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CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS517/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES OF THE PANEL

Adopted on 5 March 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. China shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the United States should be numbered USA-1 USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit in connection with the next submission thus would be numbered USA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Questions

8. The Panel may pose questions to the parties and third parties at any time, including:

   a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

   b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

9. The Panel shall meet in closed session.

10. The parties shall be present at the meetings only when invited by the Panel to appear before it.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

   (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

   a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

   b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

   c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

   d. The Panel may subsequently pose questions to the parties.

   e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that China shall be given the opportunity to present its oral statement first. If China chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day prior to the meeting. In that case, the United States shall present its opening statement first, followed by China. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its

statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the integrated executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These integrated executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

22. Each party shall submit one integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's written submissions, its oral statements and its responses to questions following the substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

23. The integrated executive summary shall be limited to no more than 30 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

28. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

29. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

    a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

    b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

    c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy, preferably in Microsoft Word format and PDF format, of all documents that it submits in paper. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits in CD-ROMs or DVDs.

    d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

    e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party only by e-mail, on a CD-ROM or DVD, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

    f. Each party and third party shall submit its documents to the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

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.]

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. In the present dispute, the United States challenges the consistency of China's administration of its tariff rate quotas ("TRQs") for wheat, long-grain rice, short- and medium-grain rice, and corn with certain of its obligations under the GATT 1994 and Paragraph 116 of the *Working Party Report* to China's Protocol of Accession. Specifically, the United States challenges six specific aspects of China's system of TRQ administration: the basic criteria for determining eligibility for TRQ allocations and reallocations ("Basic Criteria"); the principles for determining TRQ allocations ("Allocation Principles"); the information published concerning allocation and reallocation of the TRQs; the administration of the portions of the TRQs reserved for state trading enterprises ("STEs") and non-state trading enterprises ("non-STEs"); the public comment process; and the end-use requirements and penalties for non-use.[1]

2. For the reasons set out in China's written submissions, oral statements, responses to questions from the Panel and the United States, and comments on the United States' responses to questions from the Panel, China submits that the U.S. claims under Paragraph 116 of the *Working Party Report* to China's Protocol of Accession and Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 are unfounded and unsupported.

II. SUMMARY OF CHINA'S SYSTEM OF TRQ ADMINISTRATION

3. China's National Development and Reform Commission ("NDRC") is the authority responsible for allocating and reallocating the grains TRQs. Within NDRC, the Department of Economy and Trade is charged with overseeing the administration of the TRQs. Thirty-seven provincial and municipal departments are authorized to process TRQ applications.[2]

4. The grains TRQs are divided into STE and non-STE quotas.[3] NDRC issues an annual *Allocation Notice*, which provides the TRQ amounts for each grain, including the STE portion for each TRQ; the Basic Criteria for TRQ allocation eligibility; and the Allocation Principles that NDRC applies to determine the allocations that will be granted to eligible applicants.[4]

5. In relation to the non-STE portions of the grains TRQs, applicants must satisfy the Basic Criteria and commodity-specific requirements provided in the 2016 and 2017 *Allocation Notices* in order to be eligible for a TRQ allocation. Both processing and general trade applicants apply for TRQs between October 15 and October 30 of each year, and submit their application forms to a local authorized agency.[5]

6. When an authorized agency receives an application form, it will confirm that all of the information requested by the form has been provided and that the applicant has signed the form.[6] The authorized agencies are available to answer questions that applicants have in relation to the application form and the application process. The agencies answer these questions on the basis of the *TRQ Guideline of the Examination and Approval of Grain Import TRQ* ("TRQ Guidelines") and the *Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and*

[1] See China's first written submission, para. 22.

[2] See *Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Ministry of Commerce and National Development and Reform Commission, Public Notice No. 54, issued 15 October 2003) ("*2003 List of NDRC Authorized Agencies*") (CHN-6).

[3] *Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Ministry of Commerce and National Development and Reform Commission 2003 Order No. 4, issued 27 September 2003) ("*2003 Provisional Measures*"), Article 4 (CHN-5).

[4] See *2017 Allocation Notice* (CHN-7).

[5] See *2003 Provisional Measures*, Articles 10 and 11 (CHN-5).

[6] If an authorized agency determines that an application form is incomplete, the form is returned to the applicant with instructions on how to properly complete the form. See *2003 Provisional Measures*, Article 8 (CHN-5).

Answers ("TRQ FAQs") that NDRC publishes on its official website.[7] If a question is not covered by the guidelines or the TRQ FAQs, the authorized agency forwards the question to NDRC, and NDRC tells the authorized agency how to respond.[8] Questions may also be posed directly to NDRC through NDRC's official website.[9] Responses to questions submitted in writing are provided within ten working days, pursuant to Article 34 of the *2003 Provisional Measures*.[10]

7. The authorized agencies do not conduct a substantive assessment of the applications. After determining that the applications are complete and properly signed, the local authorized agency delivers the applications to NDRC.[11]

8. NDRC then reviews the applications to determine whether the applicants meet the Basic Criteria.[12] The uniform social credit code that is provided by each applicant in its application is used to generate a credit report through "Credit China" (https://www.creditchina.gov.cn).[13] The information that is used in generating a credit report includes the general registration information of the enterprise; the administrative licenses acquired by the enterprise; the administrative punishments received by the enterprise; and whether the enterprise is on the Good Credit List, Watch List, or Black List. Only the Black List is considered by NDRC. The components of the credit report are illustrated in Exhibit CHN-19.[14] Applicants with records of non-compliance (i.e. applicants who have been "blacklisted") are rejected. Applicants who inquire concerning the reasons for a rejected application will be provided with a response by NDRC or the relevant authorized agency within ten working days.[15]

9. Concurrent with the eligibility review, NDRC publishes the list of applicants by issuing the *Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains*. This notice also provides the opportunity for the public to submit comments to NDRC regarding each applicant.[16] NDRC relies on public comments to double check that applicants are eligible to receive TRQ allocations.[17] If NDRC receives a comment regarding a particular applicant, NDRC asks the responsible authorized agency to collect information in relation to the comment so that NDRC can verify its accuracy. The authorized agency also informs the applicant that a comment has been submitted in relation to its application, and the applicant is given an opportunity to provide a response. If NDRC concludes pursuant to the comment and the information collected by the authorized agency that the applicant has not fully met the Basic Criteria or that it has submitted falsified information in its application, then the application is rejected. If NDRC concludes otherwise, then the applicant remains on the list.[18]

10. Following the eligibility review, NDRC allocates the non-STE quota for each grains TRQ among the eligible applicants based on the Allocation Principles provided in Article 4 of the 2016 and 2017

[7] See Guideline on the Examination and Approval of Grain Import TRQs (National Development and Reform Commission, published 27 May 2017) ("TRQ Guidelines") (CHN-15) and Guidance on the Examination and Approval of Grain Import TRQs: Frequently Asked Questions and Answers (National Development and Reform Commission, published 27 May 2017) ("TRQ FAQs") (CHN-14).

[8] See *2003 Provisional Measures*, Article 8 (CHN-5).

[9] TRQ applicants can access the NDRC's Online Inquiry Page, available at: http://services.ndrc.gov.cn:8080/ecdomain/portal/portlets/bjweb/newpage/itemlist/itemlist.jsp?admintype=&themetype=&keyword=010092.

[10] Article 34 of the *2003 Provisional Measures* provides that "[i]nquiries relating to the allocation and reallocation of agricultural product import tariff-rate quota[s] shall be posed in writing to the Ministry of Commerce, NDRC or their respective authorized agencies. The Ministry of Commerce, NDRC or their authorized agencies shall reply to such inquiries within 10 working days."

[11] See China's response to Panel question No. 3(c), paras. 9 and 10. At this stage, if an application is found to be incomplete, NDRC will notify the responsible authorized agency, and the authorized agency will require the applicant to resubmit a complete application prior to NDRC's publication of the *Announcement of Enterprise Data*.

[12] *2017 Allocation Notice*, Article 2 (CHN-7).

[13] These credit reports are publicly searchable using an entity's name or social credit code.

[14] See China's responses to Panel questions No. 8(c), para. 24 and No. 47, para. 8.

[15] See *2003 Provisional Measures*, Article 34 (CHN-5).

[16] See Announcement of Applicant Enterprise Data for Import Tariff-Rate Quotas for Grains in 2017 (National Development and Reform Commission, issued 1 December 2016) ("2017 Announcement of Enterprise Data") (CHN-8).

[17] See China's response to Panel question No. 55(a), paras. 22 and 23.

[18] See China's first written submission, para. 15.

Allocation Notices.[19] With respect to the allocation of the non-STE quota, 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. New applications are considered in the event that the entire non-STE portion of the TRQ has not been fully allocated to applicants with historic import performance under the TRQs.[20]

11. When NDRC has completed its substantive review of each application, the authorized agencies inform each applicant of the results of its application. The annual import tariff rate quotas for agricultural products are implemented from January 1 of each year. In 2016 and 2017, the non-STE portion of each TRQ was fully allocated and fully utilized, with the one exception of short- and medium-grain rice in 2016, for the technical reason explained by China in its responses to Panel questions.[21]

12. In relation to the STE portions of the TRQs, China National Cereals, Oils and Foodstuffs Import and Export Corporation ("COFCO") is the only enterprise designated as a state trading enterprise for grains.[22] COFCO is therefore allocated the full STE portion of each TRQ.[23] This amounts to between 50 percent and 90 percent of each grains TRQ, depending on the grain, in accordance with China's Schedule CLII.[24] COFCO cannot apply for an allocation from the non-STE portion of the TRQ. No STE other than COFCO has ever received an STE portion of a TRQ allocation because COFCO is the sole authorized STE importer for grains.[25]

13. In practice, because the STE portions of the TRQs are allocated entirely to COFCO, any other TRQ allocation to an end-user is non-state trading only. If an end-user is unable to sign or complete import contracts for the entire TRQ allocation on their certificate by the end of the year, the end-user must return the unused quantity before September 15.[26] COFCO is not required to return any unused portion of its grains TRQs for reallocation, nor is it subject to penalties for less than full utilization. Only end-users are subject to the obligation to return unused amounts for reallocation and penalties for non-use.[27] All entities are subject to usage requirements.[28]

14. End-users who have imported their TRQ allocation by the end of August, as well as new users that conform to the Basic Criteria, may apply for any returned allocation amounts, from September 1 to September 15.[29] The procedures for reallocations follow the procedures for initial allocations in relation to the completeness check by the authorized agencies and the eligibility review by NDRC. Reallocations are granted based on the "first-come, first-served" methodology specified in Article 26 of the *2003 Provisional Measures*. The unused amounts of the non-STE portions of the TRQs are in fact returned and reallocated.[30]

[19] 2017 *Allocation Notice*, Article 4 (CHN-7); 2016 *Allocation Notice*, Article 4 (CHN-10); see also *2003 Provisional Measures*, Article 13 (CHN-5).

[20] See China's first written submission, paras. 16 and 17; China's response to Panel question No. 51, para. 13.

[21] See China's response to Panel question 10, para. 35 and fn 41.

[22] See *Catalogue of Import State Trading Enterprises* (Ministry of Foreign Trade and Economic Cooperation 2001 Announcement No. 28, issued 2001) (CHN-13).

[23] See China's responses to Panel questions, Table 1.

[24] See Schedule CLII – People's Republic of China, Part I – Most-Favoured-Nation Tariff: Section I-B – Tariff Quotas (WT/ACC/CHN/49/Add.1) (CHN49A1-02) ("China's Schedule CLII").

[25] See China's response to Panel question No. 6(e), para. 19.

[26] *2003 Provisional Measures*, Article 23 (CHN-5).

[27] See China's response to Panel question No. 6(e), para. 20.

[28] See China's response to Panel question No. 6, para. 20. China notes that certain Panel questions refer to the usage requirements alternatively as "end-use requirements" or "processing requirements". China explained the difference between processing requirements applicable only to entities engaged in processing trade and the end-use processing requirement applicable to all general trade recipients of wheat and corn in its response to Panel question No. 58(b). It is the end-use processing requirement applicable to all general trade recipients that is challenged by the United States.

[29] *2003 Provisional Measures*, Articles 24, 25 (CHN-5); *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2017* (National Development and Reform Commission 2017 Public Notice No. 11, issued 11 August) ("*2017 Reallocation Notice*") para. 1 (CHN-9).

[30] See China's second written submission, Table 1.

III. THE PANEL SHOULD EXERCISE JUDICIAL ECONOMY REGARDING CERTAIN OF THE U.S. CLAIMS UNDER ARTICLE X:3(A) OF THE GATT 1994 AND PARAGRAPH 116 OF THE *WORKING PARTY REPORT*

A. Examining the United States' Claims Under Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994 Is Unnecessary to Resolve this Dispute

15. The United States is pursuing claims under both Paragraph 116 and Article X:3(a) of the GATT 1994 with respect to the Basic Criteria; Allocation Principles; information published concerning allocations and reallocations of the TRQs; administration of the STE and non-STE portions of the TRQs in conjunction with penalties for non-use; and the public comment process.

