CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

(DS517)

EXECUTIVE SUMMARY OF THE
UNITED STATES OF AMERICA

November 23, 2018

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. China is both a significant producer and a significant consumer of grains, including wheat, rice, and corn. China permits imports of these grains through the administration of tariff-rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn ("grains"). According to China's own notifications and Chinese customs data, China's TRQs for wheat, corn, and rice do not fill, despite market conditions indicating sufficient Chinese demand.

2. China has breached numerous of its obligations under Paragraph 116 of the *Report of the Working Party on the Accession of China* ("Working Party Report"), incorporated by reference as a binding obligation into China's Accession Protocol. In particular, China administers its TRQs for corn, wheat, and rice inconsistently with six of these distinct obligations: (1) to administer the TRQ on a transparent basis; (2) to administer the TRQ on a predictable basis; (3) to administer the TRQ on a fair basis; (4) to administer the TRQ using administrative procedures that are clearly specified; (5) to administer the TRQ using requirements that are clearly specified; and (6) to administer the TRQ using timeframes, administrative procedures, and requirements that would not inhibit the filling of the TRQs.

3. The United States also explains how China breaches Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") because China's TRQ administration is not reasonable, because China: (1) utilizes vague eligibility criteria and allocation principles to allocate the TRQ that applicants cannot reasonably understand; (2) permits numerous authorized agents to independently interpret the vague criteria; (3) publishes applicant data for comment and "disagreement" without clear guidelines regarding how this information will be verified and used; and (3) fails to make public information regarding TRQ allocation or reallocation in a manner that would make importation feasible.

I. PARAGRAPH 116 OF THE WORKING PARTY REPORT

A. Transparent Basis

4. For TRQ administration to be on a transparent basis, the system or principles pursuant to which administration of the TRQ occurs must be easily discerned and understood. If what is published does not allow Members and applicants to easily understand the basis for TRQ administration then that publication alone would not be sufficient to satisfy this requirement. China does not administer its TRQs on a transparent basis, because: (i) the eligibility criteria and allocation principles set out in China's instruments are vague and not "easily discerned;" (ii) China does not provide any public information regarding which entities received TRQ allocations and in what amounts; (iii) China does not make public what unused TRQ quantities, if any, are returned and made available for reallocation; and, (iv) China does not publicize information regarding which entities received reallocations of TRQ and in what amounts.

5. First, the *Allocation Notice* enumerates these basic criteria, but does not define them such that the requirements would be easily understandable or obvious to Members or potential applicants. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are preconditions of eligibility to receive TRQ. However, Members and applicants cannot easily discern or understand, from the text of the *2003 Provisional Measures* and *Allocation Notice* –

even read with the application form itself – what all of the basic criteria are or how NDRC or its authorized agents might apply them in evaluating a TRQ application. Therefore, because each of the basic criteria discussed above is not "easily discerned or understood," the basis on which China administers its TRQs is not transparent. China therefore breaches Paragraph 116.

6. The *2003 Provisional Measures* and *Allocation Notice* also set forth non-transparent allocation principles by which TRQs are allocated. As with the basic criteria described above, China's instruments fail to define or explain the allocation principles on which allocation and reallocation of the relevant TRQs will be based.

7. It is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." The instruments do not provide any context, or even content, for the factor "other relevant commercial standards." That is, there apparently are "other" standards that are "relevant" to NDRC's decision-making with respect to the allocation of TRQ amounts, but these are not identified in the *2003 Provisional Measures* or the *Allocation Notice*. Among other principles *not* reflected in the *Allocation Notice*'s short statement of allocation principles, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading.

8. China apparently verifies applicant information through a public comment process. This additional step renders NDRC's administration of the TRQ application and allocation process, including NDRC's determinations with respect to both the basic criteria and allocation principles, much less clear, and increases applicants' uncertainty regarding the status or sufficiency of their applications considerably.

9. Second, China also fails to administer its grains TRQs on a transparent basis because it fails to provide information on the results of the TRQ allocation process. Without such information, Members and applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

10. Because China fails to make public the amounts allocated, the recipients of allocations, and the amounts allocated to different importing entities, China administers its TRQs through a process or set of rules or procedures that is *not* easily understood, discernable, or obvious, and thus not on a transparent basis, inconsistent with Paragraph 116 of the Working Party Report.

11. Third, NDRC does not administer the TRQs on a transparent basis because it launches a reallocation process by publishing the annual *Reallocation Notice*, but does not provide information on what amounts, if any, were returned unused and are thus available for reallocation to other importers or interested entities. China does not provide any additional information to Members, applicants or traders – either in the *Reallocation Notice* or, for example, after the September 15 deadline – regarding the amounts actually returned and available for reallocation.

12. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders do not even know whether a reallocation

will, or did, take place in a given year. Rather, the public simply sees the same *Reallocation Notice* issued every year, setting out the same application instructions and timeframes without more.

13. Finally, NDRC does not provide Members or the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot understand how NDRC assesses the applicants and determines allocated amounts. Additionally, without knowing the results of the allocation process, traders inside and outside of China lack the necessary commercial information to engage in importation under the reallocated portion of the TRQs. Thus, for these reasons as well, China fails to administer its TRQs on a transparent basis, in breach of Paragraph 116 of the Working Party Report.

B. Predictable Basis

14. China fails to administer its TRQs on a "predictable" basis for many of the same reasons its administration is not on a "transparent" basis. That is, the lack of clarity in China's requirements and processes not only renders them not transparent, it prevents Members and applicants from being able to easily predict or anticipate how administration will occur. China's TRQs are not administered on a "predictable" basis because: (i) the eligibility criteria and allocation principles are vague and Members and applicants cannot anticipate how they will be applied; (ii) China does not provide information on what amounts, if any, were returned unused and made available for reallocation; (iii) China does not provide information on which entities receive reallocations and in what amounts; and, (iv) applicants receiving a state trading allocation cannot predict whether they will be able to import the full amount.

15. First, the basic criteria for TRQ eligibility and the allocation principles set out in China's legal instruments are vague. The unpredictability caused by the vagueness of the criteria is compounded in some cases by the fact that NDRC apparently verifies or supplements information submitted by an applicant by allowing any member of the public to submit their own comments and information if it is in "disagreement" with an applicant's data.

16. Second, China launches a reallocation process by publishing the annual *Reallocation Notice*, but does not publish information on what amounts, if any, were returned unused and are thus available for reallocation. Without any information regarding the unused amounts returned and available for reallocation, Members, potential applicants and traders cannot easily predict or anticipate whether a reallocation will take place in a given year. Nor can they easily predict or anticipate how much of a reallocation they might receive were they to apply.

17. Third, NDRC does not provide the public, including traders inside and outside of China, with any information on the TRQ quantities actually reallocated, if any. As with the initial allocation, without such information, Members and reallocation applicants cannot easily predict or anticipate how NDRC assesses the various applicants and determines reallocated amounts. Therefore, Members and potential applicants are unable to easily predict or anticipate the outcome of the TRQ reallocation process generally, because they are not able to see or understand the outcome of prior processes.

18. Finally, inability of applicants to anticipate whether they might receive a state trading allocation leads to significant uncertainty for potential applicants due to the additional requirements associated with the state trading portion of the TRQ.

C. Fair Basis

19. China must administer its TRQs in an impartial manner and in accordance with rules or standards. China does not administer its TRQs in an impartial manner or in accordance with rules or standards because in many instances no rules or standards exist and, where they do exist, they are vague or unclear.

20. First, China's administration is not impartial, or carried out in accordance with rules or standards, because the allocation principles enumerated in Article IV of the *Allocation Notice* are not defined; or, in the case of "other relevant commercial standards," not even identified. Similarly, the allocation principles fail to set out clear rules and standards on the basis of which NDRC will make decisions regarding the allocation and reallocation of TRQ amounts.

21. The vagueness of the allocation principles provided in China's *Allocation Notices* impacts not only whether to apply and the information submitted to obtain the amount applied for, but also the decision regarding how much to apply for.

