

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

(DS511)

**OPENING STATEMENT OF
THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

January 22, 2018

1. Good afternoon, Mr. Chairman and members of the Panel. On behalf of the U.S. delegation, I would like to begin by thanking the Panel and the Secretariat staff assisting you, for your work on this dispute. This dispute is important to ensure that China carries out its existing WTO agricultural commitments, giving confidence to other WTO Members and agricultural stakeholders worldwide that WTO rules in agriculture are meaningful and can help promote more fair and market-oriented trade.

I. INTRODUCTION

2. We are here today because China, through its provision of domestic support to its wheat, Indica rice, Japonica rice, and corn producers, has exceeded the domestic support commitment set out in its Schedule. The United States has shown that China has exceeded this commitment level based on the rules set out in the WTO Agriculture Agreement¹ and in China's Accession Protocol.²

3. In its defense, China has proposed alternative methodologies for the calculation of market price support that ignore the plain language of the domestic support obligations contained in Agriculture Agreement, as well as the interpretation of these obligations in prior WTO panel and Appellate Body reports. Our intention today is not to repeat the statements we made in our prior written submissions. Rather, after briefly summarizing the legal claims put forward by the United States, the United States will address certain arguments made by China in its written submissions.

4. First, we will address China's argument that the text of the Agriculture Agreement contains only "fallback" domestic support methodologies. China is mistaken in suggesting that,

¹ *Agreement on Agriculture* ("Agriculture Agreement").

² *Protocol on the Accession of the People's Republic of China* ("Accession Protocol") (Exhibit US-5).

for each Member, a panel instead may apply alternative commitments and methodologies gleaned from the data contained in the Supporting Tables to Part IV of its Schedule of Concessions.

5. Second, we will address certain calculation errors committed by China in its calculation of market price support for Indica and Japonica rice.

6. Finally, we will address China’s argument that the temporary purchase and reserve policy (TPRP) for corn has expired, and therefore is not a “measure at issue” before the Panel.

II. CHINA’S PROVISION OF MARKET PRICE SUPPORT TO PRODUCERS OF WHEAT, INDICA RICE, JAPONICA RICE, AND CORN EXCEEDS CHINA’S DOMESTIC SUPPORT COMMITMENTS

7. China, like all WTO Members, is entitled to maintain a variety of domestic support measures in favor of its agricultural producers. China committed, however, consistent with Articles 3.2 and 6.3 of the Agriculture Agreement, to maintain its level of support at or below its Final Bound Commitment Level of “nil.”³ Pursuant to this commitment, and to paragraph 235 of the China’s Working Party Report,⁴ China must maintain the support provided by product-specific “amber box” measures at below a *de minimis* level of 8.5 percent of the total value of production for each basic agricultural product.⁵

8. Paragraph 8 of Annex 3 of the Agriculture Agreement provides the methodology for calculating the value of the type of domestic support at issue in this dispute – market price support.⁶ Paragraph 8 states that “market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of*

³ United States First Written Submission, paras. 80-81.

⁴ *Report on the Working Party on the Accession of China* (“Working Party Report”) (Exhibit US-7).

⁵ United States First Written Submission, paras. 82-84.

⁶ United States First Written Submission, para. 93-95.

production eligible to receive the applied administered price.”⁷ Thus, the calculation of market price support provided by a measure requires identification of three elements: the “applied administered price,” the “fixed external reference price,” and the quantity of “eligible” production.

9. As described in the U.S. First Written Submission, these elements are determined as follows:

- The “applied administered price” is the price set or established by the government for a basic agricultural product, and is, as such, distinguishable from the prevailing market price.⁸ In this case, China’s applied administered price is identified for each product and each year in the Chinese legal instruments announcing and implementing the program.⁹
- The “fixed external reference price” is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9, which states that the price “shall be based on the years 1986 to 1988” and “may be adjusted for quality differences as necessary.”¹⁰ China’s fixed external reference prices can be determined using official Chinese customs data for each of these years.¹¹
- Finally, the “quantity of production eligible to receive” the applied administered price is the amount of the product “fit or entitled”¹² to receive the price, not the amount of agricultural product actually purchased.¹³ Because China’s programs provide market price support to all production in the covered provinces, all such production is fit or

⁷ Italics added.

⁸ United States First Written Submission, paras. 96-97.

⁹ United States First Written Submission, paras. 111-112.

¹⁰ United States First Written Submission, paras. 98-100 (citing to Agriculture Agreement, Annex 3, paragraph 9).

¹¹ United States First Written Submission, paras. 113-116.

¹² United States First Written Submission, fn. 204 to para. 102 (citing to Shorter Oxford English Dictionary, “eligible”, p. 799).

¹³ United States First Written Submission, paras. 101-103 (citing to *Korea – Beef (AB)*, para. 120).

entitled to receive the applied administered price and must be included in the calculation of market price support. The quantity of eligible production identified in the U.S. submissions is drawn from official production volumes published by China’s National Bureau of Statistics and Ministry of Agriculture.¹⁴

10. When properly calculated, the level of domestic support China provided to producers of wheat, Indica rice, Japonica rice, and corn in 2012, 2013, 2014, and 2015 – the most recent years for which annual production and pricing data is available – is well in excess of China’s *de minimis* level of 8.5 percent for each product.¹⁵ Because China has exceeded its *de minimis* level for each product in each year, the value of this market price support must be included in its Total Current AMS. China’s provision of support thus exceeds its commitment level of “nil” – or zero – and breaches its obligations under Articles 3.2 and 6.3 of the Agriculture Agreement.

