CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 12, 2018

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. Each year, the People's Republic of China ("China") provides a significant level of domestic support to its agricultural producers through a variety of subsidy programs and other measures. This dispute addresses a single means of agricultural support, "market price support" ("MPS"), which China utilizes to support farmer incomes and increase production for basic agricultural products, including wheat, Indica rice, Japonica rice, and corn. Through this form of support alone, China has provided support far in excess of its WTO commitments. The level of domestic support China provided to its agricultural producers in 2012, 2013, 2014, and 2015 exceeded the level set out in Section I of Part IV of China's Schedule of Concessions on Goods ("CLII"). China's level of domestic support in favor of agricultural producers has therefore breached Articles 3.2 and 6.3 of the *Agreement on Agriculture* ("Agriculture Agreement") for the years 2012, 2013, 2014, and 2015.

2. China's MPS programs announce on an annual basis an applied administered price that will be available to farmers either immediately upon initiation of each year's program, as for corn, or when market prices drop below the applied administered price, as for wheat, Indica rice, and Japonica rice. This applied administered price is provided or furnished to farmers in the major producing provinces during the period immediately following harvest. By guaranteeing farmers an established price for their commodities, China's MPS programs for wheat, Indica rice, Japonica rice, and corn ensure that commodity prices in the relevant provinces are maintained at the Chinese government's chosen support level.

I. CHINA'S IMPLEMENTATION OF MARKET PRICE SUPPORT PROGRAMS

3. Per the annual policy direction in the *Document Number 1* and regulatory framework provided by the *2004 Grain Distribution Regulation*, China issued annual announcements of minimum prices for wheat, Indica rice (early season and mid-to-late season), and Japonica rice, and implementation plans for purchasing those grains harvested in 2012, 2013, 2014, and 2015 at the established prices. Together these instruments form the wheat, Indica rice, and Japonica rice MPS Programs. China has also maintained similar MPS Programs for corn announced through an annual notice in the years 2012, 2013, 2014, and 2015.

A. China's Wheat Market Price Support Program

4. Wheat is China's second most prevalent crop, after rice, and China is one of the world's top wheat producers. Between 2005 and 2015, wheat production in China increased by 25 percent, with production in 2015 reaching 130.19 million metric tons ("MT") annually.

5. China issues two documents each harvest year to implement the MPS Program for wheat. First, prior to the planting of winter wheat, China announces the annual "minimum purchase price" in a *Notice on Raising the Wheat Minimum Purchase Price* or *Notice on Announcing the Wheat Minimum Purchase Price* ("*Wheat MPS Notices*"). This is China's applied administered price for wheat. China's National Development and Reform Commission ("NDRC"), Ministry of Finance ("MoF"), Ministry of Agriculture ("MoA"), State Administration of Grain, and the Agricultural Development Bank of China jointly issue the annual *Wheat MPS Notice*s.

6. The *Wheat MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agricultural departments (bureaus, commissions, offices), grain bureaus, and Agricultural Development Bank of China branches in all provinces, autonomous regions, and municipalities directly under the central government." The *Wheat MPS Notices* state that "each locality is

required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *2015 Wheat MPS Notice* states that "[i]n order to protect the interests of farmers and prevent 'low grain prices hurting farmers,'" the *Notice* is provided to "guide farmers to plant rationally, and promote the stable development of grain production."

7. Second, the NDRC, MoF, MoA, State Administration of Grain, Agricultural Development Bank, and China Grain Reserves Corporation ("Sinograin") publish a *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan*, "in order to implement and fulfill the spirit of the [*2015 Document Number 1*]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Wheat MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*]."

8. The annual *Wheat MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Wheat MPS Notices*, noting that this is "the at-depot price of direct purchases [of wheat] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Wheat MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying wheat, (3) relevant timeframe, (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

9. Each year to implement the Wheat MPS Program, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots" in each affected province. These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

10. Under the Wheat MPS Program, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, . . . including the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

11. The *Wheat MPS Implementations Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard;" "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

12. Purchase and administration costs under the MPS Program for wheat are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Further, ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The wheat held by the entrusted purchasing and storage depots will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

13. The Chinese instruments setting out the MPS Programs for wheat instruct central and provincial government officials to initiate a program of wheat purchases on an annual basis. The MPS Programs ensure that farmers in the six major wheat producing provinces are able to make sales of qualifying wheat at the

announced applied administered price, if the prevailing domestic market price falls below the applied administered price. As described below, the MPS Programs for Indica rice and Japonica rice operate in a similar manner.

B. China's Indica Rice and Japonica Rice Market Price Support Programs

14. China is the world's largest rice market, accounting for nearly a third of global production and consumption. Between 2005 and 2015, total rice production in China increased by 15 percent, with production in 2015 reaching 208.23 million MT annually.

15. China issues two documents each harvest year to implement the MPS Programs for Indica rice and Japonica rice. China first issues an annual *Notice on Raising the Rice Minimum Purchase Price* or *Notice on Announcing the Rice Minimum Purchase Price* ("*Rice MPS Notices*") each year, which defines the "minimum purchase price" or applied administered price for three products: early-season Indica rice, mid-to-late season Indica rice, and Japonica rice. NDRC, MoF, MoA, State Administration of Grain, and the Agricultural Development Bank jointly issue the annual *Rice MPS Notices.*

16. The *Rice MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agriculture departments (bureaus, commissions, and offices), grain bureaus, and Agricultural Development Bank of China branches of all provinces, autonomous regions, and municipalities directly under the central government." The *Rice MPS Notices* are issued in January or February, which is well in advance of planting. The *Rice MPS Notices* state that "[a]s it is currently the middle of the preparatory spring plowing period, all localities are required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *Rice MPS Notices* continue that the announced price is to "guide farmers to plant rationally, and promote the stable development of grain production."

17. Second, the NDRC, in conjunction with the MoF, MoA, State Administration of Grain, Agricultural Development Bank of China, and Sinograin, publish an annual *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan,* "in order to implement and fulfill the spirit of the [2015 Document Number 1]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Indica Rice and Japonica Rice MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*].

18. Typically, the early Indica rice Implementation Plan is released first, and a joint mid-to-late Indica rice and Japonica rice plan follows during the later planting season. In other instances, the *Indica Rice and Japonica Rice MPS Implementation Plans* are announced in the same document as the *Wheat MPS Implementation Plan,* as was the case for 2015.

19. The annual *Indica Rice and Japonica Rice MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Rice MPS Notices*, noting that this is "the at-depot price of direct purchases [of rice] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Indica Rice and Japonica Rice MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying Indica rice or Japonica rice, (3) relevant timeframe, and (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

20. Each year to implement the Indica Rice and Japonica Rice MPS Programs, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots." These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

21. When the Indica Rice and Japonica Rice MPS Programs are activated, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, [this information] will include the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

22. The *Indica Rice and Japonica Rice MPS Implementation Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard," "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

23. Purchase and administration costs under the MPS Program for rice are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The Indica rice and Japonica rice held by the entrusted purchasing and storage depots, will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

24. The Chinese instruments setting out the MPS Programs for Indica rice and Japonica rice instruct central and provincial government officials to initiate a program of Indica rice or Japonica rice purchases on an annual basis. The MPS Programs ensure that farmers in the identified major rice producing provinces are able to make sales of qualifying rice at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. The MPS Program for corn operates in a similar manner.

C. China's Corn Market Price Support Program

25. China is the world's second largest producer of corn. Since 2005, China's corn production has increased 38 percent. Corn is primarily grown in northern and northeastern China.

26. As described in China's *Document Number 1*, the measures related to corn procurement are part of a "temporary" program to procure and store corn. To implement market price support for corn, China issues a single document titled the *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region* (the "*Notice on Purchases of Corn*"). The *Notices on Purchases of Corn* are issued jointly by NDRC, the State Administration of Grain, MoF, and Agricultural Development Bank of China, and provide details on the available applied administered price, geographic scope, timing, and requirements of the Corn MPS Program.

27. The Corn MPS Programs provide that the applied administered price is to be available in three Northeast provinces – Liaoning, Jilin, and Heilongjiang – and the Inner Mongolia Autonomous Region. The

Notices on Purchases of Corn for 2012 through 2015 provide the applied administered prices in the referenced provinces and autonomous region. This price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots."

28. The Corn MPS Program operates from when the *Notice on Purchases of Corn* is issued typically in late November or early December until April 30 of the following calendar year. This is the period immediately following the corn harvest in northeastern China.

