

CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

(DS517)

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

November 16, 2018

TABLE OF CONTENTS

1.	FACTUAL ASPECTS	1
	A. General	1
	B. Basic Eligibility Criteria	2
	C. Allocation and reallocation	4
	D. Public comments	7
	E. Usage requirements	7
2.	PARAGRAPH 116 OF CHINA’S WORKING PARTY REPORT	8

TABLE OF REPORTS

SHORT FORM	FULL FORM
<i>Argentina – Import Measures</i> (Panel)	Panel Reports, <i>Measures Affecting the Importation of Goods</i> , WT/DS438/R / WT/DS444/R / WT/DS445/R and Add. 1, adopted 26 January 2015, as modified by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>China – Raw Materials</i> (Panel)	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R / WT/DS395/R / WT/DS398/R / Add. 1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>EC – Approval and Marketing of Biotech Products</i> (Panel)	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
<i>EC – Selected Customs Matters</i> (AB)	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>US – Shirts and Blouses</i> (AB)	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shorts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

1. The United States appreciates this opportunity to comment on China’s responses to the Panel’s questions following the second meeting. The United States has addressed in its written and oral submissions many of the points that China raises in its responses. Therefore the United States focuses its comments on those points in China’s responses not previously addressed and relevant to the Panel’s consideration of the U.S. claims. The absence of comment on a particular response should not be construed as agreement with that response.

1. Factual Aspects

A. General

Question 44: The Panel notes China's statement at the second substantive meeting that the relevant NDRC officials communicated their confirmation of the NDRC's alleged practices at a meeting with MOFCOM officials. Please explain whether there is any evidence of the alleged practices other than this oral communication.

Comment:

2. China concedes that the “oral confirmation of NDRC officials at an internal meeting is the only evidence submitted by China to demonstrate NDRC’s practices,”¹ but argues that “it is well-established that statements made by public officials constitute relevant evidence and that panels ‘must not lightly cast doubt on the good faith underlying governmental declarations and on the veracity of these declarations.’”² China also asserts that the United States has not offered any “contrary factual evidence of the practices confirmed by NDRC officials.”³

3. The “confirmation of NDRC officials” relied upon by China should, however, be distinguished from public statements made on the record by public officials outside the context of dispute settlement. The panel in *Argentina – Import Measures*, which China cites as support, referred to “consistent” public statements “made on the record” by a public official.⁴ Specifically, the statements examined by the panel in that dispute were “prepared speeches delivered at formal events or were contained in notes,” and thus “cannot be dismissed as casual statements.”⁵ That panel also noted that the statements “‘are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them,’” or “are unambiguous and, in the case of plural statements, whether they are consistent and repeated over time.”⁶ While the panel in that dispute decided not to disregard the evidence of public statements

¹ China Responses to Panel Questions, Question 44, para. 6.

² China Responses to Panel Questions, Question 44, para. 6 (citing *Argentina – Import Measures* (Panel) paras. 6.79-6.80).

³ China Responses to Panel Questions, Question 44, para 6.

⁴ *Argentina – Import Measures* (Panel) para. 6.79.

⁵ *Argentina – Import Measures* (Panel), para. 6.79.

⁶ *Argentina – Import Measures* (Panel), para. 6.80 (quoting International Court of Justice, Merits, Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*) (1986), para. 64).

made by high ranking officials,⁷ the “oral confirmations” presented in China’s submissions in this dispute are not analogous.

4. As previously explained, Article 11 of the Dispute Settlement Understanding (“DSU”) specifies that the Panel is to make an “objective assessment of the matter before it, including an objective assessment of the facts of the case.”⁸ To this end, the Panel is to assess the facts put forward by both parties to the dispute.⁹ On the one hand, the United States has put on the record China’s legal instruments and annual notices underpinning China’s TRQ administration. On the other hand, China has made assertions regarding its TRQ administration based on alleged oral statements of unnamed NDRC officials, without those officials making the statements directly to the Panel (for example, in the form of a notarized statement), and which are inconsistent with its publically announced legal instruments.

