CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

OPENING STATEMENT

OF THE UNITED STATES OF AMERICA

AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

April 24, 2018

I. INTRODUCTION

1. Good morning, Mr. Chairman and members of the Panel. On behalf of the U.S. delegation, I would like to begin by thanking the Panel, and the Secretariat staff assisting you, for your time and efforts on this dispute. The U.S. delegation looks forward to continuing to work with you as you complete your work.

2. The United States has demonstrated in its written submissions and oral statements that China has provided domestic support to its agricultural producers in excess of its WTO agricultural commitments for the years 2012, 2013, 2014, and 2015. In today's oral statement, the United States will not repeat all of these arguments, but rather respond to certain arguments made by China in its most recent written submissions.

3. First, the United States will address the appropriate interpretation of Articles 1(a) and 1(h). Article 1(a)(ii) provides a hierarchy expressly directing each Member, whether or not it has a Supporting Table, to calculate an Aggregate Measurement of Support for each year during or after the implementation period "in accordance with the provisions of Annex 3." Annex 3, in turn, provides specific rules to calculate the value of market price support. Article 1(a)(ii) also provides that AMS will be calculated "taking into account" data and methodology in a Supporting Table.

4. No similar requirements exist with regard to the calculation of AMS during the base period, which is simply "specified" in the Supporting Table. And, as the United States will demonstrate, the data and methodology China asserts *was used* in its Supporting Table to calculate the value of market price support *was not, in fact, used* there. China simply did not use a "fixed external reference price" for the calculation of the value of its market price support programs in Table DS 5 of its Supporting Tables, and therefore this alleged "fixed external

reference price" could not have been reflected in the Base Total AMS "as specified in Part IV of [its] Schedule."[1] For this reason, even aside from the fact that the constituent data and methodology provided in a Supporting Table may not supplant the plain language of the Agriculture Agreement, the data and methodology suggested by China as appropriate is not available for this purpose.

5. Second, the United States demonstrates that China's legal arguments that the Supporting Table legally supplants the Agreement on Agriculture fail. They fail because the text of the Supporting Table does not establish the factual basis to underlie China's legal arguments. Simply put, again, the actual text of the Supporting Table does not in fact identify or use any "fixed external reference price." Thus, China's legal arguments that rely on use of a supposed 1996-1998 "fixed external reference price," including its arguments relating to "practice," simply lack any basis in fact. China's legal arguments also fail as a matter of law because China's Supporting Tables are not made an integral part of the WTO Agreement and do not contain binding commitments.

6. Finally, we will demonstrate that China's arguments concerning the Panel's terms of reference are in error. The United States properly identified the measures at issue in the U.S. panel request as China's domestic support in favor of its agricultural producers. And China has failed to demonstrate in this proceeding that it ceased providing such domestic support, including through support to any particular agricultural product, because that support allegedly "expired" prior to the Panel's establishment. Rather, the United States has demonstrated that the only "matter" that the United States (or any WTO Member) was able to evaluate and challenge – domestic support provided through 2015 – is inconsistent with China's WTO commitments.

[1] *See* Agriculture Agreement, Art. 1(h)(i).

II. CHINA ERRS IN ASSERTING THAT SPECIAL RULES ONLY APPLY TO IT FOR CALCULATING PRODUCT-SPECIFIC AMS FOR MARKET PRICE SUPPORT CONTRARY TO ANNEX 3

7. In the U.S. First Written Submission, the United States explained that, as provided in Article 1(a)(ii), Annex 3 of the Agriculture Agreement sets out the rules for calculating the value of "product-specific AMS," including support provided through market price support. Annex 3, 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.

Further, the Annex provides an unequivocal definition of "fixed external reference price," which states that the "fixed external reference price shall be based on the years 1986 – 1988."

