translation), (Exhibit CHN-112-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 16 November 2016 (English translation), (Exhibit CHN-113-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 22 November 2016 (English translation), (Exhibit CHN-114-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 30 November 2016 (English translation), (Exhibit CHN-115-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 7 December 2016 (English translation), (Exhibit CHN-116-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 14 December 2016 (English translation), (Exhibit CHN-117-B); *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 21 December 2016 (English translation), (Exhibit CHN-118-B) and *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain headquarters, 28 December 2016 (English translation), (Exhibit CHN-119-B).

13. To assist the Panel in its examination of these documents, however, the United States nonetheless explains below why the documents provided by China do not in any event demonstrate that China did not make the purchases required under Exhibit US-101.

14. First, contrary to China's contention, there is no indication in either form or content that Exhibit US-101 is an "internal notice" similar to Exhibits CHN-111-B through Exhibits CHN-127-B.[15] Unlike the "internal" documents China submitted, Exhibit US-101 was available on a public website.[16] The phrase "internal notice" appears nowhere in the text of Exhibit US-101 in either the U.S. or China translation. Moreover, US-101 requires local branches to publicly post notice of the prices at which those branches must make purchases, suggesting that the information contained in that document is not intended as "internal" guidance, but as public policy regarding corn purchasing. By contrast, the *2016 New Corn Purchase Guidance Price Notices issued by Sinograin Headquarters* that China submitted as Exhibit CHN-127-B and the *2016 New Corn Purchase Guidance Price Notice issued by Sinograin Inner Mongolia* submitted as Exhibit CHN-120B clearly state that the notice is "for internal use only" and do not indicate that the notice or the prices were publically posted. China's internal use only documents should not be considered replacement documents for Exhibit US-101 particularly given that any so-called new purchase price would be unknown to a buyer without a public posting.

15. Second, comparing Exhibits CHN-111-B through CHN-126-B to Exhibit US-101 reveals that Exhibit US-101 includes an announced floor price, whereas Exhibits CHN-111-B – CHN-126-B contain an "average purchase price" for a particular period. Specifically, Exhibit US-101 clearly states that "corn eligible for purchase **will be** national Standard at Medium-grade or above" and "**will be**" at the specific purchase price included in the notice.[17] In contrast, Exhibits CHN-111-B through Exhibit CHN-126-B simply list a range of purchase prices for the various regions as well as the average purchase price.[18] The language in those exhibits indicate that the prices are not for future purchases, but rather reflect past purchases. For instance, the introductory paragraph in Exhibit CHN-120-B provides that "[a]ccording to the market monitoring report issued by Sinograin headquarters on November 16, the Sinograin Inner Mongolia Branch Autumn Grain Purchase Leading Taskforce determines the purchase prices of new corn within the region of directly affiliated depots as follows."[19] The Exhibit then proceeds to list a chart reflecting a "range of purchase prices" for each region within Inner Mongolia.[20] This document is strikingly different from Exhibit US-101, which provides one price for each region.

16. China has not explained under what authority a provincial branch of Sinograin could make purchases in a manner not consistent with Exhibit US-101. There is nothing in these documents to indicate that Exhibit US-101 has been revised or replaced with another notice. As

[15] China Responses to Panel Questions, Question 52a, para. 17.
[16] Exhibit US-101 was found at www.boyar.cn.
[17] *2016 Inner Mongolia Corn Purchase Notice*, Article III (Exhibit US-101).
[18] *See* footnote 14 above.
[19] *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Inner Mongolia branch, 16 November 2016 (English translation), (Exhibit CHN-120-B).
[20] *2016 New Corn Purchase Guidance Price Notice*, by SinoGrain Inner Mongolia branch, 16 November 2016 (English translation), (Exhibit CHN-120-B).

China itself explains when referring to Exhibit US-101 "such announced prices will remain in effect until a further notice revises the price either upwards or downwards . . ."[21] China's "internal" documents do not reflect any such notice.

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:

17. China asserts that, "like any private or state-owned purchaser of corn, SinoGrain is free to buy corn in the market, and free to make offers to purchase corn at prices which it believes are consistent with its objectives and needs, in light of evolving market conditions" . . . and "has the discretion to determine and issue the specific purchase prices for each directly affiliated entity based on the local market, quality and other conditions."[22] However, as explained in United States Response to Panel Questions 55 and 56, this is not accurate.

18. China's *2016 Northeast Region Corn Purchase Notice* provides that central government-owned enterprises including Sinograin "must fully utilize their own channels and advantages to launch marketized purchasing, *striving not to go lower than the policy-based purchasing amount of the previous year*, and properly bring into play their guiding and driving role."[23] Exhibit US-101 reflects a policy instruction by Sinograin to its local branches to purchase harvest year 2016 corn at a pre-set price, consistent with the *2016 Northeast Region Corn Purchase Notice*.

19. China has not submitted any evidence that Sinograin's role or status in China's domestic support policy programs has fundamentally changed, such that its purchasing activities are unrelated to any governmental policies. Certainly none of China's new exhibits reveals such a change. Rather, as explained, Sinograin was directed by the State Council to enter the corn market and purchase corn at levels not lower than the previous year.[24]

20. China also attempts to analogize Sinograin's notices to Cargill and other private companies' purchase notices. In doing so, China states that Cargill "communicates offers to purchase corn" by "publically announcing and displaying their current offering prices on a regular basis."[25] However, as explained, Cargill's notice are in sharp contrast to the purported notices China placed on the record that were internal in nature, not publicly available, and did

[21] China Responses to Panel Questions, Question 52, para. 13.
[22] China Responses to Panel Questions, Question 52b, paras. 23-24.
[23] *2016 Northeast Region Corn Purchase Notice,* Article I (Exhibit US-87); *See also Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work* (February 3, 2017), Article III, p. 2 (Exhibit US-102), which states that "Sinograin Jilin subsidiary and the provincial reserve grain enterprises are required to give full play to their role in adjusting and controlling grain reserves. In circumstances where grain prices are falling and enterprises are retreating from the market, take the initiative in deploying purchasing capacity, actively enter the market to make . . . corn purchases, and work to not be aggressive in purchasing when prices rise and not retreat from the market when prices fall. Currently, 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."
[24] *2016 Northeast Region Corn Purchase Notice,* Article I (Exhibit US-87).
[25] China Responses to Panel Questions, Question 52b, para. 30.

not reflect a purchase price. The submitted notices by China appear to be very different than Exhibit US-101.

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

Response:

21. The United States refers the Panel to the United States' response to this question.

22. China disagrees with the United States' translation of the quoted sentence in the Panel's question. China's translation does not change the fact that specific references to ensuring that grains purchase work is carried out "smoothly" or some iteration thereof appears 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*.[26] In its response, China suggests that such language now refers to Sinograin's own, commercial purchasing decisions. However, as noted above, China has not provided any evidence to demonstrate that the nature or function of Sinograin in China's grain market has changed. To the contrary, the consistency of the language and content between the 2016 Notice reflected in Exhibit US-101 and other national market price support plans suggests that Sinograin's activities have not changed, and that the market price support programs for wheat, Indica rice, Japonica rice, and corn have similar purposes and have been implemented pursuant to the same legal authority.

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:

23. As explained in the U.S. comments on China's Response to Panel Question 52a above, contrary to China's contention, China's exhibits have limited probative value and do not demonstrate that Sinograin issued multiple pricing notices throughout the harvest period from "time to time to adjust the offered purchase prices" in Exhibit US-101 to reflect actual market prices.[27]

[26] 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 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).

[27] China Responses to Panel Questions, Question 52d, para. 41.

24. Further, while China concedes that Sinograin is a state-owned enterprise, it misrepresents the role and function of Sinograin.[28] Sinograin's website states that Sinograin is "entrusted by the State Council with the specific responsibility for operating and managing central grain reserves (including central reserves of oil, the same hereinafter), and at the same time, is entrusted by the nation to implement grain and oil purchasing, sales, transfer, and storage, and other duties of regulation and control."[29] It further provides that "since 2005, [Sinograin] has been the primary implementing entity for the minimum purchase price and national temporary purchase and reserve policies [and] has completed relatively well a series of duties for policy-type grain and oil purchasing and storage, selling-off, and relocation, effectively playing the role of the main force for regulation and control."[30]

25. In addition, China's State-run news outlet, *People's Daily*, describes Sinograin "[a]s an important carrier of the national government's macro-control of grain [and] [i]n accordance with the overall requirements of "always in the market, making balanced purchases" set forth by the State Council, Sinograin actively participates in the inter-departmental coordinating mechanism for corn purchase and storage system reform."[31]

26. Thus, it is evident that Sinograin has a central role in implementing China's corn policies and programs, and there is no evidence that Sinograin's role changed as of 2016.

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:

27. The United States refers the Panel to the U.S. Response to Panel Question 52e, in which it provided a notice similar to Exhibit US-101, from Chinatex, one of the state-owned enterprises entrusted to make purchases under both the Wheat and Rice Market Prices Support Programs and the Corn TPRP in 2015.[32] We also refer the Panel to the *2016 Heilongjiang Corn Purchase Notice* (Exhibit US-104).

28. In answering this question, China refers to pricing activities of private entities, such as Cargill, and again suggests that Sinograin is a private company. As the United States has explained, this is not an accurate characterization of Sinograin.

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

[28] China Responses to Panel Questions, Question 52d, paras. 39-42.
[29] Sinograin Profile Excerpts, available: http://www.sinograin.com.cn/aboutZCL.html?navId=47&navPid=9 (Exhibit US-107).
[30] Sinograin Profile Excerpts, available: http://www.sinograin.com.cn/aboutZCL.html?navId=47&navPid=9 (Exhibit US-107).
[31] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), p. 1, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[32] United States Responses to Panel Questions, Question 52e, para. 15.

Response:

29. China argues that Exhibit US-101 ceased to apply as soon as Sinograin issued another notice to its depots requiring them to adjust the purchase price.[33] China, then, concludes that Exhibit CHN-120-B (*2016 New Corn Purchase Guidance Price Notice, by Sinograin Inner Mongolia*) replaced Exhibit US-101.[34] However, as the United States demonstrated in its comment to China Response to Panel Question 52a, Exhibit CHN-120-B reflects an "internal" notice of "average purchase prices," without more. It does not announce a discontinuation of the previous price and purchase mandate, or set a new price for future purchases of corn, as US-101 did. Therefore, as explained in the U.S. response to this question, US-101 would appear to apply to purchases of all corn produced in 2016.