B. Basic Eligibility Criteria

Question 47: The Panel understands that, although Credit China uses information other than the blacklist in generating credit reports for applicants, the NDRC uses only the blacklist and no other information to determine applicants' eligibility to receive TRQs. [footnotes omitted]

Is this understanding correct? If not, please elaborate.

Question 48: In explaining the violations that would place an applicant on Credit China's blacklist, China explains that "records of non-compliance with industry and commerce registration, tax payments, customs, and compliance with court judgments are particularly important" for determining eligibility and that any instance of non-compliance with industry and commerce registration, tax payments, customs, and compliance with court judgments will render applicants ineligible to receive TRQ allocations. [footnotes omitted]

Please clarify whether this is an exhaustive list or whether other types of violations would also place applicants on that blacklist.

Comments on Questions 47 and 48:

5. China asserts in response to Question 47 that while the Credit China system provides other information, NDRC relies only on the blacklist and not additional Credit China report components.¹⁰ China then asserts in response to Question 48 that NDRC only considers four types of violations, or a subset of information provided pursuant to the blacklist.¹¹ China also

⁷ *Argentina – Import Measures* (Panel), paras. 6.79-6.80. *See also EC – Approval and Marketing of Biotech Products* (Panel), para. 7.532.

⁸ U.S. Responses to Panel Questions, Question 45(b), para. 4 (citing DSU, Article 11).

⁹ *See, e.g., US – Shirts and Blouses* (AB), pages 12-17.

¹⁰ China Responses to Panel Questions, Question 47, para. 8.

¹¹ China Responses to Panel Questions, Question 48, para. 9.

responds that NDRC determines eligibility based on factors other than the blacklist, such as whether the applicant has previously violated the *2003 Provisional Measures*.¹²

6. The United States understands China’s responses to Questions 47 and 48, together, to mean that when considering whether an applicant is eligible for a TRQ allocation NDRC considers:

- some, but not all, of the information provided by the “Credit China” blacklist;
- whether the applicant has attested to the accuracy of the information provided in their application; and
- whether the applicant has any prior violations of the *2003 Provisional Measures*.

7. However, China has not placed any evidence on the record to support these assertions. The only evidence China has offered even related to Credit China is a sample report from the Credit China website with separate categories for “general information,” “administrative license,” “administrative punishment,” “good credit list,” “watch list,” and “black list.”¹³ The sample report submitted by China does not provide any information regarding the black list. This sample does not indicate that any specific information is provided by Credit China regarding the violations or good behavior that result in placement on one or more of these lists.¹⁴ China does not reference this or any other evidence in support of any of its assertions.¹⁵

8. It is significant that these criteria diverge from what China annually announces as the “Basic Criteria” for applicants – including “[h]aving registered with the industry and commerce administrative departments prior to October 1, 2016; possessing a good financial condition, [good] taxpayer record, and a [good] integrity situation; as of 2015, no record of violating regulations with respect to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, environmental protection, and other areas; not having been placed on a “Credit China” website blacklist [of entities] receiving punishment; having fulfilled social responsibilities associated with [their] operations; having no conduct in violation of the [2003 Provisional Measures].”¹⁶

9. The disparity between what China communicates to Members and potential applicants, and what it claims is actually considered by NDRC again underscores the lack of transparency, predictability, and fairness of the bases for NDRC’s eligibility determinations, a critical component of China’s TRQ administration.

¹² China Responses to Panel Questions, Question 47, para. 8.

¹³ Credit China Sample (Exhibit CHN-19).

¹⁴ Credit China Sample (Exhibit CHN-19).

¹⁵ See China Responses to Panel Questions, Question 8(c), para. 24 (“The components of the credit report are illustrated in Exhibit CHN-19”); China First Written Submission, para. 14 (“Rather, the uniform social credit code that is provided by each applicant in its application is used to generate a credit report through ‘Credit China’”).

¹⁶ *2017 Allocation Notice*, Article II (Exhibit US-15).