16. It is undisputed that it is within the bounds of a panel's discretion "to determine only those claims on which a finding is necessary 'for the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings'" and thereby "'ensure effective resolution of disputes to the benefit of all Members'".[31] In China's view, the exercise of judicial economy with respect to the U.S. claims under Article X:3(a) of the GATT 1994 that it has also brought under Paragraph 116, and the United States' claims under Paragraph 116 that it has also brought under Article XIII:3(b) of the GATT 1994, would be the most efficient and effective means to resolve this dispute.[32]

17. China acknowledges that there are circumstances in which the exercise of judicial economy by a panel may not be appropriate, such as where different remedies are available under different applicable provisions. No such circumstances exist here. The United States has not argued that the exercise of judicial economy will preclude the possibility of it obtaining a remedy under another provision. Rather, it asserts only that its claims implicate "distinct" legal obligations, and that "the scope and content" of those obligations "are not the same."[33]

18. China agrees with the United States that the scope and content of Paragraph 116 and Article X:3(a) are not the same.[34] While Paragraph 116 addresses TRQ administration specifically, the scope of Article X:3(a) applies to administration generally and is therefore broader. The content of the provisions also differs because of the TRQ-specific outcomes set out in the latter half of the first sentence of Paragraph 116 (provision of effective import opportunities, etc.). The provisions nonetheless overlap to a significant degree because of the series of requirements set forth in the first part of the first sentence of Paragraph 116 (administration on a transparent, predictable, etc. basis). These requirements combine to encompass the specific obligation contained in Article X:3(a) underlying the United States' claim – the obligation to administer measures of the kind described in Article X:1 in a reasonable manner.[35] To require China to administer its TRQs on a transparent, predictable, uniform, fair and non-discriminatory basis, using clearly specified timeframes, administrative procedures and requirements, is therefore to require China to administer its TRQs in the "reasonable" manner mandated by Article X:3(a).

19. Thus, China disagrees with the United States that the differences between the scope and content of these provisions require examining the U.S. claims under both provisions, or that such differences require the Panel to decline to exercise judicial economy.[36] On the contrary, these differences militate in favour of foregoing analysis of the U.S. claims under Article X:3(a).

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[31] See China's response to Panel question No. 22, para. 61, quoting Appellate Body Report, *Australia – Salmon*, para. 223. See also Appellate Body Report, *India – Patents (US)*, para. 87 ("… a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties — provided that those claims are within that panel's terms of reference.").

[32] See also European Union's third-party submission, paras. 12-14.

[33] See China's second written submission, para. 7, quoting United States' response to Panel question No. 21(a), para. 65 and No. 21(b), para. 68.

[34] See United States' response to Panel question No. 21, para. 65.

[35] See United States' first written submission, para. 228.

[36] See Appellate Body Report, *Argentina – Import Measures*, para. 5.194. The Appellate Body explained that:

B. Examining the United States' Claims Under Article XIII:3(b) of the GATT 1994 and Paragraph 116 of the *Working Party Report* Is Unnecessary to Resolve this Dispute

20. The United States is also pursuing claims under Paragraph 116 and Articles XIII:3(b) and X:3(a) of the GATT 1994 relating to the publication of allocation and reallocation information. The United States clarified in its responses to questions from the Panel that the information it claims is required under Paragraph 116 and Article XIII:3(b) includes the total amounts actually allocated, returned and reallocated. China has already explained why it does not consider it necessary for the Panel to examine the United States' claim under Article X:3(a) relating to this information. In China's view, it is similarly unnecessary for the Panel to examine the United States' claim under Paragraph 116, for the following reasons.

21. China explained in its first written submission that Article XIII:3(b) requires publication of the total amounts that will be permitted to be imported during the specified future period and any changes to those amounts during that specified period.[37] This requirement does not extend to publishing amounts actually allocated, either in the aggregate or individually. Article XIII:3(b) thus expressly provides specific public notice requirements with respect to the administration of TRQs, including total amounts.

22. In contrast, Paragraph 116 makes no reference to public notification of TRQ amounts. The United States is trying to read such a requirement into Paragraph 116 through the more general requirement to administer TRQs on a transparent and predictable basis. China does not believe that the Panel could reasonably conclude that the precise public notice requirements in Article XIII:3(b) do *not* require publication of the amounts actually allocated, returned for reallocation, and reallocated, but find that such amounts *must* be published under Paragraph 116. Accordingly, China submits that the Panel's analysis with respect to publication of amounts actually allocated, returned, and reallocated should begin and end with Article XIII:3(b), as this will efficiently resolve the question of whether China is obligated to publish this information.

IV. THE UNITED STATES HAS FAILED TO ESTABLISH THAT CHINA'S SYSTEM OF TRQ ADMINISTRATION IS INCONSISTENT WITH ITS WTO OBLIGATIONS

A. Basic Criteria

1. The Basic Criteria Do Not Render China's System of TRQ Administration as a Whole Inconsistent with Paragraph 116 of the *Working Party Report*

23. The articulation of the Basic Criteria constitutes a particular aspect of China's administration of the TRQs. Paragraph 116 however relates to the *administration* of the TRQs as a whole. Consequently, while China acknowledges that the description of the Basic Criteria needs to be updated to better reflect the nature of NDRC's assessment,[38] this does not mean that China's system of TRQ administration is inconsistent with Paragraph 116.[39]

24. As the United States acknowledged in its first written submission, "China's administration of its TRQs relates to all aspects of its execution, or carrying out, of those TRQs".[40] Accordingly, even if the Panel were to conclude that any of the specific aspects challenged by the United States are inconsistent with the obligations in Paragraph 116, the Panel would have to then evaluate whether the inconsistency of those specific aspects with Paragraph 116 is a sufficient basis upon which to conclude that the administration of the TRQs as a whole is inconsistent with Paragraph 116.

25. In referring to its TRQ administration "as a whole", China is referring to its system of TRQ administration in its entirety. China's system of TRQ administration includes, *inter alia*, the six

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In our view, the fact that two provisions have a different "scope and content" does not, in and of itself, imply that a panel must address each and every claim under those provisions. Indeed, if this were so, then only in the rarest of circumstances would a panel be able to exercise judicial economy on a claim. Ibid.

[37] See China's first written submission, paras. 85-87.

[38] See China's oral statement to the Panel at the first meeting, para. 14.

[39] See China's response to Panel question No. 26, para. 73.

[40] See United States' first written submission, para. 67.

specific aspects challenged by the United States – the Basic Criteria; Allocation Principles; public comment process; public notice requirements; usage requirements and penalties; and administration of the STE and non-STE portions of the TRQs. China's system of TRQ administration also includes aspects not challenged by the United States, such as the application forms for TRQ allocations and reallocations utilized by NDRC; the applicant categories and application periods specified by NDRC in the annual Allocation Notice; the public inquiry process; the TRQ FAQs and TRQ Guidelines issued by NDRC; NDRC's reliance on the first-come, first-served method at the reallocation stage; the process by which NDRC and the local authorized agencies inform recipients that they have received allocations and reallocations; and the designation of COFCO as the sole STE authorized to import grains.[41]

26. Under a holistic analysis, no single administrative measure or practice is determinative of whether China's administration is consistent with Paragraph 116. To illustrate, access to information relating to allocation and reallocation is facilitated through the right of any entity (applicant or non-applicant) to submit any inquiry relating to the grains TRQs to local authorized agencies and NDRC. The inquiry feature interacts with all of the other features of China's TRQ system, including the Basic Criteria, to further the administration of the TRQs on a transparent, predictable, and fair basis, using clearly specified procedures and requirements that do not inhibit the filling of each TRQ. Any entity could submit an inquiry to NDRC requesting further details as to the operation of the public comment procedure. The question of the consistency or inconsistency of China's administration with Paragraph 116 thus is not decided by any one aspect.[42]

27. The contents of Paragraph 116 affirm that a holistic analysis is appropriate. None of the requirements set forth in Paragraph 116 pertain to specific aspects of TRQ administration, such as when and how to provide public notice of permitted imports or the mechanisms to use in determining allocation and reallocation amounts and recipients. Rather, they pertain to the administration of the TRQs regime as a whole. China also considers that the Agreement on Import Licensing Procedures ("ILP Agreement") suggests such a holistic approach is appropriate when evaluating China's administration of the TRQs.[43] Article 3.2 of the ILP Agreement requires non-automatic licensing procedures to be "no more administratively burdensome than absolutely necessary to administer the measure". China notes that the Members had this standard in mind with respect to China's TRQ administration.[44] It is well-established that evaluating the necessity of a measure entails a holistic analysis that involves weighing and balancing a series factors not limited to the measure itself.[45] China considers that the holistic evaluation of the administration of non-automatic licensing procedures under the ILP Agreement indicates that a similar evaluation should be undertaken with respect to the administration of TRQ licensing procedures under Paragraph 116.

28. China thus requests that the Panel reach a conclusion on the consistency of China's administration with Paragraph 116 that rests on China's system of TRQ administration as a whole.

2. The United States Has Not Demonstrated that the Basic Criteria Are Inconsistent with Article X:3(a) of the GATT 1994

29. The United States argues that the inclusion of "vague" or "undefined" Basic Criteria is inconsistent with China's obligation to administer its TRQs in a "reasonable manner" under Article X:3(a) of the GATT 1994. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Basic Criteria under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Basic Criteria

[41] See China's response to Panel question No. 60(b), para. 41.
[42] See China's second written submission, para. 59.
[43] See China's second written submission, para. 60.
[44] See *Working Party Report*, para. 112 ("…members asked that China ensure that its TRQ arrangements be no more administratively burdensome than absolutely necessary…").
[45] See, e.g. Appellate Body Report, *EC – Seal Products*, para. 5.169, referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164, *US – Gambling*, para. 306, and *Brazil – Retreaded Tyres*, para. 182.

necessarily leads to an unreasonable administration of the grains TRQs,[46] and because the United States has failed to "support its claim with solid evidence".[47]

30. In evaluating whether the United States has in fact demonstrated that the Basic Criteria necessarily lead to the unreasonable administration of the grains TRQs, the specific factual circumstances in which the Basic Criteria are applied must be examined in light of their objective.[48] There is no evidence that similarly situated applicants are being treated differently in NDRC's evaluation, or that the requirements have in fact caused prejudice to the United States or other Members.[49] China acknowledges that a showing of trade effects is not required to establish inconsistency with Article X:3(a). China recalls however, that "Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world" and that this "can involve and examination of whether there is a "possible impact on the competitive situation due to…unreasonableness in the application" of the measure.[50]

31. When the "real effect" of the Basic Criteria is examined, it is evident that China's administration of the Basic Criteria is consistent with Article X:3(a). The "real effect" is that all applicants are subject to the same *pro forma* screening before their applications are forwarded to NDRC for substantive review. There is no evidence that grains traders operating in China are being negatively impacted by an unreasonable application of the Basic Criteria. Furthermore, the "possible impacts'' alleged by the United States are based on a misunderstanding of the function of the Basic Criteria in the TRQ administration process.

32. The United States emphasizes that the Basic Criteria are "insufficiently specified to permit applicants to properly understand and subsequently meet the criteria."[51] However, the Basic Criteria are met as soon as an applicant signs the application, passes the standard background check, and is confirmed not to have violated the *2003 Provisional Measures*.[52] What an applicant must properly understand are the requirements to provide certain operational data and to sign the application form – requirements which are clearly specified in the form itself. The descriptions of each of the Basic Criteria have no bearing on this aspect of the application process. The United States also theorizes that the Basic Criteria "prevent applicants from correcting or improving their applications in the future."[53] As China explained in its first written submission, any applicant whose form is rejected by a local agency is informed as to the reason for the rejection and provided an opportunity to complete and resubmit the form.[54] The application of the Basic Criteria therefore cannot "have caused, [n]or are likely to cause", this outcome.[55]

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[46] See Appellate Body Report, *EC – Selected Customs Matters*, para. 201.

[47] See Panel Report, *Thailand – Cigarettes*, para. 7.874, quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 217. The Appellate Body stated:

> We observe, first, that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.

Ibid.

[48] See Panel Report, *US – COOL*, para. 7.851 (finding that "whether an act of administration can be considered reasonable within the context of Article X:3(a) entails a consideration of factual circumstances specific to each case" and "an examination of the features of the administrative act at issue in light of its objective, cause or the rationale behind it"). See also Panel Report, *Thailand – Cigarettes*, para. 7.921. The Panel found that the Appellate Body's "clarification of the principles underlying the chapeau of Article XX provide guidance on the analysis of the reasonableness requirement under Article X:3(a)" and noted that "for example…the rationale that can explain [the measure at issue] is also relevant to evaluating the question of whether it is an administrative process that leads to unreasonable administration".