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

Responses:

30. While China has constructed monthly average corn prices for a portion of the 2016 and 2017 harvest period, the United States notes that China's constructed corn prices do not explain where the data originated, nor which entities provided the data. For instance, it is not clear at which point in the purchase process the data is recorded (i.e. at the farm-gate, at the depots, or at exchanges), and whether the data reflects purchases from Sinograin, other state-owned enterprises or corn processors.

31. China's response to this answer underscores the difficulty in obtaining complete and comprehensive data concerning China's corn program in 2016 and 2017.

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:

32. See United States' Comment on China's Response to Panel Question 52e above.

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).

33. China argues that Exhibit US-101 read together with the *2016 Northeast Corn Purchase Notice* (Exhibit US-87) is different from the 2012 – 2015 TPRP Notices, and that it reflects evidence that Sinograin "followed the market price in purchasing corn after the expiry of the

[33] China Responses to Panel Questions, Question 52f, para. 46.
[34] China Responses to Panel Questions, Question 52f, para. 47.

TPRP."[35] As explained in the U.S. Comment on China's Response to Question 52d, above, China's new arguments and exhibits do not demonstrate that Sinograin is now a market actor, or that the mandatory purchases and pricing established by US-101 do not reflect an applied administered price. Rather, as the United States has explained, Exhibit US-101 shows that Sinograin announced a pre-set price for "corn newly-produced in 2016," in October 2016, and required affiliated depots to display the purchase price in "prominent locations in the depot."[36] As explained in the U.S. Response to this question, these requirements are similar to those found in the 2015 TPRP notice and reflect a continuing market price support policy.

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.

34. The United States refers the Panel to the United States' response to this question.

35. China asserts that it is irrelevant to a claim under Article 3.2 of the Agreement on Agriculture that purchase prices established by state-owned enterprises are applied administered prices. The United States disagrees. However, based on the facts at issue in this dispute, the Panel need not decide, in the abstract, whether a state-owned enterprise could set applied administered prices. Rather, the record evidence makes clear that the implementation of market price support programs is directed by the Chinese government.

36. China argues that Sinograin is suddenly acting as a market player when purchasing corn for 2016.[37] However, as explained in prior submissions, this is not accurate. While China asserts that its *2016 Northeast Region Corn Purchasing Notice* provides for "market-oriented" purchases by "market players," where all types of entities may decide to make purchases on their own initiative, the *2016 Notice* directs the same state-owned enterprises who were engaged in corn purchases in prior years to "striv[e] not to go lower than the policy-based purchasing amount of the previous year."[38] The State Council has directed Sinograin to enter the market and make purchases at an amount not lower than the prior year.[39] As explained above, Sinograin "[a]s an important carrier of the national government's macro-control of grain . . . [and] [i]n accordance with the overall requirements of "always in the market, making balanced purchases" set forth by the State Council.[40]

37. Sinograin, charged with making purchases between 2012 and 2015,[41] reported that it purchased 21.41 million metric tons of corn during the 2016/17 harvest through 743 Sinograin

[35] China Responses to Panel Questions, Question 55, para. 55.
[36] *See 2016 Inner Mongolia Corn Purchase Notice* (Exhibit US-101).
[37] China Responses to Panel Questions, Question 56, paras. 64-70.
[38] *2016 Northeast Region Corn Purchasing Notice.* Exhibit US-87.
[39] *2016 Northeast Region Corn Purchase Notice,* Article I (Exhibit US-87).
[40] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).
[41] *See 2015 Notice on Purchases of Corn,* Article II(1) (Exhibit US-55) (stating 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

depots in the northeast region.[42] According to Sinograin, this was 21 percent of the production in northeast China and 70 percent of the volume procured by state-owned enterprises.[43] Further, based on an April 7, 2017 news article, it has been reported that "[a]s diversified market purchasing entities basically stopped purchasing, [Sinograin] adhered to purchasing . .. and purchased 7,651,000 tons of new corn, comprising 23% of the total amount purchased in the entire [Heilongjiang] province."[44] Moreover, in describing its activities, Sinograin reported that "[i]n circumstances where purchasing entities have decreased, the strength of the market is insufficient, and there is downward pressure on prices, [Sinograin headquarters] does not push prices even lower; it actively enters the market to expand the number of depots and accelerate the rate of purchasing to send a strong signal to stabilize and guide market expectations."[45] The excerpts above indicate that Sinograin was not engaged in market behavior, but rather implementing Chinese government policy when it announced pre-set purchase price.

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

Response:

38. China wrongly asserts that Exhibit US-103 "strongly supports the conclusion that the new corn measures achieved a market based price discovery mechanism for corn."[46] Rather, Exhibit US-103 shows that Sinograin in the Jilin province is very involved in corn purchasing activities and continues to intervene in the corn market as a "stabilizing instrument" and "ballast."[47] Further, it shows that the directive provided to Sinograin in the *2016 Northeast Region Corn Purchase Notice*, to accelerate the rate of purchasing has been implemented. In Exhibit US-103, the Vice Director explains that he and the Jilin Province Grain Bureau have coordinated with Sinograin and other state-owned enterprises in implementing purchase plans and "accelerating the progress of purchases."[48]

39. In answering question 57, China comments on the information contained in Exhibit US-102, and acknowledges that Exhibit US-102 was issued in response to falling corn prices. China characterizes the notice as "encourage[ing]" action by various market participants. However, to

entrusted purchasing and storage depots, will make open purchases of farmers' surplus grain and will prevent the occurrence of farmers' "difficulty selling grain").

[42] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).

[43] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95).

[44] Northeast News, *Sinograin Heilongjiang Subsidiary Takes the Lead to Purchase Corn, Daily Average of 100,000 Tons Entering Granaries* (April 7, 2017) (Exhibit US-108).

[45] People's Daily, *Sinograin Report: Sinograin Plays Role of "Main Force" in the Service of Corn Purchase and Storage System Reform* (Oct. 16, 2017), at 2, *available*: http://industry.people.com.cn/n1/2017/1016/c414774-29590275.html (Exhibit US-95) (emphasis added).

[46] China Responses to Panel Questions, Question 57, para. 77.

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

[48] Report on Purchasing Activities in Jilin (May 3, 2017), p. 2 (Exhibit US-103).

the contrary, the notice in fact "required" Sinograin and other stated-owned enterprises to take action to supervise and implement corn purchasing and storage actions.[49]

40. Specifically the notice provides that "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."[50] In addition, the 2017 Jilin Notice directs Sinograin and other government 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."[51] As explained in the U.S. response to this question, the 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.

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.

Response:

41. China's answer misunderstands the United States' reliance on the Appellate Body report in *EC – Selected Customs Matters*. China uses the Appellate Body's finding that legal instruments can themselves be "measures at issue" to conclude that the legal instruments listed in the U.S. panel request in this dispute must, in fact, be the "measures at issue." The United States agrees that legal instruments are measures, and the United States has listed relevant instruments in the panel request. However, the United States described the measures at issue in a narrative form, which is consistent with important aspects of the Appellate Body report that China disregards.

42. First, the Appellate Body observed that the complainant is entitled to set out in a panel request any act or omission attributable to another member and noted that under Article 6.2 of the DSU, a complaining Member enjoys certain discretion in the identification of the specific measure at issue.[52] Second, the Appellate Body found that "[n]othing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in

[49] Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), Article III, p. 2 (Exhibit US-102).
[50] Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), Article III, p. 2 (Exhibit US-102).
[51] Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017), Article VIII, pp. 3-4 (Exhibit US-102).
[52] *EC – Selected Customs Matter (AB)*, para. 149.

substantiating the claim,"[53] and stated that "these arguments should not be interpreted to narrow the scope of the measures or the claims."[54] Finally, the Appellate Body agreed with the United States that the list of areas provided in the third paragraph of the panel request was merely illustrative, aimed to give an indication of the argument underlying the United States' claim, and did not constitute the claim itself or the measure at issue.[55]

43. The findings and observations made by the Appellate Body in *EC – Selected Customs Matters* are relevant to the discussion in the present proceeding. By arguing that the legal instruments are the measures at issue, China ignores the fact that paragraph 2 of the U.S. panel request in the present dispute did not introduce the list of instruments with the phrase "the measures consist of," like the panel request did in *EC – Selected Customs Matters*. In this dispute, the United States described the "measures at issue" through the narrative in the second sentence of paragraph 2 and in paragraph 3 of the panel request. In the second paragraph the United States separately stated that the domestic support in question was provided "through" the various legal instruments identified.

44. As the Appellate Body observed in *EC – Selected Customs Matters*, it is for the complainant to identify the specific measure at issue it wishes to challenge, and the United States identified the measures at issue as 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. The United States further identified the measures at issue by explaining that the support was provided "through" the various legal instruments listed.

45. Similar to the panel request in *EC – Selected Customs Matter*, the list of legal instruments provided in paragraph 2 was not required to be included in the U.S. panel request as the measures at issue had been identified in narrative form. However, the United States included the list of legal instruments to make the request more transparent and further identify the measures (support provided). The legal instruments anticipated certain arguments that the United States would make in its submissions about the means by which China provided its support in the relevant years.[56]

2. General Issues

For Both Parties:

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:

[53] *EC – Selected Customs Matter (AB)*, paras. 150-151.
[54] *EC – Selected Customs Matter (AB)*, paras. 150-151.
[55] *EC – Selected Customs Matter (AB)*, paras. 152-154.
[56] *See EC – Selected Customs Matter* (AB), paras. 152-154.

46. In its response to this question, China continues to misrepresent basic definitions and calculations of AMS and Current Total AMS. The United States comments below on three key errors in the legal interpretations China presents.

47. First, China asserts that calculation of the AMS in the base period did not occur "in a legal vacuum," and that Annex 3, paragraph 5 "informed the calculation of *Base* AMS."[57] China states that a Member "may have used all elements of [the Annex 3] framework to calculate its *Base* AMS . . . [o]r . . . may have used some of these elements along with Member-specific constituent data and methodology," and then extrapolates from this observation that if a Member only used "some of these elements," "the requirement for consistency" would require a panel to similarly disregard certain elements of Annex 3 in calculating a product-specific AMS for any subsequent year.[58]

48. However, the text of Article 1(a)(ii) and Annex 3 of the Agriculture Agreement does not support the interpretation suggested by China. China's argument would mean that, because a Member may have had an obligation to calculate its Base AMS according to a certain methodology during its accession negotiations, that Member's *failure to do so* would have the effect of altering its obligations with respect to all future calculations. This illogical reading of Annex 3, paragraph 5 relies on an additional alleged "requirement" – also not found in the text of the Agreement – that later AMS calculations be performed consistent with whatever calculation methodology was used to calculate Base AMS. That is, according to China, an acceding Member can calculate Base AMS in whatever way it chooses, and – even without any agreement by WTO Members – that method of calculation supersedes the calculation methodology set out in the text of the Agriculture Agreement.