22. Applicants base their decisions, including whether to apply for a TRQ allocation, which commodity to apply for, and what quantity to apply for, on the published legal instruments, including the annually issued *Allocation* and *Reallocation Notices*. Thus, applicants submit information, including "quantity applied for" and "name of agricultural product quota applied for" based on their understanding of "actual production and operating capacities (including historical production and processing, actual import performance, and operating situation, etc.) and other relevant commercial standards."

23. Second, China's administration is not impartial, or carried out in accordance with rules or standards, because the basic criteria are not defined. It is also unclear how NDRC considers comments from the public where that information may go to "disagreement" with an applicant's eligibility. This aspect of China's administrative process exacerbates the unfair nature of the administration, because not only do the basic criteria themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter or the inability of NDRC or the applicant to verify or refute the information provided.

24. The vagueness of the basic criteria impacts not only the *information* an applicant may submit to demonstrate eligibility, but also the decision *whether to apply* at all. Further, the application is not necessarily just the form supplied by NDRC as part of its annual *Allocation Notice*, but may also include "related materials submitted by the applicant" per Article 12 of the *2003 Provisional Measures*. The vagueness of the criteria may result in applicants submitting more or less additional information at any of these stages in the process. Potential applicants may choose not to apply at all because they are unable to understand the basic criteria or because they perceive the criteria in a way that they conclude in error they are not eligible.

25. Finally, applicants "bear responsibility for the authenticity of the application materials and information they submit." Applicants attest, on the application form, that they have read and understood the *Allocation Notice* and commit to guaranteeing "conformity with the grain import tariff-rate quota application criteria stipulated by the government." Thus, the *Allocation Notice* puts the burden of demonstrating eligibility and attesting to accuracy on the applicant. These applicants are basing their understanding of eligibility on the only information available to them, the basic criteria in the annual *Allocation Notices*. One applicant may attest that they guarantee conformity with the requirement to fulfill social responsibilities based on their understanding of that vague term, while another decides not to apply because they do not understand or are not comfortable attesting that they conform to the requirement because it is unclear.

26. For these reasons, the use of vague and undefined eligibility criteria does not provide TRQ administration on a fair basis; that is, based on rules and standards which can be discerned and understood by Members and applicants.

27. Therefore, because of the lack of clear rules or standards with respect to the evaluation of basic criteria, China also fails to administer its TRQs on a fair basis, in breach of China's commitments under Paragraph 116 of the Working Party Report.

D. Clearly Specified Administrative Procedures

28. The obligation under Paragraph 116 of the Working Party Report requires that China use administrative procedures that are set out in plain obvious detail. China does not administer its TRQs using administrative procedures that are "clearly specified" because (1) its allocation principles and reallocation procedures are vague and undefined, or not specified at all; and (2) China does not clearly specify the procedure for obtaining NDRC approval to import through a non-state trading entity using a state trading quota after August 15.

29. First, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Second, the instruments do not provide any context, or even content, for the factor "other relevant commercial standards." Third, the *Allocation Notice* does not address how NDRC determines which applicants will receive allocations of the portion of each TRQ reserved for state trading. Fourth, China apparently verifies applicant information in part through a public comment process. This additional step renders NDRC's determinations with respect to both the basic criteria and allocation principles unclear, and increases applicants' uncertainty regarding the status or sufficiency of their applications.

30. In addition, China does not clearly specify the procedures for seeking approval from NDRC to import state trading quota after August 15. Neither the *2003 Provisional Measures*, nor *Allocation Notice* specifies the procedure for obtaining NDRC approval, however, nor details on what basis NDRC will determine whether to grant approval. Although China makes clear *there is a procedure* to be utilized to seek approval to import state trading quota without COFCO after August 15, none of the measures specify what that procedure is.

E. Clearly Specified Requirements

31. The obligation under Paragraph 116 of the Working Party Report requires that China use requirements that are set out in plain obvious detail. China does not administer its TRQs using requirements that are "clearly specified" because its basic criteria, which applicants must demonstrate compliance with in order to be eligible to receive TRQ allocation or reallocation, are not set out in plain or obvious detail.

32. The *Allocation Notice* and *Reallocation Notice* make clear that the basic criteria are requirements to receive a TRQ allocation. However, the text of the *2003 Provisional Measures* and *Allocation Notice* – even read with the application form itself – does not detail the basic criteria or how NDRC or its local authorities might apply them in evaluating a TRQ application. No other measures detail these requirements.

F. Not Inhibit the Filling of Each TRQ

33. China's measures breach Paragraph 116 of the Working Party Report because China does not administer its TRQs using administrative procedures and requirements that would not inhibit the filling of each TRQ. In the context of China's TRQ administration, China must not employ timeframes, procedures, or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

34. First, China employs a single application process to allocate both the state trading and non-state trading portions of the TRQ, without permitting applicants to choose which portion they apply for. Nor can applicants understand the basis upon which NDRC will determine which applicants receive an allocation of the state trading portion, which restricts the TRQ Certificate holder from employing its importer of choice.

35. Applicants do not have any information regarding how NDRC will determine which applicants will receive state trading allocations. Therefore, they cannot anticipate whether they might receive an allocation of the state trading portion of the TRQ, or the non-state trading portion, which can be imported directly or through a non-state enterprise, or both.

36. Therefore, the uncertainty inherent in China's process makes it more difficult to negotiate with potential exporters, contract for sale, and import the commodities. These uncertainties may also induce applicants to limit the quantities for which they apply, just as the potential inability to complete a contract through the state trading entity may increase the amount of unused TRQ allocations returned to NDRC by September 15. And where a TRQ Certificate holder must return unused amounts, she is not eligible to apply for a reallocation of TRQ amounts to be imported without the need to import through an STE.

37. Second, China withholds critical information on the recipients of the initial allocation, and the amounts actually allocated and reallocated. Thus, grain-exporting entities do not have information that is necessary to enter into commercial relationships with potential importers, inhibiting the filling of each TRQ.

38. Specifically, China does not announce which applicants are allocated TRQ amounts and in what amounts, which prevents traders from understanding the TRQ allocations and making commercial arrangements to import the grains. With respect to reallocation, traders have even less information and thus are less able to fill the TRQs in the short time period remaining. Uncertainty about how much quota will be reallocated, or whether reallocation will take place at all, may make potential importers less likely to apply for a reallocation quota amount or lead them to apply for a smaller amount than they otherwise would have. If any TRQ amounts are reallocated, the lack of information on recipients makes it more difficult and costly for traders in China and foreign exporters to identify recipients and enter into contracts for sale or importation.

39. Finally, the processing restrictions and penalties for non-use impose a significant burden on TRQ Certificate holders and discourages applicants from applying for the full amounts desired for import. These processing requirements, and the inability of an importer to sell any unused imported products in the event its business needs or plans change, raises uncertainty and therefore increases costs for a TRQ Certificate holder. Further, because unused amounts may be reported in the following year's allocation application and may be counted against the applicant in the next allocation, the usage requirement incentivizes applicants to request a *smaller* TRQ amount than it may otherwise wish to receive for commercial purposes.

40. The *Allocation Notice* also provides that group enterprises possessing multiple processing plants must individually apply for, and individually use, TRQ allocations in the name of each processing plant. An enterprise with multiple plants could not import corn or wheat for use at one facility but then, for business reasons, choose to process it at another facility. Again, the plant usage restriction would discourage applicants from applying for the quantity actually needed or desired for commercial purposes. The usage requirements therefore have the effect of inhibiting the filling of the TRQs.

II. ARTICLE X:3(A) OF THE GATT 1994

41. The manner in which China administers its TRQs is inconsistent with China's obligations under Article X:3(a) of the GATT 1994. Of relevance in this dispute is China's obligation to administer its TRQs in a "reasonable manner." An inconsistency with a Member's WTO obligations under Article X:3(a) arises where "the identified features of the challenged administration necessarily lead to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner." According to the panel in *China – Raw Materials*, "necessarily lead to an inconsistency" does not mean administration is unreasonable in every instance. Rather, the administration may be inconsistent with Article X:3(a) if there is a "*very real risk*" or an "inherent danger" of unreasonable administration in a specific, identifiable situation.

42. China fails to administer its TRQs in a "reasonable manner," and therefore breaches Article X:3(a) of the GATT 1994, for several reasons.