29. The Corn MPS Program provides that the applied administered price is for "domestically produced corn produced in 2015, meeting the quality standards for national at-grade product," or "Grade 3" corn. The applied administered price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots." Corn that meets a lower or higher grade may also be purchased and "[p]rice differences between adjacent grades will be controlled at 0.02 yuan per *jin* [half kilogram]."

30. Sinograin is "entrusted by the state to act as the primary policy implementation entity," and in particular "will make open purchases of farmers' surplus grain and prevent the occurrence of farmers' 'difficulty selling grain.'" Aspects of the work are also delegated to the provincial governments who may issue their own implementing measures.

31. The *Notices on Purchases of Corn* further provide that "COFCO, Chinatex, and [Aviation Industry Corporation of China ("AVIC")], as the supplemental forces for [Sinograin], are entrusted by [Sinograin] to undertake purchasing and storage tasks, and will independently take on loans from the Agricultural Development Bank of China." Other warehouses and granaries may be designated as "purchasing and warehouse sites" by joint decision of local subsidiaries of Sinograin, and the Agricultural Development Bank of China, as well as local grain administration authorities. Further, permanent and temporary storage facilities may be built by Sinograin and provincial officials where there is determined to be a need for additional storage.

32. Each identified "purchasing and warehouse site" throughout the Northeast region is "required to openly post and purchase in accordance with stipulated prices." Further, they must "ensur[e] that grain standards and quality and price policies are posted and standard sample products are displayed." While assuring that these requirements are followed, the sites will also "make open purchases of farmers' surplus grain and will prevent the occurrence of 'difficulty selling grain' among farmers."

33. The Chinese instruments setting out the MPS Programs for corn instruct central and provincial government officials to initiate a program of corn purchases on an annual basis. The MPS Programs ensure that farmers in the northeast provinces are able to make sales of qualifying rice at the announced applied administered price, once notice of the program has been issued.

II. CHINA MUST MAINTAIN DOMESTIC SUPPORT EXPRESSED AS CURRENT TOTAL AMS AT LEVELS BELOW CHINA'S FINAL BOUND COMMITMENT LEVEL WHEN CALCULATED IN ACCORDANCE WITH THE AGRICULTURE AGREEMENT

34. China may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member's fixed commitment levels. The basic obligations in the Agriculture Agreement regarding domestic support are set forth as follows: (1) Article 3.2 states that: "[s]ubject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule;" (2) Article 6.3 states that: "[a] Member shall be considered

to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule"; and (3) finally, Article 7.2(b) states that: "[w]here no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6."

35. The Agriculture Agreement thus frames a WTO Member's obligation to limit domestic support: first, the Member's individual commitment recorded in Section I of Part IV of the Member's Schedule, and second, the *de minimis* level of support that may be provided by a Member to its producers of basic agricultural products, without including the value of that product-specific AMS in the calculation of Current Total AMS.

36. China scheduled a "Final Bound Commitment Level" of "nil" in Section I of Part IV of its Schedule of Concessions on Goods ("China's Schedule CLII"). China's consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support (Current Total AMS), which is the sum of the Aggregate Measurement of Support (AMS) provided to each basic agricultural product.

37. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" for a given year refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific agreement measurements of support and equivalent measurements of support for agricultural products." Pursuant to Article 6.4 of the Agriculture Agreement, a Member's Current Total AMS does not include product-specific AMS values that are less than or equal to the relevant *de minimis* level of support. For China, the *de minimis* level of support equals 8.5 percent of the total value of production of a basic agricultural product during the relevant year.

38. Therefore, to determine China's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural commodity, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a particular basic agricultural product exceeds China's *de minimis* level of 8.5 percent, the full value of the product-specific AMS would be included in China's Current Total AMS. Because China has committed to a level of domestic support of "nil" or zero, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 8.5 percent, China will have breached Articles 3.2 and 6.2 of the Agriculture Agreement.

Market Price Support

39. Annex 3 of the Agriculture Agreement identifies support that "shall" be included in a Member's AMS calculation. It states that "an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving *market price support*, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies")." Thus, the Agriculture Agreement states that "market price support" in favor of basic agricultural products is a form of non-exempt domestic support and must be included in a Member's AMS calculation.

40. The Agriculture Agreement does not expressly define the term "market price support;" it is useful to consider the ordinary meaning of the constituent terms of "market price support" to understand the scope of domestic support programs contemplated by this term. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "Support" is defined as "the action of holding up, keeping from falling, or bearing the weight of something" or "the action of contributing to the success of or maintaining the value of something."

41. Relevant to the consideration of the term "market price support," the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines "market price" as "the current price which a commodity or service fetches in the market." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

42. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that "market price support" is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for "each basic agricultural product" includes the provision of assistance in holding up or maintaining a market price for that agricultural product.

43. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute – market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible* to receive the applied administered price." The paragraph goes on to provide that "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

44. Thus, the calculation of market price support is based on the price gap between the "applied administered price" identified in the domestic support measure and the "fixed external reference price," multiplied by the quantity of eligible production.

Applied Administered Price

45. The Agriculture Agreement does not define the term "applied administered price". It is therefore necessary to evaluate the ordinary meaning of the constituent terms of "applied administered price." Specifically, "applied" is defined as to "put to practical use; having or concerned with practical application." This definition suggests an actual or real life action. With respect to "administered," "administer" is defined as to "carry on or execute (as office, affairs, etc.)," to "execute or dispense," or to "furnish, supply, give (orig. something beneficial to)." Finally, as described above, "price" is defined as "a sum in money or goods for which a thing is or may be bought or sold" or its "value or worth."

46. Considering these definitions, the "applied administered price" is the price a Member dispenses or furnishes to support a particular basic agricultural product. Paragraph 8 also refers to "the" applied administered price, suggesting that this price is known and discernable. The applied administered price is thus price set or established by the government and is, as such, distinguishable from a prevailing domestic market price. The "applied administered price" is the price the Chinese government *provides* for each of the basic agricultural products and is *identified* for each product and each year in the Chinese legal instruments implementing the program (Relevant data available at U.S. First Written Submission, Table 6; Exhibits US-20 – US-23, US-39 – US-42, US-52 – US-55).

Fixed External Reference Price

47. The "fixed external reference price" is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price "shall be based on the years 1986 to 1988" and "may be adjusted for quality differences as necessary." These fixed external reference prices can be determined using official Chinese customs data from these years (Relevant data available at U.S. First Written Submission, Table 7; Exhibit US-65).

Eligible Production

48. The third element of the market price support calculation methodology contained in Annex 3, paragraph 8, of the Agriculture Agreement directs that the established price gap be multiplied "by the quantity of production eligible to receive the applied administered price." The ordinary meaning of the terms indicates that "eligible production" is all of the production entitled or permitted to receive the administered price. Specifically, the ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc." 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.

49. 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. The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually purchased.'" The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen." 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." 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.

50. Because under China's programs all production in identified provinces is fit or entitled to receive the applied administered price, the "quantity of production eligible" is drawn from China's National Bureau of Statistic and Ministry of Agriculture official wheat, rice, and corn production volumes (Relevant data available at U.S. First Written Submission, Table 8; Exhibits US-18, US-73 – US-75).

III. CHINA'S MPS PROGRAMS FOR WHEAT, INDICA RICE, JAPONICA RICE, AND CORN PROVIDE GREATER THAN DE MINIMIS LEVELS OF DOMESTIC SUPPORT AND THUS RESULT IN CHINA EXCEEDING ITS DOMESTIC SUPPORT COMMITMENT FOR 2012, 2013, 2014, AND 2015

51. China's MPS Programs for wheat, Indica rice, Japonica rice, and corn are "market price support" measures as contemplated by Annex 3 of the Agriculture Agreement. As a preliminary matter, China has notified its Wheat and Rice MPS Programs on the "Product Specific Aggregate Measure of Support: Market Price Support" supporting table "DS:5" of its annual notification. These programs are notified as "product-specific." Therefore, China itself has stated that the MPS Programs for wheat, Indica rice, and Japonica rice operate as product-specific "market price support" and has characterized these programs as such to WTO Members.