8. Despite this clear, unambiguous language, China argues on one hand that Annex 3 reflects a "*fallback option* to calculate product-specific AMS in situations where a product was *not* included in Part IV of a Member's Schedule."[2] China on the other hand contends that the Supporting Tables referenced in Part IV of its Schedule of Concessions contain agreed China-specific data and methodologies that when read harmoniously with the Agriculture Agreement can supplant the methodology required by the Agriculture Agreement.[3] As we will explain: (a) the plain language of the text provides the Members and the panel guidance regarding the appropriate use of country-specific constituent data and methodology, (b) the text does not support an understanding that the Current Total AMS calculation must be consistent with the Base Total AMS calculation, and (c) in any event, China's proposed market price support calculation is not consistent with the calculation it used in its Supporting Tables.

[2] China First Written Submission, para. 106.
[3] China Second Written Submission, paras. 315, 317-320, and 358-375.

A. China Misunderstands the Legal Status of Supporting Tables In the Context of the Agriculture Agreement

9. The text of the Agriculture Agreement, as confirmed by the Appellate Body in *Korea – Beef*, establishes a "hierarchy" between the methodology contained in Annex 3 of the Agriculture Agreement and the constituent data and methodology contained in a Member's Supporting Tables.[4] Article 1(a)(ii) provides that the AMS for each basic agricultural product must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted in "conformity" with the methodology provided in Annex 3.[5] 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.[6] This indicates that a lesser degree of consideration is accorded to any constituent data and methodology.

10. This "hierarchy" applies whether or not a Member has provided a Supporting Table containing relevant constituent data and methodology. Thus, consistent with the plain text of the Agriculture Agreement and as confirmed by *Korea–Beef*, Annex 3 provides the rules for calculating product-specific AMS and China's country-specific data and methodology could not supplant those requirements. In using the rules set out in Annex 3, a Member or adjudicator will "tak[e] account of" the relevant data and methodology contained in China's Supporting Tables.

[4] *Korea – Various Measures on Beef* (AB), para. 111.
[5] *Korea – Various Measures on Beef* (AB), para. 111.
[6] *Korea – Various Measures on Beef* (AB), para. 111 (*citing* New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15).

11. Contrary to China's arguments, the plain meaning of Article 1(a)(ii) establishing an obligation to calculate product-specific AMS in accordance with Annex 3 is not altered when read in conjunction with Article 1(h)(ii) describing the calculation of Current Total AMS. The calculation of AMS for *a product*, and the calculation of Current Total AMS for *all products* are different operations, each subject to its own rules. China argues that the plain meaning of Article 1(a)(ii)'s "taking into account" should be altered to conform to Article 1(h)(ii)'s "with." There is no basis in the text to read into the former provision the meaning in the latter.

12. Article 1(h)(ii) describes the calculation of Current Total AMS – a later step in the calculation. Article 1(h), in its main text, starts with the AMS for each product (or non-product-specific support) as already calculated in Article 1(a)(ii) and Annex 3. Article 1(h)(ii) then provides for the summing of each AMS consistent with, for example, Article 6. Because Article 1(h) takes as a given the calculated product-specific or non-product-specific AMS under Article 1(a), there is no basis to alter the meaning of Article 1(a) by reading into it the alleged meaning of the separate and distinct operation described in Article 1(h).

13. The second phrase in Article 1(h)(ii), stating that Current Total AMS is "calculated in accordance with the provisions of this Agreement . . . *and with* the constituent data and methodology," can also be understood as reflecting a hierarchy. Grammatically, it would be odd drafting to use "in accordance with" to apply to the first object that follows, but only "with" to indicate that "in accordance with" extends to the second object. If "in accordance with" was intended to apply to both objects in the provision ("the provisions of this Agreement" and "the constituent data and methodology"), the second "with" would be superfluous. The natural drafting would have been "calculated in accordance with the provisions of this Agreement *and*

the constituent data and methodology." Instead, Article 1(h) uses two distinct prepositions with different meanings and directions regarding the use of source material.

14. China's proposed alternative meanings for the "fixed external reference price" and "quantity of production eligible" rely on alleged meanings from its Supporting Tables superseding the text of Article 1(a) and Annex 3. But, the text of Article 1(a), read in the context of Article 1(h), does not support that flawed approach.