43. First, China fails to administer its TRQs in a reasonable manner because it announces and applies vague basic criteria and allocation principles that make it difficult for applicants to understand and comply with its requirements. It is not rational, sensible, or appropriate to announce criteria and principles, but fail to make them comprehensible. Furthermore, the

allocation principles provide further uncertainty. Again, the poorly specified allocation principles limit an applicant's ability to interpret the Chinese government's requirements for importers. Applicants who receive limited TRQ allocations are unable to understand which allocation principles may have caused their allocation.

44. Second, China uses thirty-six separate provincial and municipal "authorized agencies" to receive and review applications for TRQ allocations and reallocations. The *Allocation Notice* reiterates that these authorized agencies will act as the intermediary between the central level of NDRC and applicants. Similarly, authorized local entities approved by NDRC are obligated to receive and review applications for TRQ allocation and reallocation, referring applications that comply with the requirements to NDRC, and referring insufficient applications back to applicants.

45. China's TRQ administration instruments do not provide guidance to the authorized agencies regarding the definition or requirements associated with a number of the basic criteria. For this reason, applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Prior panels have found separate local entities interpreting overly vague criteria to be a circumstance that can result in non-sensible or irrational administration of laws, regulations, decisions, or rulings.

46. Third, China provides for the publication of applicant data and permits the public to provide "disagreement," "feedback," and "opinions," without providing relevant guidance regarding how these comments are vetted, considered, or impact the TRQ allocation process. This aspect of China's administrative process exacerbates the unreasonable nature of the administration, because not only do the basic criteria and allocation principles themselves lack clear rules or standards, but the public opinions submitted could introduce bias or inequity due to the potential motivations of a submitter. Such a process prevents evaluation of TRQ applicants, and administrative decisions with respect to eligibility, from being made in a rational or sensible manner.

47. China's instruments do not provide any information regarding how NDRC determines which applicants will receive which TRQ allocation, or how an individual entity's TRQ allocation might be split between the non-state trading and state trading portions of the TRQ.

48. Fourth, China does not publish information regarding actual annual allocated TRQ volumes in the aggregate at the time of allocation (January 1), or in the aggregate at the time of reallocation (September 30). Similarly, China does not publish information regarding the total allocated amount of the TRQ that must be imported through a state-owned enterprise, and what amount may be imported directly by TRQ Certificate holders. This means meaningful information regarding the amount of wheat, rice, and corn permitted to be imported, as well as the amount of unallocated TRQ available for subsequent applicants is not provided on an annual basis.

49. Fifth, China does not release information regarding the specific TRQ allocation recipients or the TRQ volumes each recipient was granted. This information is particularly critical during the reallocation process when TRQ Certificate holders have a limited period of time within which to contract for and import the authorized grain. The lack of published information

regarding the successful TRQ applicants and permitted import volumes therefore further impedes the identification of appropriate importers to contract with, or to consolidate import volumes with, to permit cost-effective importation.

50. When coupled with the lack of clarity regarding the basic criteria, the failure to provide information regarding actual TRQ allocation and reallocation volumes prevents interested importers from understanding and utilizing the TRQ system. Additionally, without knowing the results of the allocation process traders inside and outside of China lack the necessary commercial information to engage in importation under the TRQs.

III. ARTICLE XIII:3(B) OF THE GATT 1994

51. Article XIII:(3)(b) of the GATT 1994 requires Members to provide public notice of *both* the "total quantity or value of the product or products which will be permitted to be imported during a specified future period," *and* "of any change in such quantity or value." China does not provide information regarding: the quantity of wheat, rice, or corn permitted to be imported at the initiation of the TRQ period; any changes to the quantity permitted to be imported after unused TRQ amounts have been returned to NDRC; or, any changes to this amount after reallocation of TRQ.

52. Permission to import under the TRQ is only granted to successful applicants. Thus, the amount of TRQ "which will be permitted to be imported during a specific future period" corresponds to the total amounts authorized on the TRQ Certificates issued to selected applicants.

53. China does not provide a public notification of the amounts allocated under the initial allocation process. This failure to provide even aggregate public notice of the total volume for which permission to import has been granted under each TRQ is inconsistent with China's obligation under Article XIII:3(b). China's *pro forma* announcement each year of the total TRQ quantities that it has committed to provide in its Schedule is not sufficient. To succeed in satisfying its obligation to provide public notification of amounts "permitted to be imported," China must publicly announce the amounts for which permission to import has *in fact* been granted.

54. China's TRQ administration is also inconsistent with the second public notice obligation, which requires Members to provide a public notification regarding any changes to quantities permitted to be imported. When unused TRQ allocation amounts are surrendered to the local authorized agent as required by the annual *Reallocation Notice*, the total amount of product that "will be permitted to be imported" is reduced. Thus, after September 15, the total quantity of product permitted to be imported has changed.

55. China does not publish information regarding unused allocation amounts that TRQ holders return to NDRC, or regarding the amounts available to applications for potential reallocation. Because the return of unused TRQ allocations reflects a "change" in the total quantity "permitted to be imported," China's failure to publically announce the change in these amounts breaches its obligations under Article XIII:3(b) of the GATT 1994.

56. Finally, it is not clear to applicants or importers whether in any given year China in fact grants additional permission to any applicants for the importation of reallocated TRQ amounts. Assuming the issuance of each annual *Reallocation Notice* in fact indicates that NDRC will undertake a reallocation process, the results of that process would, again, change the total quantity of product "permitted to be imported during a specified future period."

IV. ARTICLE XI:1 OF THE GATT 1994

57. Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product. When considering "a limitation on action, a limiting condition or regulation" or "something that has a limiting effect" in the context of Article XI:1, panels and the Appellate Body have considered a wide range of factors affecting the competitive opportunities and the ability to import products.

58. China's administration of its TRQs for wheat, rice, and corn imposes impermissible "restrictions … on the importation of" these grains within the meaning of Article XI:1 of the GATT 1994. First, China's administration of the state trading and non-state trading portions of the TRQ through a single application process creates significant uncertainty for TRQ applicants. Each portion of the TRQ has its own requirements and commercial considerations. However, applicants cannot indicate for which TRQ portion they wish to apply, and do not know on what basis NDRC will determine which applicants receive allocations for which portion, or in what amounts.

59. The inability of traders to anticipate what type of allocation they may receive leads to significant uncertainty for potential applicants, because different requirements and commercial considerations are associated with the state trading and non-state trading portions of the TRQ.

60. The differing requirements and commercial consideration of state trading and non-state trading TRQ allocation, when combined with applicants' inability to decide or predict which allocation they will receive and the time limits of contracting, result in significant risks and uncertainty for TRQ applicants. Furthermore, these requirements, uncertainty, and potential penalties associated with failure to import discourage applicants from applying for TRQ allocations at all, or may lead them to apply for a smaller TRQ allocation than they might otherwise have in the absence of such uncertainty. These aspects of China's TRQ administration thus constitute a restriction on the importation of rice, wheat and corn, in breach of Article XI:1 of the GATT 1994.

61. Second, China imposes usage restrictions and penalties for non-use, which creates burdens and uncertainty for importers and thereby discourage use of the TRQs. The restrictions impose limitations and limiting conditions on importation by creating or increasing risks and uncertainties associated with importation, and thereby increasing the costs associated with importation. Restricting TRQ Certificate holders from selling or transferring imported wheat, rice, or corn creates waste and increases unnecessarily the cost of using imported products in their production processes. Further, China's restrictions prevents TRQ Certificate holders from reacting to commercial considerations in a meaningful way. Failure to utilize all imported grain covered by a TRQ Certificate may lead to reductions in the next year's allocation. To avoid these outcomes, TRQ applicants would request a smaller amount of imports than they might

otherwise request if acting pursuant to their commercial interests, rather than in the light of China's requirements and penalties.

62. Previous panels have found that measures imposing limitations of this kind constitute restrictions under Article XI:1 of the GATT 1994. China's requirements thus constitute a "restriction… on the importation" of these products, in breach of China's obligations under Article XI:1 of the GATT 1994.