III. CHINA’S NON-TEXTUAL INTERPRETATION OF THE AGREEMENT ON AGRICULTURE IS IN ERROR

11. In its defense, China argues that the obligations outlined in the Agriculture Agreement concerning the calculation of market price support – and in particular the requirements related to the fixed external reference price and eligible production – are “only a fallback option to calculate product-specific AMS in situations where a product was not included in Part IV of a Member’s Schedule.”¹⁶ Because China included rice, wheat, and corn in Part IV of its Schedule, the rules in Annex 3 do not apply in this dispute. Instead, China claims that, based on a “holistic interpretation”¹⁷ of the Agriculture Agreement and China’s Supporting Tables (or, as China calls it, “Rev.3”), the Panel should rely on the information contained in China’s Supporting Tables to

¹⁴ United States First Written Submission, paras. 117-121.

¹⁵ United States First Written Submission, paras. 123-128.

¹⁶ China First Written Submission, para. 106.

¹⁷ China First Written Submission, paras. 91, 93, 117, 120, 124, 131, 159.

unilaterally alter the methodology set out in the Agriculture Agreement to create separate, China-specific obligations. That is, China argues that the use of certain data in its Supporting Tables with respect to its “base period” somehow implies an agreement by the Members to China-specific AMS rules. However, the rules or calculation methodologies China proposes not only run counter to the plain text of the Agriculture Agreement, but they are, in fact, not reflected in China’s Accession Protocol or Working Party Report. China’s approach does not, therefore, reflect the rules agreed by China when it acceded to the WTO.

12. China’s proposed interpretation does not reflect the basic tenets of treaty interpretation reflected in the *Vienna Convention on the Law of Treaties*, and would cast doubt on the status and nature of all Members’ commitments – on everything from agriculture to services. China’s approach also would result in the WTO dispute settlement system “diminish[ing] the rights and obligations in the covered agreements,” contrary to Articles 3.2 and 19.2 of the DSU. This is not an appropriate outcome and the Panel should reject China’s interpretation accordingly, as prior panels and the Appellate Body have rejected similar arguments before.¹⁸

A. China’s Obligations With Respect to Agricultural Domestic Support

13. When China acceded to the WTO, it agreed to implement the obligations contained in the WTO Agreements “as if it had accepted that Agreement on the date of its entry into force,” “[e]xcept as otherwise provided for in [its Accession] Protocol.”¹⁹ Members did agree to certain changes regarding the calculation of China’s Current Total AMS – for example, by establishing an 8.5 percent *de minimis* level under Article 6.4 of the Agriculture Agreement. This *de minimis* level was memorialized in paragraph 235 of China’s Working Party Report, and incorporated by

¹⁸ See *EC – Export Subsidies on Sugar* (Panel), para. 7.157; see also *EC – Export Subsidies on Sugar* (AB), para. 213.

¹⁹ Accession Protocol, Part I, para 1.3.

reference into China’s Accession Protocol, which refers to the commitments (including paragraph 235) listed in paragraph 342 of the Working Party Report. For all other obligations with respect to which no modifications were agreed in China’s Protocol, China must implement the obligations “as if it had accepted that Agreement on the date of its entry into force.”

14. The Agriculture Agreement sets out the ways in which the information contained in a Member’s Supporting Tables may be used in the calculation of a Member’s Current Total AMS. Specifically, Article 1(a) of the Agriculture Agreement states that the product-specific AMS must be “calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member’s Schedule.”²⁰ Therefore, the calculation of current market price support provided to producers of a particular product must “take into account” any “constituent data and methodology” used in the Supporting Tables to calculate past levels of support for that product.

15. Article 1(h), in turn, provides that a Member’s “Total AMS” refers to “the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products.” For a given year, the “Current Total AMS” must be calculated *in accordance with* the provisions of this Agreement, including Article 6, *and with* the constituent data and methodology used in the supporting material.”

16. China essentially argues that the Panel should interpret the terms “in accordance with” and “taking into account” in Article 1(a)(ii) interchangeably, lest the Current Total AMS be

²⁰ Emphasis added.

calculated differently than the product-specific AMS for a particular product.²¹ However, a proper interpretation of the ordinary meaning of the text of the relevant articles does not support such an understanding.²² The inclusion of the phrase “in accordance with” in Article 1(a) indicates that a product-specific AMS calculation must be conducted “consistent with”²³ the methodology provided in Annex 3. Conversely, the use of the phrase “taking into account” in reference to constituent data and methodology requires a panel to “take into consideration, [or] notice” that information.²⁴ This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

17. The Appellate Body report in *Korea – Beef* supports this understanding. In that dispute, the Appellate Body noted the distinction reflected in the text of Article 1(a)(ii) between the phrases “in accordance with” and “taking into account,” and found that the ordinary meaning of the phrases suggests a hierarchy attributing a “more rigorous standard” to Annex 3, than to constituent data and methodology.²⁵ The Appellate Body did not limit this statement regarding the supremacy of Annex 3 to those circumstances in which *no* constituent data and methodology were provided by a Member; nor would the text of the Agriculture Agreement have supported such a view.²⁶ Rather, the text of the Agriculture Agreement suggests that, when performing the calculation of AMS for a particular product pursuant to Annex 3, the data and methodology contained in the supporting material may provide additional information relevant to the calculation of support for the specific product at issue.