52. Further, China's MPS Programs for wheat, Indica rice, Japonica rice, and corn constitute "market price support" within the meaning of Annex 3, because each Program exhibits an "applied administered

price" and "quantity of production eligible." Specifically, China announces for each MPS Program the "minimum procurement price" at which designated state-owned enterprises will purchase wheat, Indica rice, Japonica rice, and corn. This annually announced "minimum procurement price" constitutes an "applied administered price," because it is the known or discernable price China dispenses or furnishes for each basic agricultural product, regardless of the price that would be otherwise determined by the market. This offers price support to Chinese farmers in the designated regions.

53. China's MPS Programs also each establish a "quantity of eligible production." The MPS Programs specify that production in designated provinces is eligible for support, and in those provinces the state-owned enterprises will purchase all proffered product. Therefore, the portion or amount of the commodity produced that is entitled to receive the administered price is identified in the MPS Programs as all production produced in the identified provinces.

54. For these reasons, China's MPS Programs for wheat, Indica rice, Japonica rice and corn are "market price support" programs for the purposes of the Agriculture Agreement and must be evaluated per the methodology set forth in Annex 3.

55. As described above, Annex 3, paragraph 8, of the Agriculture Agreement provides the calculation methodology for market price support as:

*(Applied Administered Price – Fixed External Reference Price) * Quantity of Production Eligible = AMS*

56. Based on the values for each element of the "market price support" calculation, as well as the "total value of production" data, China has provided support in excess of its *de minimis* level for each of wheat, Indica rice, Japonica rice, and corn solely through its market price support programs for the years 2012, 2013, 2014, and 2015. Accordingly, China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement on the basis of the level of domestic support provided through China's market price support measures in favor of wheat, Indica rice, Japonica rice, and corn, viewed separately or collectively. Therefore, the United States requests that the panel issue the mandatory recommendation for China to bring its measures into conformity with the Agriculture Agreement.

EXECUTIVE SUMMARIES OF THE U.S. COMMENTS ON CHINA'S CHALLENGE TO THE PANEL'S TERMS OF REFERENCE, U.S. ORAL STATEMENTS AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL, AND THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

57. [Summaries of the U.S. comments on China's challenge to the Panel's terms of reference, the U.S. oral statements at the first substantive meeting, and the U.S. Responses to the Panel's First Set of Questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. DOMESTIC SUPPORT PROVIDED BY CHINA TO ITS CORN PRODUCERS IN 2012 THROUGH 2015 IS PROPERLY WITHIN THE PANEL'S TERMS OF REFERENCE

58. During this panel proceeding, China has not denied that it provided domestic support to corn producers from 2012 through 2015 in excess of its Final Bound Commitment Level. Instead, China erroneously argues that the Panel is precluded from examining and making findings and recommendations on China's provision of domestic support to its corn producers from 2012 through 2015. China argues that the annual legal instruments through which China provided domestic support to its corn producers in 2015 have

"expired," and on that basis the provision of domestic support provided to Chinese corn producers from 2012 through 2015 is outside the Panel's terms of reference.

59. China's arguments misunderstand "the matter" at issue in this dispute, and the nature of domestic support challenges generally, which necessarily relate to past action by a responding Member. As explained below, the United States properly identified the matter at issue in its panel request – the only matter as of the date of panel establishment that would permit an examination, and a finding of WTO-inconsistency. The DSU thus requires the Panel to examine and make findings and a recommendation regarding China's provision of domestic support during the relevant years. The expiration of annually-issued legal instruments through which China provided such support in the relevant years does not alter the Panel's terms of reference. Moreover, China's non-transparency prevents it from demonstrating that China ceased to provide domestic support to its corn producers in excess of its commitment level prior to the establishment of the Panel.

60. The "matter" to be resolved is that described in Article 7.1 of the DSU. This provision states that a panel's terms of reference are "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), *the matter referred to the DSB* by the [United States] in [its panel request] …, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreements". With respect to Article 7.1 of the DSU, the Appellate Body has stated: "[a] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings." Accordingly, the matter that the DSB places within a panel's terms of reference for its examination is defined by the complaining Member's panel request.

61. Thus, as set out in the U.S. panel request and explained in prior submissions, the United States has challenged China's provision of domestic support to its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's Final Bound Commitment Level of "nil" and in breach of Articles 3.2 and 6.3 of the Agriculture Agreement. The panel request describes four measures at issue: the "domestic support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015. It also describes eight affirmative claims, i.e., the United States challenges that the levels of domestic support provided for each of the four years exceeds China's final bound commitment level in breach of Article 3.2 and of Article 6.3 of the Agriculture Agreement. These four measures and eight claims constitute the "matter" that the DSB has charged the Panel with examining through its terms of reference.

62. In addition to identifying the "matter," the U.S. panel request also includes additional information that previews the main arguments the United States will advance in its First Written Submission to demonstrate its claims. Prior panels and the Appellate Body have explained that there is a significant difference between the claims identified in a panel request, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and clarified progressively in the written and oral submissions. The United States has identified both in its panel request.

63. The U.S. panel request is best understood by parsing the constituent parts of the three sentences in the U.S. panel request. The italicized language identifies the measures, the bolded language identifies the claims, and the underlined language previews the arguments put forward by the United States.

> The United States considers that **China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement because the level of**

> *domestic support provided by China* **exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII**. In particular, *China's domestic support in favor of agricultural producers*, expressed in terms of its current Total Aggregate Measurement of Support ("Total AMS"), **exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015** on the basis of domestic support provided to producers of, *inter alia*, wheat, Indica rice, Japonica rice, and corn. The United States further considers that, **to the extent applicable,** *these measures* **are inconsistent with China's obligation under Article 7.2(b) of the Agriculture Agreement because, in 2012, 2013, 2014, and 2015,** *China provides domestic support* for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific de minimis level of 8.5 percent for each product.

64. The first sentence includes the measures and claims. The second sentence previews that the claims will be demonstrated on the basis of a specific argument. The third sentence includes an alternative claim and argument. As the Appellate Body recognized in *EC – Selected Customs*, "nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims." Accordingly, the U.S. panel request includes both the matter referred to the DSB under Article 7 of the DSU, and a preview of the arguments supporting those claims that the United States advanced progressively in its written and oral submissions.

65. Therefore, contrary to China's claims that the Panel is precluded from examining China's provision of domestic support to its corn producers in 2012, 2013, 2014, and 2015, the Panel's function pursuant to Article 11 of the DSU is to make an objective assessment of "the matter" before it – the same "matter" that the DSB has put within the Panel's terms of reference. In this dispute, in light of the U.S. panel request and Article 7.1 of the DSU, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years exceeded China's commitment level and thereby breached its commitments under the Agriculture Agreement.

A. China's Rebuttal Arguments Do Not Establish that the Measures and Claims Identified in the U.S. Panel Request Fall Outside the Panel's Terms of Reference

66. In China's Response to the Panel's Questions, China makes a number of false statements and advances arguments unsupported by the DSU and the Agriculture Agreement. First, China argues that "domestic support" and the "level of domestic support" are not measures but a "legal concept," and therefore are insufficient to present the problem clearly under Article 6.2 of the DSU. In supporting its argument, China tries to draw a parallel between "domestic support" covered by the Agriculture Agreement and "subsidies" disciplined under the SCM Agreement. Further, it argues that the "level of domestic support" is not a measure, but an unspecified reference to a numerical value that fails to "identify the specific measures that are alleged to have contributed to the level of domestic support." China's arguments are in error and must fail principally because the United States properly identified the measure at issue in its panel request.

67. The United States has not identified the measure in its panel request as simply the "level of domestic support" or "domestic support." China has failed to provide the complete and accurate identification of the measure included in the U.S. panel request. As stated repeatedly, the measure at issue is "China's domestic support in favor of agricultural producers" (also expressed as the "domestic support provided by China"), and the panel request then lists legal instruments through which that support is provided. The measure is therefore neither a numerical value, nor a legal concept but *action* by China. As China itself noted in its answer, the measure at issue in a dispute may be any act or omission attributable to the responding Member. The United States, indeed, identified the measure as "China's domestic support in favor of agricultural

producers" and "domestic support provided by China." Thus, the United States identified a specific measure at issue – an act attributable to China – in its panel request.

68. Moreover, contrary to China's argument, a comparison between domestic support under the Agriculture Agreement and a subsidy under the SCM Agreement does not support China's position that the provision of domestic support by China is insufficient to identify the specific measure at issue. Unlike the Agriculture Agreement, the SCM Agreement prohibits Members from providing certain types of subsidies, known as prohibited subsidies, and seeks to neutralize adverse trade effects on the interests of another Member, through serious prejudice actions and authorizing the use of countervailing measures. Conversely, the Agriculture Agreement neither prohibits any specific form of domestic support, nor seeks to counter any negative effects of the provision of support. The Agriculture Agreement simply seeks to limit the amount of domestic support provided by a Member and requires that the Member calculate and notify the amount of support given in accordance with certain methodologies.