C. Allocation and reallocation

Question 52: China explains that the first-come, first-served method "is used in the reallocation process" and that "[a]s in the case of initial allocation, when amounts are available for reallocation, NDRC determines the eligibility of applicants for reallocation and then proceeds to grant allocations based on the 'first-come, first-served' method". [footnotes omitted]

- a. Is the Panel correct in understanding that, during the *initial allocation process*, the NDRC allocates the amount of TRQs based on the allocation principles in Article IV of the annual allocation notices, and that the first-come, first-served method is not used at this stage? If not, please elaborate.
- b. Is the Panel correct in understanding that, during the *reallocation process*, the NDRC reallocates the amounts of TRQs based on the first-come, first-served method, and that the allocation principles in Article IV of the annual allocation notices do not apply to the NDRC's reallocation decisions? If not, please explain in detail how the allocation principles apply at the reallocation stage.

Comment:

10. China asserts that the Allocation Principles in Article IV of the annual *Allocation Notice* do not apply at the reallocation stage.¹⁷ The United States refers the Panel to its response to Question 64, and the provision of China’s *2017 Reallocation Notice* that states, “when the number of applications that meet the criteria, in total, is larger than the reallocated tariff-rate quota quantity, reallocation will be carried out according to the Allocation Principles and the Allocation Rules.”¹⁸ Again, China’s response regarding its TRQ administration is inconsistent with its own published measures and is not otherwise supported with evidence on the record. China’s assertion underscores that China’s reallocation procedure is not clearly specified.¹⁹

Question 53: The Panel wishes to understand the circumstances that may lead to an applicant receiving a TRQ allocation greater or smaller than that of the previous year. To this end, please respond to the following questions:

- a. China points out that an applicant can receive a TRQ allocation greater than its TRQ allocation in the previous year by fully utilizing its initial TRQ allocation and then applying for and receiving a TRQ reallocation. [footnote omitted] Is the Panel correct in understanding that participation in the reallocation process is the only way to receive an allocation greater than that of the previous year? If not, please

¹⁷ China Responses to Panel Questions, Question 52(b), para. 15.

¹⁸ *2017 Reallocation Notice* (Exhibit US-16).

¹⁹ U.S. First Written Submission, para. 168.

explain, on the basis of record evidence, which other situations may lead to the same outcome.

- b. In arguing that "actual import performance is the factor given most weight in NDRC's allocation analysis", China asserts that "[a]bsent disqualification in relation to the Basic Criteria or a usage penalty, applicants who have previously imported under the TRQ know that their allocation will be similar to the prior year". [footnote omitted] Is the Panel correct in understanding that disqualification and penalties are the only two situations that would lead to an applicant receiving a TRQ allocation smaller than that of the previous year? If not, please explain, on the basis of record evidence, which other situations may lead to the same outcome.**

Comment:

11. China responds that an applicant’s allocation could decline if its import performance or processing capacity declines. China’s response is inconsistent with both its prior written submissions to the Panel, and its published measures.

12. China subsequently stated in its response to Question 51 that “actual import performance” in Article IV, Allocation Principles, pertains to import performance under the TRQs. Therefore the United States understands China’s response to Question 53(b) to mean an applicant’s allocation could decline based on import performance only if it did not import all of its prior allocation under the TRQ.

13. It is unclear based on China’s responses whether this allocation principle is different from the penalties, *i.e.* proportionate deduction, for failing to import an allocation.²⁰ China asserted in its First Written Submission that “[a]bsent disqualification in relation to the Basic Criteria *or a usage penalty*, applicants who have previously imported under the TRQ know that their allocation will be similar to the prior year.”²¹ China does not clarify in its First Written Submission whether the “usage penalty” refers to a penalty for failure to process the imported product in the TRQ Certificate holder’s own facility, pursuant to Article V of the *Allocation Notice*, or a penalty for failure to import the full allocation, pursuant to the *2003 Provisional Measures*. If China uses “usage penalty” to refer to the processing requirement, China’s statement is inconsistent with its prior statements that China does not apply penalties to enforce the processing requirement.²² If China uses “usage penalty” to refer to the penalty for failure to import the TRQ Certificate Holder’s full allocation, the United States understands China’s response to Panel Question 53(b) to conflate a reduced allocation based on import performance, *i.e.*, the allocation principle, with a reduced allocation based on a usage penalty, *i.e.*, penalties in the *2003 Provisional Measures*.²³

²⁰ *2003 Provisional Measures*, Articles 30 and 31 (Exhibit US-11).