²¹ China First Written Submission, paras.105, 122-131.

²² Vienna Convention on the Law of Treaties, Article 31(1).

²³ The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15.

²⁴ The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15.

²⁵ *Korea – Beef (AB)*, para. 112.

²⁶ *Korea – Beef (AB)*, para. 114.

18. The United States notes that the Agriculture Agreement describes certain circumstances in which a panel should rely on materials found in a Member’s Supporting Table. For example, Article 1(b) states that “basic agricultural product” “is defined as the product as close as practicable to the point of first sale as specified in a Member’s Schedule and in the related supporting material.”²⁷

19. Therefore, China seriously errs in suggesting that the Annex 3 methodology reflects only a “fallback option.”²⁸ To the contrary, the Agriculture Agreement requires that China’s product-specific AMS for each product be calculated “in accordance with” Annex 3. Not only does China ask the Panel to supplant this methodology with an alternative methodology derived from data in China’s Supporting Tables, it asks the Panel to apply a methodology that is *inconsistent with* Annex 3. Nothing in the Agriculture Agreements or in China’s Accession Protocol permits such an outcome.

20. As prior panels and the Appellate Body have similarly found, a Member’s Schedule of Concessions is a schedule of *concessions*. A Member may not use its schedule to *derogate* from obligations in the WTO Agreements. In the *EC – Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that “WTO Members may use entries in their Schedules of Concessions to *clarify and qualify* the ‘concession’ they individually agree to assume in their Schedules, but *not to reduce or conflict* with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture.”²⁹ This echoed prior statements by a GATT 1947 panel in *US – Sugar* finding that a “Schedule of Concessions” is for Members to

²⁷ Agriculture Agreement, Article 1(b)

²⁸ China First Written Submission, para. 106.

²⁹ *EC – Export Subsidies on Sugar (Panel)*, para. 7.157 (internal citations omitted, original emphasis); *see also EC – Export Subsidies on Sugar (AB)*, para. 213.

“incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.”³⁰

21. Therefore, the Panel must apply the methodology set out in Annex 3 of the Agriculture Agreement. Contrary to China’s argument that its Supporting Tables establish a China-specific, alternative rule, the Panel must look to Annex 3, paragraph 8 of the Agriculture Agreement, providing that the volume of production to be used in calculating market price support is that “eligible to receive the applied administered price,” and Annex 3, paragraph 9, providing that the fixed external reference price “shall be based on the years 1986 to 1988.”

B. China’s Arguments Regarding the Technical Note and Acceding Members’ “Consistent Practice” Are Unavailing

22. China has also argued that the Panel should calculate its AMS based on a 1996-1998 fixed external reference price, because a 1996 Secretariat Technical Note regarding accessions instructed acceding members to use a more recent base period and because many acceding Members did so. China’s arguments fail because China provides no legal basis for its reliance on the Technical Note, and appears to misunderstand the legal implications of the “practice” to which it refers.

23. The Technical Note states in its first sentence that its purpose “is to allow governments to present factual information on their domestic support and export subsidy measures *actually in place* in agriculture.”³¹ That is, the Note intends to assist Members in providing information regarding the support provided during a base period. The Note does not contain direction or instruction with respect to the calculation of market price support or other support for purposes of determining a Current Total AMS. In fact, paragraph 13 of the Technical Note directs

³⁰ *US – Sugar (GATT Panel)*, para. 5.2.

³¹ Emphasis added.

acceding Members to calculate product-specific AMS as described in Annex 3 of the Agreement on Agriculture. Therefore, China appears to have misunderstood the document to which it cites, as this document does not purport to alter, much less have the effect of altering, the obligations set out in the Agriculture Agreement.

24. China also misunderstands the role “practice” can play in the Panel’s interpretation of China’s domestic support commitments. China argues that it may employ a different fixed external reference price for calculating AMS market price support than the 1986-1988 period identified in Annex 3, because of an alleged “consistent practice” of acceding countries using base periods of the three years preceding their accession.³²

25. China’s argument establishes no “practice” that would be legally relevant for the Panel’s interpretation in this dispute. China states that all of the accessions that have taken place since the establishment of the WTO in 1995 have used *base periods* other than the 1986-1988 period. But use of a specific period of time as a base period for negotiations, is not the same as agreement that a different commitment will apply for calculating a product-specific AMS for purposes of determining Current Total AMS. It is product-specific AMS, and in particular the rules concerning calculation of market-price support under Annex 3, that is at issue. China has conflated two related, but distinct concepts.

26. More importantly, China fails to explain how an alleged practice by acceding Members with respect to the use of later base periods can operate to modify the WTO rules contained in Annex 3. To the extent a “practice” may inform the interpretation of a WTO commitment, that practice would need to constitute a “subsequent practice” within the meaning of the customary

³² China First Written Submission, para. 176.

rules of interpretation of public international law³³ reflected in the *Vienna Convention on the Law of Treaties*.