69. In addition, China seems to conflate terms of reference issues with issues to be resolved on the merits. The question of whether the measures identified in the panel request can breach an obligation under a covered agreement is a substantive issue to be addressed and resolved on the merits. China's argument that "domestic support" and "level of domestic support" are legal concepts not only misstates the U.S. identification of the measure, but asserts that these "concepts" *cannot* breach the Agriculture Agreement themselves. The Panel should examine whether the measure identified by the United States (the provision of domestic support by China) breaches the Agriculture Agreement as part of its review of the merits.

70. In a final attempt to persuade the Panel, China baselessly argues that the right to challenge "domestic support" or the "level of domestic support" would deprive the respondent of its due process rights to know the case it must answer, result in uncertainty about the steps it must take to bring its measure into conformity, and permit a complaining Member to inappropriately broaden the scope of any compliance proceeding. China's concerns are unfounded. First, as explained above, the United States did in fact identify the specific measure at issue. Second, the concern China advances is not present in this dispute. The U.S. panel request, in addition to identifying "China's domestic support in favor of agricultural producers," also sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products). Thus, China's concern may apply to another dispute and another panel request, but the circumstances China concerns itself with are not present here. Typically, original panels do not dictate to respondents how to bring their measures into conformity; rather, a panel's recommendation is simply to bring measures into conformity with the covered agreement. Respondents have the flexibility to choose how to comply with a panel's recommendation. Therefore, despite China's arguments, the U.S. identification of "China's domestic support in favor of agricultural producers," including domestic support to China's corn producers, is not contrary to the DSU and would not permit challenges to unidentified measures.

71. Second, China mischaracterizes the nature of a domestic support challenge. To overcome an objection that its terms of reference argument renders domestic support unchallengeable, China goes so far as to argue that a complaining Member could bring an AMS claim *before* the necessary data is available to prove a breach. China's statement reflects a fundamental misunderstanding of WTO AMS commitments and would, indeed, render such commitments beyond challenge. A Member's domestic support commitments, in terms of their Final Bound Commitment Level, apply with respect to domestic support provided over a full calendar, marketing, or financial year. Therefore, the question of whether a WTO Member is in breach of its domestic support commitments necessarily involves a retrospective examination of the level of domestic support, calculated as Current Total AMS provided over a period of time. 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.

72. With respect to the market price support at issue in this dispute, data for both annual production and prices for each product were necessary for the United States to examine whether China had exceeded its Final Bound Commitment Level. And, importantly, the United States and other WTO Members do not have access to the necessary data until *China itself* releases it to the public. 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. 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.

73. 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, indeed, 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. If the Panel were precluded from examining past provisions of domestic support simply because a program has allegedly changed, given the retrospective nature of domestic support obligations, simple changes to a legal instrument would preclude challenges to a Member's domestic support without the Member having achieved conformity of its support with its WTO obligations. The Panel should not endorse a legally erroneous approach that would also open such a loophole in WTO rules. Instead, consistent with the DSU and the Agriculture Agreement, the Panel should consider China's domestic support provided through annual legal instruments during the years at issue, as set out in the U.S. panel request and therefore within the Panel's terms of reference.

74. Such an analysis is exactly what the panel and Appellate Body did in *Korea – Beef*. Specifically, in *Korea – Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively, and the panel was established on May 26, 1999. The panel and Appellate Body issued findings concerning domestic support provided in 1997 and 1998 – that is, the two years *prior to* the complaining parties' requests for panel establishment. Moreover, in examining whether Korea's provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the DSB established the panel to examine the matter raised in the requests for panel establishment.

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

B. China's Rebuttal Arguments Do Not Establish that the Panel Is Precluded From Making Findings and Recommendations On the Measures Identified in the U.S. Panel Request

76. The United States has explained that it is not challenging a measure that had expired prior to panel establishment, but rather is challenging the domestic support provided by China. 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. Therefore, the replacement of the annual 2015 corn legal instrument with another instrument for 2016 is not relevant. To the extent the 2015 corn support legal instrument is considered to have "expired," it would be appropriate for the Panel to make findings and recommendations in light of the Panel's terms of reference and the DSU provision (Article 19.1) requiring a recommendation for any measure within the panel's terms of reference found to be WTO-inconsistent.

77. The Appellate Body reports in *China – Raw Materials* demonstrate that expiry of an annual legal instrument should not deprive the complaining party of a finding and recommendation on a WTO-inconsistent measure within a panel's terms of reference. The situation in this dispute is similar to that in *China – Raw Materials*, which also dealt with a series of annual Chinese measures. 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 that 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.

78. In the present dispute, China argues that *Raw Materials* is not applicable because the annual legal instruments that implement the provision of domestic support for corn in 2015 allegedly expired before panel establishment. However, as explained above, China is incorrect that the expiration of an annual legal instrument for a particular year prevents a panel from making findings on the domestic support provided through that instrument in the relevant year – the U.S. panel request sets out the only "matter" that existed and demonstrated China's WTO-inconsistent support as of that date. Moreover, in the context of domestic support, China's argument creates the very loophole the panel and Appellate Body in *Raw Materials* sought to avoid.

79. Most of the instruments identified in the U.S. panel request are annual in nature – both for corn and for wheat and rice. China has indicated that it does not argue that the market price support programs for wheat or rice have expired. As China explained at the first panel meeting and in its answers to the Panel's questions, the rice and wheat programs essentially operate in the same way the export duties and quotas in *Raw Materials* operated – *i.e.*, they consist of an ongoing legislative framework and a series of annual measures that identify the specific applied administered price and implementation plans for each year in which the MPS program operates. However, China has not explained why the Panel should view the instruments for corn any differently, or why the differences between the annual legal instruments for corn in 2015 and 2016 mean that the expiration of the 2015 legal instruments extinguishes the Panel's authority with respect to the provision of support during 2012-2015.

80. Specifically, China does not dispute that all of the annual legal instruments for rice and wheat issued in 2012 through 2015 in fact expired prior to the establishment of the panel. Therefore, China appears to suggest that the continued existence of the ongoing legal framework measures, including the 2004 Grain Distribution Regulation, preserves the Panel's authority to make findings regarding the provision of domestic support for rice and wheat in the relevant years. But China's argument does not support finding that corn domestic support has "expired", for two reasons.

81. First, the *2004 Grain Distribution Regulation* provides authority for China to implement market price support for corn, as well as for wheat and rice. The annual legal instruments for each product covers one year (and therefore could be argued to "expire" with that year). There is no logical basis to distinguish rice and wheat from corn, then, and to think that the authorizing framework that applies to the three products provides a basis for the Panel's terms of reference for rice and wheat, but not for corn. China's approach would lead to the very "disappearing target" dilemma the panel and Appellate Body in *Raw Materials* warned against.

82. Second, China's argument apparently relies on the absence of a regulatory framework pursuant to which the corn instruments were enacted. But, if the mere absence of an ongoing legal framework meant that the expiration of annual instruments precluded a panel from making findings, this again would allow the same "disappearing target" danger – a constantly moving target that required a complainant to continually update its analysis in hopes of keeping up with the changing measures. Moreover, such a finding would encourage Members to reduce the level of transparency in their systems and instead rely on annual, and even *ad hoc*, legal instruments alone – a development that would only add to a complainant's difficulty in bringing a successful challenge.

83. As the United States has explained previously (and again in the next section of this submission), the fact is we do not know – and the Panel therefore cannot properly evaluate – the factual and legal situation in China in 2016. Under such circumstances, and given the nature of challenges to a Member's AMS, to avoid prejudicing U.S. rights to meaningful findings and recommendations with respect to the provision of domestic support in 2012-2015, including through support for corn, the Panel must make findings on the matter as articulated in the U.S. panel request. That the specific legal instruments upon which those findings would be based may have expired does not alter the matter at issue or exclude the relevant measures from the Panel's terms of reference.

84. In addition to being required to examine the "matter" before it, if the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement. Pursuant to Article 11, therefore, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years is in excess of its commitment level and thereby breaches China's commitments under the Agriculture Agreement. If the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement.