EXECUTIVE SUMMARY OF THE U.S ORAL STATEMENTS AT THE FIRST MEETING

63. [Summaries of the U.S. oral statements at the first substantive meeting are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

64. [Summaries of the U.S. responses to the Panel's 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

65. In an attempt to rebut the *prima facie* showing of the United States, China advances a series of unsubstantiated assertions that according to China explain the administration "in practice" of China's TRQs. When asked for evidence regarding these alleged practices by the Panel and for more information on TRQ allocation and reallocation generally by the United States, China has provided little more than general assertions and "confirmation" from Chinese government officials. China has not provided documentation, data, legal instruments, or any other evidence, as requested by the Panel and the United States, to substantiate its assertions on those alleged TRQ administration practices, or to demonstrate compliance with its WTO obligations.

66. The Panel is to assess the facts put forward by both parties to the dispute. The Panel would need to weigh the evidence on the record in this dispute to make its findings of fact and consider the arguments made by both parties on "the applicability of and conformity with the relevant covered agreements." If the Panel has rejected China's assertions as to alleged NDRC "practices," then these non-facts (unsubstantiated allegations) cannot provide further bases in support of the U.S. claims. However, it may be that the Panel finds it appropriate to address certain arguments of China or the United States relating to these assertions as part of the Panel's explanation of its interpretation or its application of the provisions of the covered agreements to the facts (including the substance of the measures).

67. The U.S. First Written Submission established that the legal instruments establishing China's TRQ administration are inconsistent with China's WTO obligations. China's assertions, even aside from not being supported by evidence, only underscore China's failure to comply with its WTO obligations rather than demonstrate compliance.

I. CHINA FAILS TO REBUT THE U.S. CLAIMS UNDER PARAGRAPH 116

68. China "does not disagree with the United States concerning the ordinary meaning of the terms that comprise the six obligations referenced by the United States, and China does not disagree with the United States concerning the legal standard that should be applied by the Panel." China in this manner accepts both the substance of the legal obligations and agrees that each obligation should be considered independently.

A. Transparent Basis

69. China primarily disagrees with what is required for China to administer its TRQs on a basis that is "easily understood, discerned, or obvious." China addresses certain of the bases set out by the United States but fails to rebut the *prima facie* case made by the United States.

70. First, China does not address the inconsistency of the basic criteria with Paragraph 116, except to indicate that it does not use the basic criteria to determine eligibility.

71. Second, with regard to allocation principles, China asserts that, for purposes of China's obligation to administer its TRQs on a transparent basis, "it is sufficient for applicants to know that TRQs will be allocated in accordance with applicants' actual production and operating capacities (including historical production and processing, actual import performance, and operations) and other relevant commercial standards." However, China's legal instruments do not provide any context, or even content, for "other relevant commercial standards." Further, China, noting that its allocation of TRQs "is not automatic," states that it "does not believe, however, that transparent . . . TRQ administration requires the elimination of any element of discretion from the allocation process." China does not recognize the relationship between this discretion and its WTO obligations, rather, it states that "China's view that this is the most transparent . . . way of achieving full utilization of the TRQ should not be 'second guess[ed].'"

72. China relies on the Headnotes to Schedule CLII to defend the use of "other relevant commercial standards," suggesting that the Schedule's reference to a "residual category" authorizes China to publish the vague "other relevant commercial standards," without further definition. However, even aside from the fact that this language only applied to the first year, Schedule CLII can neither shield China from other obligations in the covered agreements, nor provide derogations from the obligations provided in those agreements. Further, nothing in the Schedule indicates that China need not specify what these standards are in the measures that actually implement the TRQs, and indeed China's Schedule CLII contemplates distribution based on "relevant commercial criteria, subject to specific conditions to be published." Thus, the Headnotes anticipate the publication of more detail in line with China's Paragraph 116 obligation to administer TRQs on a transparent basis.

73. Third, China does not consider publication of information to be required by the obligation to administer TRQs on a transparent basis. China argues that because applicants may request certain information, on an individual basis, there is no inconsistency with its obligation to Members to administer its TRQs on a transparent basis. China's responses disregard the affirmative nature of China's obligation to ensure that *China* administers its TRQs on a

transparent basis. China also argues that information on which entities received TRQ allocations is business confidential. The United States continues to disagree.

74. Finally, China argues its failure to provide information on amounts returned and reallocated does not amount to inconsistency with its obligations because "China's Schedule CLII commitments incorporate a publication schedule that is irreconcilable with publishing additional information regarding reallocation in advance of or after the September 15 deadline." China's Schedule does not comprise a "publication schedule;" rather, the Headnotes set out certain deadlines for the allocation and reallocation process. The Schedule does not limit or prohibit the publication of information, including information necessary to ensure that China administers its TRQs on a transparent basis.

B. Predictable Basis

75. China fails to directly address the claims that it does not administer its TRQs on a predictable basis.

76. First, China states that it "does not contest the U.S. claim," and thus appears to concede that the basic criteria are inconsistent with Paragraph 116, including the requirement to be administered on a predictable basis.

77. Second, with regard to whether its allocation principles are sufficiently predictable, China relies on the same argument made in response to the claim that they are not transparent because China addresses, collectively, the separate claims regarding the allocation principles. China fails to provide any reason its allocation principles are sufficient to meet the obligation to administer its TRQs in a predictable manner.

78. Third, China fails to directly address the claims that it does not administer its TRQs on a predictable basis because China does not provide information on what amounts, if any, were returned unused and made available for reallocation, and because China does not provide information on which entities receive reallocations and in what amounts. Rather, China addresses the lack of information generally, relying on the availability of individual inquiries, Schedule CLII, and business confidentiality to assert China administers its TRQs consistent with Paragraph 116 as a whole. These arguments are insufficient to rebut the U.S. case that China does not administer its TRQs on a predictable basis.

79. Finally, the United States demonstrated that China does not administer its TRQs on a predictable basis because applicants receiving a state trading allocation cannot predict what type of allocation they will receive and whether they will be able to import the full amount. China disagreed with the factual basis for this argument, asserting that "applicants do not receive allocations from the STE portion of each TRQ . . . [t]he entire STE portion of each TRQ is allocated to COFCO." China's asserted "practice" is inconsistent with its measures.

80. Regardless of whether China "in practice" allocates the STE portion to COFCO, non-STE applicants, or both, the legal instruments relied upon by applicants indicate that applicants could receive (1) an STE portion of the TRQ, which will be required to be imported through COFCO, (2) a non-STE portion, or (3) a mixed allocation, a portion of which will be subject to

the requirement to import through COFCO. The inability of applicants to anticipate whether they might receive a state trading allocation thus leads to significant uncertainty for potential applicants, and is inconsistent with Paragraph 116.

C. Fair Basis

81. China does not contest the U.S. claim that China's basic criteria are unfair, but claims this is insufficient to find an inconsistency with Paragraph 116 because "Paragraph 116 relates to the administration of the TRQs as a whole." China's argument is without merit.

82. China again argues that it is entitled to discretion, and thus China's determination that a basis is fair should not be second-guessed. However as noted above, China's TRQ administration, including any exercise of discretion in allocating TRQs, must be consistent with its WTO obligations.

D. Clearly Specified Procedures

83. With respect to the claim that China does not clearly specify the procedure for obtaining NDRC approval to import a state trading quota through a non-state trading entity after August 15, China concedes "the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process."

E. Clearly Specified Requirements

84. China does not contest that the basic criteria are "requirements" or that they are not clearly specified. However, China asserts that "the articulation of the basic criteria constitutes a specific aspect of China's administration of the TRQs, while Paragraph 116 relates to the administration of the TRQs as a whole." The basic criteria are requirements used to administer the TRQs. Failure to ensure that these are clearly specified is inconsistent with Paragraph 116.

85. With respect to allocation information, China asserts that because any grain-exporter can use the applicant information published in the *Announcement of Applicant Enterprise Data* "to identify companies with the capacity to meet its needs and make overtures accordingly," the information China presently provides does not inhibit the filling of each TRQ. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all. China points to a work-around that entities could deploy to mitigate the impact, which does not diminish China's obligation to not inhibit the fill or excuse China's failure to provide sufficient public information regarding the results of the allocation process.