²¹ China First Written Submission, para. 49 (emphasis added).

²² See, *e.g.*, China Responses to Panel Questions, Question 57(a), para. 29.

²³ *2003 Provisional Measures*, Articles 30 and 31 (Exhibit US-11).

Question 54: According to Article 24 of the 2003 Provisional Measures, China makes the TRQ amounts that are returned from the initial allocation available for reallocation, and applicants can apply for reallocation from September 1 to September 15.

- a. Please explain, by referring to the relevant evidence, whether China makes all the TRQ amounts that are returned from the initial allocation available for reallocation.**
- b. Please explain whether China, in the event that the total amount of available TRQs is not allocated during the initial allocation process, makes the amount that is not allocated at the initial allocation stage available for reallocation. Please respond by referring to the relevant evidence.**

Comment:

14. China asserts in its Second Written Submission that Table 1, showing reallocation of limited quantities of non-STE TRQ for certain commodities in certain years, “affirms that unused amounts of the non-STE portions of the TRQ are in fact returned and reallocated.”²⁴ The United States disagrees; China has provided insufficient evidence that reallocation actually occurs. The United States would expect to see internal documents referencing the returned and reallocated volumes, or TRQ certificates representing amounts actually reallocated. Disappointingly, China continues to rely on nothing more than summary data (Table 1) and the assertions of unnamed officials.²⁵

15. Moreover, as noted at the second panel meeting, the necessary implication of China’s assertions in these proceedings is that the STE portion, which China concedes is not returned or reallocated, goes unused.²⁶

16. China’s response is also significant in the distinction drawn between amounts not initially allocated and amounts initially allocated and subsequently returned. China concedes that amounts not initially allocated (*e.g.*, in a situation where 5,000 tons of the non-STE portion of a TRQ is not initially allocated for some reason) will not be included in the amount to be reallocated and thus will remain unused for that year. China’s TRQ administration thus would prevent full utilization of the TRQs. China concedes in response to the Panel’s Question 54(b) that according to the 2016 and 2017 *Reallocation Notices* “only returned TRQ amounts are subject to reallocation. Any TRQ amounts not allocated at the initial allocation stage would therefore not be available for reallocation.”²⁷ This, coupled with China’s lack of transparency preventing potential applicants in the current year or future years from knowing about potentially available allocations, would appear to further result in TRQ administration that would inhibit the filling of each TRQ.

²⁴ China Second Written Submission, para. 34.

²⁵ China Second Written Submission, para. 33, China Responses to Panel Questions, Question 44, para. 6.

²⁶ U.S. Second Written Submission, paras. 82-83.

²⁷ China Responses to Panel Questions, Question 54(b), para. 19.

D. Public comments

To China:

Question 55: The Panel recalls China's argument that comments provided by the public are taken into account in determining applicants' eligibility. [footnote omitted]