49. China's argument makes no sense and has no basis in the Agriculture Agreement or China's Accession Protocol. With regard to paragraph 5 of Annex 3, this provision does not contain an ongoing commitment regarding the calculation of the level of domestic support during the base period and therefore has no relevance to the issues before the Panel in this dispute. Even if an acceding Member should have calculated its base AMS and Base Total AMS consistent with Annex 3, failure to comply with this requirement is of no consequence during subsequent years.[59] Rather, this provision indicates that these values form the basis for negotiated commitments, which are recorded in the form of an Annual or Final Bound Commitment Level, and subsequently implemented by the Member. Separately, China's obligations with regard to calculating product-specific AMS and Current Total AMS in subsequent years are that they be done "in accordance with" the Agriculture Agreement, including Annex 3 and Article 6.[60] These obligations apply whether or not its Base Total AMS contained errors or was calculated inconsistently with Annex 3.

50. Second, China misstates the requirements of Article 1(a)(ii) with regard to calculation of AMS in subsequent years. Specifically, China again ignores the text of Article 1(a)(ii) – either

[57] China Responses to Panel Questions, Question 62, para. 89.
[58] China Responses to Panel Questions, Question 62, para. 91 and fn 115.
[59] *See e.g., Korea – Various Measures on Beef* (AB), para. 115.
[60] Agriculture Agreement, Articles 1(a)(ii) and 1(h)(ii).

reading out the phrases "in accordance with" and "take into account," or reading the two phrases as equivalent.[61] However, as discussed at length in this dispute,[62] these distinct terms have distinct definitions and provide Members and the Panel with distinct instructions regarding how the two sources of information are to be considered.

51. Article 1(a)(ii) states that AMS shall be calculated "in accordance with" Annex 3, and "taking into account" constituent data and methodology used in the Member's Supporting Tables. This clarifies that a panel must in all instances follow or act in conformity with the requirements of Annex 3 when calculating the value of AMS. They may also "take into account," meaning consider or take note of, constituent data and methodology – not to supplant Annex 3 – but to provide country-specific and crop specific information that may be needed to perform the calculations set out in the Agriculture Agreement. This interpretation does not "read out any meaning to be given to the phrase 'constituent data and methodology,'" but rather follows the express instructions provided by the Agriculture Agreement.

52. Third, China also obfuscates the requirements for Current Total AMS under Article 1(h)(ii),[63] where a similar hierarchy is established between the text of the Agriculture Agreement and a Member's constituent data and methodology. 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. As noted with respect to 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] The second direction in Article 1(h)(ii) states that Current Total AMS is also "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."[65] This is a less demanding requirement than "in accordance with."

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):

[61] China Responses to Panel Questions, Question 62, para. 91.
[62] United States Second Written Submission, paras. 64-71; United States Response to Panel Questions, Question 18, paras. 86-90.
[63] China Responses to Panel Questions, Question 62, para. 97.
[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] *Shorter Oxford English Dictionary*, "with," vol. II, p. 3703-04 (ed. 1993) (Exhibit US-105).

53. The role of the Panel is to "make an objective assessment of the matter before it, including an objective assessment of the facts."[66] China's assertion, however, that in instances where a discrepancy exists the Panel should utilize China's data, is without merit.[67] China asserts that China's data "is sourced from official and verified information published by Chinese authorities."[68]

54. The United States notes that all data utilized by the United States has been sourced from publically available Chinese government sources.[69] Conversely, China's proposed data is not publically available or verifiable in any meaningful way. Specifically, the procurement data utilized by China is not publically available in any known Chinese publication, and there is no way to discern the accuracy of this information.[70] However, with respect to the procurement data in particular, the Panel need not determine the accuracy of China's proposed data in any event, because under the terms of China's market price support programs, the quantity of "eligible" production includes the entire volume of production.

Question 64: 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:

55. Noting that the United States utilized terms other than "fixed external reference price" in the preparation of its Supporting Tables, China asserts that it "is *not* the *form* or the precise label that matters, *but* the *substance*" that is relevant.[71] In the case of the United States, China states that the "reference prices" included in the U.S. Supporting Tables "amount to 'constituent data'. . . in the form of a fixed external reference price that comports with the framework provided by paragraphs 8 and 9 of Annex 3."[72] That is, China appears to suggest that because, in substance, the U.S. figures comply with Annex 3, the United States will continue to be required to calculate its fixed external reference price according to Annex 3. Conversely, China suggests that because China in "substance" did not use a fixed external reference price that comported with Annex 3 in its Supporting Tables, China is not required to do so in the future.

56. In making this argument, China misunderstands the issue raised by the United States regarding the terminology and calculations reflected in China's Supporting Tables. China has claimed in this dispute that its use of an alternative "fixed external reference price" in its Supporting Tables must be interpreted by the Panel as agreement by WTO Members to a China-

[66] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 11.
[67] China Responses to Panel Questions, Question 63, para. 105.
[68] China Responses to Panel Questions, Question 63, para. 105.
[69] *See e.g.,* United States Responses to Panel Questions, Question 97, paras. 171-174.
[70] State Administration of Grain, 2012-2016 MPP Purchased Amount (Exhibit CHN-48A/48B).
[71] China Responses to Panel Questions, Question 64, para. 108 (emphasis original).
[72] United States Responses to Panel Questions, Question 64, para. 109.

specific modification to the calculation obligations contained in Annex 3.[73] As the United States has pointed out, however, China's Supporting Tables not only fail to refer to Annex 3, paragraph 9 or the "fixed external reference price" reflected in that provision, but China's calculation of a "reference price" comports – in substance – with *neither* the calculation methodology contained in Annex 3, paragraph 9, *nor* the calculation of the "fixed external reference price" China has argued the Panel must use in calculating AMS for purposes of this dispute.[74] In other words, China's Supporting Tables do not support its arguments regarding the fixed external reference price, either in form or in substance.

57. As the United States has explained at length, however, if Members had agreed to alter China's obligation with respect to the calculation of market price support, that alteration would be set out in China's Accession Protocol directly or by incorporating a provision from its Working Party Report.[75] Members did not agree to alter the terms of the Agreement on Agriculture for China in this respect. Thus, China (like the United States) is obligated to utilize "fixed external reference price(s)" based on the years 1986 to 1988 when calculating the value of market price support programs, as required by Annex 3.

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 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.[76]**

Response:

58. China's response to this question misunderstands the U.S. position and continues to misrepresent the role and status of constituent data and methodology in the calculation of AMS. The position of the United States with regard to the use of Supporting Tables is neither "extreme,"[77] nor a "struggle;"[78] rather, the U.S. statements regarding the role of constituent data and methodology are based on the text of the covered agreements to which China acceded.

59. As the United States explained in response and comments on Question 62, the Agriculture Agreement provides express directions in two respects: first, as to the methodology required for calculating AMS and Current Total AMS in subsequent years, and second, in the

[73] China First Written Submission, paras. 51, 177.
[74] United States Responses to Panel Questions, Question 79, paras. 132-139.
[75] *See* United States Responses to Panel Questions, Question 17.
[76] United States' second written submission, para. 65.
[77] China Responses to Panel Questions, Question 67, para. 116.
[78] China Responses to Panel Questions, Question 67, para. 120.

role and use of a Member's constituent data and methodology in those subsequent years. With regard to the directions for calculating AMS and Current Total AMS in subsequent years, those are provided in Articles 1(a)(ii) and 1(h)(ii) respectively. Article 1(a)(ii) directions that calculations of AMS shall be "in accordance with" Annex 3, and "taking into account" constituent data and methodology. Article 1(h)(ii) directs that calculation of Current Total AMS shall be "in accordance with" the Agreement, including Article 6, and "with" constituent data and methodology.

60. With regard to the use of "constituent data and methodology" in subsequent years, the Agriculture Agreement specifies that this information is to be "tak[en] into account," meaning considered or referenced. Such data and methodology, therefore, does not "*necessarily* give rise to domestic-support-related rights and obligations, because [the constituent data and methodology] affect the outcome of those calculations."[79] Nothing in the text of Articles 1(a) and 1(h) authorizes a rewrite of clear calculation requirements on the basis of constituent data and methodology. Instead, these provisions make clear that all calculations must be done "in accordance with" the Agriculture Agreement.

61. As the United States has pointed out before, China's argument that material contained in a Member's Supporting Tables necessarily gives rise to new rights and obligations would lead to absurd results. Not only would it mean that every WTO Member potentially could have different obligations with respect to the calculation of AMS, but determining what those obligations might entail would be nearly impossible. For example, say a Member has a market price support program at the time they calculate their Base AMS, and does not have any other kind of domestic support. If the Supporting Tables serve to create new obligations, could a panel later determine that this Member agreed to use only market price support in the future, and not to introduce any other type of non-exempt support? If not, why not?

62. China's legal theory does not require any clear indication of an intent (or agreement) to alter the Agriculture Agreement, only that the Supporting Tables, in substance, reflect an alteration. To take another example, say the same Member included an inadvertent error in the calculation of its market price support program and the Member continues to use the same program. Must a panel calculate market price support consistent with that erroneous calculation? If not, on what basis could a panel determine when a calculation modification reflected a new obligation and when it reflected an error? The answer, as the United States has explained, is that a panel need not derive a Member's rights and obligations with regard to the basic calculation methodology from the information contained in its Supporting Tables. Rather, it must calculate the support provided by whatever programs are at issue based on the text of the Agriculture Agreement.

[79] China Responses to Panel Questions, Question 67, para. 121. That said, the data and methodology drawn from constituent data and methodology may change the outcome of a calculation from one Member to another. For instance, subdividing a product into subspecies (e.g., yellow corn and white corn, as compared to all corn) can impact calculation results, including whether a particular product exceeds the *de mininis* level and must be included in Current Total AMS.

63. A Member that included particular data or methodology in their constituent data is not obligated to continue using that methodology if it no longer relates to the type of domestic support provided.[80] The Agriculture Agreement is intentionally flexible, permitting Members to alter the types of support used,[81] and encouraging Members to switch to "green box" programs. If these measures are structured in a manner that renders the constituent data and methodology no longer applicable, then there is no obligation for the Member to artificially impose that methodology. For instance, if under a new program the payment year has changed from fiscal year to calendar year, or if market price support currently benefits yellow and white corn without distinction whereas the program previously supported only one, the Member need not maintain the methodology reflected in their constituent data and methodology.