[49] See Panel Report, *Thailand – Cigarettes*, para. 7.969 (finding a violation of Article X:3(a) where proven delays under Thailand's customs review process tended "to show prejudice caused to other Member governments and traders").

[50] See Panel Report, *Argentina – Hides and Leather*, para. 11.77 (emphasis added).

[51] See United States' first written submission, para. 233.

[52] See China's first written submission, para. 35.

[53] See United States' first written submission, para. 238.

[54] See China's first written submission, para. 38.

[55] See Panel Report, *China – Raw Materials*, para. 7.705, quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 225. The Appellate Body stated:

33. In relation to the U.S. argument that authorized agencies may be providing divergent interpretations of the Basic Criteria, the United States misunderstands the role that authorized agencies play in the administration of China's TRQs. Authorized agencies do not conduct substantive reviews of applications. The role of authorized agencies is explained in Articles 8, 11 and 12 of the *Provisional Measures*. The role of the authorized agencies pursuant to these provisions is simply to check the applications for completeness and forward applications to NDRC for review. The authorized agencies do not interpret the Basic Criteria, and if they receive a question that is not answered by the TRQ FAQs or TRQ Guidelines, they forward such questions to NDRC. Accordingly, there is no opportunity for "divergent interpretations" or "inequitable application" of the eligibility criteria.[56]

34. The reasonableness of the Basic Criteria must also be evaluated in light of their objective, which is to ensure that all TRQ applicants are accountable for the information they submit and are acting in accordance with the law, so as to ensure that the administration of each TRQ is "uniform, fair, just, predictable and non-discriminatory".[57] This objective is both reasonable and reconcilable with China's administration of the Basic Criteria.[58] When considered in conjunction with the fact that the Basic Criteria are applied uniformly and impartially, and that only NDRC is authorized to conduct a substantive review of each application, it is evident that China's measures are consistent with its obligations under Article X:3(a).[59]

35. Finally, the reasonableness of the Basic Criteria must be evaluated with due regard to China's right, and the right of all Members, to deploy the manner of administration that each considers "most appropriate in the particular circumstances in which it is situated".[60] China developed a preliminary screening step in order to efficiently ensure that the hundreds of applicants for TRQ allocations reviewed by NDRC are complete. China reasonably assessed that it would not be an efficient use of NDRC's limited resources to both confirm completeness and conduct substantive reviews of each application.[61]

36. For these reasons, the United States has failed to demonstrate that the inclusion of the Basic Criteria necessarily leads to an unreasonable administration of the grains TRQs, and the U.S. claim under Article X:3(a) must fail.

[W]e may conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non- uniform application of the legal instrument at issue.

Ibid.

[56] See United States' first written submission, para. 230. See also China's second written submission, paras. 21-27.

[57] See *2003 Provisional Measures*, Article 1 (CHN-5).

[58] See Panel Report, *Thailand – Cigarettes*, fn 1573 (discussing the Appellate Body's holding in *US – Shrimp* that one of the bases for its conclusion that a measure resulted in unjustifiable discrimination was the difficulty of reconciling the application of the measure with its stated objective).

[59] See Panel Report, *Thailand – Cigarettes*, paras. 7.922 and 7.929. The Panel found as follows in examining the Philippines' claims under Article X:3(a):

[G]ranting dual function officials the power to make customs and fiscal decisions concerning cigarettes, both imported and domestic, as well as access to confidential information on imported cigarettes would appear to constitute an act of inappropriate and/or not sensible administration *unless there is a particular rationale that can explain the concerned act*. … In conclusion, *given the rationale behind it*, and considered in conjunction with safeguards in the system, we find that the Philippines has not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X:3(a).

Ibid (emphasis added).

[60] See Panel Report, *Thailand – Cigarettes*, para. 7.925.

[61] See China's first written submission, para. 42.

B. Allocation Principles

1. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Paragraph 116 of the *Working Party Report*

37. The United States claims that the Allocation Principles are inconsistent with Paragraph 116 of the *Working Party Report*, because the Allocation Principles are not transparent, predictable, fair, or clearly specified.

38. In China's view, transparent, predictable, fair, and clearly specified TRQ administration does not require that an applicant know precisely how NDRC weighs the factors identified by the Allocation Principles. China submits that 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". China also submits that applicants can easily discern from China's measures that there are different categories of applicants, and that NDRC takes an applicant's category into account in applying the Allocation Principles.[62]

39. The United States further claims that the content of the category "other relevant commercial criteria" in the Allocation Principles is not defined, and that this also renders the Allocation Principles not "transparent", "predictable", "fair", or "clearly specified" within the meaning of Paragraph 116. China does not believe that the use of a residual category renders the Allocation Principles inconsistent with Paragraph 116 of the *Working Party Report*. The use of residual categories like "other relevant commercial criteria" is common practice in the administrative regulations of WTO Members.[63] Such categories are purposefully broad in order to preserve the administering authority's ability to take into account all relevant information.

40. China's method of distributing allocations is not automatic, and China does not suggest otherwise. China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process. China submits that it is responsibly exercising "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[64] In this case, China wants to utilize the expertise of NDRC officials to the maximum extent possible by granting them latitude to make sufficiently individualized decisions with respect to applications.[65] China's view that this is the most transparent, predictable, and fair way to achieve full utilization of the TRQ should not be "second guess[ed]", even if there are other methods of allocation that might achieve this objective.[66] China also notes that the United States has presented no evidence that any applicants are actually confused by the Allocation Principles.

2. The United States Has Not Demonstrated that the Allocation Principles Are Inconsistent with Article X:3(a) of the GATT 1994

41. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim relating to the Allocation Principles under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should reject it because the United States has not demonstrated that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQs.

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[62] See China's oral statement to the Panel at the second meeting, paras. 14 and 15.

[63] See China's first written submission, para. 54 (quoting the U.S. sugar TRQ regulations).

[64] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel found:

> A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions.

Ibid.

[65] See Panel Report, *Thailand – Cigarettes*, para. 7.924.

[66] See Panel Report, *Thailand – Cigarettes*, para. 7.924. The Panel determined that it was "not in a position to second guess the specific needs of the Thai government in assigning selected customs and tax officials with a dual role as a director of a state enterprise, TTM" and "therefore recognize[d] that the Thai government officials…may indeed be well equipped to apply their expertise in laws and regulations relating to customs and internal taxes to the management of TTM".

42. In relation to the argument that applicants must be able to understand how NDRC evaluates "actual production and operating capacity", China repeats that reasonable administration does not require that the measures provide a detailed understanding of the basis upon which NDRC evaluates each application.

43. In relation to the inclusion of "other relevant commercial criteria", the United States similarly fails to demonstrate that this necessarily leads to unreasonable administration. As China has explained, this residual category is a commonly used mechanism for preserving a necessary element of discretion in administrative decision-making processes. As China has also explained, including a reasonable element of discretion as part of its allocation process is permissible. Thus, the Panel should reject the United States' argument that China fails to administer its TRQs for wheat, rice, and corn in a reasonable manner due to the alleged vagueness of the Allocation Principles.

C. Administration of STE vs. Non-STE Portions of the TRQs

1. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Paragraph 116 of the *Working Party Report*

44. The United States alleges in relation to the STE vs. non-STE allocation process that China does not administer its TRQs on a transparent or predictable basis and that it does not use administrative procedures that are clearly specified. In support of these allegations, the United States repeatedly emphasizes that the *2017 Allocation Notice* does not address how NDRC determines which applicants will receive allocations from the STE versus non-STE portions of each TRQ, nor do the Allocation Principles distinguish or refer to the STE portion specifically.[67]

45. The *2017 Allocation Notice* does not provide this information and the Allocation Principles do not otherwise distinguish the STE portion because applicants do not receive allocations from the STE portion of each TRQ. The entire STE portion of each TRQ is allocated to COFCO.

46. The United States also argues that it is not transparent or predictable to deny an applicant the opportunity to specify whether the applicant is requesting an allocation under the STE or non-STE portion of the TRQs and whether the applicant would accept an STE allocation, if granted.[68] Applicants are not given this opportunity because applicants are not granted allocations under the STE portion of the TRQs.

47. The fact that applicants are not granted allocations from the STE portion also moots the United States' argument that because end-users with such allocations would need to seek approval from NDRC to import directly in the event that the STE does not secure a contract to import the full amount of the allocation by August 15, the TRQ holder "*may not be able to* import the full amount of TRQ allocation received."[69] No TRQ Certificate holder is ever required to seek approval from NDRC for the right to import directly because no TRQ Certificate holder other than COFCO is ever granted an STE allocation in the first instance. No TRQ Certificate holder is therefore ever in a position where they "have just thirty days to contract for importation."[70] For this reason, the *2017 Allocation Notice* provides no further detail regarding the post-August 15 approval process.

48. The United States' argument that applicants allocated an amount from the STE portion of the TRQ "cannot be certain they will be able to import the full amount within the specified timeframes, and thus be eligible to apply for a reallocation, if desired, and avoid any penalties associated with failing to import" is also moot.[71] The United States' proposed hypothetical category of applicants granted STE allocations does not exist. All non-STE applicants receive the same type of allocation. All non-STE applicants can therefore easily predict whether they will be able to import the amounts allocated within specified time periods.

[67] See United States' first written submission, paras. 91 and 92, 130-132, 172.
[68] See United States' first written submission, paras. 92, 132.
[69] See United States' first written submission, para. 147 (emphasis original).
[70] See United States' first written submission, para. 148.
[71] See United States' first written submission, para. 145.

49. The United States' arguments in relation to the use of administrative procedures that would not inhibit the filling of each TRQ largely repeat the U.S. arguments in relation to transparency and predictability and therefore are similarly inapplicable in light of the allocation of the entire STE portion of the TRQ to COFCO.[72] In arguing that the STE vs. non-STE distinction inhibits the filling of the TRQ, the United States elaborates on the alleged inability of applicants to request a particular allocation type.[73] As explained, however, applicants do not have the ability to choose which allocation type to apply for because the STE portion is only available to COFCO.

50. The United States also reiterates that applicants do not have information regarding the STE vs. non-STE allocation process. Again, because no applicants receive state trading allocations, there is no need for applicants to understand the basis on which that hypothetical determination would be made. Furthermore, there are no "costs, time constraints, and administrative burdens" that are distinct to "each type of importation process" which result in "uncertainty" that "makes it more difficult to negotiate with potential exporters" because there is only one type of importation process for all TRQ applicants other than COFCO – direct importation.[74]

51. In sum, China's administration of its TRQs is not inconsistent with its obligations under Paragraph 116 of the *Working Party Report* because the administration of both the STE and non-STE portions of the TRQ is transparent, predictable, uses administrative procedures that are clearly specified, and does not inhibit the filling of each TRQ.

2. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article X:3(a) of the GATT 1994

52. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a). Even if the Panel proceeds to examine the U.S. claim, the Panel should find that China administers the STE and non-STE portions of the TRQs consistently with Article X:3(a).

53. The United States claims that because China administers a "single application process", applicants are less able "to anticipate and commercially plan for the allocated TRQ amounts they receive."[75] As China has explained, the use of a "single application process" does not create uncertainty because there is only a single type of allocation granted to non-STE applicants. The United States also claims that "TRQ Certificate holders can receive state trading, non-state trading, or a mixed allocation. However, no guidance is provided regarding how NDRC determines the allocation."[76] This outcome is not possible. Mixed allocations cannot be granted because NDRC grants only one type of allocation to non-STE applicants.[77] It follows that since no mixed allocations are granted, there is no risk that each portion of a mixed allocation will not be granted in commercially viable amounts and that this will "further increase risks and costs associated with importation, compounding an already unreasonable process."[78] The United States' claim under Article X:3(a) relating to the administration the STE vs. non-STE portions of the TRQs should therefore be rejected.

3. The United States Has Not Demonstrated that the Administration of the STE vs. Non-STE Portions of the TRQs Is Inconsistent with Article XI:1 of the GATT 1994

54. The United States argues that "[t]he use of a single application for the state trading and non-state trading TRQ allocations constitutes a 'restriction' on importation of wheat, rice, and corn within the meaning of Article XI:1 of the GATT 1994" because the United States argues that "differing requirements and commercial consideration of state trading and non-state trading TRQ allocation,

[72] See United States' first written submission, paras. 190-205.
[73] See United States' first written submission, para. 197.
[74] See United States' first written submission, para. 201.
[75] See United States' first written submission, paras. 230, 255-260.
[76] See United States' first written submission, para. 242.
[77] The United States points out that the sample TRQ Certificate annexed to the *2003 Provisional Measures* indicates that an applicant may be allocated a certain amount categorized as "state-trading". See United States' first written submission, para. 258. In practice, TRQ Certificates do not allocate amounts of this type because, as explained above, there is only one type of allocation available to non-STE applicants.
[78] See United States' first written submission, para. 259.

when combined with applicants' inability to decide or predict which allocation they will receive" creates uncertainty that discourages applicants from applying for allocations.[79]

55. The U.S. claim under Article XI:1 of the GATT 1994 is unfounded. First, as China will explain in Part F below, TRQs, including measures necessary for their administration, are not "restrictions… on the importation of any product" within the meaning of Article XI:1.[80] Second, as China has explained above, all non-STE applicants receive non-STE allocations that present the same requirements and implicate the same commercial considerations, therefore there is no "uncertainty" introduced into the administrative process via the allocation of the non-STE and STE portions of the TRQs.