- a. If the NDRC, as China asserts, determines eligibility solely based on whether applicants appear on Credit China's blacklist, what possible relevance could comments from the public have?**
- b. In response to the Panel's questions at the second substantive meeting, China argued that the NDRC only publishes applicant enterprise data for applicants that "passed" the NDRC's basic eligibility test. Can China confirm that the NDRC does not publish applicant enterprise data for applicants that do not "pass" the basic eligibility test, i.e. those placed on Credit China's blacklist?**
- c. In response to the Panel's questions at the second substantive meeting, China argued that public comments are relevant for the grain-specific eligibility criteria and that they also serve as a "double-check" for the basic eligibility test (i.e. Credit China's blacklist) because interested parties can "challenge" applicants as to whether they are on Credit China's blacklist and as to whether they have "other wrongdoings". Please elaborate on how public comments serve as a "double-check" for the basic eligibility test. In particular, please specify what types of "other wrongdoings" would render applicants ineligible to receive TRQs.**
- d. Can the NDRC disqualify an applicant that was not on Credit China's black list, on the basis of comments received from the public?**
- e. Based on China's response to the Panel's questions at the second substantive meeting, the Panel understands that public comments are also taken into account in the allocation of TRQ amounts on the basis of the allocation principles. Is this understanding correct?**

Comment:

17. The United States again recalls that China provides no guidance to Members, applicants, or members of the public regarding the information sought by means of the public comment process or the use of the information in China's TRQ administration system.

E. Usage requirements

Question 58: The Panel recalls China's response to Advance Question No. 5 at the second substantive meeting that the processing requirements for wheat and corn apply in all circumstances but that the NDRC does not "monitor" TRQ recipients' compliance with these requirements "on a daily basis", and determines on a case-by-case basis whether to impose

penalties when it "becomes aware" of violations. The Panel also recalls China's statement that, in such cases, penalties take the form of deductions in TRQ allocations in the coming year.

- a. Is this understanding correct?
- b. How does the NDRC's alleged practice relate to China's previous statement concerning the monitoring and enforcement of processing requirements, namely, that "[c]ustoms monitors processing trade contracts and clearance procedures for processed products" and that "the act of selling bounded products [including raw materials imported by enterprises engaged in processing] domestically ... constitutes smuggling" subject to confiscation, fines and criminal penalties? [footnote omitted] Can these two explanations be reconciled?

Comment:

18. China's response creates more, rather than less, confusion. Specifically, China suggests that the "end use requirement set forth in Article V(2) of the *Allocation Notice*, which requires recipients to process their allocations in their own facilities . . . applies to all 'general trade' recipients."²⁸ China then argues that this requirement is not monitored on a daily basis by NDRC. By implication, China suggests that this does not apply to "processing trade" recipients, who appear to be subject to a different requirement to export the finished product that they process. Although it is unclear where this requirement is reflected in China's legal instruments, China argues that the requirement to export the finished product is monitored and enforced. That said, nothing in China's annual *Allocation Notices* suggests such a distinction. If accurate, this again illustrates China's failure to provide clearly specified procedures and requirements in a manner inconsistent with Paragraph 116.

2. Paragraph 116 Of China's Working Party Report

Question 60: Please respond to the following questions regarding China's view that its TRQ administration should be assessed "as a whole" in connection with the United States' claims under Paragraph 116 of China's Working Party Report:

- a. The Panel understands China to agree with the United States' view that the various obligations in Paragraph 116 apply separately and that a violation of any single one of those obligations is sufficient to demonstrate a violation of Paragraph 116. [footnote omitted] Is this understanding correct?
- b. The Panel understands China to argue that, to demonstrate a violation of Paragraph 116, it is not sufficient to demonstrate that a specific aspect of China's TRQ administration is inconsistent with one of the obligations in Paragraph 116,

²⁸ China Response to Panel Questions, Question 58(b), para. 34.

and that the United States is required to demonstrate that China's TRQ administration "as a whole" is inconsistent with that particular obligation in Paragraph 116. Is this understanding correct?

If so, please elaborate what China means by TRQ administration "as a whole" in this context.

Comment:

19. China has again explained its view that for China's TRQ administration to be inconsistent with any of the six Paragraph 116 obligations cited by the United States it must be inconsistent "as a whole" rather than based on specific aspects demonstrating inconsistency.²⁹ To this end, China cites not only the aspects of TRQ administration discussed during this dispute, but other "aspects not challenged by the United States."³⁰

20. As described in the U.S. Response to Panel Question 61, WTO-consistent administration in one area does not excuse a failure elsewhere. The "holistic" argument is particularly confounding as a failure in any one of these particular aspects could undermine the entire TRQ administration system.³¹ As previously described, the analysis required under Paragraph 116 is similar to that under GATT 1994 Article X:3(a). As such, we note that under Article X:3(a), a complainant must show that a "feature of an administrative process" is inconsistent,³² not that on balance the administrative process is inconsistent.