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?

Response:

64. China asserts that "where the data accurately reflects the applicable fixed external reference prices, application of a slightly different label does not, as matter of law, alter the character of the data points in a Members Supporting Tables."[82] However, China's Supporting Table DS 5 reflects neither the legal term ("fixed external reference price"), nor the practice (an average price based on the years 1996 to 1998) that China now seeks to utilize.[83] To this end, there is neither a relevant data point, nor a methodology for China to point to as "used" in its relevant tables of supporting materials. As described in comments on Questions 62 and 64 above, Table DS 5 does not reflect any intention or agreement by the Members to alter the requirements of Annex 3, paragraph 9 for the purpose of future calculations. For this reason, even if it were possible to alter a Member's obligations through their Supporting Tables, it is impossible to understand what alteration China has selected with regard to its fixed external reference price.

65. Moreover, we note that China's response to this question references not the term or practice used in its Supporting Tables, but that provided in its notifications to the Committee on Agriculture. As the United States has indicated, a Member's notifications are to inform WTO Members of the nature and value of domestic support programs, but such unilateral notifications do not reflect compliance and cannot reflect tacit agreement by the Members of the WTO to modifications of existing WTO obligations as set out in the Agriculture Agreement.

[80] United States Responses to Panel Questions, Question 55, paras. 151-152.
[81] Agriculture Agreement, Article 7.2(a).
[82] China Responses to Panel Questions, Question 68, para. 129.
[83] China's Supporting Tables, Table DS 5, WT/ACC/SPEC/CHN/38 Rev. 3. *See also* United States Responses to Panel Questions, Question 79.

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?

Response:

66. China asserts that in its notifications "China has consistently used the same *average* of the 1996-1998 external reference prices for wheat and rice."[84] China's assertion is inaccurate in at least three respects. First, the United States notes that China's notification of its Wheat Market Price Support Program relies on data drawn from an appendix to Supporting Table DS 5, but not data used in its DS 5 Supporting Table. Second, China's Indica rice and Japonica rice notifications rely on a consolidated value that does not appear in its Supporting Tables. Third, China has *never* notified its Corn Market Price Support Programs (or TPRP) using any fixed external reference price.[85]

67. The United States would also highlight that China's notifications depart from the identification of basic agricultural products found in its constituent data and methodology. Specifically, rather than address Indica rice and Japonica rice separately as reflected in its Supporting Tables, China has chosen to consolidate "rice" "to reflect the reality of Chinese agricultural production."[86] Under China's theory, if China's Supporting Tables "necessarily give rise to domestic-support-related rights and obligations,"[87] the calculation methodology provided in China's notifications consolidating rice is inconsistent with its obligations. This once again demonstrates China's unprincipled willingness to pick and choose convenient elements of the Supporting Tables.

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')".[88] Please explain what this policy consisted of and how it related to adopting the "TPRP Notices".

Response:

68. The United States disagrees with China's claim that "[a]bsent annual TPRP notices, there exists no TPRP," and that "this means that there is no geographic and temporal scope of application of anything resembling the TPRP" because "under its new corn measures, China

[84] China Responses to Panel Questions, Question 69, para. 130.
[85] *See e.g.*, China's Notification (1999-2001), G/AG/N/CHN/8 (March 31, 2006) (Exhibit US-1); China's Notification (2002-2004), G/AG/N/CHN/17 (March 24, 2010) (Exhibit US-2); China's Notification (2005-2008), G/AG/N/CHN/21 (October 13, 2011) (Exhibit US-3); and China's Notification (2009-2010), G/AG/N/CHN/28 (May 6, 2015) (Exhibit US-4) (collectively, "China's COA Notifications (1999-2010)").
[86] China Responses to Panel Questions, Question 69, para. 133.
[87] China Responses to Panel Questions, Question 67, para. 121.
[88] China's first written submission, paras. 284-285; second written submission, paras. 3 and 13.

provides direct payments to producers of corn."[89] While China may have changed the name of the notices it issues concerning corn in 2016 or even ceased to issue notices, the absence of such legal instruments does not mean that China's policy of providing price support to corn has ceased.

69. As the United States has explained in the U.S. Response to Question 52, as well as in prior submissions, China has not demonstrated that it ceased providing market price support to corn producers as of 2016, and U.S. exhibits in fact show that China appears to have continued to announce and apply administered prices for the purchase of corn in the 2016/17 harvest.[90]

70. Moreover, the United States challenged China's provision of domestic support to agricultural producers in each of the relevant years in excess of its commitments, including through market price support for four commodities including corn. Therefore, the expiration of the annual legal instruments for corn does not preclude the Panel from making findings on the measures at issue. Were that the case, a respondent could easily elude liability for domestic support merely by changing the name or form of its domestic support measures. This is consistent with the findings of the Appellate Body in *China – Raw Materials* demonstrate, which also dealt with a series of annual Chinese measures. In that dispute, the Appellate Body held that with respect to annual instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by annual legal instruments that may have been superseded in the course of the dispute. In so doing, both the panel and Appellate Body examined the measure *as it existed at the time of panel establishment*. The Appellate Body noted that if complainants were precluded from challenging measures of an annual nature because they may have expired during the course of the panel proceedings, it would create a loophole in the system. Complainants could find themselves "taking aim" at "appearing and disappearing targets," and responding parties could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.[91]

71. And as explained in prior U.S. submissions, the rationale set out in *China – Raw Materials* is particularly apt with respect to an AMS challenge, which necessarily relies on the provision of domestic support over the course of a full year. Where a challenge involves market price support programs, the complaining party must produce, among other things, data related to a country's total annual production volume and average farm-gate prices for the full years at issue in order to establish the level of domestic support provided and then compare that support to a Member's AMS commitments. Therefore, China is incorrect that the expiration of an annual legal instrument or the cessation of distributing legal instruments for a particular year requires the Panel to find that it lacks the authority to make findings on the U.S. claims as they relate to corn.

[89] China Responses to Panel Questions, Question 70, para. 142.
[90] United States Responses to Panel Questions, Questions 2 and 52; United States Second Written Submission, paras. 48 – 58; United States Opening Statement at the Second Substantive Meeting of the Panel, paras. 59 – 63.
[91] *China – Raw Materials* (AB), para. 144 (referring to the United States' other appellant's submission, paras. 60 and 61). *China – Raw Materials* (Panel), para. 7.33.

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?

Response:

72. China argues that the Panel must address the minimum purchase price programs for the products at issue as separate "measures" based on the U.S. claims. However, China's argument is not consistent with the text of the DSU or the U.S. panel request.

73. As the United States has previously explained, Article 7.1 of the DSU requires a Panel to examine the matter referred to the DSB by the complainant in its panel request. 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 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.[92]

74. With respect to the products at issue, as the United States has explained, it chose four exemplary products and calculated support provided through a single type of program – market price support – to demonstrate that China exceeded its domestic support commitments in four separate years.[93] However, a finding that China exceeded its commitment level based on *any* one of these products in a given year would constitute a breach of China's commitments under Articles 3.2 and 6.3 of the Agriculture Agreement and result in a recommendation to bring its measures into compliance. The Panel need not make a separate finding of breach with respect to each product to have made sufficient findings on each U.S. claim. China's argument to the contrary would only result in narrower findings and recommendations than would allow resolution of the U.S. claims, as breach of an AMS obligation relates to non-exempt domestic support provided to all agricultural producers during a single year.

75. Taken to its logical conclusion, China's argument would require a complainant to investigate, catalogue, and calculate all domestic support provided through all types of support to all agricultural producers of every agricultural product during a given year even where calculation of support for a single product would be sufficient to demonstrate a breach. Given the size and diversity of China's agricultural economy, the number of support programs it maintains, and the restrictions regarding availability of relevant data in China, China's argument

[92] The United States also challenged, in the alternative, the provision of domestic support under Article 7.2(b) of the Agriculture Agreement.
[93] *See* United States Responses to Panel Question 6, paras. 39-40.

would prevent a complainant from ever bringing a challenge that could result in meaningful implementation obligations appropriate to resolve an AMS dispute. For this reason as well, the Panel should address the U.S. claims as identified in the US. panel request, consistent with the DSU.

4. Constituent Data and Methodology (CDM)

For Both Parties:

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 <u>do not</u> 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, <u>do not</u> contain any "constituent data and methodology"

<u>Responses to (a) and (b):</u>

76. Contrary to China's arguments, the United States does *not* "limit, inappropriately, the scope of the phrase 'constituent data and methodology,' and essentially read[] out the phrase from Articles 1(a)(ii)and 1(h)(ii)."[94] Instead, the United States' interpretation of this phrase is consistent with the text of Articles 1(a)(ii) and 1(h)(ii), as explained above in the U.S. Comments on China's Response to Question 62.

77. With regard to part (c) of the Panel's question, China asserts the "use of the qualifier 'constituent' to the phrase 'data and methodology' means that not everything in a Member's Supporting Tables constitutes 'constituent data and methodology.'"[95] Noting that some information is extraneous, China asserts that to qualify as "constituent" the specific data or methodology "must constitute elements of the Base (Total) AMS calculation that remain relevant

[94] China Responses to Panel Questions, Question 73, para. 150.
[95] China Responses to Panel Questions, Question 73(c), para. 159.

for the calculation of Current Total AMS."[96] As the United States has explained at length including in response to and in comments on Question 62, China's proposed use of constituent data and methodology is unsupported by the text of the Agriculture Agreement. The Agriculture Agreement demands that calculation of current AMS be "in accordance with" Annex 3 and does not contemplate the use of "unchanging elements" of constituent data and methodology that are inconsistent with Annex 3.

78. For the purposes of this dispute, China asserts that the relevant "constituent data and methodology" includes (i) the fixed external reference price based on a 1996 to 1998 average, (ii) the methodology for determining eligible production, (iii) the alleged conversion rate for rice, and (iv) the methodology for converting paddy rice to milled rice.[97] However, none of these alleged data or methodologies could be used to alter the calculation methodologies set out in Annex 3 in the manner suggested by China.