4. The United States Has Not Demonstrated that the Allocation of the STE Portions of the TRQs Entirely to COFCO Is Inconsistent with Paragraph 116 of the *Working Party Report* or Articles X:3(a) and XI:1 of the GATT 1994

56. With respect to Paragraph 116, China disagrees that it is not transparent, predictable, or fair for China's measures and practices to distinguish between STEs and non-STEs. STEs and non-STEs are different entities and China's measures expressly distinguish between them. It is therefore easily discernible, predictable, and fair that non-STEs and STEs are subject to different requirements.[81]

57. Specifically, in China's view, there is nothing inherently unfair in NDRC's decision to allocate the STE portions of the TRQs entirely to COFCO without applying the Basic Criteria and Allocation Principles. The STE portions of the TRQs may be allocated only to those STEs authorized to import grains. As China has explained, COFCO is the only STE authorized to import grains.[82] Applying the Basic Criteria and the Allocation Principles to COFCO would therefore not make sense.

58. As China has explained, COFCO is not an end-user as defined in China's written measures. COFCO is therefore not required to return its unused amounts for reallocation.[83] Requiring the only STE authorized to import grains to return unused grains would not make sense because no other STE would be eligible to apply for COFCO's unused amounts at the reallocation stage.[84]

59. For the same reason, penalizing COFCO at the initial allocation stage for failing to utilize its entire allocation would not make sense. The amounts not allocated to COFCO could not be allocated to any other STE because COFCO is the only STE authorized to import grains. Reducing COFCO's annual allocation would therefore guarantee that part of the STE portion of each TRQ would not be utilized. In contrast, by allocating the entire STE portion of each TRQ to COFCO each year, NDRC preserves the opportunity for the STE portions to be fully utilized.[85]

60. With respect to Article XI:1, the United States has failed to demonstrate that allocating the entire STE portion of each TRQ to COFCO exerts a "limiting effect" on imports independent of the underlying TRQ and is therefore inconsistent with Article XI:1. In its responses to questions from the Panel, China provided data with respect to the allocation of the STE and non-STE portions of the TRQ. This data confirms that both the non-STE and STE portions of the TRQs are fully allocated. Specifically, the data confirm that each year, the STE portions of the TRQs have been fully allocated to COFCO. When there is full allocation, allocation is not operating as an aggregate limitation on in-quota imports. Thus, China's practice of allocating the entire STE portion to COFCO is not exerting a limiting effect on imports independent of the underlying TRQ.[86]

[79] See United States' first written submission, paras. 292, 301.
[80] See, e.g. Appellate Body Report, *EC – Bananas (21.5)*, para. 335.
[81] See China's response to Panel question No. 63, para. 44.
[82] See China's response to Panel question No. 5(a), para. 12.
[83] See China's second written submission, para. 30.
[84] See China's response to Panel question No. 66, para. 46.
[85] See China's response to Panel question No. 66, para. 47.
[86] See China's second written submission, paras. 88 and 89.

D. Public Comment Process

1. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Paragraph 116 of the *Working Party Report*

61. The U.S. claims under Paragraph 116 relate to the fact that the process for evaluating and verifying public comments is not spelled out in the relevant measures. In practice, all of the U.S. concerns are unfounded. Applicants are informed of comments, they are provided with an opportunity to rebut comments, and comments are only taken into account if the information provided is verified. The United States believes that the procedures for evaluating the comments need to be described on the face of the measures, but the United States has presented no evidence that any applicant is in fact confused about the public comment process. Nor has the United States presented any evidence that an applicant has sought clarification concerning the public comment process from NDRC, and such clarification has not been provided.

62. The United States acknowledges that "it is clear on the face of the *Announcement of Applicant Enterprise Data*" that this procedure exists.[87] The United States therefore concedes that it is clear from China's measures that a public comment process is part of China's system of TRQ administration. The United States' desire for more information regarding precisely how this procedure works in practice is not determinative of whether in fact this aspect is "clearly specified". The fact that the existence of the public comment process is easily discerned from China's measures and that further details can be acquired by interested entities using the public inquiry process is sufficient to comply with Paragraph 116.

2. The United States Has Not Demonstrated that the Public Comment Process Is Inconsistent with Article X:3(a) of the GATT 1994

63. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claim under Article X:3(a) relating to the public comment process. Even if the Panel proceeds to examine the U.S. claim, it should reject it because the United States largely repeats the arguments that it presents in relation to Paragraph 116, which provide no basis for arguing that the public comment process necessarily leads to the unreasonable administration of the grains TRQs.

E. Information Concerning TRQ Allocation and Reallocation

1. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Paragraph 116 of the *Working Party Report* and Article X:3(a) of the GATT 1994

64. For the reasons China has explained, the Panel should exercise judicial economy with respect to the United States' claims that Paragraph 116 and Article X:3(a) require China to publish the total amounts actually allocated, returned, and reallocated.[88] Even if the Panel proceeds to examine the United States' claims concerning the publication of this information under Paragraph 116 and Article X:3(a), for the reasons China explained in its first written submission, the United States has failed to establish that either Paragraph 116 or Article X:3(a) requires China to publish this information.[89] China also explained in its submissions and responses to Panel questions that neither Paragraph 116 nor Article X:3(a) require China to publish the identities of TRQ recipients and the individual amounts actually allocated to each recipient.[90] China notes that the European Union agrees with China that no requirement to publish the identities of the recipients of TRQ allocations and reallocations can be derived from the text of Paragraph 116 or Article X:3(a).[91]

[87] See United States' response to Panel question No. 9, para. 33.
[88] See Section III.B, *supra*.
[89] See China's first written submission, paras. 61-82.
[90] See China's first written submission, paras. 66 and 67.
[91] See China's oral statement to the Panel at the first meeting, para. 28, citing European Union's third party submission, paras. 103 and 104.

2. The United States Has Not Demonstrated that the TRQ Allocation and Reallocation Information Published by China Is Inconsistent with Article XIII:3(b) of the GATT 1994

65. Properly interpreted, Article XIII:3(b) requires only the publication of the total TRQ quantities for wheat, rice, and corn, as provided in China's Schedule CLII. Article XIII:3(b) refers to "import restrictions involving the fixing of quotas". "To fix" means to "settle definitely" or to "determine".[92] Article XIII:3(b) therefore refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows – "which will be permitted to be imported" – must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.

66. Under the plain meaning of the terms of Article XIII:3(b), the scope of this provision is therefore limited to the total quota quantities set forth in China's Schedule CLII. It does not extend to the specific quantities later permitted to be imported in connection with individual import licenses issued to particular entities.

67. The requirement to give public notice of "any change in such quantity or value" must also be interpreted in relation to the "fixing of quotas". It follows that the "change" referred to can only be a change to the quotas that are initially "fixed". As noted above, in China's case, these are the quotas provided in China's Schedule CLII. Thus, the "change" that must be notified would be "any change" to those scheduled quotas – not "any change" to the specific quantities allocated from those quotas, whether at the time unused quotas are returned or at the time of reallocation. China notes that Canada agrees with China that these terms require only publication of the total amount that a Member decides will be permitted to be imported at the within-quota rate in a quota year, and any subsequent change to that amount.[93]

68. The fact that total TRQ amounts may also be provided in a Member's schedule does not render the public notice requirements of Article XIII:3(b) "useless".[94] As China explained in its responses to questions from the Panel, the TRQ information in a Member's schedule will not always satisfy the specific public notice requirements set out in Article XIII:3(b), such as where the specific dates of the quota period are not provided in the schedule.[95] The public notice requirements in Article XIII:3(b) are also necessary to ensure that importers do not mistakenly equate an announcement that a Member intends to eliminate a scheduled TRQ through formal negotiations for a decision to halt administration of that TRQ during the quota period.[96] Article XIII:3(b) is also necessary to ensure notice continues to be provided in relation to quota periods that open between when a Member negotiates a change to its TRQ commitments pursuant to Article XXVIII and publishes an updated schedule.[97] Additionally, in the event that a Member will not be administering a scheduled TRQ during the quota period because better access conditions will be applied than scheduled, Article XIII:3(b) would ensure a Member provided public notice of that information.[98]

69. The existence of Article XXVIII of the GATT 1994 similarly does not render redundant the obligation in Article XIII:3(b) to publish any change in quantity or value. Article XXVIII requires a Member to inform other Members if it wishes to withdraw or modify any concession embodied in its schedule as a formal matter. This is not the same as notifying the public of an increase in the amount of a TRQ over and above the amount specified in a schedule for a given year. If China were to decide to increase the amounts of its TRQs beyond the amounts specified in its Schedule CLII during the

[92] See *New Shorter Oxford English Dictionary*, Vol. 1, p. 962.

[93] See China's oral statement to the Panel at the first meeting, para. 22, citing Canada's third-party submission, paras. 34 and 35.

[94] See European Union's third-party submission, para. 95.

[95] See China's response to Panel question No. 36, para. 90.

[96] See Notification of Brazil in Document G/AG/N/BRA/44 of 22 February 2018.

[97] See, e.g. Notification by the European Union in Document G/AG/N/EU/40, of 15 November 2017 (noting where applicable "[q]uantity updated with effect from 1 January 2017, pursuant to the result of negotiations under Articles XXIV:6 and XXVIII GATT relating to the accession of Croatia to the European Union.").

[98] See, e.g. Notification of Mexico in Document G/AG/N/MEX/35 of 2 February 2018.

quota period, it would be required by the terms of Article XIII:3(b) to publish this change. China would not be required to inform other Members of this change pursuant to Article XXVIII of the GATT 1994, and so the obligation in Article XXVIII does not render the obligation in Article XIII:3(b) redundant.

70. China's decision to publish only the total aggregate amounts available for importation under each TRQ specified in China's Schedule CLII is therefore consistent with its obligations under Article XIII:3(b) of the GATT 1994.

F. End-Use Requirements and Penalties for Non-Use

1. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Paragraph 116 of the *Working Party Report*

71. China disagrees with the United States that its end-use requirements and penalties inhibit the filling of the TRQs. In China's view, the United States' claim concerning these components of China's TRQs fails on three related grounds.

72. First, the United States has challenged China's end-use requirements and penalties under a requirement listed in the first sentence of Paragraph 116, which addresses the *administration* of China's TRQs. For the reasons China explains in Part 2, China's end-use requirements and penalties are not *administrative* in nature, but instead are *substantive* rules that form part of the TRQ itself. Consequently, these components of the TRQ are not subject to challenge under the requirement to administer TRQs in a manner that would not inhibit the filling of the TRQs.

73. Second, even if end-use requirements and penalties could be properly evaluated under Paragraph 116, the United States has not demonstrated that end-use requirements and penalties inhibit the filling of the TRQs. In China's view, these measures cannot inhibit the filling of the TRQs because they do not exert a limiting effect on the quantity of in-quota imports. China elaborates on this point in Part 2.

74. Third, China's Schedule CLII indicates that imposing end-use requirements and penalties is consistent with Paragraph 116. As China explained in its responses to Panel questions, penalties for non-use are expressly required by Schedule CLII, at paragraph 6(D).[99] Had the Members felt that the imposition of penalties, whether alone or in conjunction with end-use requirements, serves to inhibit rather than encourage the filling of TRQs, it is reasonable to presume that they would not have been included in China's Schedule.

75. Similarly, Schedule CLII specifies that China may take into account "production capacity" in determining allocations.[100] Grains imported into China are typically processed prior to sale. Taking an enterprise's capacity to produce processed grains into account is only logical if enterprises are required to process grains in their own facilities. Absent this end-use requirement, there would be no purpose for collecting and considering production capacity data. As China explained in its first written submission, requiring production of processed grains in the applicant's own facilities is a reasonable means of ensuring efficient allocation of the TRQs.[101] To interpret Paragraph 116 as prohibiting measures explicitly or implicitly contemplated by Schedule CLII is to preclude a harmonious interpretation of China's obligations.

76. For these reasons, the Panel should reject the United States' challenge under Paragraph 116 to these components of China's TRQs.

[99] See China's response to Panel question No. 27, para. 77.
[100] See China's response to Panel question No. 27, para. 78.
[101] See China's first written submission, para. 126.