27. Article 31(3) of the Vienna Convention on the Law of Treaties provides, in relevant part, that under the general rule of interpretation “[t]here shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

28. That is, Article 31(3) directs a Panel to take into account any subsequent practice “which establishes the agreement of the parties regarding [] interpretation” of the treaty. China has not identified which provision of the Agriculture Agreement it is asking the Panel to interpret based on this subsequent practice of acceding Members. The Agriculture Agreement does not require that Members use a particular *base* period; therefore, the interpretation of such provision is not before the Panel. If China is arguing that an alleged subsequent practice is relevant to the Panel’s interpretation of the term “fixed external reference price” provided for in Annex 3, paragraph 9 of the Agriculture Agreement, it would appear to have misunderstood the interpretive exercise.

29. China does not claim that the use of particular base periods by different acceding Members elucidates the meaning of the term “fixed external reference price.” Instead, China appears to suggest that the practice would support *different meanings* of the text of Annex 3, paragraph 9 – apparently, depending on which Schedule of which Member is at issue. The suggestion that “subsequent practice” may replace the text of Annex 3, paragraph 9, is not supported by the Vienna Convention. Article 31(3)(b) establishes that subsequent practice in the

³³ DSU, Article 3.2.

application of a treaty may be taken into account in order to interpret the terms in a treaty, not to amend or create a derogation from the provisions of the treaty.

30. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* made a similar finding with respect to subsequent agreements. It noted that Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied," and that agreement regarding application of an obligation does not include the creation of new or the extension of existing obligations.³⁴ Therefore, a subsequent agreement or practice cannot have the legal effect of changing an obligation in a way not supported by the text.

31. Because China's argument lacks both a textual and contextual basis, the Panel should reject its interpretation and calculate China's product-specific AMS consistent with the terms of the Agriculture Agreement.

C. The Relevance of China's Constituent Data and Methodology Regarding Eligible Production Is Limited

32. With respect to eligible production, China argues that the Panel should use procurement volumes for purposes of determining eligible production, because China used procurement as eligible production in its Support Tables³⁵ to Part IV of its Schedule and its subsequent notifications.³⁶ In making this argument, China argues that the Agriculture Agreement does not define the phrase "production eligible to receive the applied administered price," or provide a methodology for its identification – "leav[ing] room for a Member-specific" outcome based on

³⁴ *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 391.

³⁵ Communication from China, *Working Party on the Accession of China*, WT/ACC/CHN/38/Rev.3, fn 19 (July 19, 2001) (referring to "the amount purchased by state-owned enterprises from farmers at state procurement prices for food security purposes" and "the amount purchased by state-owned enterprises from farmers at protective price in order to protect farmer's income").

³⁶ China First Written Submission, paras. 199-200.

constituent data and methodology.³⁷ In China’s view, “Rev.3 defines ‘eligible production’ for China’s calculation of AMS.”³⁸ For the reasons already explained, data contained in China’s Supporting Tables cannot have the effect of creating new China-specific commitments that deviate from the obligations set out in Annex 3.

33. Annex 3, paragraph 8 states that the quantity of production to be used in calculating market price support is that “eligible to receive the applied administered price.” The Annex goes on to state that “[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.”

34. While the Agriculture Agreement may not contain a definition of eligible production, the Vienna Convention requires that the Panel interpret Annex 3 “in accordance with the *ordinary meaning* to be given to [its] terms.”³⁹ Therefore, the lack of a definition does not warrant a panel abandoning an interpretive approach consistent with customary international law; or permit it to supply the terms of the Agreement with Member-specific “definitions” found in other documents. Rather, the Panel may simply look to the term’s dictionary definition.

35. Based on the ordinary meaning of the term “eligible,” the “[q]uantity of production eligible to receive the administered price” is a volume of the commodity that is “fit” or “entitled” to receive the administered price in a particular year.⁴⁰ As explained in the U.S. first written submission, China’s market price support programs allow all producers from covered provinces to receive the support price, and do not impose any limit on the amount of production that authorities may purchase in those provinces.⁴¹ Therefore, for each of the market price support

³⁷ China First Written Submission, para. 197.

³⁸ China First Written Submission, para. 199.

³⁹ Emphasis added.

⁴⁰ United States First Written Submission, para. 102.

⁴¹ United States First Written Submission, paras. 101-103.

programs at issue, the “quantity of production eligible to receive the applied administered price” is the total volume of the commodity grown in the provinces where the program is administered.

36. The findings of the Appellate Body in *Korea – Beef* support this interpretation. In also finding that the ordinary meaning of eligible is “fit or entitled to be chosen,”⁴² the Appellate Body noted that “production eligible to receive the applied administered price” has a “different meaning in ordinary usage from ‘production actually purchased.’”⁴³ This confirms the ordinary meaning of the Agriculture Agreement does not permit China’s conclusion that “eligible” production under China’s programs can be limited to the volume of production actually procured by the government.

37. The direction to “take into account” the information contained in China’s Supporting Tables would not permit amending Annex 3 and its definition of eligible production. It is also the case that the eligible production data set out in the Supporting Tables relates to a different program providing support during China’s base period. In this case, the programs for which China provided data during its base period appear not to have operated in the same way as China’s current programs.