21. For these reasons, there is no requirement to weigh and balance China's administrative system as a whole. Such an assessment would be impossible for the Panel; moreover, it would require China to have put on the record information regarding the supposedly WTO-consistent aspects its TRQ administration system. Instead, as China is aware, it is the inconsistency of any of the identified bases or set of underlying principles or rules that is relevant.

Question 63: Please respond to the United States' argument that the NDRC's practice of allocating the entire STE portions of the TRQs to COFCO without applying the basic eligibility criteria and the allocation principles violates the obligation in Paragraph 116 to administer TRQs on a fair basis. [footnote omitted]

Question 66: Taking into account China's view that "end-use requirements and penalties encourage the filling of the TRQs by incentivizing applicants to apply for allocation amounts that they can actually utilize", please explain the rationale for not subjecting COFCO to the obligation to return unused TRQ portions and the penalties for non-use of TRQs. [footnote omitted]

²⁹ China Responses to Panel Questions, Question 60(b), paras. 41-43.

³⁰ China Responses to Panel Questions, Question 60(b), para. 41.

³¹ U.S. Responses to Panel Questions, Question 61, para. 14.

³² *EC – Selected Customs Matters* (AB), para. 226; *China – Raw Materials* (Panel), para. 7.706.

Comment on Responses to Question 63 and 66:

22. China continues to assert that it is appropriate to provide the entire STE portion of each TRQ to COFCO.³³ China claims that as COFCO is the only STE designated for grain importation, it is the only potential recipient of this allocation, and that COFCO is not an “end user” as defined by the *2003 Provisional Measures*. China’s explanation is inconsistent with both its own measures and the obligation found in the Headnotes to its Schedule CLII.

23. First, as the United States has previously indicated, China’s reference to the definition of “end user” in the *2003 Provisional Measures* does not support its non-application of TRQ requirements to COFCO.³⁴ In particular, if COFCO is acting as an end user, rather than as an entity through which grain is imported on behalf of another entity, then the legal instruments on the record of this dispute suggest that all relevant obligations should apply, including the basic criteria, end-use requirements, and penalties. As such, China’s allocation of the entire STE portion of the TRQ to COFCO and the failure to obligate COFCO to return its unused allocation for reallocation to another applicant is inconsistent with China’s obligation to administer its TRQs on a transparent, predictable, and fair basis, and to not inhibit the filling of each TRQ.³⁵

24. Second, China’s contention that COFCO is the only identified STE and thus there would be no other entities to whom to reallocate COFCO’s allocation³⁶ is not the situation envisioned under the Headnotes to China’s Schedule. Headnote 5 states that:

An entity granted a tariff quota allocation (quota-holder) may engage in importation through state-trading enterprises and/or through entities possessing the right to trade other than state trading enterprises, including direct importation by the quota holder, as indicated on documentation issued with the allocation or reallocation of the tariff quota quantities.³⁷

This language recognizes a “quota-holder” and an entity “through” which importation occurs (“state-trading enterprises” or “entities possessing the right to trade other than state trading enterprises”). This language does not authorize the reservation of 50 to 90 percent of each TRQ for COFCO or other designated STEs as quota-holders. Here, “importation through state-trading enterprises” indicates that importation is by means of an intermediary or agent. In this case, the intermediary or agent is the designated STE. Thus, the designation of COFCO as the relevant STE through which allocations should be imported is not the same as providing COFCO with the entire allocation as “[a]n entity granted a tariff quota allocation (quota-holder).” Further, it does not authorize China’s failure to apply the requirements in Headnote 6(D), which apply to “quota-holder,” to COFCO.³⁸ For these reasons, the United States does not view China’s allocation of

³³ China Responses to Panel Questions, Question 63, para. 44.