2. The United States Has Not Demonstrated that China's End-Use Requirements and Penalties for Non-Use Are Inconsistent with Article XI:1 of the GATT 1994

77. The United States alleges that China's end-use requirements and penalties for non-use are inconsistent with Paragraph 116 of the *Working Party Report* because they inhibit the filling of each TRQ.[102] The United States also alleges that these end-use requirements and penalties are prohibited under Article XI:1 of the GATT 1994. The United States challenges the end-use requirements in combination with penalties and the end-use requirements *per se*.

78. China submits that its end-use requirements, whether separately or in combination with penalties for non-use, are not inconsistent with Article XI:1. First, TRQs are not subject to Article XI:1. A TRQ is not a prohibited "quantitative restriction" because it does not restrict the quantity of imports. A TRQ limits the volume of imports that may take advantage of the lower in-quota rate, but it imposes no limit on the total volume of imports that may enter once the in-quota volume is filled; out-of-quota imports are simply subject to the higher, out-of-quota rate. The Appellate Body has previously considered and rejected the proposition that TRQs are subject to Article X1:1. TRQs are "duties" subject to Article II of the GATT 1994, not "quantitative restrictions" prohibited under Article XI:1.[103]

79. Second, the end-use requirements and penalties are not subject to Article XI:1 because they are substantive conditions on access to the TRQ and therefore form part of the TRQ itself. TRQs are stepped tariffs, consisting of a lower in-quota rate and a higher out-of-quota rate. To access the in-quota rate, importers will typically need to comply with certain *administrative* procedures, such as completing and submitting applications. In addition, access to a TRQ may also be limited by certain *substantive* conditions.

80. The distinction between the substantive content of a measure of general application and its administration has been clearly drawn by the Appellate Body in the context of interpreting the scope of Article X:3(a).[104]

81. In China's view, end-use requirements and penalties are substantive rules. These measures condition access to the TRQ in the same manner that customs classification rules condition access to certain duties. As substantive rules, these measures form part of the TRQ and fall outside the scope of Article XI:1.

82. Substantive conditions of access include conditioning access based on the country of origin of the imports. For example, Members may reserve a portion of a TRQ for imports from a designated country or countries.[105] If no imports originate from a designated country, the portion of the quota reserved for that country may not be available for importation. In this way, the condition contributes to defining the amount of the quota that is available – it does not address how that quota will be administered. The consistency of this type of reservation with a Member's WTO obligations could be

[102] See United States' first written submission, para. 192.

[103] See Appellate Body Report, *EC – Bananas (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 335 (explaining that "[i]n contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I [i.e. on an MFN basis]" and that "Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions.").

[104] Appellate Body Reports, *EC – Bananas III*, para. 200 and *EC – Poultry*, para. 115.

[105] See Notification by Canada in Document G/AG/N/CAN/116, of 12 March 2018 (Conditioning access to cheese and curd by specifying that "allocation to supplying: 69.9% of the tariff rate quota (TRQ) is reserved for imports from the EU, 30.1% for imports from all other sources."); see also Notification by the United States in Document G/AG/N/USA/120, of 28 March 2018 (noting where the tariff quota quantity "does not include quantities reserved for Mexico under NAFTA"); Notification by the United States in Document G/AG/N/USA/117, of 29 September 2017 (distinguishing between "Canada and all others" with respect to country import arrangement for "[s]ugar containing products (articles containing over 10% dry weight of sugars)"). Countries may also condition access by scheduling unlimited access for particular importers. See Notification by Thailand in Document G/AG/N/THA/84 of 10 February 2017 (specifying entities that may receive unlimited quantities of "[s]oya beans, edible and inedible, whether or not broken" and "soya bean cake").

properly analysed under Article II of the GATT 1994. Another type of substantive condition of access is the specification of certain end-uses for imports. This practice is common among Members.[106]

83. End-use requirements are substantive because they define the parameters of the quota itself; if imports will not be used for the specified purpose, they will not be accessible for importation regardless of whether the applicant submits an application or complies with any other administrative procedural requirement. China considers that a useful point of reference for distinguishing substantive conditions on access from administrative procedural requirements is whether the conditions in question are set forth in the Member's schedule. For example, China's Schedule CLII provides for the imposition of penalties and also of end-use requirements, through taking account of capacity to produce processed grains.

84. The conclusion that the substantive elements of a TRQ must be examined under Article II is even stronger when, as in this case, the challenged aspects of the TRQ are set forth in the responding Member's schedule. As China discussed in its responses to Panel questions, the usage requirements and penalties for non-use are contemplated by China's Schedule CLII (and, in the case, of the penalties for non-use, are expressly required).[107] The usage restrictions and penalties for non-use therefore form part of the quota described in China's Schedule. However one defines the distinction between substance and procedure, and between which elements of a TRQ form part of the "quota" that is excluded from Article XI:1 and which do not, certainly those elements that are set forth in the Member's schedule are outside the purview of Article XI:1. Otherwise the "treatment" that a Member is *allowed* to provide under its schedule in accordance with Article II could be found to constitute a prohibited "quantitative restriction" under Article XI:1

85. In contrast to substantive conditions on access, administrative procedures pertaining to import licensing could be subject to Article XI:1. However, the question of whether evaluation under Article XI:1 is appropriate in light of the applicability of the ILP Agreement, which specifically addresses this subject, is unsettled. Past statements by the Appellate Body suggest that administrative procedures used to administer TRQs should be examined under the ILP Agreement, at least in the first instance.[108] Acknowledging the applicability of the ILP Agreement to administrative measures and the applicability of Article II to TRQs avoids the conflict between Article II and Article XI:1 that necessarily results from the United States' overly broad interpretation of Article XI:1.

86. Even if end-use requirements and penalties were properly subject to Article XI:1, the United States has not demonstrated that these requirements have a "limiting effect" on imports separate from the limiting effect of the quota itself. Such an effect must be demonstrated to establish a breach of Article XI:1.[109]

87. In *Argentina – Import Measures*, the Appellate Body observed that "not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so."[110] To violate Article XI:1, "the challenged measures themselves must limit the importation of products, and the limitation caused by other measures should not be attributed to them."[111] If elements such as the usage restrictions and penalties for non-use do not themselves "limit the

[106] See China's second written submission, para. 77.
[107] See China's response to Panel question No. 27.
[108] See Appellate Body Report, *EC – Bananas III*, para. 204. The Appellate Body explained that:
> Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.

Ibid. See also China's response to Panel question No. 38, paras. 97-99.
See also Panel Report, *Turkey – Rice*, para. 7.38. The Panel held that:
> In contrast to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the provisions of the Import Licensing Agreement invoked by the United States and Articles X:1 and X:2 of the GATT 1994 deal with the administration or application of trade measures rather than with the substantive content of such measures *per se*.

Ibid. See also China's response to Panel question No. 38(a), para. 96.
[109] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[110] Appellate Body Report, *Argentina – Import Measures*, para. 5.243.
[111] Appellate Body Report, *Argentina – Import Measures*, para. 5.244 (emphasis added).

importation of products independently of the limiting effect of another restriction", then those elements "cannot be said to produce the limiting effect and, thus, [they] will not amount to a 'restriction' captured by the prohibition in Article XI:1."[112]

88. The United States has not demonstrated that the usage restrictions and penalties for non-use have a limiting effect on imports separate from the limiting effect of the quota itself. The United States offers nothing but speculation about how the existence of usage restrictions and penalties for non-use might affect the import behaviour of an individual importer.[113] In the context of a TRQ, however, the limiting effect on trade results from the aggregate limitation on imports at the in-quota tariff rate. Unless the usage restrictions and penalties for non-use cause import levels to fall below the TRQ volume, they cannot have a limiting effect on trade that is independent of the TRQ itself. The United States has presented no evidence that this is the case. Moreover, China has confirmed that the non-STE portion of each TRQ was fully utilized in 2016 and 2017, with one exception in the case of short- and medium-grain rice (which is not subject to usage restrictions and is therefore irrelevant in this context). It is therefore evident that the usage restrictions and penalties for non-use do not have an independent limiting effect on imports.

89. These considerations illustrate why the United States' reliance on cases such as *India – Quantitative Restrictions* and *Indonesia – Import Licensing* is misplaced.[114] Those disputes did not concern TRQs. In the context of a TRQ, and even accepting that TRQs can be examined under Article XI:1, the complainant must demonstrate that the challenged aspects of the TRQ have an independent limiting effect on trade. The United States has failed to do so.

V. CONCLUSION

90. For the reasons set forth in its submissions, China respectfully requests that the Panel reject the United States' claims.

[112] Appellate Body Report, *Argentina – Import Measures*, para. 5.244.
[113] See, e.g. United States' first written submission, para. 306.
[114] See, e.g. United States' first written submission, para. 307.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. As a major agricultural exporter,[1] Australia has a significant interest in ensuring a transparent and predictable global trading system – including the transparent and predictable operation of tariff rate quotas (TRQs) for agricultural products. This dispute raises a number of interpretative questions regarding the interaction between the administration of TRQs and: (i) paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol; as well as (ii) a number of provisions of the General Agreement on Tariffs and Trade 1994.

2. In these proceedings, Australia has focused on the interaction between the administration of TRQs and the disciplines set out in paragraph 116 of China's Working Party Report.

II. PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT, INCORPORATED INTO CHINA'S ACCESSION PROTOCOL

3. Paragraph 116 of the Working Party Report is incorporated into China's Accession Protocol and therefore contains binding obligations on China.[2] As recognised by both the panel and Appellate Body in *China – Measures Affecting Imports of Automobile Parts*, the commitments China made in these accession documents are enforceable as an integral part of the WTO Agreement.[3] China is therefore bound to administer TRQs in accordance with the commitments made in that paragraph, namely to:

> … ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ. China would apply TRQs fully in accordance with WTO rules and principles and with the provisions set out in China's Schedule of Concessions and Commitments on Goods.[4]

4. In Australia's view, China's commitments in paragraph 116 address three distinct but interrelated aspects of TRQ administration:

(i) the *basis* on which TRQs are administered ("on a transparent, predictable, uniform, fair and non-discriminatory basis");

(ii) the *manner* in which TRQs should be administered ("using clearly specified timeframes, administrative procedures and requirements"); and

(iii) the *outcome* of TRQ administration ("[to] provide effective import opportunities … [to] reflect consumer preferences and end-user demand and … [to] not inhibit filling of each TRQ").

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[1] In particular, Australia is one of the leading global exporters of wheat, and the largest exporter of wheat to China. In 2017, China imported AUD$551 million HS 1001 (Wheat and meslin). Australia has been the top import source in this category since 2014: China Customs Data.

[2] See paragraph 1.2 of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"). The paragraphs listed for incorporation are contained in paragraph 342 of the Report on the Working Party of the Accession of China (WT/ACC/CHN/49) ("Working Party Report"). Paragraph 116 is listed as one of these paragraphs and is therefore incorporated into China's Accession Protocol. See also United States' first written submission, paras. 57-69.

[3] Panel Report, *China – Auto Parts*, paras 7.740-7.741; Appellate Body Report, *China – Auto Parts*, paras. 213-214.

[4] Paragraph 116, Working Party Report.

5. As treaty text, these commitments must be interpreted using principles of international treaty interpretation[5] in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties 1969* – that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[6]

(i) "ensure TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis"

6. The first tranche of commitments in paragraph 116 relates to the basis on which TRQs are administered. The ordinary meaning of the verb "**to administer**" is "manage as a steward; carry on or execute (an office, affairs etc.)".[7] The breadth of this term – and the lack of any textual qualification – indicates that it encompasses the full spectrum of activities associated with the administration of TRQs.

7. With respect to object and purpose, Australia observes that TRQs and the disciplines placed upon them arose from the commitment of Members in the Uruguay Round to phase out non-tariff barriers, such as quantitative restrictions, in favour of "tariffication". In this way, TRQs are permitted under WTO rules because they are recognised as a tool for Members to move towards greater trade liberalisation. However, to function as a tool for liberalisation, Members must administer TRQs consistently with the relevant prescribed disciplines. The commitments in paragraph 116 of China's Working Party Report were included to require China to undertake an express "commitment to administer TRQs in a simple, timely, predictable, uniform, non-discriminatory and non- trade restrictive manner, and in a way that would not cause trade distortions".[8]

8. In Australia's view, the breadth and context of the term "to administer", together with the object and purpose of the disciplines governing the administration of TRQs – and of paragraph 116 in China's Working Party Report – indicates that the commitments in this paragraph apply to *all* administrative actions and legal instruments associated with the allocation and reallocation of TRQs.[9]

9. A "**basis**" is "a determining principle; a set of underlying or agreed principles".[10] In Australia's view, this term indicates that all actions and legal instruments within the broad scope of "administration" (discussed above) must be *determined by* transparency, predictability, uniformity, fairness and non-discrimination.