86. China characterizes the processing requirement as follows: "End users that do not have sufficient capacity to process the raw grains that they import under their quota may sell those imported grains to other entities for processing." The distinction between end users with processing capacity and those without sufficiency capacity to process the grains they import is absent from China's legal instruments. But if China differentiates its application or enforcement

of the requirement based on the end user's capacity, this further demonstrates the claim that the restriction, coupled with penalties for non-use, inhibits the filling of each TRQ.

F. Not Inhibit the Filling of Each TRQ

87. China must not employ timeframes, procedures or requirements that would hinder, restrain, or prevent each TRQ from becoming full or being satisfied.

88. With regard to the first reason for inconsistency, that administering both portions of the TRQ in a single process inhibits the filling of each TRQ, China responds only that the U.S. claims "largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of entire STE portion of the TRQ to COFCO." China's response fails to rebut the *prima facie* case because China's own legal instruments and Schedule CLII indicate that end users, including non-STE end users, who apply for TRQ allocations can receive an STE portion of the TRQs.

89. China also fails to rebut the second argument, that China's failure to provide sufficient public information regarding the results of the allocation and reallocation process prevents traders, including foreign exporters, from making use of the TRQ amounts available. The *Announcement of Applicant Enterprise Data* lists entities that applied for TRQ, but does not indicate whether a given applicant received an allocation. Therefore a grain exporter could not use the applicant information "to identify companies with the capacity to meet its needs" because between 48 and 77 percent of the applicants listed have no authorization to import pursuant to the TRQs at all.

90. Third, China imposes restrictions on the use of imported products, coupled with penalties for non-use, which also discourage applicants from applying for the full quantities desired. China responds that, on the contrary, the usage restriction encourages full TRQ utilization. But China's response focuses on a different aspect of its measures – the penalties for failure to import and use a TRQ allocation – not the *restrictions on the use* of the imported product. The United States has not challenged a general prohibition on the sale or transfer of TRQ Certificates, or what China characterizes as a "restriction on transferring or selling the quota itself."

91. Further, China's annual *publication* of these usage restrictions, as notified to potential applicants by the *Allocation Notice*, creates uncertainty because an applicant understands it must apply for a specific amount of each TRQ and will be responsible for processing the grains once imported, without any flexibility to process elsewhere should circumstances change between applying and importing. Further, because the potential applicant understands that unused amounts may be reported and counted against the applicant in the next allocation, the usage requirement incentivizes an applicant to request a smaller TRQ amount than it may otherwise wish to receive for commercial purposes, regardless of how China applies or enforces the requirement in practice.

92. Thus, the combination of restrictions on the usage of imported products and the penalties imposed on TRQ Certificate holders for failing to import the full TRQ amounts would therefore inhibit the filling of the TRQs.

II. CHINA'S ASSERTIONS PROVIDE ADDITIONAL BASES FOR FINDING INCONSISTENCIES WITH PARAGRAPH 116

93. In its First Written Submission, China highlights "certain key aspects of its system for administering its grains TRQs that the United States overlooked or misunderstood in its description of China's legal framework for administering its TRQs." However, China's description of these "key aspects" directly contradicts China's own legal instruments, announcements, and other publically available information, and, if accurate, demonstrates further inconsistency with the obligations in Paragraph 116. The United States notes that the characterization "if accurate" is important because China has provided no evidence to support its assertions.

A. Allocation of STE Portions to COFCO China Allocates the Entire STE Portion to COFCO and COFCO is Not Required to Return Unused Amounts, Inconsistent with Paragraph 116

94. Based on the legal instruments, and absent different information on allocation of the STE portion of each TRQ, Members, applicants, and other interested entities would necessarily understand and predicate application decisions on the understanding that they could be allocated an amount of the STE TRQ portion, or receive a mixed allocation of both the STE and non-STE portion, which would need to be imported through different entities. However, China asserts in this proceeding that, in practice, COFCO is allocated the full STE portion of each TRQ, which is between 50 percent and 90 percent of each TRQ, depending on the grain. In addition, China now asserts COFCO is not required to return any unused portion of its TRQs for reallocation. China's published measures do not expressly provide for COFCO's exemption from this requirement, nor is it discernable based on China's measures.

95. If accurate, China's assertions that the entire STE portion of each TRQ is allocated to COFCO, and that COFCO is not required to return unused amounts, are inconsistent with China's obligations to administer each TRQs on a basis that is (a) transparent, (b) predictable, (c) fair basis, and (d) does not inhibit its filling.

96. First, the actual basis for TRQ administration is not discernable because NDRC does not publish, indicate, or otherwise disclose the fact that COFCO receives the entire STE portion, and this significant portion of each TRQ (50 to 90 percent depending on the commodity) is therefore unavailable to applicants. Based on Schedule CLII and China's legal instruments, if an STE is an end user then any TRQ allocated must be returned or a penalty assessed. If, as China asserts, COFCO is not required to return unused portions, China does not administer its TRQs on a transparent basis.

97. Second, the legal instruments China issues lead Members, applicants, and other interested entities to anticipate being able to receive an allocation of the STE portion, non-STE portion, or a mixed allocation. Thus, where a Member, applicant, or other interested entity sought to anticipate the TRQ allocation, reallocations, and other administration requirements based on the system of rules and procedures established by China's legal instruments, the prediction is incorrect. Instead, China claims that in practice it allocates the entire STE portion to COFCO, and does not require COFCO to return unused quota. The actual basis for TRQ administration is

thus not predictable because NDRC does not publish, indicate, or otherwise disclose this information.

98. Third, China asserts that "[a]pplicants become aware of this practice through their participation in the TRQ administration system." China's obligation is not just to "applicants," but to other Members. This practice further suggests that China's TRQs are not allocated or administered in accordance with rules and standards, or on an impartial basis. That is, China ignores the basic criteria and allocation principles purporting to be rules or standards, and instead allocates between 50 to 90 percent of each TRQ to a single government controlled entity regardless of its interest in importing the grains or any other published criteria. This practice is not in accordance with rules and standards.

99. Fourth, China sets out a clear requirement that all end users return unused amounts for reallocation, but in fact COFCO is not subject to this requirement, nor does COFCO appear to be penalized for its failure to comply. This practice again appears to be neither impartial – as it treats the government owned entity more favorably than other end users – nor in accordance with China's own rules and standards.

100. NDRC's allocation of the STE portion of each TRQ to COFCO, and the exemption of those significant portions from the requirement to return unused amounts for reallocation inhibits the fill of each TRQ. The results of this practice are significant and recognized in these proceedings. Specifically, while China declined to provide specific fill rates for the STE and non-STE portions of the TRQs, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." Therefore, necessarily *COFCO is declining to import large volumes of its allocations each year*, and its failure to return unused quantities is ensuring that this TRQ quantity is not available to other entities.

101. Therefore, in 2017 between 25 and 61 percent of each TRQ was not available for reallocation to applicants. This effectively excluded from China's TRQ administration a significant volume of wheat, corn, and rice, despite measures and an annual *Allocation Notice* announcing the scheduled amounts available for allocation and reallocation. This scenario squarely fits within the plain meaning of "inhibit the filling."

B. China's Reliance on Credit China Instead of Published Criteria is Inconsistent with Paragraph 116

102. China asserts that it roundly ignores each of the basic criteria; China now states that "in practice, [China] does not conduct an individual assessment of the Basic Criteria," but rather uses an unannounced evaluation method – Credit China reviews – to evaluate an applicant's eligibility. China's assertion is inconsistent with China's obligations to administer TRQs (a) on a transparent basis; (b) on a predictable basis; (c) on a fair basis; and (d) using clearly specified requirements.

103. First, even assuming *arguendo*, that China's unsupported assertions are accurate, using an unannounced method of determining eligibility is even less transparent than using a vague, but announced method. Members, applicants, and other interested entities cannot discern that NDRC relies solely on Credit China. Given China's statements it is unclear which information

contained in the Credit China system is used to evaluate applicants, resulting in an application process, the basis on which China administers its TRQs, that is not easily understood or discernable.

104. Second, China sets out a basis on which it purports to administer TRQs but uses another basis; Members, applicants and other interested entities are not able to anticipate how TRQs will be allocated based on the measures.