79. With respect to the fixed external reference price, as discussed in the U.S. response to Question 79, the "fixed external reference price" proposed by China was simply not used to calculate market price support in the context of China's Base AMS. As noted by the United States, the text of Article 1(a)(ii) refers only to constituent data and methodology "*used* in the tables of supporting material."[98] The fixed external reference prices provided by China do not even fit China's definition of relevant constituent data or methodology, which it describes as data or methodology that "must be able to constitute an unchanging element . . . that carries over from the calculation of the Base (Total) AMS."[99] China's proposed fixed external reference prices were not a part of the calculation of China's Base Total AMS at the time, and therefore could not be "carrie[d] over." In any event, the fixed external reference prices are also inconsistent with the requirements of Annex 3, paragraph 9, which provides that the "fixed external reference price shall be based on the years 1986 to 1988." Because Article 1(a)(ii) requires that the calculation of AMS be consistent with Annex 3, China's proposed fixed external reference price must be rejected.

80. Regarding eligible production, as discussed at length in the U.S. comments on China's response to Question 95, read together, China's statements regarding eligible production suggest that (1) China's calculation of quantity of eligible production was consistent with the text of Annex 3, paragraph 8, during the base period, and (2) China's Supporting Table reflects neither an intent nor an agreement amongst Members to alter the definition of quantity of eligible production for future calculations. For this reason, in addition to the legal point that a Member's Supporting Table may not supplant the requirements of the Agriculture Agreement in, China's Supporting Table does not deviate from the Agriculture Agreement with regard to the methodology for determining eligible production.

81. With respect to China's proposed rice conversions, China asserts that methodology for converting paddy rice based data to milled rice based data utilizing a conversion rate of 70

[96] China Responses to Panel Questions, Question 73(c), para. 161.
[97] China Responses to Panel Questions, Question 73(c), para. 170.
[98] Agriculture Agreement, Article 1(a)(ii) (emphasis added).
[99] China Responses to Panel Questions, Question 73(c), para. 161.

percent is drawn from its constituent data and methodology.[100] However, as discussed in the U.S. comments on China's response to Question 99, the alleged conversion rate of 70 percent for converting both prices and quantities of paddy rice to milled rice does not appear in China's Supporting Tables, and is instead based on China's comparison of various draft Supporting Tables.[101] Nothing on the record suggests that this conversion rate was in fact used in the conversion of paddy to milled rice in China's final tables. Moreover, the text of Article 1(b) and Annex 3, paragraph 7 of the Agriculture Agreement indicates that the calculation of AMS must be done as close as practicable to the point of first sale. The point of first sale for rice in China is on a paddy rice basis.[102] Therefore, the Agriculture Agreement in fact precludes the Panel from converting the applied administered price and quantity of eligible production to a milled rice basis as China proposes.

82. Finally, China does not mention the legitimate uses of the constituent data and methodology to provide China-specific information, procedures, sources, and other guidance that can and have been used in the proposed calculation of China's AMS and Current Total AMS. Specifically, the methodology for determining the value of total production is not provided by the text of the Agriculture Agreement, but China provides its version of this calculation with identified sources at page 20 of its Supporting Tables. China identifies the basic agricultural products receiving support at the time of accession as wheat, Japonica rice, Indica rice, corn, and cotton.[103] This information should be taken into account when developing each years' AMS and Current Total AMS.

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.[104] The tables of supporting materials of China and other Members are incorporated into China's and other Members' schedules respectively.

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[100] China Responses to Panel Questions, Question 73(c), para. 170.
[101] *See* Conversion Rate Applied to WT/ACC/CHN/38 (Exhibit CHN-64).
[102] United States Responses to Panel Questions, Question 38, paras. 115-117; United States Second Written Submission paras. 100-103.
[103] We note China now specifies that it meant "milled rice" but this choice is not reflected in the text provided in the Supporting Table. China's Supporting Table, WT/ACC/CHN/38/Rev.3, pp. 9-10.
[104] "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).

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:

83. While the United States and China agree that other Members' Supporting Tables may be considered as "context," China views this context as creating a new rule applicable to some, but not all, WTO Members. Specifically, China asserts that "context" provided by Member's Supporting Tables "demonstrates that the relevant provisions of the Agreement on Agriculture establish a single rule"[105] pursuant to which "each Member [must] use a three-year base period for establishing domestic support commitments, including the identification of the applicable fixed external reference price," and that "the three-year base period must be sufficiently proximate to the time of the Member's accession."[106] China is in error.

84. As noted by the DSU, the dispute settlement system serves "to clarify *the existing provisions of those agreements* in accordance with customary rules of interpretation of public international law," and further states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[107] Under those customary rules of interpretation, "rules" applicable to WTO Members are not interpreted based on context alone, but through reference to the ordinary meaning of the text of the covered agreements, in its context. Specifically, the customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement.[108] Rather, Article 31(1) of the *Vienna Convention on the Law of Treaties* states the treaty "shall be interpreted . . . *in accordance with the ordinary meaning* to be given the terms of the treaty *in their context* and in the light of its object and purpose." Thus, the suggestion that information contained in some Members' Supporting Tables can serve as context having the effect of eliminating or rewriting portions of the Agriculture Agreement misunderstands the interpretive process.

85. China asserts that for original Members, the base period is "as memorialized in paragraph 9 of Annex 3"[109] whereas the context of other Members' Supporting Tables "reinforces" its interpretation of that same paragraph to permit alternative dates to be used to determine the fixed

[105] China Responses to Panel Questions, Question 74(b), para. 176.
[106] China Responses to Panel Questions, Question 74(b), para. 177.
[107] DSU, Article 3.2 (emphasis added).
[108] *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'").
[109] China Responses to Panel Questions, Question 74(b), para. 178.

external reference price.[110] As the United States has reiterated in this submission, there is no reasonable interpretation of the text of Articles 1(a) and 1(h), and Annex 3, paragraphs 5, 8 and 9 that suggests Members are permitted to use alternative dates to determine their fixed external reference price, nor is there evidence of a specific agreement to permit China to utilize alternative dates. China's arguments misrepresent the content of Annex 3, paragraph 9, which lays out the requirements for all Members' fixed external reference prices, and again conflates the fixed external reference price and the base period. According to the provisions of the Agriculture Agreement, any Member (whether a Uruguay Round Member or a subsequently acceding Member) maintaining a market price support program must utilize a fixed external reference price based on the years 1986 to 1988 to evaluate that program in subsequent years.

86. In addition to discussing "context," China asserts that "the design and architecture of the *Agreement on Agriculture*, and its object and purpose, which is to *reduce* domestic support, require that Base (Total) AMS and Current (Total) AMS be calculated using the same constituent data and methodology."[111] As with context, however, the *Vienna Convention* analysis does not support the use of "design and architecture" or "object and purpose" to depart from the plain meaning of the provisions to be interpreted. In this instance, the issue is whether Annex 3, paragraph 9, requires the use of a 1986 to 1988 fixed external reference price. Per the *Vienna Convention*, the plain meaning of Annex 3, paragraph 9, must be considered "*in the light of* [the treaty's] object and purpose." The task of the interpreter is to use the context and the object and purpose of the Agreement to elucidate the plain meaning of the text. This does not permit reliance on the object and purpose to rewrite or supplant the text.

87. Finally, China departs from its context argument and asserts that by "formally approving China's accession, including its Schedules which rely on a base period of 1996-1998" other Members "accepted [China's] approach."[112] As the United States has previously stated, all alteration to the provisions of the Agriculture Agreement intended to be applicable in the future were recorded in China's Accession Protocol or its Working Party Report (and then incorporated by reference into China's Accession Protocol). The language used in China's supporting materials provide neither a clear intent to alter future calculation methodology, nor agreement amongst the Members to do so (as opposed to, for example, the China-specific *de minimis* provision in its Accession Protocol). Furthermore, as indicated in China's Working Party Report, Members accepted China's supporting materials as providing "a basis for supporting the commitments of China's Schedule," but noted that "this document still contained issues which required further methodological clarification relating to policy classification."[113] Thus, Members made clear that the supporting materials did *not* reflect agreement amongst the Members on every particular methodology contained therein.

88. In sum, other Members' Schedules may provide context that can be considered as part of a panel's interpretative process. However, like all other sources of context, this information is to be used to interpret the relevant provision "in accordance with the ordinary meaning to be given

[110] China Responses to Panel Questions, Question 74(b), para. 179.
[111] China Responses to Panel Questions, Question 74(b), paras. 182-183.
[112] China Responses to Panel Questions, Question 74(b), para. 189.
[113] China's Working Party Report, para. 238 (Exhibit US-7).

to the terms . . . in their context." Thus, "context" cannot supplant or rewrite the ordinary meaning of an agreement, but may assist in determining the meaning or meanings to be given to the relevant terms.

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:

89. China asserts that all domestic support commitments are reduction commitments, noting that the Agriculture Agreement "provides no basis for an artificial distinction between alleged domestic support commitments . . . and alleged domestic support reduction commitments."[114]

90. The United States disagrees. The Agriculture Agreement provides for "Annual" commitments, "Final Bound Commitments," and, in Article 7.2(b), sets out the obligation for circumstances in which no such commitments were recorded in a Member's Schedule.

91. China made a single Final Bound Commitment of "nil," effective upon accession to the WTO Agreement. Therefore, China never had an annual or a reduction commitment, and its arguments with respect to such commitments are irrelevant. In any event, the applicability of the obligations set forth in Article 1, Article 6, and Annex 3 of the Agriculture Agreement is not dependent on the type of domestic support commitment taken. In every instance, a Member providing non-exempt domestic support in subsequent years is required to calculate the value of that support consistent with the text of the Agriculture Agreement.

92. As described in the U.S. response to Question 79, there is no requirement for "consistency" between the Base Total AMS calculation and subsequent calculation of Current Total AMS. The Agriculture Agreement obligation is to provide domestic support at or below the Final Bound Commitment Level, a value recorded in the Member's Schedule.[115] Whether a Member is providing support consistent with this obligation is determined by evaluating that Member's current domestic support as directed by Article 1(a)(ii) and 1(h)(ii).

93. It is telling that China points not to the text of the Agriculture Agreement, but the alleged "logic" required to "ensure the usefulness of the AMS calculation,"[116] and to a requirement supposedly "enshrined in the design and architecture of the Agriculture Agreement"[117] to support

[114] China Responses to Panel Questions, Question 75, para. 192.
[115] Agriculture Agreement, Article 6.3, Article 3.2.
[116] China Responses to Panel Questions, Question 75, para. 201.
[117] China Responses to Panel Questions, Question 75, para. 202.

its claims regarding "consistency." However, there is nothing logical about China's assertions. As previously stated, the preamble to the Agriculture Agreement cites the need for commitments to apply "in an equitable way among all Members."[118] This indicates that all Members must be judged by an equivalent standard. That standard or calculation obligation is set forth in the text of the Agriculture Agreement, and in particular Annex 3 and Article 6.