10. The object and purpose of the disciplines governing TRQ administration and of paragraph 116 of China's Working Party Report in particular (discussed above) further support this interpretation.

11. Australia considers that any aspects of TRQ administration not based on or determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination, or that contradict these determining principles, would therefore not be consistent with this commitment.

(ii) "using clearly specified timeframes, administrative procedures and requirements"

12. The second tranche of commitments in paragraph 116 relates to the manner in which TRQs must be administered – that is, by having the relevant timeframes, administrative procedures and requirements associated with the allocation and reallocation of TRQs "clearly specified". The ordinary meaning of "**clearly**" is "distinctly; plainly; manifestly, obviously".[11] The verb "**to specify**" is defined as "mention or name (a thing, that) explicitly; state categorically or explicitly".[12] These terms indicate that the timeframes, administrative procedures and requirements associated with TRQ administration must be stated plainly and explicitly.

[5] In accordance with Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

[6] Article 31(1), Vienna Convention on the Law of Treaties 1969.

[7] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 29.

[8] Paragraph 112, Working Party Report.

[9] United States' first written submission, paras. 66-69.

[10] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 194.

[11] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 427.

[12] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 2, 2007, page 2944.

13. In Australia's view, in light of the object and purpose of the disciplines governing TRQ administration and of paragraph 116, the requirement to "clearly specify" these aspects of TRQ administration is to ensure that the audience that relies on this information can both obtain that information *and* understand what is required.

14. Australia considers that this commitment therefore requires that information on TRQ timeframes, administrative procedures and requirements must be explicit, accessible and comprehensible for the intended audience.

(iii) "that would provide effective import opportunities; that would reflect consumer preferences and end-user demand and that would not inhibit filling of each TRQ"

15. The third tranche of commitments in paragraph 116 makes clear that the administration of TRQs, in accordance with the prescribed basis and manner, should ensure outcomes that, among other things, do not inhibit the filling of each TRQ.

16. The ordinary meaning of "**inhibit**" is to "restrain, prevent";[13] and "**fill**" means to "make or become full".[14] In Australia's view, this indicates that a Member's administration of TRQs *must not prevent* the TRQ from being "full" – that is, from being fully exhausted.

17. In Australia's view, taken together, the individual prescribed commitments in paragraph 116 therefore create a broad and comprehensive obligation for China to administer TRQs on a specific basis, in a specific manner, to ensure specific outcomes.

18. Applying the relevant legal framework to the context of this dispute, Australia considers that the Panel will need to determine whether not complying with any one of the commitments in paragraph 116 amounts to a breach of China's obligation. In particular, Australia observes that the facts before the Panel indicate China's TRQs for wheat, corn and rice have been underfilled over several years.[15] Australia considers that the Panel will therefore need to examine:

- whether the mere underfilling of a TRQ alone determines that China's TRQ administration has inhibited the filling of each TRQ;
- whether inhibiting the filling of each TRQ alone amounts to a breach of paragraph 116; or
- whether a breach of paragraph 116 is only established if the specific basis and/or the specific manner in which China administers its TRQs has inhibited the filling of each TRQ.

III. CONCLUSION

19. In summary, Australia submits that China's distinct but interrelated commitments in paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol, create a broad and comprehensive obligation for China to ensure all actions and legal instruments associated with the allocation and reallocation of TRQs are administered:

- on a specific basis (determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination);
- in a specific manner (making explicit, accessible and comprehensible the information on TRQ timeframes, administrative procedures and requirements); and
- to ensure specific outcomes (including to ensure the filling of TRQs is not prevented).

20. We thank the Panel for the opportunity to submit these views.

[13] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 1384.
[14] *Shorter Oxford English Dictionary*, Sixth Edition, Volume 1, 2007, page 962.
[15] United States' first written submission, paras. 42-51.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. Brazil interprets the overall object and purpose of the set of different obligations under Paragraph 116 of China's Working Party Report as aiming for the reduction of the additional burden imposed on exporter Members by Tariff Rate Quotas (TRQs). Conforming to Article XIII:2 of the GATT, in applying import restrictions, Members "shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".

2. Moreover, Brazil understands that Paragraph 116 determines different types of obligations, which should be addressed separately on its own terms. The reason for this approach is that the violation of even one of these obligations will most likely affect both the overall transparent, predictable and fair basis of the TRQ's administration and its final outcome. In this sense, even if in practice the totality of the TRQ is filled, there may still be a violation of the different obligations set out in the provision, as the competitive opportunities of exporters would be nevertheless affected. Brazil thus believes that the Panel should analyze each obligation on its own terms. Some of those obligations are commented below.

a. TRANSPARENCY

3. Brazil believes that the definition of "transparency" as the "ease of assessment of information" should provide useful guidance in the present case. Brazil thus understands that the test to be applied by the Panel should comprise the prompt availability of information to an exporter and the ease of understanding how the domestic authorities implement the rules of administration of the TRQs. In that sense, it is Brazil's view that the obligation to readily publicize detailed information about the amounts allocated under the TRQs and the legal/administrative reasoning justifying the actual distribution of the quotas are an integral part of the obligation of administering TRQs in a transparent manner.

b. PREDICTABILITY

4. Paragraph 116 of the Working Party Report establishes China's obligation of administering its TRQs in a "predictable" manner. As defined by the United States, "the term 'predictable', in context, supports an interpretation that China must administer its TRQs through a process or system of rules or procedures such that applicants can easily predict or anticipate *how* decisions regarding TRQ administration, including allocation and reallocation, will be made". Brazil agrees that this is a useful test for the Panel to apply when assessing the conformity of China's administration of its grains TRQs under the predictability obligation provided by Paragraph 116.

5. Brazil does not believe that the obligations enshrined in Paragraph 116 imply "the elimination of any element of discretion from the allocation process". Such discretion, however, is not unbounded, as it must be subject to an obligation that the administration of –in the present dispute – TRQs is performed in a uniform, impartial, reasonable manner and, in the present case, in a way that is transparent, predictable and fair.

c. EFFECTS OF THE ADMINISTRATION OF TRQs

6. As regards the effects resulting from the absence of transparency and predictability in Members' domestic rules for the importation of agricultural products, Brazil notes that the system of tariff quotas imposes transaction costs to the exporter. Therefore, the principles of transparency, predictability, uniformity, fairness and non-discrimination should be duly respected by the Members who utilize TRQs so as to avoid the imposition of additional burdens over Members that export agricultural products.

II. APPLICATION OF ARTICLE XI OF THE GATT TO THE ADMINISTRATION OF TRQs

7. Brazil believes that Article XI:1 of the GATT encompasses a broad range of measures, for in accordance with said provision no Member shall institute or maintain prohibitions or restrictions other than duties, taxes or other charges "whether made effective through quotas, import or export licenses *or other measures*". Therefore, Brazil does not see why *a priori* these measures could not fall within the scope of Article XI:1.

8. While the TRQs can be considered duties and thus not covered by Article XI:1 of the GATT, a measure unrelated to the TRQ itself, which restricts access to a lower tariff bound in the schedule can be considered a "restriction on the importation of a product" within the meaning of the provision, as importers would have their access to the market hindered. Such measures restrict access much in the same way of other requirements which have been found to be inconsistent with Article XI:1 of the GATT, such as the requirements in the panel in *India – Quantitative Restrictions* where an import measure that required goods to be imported only by the "actual user" violated Article XI:1 and the prohibitions on importers from trading and/or transferring imported products in *Indonesia – Import Licensing* likewise.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute raises issues on the interpretation of provisions under the GATT 1994 and China's Protocol of Accession regarding the administration of tariff rate quotas (TRQs). Canada appreciates the opportunity it has had to provide its views on these issues and provides the following summary of its key arguments.

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

2. Article X:3(a) requires that a Member administer its "laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article" in a manner that is uniform, impartial and reasonable[1]. There are three key elements that should direct the Panel's analysis in assessing a claim under Article X:3(a).

3. First, the Panel must consider whether the matter at issue involves measures described in Article X:1 and therefore fall within the scope of Article X:3(a). Article X:1 describes a broad range of measures relevant to trade including those "pertaining to … rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports." In Canada's view, Article X:3(a) applies to the administration of a wide range of measures, including requirements for importation, that could affect trade and traders.

4. Second, the Panel must focus its analysis on assessing the Member's "administration"[2] of the relevant legal instruments. Article X:3(a) focuses on the manner in which Members administer or apply the legal instruments rather than disciplining the substantive content of the measure[3].

5. Nonetheless, as clarified by the Appellate Body in *EC – Selected Customs Matters*, it is possible to challenge under Article X:3(a) "the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1"[4]. To the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1"[5].

6. Third, the Panel must examine whether the respondent administers the legal instruments in a manner that is uniform, impartial or reasonable. These terms represent legally independent obligations[6]; a failure to comply with one or more of these obligations will result in an inconsistency with Article X:3(a).

7. Canada notes that Article X:3(a) does not prescribe in detail how a Member must administer its trade measures in order to meet its requirements. Article X:3(a) allows some discretion for the Member to administer its trade measures "in the manner it deems fit", although such discretion must be exercised in a way that respects "certain minimum standards for transparency and procedural fairness" [7]. The Panel must ultimately "exercise a balanced judgment" between the "traders' fundamental right" to minimum standards of transparency and procedural fairness, and the

[1] Panel Reports, *US – COOL*, para. 7.812.
[2] The Appellate Body has described "administration" as "putting into practical effect, or applying, a legal instrument of the kind described in Article X:1." See Appellate Body Report, *EC – Selected Customs Matters*, para. 224.
[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 199.
[4] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.
[5] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.873.
[6] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.867.
[7] Panel Reports, *US-COOL*, para. 7.861.

"sovereign right" afforded to Members to manage the manner in which they administer domestic measures[8].

8. Previous panel reports provide some guidance. For example, a vague application criterion, which was interpreted by numerous departments, without any guidance, has been found to necessarily lead to an unreasonable administration inconsistent with Article X:3(a)[9] because applications with equal descriptions could succeed or fail based on interpretations applied by officials[10].

9. Other panels have noted that if the measures were applied in a way that negatively affects traders' commercial interests, for example through a procedure that "inherently contains the possibility of revealing confidential business information", this may support a finding of inconsistency with Article X:3(a)[11].

10. Finally Canada notes that while the scope of Article X:3(a) is broad, bringing a claim under Article X:3(a) should be undertaken cautiously and it must be supported by "solid evidence" in reflection of the "gravity of the accusations" inherent in the claim under Article X:3(a)[12].

11. In Canada's view, China's administration of the TRQs falls within the scope of Article X:3(a) and therefore the panel should follow the guidance provided in previous panel reports in assessing whether, based on the evidence before it, the application criteria are unreasonable due to vagueness and application by numerous departments and agencies without guidance and whether the administration of the State Trading Portion of the TRQ is unreasonable on the basis that it negatively affects the competitive situation of the applicant.

III. INTERPRETATION OF THE OBLIGATION UNDER PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT

12. In Canada's view, the obligations under paragraph 116 of China's Working Party Report can be divided into three key elements: (1) the TRQ must be administered on a basis that is transparent, predictable and fair; (2) the timeframes, administrative procedures and requirements must be clearly specified; and (3) these clearly specified timeframes, administrative procedures and requirements must provide for effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit filling of the TRQ. Within each of these three elements are specific obligations that must be met.

13. Under the first element, China must fulfil all three requirements - to administer the TRQ on a transparent, predictable and fair basis; a failure to fulfil any one of these requirements will result in a failure to comply with the obligation under paragraph 116.

14. Canada notes that there is some overlap between the obligations under the first element of paragraph 116, which requires China to administer the TRQ on a transparent, predictable and fair basis, and Article X:3(a) of the GATT 1994, which requires a Member to administer its laws, regulations, decisions and rulings of general application in a manner that is uniform, impartial and reasonable. As such, the legal standard adopted under Article X:3(a) can provide guidance with respect to the legal standard applied under the first element of paragraph 116.

15. Under the second element of paragraph 116, China is required to set out timeframes and administrative procedures in a manner that is explicit and understandable to the traders that are required to follow and use these procedures.

16. With respect to the third element of paragraph 116, this requires ensuring that the clearly specified timeframes and administrative procedures and requirements are conducive to effective

[8] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.874.
[9] Panel Reports, *China – Raw Materials*, paras. 7.744-7.746.
[10] Panel Reports, *China – Raw Materials*, para. 7.743.
[11] Panel Report, *Argentina – Hides and Leather*, para. 11.94.
[12] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

import opportunities under the TRQs, reflect consumer preferences and end-user demand, and do not inhibit filling of the TRQs.

17. A failure to meet the specific obligations in any one of these three elements would result in a failure to meet the obligations under paragraph 116.