38. Specifically, during its “base period” China maintained a “State Procurement System” program and a “Protective Price Policy” program, which China eliminated when it implemented the MPS Programs at issue here.⁴⁴ The prior programs operated in accordance with their own legal framework and rules, and China does not suggest otherwise. Therefore, the identification of eligible production for those programs would have been based on the legal framework in place at the time. And, according to footnote 10 of China’s Supporting Tables, under the previous

⁴² *Korea-Beef* (AB), para. 120.

⁴³ *Korea-Beef* (AB), para. 120.

⁴⁴ China First Written Submission, paras. 23-25.

programs “[t]he State *sets government procurement amount* and government procurement prices of wheat, rice and corn, as shown in the AMS calculation of wheat, rice and corn in Supporting Table DS 5.”⁴⁵ China ignored this footnote in its submission, only relying on a later abbreviated note 19, which states that the production amounts reflect the amounts purchased. Consistent with Annex 3, procurement would have been the appropriate volume of eligible production if the government imposed a pre-fixed purchasing volume for purchases, as the footnotes appear to suggest. That is, where the relevant measure indicates that the government will only purchase a limited volume of production, only that limited volume is “eligible” to receive the applied administered price. And if the base period program operated in the same way China’s current programs operate, the use of procurement for “eligible production” would simply have been in error.

39. Whatever the factual situation may have been before, China has not explained how the Panel could apply a methodology for purposes of identifying eligible production that is at odds with that provided in the Agriculture Agreement. As already explained, a Member’s schedule cannot operate to allow a Member to unilaterally derogate from its WTO obligations. Moreover, to the extent the base period program data and methodology were “taken into account,” the Panel should note that it was a different program that, in fact, operated differently from the current programs with respect to the volume of production eligible to receive the administered price, further confirming that the data and methodology contained in the Supporting Tables are not relevant to the Panel’s identification of eligible production under the new programs. The correct approach is to apply the methodology set out in Annex 3, paragraph 8 with respect to eligible production.

⁴⁵ China’s Supporting Tables, WT/ACC/CHN/38/Rev.3, fn 10(1).

IV. CHINA ERRS IN ARGUING THAT THE PANEL MUST CALCULATE MARKET PRICE SUPPORT FOR RICE ON A MILLED RICE BASIS

40. With respect to the calculation of market price support for Indica and Japonica rice, China makes a series of errors, in particular with respect to proposed adjustments to the volume of eligible production and the applied administered price from a paddy to a milled rice basis.

41. China argues that the product-specific AMS calculation should be done at the price level of “semi-milled or wholly milled rice, whether or not polished,”⁴⁶ rather than at the paddy level. Specifically, China calls for the application of a “milling rate” to both the applied administered price and quantity of eligible production, and thus proposes both a price conversion ratio and a milling rate for the Panel to use in completing its analysis. China further asserts that the Panel must make these adjustments, instead of the adjustment to the fixed external reference price proposed by the United States, because “it is not legally permissible to adjust downward a fixed external reference price.”⁴⁷ China is in error.

42. The Agriculture Agreement states in paragraph 7 of Annex 3 that the “AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned,” and in paragraph 9 that the “fixed external reference price *may be adjusted* for quality differences as necessary.”

43. In the case of rice, the first point of sale is the purchase of paddy rice from farmers at the applied administered price. As the Agriculture Agreement requires the Panel to calculate market price support as close to the point of first sale as possible, any adjustments made for rice should serve to put the relevant values on a paddy rice basis. Therefore, converting the quantity of

⁴⁶ China First Written Submission, paras. 231-32.

⁴⁷ China First Written Submission, para. 246.

eligible production and the applied administered price *from* a paddy basis *to* a milled basis would move the calculations *away* from the point of first sale.

44. Moreover, the Agriculture Agreement does not prohibit “downward” adjustments; to the contrary, it states that the fixed external reference price *may* be adjusted for quality differences as necessary. Therefore, China errs in asserting that no adjustments to the fixed external reference price may be made. In fact, because only milled rice is imported or exported, and the fixed external reference price is calculated based on c.i.f. or f.o.b. prices – i.e., import and export prices – it is necessary to convert the fixed external reference price in order to express it at the point of first sale. For these reasons, China’s proposal to use milling adjustments to convert the calculation into a market price support value for milled instead of paddy rice is inconsistent with the Agriculture Agreement. This being the case, the Panel need not determine which of the multiple, unsupported “milling” conversions China suggests should be used. Instead, the Panel should reject China’s arguments and calculate each of the relevant values to reflect a paddy rice basis, as submitted by the United States in its first written submission.

V. THE PROVISION OF DOMESTIC SUPPORT WITH RESPECT TO CORN IN 2012-2015 IS WITHIN THE PANEL’S TERMS OF REFERENCE

45. Finally, we address China’s argument that the temporary purchase and reserve policy (TPRP) for corn has expired, and therefore is not a “measure at issue” within the Panel’s terms of reference.⁴⁸ China’s argument is in error. China misreads the U.S. panel request, misunderstands the domestic support challenge at issue, and ignores the objectives of WTO dispute settlement.

⁴⁸ China First Written Submission, para. 342.