105. Third, while the annually announced basic criteria purport to establish the rules and standards for TRQ administration, China conceded it does not administer its TRQs in accordance with these rules and standards. It is plainly inconsistent with China's Paragraph 116 obligations to administer its TRQs in contravention of, or with disregard for, announced rules and standards. Therefore based on China's assertion, China does not administer its TRQs on a fair basis.

106. Finally, by publishing the annual *Allocation Notice*, China is notifying the public, including Members, applicants, and other entities, that applicants must demonstrate compliance with the basic criteria to be eligible for a TRQ allocation. NDRC annually publishes a list of criteria, but rather uses unannounced requirements – verified by the Credit China report – to evaluate an applicant's eligibility. Therefore, the requirements used to administer TRQs are not specified at all, and China is inconsistent with its obligations under Paragraph 116.

C. China's Procedure for Verification and Rebuttal of Public Comments

107. Each year China issues an Announcement *of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains*, and provides an opportunity for the public to submit comments to NDRC regarding each applicant. No other measure or legal instrument references, let alone describes, the public comment process.

108. China now asserts that if NDRC receives a comment regarding a particular applicant, an administrative procedure to verify its accuracy, including an opportunity for the applicant to rebut the comment, is used to determine whether the comment should be considered in determining the applicant's eligibility. This statement is unsupported by the measures or any other evidence on the record.

109. The verification and rebuttal process described by China is an administrative procedure, that is, it is a set of instructions for performing a specific task. Here, the task is verifying a public comment by collecting additional information and soliciting a response from the applicant. China has made no effort however to specify or even notify Members, applicants, or other entities of this procedure. It is not described, referenced, or otherwise suggested by any measure or information provided by China. For this additional reason, China does not administer its TRQs consistent with Paragraph 116. Article IV of the *Allocation Notice* does not indicate that NDRC applies different principles depending on applicant type. Rather, it suggests that all of these factors will be considered.

D. China Asserts that Different Allocation Principles Apply to Certain Applicant Types

110. China now states that with respect to allocation of the non-STE portion, a general trade TRQ applicant's historic import performance is the most important factor in determining the amount of the allocation. For a processing trade applicant, the applicant's production and processing capacities are key factors in addition to its historic performance in determining the amount of the allocation. In addition, China asserts that new applicants are only considered if the TRQ is not fully allocated to applicants with historical import performance. The legal instruments provided by China do not reflect this.

111. China's asserted practice diverges from its publicly announced legal instruments and would thus be inconsistent with its obligation to administer TRQs on a transparent basis. Noting that China is obligated to administer its TRQs based on a system or principles that are easily discerned and understood, China has in this instance announced one set of principles and subsequently indicated that it is using an alternative, unannounced set of principles in practice. This is simply not a transparent basis for administering its TRQs.

112. China sets out a basis on which it purports to administer TRQs but uses another basis; Members and traders are not able to anticipate how TRQs will be allocated based on the measures. Therefore, China again purports to set out a process or set of rules or principles for allocating TRQ Certificates, but asserts it in practice applies a different set of principles. Moreover, China applies the principles differently to different types of applicants, without disclosing this to Members, applicants, or other interested entities. For these reasons, Members, applicants, and other interested entities cannot anticipate or plan for the basis on which allocation amounts are actually determined.

E. China Does Not Apply or Enforce the Usage Requirements to Certain TRQ Holders with Insufficient Processing Capacity

113. China's Allocation Notice makes clear that TRQ Certificate holders must process in their own facilities all wheat and corn imported pursuant to the TRQ. Because TRQ holders are also penalized for not using (*i.e.*, importing) their allocations, applicants are incentivized to limit their applications according to their processing capacities. China asserts that it would not apply or enforce the processing requirement in accordance with the rules and principles set out in the *Allocation Notice.* The *Allocation Notice* does not suggest this kind of flexibility, or provide any guidance regarding how NDRC evaluates an applicant's or a TRQ Certificate holder's current capacity for purposes of this requirement.

114. China's assertions regarding its usage restrictions, namely, that it would not uniformly apply the processing requirement set out in the *Allocation Notice,* further demonstrates that China does not administer its TRQs on a predictable basis or using clearly specified requirements. China publishes a processing requirement applicable to all TRQ holders, but asserts it would apply or enforce the requirement only with respect to certain TRQ holders. Non-enforcement of significant requirements at the discretion of NDRC renders China's administration unpredictable.

115. China's publication of a processing requirement applicable to all TRQ holders, but application or enforcement of the requirement only with respect to certain TRQ holders, is inconsistent with its obligation to administer TRQs using clearly specified requirements. The *Allocation Notice* does not indicate this varied application, nor does it indicate how NDRC determines an applicant's capacity for purposes of this requirement.

116. China has thus failed to clearly specify its requirements for use of the imported grains. Instead, China has led Members, applicants, and other interested entities to believe one requirement exists, while secretly imposing a different standard. In this circumstance, China has not sufficiently specified its TRQ administration requirements to comply with Paragraph 116.

III. CHINA FAILS TO REBUT AND PROVIDES ADDITIONAL BASES FOR FINDING INCONSISTENCY WITH GATT 1994

117. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies.

A. Article X:3(a) of the GATT 1994

118. Neither China's legal nor factual arguments demonstrate that it has not acted inconsistently with its obligations. Moreover, many of China's largely unsupported factual assertions, if true, would demonstrate additional inconsistencies with GATT 1994 Article X:3(a).

119. First, China, in its First Written Submission, asserts that to be inconsistent with Article X:3(a) the cited administrative practice must "necessarily lead[] to an unreasonable administration of the grains TRQs." China suggests that the "necessarily leads" approach is stricter than the one contemplated by the panel in *China – Raw Materials*, which described administration where there is "a very real risk" of unreasonable administration as inconsistent with Article X:3(a). In this vein, China also asserts that the availability of an alternative means of "achieving a Member's stated administrative objective does not render a Member's chosen means unreasonable." The description of the interpretative approach provided by the panel in *China – Raw Materials* is a restatement of the interpretative approach described in the Appellate Body report for *EC – Selected Customs Matters* and panel report for *Argentina – Hides and Leathers*, and in any event, China has failed to comply with Article X:3(a) applying any of the interpretative approaches.

120. Second, even while China accepts that no showing of trade effects is required, China asserts that "'Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world.'" The structure and requirements built into a particular measure may be sufficient to demonstrate a breach of Article X:3(a).

121. Six separate aspects of China's TRQ administration result in unreasonable administration. Neither China's First Written Submission, nor China's Responses to Panel Questions respond in any meaningful way to the evidence presented by the United States of China's inconsistency with Article X:3(a) of the GATT 1994.

122. First, China asserts that the lack of proper basic criteria does not cause "any negative impacts – actual or possible – on TRQ applicants," because while the criteria listed are erroneous it simply uses information typically supplied by the applicant to determine eligibility. However, the failure to provide clear applicant criteria is not just an issue for NDRC and its authorized agents who must determine eligibility, but for Members and those potential applicants to whom the criteria are communicated. These criteria discourage new applicants who are unable to interpret China's requirements, as well as applicants who have previously failed to receive an allocation. China asserts that applicants can just seek information regarding their rejection from NDRC, but the annual publication of erroneous criteria suggests they would not even understand the appropriate questions to ask.

123. Second, in response to concerns raised regarding the allocation principles, China asserts that the "alleged vagueness of the Allocation Principles" does not "necessarily lead[] to an unreasonable administration of the TRQ." However, it is unclear from the text of the *2003 Provisional Measures* or the *Allocation Notice* how NDRC evaluates applicants' "actual production and operating capacities." Failure to provide this information to applicants results in administration that is not sensible or rational. Moreover, taken together with the additional catch-all, "other relevant commercial criteria," this creates additional confusion for applicants.

124. Third, China simply rejects as a "misunderstand[ing]" the role that authorized agencies play in the administration of China's TRQs. Rather, both the *2003 Provisional Measures* and the annual issued *Allocation* and *Reallocation Notices* call for an evaluation by the local authorized agents of whether the applicant has met the basic criteria. Structuring its TRQ administration so as to permit numerous entities to independently evaluate and determine whether applicants are consistent with undefined criteria leads to a situation where applications made in one locality may receive different consideration and a different result than applications made in any of the other thirty-six locations. Without clear criteria, guidance or other information, it is therefore impossible to ensure that the criteria are interpreted and applied in a consistent manner. For these reasons, the application of vague and undefined criteria by thirty-seven separate authorized agents as part of the administration of TRQ allocation renders the manner in which China administers its TRQs unreasonable.