³⁴ U.S. Responses to Panel Questions, Question 1, para. 2 (citing *2003 Provisional Measures*, Articles 38-39); U.S. Second Written Submission, paras. 66-67.

³⁵ United States Second Written Submission, paras. 69-83.

³⁶ China Responses to Panel Questions, Question 66, para. 46.

³⁷ China Schedule CLII, Headnote 5 (Exhibit US-23).

³⁸ China Schedule CLII, Headnote 6(D) (Exhibit US-23).

the majority of each TRQ to COFCO to be contemplated by the Headnotes to Part I, Section I-B of Schedule CLII.

Question 67:

Please respond to the United States' argument that the NDRC's practice of not applying the processing requirements for wheat and corn laid down in China's legal instruments in situations where recipients do not have sufficient processing capacity, violates the obligations to administer TRQs on a predictable basis, using clearly specified administrative procedures, set forth in Paragraph 116. [footnotes omitted]

Comment:

25. The United States remains perplexed that a published requirement can be both “a compulsory requirement” applying to all TRQ recipients and applied (or not applied) at the discretion of NDRC, without notice.³⁹ China has raised as a defense the lack of enforcement of this requirement, but this practice is not included in the published measures.⁴⁰ More perplexing, while China suggests that the requirement has no effect as it is not enforced, it also states that China is not required to “detail precisely how NDRC’s internal decision making processes operate” and that “[i]t is sufficient that applicants understand what is required to apply for an allocation and the obligations that accompany receipt of an allocation.”⁴¹

26. However, as discussed by the United States at length, the difference between what is published and what NDRC does is exactly the problem. China has issued legal instruments that suggest one particular obligation to Members and applicants, while indicating in these proceedings, without support, that there are exceptions to this obligation such that it is not enforced. Moreover, to the extent TRQ Certificate Holders could receive an exemption, China could only vaguely describe the procedures for receiving an exemption from the requirement during the second panel meeting. As the United States explained at length in the U.S. Second Written Submission, China is obligated to administer its TRQs on a predictable basis and using requirements that are clearly specified.⁴² China’s disclosure of one requirement while pursuing a secret policy does not meet the requirement to administer in a manner that allows Members and applicants to understand and predict the TRQ administration process or to provide requirements in an understandable and discernible manner.

Question 69: With respect to your argument that the processing requirements for wheat and corn are necessary for the filling or efficient allocation of wheat and corn TRQs, please explain the following:

a. Please elaborate on your view that the processing requirements are "implicitly contemplated" in China's Schedule CLII since this Schedule specifies that

³⁹ China Responses to Panel Questions, Question 67, para. 48.

⁴⁰ China First Written Submission, paras. 122-125.

⁴¹ China Responses to Panel Questions, Question 67, para. 48.

⁴² U.S. Second Written Submission, paras. 109-112.

processing capacity may be taken into account in determining TRQ allocations. In particular, please explain why it would be necessary to impose processing requirements in addition to taking processing capacity into account when allocating TRQs.

- a. How would the filling or efficient allocation of wheat and corn TRQs be deterred by allowing TRQ recipients to sell unprocessed wheat or corn to other enterprises?**
- b. How does the requirement that "group enterprises with multiple plants must individually apply for TRQs in the name of each plant and individually process wheat and corn imported under allocated TRQs in each plant" contribute to the filling or efficient allocation of wheat and corn TRQs? What is the *raison d'être* of this requirement in China's TRQ administration? [footnotes omitted]**

Comments:

27. China’s response focuses on the efficient use of grains by non-STE entities within China, but does not explain how China’s processing requirements actually impact efficient allocation and importation pursuant to the TRQs. Further, China continues to conflate “taking processing capacity into account in determining TRQ allocations,” and what appears to applicants to be stringent requirements on the processing of grain.⁴³

28. While the collection and consideration of information regarding processing capacity may be relevant to allocations, there is no reason related to the function of TRQ allocations to impose a downstream requirement regarding actual processing. In particular, the intercompany transfer of grains or sale to other processors after importation do not appear to be factors that would affect the efficient allocation and importation of grain under the TRQs. It is the companies requesting allocation that are in the best position to judge the risks and rewards associated with seeking and receiving TRQ allocations, and China’s announced processing requirement undermines this analysis. As the United States has described at length,⁴⁴ this requirement serves as a disincentive to request allocations.