85. Thus, a panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and such a recommendation is the right of a complainant under the DSU. Therefore, if this Panel finds that China has provided domestic support in excess of its AMS commitments for any of the relevant years, the Panel must recommend that China bring the measure(s) into compliance with its obligations.

C. China Has Not Demonstrated That Its Market Price Support Program for Corn "Expired," or That It Ceased to Provide Domestic Support for Corn in Excess of Its Commitment Level in 2016

86. As explained in the preceding section, the matter at issue before the Panel is whether China's provision of domestic support to its agricultural producers from 2012 through 2015 is inconsistent with its domestic support commitments. Based on the U.S. panel request and the nature of AMS disputes, the

expiration of specific legal instruments through which the United States has demonstrated that China has breached its Final Bound Commitment Level does not preclude the Panel from making findings on this matter. For completeness, however, the United States also explains in this section why China also has failed to show that its market price support program for corn had "expired" by the time of the Panel's establishment, or that it ceased to provide domestic support for corn in excess of its commitment level in 2016.

87. First, China asserts at some length that after the "expiry" of the 2015 corn market price support instrument, it moved to a system of "market-oriented purchase" by "market players," where all types of entities may decide to make purchases "on their own initiative." According to China, the 2016 corn purchasing instruments are "*seeking* to achieve a market-based price discovery." China supports this assertion with the text of the 2016 corn purchasing instruments. However, the market-based aspirations espoused in the *2016 Northeast Region Corn Purchase* are simply not sufficient to demonstrate that China no longer provides domestic support for corn in excess of its commitments. The United States notes that *seeking* market-based price discovery is not the same as *eliminating* price support policies for corn, and "reform" of the price support program is not the same as termination. On its face, then, the instrument China identifies does *not* support its assertion that market-price support had "expired" or been withdrawn.

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

89. This dichotomy between encouraging "market-oriented purchases" and maintaining government control also is apparent on the face of the 2016 corn purchasing instruments and reflected in China's responses to the Panel's Questions. The *2016 Northeast Region Corn Purchase Notice* cites as its goal facilitating a situation where farmers "sell corn according to the fluctuating market price," and that "market entities of all types [are] independently entering the market to make purchases." However, China's *2016 Northeast Region Corn Purchase Notice* simultaneously 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." The 2016 instrument further states that "[r]elevant central government-owned enterprises such as COFCO and AVIC must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role." All of this is to "prevent the occurrence of farmers having "difficulties in selling grain.'" Therefore, while the 2016 measure does encourage "all types" of entities to enter the market, it *also* recognizes and provides for the continuing role of state-owned enterprises tasked with ensuring the market operates properly to compensate farmers and avoid difficulty selling corn by purchasing substantial volumes of newly harvested corn. Thus, direction towards increased "marketization" does not, and has not in the past, meant that the Chinese government cannot continue to engage in the provision of domestic support through government purchasing, including at support prices.

90. The provincial implementation measure from Heilongjiang, the *2016 Notice on Proper Handling of Corn in Heilongjiang*, similarly recognizes the separate roles of private actors beginning to "marketize" the corn market, and state-owned enterprises tasked with driving the market by making purchases at levels similar to prior years. For instance, the regional implementing instrument states that "all types of entities can enter the market to purchase the corn as they wish." To that end, the provincial government is both "encouraging multiple market players to actively purchase and sell corn in the market," and "mak[ing] overall plans on coordinating the branches of central enterprises and major local grain enterprises in the administrative regions to take the lead to purchase corn in the market." Specifically, the instrument provides that "[a]ssociated branches of central enterprises, such as COFCO, Chinatex Corporation, Aviation Industry Corporation of China, etc. shall make full use of their own advantages and channels to carry out the market-oriented purchase, work harder to ensure the purchase volume [is] no less than that of the policy-based purchase last year, and play a leading role in stabilizing the market and guiding the expectations." Thus, while the instrument released at the provincial level by Heilongjiang suggests a desire for private enterprises to enter the market and purchase corn, it also recognize the need for state-owned enterprises to guide the market through continuing purchasing activities and ensuring that farmers are able to sell their corn.

91. Second, China argues in its responses to Panel Question 2(b) that prices for corn are now determined by the market and "reflect[] the market forces of supply and demand." To support this assertion, China cites to an NDRC press release reporting that "[c]orn prices are based on the market," and reflect "reasonable price differences resulting from regional differences and corn quality differences." The United States notes that the press release was published on June 23, 2017, *seven months* after the U.S. panel request. The NDRC press release contains *no* citations or data, and therefore consists of a series of unsubstantiated assertions. This new exhibit provides no information that is pertinent to the Panel's assessment of "the matter" as of the date of panel establishment.

92. Moreover, that China permitted prices for corn to decline from artificially high levels does not demonstrate that China has instituted a "market-based price discovery mechanism," or that Chinese corn prices have "linked up with the international market." To the contrary, Chinese corn prices have remained above international prices for corn throughout 2016 and 2017 as illustrated by Exhibit US-94. Further, the GAIN Reports cited by China further illustrate the continuing differential between Chinese domestic prices for corn and international prices. According to the GAIN Reports, the "spot market" for corn in early December 2016 provided a price of 1,681 RMB or $244 per ton. The Report compares these Chinese port prices to the U.S. corn import price in December 2016 which "landed at Chinese ports is about 1,500 RMB per ton ($218)," and other competing grain imports such as U.S. sorghum, which costs 1,690 RMB or $205. Thus, the lack of an applied administered price communicated to private market actors and farmers does not mean that the domestic price is market-based, or that the purchases made by state-owned enterprises were not done at support prices.

93. Third, China makes a number of other erroneous assertions regarding its 2016 corn purchasing instruments and activities. In particular, China states that that the 2016 instruments "are *not* designating enterprises to purchase corn." As the United States described in its response to Panel Question 2(a)-(c), the central and provincial level instruments implemented in 2016 mirrored prior corn market price support instruments in all relevant policy and logistical elements – including the designation of state-owned enterprises, such as Sinograin, COFCO, and AVIC, to purchase corn. Like in prior years, private entities may also purchase corn, but designated state-owned enterprises have a "guiding and driving role." These state-owned enterprises "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." Further, both the 2015 and 2016 corn purchasing instruments also provide for financing through the Agricultural Development Bank of China, and making available storage for purchased grain.

94. Next, China erroneously asserts that "there is no purchase of corn by government entities after 30 April 2016," and that "the Chinese government does not have statistics" regarding purchases after the expiry of the TRPR. However, as described in the response of the United States to Panel Question 2(a)-(c), Sinograin, a state-owned enterprise also charged with making purchases between 2012 and 2015, reported that it purchased 21.41 million metric tons of corn during the 2016/17 harvest through 743 Sinograin depots in the northeast region. According to Sinograin, this was 21 percent of the production in northeast China and 70 percent of the volume procured by state-owned enterprises. Describing its activities, Sinograin further 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." Moreover, in addition to the statistics kept by state-owned enterprises, such as Sinograin, the 2016 corn purchasing instruments direct certain recordkeeping and reporting activities. The *2016 Northeast Region Corn Purchase Notice,* states that "[a]ll relevant regions must . . . strengthen situation analysis and evaluation, closely track market changes, regularly announce information such as grain purchasing progress and market price trends." Thus, it appears that records regarding purchasing and pricing activity are held by the Chinese government through its provinces and state-owned enterprises.

95. Finally, 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 above and in the U.S. response to the Panel's Question 2, it was not clear at the time of 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.

II. CHINA HAS FAILED TO REBUT THE UNITED STATES' CLAIM THAT CHINA BREACHED ITS DOMESTIC SUPPORT COMMITMENTS

96. China attempts to rebut the U.S. showing that China has exceeded its permitted levels of domestic support by arguing that it is permitted to use an alternative approach to the computation of the product-specific AMS. Specifically, China argues that the methodology contained in Annex 3 of the Agriculture Agreement is only a "fallback" option, and that the Supporting Tables attached to Part IV of its Schedule of Concessions contain agreed China-specific methodologies that supplant the methodology required by the Agriculture Agreement. However, China's position is unsupported by the text and structure of the relevant covered agreements, including China's Protocol of Accession.

97. China, like all WTO Members, committed to abide by the rules outlined in the Agriculture Agreement, as well as maintain a level of domestic support at or below its Final Bound Commitment Level of "nil." Paragraph 1.3 of China's Protocol of Accession specifically states: "*[e]xcept as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force." The Agriculture Agreement is one of the listed Multilateral Trade Agreements annexed to the WTO Agreement, and with which China has agreed to comply.