B. China Errs in Claiming that the Panel Must Calculate China's Current AMS Consistent with China's Base AMS

15. 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."[7] While China insists that the Agriculture Agreement and its Supporting Tables can be interpreted harmoniously,[8] 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.

16. As we will explain in more detail in response to the Panel's questions, the Agriculture Agreement defines the terms "AMS," "Base Total AMS," and "Current Total AMS," and sets

[7] China Second Written Submission, para. 298.
[8] China Second Written Submission, paras. 315, 357.

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.

17. 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.

18. 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.

19. 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."

20. 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.[9] 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.

21. 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."

22. 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."

[9] U.S. Response to Questions, Question 18, paras. 89-90; U.S. Second Written Submission, paras. 64-71.

23. 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."

24. 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."[10]

25. 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."

26. Thus, Article 1(h)(ii) provides <u>both</u> a definition of Current Total AMS and instructions for the calculation of Current Total AMS.

27. 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,

[10] *Korea – Various Measures on Beef* (AB), para. 115.

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).

C. China's Proposed Methodology is Not Consistent With the Calculations Contained in its Supporting Tables

28. 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[11] 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.[12] 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.

29. 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."[13] 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.[14] China broadly notes "China's FERP for corn may be found in Rev.3."[15] 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)

[11] *See* China First Written Submission, Tables 17, 18, and 22.
[12] *See* China First Written Submission, para. 178.
[13] China First Written Submission, para. 269.
[14] China First Written Submission, paras. 222, and 229-30.
[15] China Responses to Questions, Question 20, para. 86.

based on China's status, during that period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*."[16]

30. 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.

31. As you will see in the below excerpt from China's Support Table, the fifth column 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.

32. To illustrate, we have reproduced Table DS 5. As you will see, 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.

[16] China Second Written Submission, para. 318.

Supporting Table DS: 5

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

Product-Specific Aggregate Measurement of Support: Market Price Support

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

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

33. 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*.

34. 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.

35. 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.

36. 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.

III. CHINA MISUNDERSTANDS THE RELATIONSHIP BETWEEN ITS SCHEDULE OF CONCESSIONS AND THE MARRAKESH AGREEMENT

37. As an alternative to arguing that the constituent data and methodology of any Member may supplant the provisions of the Agriculture Agreement, China also argues that for structural reasons its Supporting Table provides binding treaty text that would prevail over the Agriculture Agreement. As a preliminary matter, the actual text used in the Supporting Table that we have just reviewed does not support any of China's legal arguments because the text of the Supporting Tables do not identify any "fixed external reference price", do not use any "fixed external reference price" in the calculation of market price support, cannot therefore contribute to establish any practice regarding not basing the fixed external reference price on the 1986-1988 period, and does not contain any text even purporting to deviate from the binding commitments found in the Agriculture Agreement. That is, the text of the Supporting Table does not establish the factual basis to underlie China's legal arguments.

38. China's legal arguments also fail as a matter of law; as we will address: (a) China's Supporting Table is not made an integral part of the Marrakesh Agreement; and (b) China's Supporting Table does not contain binding commitments; and (c) China's terms of accession does not support its position that it has a China-specific FERP and definition of eligible production.

A. China's Supporting Tables Are not Made an Integral Part of the Marrakesh Agreement

39. China argues that its Supporting Tables are part of the Marrakesh Agreement by virtue of their incorporation into the Schedule of Concessions, which itself is contained in Annex 8 of

China's Accession Protocol. China misunderstands the legal status of its Schedule of Concessions as annexed to its Accession Protocol. As explained in prior U.S. submissions, China's Supporting Tables are part of the GATT 1994 by virtue of express language in Part II, paragraph 1, of China's Accession Protocol: "[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 GATT 1994. That China's Schedule may have been included as an Annex in the set of documents supporting its accession to the WTO does not alter the legal status of the documents contained in that set, as set out in the plain text of China's Accession Protocol. Thus, it is clear that China's Schedule of Concessions is legally part of and annexed to the GATT 1994.