IV. INTERPRETATION OF ARTICLE XIII:3(B)

18. Article XIII:3(b) contains a publication requirement that requires a Member applying a quota, or by virtue of Article XIII:5 a TRQ, to publish the quantity or value of the products that will be permitted for import and any change to this figure.

19. In Canada's view, with respect to a TRQ, this provision requires Members to publish the total quantity or value of the goods that the Member is permitting to be imported at a within-quota rate for a specified future period, and if there is any change to the quantity or value that is being permitted to be imported, the Member must publish the revised number.

20. In Canada's view, the obligation under Article XIII:3(b) goes beyond publishing the TRQ quantities set out in the Member's schedule and publishing any changes made to the schedule with respect to these quantities, as this would be of limited utility and is already effectively covered under the Decision on the Procedures for the Modification and Rectification of Schedules.

21. However, in Canada's view the obligation under Article XIII:3(b) does extend as far as requiring that the Member continually publish or notify each time an allocation is granted, returned or reallocated. Reading in this requirement would be more prescriptive than what is contemplated under Article XIII:3(b).

22. Canada also notes that the specific information that needs to be published or notified will depend to some extent on the TRQ regime and system of allocation. The outcome required under Article XIII:3(b) is that the relevant traders can obtain information on the amount of quota available for allocation each year.

V. INTERPRETATION OF GATT ARTICLE XI

23. Canada recognizes that TRQs are not prohibited by Article XI:1, as noted by the Appellate Body in *EC – Bananas III (Article 21.5 – US)* and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I[13]. In addition, TRQs must be consistent with Article II of the GATT 1994 such that "in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff must not fall short of the scheduled amount"[14].

24. In Canada's view, to the extent that the TRQ is subject to conditions or requirements set out in the Member's schedule, those conditions are permitted; however, the implementation or administration of the TRQ and related conditions are subject to other applicable provisions of the GATT 1994 such as Article XI:1 and other relevant WTO agreements such as the Import Licensing Agreement. TRQ administration, which involves granting of approval to import at a lower duty rate, is a type of import licensing within the meaning of Article XI:1.

25. Therefore, the administration of the TRQs – separate from the underlying TRQs which are permissible – is still governed by the disciplines of Article XI:1 and Members are required to refrain from administering their TRQs in a way that could restrict imports.

26. Article XI:1 disciplines measures, whether considered individually or taken together, that have a limiting effect on importation or exportation. Thus, a panel could find that a single specific measure is inconsistent with Article XI:1 or that the effect of a number of measures, taken together, results in a quantitative restriction.

[13] Appellate Body Reports, EC – Bananas III *(Article 21.5 – US)*, para. 335.
[14] Ibid.

A. State-Trading portion of TRQs

27. In Canada's view, the Panel should, in assessing whether China's TRQ administration is consistent with Article XI:1, consider whether it has a "limiting effect on importation by negatively affecting the competitive opportunities available"[15]. In conducting this analysis, Canada invites the Panel to consider the guidance found in the panel's report in *Argentina – Import Measures*. While Canada recognizes that *Argentina – Import Measures* did not involve TRQ administration, both that case and this matter involve administrative procedures that can be characterized as an import licensing system as defined in paragraph 1 of Article 1 of the Import Licensing Agreement.

28. In Canada's view, the Panel should consider whether, based on the evidence before it, China's administration of the state-trading portion of the TRQs cumulatively restricts imports contrary to Article XI:1 by i) creating uncertainty regarding the applicant's ability to import the full share of the quota that it has been assigned; ii) imposing a significant burden on the applicants that is unrelated to their normal importing activity; and iii) restricting market access for imported products by preventing the applicants from importing as much as they desire or need.

B. User Requirements

29. The United States argues that China imposes user requirements which require the applicant to self-use its share of the TRQ allocation; to process the imported goods itself; and in the case of an enterprise that owns multiple processing plants, to require each processing plant to apply for and use the TRQ in its own name[16]. The applicant could be subject to penalties for non-use of its allocated share of the TRQ[17].

30. In *Indonesia – Import Licensing Regimes*, the panel found that the requirements that forced the importers "to either use all the products they import for processing or find alternative ways to dispose of unused products that do not involve selling or transferring them" constituted a restriction that had a limiting effect on importation contrary to Article XI:1[18]. In Canada's view, if the Panel finds that the applicants are subject to the user requirements as described by the United States, the Panel could reach a similar conclusion in this case.

31. With respect to penalties for non-use, Canada notes that the right to impose these are set out in China's schedule and therefore the imposition of penalties for non-use is permitted as part of China's tariff schedule. However, any additional details relating to the administration of the penalties and usage requirements that are set out outside of China's tariff schedule[19] can constitute additional conditions and requirements that form part of the regime for administering the TRQ. These additional administrative procedures and requirements, which are not included in China's schedule but designed to implement the TRQ, are part of the administrative procedures or licensing regime subject to Article XI:1.

32. Further, in Canada's view, to the extent that the cumulative effect of more than one requirement of the import licensing regime results in a restriction in addition to the underlying TRQ, the requirements could collectively result in a violation of Article XI:1.

VI. CONCLUSION

33. Canada thanks the Panel for the opportunity to comment on the legal issues raised in this dispute.

[15] Panel Report, *Colombia – Ports of Entry*, para. 7.257.
[16] United States' first written submission, paras. 303 and 304.
[17] United States' first written submission, paras. 306 and 308.
[18] Panel Report, *Indonesia – Import Licensing Regimes*, paras. 7.198 - 7.200.
[19] See for example *2003 Provisional Measures*, Article 23 (Exhibit US-11); 2017 *Allocation Notice*, Article V (Exhibit US-15).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL

Ecuador considers that the Panel should take into account both the literal and teleological interpretation of the multilateral rules, as well as the references of the existing jurisprudence on the provisions in which the Complainant has based its allegations.

The Republic of Ecuador considers that this dispute has a high relevance for the country in terms of administration of tariff quotas and the treatment that other countries give to them in the international arena. Similarly, Ecuador strongly recommends and requests the Panel to review in detail the scope of application of the provisions invoked by the Claimant and Respondent, and the specific annotations provided within this submission.

Ecuador believes that the Panel should take into account previous cases which had set forth specific recommendations and findings regarding the application of tariff quotas, as well as the existing jurisprudence.

Ecuador recommends that the Panel should take into account while analyzing the submissions, regulations, and laws, the principle good faith, which is a fundamental principle of international law in general, and of international trade law in particular, thus, a basic tenant of the WTO´s Dispute Settlement System and in the light of its object, context, purpose and all of the rules of interpretation established in the Vienna Convention on the Law of the Treaties. In that regard, the Panel is in the need to assess such determinations by interpreting all the agreements cited in the request for consultations through the rules of general interpretation set out in the Vienna Convention on the Law of Treaties.

2 REGARDING VIOLATION OF PART I, PARAGRAPH 1.2 OF CHINA'S PROTOCOL OF ACCESSION

1. Ecuador reaffirms that Dispute Settlement System (DSS) adopted by the WTO and all its Members is based upon one of the most important Principles in the International Law i.e. "Good Faith", therefore all the procedures under the DSS should be based considered by "Good Faith".

2. "Not only action but also the absence of action, and in particular the failure to inform about the applicable trade laws, regulations, procedures and practices, promptly and accurate, may constitute a formidable barrier to trade."[1] In this regard, the United States alleges that China violated Part I, para. 1.2 of the Protocol of Accession because the basis for China´s TRQ[2] is not (1) transparent; (2) predictable; or (3) fair; because its grains TRQs are not administered using (4) clearly specified administrative procedures, or (5) clearly specified requirements; this on behalf (6) using timeframes, administrative procedures, and requirements that would not inhibit the filling of each TRQ. Therefore the United States reaffirms that TRQs for corn, wheat, and rice are not fulfilling the statement from Part I, para 1.2 of the Protocol of Accession.

3. On the other hand, China disproves the claim held by United States by saying that China's method of distributing allocations is not automatic. "China does not believe, however, that transparent, predictable, and fair TRQ administration requires the elimination of any element of discretion from the allocation process."[3] China ensures certain obligations such as transparent, predictable, uniform, fair and non-discriminatory basis, clearly specified timeframes, administrative procedures and requirements. China also bases its argument in the Panel Report of Thailand –

[1] Van Den Bossche. The law and policy of the World Trade Organization. Cambridge. Second Edition. 2008.

[2] "a tariff rate quota involves the application of a higher tariff rate to imported goods after a specific quantity of the ítem has entered the country at a lower prevailing rate" – Panel Report, US- Line Pipe, para. 7.18.

[3] Para. 51. China's first written submission (DS517)

Cigarettes in order to exercise "discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit."[4]

3 REGARDING VIOLATION OF ARTICLE X:3 (A) OF THE GATT 1994

1. The United States claims that China attempts to Article X:3(a) of the GATT 1994 because China's TRQ administration is not reasonable. China responded that the United States must demonstrate that the alleged vagueness in the Allocation Principles *necessarily leads* to an unreasonable administration of the TRQ.

2. Article X:3 (a) of the GATT 1994 mentions "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

3. Regarding to the term "shall administer" the Panel in the case EC-Bananas III agreed that the text of the Article X:3(a) indicates that the requirements of uniformity, impartiality and reasonableness do not apply to the laws, regulations, decisions and rulings themselves but rather to the administration of those laws, regulations, decisions and rulings.[5] While in Argentina- Hides and Leather, the Panel found that there is no requirement in Article X:3(a) that it apply only to "unwritten" rules.[6] Furthermore, talking about the term "uniform" the jurisprudence agrees that uniform is understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision.[7]

4. On the same line, by "impartial" the jurisprudence alleges that "impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, [8]unbiased and unprejudiced manner."[9] Finally, by "reasonable" the case China- Raw Materials the Panel concluded that the lack of any definition, guidelines or standards poses a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

4 REGARDING VIOLATION OF ARTICLE XI:1 OF THE GATT 1994

1. The United States claims that China's administration of its TRQs for wheat, rice, and corn is inconsistent Article XI: 1 of the GATT 1994, because it imposes impermissible "restrictions" on the importation of wheat, rice, and corn. Article XI: 1 of the GATT 1994 bars prohibitions or restrictions on importation or exportation other than through duties, taxes, or other charges. The United States alleges that China's process administration creates commercial uncertainty limiting importation and its TRQ administration use restrictions on products imported under the TRQ.

2. China alleges that "no evidence of the quantification of the effects of a measure alleged to restrict imported products is required to demonstrate a limitation on the importation of products under Article XI:1. In determining whether a measure is inconsistent with Article XI:1"[10] and reaffirms that the restriction on the transfer of licenses, usage requirements, and penalties must be examined within the fact, as China assures, that they are designed and structured to increase competitive opportunities for imports and promote the filling of each TRQ.

3. It is a lot of jurisprudence in cases on the interpretation of the Article XI:1 of the GATT 1994. In the case Japan – Semi-conductors, the Panel established that non-binding measures, restricting the export of certain semi-conductors at below-cost were nevertheless restrictions.[11] However, the Panel in EEC- Minimum Import Prices established that in the case of automatic import licensing constituted a restriction of the type meant to fall under the purview of Article XI:1.[12] Nonetheless,

[4] Panel Report, *Thailand – Cigarettes*, para. 7.924. "A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions."

[5] Appellate Body Report EC-Bananas. para 200

[6] Panel Report. Argentina- Hides and leather. para. XI.739

[7] Appellate Body Report EC – Selected Customs Matters. para 224

[8] Panel Report China- Raw Materials. para. 7743

[9] Panel Report Thailand – Cigarettes. Para. VII.899

[10] Chinas first written submission (DS517) para. 144

[11] Panel Report. Japan-Semiconductors. Para 106.

[12] Panel Report EEC- Minimum Import Prices. Para. 4.1

the case Brazil- Retreaded Tyres the Panel concluded that "what is important in considering whether a measure falls within the types of measures covered by Article XI:1 is the nature of the measure.[13]

5 REGARDING VIOLATION OF ARTICLE XIII:3 (B) OF THE GATT 1994

1. The United States assure that China failed in providing "meaningful" information to the public regarding actual TRQ allocation at the time of allocation, at the time unused quota amounts are returned, and at the time of reallocation.[14] At last, the United States reaffirms that China maintains an import prohibition or restriction other than duties, taxes, or other charges, through administrative actions creating a limitation on importation, violating with the Article XIII:3(b) of the GATT 1994.