98. Consistent with Paragraph 1.3 Members also agreed in China's Accession Protocol to certain modifications of the calculation methodology for Current Total AMS. Specifically, pursuant to paragraph 235 of China's Working Party Report, incorporated by reference into China's Protocol of Accession, China

agreed that, for purposes of Article 6.4, it would maintain product-specific domestic support at or below a *de minimis* level of 8.5 percent of the total value of production for each basic agricultural product and that China would not have recourse to Article 6.2.

99. In contrast to Paragraph 235, Paragraph 238 of the Working Party Report records that Members did not agree with all elements of the methodology and policy classifications used in China's Supporting Tables. Specifically, Members asked China to clarify methodological issues contained in its Supporting Tables, and, China agreed to clarify the methodological issue in the context of its notification obligations under the Agriculture Agreement. This demonstrates that WTO Members did not view China's Supporting Tables as reflecting new rights or obligations of China to which they were "agreeing."

100. Therefore, for China, as for other Members, Paragraph 8 of Annex 3 of the Agriculture Agreement mandates the methodology for calculating the value of the type of domestic support at issue in this dispute – market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible to receive* the applied administered price."

101. China has argued that the Panel can look to information contained in its Supporting Tables to identify China-specific methodologies for identification of the fixed external reference price and the quantity of eligible production, and that these methodologies supplant the "fallback" obligations contained in Annex 3 of the Agriculture Agreement. Specifically, China argues that "Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* … specifically designate the 'constituent data and methodology' as the elements from the supporting tables that give rise to domestic-support-related rights and obligations in the calculation of Current (Total) AMS." China relies on the Appellate Body report in *Korea – Beef* to argue that there is no hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology. China's arguments misunderstand the relationship between the Agriculture Agreement and a Member's Schedule of Concessions and Supporting Tables, as well as the role and status of information contained in Supporting Tables under the Agriculture Agreement.

102. 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. Specifically, Article 1(b) states that "basic agricultural product" "is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material." Similarly, the definition of "year" provided by the Agriculture Agreement in Article 1(i) "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member." Thus, the Agriculture Agreement directs the use of a Member's Supporting Table to glean Member-specific factual information for purposes of identifying the basic agricultural products in the Member's territory and definition of year for a particular program; it does not create independent rights and obligations.

103. Where the Agriculture Agreement does not expressly direct recourse to information contained in the Supporting Tables, the information may be used only as provided in Articles 1(a) and 1(h). Specifically, Article 1(a)(ii) of the Agriculture Agreement states that the product-specific AMS must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of

support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products." For a given year, the "Current Total AMS" must be calculated *in accordance with* the provisions of this Agreement, including Article 6, *and with* the constituent data and methodology used in the supporting material."

104. The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted "consistent with" the methodology provided in Annex 3. Conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" that information. This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

105. Contrary to China's argument, the Appellate Body report in *Korea – Beef* supports this understanding. In that dispute, the Appellate Body noted the distinction reflected in the text of Article 1(a)(ii) between the phrases "in accordance with" and "taking into account," and found that the ordinary meaning of the phrases suggests a hierarchy attributing a "more rigorous standard" to Annex 3, than to constituent data and methodology. The Appellate Body did not limit this statement regarding the supremacy of Annex 3 to those circumstances in which *no* constituent data and methodology were provided by a Member; nor would the text of the Agriculture Agreement have supported such a view. Rather, the text of the Agriculture Agreement suggests that, when performing the calculation of AMS for a particular product pursuant to Annex 3, the data and methodology contained in the supporting material may provide additional information relevant to the calculation of support for the specific product at issue, but it does not permit Members to use alternative methodologies in its Supporting Table.

106. When discussing how a panel should treat a conflict between Annex 3 and a Member's constituent data and methodology, China states that "the Appellate Body in *Korea – Beef* did not resolve the question of any hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology . . . the Appellate Body therefore explicitly left open the question of a hierarchy, and even entertained the possibility that the hierarchy could be in favor of the constituent data and methodology." Contrary to China's argument, the Appellate Body in *Korea – Beef* did address the apparent hierarchy between Annex 3 and a Member's constituent data and methodology, and did not find that Article 1(a)(ii) permitted a panel to favor a Member's constituent data and methodology.

A. The Legal Status of a Member's Supporting Table Is the Same regardless of When the Member Joined the WTO

107. China also argues that the constituent data included in a Member's Supporting Tables has a different legal status depending on whether the Member is an original Member or a recently acceding Member. Specifically, China argues that, "for each original Member of the WTO, . . . based on the incorporation by reference of a Member's supporting tables into that Member's Schedule of Concessions, the supporting tables constitute an integral part of the GATT 1994." However, in contrast to original WTO Members, China argues that for "later-acceded Members . . . the supporting tables are an integral part of the terms of that Member's accession to the WTO, under Article XII:1 of the Marrakesh Agreement." This is false, and China's argument must fail for two reasons.

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

form part of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Thus, it is clear that China's Schedule of Concessions is not part of the Accession Protocol, but the GATT 1994.

109. Second, Article 21, paragraph 1 of the Agriculture Agreement clarifies the relationship between the Agriculture Agreement and the GATT 1994. It states that the "provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the other provisions of this *Agreement*." In other words, where there is a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail.

110. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume," but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture." This echoed prior statements by a GATT 1947 panel in *US – Sugar* suggesting that a "Schedule[] of Concessions" is for Members to "incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement." Therefore, where, as here, a Member's Schedule conflicts with the obligations of the Agriculture Agreement, the provisions of that Schedule must fail, and the Panel must apply the applicable provisions of the Agriculture Agreement instead.

111. We note that the European Union relies on *EC – Export Subsidies on Sugar* to suggest that a Member may deviate from agreements found in the covered agreement in its Schedule where the deviation "does not 'reduce' *per se* the commitments of the newly acceded Members under the Agriculture Agreement." That is, the European Union suggests that a panel must evaluate the apparent change to the Member's commitment to determine whether it in fact "reduces" the commitment, or only alters it. However, the European Union fails to provide the legal basis for such a position, much less explain how or why in practice such a rule could operate. Similar to China's arguments, the European Union's argument would mean that every WTO Member could in theory be bound by as-of-yet unknown commitments, different from those reflected in the texts of the covered agreements as agreed by WTO Members, and different from the commitments of every other WTO Member.

112. The only vehicle through which China could accede to a commitment not consistent with the obligations of the Agriculture Agreement was its Accession Protocol, including any paragraphs of the Working Party Report incorporated by reference into that Protocol. Absent such a commitment, China must comply with the obligations of the Agriculture Agreement like any other WTO Member must, including the methodological obligations contained in Annex 3 with respect to the calculation of market price support. For these reasons, the Supporting Tables thus do not, and could not, themselves set out any legally permissible deviation from the Agriculture Agreement.

113. Even aside from the fact that China may not alter an Agriculture Agreement commitment through its Schedule or Supporting Table, we note that China's Supporting Tables contain no reference to an article in the Agriculture Agreement, nor any express language indicating that the Membership agreed to alter a commitment specifically for China. Compare the language included in China's Supporting Table to the language used in China's Working Party to deviate from the *de minimis* amount outlined in Article 6.4 of the Agriculture Agreement.

114. When WTO Members agreed to provide China with an obligation different from the Agriculture Agreement, they clearly referenced the legal obligation to be modified by name. The Working Party Report thus clearly evinces that WTO Members *agreed* to provide China with a different *de minimis* than that provided for in the Agriculture Agreement, and *agreed* that China would not have recourse to Article 6.2 of

the Agriculture Agreement. In contrast, China's Supporting Table contains no similar reference. On the face of the Supporting Table, there is no indication that the WTO Members agreed to modify *any* legal obligation (because there was no agreement), and there is no reference to Annex 3 or any other provision in the Agriculture Agreement. Accepting China's argument would create a situation where, again, Members would not know what other Members' obligations are, because numerous implicit methodologies could be drawn from the data and descriptions provided in a Member's Supporting Tables. Such an interpretation lacks any legal basis and would lead to absurd and unworkable results.

115. This dilemma becomes apparent when looking more closely at China's arguments regarding the quantity of eligible production. China argues that the Panel should use the procurement amounts for purposes of calculating MPS for the programs at issue here, because it used procurement for the programs in existence when it calculated its base AMS. However, the description provided in the Supporting Table does not make clear how the China's market price support programs operated, including whether the programs limited purchases to a specific amount. Were the latter to be true, total production would not have been the appropriate value to use for eligible production.