B. China Incorrectly Argues that China's Supporting Tables Are Treaty Text Giving Rise to Binding Commitments

40. China also argues that the constituent data and methodology in its Supporting Tables give rise to China-specific binding domestic support commitments, including with respect to the base period, fixed external reference price, methodology for calculating eligible production, the choice between price gap methodology or budgetary outlays for non-exempt direct payments, identification of base agricultural products, and the years for which AMS is calculated.[17]

41. However, as explained in previous submissions, the only instrument 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

[17] China Second Written Submission, paras. 187-188.

methodological obligations contained in Annex 3 with respect to the calculation of market price support. For these reasons, the Supporting Tables do not, and could not, themselves set out any legally permissible deviation from the Agriculture Agreement.

42. Moreover, nothing in a Member's Schedule of Concessions can give rise to a binding commitment if that commitment were to conflict with Annex 3 of the Agriculture Agreement. Article 21.1 of the Agriculture Agreement provides that the provisions of the GATT 1994 shall apply subject to the provisions of the Agriculture Agreement – that is, the Agriculture Agreement must prevail to the extent of the conflict.

43. Further, as the panel and the Appellate Body noted in *EC – Export Subsidies on Sugar*, "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."[18] This finding 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."[19] Therefore, based on Article 21.1 and as reflected in the reports in *EC – Export Subsidies Sugar* and *US – Sugar*, if 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.

44. China contends that if there were a conflict between Annex 3 of the Agriculture Agreement and China's Supporting Tables, China's Supporting Tables would prevail pursuant to

[18] *EC – Export Subsidies on Sugar (Australia)* (Panel), para. 7.157; *see also EC – Export Subsidies on Sugar* (AB), para. 213.
[19] *US – Sugar (GATT Panel)*, para. 5.2.

Article XVI:3 of the Marrakesh Agreement, which provides that "[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict."[20] For this reason, China asserts that any binding commitments in its Schedule of Concessions and Supporting Tables prevail over any conflicting obligations provided for in Annex 3 or elsewhere in the covered agreements. That is not true.

45. Notwithstanding the fact that China may not alter an Agriculture Agreement commitment through its Schedule of Concessions or Supporting Tables, we also note that the portions of China's Supporting Tables to which it refers in these arguments 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. For instance, China suggests that a reference in Note 19 to the definition of quantity of eligible production changes its obligations with respect to the calculation of eligible production, while the rest of Note 19 and two other Notes – 10 and 16 – providing contradictory statements do not have the same effect because they are merely factual.[21] However, none of the text to which China refers contains language expressing the clear intention of the Members to alter the market price support methodology for purposes of calculating China's product-specific and Current Total AMS. Nonetheless, China would have the Panel review all the text contained in its Supporting Tables to determine whether any such text implies or suggests a legal commitment on behalf of WTO Members. This is not the manner in which WTO Members memorialize legal commitments, and for obvious reasons, the Panel should decline China's invitation to decide otherwise.

[20] China Second Written Submission, para. 394.
[21] China Second Written Submission, para. 379.

IV. CHINA HAS FAILED TO DEMONSTRATE THAT CHINA'S PROVISION OF DOMESTIC SUPPORT TO CORN PRODUCERS IN 2012 THROUGH 2015 IS OUTSIDE OF THE PANEL'S TERMS OF REFERENCE

46. Finally, we will address China's terms of reference argument. China contends that its provision of domestic support to corn producers from 2012 through 2015 is outside the Panel's terms of reference because the legal instruments through which the domestic support was provided "expired" prior to the Panel's establishment. However, China's argument fails because is misunderstands the matter referred by the DSB to the Panel. Separately, China has failed to demonstrate that the measures identified in the U.S. panel request expired prior to the Panel's establishment.

47. Throughout China's submissions, China has consistently misunderstood the "matter" before the Panel and misidentified the measures at issue in this dispute. China claims that the United States is not challenging the provision of domestic support to China's agricultural producers, but rather has "framed its claim as one involving the application of the specific legal instruments."[22]

48. China additionally maintains that the introduction of an alleged "new" corn program demonstrates that it has established that the TPRP expired prior to panel establishment, and as a result of that expiry, the Panel is precluded "from making findings and recommendations regarding the TPRP."[23] China is incorrect on both counts.