94. Moreover, it is not, as China suggests, "meaningless" to compare China's current activities, in the current year, utilizing the methodology required for the current year. It is relevant to note that many things in China have changed since its accession. For instance, China's market price support programs have fundamentally changed from providing below international prices to relatively high prices for commodities, and from purchasing pre-set volumes to purchasing all production offered for sale in certain provinces. Additionally, the value of overall agricultural production in China has increased significantly. The value of support provided through market price support is not "exaggerate[ed]" by the use of the methodology spelled out in the Agriculture Agreement. Rather, it is appropriately calculated – according to the same methodology all other WTO Members must use – and has proven to be far in excess of China's Final Bound Commitment Level of "nil."

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, <u>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</u>.[119]**

<u>Response</u>:

95. China asserts that constituent data and methodology "must be used consistently, where pertinent, for the calculation of that Member's Base (Total) AMS and Current (Total) AMS."[120] To this end, China states that "Articles 1(a)(ii) and 1(h)(ii) require the use of a Member's 'constituent data and methodology' as relevant inputs for the calculation of Current (Total) AMS," and "do not limit the application of a Member's 'constituent data and methodology' to the same measures that already existed during the base period."[121]

96. China misstates the requirements of Articles 1(a) and 1(h) of the Agriculture Agreement. Articles 1(a) and 1(h) prioritize consideration and use, not of what data and methodology were

[118] Agriculture Agreement, preamble.
[119] China's second written submission, para. 189.
[120] China Responses to Panel Questions, Question 83, para. 206.
[121] China Responses to Panel Questions, Question 83, paras. 208-209.

used to evaluate different programs at the time of accession, but rather the calculation requirements provided by the text of the Agriculture Agreement. This is made explicit by the hierarchy provided in Article 1(a)(ii).[122] Article 1(a)(ii) does not use the same language or instruction to describe both elements of calculation, as suggested by China.[123] Rather, it specifies Members are to calculate the value of AMS "in accordance with the provisions of Annex 3 of this Agreement," and that Members are to calculate AMS "taking into account the consistent data and methodology used in the tables of supporting material."[124] Article 1(h)(ii) governing the calculation of Current Total AMS in subsequent years presents a similar hierarchy.[125]

97. As noted by China, Articles 1(a)(ii) and 1(h)(ii) do not limit the application of constituent data "to the same measures that already existed during the base year."[126] Instead, the text limits the application by first plainly stating that the calculation in subsequent years must be consistent with the text of the Agriculture Agreement. For this reason, the types of information that may be drawn from a Member's constituent data and methodology is the information that may apply from program to program – such as types of products, typical year, etc. The subsequently used data and methodology may not be not inconsistent with the requirements of the Agriculture Agreement. The reference to constituent data and methodology does not, as suggested by China, permit the use of a methodology that was accurate for a program in the base period (such as the using a pre-set maximum procurement volume as the quantity of eligible production) to calculate the value of support provided through a different program that requires a different evaluation pursuant to the requirements of Annex 3.

98. In support of the application of "methodology" used to evaluate *different* domestic support measures that operated under *different* legal requirements and parameters, China again falls back on its demand for "consistency."[127] China suggests that a calculation not based on this historic methodology used to evaluate a different program would "involve substantial distortions," and "would become a meaningless apples-to-oranges comparison."[128] China's argument is again without merit.

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

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[122] *See also Korea – Various Measures on Beef* (AB), paras. 112-113.
[123] China Responses to Panel Questions, Question 83, para. 208 (referring to "a Member's 'constituent data and methodology' as an element of those calculations").
[124] Agriculture Agreement, Article 1(a)(ii).
[125] United States Responses to Panel Questions, Question 62.
[126] China Responses to Panel Questions, Question 83, para. 209
[127] China Responses to Panel Questions, Question 83, para. 214.
[128] China Responses to Panel Questions, Question 83, para. 214

100. Finally, with regard to the statements of the panel and the Appellate Body in *Korea – Beef*, China suggests that the Appellate Body "shared the panel's understanding of . . . the need for consistency with Base AMS."[129] As explained by the United States in response to Questions 79 and 82, the United States does not share China's reading the Appellate Body's statements. Specifically, the Appellate Body's footnote citing to the panel report in *Korea – Beef* appears to indicate that while the panel and Appellate Body both agreed they did not need to reach the issue of how to address constituent data and methodology, the Appellate Body *disagreed* with the panel's broad statements regarding consistency between the calculation of Base Total AMS and Current Total AMS. Specifically, the Appellate Body asserted that a hierarchy exists between the text of the Agreement and a Member's constituent data and methodology, and this would appear to directly refute China's proposed blanket requirement for "consistency."[130]

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 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?

Response:

101. The United States and China agree that "there may be different ways of providing market price support."[131] However, regardless of the manner of operation, the program should be evaluated and the value of support calculated on the basis of Annex 3 of the Agriculture Agreement, taking into account any constituent data and methodology used in the Supporting Tables that is relevant.

102. As the United States highlights in its comments on China's response to Question 94, contrary to China's suggestion in paragraph 223 of its responses, the market price support program in place during the base period appears to have operated on the basis of predetermined purchase amounts. This is different than the programs reviewed in this proceeding, which do not limit the amounts of wheat, rice, and corn in selected provinces that may be purchased at applied administered prices.

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.[132] (original footnotes omitted)**

[129] China Responses to Panel Questions, Question 83, para. 217.
[130] *Korea – Various Measures on Beef* (AB), fn 49.
[131] China Responses to Panel Questions, Question 84, para. 219.
[132] China's second written submission, para. 320.

Response:

103. While China suggests it is "clarify[ing]" its position, it continues to promote an interpretation that abrogates the mandatory language of Annex 3, paragraph 9. Specifically, China contends that a holistic and harmonious interpretation of the treaty as a whole requires a permissive interpretation of Annex 3, paragraph 9, which reads out the mandatory requirement to base a fixed external reference price on the years 1986 to 1988. As explained in the U.S. comments regarding China's responses to Questions 74 and 83, there is no permissible interpretation of the relevant provisions of the Agriculture Agreement that converts a mandatory rule into a voluntary one.

104. Nor do the Appellate Body reports cited by China support such an interpretation.

105. China first points to the differing interpretations of the term "like products" in the context of GATT 1994 Articles III:2 and III:4, and suggests that the potential for different interpretations of the same term supports its interpretation of paragraph 9.[133] However, the interpretive exercise reflected in *EC – Asbestos* is not analogous to the interpretive exercise proposed by China in this dispute. With respect to Articles III:2 and III:4, the Appellate Body determined that although the term "like products" was used in both provisions, the immediate context of each differed, and therefore the ordinary meaning of the term in those different contexts also differed slightly.[134] The meaning given to each term based on its context did not, however, *contradict* the ordinary meaning of the term itself.[135] Rather, the Appellate Body found that the context of Article III:4 indicated that a broader group of products would be considered "like" for purposes of that obligation than for Article III:2.[136] Thus, the findings of the Appellate Body followed the tenets of customary rules of interpretation in reaching its conclusions regarding like products, unlike what China's asks the panel to do in this dispute.

106. China's arguments with respect to Article 21.5 of the DSU are similarly unavailing. China suggests that the Appellate Body has interpreted the phrase "measures taken to comply" in a way that is "broader than the allegedly clear dictionary meaning of those words . . . in comparison to what may have emerged from a purely dictionary-based interpretation."[137] Again, however, China conflates an interpretation reflecting a "broad" interpretation of the relevant terms based on the context of those terms and the object and purpose of the Agreement with an interpretation that is *inconsistent with* the ordinary meaning of the relevant terms.

107. With respect to Article 21.5 specifically, the first sentence states that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." Thus, as discussed by the Appellate Body in *US – Softwood Lumber IV* (*Article 21.5 – Canada*), the reference to "existence or consistency" informs the understanding of the ordinary meaning of

[133] China Responses to Panel Questions, Question 85, para. 234.
[134] *EC- Asbestos* (AB), para. 99.
[135] *EC- Asbestos* (AB), paras. 90-91.
[136] *EC- Asbestos* (AB), para. 99.
[137] China Responses to Panel Questions, Question 85, para. 238.

"measures taken to comply."[138] Thus, the interpretation of the text in the context of the remainder of the sentence does not depart from the ordinary meaning of the provision in a manner that would, for instance, read out the existing text or render it meaningless, as China's proposed interpretation of Annex 3, paragraph 9 would.

108. Finally, China points to the Appellate Body's interpretation of Article 2.1 of the TBT Agreement[139] to similarly argue that use of context and object and purpose led to an interpretation that differed from what would have been found had only the dictionary definition been relied upon. China states that while the phrase "accord treatment no less favourable" appears to provide a narrow mandate, the Appellate Body has interpreted this as not "prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from a legitimate regulatory distinctions."[140] This language was interpreted in its context, including by reference to the full text of Article 2.1 of the TBT Agreement, the definition of "technical regulation" provided by the TBT Agreement, and the text of the preamble to the TBT Agreement.[141] China's argument regarding Article 2.1 fails for the same reasons its other examples failed. The United States does not argue that the Panel may not refer to the context or object and purpose of the Agriculture Agreement in interpreting the text of Annex 3, paragraph 9, only that these interpretive sources may not undermine the ordinary meaning of the text itself. In the context of Article 2.1 of the TBT Agreement, the Appellate Body interpreted the ordinary meaning using context and object and purpose; however, it did not depart from the ordinary meaning in the manner suggested by China in this dispute.

109. In none of these instances was the context provided by other text in the covered agreements used to eliminate or nullify the ordinary meaning of the text to be interpreted. Nor was the context used to provide a country-specific interpretation. Rather, whether the interpretation is viewed by China as "broad" or "narrow", it was specific to the legal provision in which the text was situated. As the United States has stressed, it is appropriate to consider context when completing a *Vienna Convention* interpretation; however, the use of Supporting Tables to glean a rule which nullifies the plain text of the Agriculture Agreement for some Members, but not others, is not permitted.

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 <u>relevant</u> 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.[142]**

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[138] *US – Softwood Lumber IV* (Article 21.5 – Canada) (AB), para. 67,
[139] China Responses to Panel Questions, Question 85, para. 240.
[140] China Responses to Panel Questions, Question 85, para. 241 (*quoting US – Clove Cigarettes* (AB), para. 174.
[141] *US – Clove Cigarettes* (AB), para. 88.
[142] China's second written submission, para. 321.