29. China suggests that without the requirement to process imported grains in the TRQ Certificate Holder’s own facility “processors could overestimate their processing capacity” and thus they are incentivized “to provide accurate data.”⁴⁵ The United States understood the self-attestation as well as the public comment process to also be a means of ensuring accurate data. Further, additional application questions to this effect would appear to be sufficient to resolve China’s concern. Paragraph 116 does not provide that the desire for even more accurate data permits an exception to the requirement to administer TRQs in a manner that will not inhibit their fill.

⁴³ China Responses to Panel Questions, Question 69(a), para. 49.

⁴⁴ U.S. First Written Submission, paras. 214-218, 302-308; U.S. Second Written Submission, paras. 54, 57-58.

⁴⁵ China Responses to Panel Questions, Question 69(c), para. 52.

30. Finally, China attempts to respond by referring to the U.S. administration of its dairy TRQs. However, as the United States has previously noted, the U.S. dairy TRQs are not at issue in this dispute.

Question 71: The Panel notes China's argument that "processing capacity might be double-counted" if headquarters and subsidiaries of group enterprises were not required to apply for wheat and corn TRQs independently. In this regard, please respond to the following questions:

- a. In response to the Panel's question at the second substantive meeting as to how the alleged double-counting would occur, China stated that if headquarters and subsidiaries were allowed to apply for wheat and corn TRQs at the same time, the headquarters would calculate their processing capacity as including that of its subsidiaries and the subsidiaries would also submit applications, resulting in double-counting.

Does this explanation not suggest that it is China's current rules regarding group enterprises' applications for wheat and corn TRQs that lead to the risk of double-counting?

- b. Even assuming that it is necessary to require headquarters and subsidiaries to apply independently for TRQs, please explain why it is also necessary to require that wheat and corn imported under allocated TRQs be processed independently in the plants of headquarters and subsidiaries. What is the rationale underlying this requirement?
- c. At the second substantive meeting, the Panel asked why the requirements differ for wheat and corn TRQs, on the one hand, and rice TRQs, on the other hand. More particularly, the Panel inquired why headquarters and subsidiaries of group enterprises applying for rice TRQs are not required to apply independently but rather required to apply either in the name of the group headquarter or a subsidiary, and not permitted to "apply at the same time". In response, China explained that there is no risk of double-counting with regard to rice TRQs because there is no processing requirement for rice imported under TRQs.

The Panel understands the concern about double-counting to be that group enterprises might apply for and receive allocations greater than their total processing capacity. The Panel also notes that the application form requires data concerning processing capacity regardless of whether the application concerns rice or wheat/corn TRQs.

Is the Panel's understanding correct? If so, please explain why the double-counting concern does not also apply to TRQ applications for rice. [footnotes omitted]

Comment:

31. China’s explanation regarding its group enterprise restrictions is that these processing requirements “reflect [China’s] interest in collecting the most accurate processing capacity data from applicants that is practicable to obtain.”⁴⁶ In effect, China therefore strictly limits processing options and commercial opportunities in an effort to ensure it has accurate data regarding processing capacity. It appears however that under China’s current TRQ administration system this data could be collected with additional application questions and verified through applicant attestations and public comment. Instead, China has chosen to use an administrative procedure that inhibits the filling of each TRQ, as demonstrated by the United States in its written submissions.⁴⁷

⁴⁶ China Responses to Panel Questions, Question 71(a), para. 53.

⁴⁷ U.S. First Written Submission, paras. 214-222; U.S. Second Written Submission, paras. 54-58.