A. China Continues to Incorrectly Identify the Measures at Issue

49. China incorrectly argues that the U.S. panel request identifies the measures at issue as the "MPP programs for wheat and rice and the (albeit expired) 2012-2015 TPRP for corn."[24] As

[22] China Second Written Submission, para. 34.
[23] China Second Written Submission, para. 118.
[24] China Second Written Submission, para. 13.

explained in our prior submissions, China has misunderstood the "matter" that was referred to the Panel by the Dispute Settlement Body (DSB). Consistent with Article 7.1 of the DSU, the DSB established the Panel to examine the "matter" set out in the U.S. panel request, which 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.

50. The U.S. panel request not only identified the measures and claims before the Panel, but also included additional information that previewed the main arguments the United States would present in its First Written Submission.

51. As explained in prior submissions, given that under WTO rules, Members are allowed to provide domestic support to agricultural producers as long as the level of the support provided does not exceed a Member's final bound commitment level, the provision of market price support alone does not lead to a breach of a domestic support commitment. Rather, the breach occurs if, and only if, the level of domestic support provided by the Member in a calendar year is in excess of the Member's final bound commitment level. Therefore, the nature of AMS commitments, and the manner in which their breach must be demonstrated, provides further context for understanding the measures, as set out in the U.S. panel request, to include the provision of domestic support provided by China in each of four specific years.

B. China Has Failed to Prove That the U.S. Panel Request Lacks Specificity and is Inconsistent with Article 6.2 of the DSU

52. As an alternative argument, China contends that "even if the Panel were to agree with the United States that its panel request properly identified the 'level of domestic support' as the 'specific measure at issue,' then the Panel should find that the identification of 'the level of domestic support' as a 'measure at issue' fails to meet the specificity requirements under Article 6.2 of the DSU."[25] China's arguments fail as well because the United States has identified a specific measure: the provision of domestic support for all agricultural producers.

53. First, as we explained previously, the United States has not identified the measure in its panel request as the "level" of domestic support, but rather as China's provision of domestic support to its agricultural producers.[26] The measure is therefore neither a numerical value, nor a legal concept – it is an action by China.[27]

54. Second, China is incorrect that to satisfy the requirements of Article 6.2 of the DSU, the U.S. challenge must be directed at particular products or legal instruments defining domestic support programs. While listing legal instruments may assist in identifying a specific measure at issue, a measure can be identified through a description of its substance. Indeed, in the case of an unwritten measure, the measure can *only* be identified through a narrative description of its substance. Therefore, it is incorrect to say that without reference to legal instruments, a panel must find that a panel request is insufficiently specific under Article 6.2.

55. In addition, China's arguments continue to misunderstand the nature of the U.S. claims. As the United States has explained, because China's AMS commitment is zero, support

[25] China Second Written Submission, para. 42.
[26] United States Second Written Submission, paras. 14, 24.
[27] United States Second Written Submission, para. 24.

provided for any product in excess of 8.5 percent of the total value of production for that product would constitute a breach. As a result, the United States chose four exemplary products – wheat, Indica rice, Japonica rice, and corn – and calculated the support provided through a single type of program – market price support. Thus, while the breach relates to China's provision of domestic support in excess of its commitment of zero, the evidence the United States presented, in the form of various legal instruments and production and other data, relates only to those four products. As the United States explained in its submissions, demonstration of a breach based on these products alone is sufficient to demonstrate a breach of China's obligations.

56. The U.S. panel request complies with the requirements of DSU Article 6.2. The DSB established the Panel to examine "the matter" set out in the U.S. panel request. Pursuant to Article 11 of the DSU, the Panel is to make an objective assessment as to whether China's provision of domestic support to its agricultural producers in 2012, 2013, 2014, and 2015 is in excess of its commitment level of "nil" and breaches China's commitments under the Agriculture Agreement.