Response:

110. See U.S. comments on China's response to Question 85.

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.[143] (original footnotes omitted)**

Response:

111. China states in its response to this question that if the Panel uses Members' Supporting Tables as context, "it may consider that it would no longer be necessary or appropriate . . . to use Members' Supporting Tables to discern a subsequent practice."[144] The United States agrees that the Panel need not consider the "subsequent practice" of other Members in interpreting Annex 3, paragraph 9, but for the reasons outlined in the U.S. response to Question 74.

112. We note that China acknowledges that "there is no instance of a WTO adjudicator having considered a subsequent practice in its treaty interpretation."[145] Instead, China's cites to the views of a commentator regarding a single instance of what that commentator considered to be "subsequent practice," and in which a "practice" amongst parties to a treaty "suggest[ed] that States possess a certain discretion" not reflected in the mandatory nature of the agreement.[146] In that situation, armed groups targeted medical convoys displaying "Red Cross" or "Red Crescent" symbols and, to avoid such attacks, certain States had refrained from marking their medical convoys. The commentary notes that the failure to comply with the mandatory obligation of the Geneva Convention of 1949 to use such symbols was not objected to by other States, and concludes that, therefore, "[s]uch practice by States confirms an interpretation according to which article 12 does not contain an obligation to use the protective emblem in all circumstances, and thereby indicates a margin of discretion for the parties."[147] Putting aside the question of whether this "practice" rose to the level of subsequent practice for purposes of the Vienna Convention (this conclusion was not the result of a dispute or adjudication), we note that this situation is not at all analogous to the nature and scope of the practice China has alleged in this dispute. Therefore, it is of very little persuasive value to the Panel in this dispute.

113. Moreover, that a single commentator has interpreted a mandatory obligation as being voluntary in some circumstances does not mean that the Panel could come to a similar

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[143] China's second written submission, para. 333.
[144] China Responses to Panel Questions, Question 87, para. 247.
[145] China Responses to Panel Questions, 87, para. 251.
[146] Special Rapporteur Georg Nolte, United Nations General Assembly, International Law Commission, 66th Session, A/CN.4671, 26 March 2014 (Exhibit CHN-95), pp. 16-17.
[147] Special Rapporteur Georg Nolte, United Nations General Assembly, International Law Commission, 66th Session, A/CN.4671, 26 March 2014 (Exhibit CHN-95), pp. 16-17.

conclusion based on the facts of this dispute. As previously noted, an alleged subsequent practice must occur with respect to the application of the relevant provision of a treaty. Here, the use of an alternative base year does not reflect the application of Annex 3, paragraph 9, which requires the use of a particular time frame for the "fixed external reference price" when calculating market price support for Current AMS. The choice of a time period for establishment of a Base Total AMS is a different exercise not subject to the same obligations under Annex 3.

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.

Response:

114. Contrary to China's assertions, the definition of "eligible production" is not a methodological matter to be drawn from a Member's Supporting Tables "because that quantity changes from year to year."[148] Rather, the meaning and methodology is derived from the requirements found in the text of Annex 3, paragraph 8.

115. The United States notes that like many phrases in the covered agreements "quantity of eligible production" is not a defined term. However, it is to be interpreted as provided by Article 31(1) of the *Vienna Convention on the Law of Treaties* – "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[149]

116. Annex 3, paragraph 8, of the Agriculture Agreement directs that the established price gap to be multiplied "by the quantity of production eligible to receive the applied administered price."[150] The ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc."[151] Thus, the "quantity of production eligible" is a portion or amount of the commodity produced that is entitled to receive the applied administered price. It is the amount of agricultural production that has the rightful claim to receive the applied administered price, whether or not that amount of production actually received the specified applied administered price.[152]

117. The Appellate Body in *Korea – Beef* considered the meaning of the phrase "quantity of production eligible to receive the applied administered price" and reached a similar understanding.[153] The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually

[148] China Responses to Panel Questions, Question 88, para. 255.
[149] VCLT, Article 31(1).
[150] Agriculture Agreement, Annex 3, paragraph 8.
[151] *Shorter Oxford English Dictionary*, "eligible," p. 799 (ed. 1993) (Exhibit US-64).
[152] *See also Shorter Oxford English Dictionary*, "entitled," p. 830 (ed. 1993) ("Now (chiefly of circumstances, qualities, etc.) confer on (a person or thing) a rightful claim *to* something or a right *to do*." (emphasis original)); *Shorter Oxford English Dictionary*, "fit," p. 960 (ed. 1993) ("Be suited to or appropriate for;" "Meet the requirements of") (Exhibit US-64).
[153] *Korea – Various Measures on Beef* (AB), para. 120.

purchased.'"[154] The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen."[155] It noted that "a government is able to define and limit 'eligible' production," and that "[p]roduction actually purchased may often be less than eligible production."[156] Thus, "eligible production" within the meaning of Annex 3, paragraph 8 of the Agriculture Agreement is production, which is fit or entitled to receive the administered price, whether or not the production was actually purchased.[157]

118. To extent that the data and methodology remains relevant, a panel taking note of constituent data and methodology on this point may look to the official sources used in the original Supporting Tables, divisions between one agricultural product or another, or other similar factors. Members may not undermine or rewrite the plain meaning of Agriculture Agreement through descriptions provided in their constituent data and methodology.

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

Response:

119. As noted in the U.S. response to Question 89, nothing in the text of the Agriculture Agreement defines "base period" for the purposes of evaluating domestic support. This period is distinct from the obligation set forth in Annex 3, paragraph 9, with respect to the use of a fixed external reference price for the calculation of market price support in subsequent years. Further, the United States has responded to China's argument regarding consistency in the U.S. comments on China's responses to Questions 75, 83, and 104.

120. China also argues that if a Member cannot calculate Current Total AMS on the same basis as its Base Total AMS that Member would be subjected to "commitments it did not undertake, in violation of Article 3.2 of the DSU."[158] This statement is without support. China committed, and other Members agreed, to the Final Bound Commitment Level recorded in China's Schedule.[159] Further, China committed, and other Members agreed, to the calculation methodology set out in Agriculture Agreement and in its Accession Protocol, including

[154] *Korea – Various Measures on Beef* (AB), para. 120.
[155] *Korea – Various Measures on Beef* (AB), para. 120.
[156] *Korea – Various Measures on Beef* (AB), para. 120.
[157] *See also Korea – Various Measures on Beef* (Panel), para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").
[158] China Responses to Panel Questions, Question 89, para. 260.
[159] China's Accession Protocol, Part I, 1.2 (Exhibit US-5).

incorporated provisions of China's Working Party Report.[160] Far from assuming commitments it did not undertake, China now attempts to alter the rights and obligations it undertook by the agreement of the Members of the WTO and China. These arguments are not consistent with the text of the relevant provisions of the Agriculture Agreement or China's obligations under its Accession Protocol, and again, should be rejected.

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)**

[160] China's Working Party Report, para. 235 (Exhibit US-7).

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:

121. The United States notes that China has not provided the underlying reports supporting this data. However, the values identified by China appear consistent with those the United States was able to identify. This additional information clarifies that "off grade" grain is a *de minimis* volume each year as described in the U.S. response to Question 93.

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:

122. China seeks to use select phrases in its Supporting Tables as support for its position that Note 19 not only defines "eligible production" during the base period, but sets forth a methodology to be utilized in *future* calculations. For the Panel's convenience we provide below the relevant statements regarding "quantity of eligible production."

Note 19 to Table DS 5:

[19] 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.

Data sources:
Eligible production for grain at state procurement price and protective price are provided by SAG and SDPC.

Endnote 10 of Supporting Table DS 1:

[10] In order to safeguard food security, the Chinese government set up the Buffer Reserve System to agricultural products that have a significant bearing on the national economy and people's livelihood, namely wheat, rice, corn, vegetable oils and sugar. In the 1996-1998 base period, the buffer reserve of grain for food security purposes was conducted in the following ways:

(1) *Wheat, rice and corn*: According to the State Buffer Reserve System for food security purpose, State-owned grain enterprises at provincial, county and township levels designated by the State purchase wheat, rice and corn at the government procurement prices within the procurement amount predetermined by the System, and then state-owned grain reserve enterprises reserve the purchased grains. When food security is endangered due to natural disasters or reduction of grain production, the designated state-owned grain enterprises sell the reserved grains at market prices. Outlays for the program cover all the operating costs, including transportation and storage costs, and loan interest. This information is provided according to Footnote 5 of Annex 2. The State sets government procurement amount and government procurement prices of wheat, rice and corn, as shown in the AMS calculation of wheat, rice and corn in Supporting Table DS 5.

(2) *Vegetable oils and Sugar*: The State purchase vegetable oils and sugar at market prices and set procurement amount through enterprises, and store the purchased vegetable oils and sugar through reserve enterprises. In case of natural disaster when food security of residence is endangered and base nutrition level is decreasing, the State sells the reserved vegetable oils and sugar at the market prices. Outlays for the reserve program cover operating costs related to transportation, storage and loan interest.

Note 1 to Appendix Table DS 5-1 (State Procurement Price Policies):

Notes:
1/ The government procures wheat, rice, corn and cotton from farmers through state-owned grain enterprises at state procurement price in order to safeguard food security.

Note 1 to Appendix Table DS 5-2 (State Protective Price Policies):

Notes:
1/ The protective price set up by the government is to safeguard farmers' income. The state-owned grain enterprises were designated to purchase farmers' grain at protective price and pre-set amount.

123. The plain text of Note 19 does not support China's position that this portion of the Supporting Table establishes a "methodology" for future AMS calculations. With regard to the "State Procurement Program," Note 19 states both that "Eligible Production for State Procurement Price refers to the amount purchased by state-owned enterprises" and to "see Endnote 10 of Supporting Table DS 1."[161] Endnote 10 in turn states that "[s]tate-owned grain enterprises . . . purchase wheat, rice and corn at the government procurement prices within the procurement amount predetermined by the System, and then state-owned grain reserve enterprises reserve the purchased grains," and that "[t]he State sets government procurement amount and government procurement prices of wheat, rice and corn, as shown in the AMS calculation of wheat, rice and corn in Supporting Table DS 5."[162] Read together these statements indicates that the volume purchased by the state-owned enterprises was the "predetermined" volume. Note 1 to Appendix DS 5-1 provides why grain is purchased but does not appear to address the factors determining how much grain is purchased.