125. Fourth, with regard to the public comment process, China alleges that it relies on a previously undisclosed process related to the verification of public comments and opportunity for rebuttal to suggest that its administration is "reasonable." Again, there is nothing to suggest that members of the public understand the vague and undefined basic criteria any better than applicants. They are permitted to comment on applicants' compliance when there is no clear indication of what compliance means. Further, this entire process is curious as China suggests the only relevant factor regarding eligibility is passing the Credit China background check.

126. Fifth, China asserts that the use of a single application process for allocating STE and non-STE TRQ portions "cannot create uncertainty where there is only a single type of allocation granted to non-STE applicants." Numerous aspects of China's legal instruments indicate to Members, applicants, traders, and other interested entities that a certain volume of imports are to be completed "through" the STE, but that any eligible applicant may receive a TRQ allocation in either the STE or non-STE portion. Thus, China informs Members and applicants that they may receive STE or non-STE allocations regardless of whether this is accurate. For this reason, this

process fails to be a reasonable means of TRQ administration and is a breach of GATT 1994 Article X:3(a).

127. Finally, China responds that the United States has provided "no factual evidence that the information currently published by China prevents traders from entering into necessary arrangements to utilize their allocations." As described above, it is the structure and architecture of this measure that is at issue, and there is no requirement for evidence of actual trade impact.

128. Additionally, certain aspects of China's "in practice" administration, if accurate, do not demonstrate that China has not acted inconsistently with Article X:3(a), but rather further demonstrate a breach of Article X:3(a).

129. First, with regard to the basic criteria, which China annually announces and has cited in its FAQs, China asserts that in practice "NDRC does not conduct an individual assessment of each of the Basic Criteria." Instead, "NDRC generates a credit report through 'Credit China,'" and "utilizes all of the information available through Credit China in evaluating each applicant." The use of divergent, unpublished criteria hamper Members' and applicants' ability to understand the application process and potential reasons for rejection, and thus result in unreasonable administration.

130. Second, China has indicated that it provides the entire STE portion of each TRQ to a single entity – COFCO. This administrative practice is "unreasonable." China once again annually announces one practice to Members and applicants, and then in reality employs a very different practice for distributing TRQ allocations. A system where applicants are required to apply to the Chinese government for permission to import wheat, corn, and rice on the basis of specifications and applications that have no bearing on the actual decision making of the government is not rational or sensible, and results in inconsistency with Article X:3(a). For these additional reasons, China has breached Article X:3(a) of the GATT 1994.

B. Article XIII:3(b) of the GATT 1994

131. China claims that the plain meaning of the terms of Article XIII:3(b) of the GATT 1994 provides that "the scope of the provision is . . . limited to the total quota quantities set forth in China's Schedule CLII." Rather, Article XIII:3(b) requires the provision of meaningful aggregate information regarding TRQs both with regard to the initial amounts permitted to be imported in a specified future period and any changes to that amount.

132. China further points to GATT 1994 Article XIII:3(a), indicating that this subparagraph addresses those situations where a license is issued. China's analysis is again in error. Article XIII:3(b) deals with "import restrictions involving the fixing of quotas;" thus addressing instances where a Member fixes a quota. Conversely, Article XIII:3(a) applies to instances where "import licenses are issued in connection with import restrictions." Article XIII:3(a) thus addresses circumstances where import licenses are required in order to effectuate an import restriction.

133. China appears to also contend that, while TRQs are subject to the provisions of Article XIII of the GATT 1994 as prescribed by paragraph 5, more generally TRQs are not "quantitative

restrictions." This is inaccurate. Paragraph 5 of Article XIII makes clear that TRQs are a type of import restraint addressed by Article XIII and that more specifically, the reference to "fixing of quotas" includes TRQs. More generally, the reference to quantitative restrictions in the title of Article XIII does not circumscribe the scope of Article XIII, and in any event Article XIII:5 expressly provides that TRQs are within the scope of Article XIII.

C. Article XI:1 of the GATT 1994

134. China makes three primary arguments with regard to Article XI:1. First, China claims that TRQs and all associated requirements – whether characterized as administrative or substantive – are outside the scope of Article XI:1 of the GATT 1994. As part of this argument, China asserts that the U.S. claim should fail because other claims could have been made under other articles of the GATT 1994 or other agreements. Finally, China argues that the United States has not demonstrated a "limiting effect" on imported products.

135. With regard to the first argument, China asserts that TRQs are simply outside the scope of Article XI:1, and that while "non-automatic import licenses generally have been found to be within the scope of Article XI:1," this is not the case where licenses are for the purposes of administering TRQs specifically. China further clarifies that in its view, not just the duty, at an in-quota or out-of-quota level, is excluded from consideration under Article XI:1, but all "substantive conditions that a Member imposes upon access to the TRQ" are outside the scope of Article XI:1 of the GATT 1994.

136. However, this dispute does not challenge the "imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general," but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ" including specific administrative actions and omissions China uses to authorize imports pursuant to those TRQs. Nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import restrictions from the obligations under Article XI:1. Rather, Article XI:1 is squarely applicable to China's TRQ administration because Article XI:1 explicitly addresses prohibitions or restrictions "made effective through quotas, import or export licenses or other measures." That is, restrictions on imports that are produced or operative because of quotas, import or export licenses or other measures.

137. China also asserts that the U.S. claim should have been brought under another article or agreement depending on whether the challenged aspect is considered "administrative" or "substantive." This argument is without merit. Specifically, China attributes "a certain scepticism" to the analysis of import licensing procedures under GATT 1994 Article XI:1 in the *Argentina – Import Measures* dispute, and draws from this the conclusion that "claims relating to the administration of import licensing systems, including TRQ licensing systems should be brought under the [Import Licensing] Agreement." No such conclusion is supported by the Appellate Body's discussion in *Argentina – Import Measures*. Moreover, the *Agreement on Import Licensing Procedures* (the "Import Licensing Agreement") itself states that "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols." Unlike other WTO agreements, which have explicit conflicts clauses, the Import Licensing

Agreement expressly notes that the GATT 1994 applies simultaneously. For this reason, prohibitions and restrictions on importation related to import licensing may appropriately be considered under Article XI:1 of the GATT 1994.

138. China makes a further argument that "substantive elements of a TRQ form part of the quota itself and must be examined under provisions of the GATT 1994 other than Article XI:1, most notably Article II of the GATT 1994." China notes that "[s]ubstantive conditions of access define the quota itself." As noted by the United States, in some instances Members negotiated specific narrow TRQs; for instance, a Member may have a TRQ open to only certain other countries or for a narrowly defined product like "skimmed milk powder (for school lunch)." These narrowly defined and scheduled TRQs are different from the obligations imposed by China through its regulatory process and subsequent "practice." Further, contrary to China's assertion, China's Schedule CLII contains no authorization or agreement to the challenged aspects of China's TRQ administration. Rather, the Headnotes indicate that China will implement TRQ regulations making clear their practices and methodologies, and demand that these regulations "be applied in a consistent and equitable manner." For these reasons, nothing bars a challenge to China's measures under Article XI:1 of the GATT 1994.

139. Finally, China misunderstands the burden of proof. It is not necessary to demonstrate a limiting effect by recourse to trade flows. Rather, as explained by the Appellate Body, this "limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context." Two administrative procedures – the usage restrictions and associated penalties, and the administration of the TRQ for both the STE and non-STE portion through a single process – are structured so as to have a limiting effect on imports.

140. The United States has demonstrated this restriction first by reference to China's administration of the state trading and non-state trading portions of the TRQ through a single application process that creates significant uncertainty for TRQ applicants. Second, China's use restrictions on products imported under the TRQ, combined with penalties for non-use of the full allocation, also restricts imports inconsistent with Article XI:1.