C. 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

57. The United States has explained that it is not challenging a measure that expired prior to panel establishment, but rather is challenging the domestic support provided by China to its agricultural producers in 2012, 2013, 2014, and 2015. 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 on the matter within the Panel's terms of reference pursuant to DSU Article 19.1 requiring a recommendation for any measure within the panel's terms of

reference found to be WTO-inconsistent. The alleged expiration of an annually-issued legal instrument through which China provided domestic support does not alter the Panel's terms of reference and does not demonstrate that China has withdrawn the challenged measure – the provision of domestic support to agricultural producers.

58. Even aside from this, as the United States also has explained previously, the lack of transparency regarding China's 2016 activities means that we do not know today – and the Panel therefore cannot properly evaluate – the factual and legal situation in China in 2016; and the United States certainly was in no position to evaluate this situation at the time of its panel request. China has not denied that it provided market price support in excess of its commitment levels to corn producers in 2012 through 2015,[28] nor has China put forth any evidence demonstrating that it has stopped providing market price support to corn producers in 2016. China has argued that it has "reformed" its domestic support program to provide direct payments and corn purchases, and that the introduction of its "reformed" program in 2016 establishes that the TPRP expired, and as a result of the expiry the Panel is precluded "from making findings and recommendations regarding the application of the TPRP."[29]

59. As the United States has explained, 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

[28] *See* China Response to Question 20, para. 85 and Table 1 (China's erroneous alternative methodology reveals breach of its domestic support commitments for 2013 through 2015).
[29] China Second Written Submission, paras. 118 – 121.

"market players," where all types of entities may decide to make purchases on their own initiative, but 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."[30]

60. 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.[31] Entitled, *Notice on Activating 2016 Autumn Grains Corn Purchase Work*, 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 establishes a similar government purchase process to that established under the 2012, 2013, 2014, and 2015 Corn MPS Programs.

61. Second, while China asserts that in 2016 "all kinds of processing and trading enterprises, whether privately owned or state-owned, have purchased corn at their own initiative and in pursuit of their corn-related businesses, without being required or entrusted to do so by the government,"[32] a provincial level instrument issued in February 2017 appears to direct the

[30] *2016 Northeast Region Corn Purchasing Notice*. Exhibit US-87.
[31] Price Announcement For Corn Purchase (October 16, 2016) Exhibit US-101.
[32] China Responses to Questions, Question 12, para. 68.

major state-owned enterprise to purchase corn. The instrument from Jilin province states that "market prices for grain have been dropping quite sharply," and directs that "Sinograin is required to accelerate the pace of purchases, establish additional purchase and storage depots, extend purchase hours, and exploit its purchasing potential to the greatest possible extent."[33]

62. Third, a May 2017 report from Jilin province does not suggest that Jilin has moved to price formation based on supply and demand. Rather the report states that "[a]ccording to the guidance prices of Sinograin headquarters, [Sinograin's Jilin province subsidiary] has consulted market prices and adjusted purchase prices once per week to release positive market signals." In this context, "Sinograin's Jilin province subsidiary has given full play to its role of macro-control and as a 'stabilizing instrument' and 'ballast.'"[34]

63. Taken together, these documents suggest that China has not "ceased" government purchases of corn at pre-set prices.

V. CONCLUSION

64. As we have demonstrated in the U.S. written submissions and oral presentations and again this morning, China's attempts to distort the legal agreements and distract the Panel from the pertinent legal questions should be rejected by the Panel. Consistent with the arguments presented in its prior submissions, the United States respectfully requests that the Panel find that China has breached Articles 3.2 and 6.3 of the Agriculture Agreement in each of the years 2012, 2013, 2014 and 2015. We further request that the Panel recommend, consistent with DSU Article 19.1, that China bring its measures providing domestic support, including for wheat,

[33] Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017) Exhibit US-102.
[34] Report on Purchasing Activities in Jilin (May 3, 2017) Exhibit US-103.

Indica rice, Japonica rice, and corn, into conformity with its commitments under the Agriculture Agreement.[35]

65. Mr. Chairman, members of the Panel, this concludes the U.S. opening statement. We thank you for your attention and look forward to responding to your questions.

[35] DSU Article 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, *it shall recommend* that the Member concerned bring the measure into conformity with that agreement.") (italics added).