116. China argues that any differences between the programs does not matter, because constituent data and methodology apply to products, and not measures. However, China fails to explain how this view supports its arguments. With respect to eligible production, for example, China argues that the Panel must calculate market price support based on the calculation of the market price support program (measure) in its Supporting Tables. China therefore appears to suggest that while the methodology in the Supporting Tables relates to a particular program, the methodology now must necessarily be used with respect to all market price support measures for the same product regardless of the differences between the market price support programs at issue. However, if constituent data and methodology apply to products and not measures, then the more logical consequence of this view would be that China's use of an alternative methodology with respect to the calculation of a particular program simply does not reflect the type of constituent data and methodology the Panel must take into account in determining China's current product-specific AMS for the relevant products. Regardless, as the United States has explained, China may not rely on constituent data and methodology where the methodology is inconsistent with the requirements of the Agriculture Agreement.

117. Moreover, not knowing how a program described in China's Supporting Tables works, it is unclear on what basis the Panel would be able to determine that the values used in that calculation reflect the intention by the Members to alter the market price support methodology for purposes of calculating China's product-specific and Current Total AMS. That is, the Panel cannot determine based on the record before it whether the calculation provided in the Supporting Table is consistent with Annex 3 or not. Therefore, based on the vague factual descriptions provided in the Supporting Table alone, China asks the Panel to assume an intention on the part of the WTO Membership to amend an obligation under the Agriculture Agreement as it applied to China only.

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

119. The second concern raised by China's argument is the disparity it would create between original and acceding Members to the WTO. Without a clear indication in the legal texts, a Member like China acceding

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

120. Accordingly, the Panel should reject China's interpretations of the relevant Agreements, because they lack any legal basis and would give rise to serious concerns regarding the status and content of the WTO commitments of all Members.

B. China Has Not Demonstrated the Existence of a Subsequent Practice or Subsequent Agreement Regarding the Use of an Alternative Fixed External Reference Price For Newly Acceding WTO Members

121. In addition to its argument that both its quantity of eligible production and its fixed external reference price were modified by virtue of information contained in its Supporting Table, China has now argued in its responses to questions that the "practice of Members to use, for later-acceded Members, a different base period, including for the fixed external reference price, constitutes a subsequent practice in the application of the treaty, within the meaning of Article 31 of the Vienna Convention."

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

123. That is, Article 31(3) directs that a panel shall take into account that subsequent practice "which establishes the *agreement of the parties* regarding [the] *interpretation*" of the treaty. Therefore, for the practice of WTO Members to be relevant to the Panel's interpretive exercise, the practice must relate to the interpretation of a relevant provision of the Agriculture Agreement. In this dispute, the Panel is charged with interpreting and applying China's obligations under Article 3.2 and 6.3 of the Agriculture Agreement regarding Current Total AMS. The Agriculture Agreement provides instructions for the calculation of each of China's product-specific AMSs, and then its Current Total AMS, in Articles 1(a)(ii) and 1(h)(ii), and by extension in Annex 3 and Article 6.

124. The heart of the interpretative concern is Annex 3, paragraph 9 of the Agriculture Agreement, which states the "fixed external reference price shall be based on the years 1986 to 1988." The text of Annex 3 is clear in requiring Members to calculate market price support for purposes of product-specific AMS using a fixed external reference price of 1986-1988. Customary rules of interpretation do not permit an interpreter to use context, or a subsequent practice or agreement, to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the

provisions of the treaty. Rather, these sources of interpretation must be used to determine the particular meaning of the terms as used in the relevant provision.

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

126. China has shown no subsequent agreement regarding the interpretation of Annex 3, paragraph 9, because it has pointed to no text in any supporting table that even refers to that provision and it has pointed to no "agreement" that speaks to an "interpretation" of that provision. Moreover, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some Members only, and not to other Members. China appears to suggest that the alleged subsequent practice would support *different meanings* of the text of the Agriculture Agreement for different Members. But while a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an illogical result, whereby each Member may be subject to potentially very different obligations.

127. Therefore, the Panel should reject China's argument that the use of an alternative fixed external reference price for newly acceding WTO member amounts to a subsequent practice or subsequent agreement under the VCLT.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENTS AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

I. CHINA ERRS IN CLAIMING THAT THE PANEL MUST CALCULATE CHINA'S CURRENT AMS CONSISTENT WITH CHINA'S BASE AMS

128. Throughout this dispute, China has argued that China's "Current Total AMS" for subsequent years must be calculated consistently with the calculation of its "Base Total AMS," as set out in its Supporting Tables. China asserts that "the same constituent data and methodology, including the same fixed external reference prices and the same methodology for determining eligible production, must be used to calculate both *Base* (Total) AMS and *Current* (Total) AMS." While China insists that the Agriculture Agreement and its Supporting Tables can be interpreted harmoniously, it is clear that China is suggesting that a Member's Supporting Table can supplant the calculation requirements provided in the Agriculture Agreement for calculation of AMS and Current Total AMS with country-specific methodologies. This would both contradict the Agriculture Agreement and significantly expand China's ability to provide domestic support while other WTO Members are subject to different rules. The text of the WTO Agreements simply does not support this understanding.

129. The Agriculture Agreement defines the terms "AMS," "Base Total AMS," and "Current Total AMS," and sets out specific instructions and methodologies for the calculation of "AMS" and "Current Total AMS." The Agriculture Agreement does not impose specific requirements on the calculation of AMS during a base period or Base Total AMS. Indeed, Base Total AMS is not relevant as an obligation of a Member; rather, that calculation provided a basis for the Annual and Final Bound Commitment Levels that are the subject of a Member's commitments under Article 3.2 and 6.3. Naturally, then, the Agriculture Agreement nowhere requires "consistency" between the calculation of Current Total AMS and the calculation of Base Total AMS.

130. First, turning to AMS, it is described in Article 1(a). AMS is the annual level of non-exempt domestic support, expressed in monetary terms, provided to the producers of the basic agricultural product or non-product-specific support provided in favor of the agricultural producers generally. Romanette (i) of Article 1(a) states that AMS "with respect to support provided during the base period" is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule." From the plain text, it is clear that Article 1(a)(i) does not set out or mandate any calculation for AMS during the base period, but rather identifies where the value of such support is recorded for the base period. Romanette (ii) addresses AMS "with respect to support provided during any year of the implementation period and thereafter." As we described earlier, Article 1(a)(ii) does require a calculation. Each product-specific AMS in a subsequent year will be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule."

131. Thus, Article 1(a)(ii) provides a calculation requirement for AMS in the subsequent years, while Article 1(a)(i) provides no such requirement for AMS provided during the base period. Nothing in the Agreement suggests that the method a Member used to calculate AMS in the base period would have the effect of nullifying the obligation to calculate AMS in the subsequent years "in accordance with" Annex 3, and "taking into account" constituent data and methodology. As previously explained, "taking into account" does not require calculation consistent with or in conformity with information contained in the Supporting Tables. Rather, it requires a Panel to give consideration to country-specific "constituent data and methodology" – including the types of basic agricultural products grown in that Member's territory, the "year" relevant for domestic support, or whether supported products have unique attributes that affect the calculation of support such as multiple growing seasons, processing practices or requirements, or issues of quality – when calculating AMS.

132. The AMS or AMSs described in Article 1(a) are discrete component parts of a Member's Total AMS. Specifically, if individual AMSs exceed the *de minimis* level when calculated in accordance with Article 6 of the Agriculture Agreement, each such product-specific AMS (and if applicable a non-product specific AMS) must be included in the "Total AMS." Total AMS refers to a different stage in the computation of domestic support – namely, the summing of component parts. Article 1(h) defines Total AMS as the "sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products."

133. The definition of Total AMS informs the definition of both "Base Total AMS" and "Current Total AMS." Specifically, Article 1(h)(i) states that Base Total AMS, all domestic support provided in favor of agricultural producers in the "base period," is "as specified in Part IV of a Member's Schedule."

134. Critically, again, Article 1(h) does not provide a calculation methodology for determining the value of Base Total AMS; it indicates where the value of such support can be found. As the Appellate Body observed in *Korea – Beef*, "Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned."