46. As explained in our submission to the Panel on this issue, the TPRP is not itself a measure at issue identified in the U.S. panel request; rather, it is a series of legal instruments, issued annually, and *through which* China provided “domestic support in favor of [corn] producers” during each of the relevant years.⁴⁹ The *measures* at issue were identified as the provision by China of domestic support in favor of agricultural producers during each of the years 2012, 2013 2014 and 2015.⁵⁰

47. The United States has thus made eight affirmative claims – that the levels of domestic support provided for each of the four years exceeds China’s final bound commitment level in breach of both Article 3.2 and Article 6.3 of the Agriculture Agreement.⁵¹ In the event the Panel finds that China has not taken a domestic support commitment in its Schedule, the United States has made four alternative claims under Article 7.2(b). Together, the measures and legal basis for the complaint in these claims constitute “the matter” that the DSB has charged the panel with examining through its terms of reference.⁵²

48. Therefore, the United States asks the Panel to make findings regarding the domestic support China provided to agricultural producers during each relevant year, and to conclude that the level of domestic support provided in each relevant year exceeded the commitment level identified in China’s Schedule, in breach of Article 3.2 and Article 6.3 of the Agriculture Agreement. The United States is demonstrating this breach by showing that China exceeded its domestic support commitments, for example, through the provision of market price support to producers of four basic agricultural products. A finding on any one of these showings would constitute a breach of China’s commitments.

⁴⁹ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 15.

⁵⁰ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 14.

⁵¹ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 14.

⁵² United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 14.

49. The United States does not seek a finding that any particular legal instrument (or support program), such as the TPRP, is in breach of China’s commitments.⁵³ This is because the existence or maintenance of the TPRP or any other legal instrument would not itself necessarily lead to the breach of a domestic support commitment.⁵⁴ As the United States explained in its first written submission, under WTO rules, Members are permitted to provide various kinds of domestic support, including market price support such as that provided by China through the TPRP, so long as the level of that support does not exceed the Member’s final bound commitment level.⁵⁵ Thus, the United States as complaining party put as “the matter” before the DSB whether the level of domestic support provided during the most recent period years was in excess of the Member’s final bound commitment level. That is the matter which the DSB has charged the Panel with examining. The alleged expiry of a legal instrument does not change the matter the DSB put within the Panel’s terms of reference, nor does it make another matter susceptible to examination by the Panel.

50. This understanding is consistent with both the scope and nature of Members’ AMS commitments, as well as the objectives of the WTO dispute settlement system.

51. Article 3.7 of the DSU provides in relevant part that: “...the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned *if these are found to be inconsistent* with the provisions of any of the covered agreements. That is, withdrawal is relevant to the extent that the measure can be found to produce an inconsistency with a covered agreement. Article 4.6 of the DSU goes on to provide that consultations may concern “any representations made by another Member concerning *measures affecting the*

⁵³ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 25.

⁵⁴ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 25.

⁵⁵ United States Comments on China’s Challenge to the Panel’s Terms of Reference, para. 25.

operation of any covered agreement.” Here, again, the DSU is concerned with situations in which a measure may be inconsistent with a covered agreement. It is critical, therefore, to consider *which measure of China could be inconsistent* with its commitments under the Agriculture Agreement.

52. Article 7.1 of the DSU requires a Panel to examine the matter referred to the DSB by the complainant in its panel request. Article 6.2 in turn provides that the matter to be examined by the DSB comprises the specific measures at issue and the brief summary of the legal basis of the complaint. Consistent with Article 6.2, the United States identified in its panel request the measures at issue in this dispute: the provision of domestic support by China to its agricultural producers in 2012, 2013, 2014, and 2015. The panel request also provided a brief summary of the legal basis of the complaint, namely, that the provision of domestic support exceeded China’s AMS commitment level of “nil” in breach of Articles 3.2 and 6.3 of the Agriculture Agreement, or in the alternative, Article 7.2(b).

53. Therefore, the matter referred to the DSB in this dispute includes China’s provision of domestic support at levels that breach Articles 3.2, 6.3 and 7.2(b) of the Agriculture Agreement in 2012, 2013, 2014 and 2015. Article 11 of the DSU requires the Panel to make an objective assessment of this matter.

54. China asserts that the measures at issue must be limited to the specific legal instruments referenced in the U.S. panel request with respect to the years 2012 to 2015, and that the U.S. panel request would fail under Article 6.2 if the United States attempted to challenge anything beyond this. China further claims that the retrospective examination of a Member’s provision of domestic support by a panel is no different than the examination of historical evidence in any other dispute.

55. However, China fails to acknowledge the dilemma created by its arguments. To succeed in a domestic support challenge, a complainant must base its claims on a full year's data. China does not, and indeed, could not dispute that the data needed to make such a demonstration will not become available until many months after the conclusion of that year.⁵⁶ But China's arguments could, first, require a complainant to bring its complaint during the very year for which it wishes to challenge an AMS level in order to ensure that a panel had the authority to review its claims against the legal instrument existing in that year. This is an absurd result – because of the nature of AMS calculations, and the delayed availability of data necessary for performing such calculations, a complainant may never be able to make such an assessment while a particular legal instrument remains in place. Further, a panel could not make findings on the matter without all the necessary information.