2. China refutes by saying that the article invoked refers to the determination of the initial quota amount provided under an import restriction. The "total quantity or value of the product or products" is the value that is initially "fixed", not some other unspecified quantity or value unknown at that point in time. The language that follows – "which will be permitted to be imported" – must be interpreted in relation to the preceding clauses. That "which will be permitted to be imported" is therefore the "total quantity or value" that was initially 'fixed'. In China's case, the relevant 'total quantities' are those provided in China's Schedule CLII for wheat, long-grain rice, short- and medium-grain rice, and corn.[15]

3. It is no existent jurisprudence or related to the interpretation of Article XIII: 3(b).

[13] Panel Report Brazil – Retreaded Tyres. Para. 7.361
[14] Paraphrase. para. 56.United States first written submission (DS517)
[15] Paraphrase. Para 85. China's first written submission (DS517)

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. As a preliminary matter, the EU submits that the Panel's findings as regards Paragraph 116 of the Working Party Report, as incorporated into China's Protocol of Accession to the WTO will be sufficient to solve this dispute because Article X:3(a) of the GATT 1994 and Paragraph 116 impose broadly overlapping obligations and Paragraph 116 appears to be the more specific provision. Hence, the Panel should exercise judicial economy on the claims raised by the US concerning Article X:3(a).

2. Paragraph 116 concerns all actions or omissions by which China manages, runs, or carries out its TRQs regime, whether they concern concrete punctual actions or omissions, or the guiding principles of that regime, including the legal instruments that regulate the administration of the TRQs.

3. The various obligations contained in Paragraph 116 relate to the same matter, i.e. the administration of the TRQs regime and they all respond to the same concerns raised by WTO Members. It is logical to expect that these obligations may sometimes overlap and may impart meaning to each other.

4. With regard to the Basic Criteria, and the Allocation principles that must be fulfilled in order to receive an allocation under the TRQs at issue, as well as the and "public comment process", China's explanations tend to confirm that China does not administer these TRQs in compliance with Paragraph 116. Indeed, China has relied on how those criteria, principles and process are applied "in practice", but has not demonstrated that this practice is set out in a clear, transparent and predictable way. Rather, China has invoked the apparently unlimited latitude for the NDRC to change that practice as it sees fit.

5. Moreover, the EU has pointed to a rather manifest disconnect between various parts of China's schedule, which presuppose that the portions of the tariff-quota reserved for importation through STE should be allocated to different applicants, and China's defence in the present case, according to which the STE portions of the TRQs are allocated entirely to COFCO.

6. With regard to the Information concerning allocation and reallocation the EU considers that if some information must be published pursuant to paragraph 3(b), together with paragraph 5 of Articles XIII of the GATT 1994, then it is not necessary to examine if the same information requirement can also be derived by more general provisions.

7. In keeping with the object and purpose of the GATT, Article XIII:3 must be interpreted as obliging the Member which administer a TRQ to give public notice of both the total amount of permitted imports (as initially fixed by that Member) and of any change in such amount. Thus, in the present case China should give public notice of the total amount authorized for import on the TRQ certificates issued to selected applicants during the allocation process, the amounts returned by 15 September and those authorized following the reallocation process.

8. On the other hand, the EU considers that neither Paragraph 116 nor Article X:3(a) of the GATT 1994 can be interpreted as requiring China to make public the identity of TRQ certificate holders, and the amount allocated or reallocated to each of them.

9. China's explanations concerning the allocation process for the state trading portion of the TRQs raise serious concerns that China's allocation system could be incompatible with its WTO obligations. First, the STE portion of each TRQ is allocated to COFCO according to undisclosed criteria, and therefore in violation of Paragraph 116. Second, the explanation provided by China seems to be at odds with China's commitments under paragraphs 6.A, 6.B, 6.C of Section I B and note 1of its Schedule.

10. With regard to the usage restrictions and penalties for non-use applied by China, the EU would like to stress that it agrees with China that the usage restrictions and penalties for non-use cited by the US fall outside the scope of Article XI:1 of the GATT 1994, because Article XI:1 of the GATT 1994 does not apply to TRQs. Indeed, TRQs are not "quantitative import restrictions" within the meaning of Article XI:1 of the GATT 1994, but tariff measures.

11. Many Members have bound in their Schedules TRQs or unlimited tariff concessions which are subject to an end-use condition. The possibility to provide for certain usage conditions may encourage Members to make concessions that they would not make otherwise. If Article XI:1 would apply to those usage restrictions, Members would be deterred from making further concessions.

12. Similarly, the processing requirement is not part of the "administration" of the TRQs within the meaning of Paragraph 116, but a substantive condition.

13. Finally, with regard to the penalties for the non-use of TRQs, the EU shares China's view that this type of measures may contribute to a more efficient and effective use of the TRQs and therefore comply with Paragraph 116, provided the penalties are not disproportionate or applied inconsistently. China has confirmed those penalties are not applied to COFCO with respect to the non-use of the STE portion of the TRQs, which is allocated to it.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. LEGAL NATURE OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

1. With respect to the legal nature of China's obligations under Paragraph 116 of the Working Party Report, Paragraph 116 provides that "China would ensure that TRQs were administered on a transparent, predictable, [… and] fair […] basis using clearly specified timeframes, administrative procedures and requirements […] that would not inhibit the filling of each TRQ." In the same paragraph, it is also provided that "China would apply TRQs fully in accordance with WTO rules and principles."

2. Paragraph 116 is incorporated into China's Accession Protocol, which, in turn, is incorporated into the WTO Agreement. Specifically, Paragraph 1.2 of the Protocol states that the Protocol "shall be an integral part of the WTO Agreement" and therefore contains binding obligations for China. Consequently, any failure by China to administer its TRQs in a manner consistent with its commitment under Paragraph 116 would constitute a breach of its WTO obligations.

3. In this dispute, the United States argues that China's administration of its grains TRQs is inconsistent with Paragraph 116 of the Working Party Report, as well as Articles X:3(a), XI:1, and XIII:3(b) of the GATT 1994.[1] While there may be overlapping obligations between Paragraph 116 and the relevant provisions of the GATT 1994, Japan observes that China's obligations under Paragraph 116 are not less stringent than those provided under the provisions of the GATT 1994. Thus, the Panel should examine if China meets the requirements stipulated under Paragraph 116 in order to examine whether China's administration of its grains TRQs is inconsistent with its obligations under the WTO agreements.

II. INTERPRETATION OF CHINA'S OBLIGATIONS UNDER PARAGRAPH 116 OF THE WORKING PARTY REPORT

4. With respect to the interpretation of China's obligations under Paragraph 116 of the Working Party Report, Japan is of the view that the three following considerations should be taken into account.

5. First, the United States argues that Paragraph 116 contains six "related but independent obligations" or "related but distinct commitments", and that "failure by China to administer TRQs consistent with any of these commitments represents a distinct breach."[2] In response to Panel's question No. 1, subparagraph (a), in Japan's view, the legal standard under each of the six obligations is particular to China's obligations regarding its administration of TRQs under Paragraph 116. Based on this understanding, Japan considers that the legal standards under the six obligations may rest on common elements such as "transparent basis", as "transparent basis" would be essential in examining other elements cited in Paragraph 116. At the same time, other elements may have differences with respect to the way evaluation is made of relevant aspects of China's TRQs administration. In response to the Panel's question No. 1, subparagraph (b), Japan is of the view that failure by China to administer its TRQs in a manner consistent with any of its commitments including those found in Paragraph 116 means that China is in breach of its WTO obligations.

6. Second, in response to the Panel's question No. 2, per paragraph cited by the Panel (para. 144), Japan recognizes that the European Union submits that "the processing requirement is not part of the 'administration' of the TRQs within the meaning of Paragraph 116 of the Working Party Report", and, as the Panel's question describes, that it is "therefore not susceptible to a challenge under Paragraph 116 of China's Working Party Report."[3] Japan also considers that the processing

[1] United States' first written submission, paras. 5-6.
[2] United States' first written submission, paras. 63-64.
[3] European Union's third party submission, para. 144.

requirement is not part of the administration of TRQs within the meaning of Paragraph 116, as argued by the European Union in its submission.

7. Third, as a general matter, Japan considers that TRQs are "import measures" rather than traditional "quantitative restrictions" such as quotas or bans. This is because they do not prohibit or restrict the quantity of imports, but they rather apply a lower tariff for a certain volume of imports and improve market access. In this regard, the Appellate Body stated in *EC – Bananas III* that "tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I".[4] Therefore, Japan is of the view that there may be differences among Member's import measures such as TRQs as there may be differences among Members in terms of their market structure, business practice and so on. However, such differences must remain within the confines of the WTO Agreements.

[4] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 - United States)*, para. 335.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

I. INTRODUCTION

Mr. Chairperson, distinguished Members of the Panel,

1. Ukraine welcomes this opportunity to present its views to the Panel concerning the administration of tariff rate quotas ("TRQs") for grains by the People's Republic of China ("China") and its correspondence with the relevant provisions of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

2. As a third party, Ukraine has a systemic and trade interest in a proper and consistent interpretation of the provisions of the World Trade Organization ("WTO") covered agreements, in particular the GATT 1994. Ukraine will focus on some key issues relating to the interpretation of Articles X:3(a), XIII:3(b), and XI:1 of the GATT 1994 in its oral statement. Ukraine clarifies that it does not have any specific views on the factual aspects of the case.

II. ARGUMENTS

Article X:3(a) of the GATT 1994

3. In paras. 223-266 of its First Written Submission, the United States argues that China's administration of its TRQs for grains is incompatible with China's obligations under Article X:3(a) of the GATT 1994 because of numerous violations of reasonableness requirement of Article X:3(a).

4. In turn, China claims that the United States has not demonstrated that the alleged vagueness of eligibility criteria and principles for allocation necessarily results in an unreasonable administration of the grains TRQs.[1] Ukraine would like to highlight the following case law in this regard.

5. The panel in Thailand – Cigarettes (Philippines) stipulated that the administration under Article X:3(a) "includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation",[2] including administrative processes leading to administrative decisions. Thus, it is essential for the complainant to show how and why "certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument" provided in Article X:1.[3]

6. In Dominican Republic – Import and Sale of Cigarettes case, the panel stated that requirements of Article X:3(a) such as uniformity, impartiality, and reasonableness are not cumulative[4] which means that it is enough to demonstrate violation of one requirement to establish violation of Article X:3(a). On the other hand, in order to comply with Article X:3(a) it is necessary to fulfil all three requirements.[5]

7. The United States claims that China's administration of grains TRQs is not reasonable.[6] In this regard, in US – COOL, the panel stipulated that "reasonable" administration under Article X:3(a) "entails a consideration of factual circumstances specific to each case."[7]

8. Notwithstanding the above-mentioned reasoning of the panel regarding assessment on the case-by-case basis whether administration is reasonable, Ukraine believes that in any case "rigorous

* Ukraine has requested that its Oral Statement serve as Integrated Executive Summary.
[1] China's First Written Submission, para. 29.
[2] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.873.
[3] Ibid.
[4] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383.
[5] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.867.
[6] US' First Written Submission, para. 223.
[7] Panel Report, *US – COOL*, para. 7.851.

compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure"[8] and this is for the respondent to substantiate that the administration of the measure is conducted in uniform, impartial, and reasonable manner.

Article XIII:3(b) of the GATT 1994

9. Realizing that there is no interpretation of Article XIII:3(b) of the GATT 1994 up to date, Ukraine draws the Panel's attention to the customary rules of interpretation of public international law available under Article 3.2 of the Dispute Settlement Understanding ("DSU") which are codified in the Vienna Convention on the Law of Treaties, namely Articles 31-33 thereof.

10. Ukraine believes that special attention should be given to the interpretation of the phrases "notice of the total quantity or value of the product or products" and "any change in such quantity or value" of Article XIII:3(b), bearing in mind that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[9]

Article XI:1 of the GATT 1994

11. Article XI:1 of the GATT 1994 was already interpreted by the preceding panels and Appellate Body regarding application of TRQs.[10]

12. Nevertheless, panel reports are binding between the parties for the particular dispute[11] and the determination whether a measure constitutes a breach of member's obligations under the WTO Agreements should be made on a case-by-case basis,[12] taking account of all relevant facts.

13. In Article XI:1 the expression "made effective through" precedes the terms "quotas, import or export licences or other measures". This suggests that the scope of Article XI:1 covers a measure through which a prohibition or restriction is produced or becomes operative.

14. Thus, the Panel in this case is not prevented from examining whether China's TRQs administration is a measure through which "impermissible restrictions on the importation"[13] produced or became operative. In Ukraine's view, the relevant guidance in this case is to establish whether China's TRQs administration "imposes a restriction or prohibition on importation."[14]

III. CONCLUSION

15. Mr. Chairperson, distinguished members of the Panel and representatives of the delegations, this concludes Ukraine's oral statement. We thank the Panel for its consideration of the views of Ukraine. We look forward to answering any questions that the Panel may have.

[8] Appellate Body Report, *US – Shrimp*, para. 182.
[9] Vienna Convention on the Law of Treaties, Article 31.
[10] Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 335.
[11] Appellate Body Report, *Japan – Alcoholic Beverages II*, page 14.
[12] Appellate Body Report*, China – Raw Materials*, para. 328.
[13] US' First Written Submission, para. 335.
[14] Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.55.