141. China asserts "there is no 'uncertainty' . . . because all non-STE applicants receive non-STE allocation." However, at no point does China communicate this information to Members, applicants or other interested entities. Instead, China's STE and non-STE TRQs administration – as described in its Schedule, its *2003 Provisional Measures*, and annual *Allocation* and *Reallocation Notices* – indicates that allocation of the STE portion is provided to end users and results in concerns and self limitation for applicants who anticipate potentially receiving this TRQ allocation.

142. With regard to the usage restrictions and associated penalties, China again asserts that "'in practice,' an end user that finds it is unable to process all of the grains imported under its quota may sell those grains directly to any other entity." Again, however, there is no evidence that Members, applicants, or other interested entities are aware of China's alleged "practice." To the contrary, China annually announces in its *Allocation Notices* that for the wheat and corn TRQs, all product must be processed by the TRQ holder. Previous panels have found that

measures imposing limitations of this kind constitute restrictions on importation under Article XI:1 of the GATT 1994.

143. China's submissions suggest a number of additional restrictions on imports. In particular, if China's unsupported assertions are accurate, the provision of the entire STE share to COFCO, and the failure to require COFCO to return unused allocation for reallocation is a significant limitation on imports.

144. China asserts that contrary to the directions provided in its Schedule CLII and *2003 Provisional Measures*, which suggest that some amount of the STE portions of each TRQ will be allocated to end users who must import "through" an STE, China allocates the entire STE share directly to COFCO. China is thus annually providing large quantities of each TRQ portion to a government controlled entity – COFCO. That government controlled entity subsequently declines to import significant volumes of wheat, corn, and rice, and is not required to return the allocation so as to make it available to other end users. This allocation, refusal to import, and refusal to reallocate unused TRQ is a blatant restriction on importation.

145. The results of this practice are significant. Specifically, China asserts that "the non-STE portion of each TRQ was fully allocated and fully utilized." COFCO is declining to use between 25 to 61 percent of the overall TRQ, and because China does not require COFCO to return unused allocations this volume is unavailable to non-STE users who would likely be willing and able to import some or all of this amount.

146. The ability of China to limit imports at the in-quota duty rate, by allocating 50 to 90 percent of each TRQ to COFCO is an additional significant restriction on the importation of wheat, corn, and rice into the Chinese market, and is further inconsistent with China's obligation under Article XI:1 of the GATT 1994.

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

147. China is incorrect in arguing that a "holistic approach" means that consistency with one or more requirements of Paragraph 116 would excuse an inconsistency with another requirement of Paragraph 116. China did not undertake an obligation to administer some parts of its process at a WTO plus level and others at a WTO minus level, such that general TRQ administration averages out to Paragraph 116. China's so-called "holistic" approach should be rejected.

148. With regard to Article XIII:3(b) of the GATT 1994, the United States notes that while China purports to agree that Article XIII:3(b) is a "forward-looking" and "ongoing" obligation, it continues to contend that the text has no practical meaning after a Member has included TRQ amounts in its schedule, unless the Member offers larger TRQs than required under its schedule.

149. China continues to broadly argue that TRQs generally are not subject to Article XI:1 because they are not "quantitative restrictions," but rather "duties" and thus outside the scope of Article XI:1. However, the United States has not challenged the imposition by China of in-quota or out-of-quota duty rates or the use by China of TRQs in general, but rather the "series of steps, or events, that are taken or occur in the carrying out of China's TRQ," including specific administrative requirements and processes pursuant to those TRQs. It is these administrative

aspects that constitute restrictions on importation, not the connection to lower or higher duty rates.

150. Further, nothing in the text of Article XI:1 suggests that association with, connection to, or proximity to "duties, taxes or other charges" is sufficient to shield other import prohibitions or restrictions from liability under Article XI:1. China continues to suggest that processing requirements and associated penalties are not subject to Article XI:1 because they are "substantive conditions" for accessing the TRQ and thus part of the TRQ itself. China is in error.

151. GATT 1994, Article X:3(a) specifically addresses the manner of "administration" of "laws, regulations, decisions and rulings," and thus expressly does not address substantive concerns related to those laws, regulations, decisions, and rulings. By contrast, the applicability of Article XI:1 turns on whether the challenged measure is a prohibition or restriction on importation *other than* a duty, tax, or other charge.

152. A measure is not exempt from Article XI:1 because a Member has imposed the prohibition or restriction in addition to a duty, tax, or other charge. To that end, the United States reiterates that it is not challenging the in-quota or out-of-quota duty rates or the application of those rates to particular products. The United States is challenging the importation restrictions in China's measures that are in addition to the in-quota duty rates.

153. China goes on to conflate the negotiated terms of a Member's TRQ contained in its schedule – such as maintaining a TRQ on a country specific basis or limiting it to a particular end-use – with "substantive conditions" that China suggests can be put in place at the Member's discretion and are not subject to review under Article XI:1. China's Schedule CLII includes a description of the products as "corn," "wheat," etc., the relevant tariff item numbers, the in-quota duties and TRQ quantity amounts, and other terms and conditions, such as implementation stages for TRQ quantities. China negotiated TRQs applicable to grains for any use, so long as they fit under the cited tariff item numbers. China has not negotiated TRQs like those in Canada's or Japan's Schedules of Concessions that identify products through certain end uses, such as skim milk powder for school lunches.

154. The Schedule does not, as China suggests, "provide for the imposition of . . . end-use requirements, through taking account of capacity to produce processed grain." China also suggests that an exercise of judicial economy would be appropriate, and the Panel should only make certain findings under Paragraph 116 and Article XIII:3(b).

155. Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") establishes the standard terms of reference when the Dispute Settlement Body ("DSB") charges a panel with examining a matter the complaining party has referred to the DSB. DSU Article 11 sets out the "function" of panels, and tracks the standard terms of reference. In pertinent part, these provisions establish that the DSB tasks a panel with "examining" a matter and then making "such other findings as will assist the DSB in making the recommendation" set out in DSU Article 19.1 (that is, a recommendation that the Member bring the measure into conformity with that agreement). A panel should "address those claims on which a finding is

necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."

156. Because compliance will not simply be a matter of China eliminating or removing its TRQ administration measures, but rather reforming its TRQ administration measures so as to comply with China's specific WTO obligations, it is important to make findings on each of these obligations so as to properly guide implementation. Without sufficient findings to inform implementation, it is likely that the dispute will not be resolved.

157. China argued in its Second Written Submission for specific applications of judicial economy, first with respect to Paragraph 116 and Article X:3(a) of the GATT 1994 and, second, with respect to Paragraph 116 and Article XIII:3(b) of the GATT 1994.

158. China "agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same." China contends that if the Panel were to consider both Paragraph 116 and Article X:3(a) it would "inevitably reach the same conclusion" under both provisions.

159. As described at length in this dispute, China maintains a complex and opaque TRQ administration that is difficult to understand and participate in and results in underutilization of China's TRQs. Unlike a dispute where the inconsistent measure will likely be withdrawn, China will continue to maintain TRQ administration measures for allocating licenses and permitting importation at in-quota duty levels. It will be critical for China to consider whether the measures taken to comply are: transparent, predictable, fair, clearly specified, and unlikely to inhibit the fill of the TRQ, as well as reasonable. For this reason, sufficiently precise findings with regard to Paragraph 116 and Article X:3(a) would be helpful to inform the actions China must take to come into compliance with its WTO obligations.

160. China continues to argue that whatever the Panel determines Article XIII:3(b) requires should be sufficient to satisfy the transparency requirement under Paragraph 116 of the Working Party Report. The United States disagrees. Article XIII:3(b) requires public notice of the amounts permitted to be imported and changes to those amounts.

161. Paragraph 116 requires China to administer its TRQs, including with respect to allocation and reallocation, through a process or set of rules or principles that is easily understood, discerned, or obvious. As part of this obligation, China should be providing information to Members and applicants regarding how the rules function, how they are applied, and the results of applying those rules in a timely manner. This will include and go beyond the specific information required to be made public by Article XIII:3(b) of the GATT 1994. For this reason, findings under both Article XIII:3(b) and Paragraph 116 of the Working Party Report would be important to help resolve the dispute.

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

162. [Summaries of the U.S. responses to the Panel's questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]