56. And China's arguments raise a second dilemma. We now find ourselves in a situation before this Panel in which China is attempting to avoid examination of its provision of domestic support for corn in 2015 by arguing that the legal situation in 2015 had changed by the time of the panel's establishment. The complete data required by the United States in preparing its case for the year 2015 were not publicly available until November 2016 – just before the United States filed its panel request.

57. We ask that the Panel now turn to the timeline attached to this statement, which reflects the timing of corn-related domestic support activities and the publication of data related to such activities for 2015. The timeline demonstrates that, as just explained, China does not provide the data necessary to calculate the total value of production for corn until about one year after the

⁵⁶ United States Comments on China's Challenge to the Panel's Terms of Reference, paras. 26-27.

beginning of the corn purchase period.⁵⁷ There are two critical data points to emphasize: Chinese production volume and farmgate prices. China did not publish the data related to these two values for the 2015 MPS program until September and November, respectively, of the following year, 2016.

58. Not only is data for both of these values necessary to determine whether China has exceeded its AMS commitments, but the United States and other WTO Members do not have access to the data until *China itself* releases it to the public. Under these circumstances, China's argument that the United States is precluded from challenging China's provision of domestic support to its corn producers for 2012-2015, based on an alleged change to the program thereafter, serves a clear purpose: to frustrate the ability of the United States or any other WTO Member to challenge China's provision of excessive domestic support.

59. The fact is, based on the record before the Panel in this dispute, *no one knows, and no one could know (given China's lack of transparency)*, whether China continued to provide domestic support in excess of its commitment level in 2016, at the time of the U.S. panel request. And *no one knows, and no one could know (given China's lack of transparency)*, whether China discontinued the provision of support through market price support mechanisms, including through the application of an administered price. What we do know is that the mere passage of time past the date of application of the 2015 market price support instrument for corn does not demonstrate that China ceased to provide such support for producers of corn as of the date of panel establishment or permanently.

60. The evidence China submits with respect to the content of the "new" corn program fails to demonstrate that China would not provide price support for corn during 2016 or thereafter.

⁵⁷ Timeline pertaining to China's Temporary Purchase and Reserve Policies, Exhibit US-92.

Most of China’s evidence in this respect consists of press reports and government statements.

China announced only two instruments publicly in 2016 regarding domestic support for corn – a new direct subsidy and a program for government purchases of corn produced in three Chinese provinces and the Inner Mongolia Autonomous Region. The *2016 Notice on Pragmatically Handling This Year’s Corn Purchase Work in the Northeast Region* does not indicate how the government determined the prices for purchases made in these provinces.⁵⁸ The announcement stated the program would follow the “*principle of letting the market determine prices;*” but the *2004 Grain Regulations* and *2004 Grain Opinions* governing the MPS programs for grains contain similar statements.⁵⁹ Without more, the nature of the “new” programs is not clear.

61. China may be correct that, ideally, an applied administered price would be reflected in public legal instruments. But the absence of such a public price is not conclusive of the nature of the program absent greater transparency than exists here. We note that China itself purports to take significant actions under its domestic support programs without making those actions public. In paragraphs 76 to 80 of China’s first written submission, it describes in detail official communications between various levels of government regarding the “activation” and “deactivation” of government purchases at administered prices. China does not indicate in its citations the public source for these documents, and the United States was unable to locate them online.

62. Whatever the status of China’s current programs may be, it is important to remember that the United States is not requesting that the Panel make findings with respect to China’s 2016 domestic support levels. Therefore, the Panel need not assess or pass judgment on China’s

⁵⁸ Exhibit US-87, Exhibit CHN-80-B.

⁵⁹ See 2004 Grain Opinion, Section II, paragraph 5 (Exhibit US-10); 2004 Grain Regulation, Article 4 (Exhibit US-12).

current corn program. This dispute is about China’s provision of domestic support in the years 2012, 2013, 2014 and 2015. China’s future compliance under the continuing application of its current, or a future, program, whatever that may be, is not prejudiced by findings made with respect to 2012-2015. If China maintains support levels within its commitment levels, no further recourse would be available to the United States.

63. Failing to make findings on the U.S. claims, however, would prejudice the United States’ rights to DSB recommendations on the matter referred by the DSB to the Panel. Were China to continue to provide support for corn at levels that exceed its domestic support obligations, despite the United States having raised its claims at the earliest possible opportunity, the Panel will have deprived the United States of its rights to pursue those issues further under the DSU. Given that China has not demonstrated that it has discontinued the provision of domestic support to corn at levels that exceed its commitment level, including through the potential continuing use of market price support mechanisms, the Panel must make findings and recommendations with respect to the U.S. claims to fulfil its duties under the DSU – in particular, to make recommendations under DSU Article 19.1 on any measure found to be inconsistent with the Agreement on Agriculture.

64. The United States notes the pertinent consideration of the panel in *EC – Approval and Marketing of Biotech Products*. That panel relied on the DSU in finding that, to “determin[e] whether to make findings on a measure no longer in existence on the date of establishment of a panel, panels should notably take account of the object and purpose of the dispute settlement system.”⁶⁰ The panel explained that pursuant to Article 3.7 of the DSU, the aim of dispute settlement “is to secure a positive solution to the dispute.”⁶¹ The panel reasoned that even if a

⁶⁰ *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.1309.