135. Separately, in romanette (ii), Article 1(h) provides the definition and calculation directions for "Current Total AMS." Current Total AMS is "the sum of all domestic support provided in favour of agricultural producers . . . actually provided during any year of the implementation period and thereafter." The Current Total AMS is "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material

incorporated by reference in Part IV of the Member's Schedule." Thus, Article 1(h)(ii) provides both a definition of Current Total AMS and instructions for the calculation of Current Total AMS.

136. Nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations that may (or may not) be contained in a Member's Supporting Tables can supplant the rules in Article 1(h) to calculate "Current Total AMS." Because no particular calculation or rules for such a calculation is required to establish Base Total AMS, naturally, the Agreement nowhere suggests that consistency is required between the calculations. Rather, constituent data and methodology reflected in these documents may provide country-specific data and methodologies to inform, but not alter, the calculation requirements set out in Article 1(h).

137. China's proposed methodology is not consistent with the calculations contained in its supporting tables. Not only do China's arguments regarding "consistency" between the calculations of Base Total AMS and Current Total AMS fail because they are legally unfounded, but China's proposed market price support calculations are not in fact "consistent" with the calculations actually utilized in its Supporting Tables. This is a critical point, and fatal to China's case. Recall that China has been asserting that its Current Total AMS must be calculated using the *same* methodology as in its Schedule. But, on closer inspection, China *did not in fact use* a "fixed external reference price" based on the years 1996 to 1998 for wheat, Indica rice, Japonica rice, and corn in its original Base Total AMS. To recall, China asserts that the "*fixed external reference price* for wheat is 1698.1 Yuan per ton, as set out in Appendix DS 5-3 to Rev.3." Similarly, citing an appendix to DS-5 of its Supporting Tables, China provides a "fixed external reference price of 2343.0 yuan per ton for Indica rice and a fixed external reference price of 3290.6 yuan per ton for Japonica rice. China broadly notes "China's FERP for corn may be found in Rev.3." China further clarifies in its second written submission that "Rev.3 . . . includes FERPs for China that apply to certain products," and that "[t]hese FERPS are (i) based on a *three-year* base period of 1996-1998; (ii) based on China's status, during that period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*."

138. However, China's calculation of its Base Total AMS *was not* based on a "fixed external reference price" or the values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. Instead, China's market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual "external reference price[s]" corresponding to each year of the base period. The fifth column in China's Support Table is labeled "external reference price" – not "fixed" external reference price; and the values contained in that column reflect three different prices, one for each year. According to footnotes 17 and 18 to the Supporting Table, these "external references prices" were calculated based on CIF prices for wheat, and on FOB prices for Indica rice, Japonica rice, and corn. Rather than use a *fixed* external reference price covering 1996-1998, as China has asserted to the Panel, China's market price support calculations thus compared a 1996 applied administered price to a 1996 external reference price, a 1997 applied administered price to a 1997 external reference price, and a 1998 applied administered price to a 1998 external reference price. The values of market price support calculated in these tables were included in China's DS 4 Table calculating its Base Total AMS. To illustrate, in the row covering wheat, for each year from 1996-1998, there is a separate price. So, it is not the same average price that would reflect a fixed external reference price.

139. Thus, Table DS 5, which contain the actual calculations of market price support for wheat, Indica rice, Japonica rice, and corn, reveals that the calculation of market price support during the base period did not utilize a "fixed" external reference price at all. Rather, the calculation appears to reflect an evaluation of market price support using the price gap between an applied administered price and the average FOB or CIF unit value for the basic agricultural product *in the specific year in question*.

140. Were this methodology applied to the calculation of market price support in this dispute, China's support would be determined based on the gap between the applied administered price for wheat in 2015, for example, and the average CIF prices for Chinese wheat imports *in 2015*, and similar external reference prices would be needed for each year from 2012 to 2014. China does not argue that a Panel may calculate market price support in this way, and Annex 3, which requires the use of a "fixed external reference price . . . based on the years 1986 to 1988," does not permit such a calculation methodology.

141. China draws its proposed "fixed external reference price" for each product, not from the Supporting Tables that informed its market price support (DS 5) and Base Total AMS (DS 4) calculations, but from a separate appendices included in its Rev. 3 containing values that appear not to have been used in the original calculation process. These appendices provide the underlying calculation for China's year-by-year external reference price calculation, including the import/export volumes, import/export values, CIF/FOB prices, and calculated CIF/FOB unit prices. The charts also contain an average of these values, but this is not utilized elsewhere in the document, and in particular to calculate the AMS for each product for each year.

142. For this reason, China's demand for consistency between the Base Total AMS and Current Total AMS seems misplaced. First, nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations contained in a Member's Supporting Tables can replace the binding commitments in the Agreement to calculate "Current Total AMS" in accordance with Annex 3. Second, in any event, China's own Supporting Tables did not use the data or methodology suggested by China in its actual calculation of market price support and Base Total AMS. Rather, the Agriculture Agreement sets forth the requirements for calculating Current Total AMS in subsequent years and this includes recourse to country-specific data and methodology reflected in a Member's Supporting Tables to the extent that it informs, but does not alter, the calculation requirements.

II. CHINA HAS NOT ESTABLISHED THAT THE PANEL IS PRECLUDED FROM ISSUING FINDINGS AND RECOMMENDATIONS CONCERNING CHINA'S PROVISION OF DOMESTIC SUPPORT TO CORN PRODUCERS IN 2012 THROUGH 2015

143. China has not demonstrated that its Corn MPS Program had "expired" prior to the Panel's establishment; nor has China shown that it ceased to purchase corn at administratively determined prices during the 2016/17 harvest. First, the introduction of a direct payment program for corn producers does not demonstrate that China no longer purchases corn at an administratively determined price. Second, 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."

144. Although not required in order to satisfy the obligations of Article 6.2 of the DSU, the United States has continued to seek additional information and instruments related to China's 2016-17 corn purchase programs for the Panel's reference. The additional information found suggests that China had not ceased to provide market price support in 2016. First, despite China's statements regarding the transition to the use of a "market price" for government purchases of corn in 2016, the United States has identified a notice of administered prices issued by Sinograin to certain purchasing locations in Inner Mongolia on October 16, 2016. Entitled, *Notice on Activating 2016 Autumn Grains Corn Purchase Work* (Exhibit US-101), this document – released one month after the "reformed" purchasing instruments – announces the prices at which government purchases will be made, and directs local grain depots to display or post the available prices for new, standard grain corn in that area. This announcement read together with the 2016 Northeast Region

Corn Purchase Notice (Exhibit US-87) are very similar in form and content to the 2012 – 2015 Corn MPS Programs.

145. Second, Exhibit US-102, entitled *Jilin Notice on Further Proper Handling of Corn Purchases and Sales Work* issued by the Jilin Province Grain Bureau, a provincial branch of the State Administration of Grain, directs Sinograin and other state-owned enterprises to enter the corn et and make corn purchases, in order to counteract negative market trends, including falling corn prices.

146. Third, Exhibit US-103, a May 2017 transcript of a live broadcast interview of the Jilin Province Grain Bureau Vice Director confirms that Sinograin's Jilin province subsidiary has given full play to its role of macro-control and as a 'stabilizing instrument' and 'ballast.'" Taken together, these documents suggest that China has not "ceased" government purchases of corn at pre-set prices.

U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

Summary of U.S. Response to Panel Question 74

147. Generally, other Member's Supporting Tables may be considered "context" in instances where they assist in the interpretation as directed by Article 31 of the VCLT.

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

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

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

Summary of U.S. Response to Panel Question 75

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

U.S. COMMENTS ON CHINA'S RESPONSE TO THE PANEL'S SECOND SET OF QUESTIONS

Summary of U.S. Comments on China's Response to Panel Question 52

152. China erroneously argues that Sinograin acted as a market player and subsequently "adjusted its prices" to reflect market prices reflected in Exhibits CHN-111-B – CHN-127-B. However, 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. Moreover, nothing in the documents presented by China 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 documents placed on the record by China appear to be internal price monitoring documents devoid of any indication of its authenticity and status, rather than directions to purchase at a particular price as provided for in Exhibit US-101.

Summary of U.S. Comments on China's Response to Panel Question 83

153. 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."

154. 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 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). Article 1(a)(ii) does not use the same language or instruction to describe both elements of calculation, as suggested by China. 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." Article 1(h)(ii) governing the calculation of Current Total AMS in subsequent years presents a similar hierarchy.

155. 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." 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. 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.

156. 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." 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." China's argument is again without merit.

157. 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.

158. 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." 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."