[161] China's Supporting Table, WT/ACC/CHN/38/Rev.3, p. 26.
[162] China's Supporting Table, WT/ACC/CHN/38/Rev.3, p. 17.

124. With regard to the "State Protective Program," Note 19 states that the "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."[163] While there is no reference to Endnote 10, Note 1 to Appendix DS 5-2 states that "[t]he state-owned grain enterprises were designated to purchase farmers' grain at protective price and pre-set amount."[164] This similarly suggests that when the information regarding the Protective Price Policy is read together it is clear that it also relied on pre-set volumes of grain that would be purchased annually.

125. Based on the forgoing, it appears that the methodology utilized by China with regard to both programs is consistent with the methodology demanded by Annex 3, paragraph 8, of the Agriculture Agreement. That is, the volume of production eligible to receive is equivalent to the predetermined maximum purchase volume.[165]

126. Additionally, China's factual description of its methodology does not express an intent to change the methodology used in the future, or an agreement by the Members to do so. Specifically, while the programs in place in the mid-1990s used predetermined purchase limits, the market price support programs examined in this dispute do not and provide for unlimited purchasing in identified provinces. Nothing in China's Supporting Tables suggests that China would *not* continue to use the methodology obligated by the Agriculture Agreement in this circumstance and include all production eligible to receive the applied administered price in its calculation.

127. China concludes that in any event Note 19 "does not exclude application of that same methodology for future market price support measures,"[166] and claims the obligation to apply this methodology extends from the requirements "that constituent methodologies . . . be given meaning" as provided in Articles 1(a)(ii) and 1(h)(ii).[167] As the United States has indicated a number of times in this dispute, Article 1(a)(ii) states that for the purposes for AMS calculations in subsequent years Members shall calculation AMS in accordance with Annex 3. They shall also take into account material in their Supporting Tables. However, the dichotomy between "in accordance with" and "take into account" suggests a lesser level of consideration for material used in the Supporting Tables and clearly indicates it cannot be material that would result in an evaluation inconsistent with Annex 3.

7. Calculations and Methodology

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".[168] (own emphasis)

[163] China's Supporting Table, WT/ACC/CHN/38/Rev.3, p. 26.
[164] China's Supporting Table, WT/ACC/CHN/38/Rev.3, p. 25.
[165] *See e.g., Korea – Various Measures on Beef* (Panel), para. 827.
[166] China Responses to Panel Questions, Question 95, para. 269.
[167] China Responses to Panel Questions, Question 95, para. 276
[168] Agreement on Agriculture, Article 1(b).

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:

128. China states that Article 1(b) describes basic agricultural products as both "defined as the product as close as practicable to the point of first sale," and "as specified in a Member's Schedule and in the related supporting material."[169] From the first clause China concludes that this is "not simply the identification of the product variety, but also the identification of the processing level."[170] China concludes that this information can be found in a Member's Schedule and Supporting Tables.[171]

129. The United States disagrees with China's interpretation. The direction to identify products "as close as practicable to the point of first sale" is not a choice of processing level, but an instruction provided by Article 1(b). The text of Article 1(b) means the identified product will be considered as the product as close as possible to the first sale by the farmer to the middleman, government, or trader. Further, Annex 3, paragraph 7 provides context for interpreting this requirement. It states that the AMS calculation shall be "as close as practicable to the point of first sale of the basic agricultural product concerned." That provision further states that the AMS calculation is intended to capture domestic support in favor of basic agricultural producers but not processors. This reinforces the choice of products as close to the farmers level as possible.

130. In any event, China's Supporting Tables do not indicate that China selected "milled" Indica rice and "milled" Japonica rice as its basic agricultural products. There is nothing on the face of China's Supporting Table that supports this selection; the term "milled" is simply not used. China argues that it converted paddy rice data to a milled rice basis in its supporting materials, but on the face of China's Support Tables, it does not appear that such a conversion was performed, as explained in the U.S. comment of China's response to Question 73, above. China also relies on the reference in China's Supporting Tables to the Harmonized Tariff Schedule code for exported milled rice. However, neither China's Supporting Tables, nor the prior versions of the Supporting Tables reference by China,[172] indicate whether the external reference prices to which China refers were also subject to an adjustment, such that they would reflect a milled rice basis. Rather, the products specified in China's Supporting Tables are "Indica rice" and "Japonica rice." The relevant point of first sale for these products is in a paddy rice form.

131. Finally, with regard to China's objection to the conversion rate proposed by the United States, China now seems to have moved from asserting the comparison is inappropriate because

[169] China Responses to Panel Questions, Question 99, para. 312 (quoting Agriculture Agreement, Article 1(b)).
[170] China Responses to Panel Questions, Question 99, para. 313.
[171] China Responses to Panel Questions, Question 99, para. 315.
[172] China's Draft Supporting Table, WT/ACC/CHN/22 (providing data on "rice" rather than Indica rice and Japonica rice).

it is derived from a "retail" price,[173] to asserting it is inappropriate because it is derived from a "border" price.[174] As the United States has described a number of times, the source of the price comparison, the *China Yearbook of Agricultural Price Survey*, provides "rural free market" prices.[175] The observations are thus reported at the geographic location of the first point of sale by farmers of paddy rice. This is *also* the location of most milling activities. The "distortion" China asserts regarding "level of trade" is therefore simply not present.

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:

132. The United States refers the Panel to the U.S. Comments on China's Response to Question 62.

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 APP 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:

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

[173] China Responses to Panel Question 38, para 172.
[174] China Responses to Panel Questions, Question 99, para. 319. China seems to misunderstand the U.S. submission of Exhibit US-100, which compares the data in the *China Yearbook of Agricultural Price Survey* (again "rural free market" prices) to port prices and suggests they are similar. Contrary to China's argues this suggests there is no significant change to the price between the location of milling activities and the port.
[175] *See* China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2006) (Exhibit US-69); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2008) (Exhibit US-870); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2012) (Exhibit US-71); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2014) (Exhibit US-72); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2016) (Exhibit US-99).

Calculating MPS at unmilled level:

$$\boldsymbol{MPS = (AAP - xFERP) * Q}$$

Response:

133. The United States refers the Panel to the U.S. response to Question 101 and reiterates the need to distinguish between the conversion factor required to convert the volume of paddy rice to a milled rice volume, and the price of paddy rice to a milled rice price.

134. In its response to Question 101, China again asserts that "AMS from China's market price support for indica rice and japonica rice must be calculated at the milled rice level."[176] The United States has responded to China's arguments in comments on China's responses to Questions 73 and 99.

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:

135. Neither paragraph 71 of the U.S. Second Written Submission, nor the other statements of the United States in this dispute support China's assertion that "the United States has accepted that a Member's constituent data and methodology . . . must be used irrespective of the provisions of Annex 3."[177] Quite the opposite.

136. The United States notes that paragraph 71 responded to Panel questions regarding a passage in the *Korea – Beef* report. The Appellate Body in *Korea – Beef* speculated that:

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

[176] China Responses to Panel Questions, Question 101, para. 328.
[177] China Responses to Panel Questions, Question 103, para. 343.

> the Base Total AMS calculation. We do not believe that the Agreement on Agriculture would sustain such an extrapolation.[178]

137. It is the consistent view of the United States is that both the text of the Agriculture Agreement and a Member's constituent data and methodology have a specific role spelled out by the Agriculture Agreement itself. Article 1(a)(ii) states that the calculation of AMS shall be "in accordance with" Annex 3, and "take into account" constituent data and methodology used in the Member's Supporting Tables. This clarifies that Members are in all instances to follow the requirements of Annex 3 when calculating the value of AMS. They may also "take into account" constituent data and methodology, not to supplant Annex 3, as that must be complied with in all cases, but to provide, for example, country-specific and crop-specific information that may inform the calculations required under the Agriculture Agreement. This interpretation does not "read out any meaning to be given to the phrase 'constituent data and methodology,'" but rather follows the express instructions provided by the Agriculture Agreement.

138. Given the clear meaning of Article 1(a)(ii) of the Agriculture Agreement, the Appellate Body's statement posited, on an *arguendo* basis, a hypothetical circumstance in which "one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3."[179] The United States noted the Appellate Body's statement suggested an example of what one such circumstance might theoretically include – the calculation of support provided during the implementation period for reduction commitments. However, that circumstance does not arise in this dispute, and therefore China errs in attempting to recast its Final Bound Commitment Level as a reduction commitment. Not only did China not take reduction commitments, but China's interpretation of constituent data and methodology in that context would remain inconsistent with the text of the Agreement – as clearly acknowledged by the Appellate Body in *Korea – Beef*.

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.[180]**

Response:

[178] *Korea – Various Measures on Beef* (AB), para. 114.
[179] *Korea – Various Measures on Beef* (AB), para. 114.
[180] *Korea – Various Measures on Beef* (AB), para. 115.

139. China claims that the cited statement by the Appellate Body in *Korea – Beef* supports "China's view that consistency/parallelism is required in the calculation of Base (Total) AMS, which serves as the basis for domestic support reduction commitments, and Current (Total) AMS."[181] China is incorrect. In fact, the statement by the Appellate Body directly rebuts China's arguments and is consistent with the plain meaning of Article 1(a)(ii), as explained by the United States.

140. Like China in this dispute, Korea complained that "[u]sing one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results."[182] The Appellate Body rejected this argument. In doing so, the Appellate Body found that "the relevant treaty provisions do not provide for any particular mode of calculation of the 'Base Total AMS,'" whereas the "treaty definitions of both AMS and Total AMS . . . do provide a specific methodology for calculating Current AMS and Current Total AMS in respect of a particular year during the implementation period."[183] Based on the text of the Agriculture Agreement, therefore, the Appellate Body concluded that the Final Bound Commitment Level is an absolute value to which "Current Total AMS . . . *calculated according to Annex 3*, is compared."[184] Neither the Agriculture Agreement, nor the findings of the Appellate Body, support the conclusion that Current Total AMS is compared to, or must be calculated consistent with, a Member's *Base* Total AMS.

141. China's proposed interpretation would nullify the plain meaning of Articles 1(a)(ii), Annex 3, paragraph 8, and Annex 3, paragraph 9, and should be rejected for the same reasons Korea's interpretation was rejected by the Appellate Body in *Korea – Beef*.

[181] China Response to Panel Questions, Question 104, para. 346.
[182] *Korea – Various Measures on Beef* (AB), para. 115.
[183] *Korea – Various Measures on Beef* (AB), para. 115.
[184] *Korea – Various Measures on Beef* (AB), para. 115 (emphasis added).