⁶¹ *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.1309.

particular instrument ceased to exist, if the respondent acted inconsistently with its WTO obligations, a panel should issue findings on the expired instrument in order to secure a positive solution to the dispute.⁶²

65. The United States is not asking the Panel to make findings on expired measures. However, the United States asks the Panel to take similar account of the objectives of the dispute settlement system in interpreting the U.S. panel request and in making the requested findings under the relevant provisions of the Agriculture Agreement. If China believes that it has now come into compliance with its domestic support commitments through withdrawal of the TPRP and its implementation of a new program, it should have no concern if the Panel issues the mandatory recommendation under DSU Article 19.1 (as did the panel in *EC – Approval and Marketing of Biotech Products*). Presumably, upon adoption by the DSB of that recommendation, China would declare that it has come into compliance, and the parties would likely need to consult on that claim of compliance in order for the United States to determine whether a solution to the dispute has been found. But that is not a matter for this Panel to decide.

VI. CONCLUSION

66. As we have demonstrated in the U.S. written submissions and again this afternoon, China's attempts to rebut and undermine the claims of the United States are without merit and the Panel should reject them. Consistent with the arguments presented in its first written submission, the United States respectfully requests that the Panel find that China has breached Articles 3.2 and 6.3 of the Agriculture Agreement in each of the years 2012, 2013, 2014 and 2015. We further request that the Panel recommend, consistent with DSU Article 19.1, that

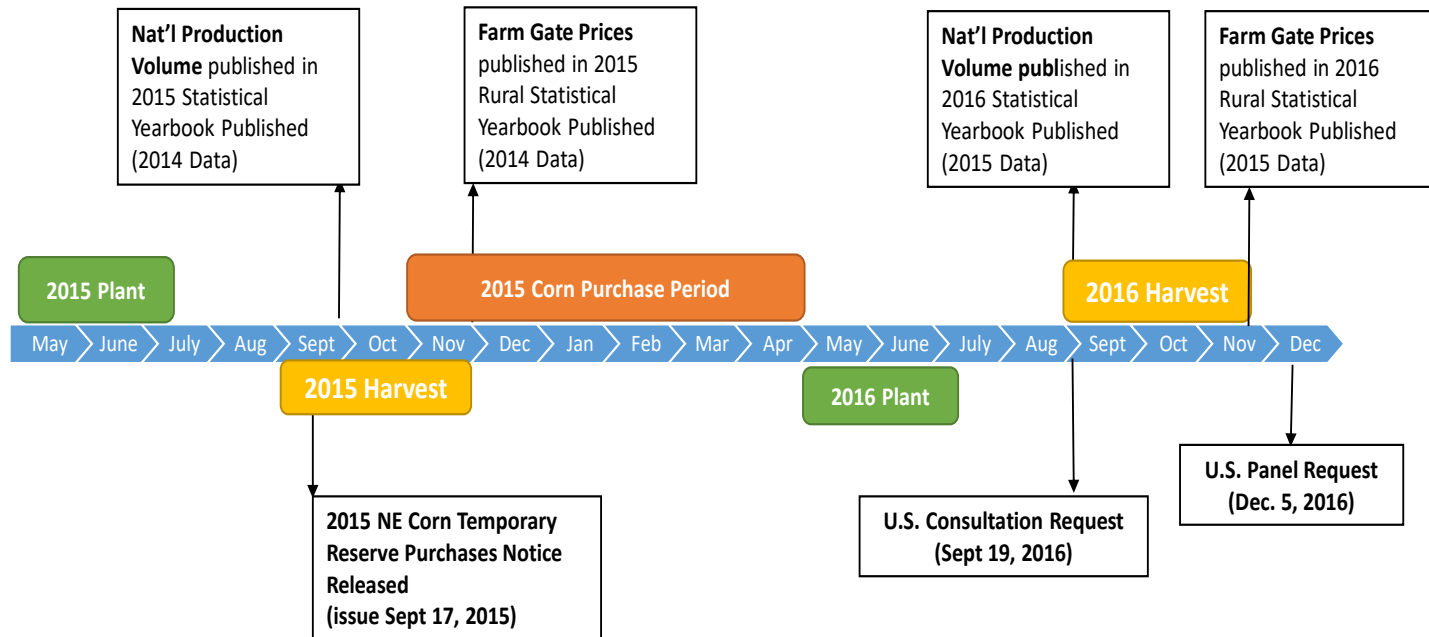
⁶² *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.1311.

China bring its measures providing domestic support, including for wheat, Indica rice, Japonica rice, and corn, into conformity with its commitments under the Agriculture Agreement.⁶³

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

⁶³ DSU Article 19.1 (“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, *it shall recommend* that the Member concerned bring the measure into conformity with that agreement.”) (italics added).

Exhibit US-92



Sources:

Statistical Yearbook (2015) and Rural Statistical Yearbook (2015 & 2016) Publication Information – www.purpleculture.net

Statistical Yearbook (2016) Publication Information – www.purpleculture.net

2015 NE Corn Temporary Reserve Purchases Notice & Corn Purchase Period – US FWS Exhibit US-55 (Guo Liang Tiao [2015] No. 169)

Planting and Harvesting Data – USDA World Agricultural Outlook Board