

ORIGINAL ARTICLE

China – Tariff Rate Quotas for Certain Agricultural Products: Against the Grain: Can the WTO Open Chinese Markets? A Contaminated Experiment

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Abstract

The US complaint about Chinese tariff-rate quotas (TRQs) on certain grain products helps illustrate several key issues in US–China trade relations and the effectiveness of WTO disputes. First, do international obligations based on transparency and fairness work in relation to an authoritarian country not known for the rule of law domestically? Second, can there be a disconnect between the legal aspects of a dispute and the underlying economic interests, with a DSB ruling sometimes not leading to improved trade flows? And third, given the bilateral trade war and ‘phase one’ trade deal between the United States and China, has the WTO been superseded in this trade relationship? This paper summarizes the facts and law of the China–TRQs dispute, and examines each of these questions in that context.

Keywords: WTO; China; Dispute Settlement Understanding; Tariff Rate Quota Administration

1. Introduction

In the midst of the US–China trade war that has emerged over the last couple years, the prevailing view in Washington, DC policy circles is that WTO dispute settlement is only of limited value in addressing Chinese trade barriers. The US Trade Representative’s Office (USTR), the agency in charge of deciding whether to file WTO complaints, seems skeptical of the prospects: ‘The notion that our problems with China can be solved by bringing more cases at the WTO alone is naïve at best, and at its worst distracts policymakers from facing the gravity of the challenge presented by China’s non–market policies’ (US Trade Representative, 2018, p. 5). Part of the reason for this doubt is that in a non–transparent, authoritarian regime, eliminating a particular barrier may not lead to additional export sales, as it is easy for the Chinese government to put in place an alternative barrier (Groombridge and Barfield, 1999, p. 2; *The Economist*, 2020).

But conventional wisdom is not always correct. Surveys of WTO complaints against China show that the Chinese reaction to complaints and adverse rulings have been reasonably good (Bacchus et al., 2018; Zhou, 2019). At the same time, WTO disputes can be complex, and a superficial overview of the cases only tells you so much. In this paper, we dig deep into one particular case, in order to evaluate the impact of a US complaint about Chinese trade restrictions on certain agricultural products. As part of its accession to the WTO, China agreed to open its market to wheat, corn, and rice through a tariff-rate quota (TRQ). But 15 years later, US producers felt they were not getting what had been promised, as the TRQ was being administered in a way that left it unfilled. At the end of the Obama administration, US producers convinced USTR to file a consultations request with the WTO Dispute Settlement Body (Caporal, 2016). The complaint was pursued by the Trump administration, and a panel ruling was issued and adopted in 2019.

Beyond the issue of whether China complies with WTO rulings, there are several features of this dispute worth considering as part of the discussion of the legal and economic aspects of the case. First, do international obligations based on transparency and fairness work for an

authoritarian country not known for the rule of law domestically? If China does not follow these principles internally, what can we realistically expect externally?

Second, is there a disconnect between the legal aspects and the underlying economic aims? The purpose of the complaint was to generate an increase in the quantity of US exports. But the legal provisions invoked do not refer to specific figures for exports, but rather to some abstract legal provisions about transparency and fairness. Could a finding of violation of such provisions lead to the export increases that the US producers were seeking?

Third, given the bilateral trade war and trade deal the United States and China are engaged in, has the WTO been superseded? Which set of rules – multilateral or bilateral – are most relevant here?

2. Expectations for Chinese Grain Imports at the Time of WTO Accession

Expectations for Chinese grain imports at the time of WTO accession were mixed. China's imports of wheat and corn surged as economic reforms began in the late 1970s (Gale et al., 2015). Throughout the 1970s and 1980s, China was one of the world's largest wheat importers, importing about 12–15% of its annual consumption needs (US Department of Agriculture, 2020a). By the end of the 1990s, productivity gains, bolstered in part by government support policies, had seen Chinese wheat production rise, though China still remained one of the largest destinations for global wheat exports (Table 1).

Despite being a larger net exporter of corn in the 1980s and 1990s, China was viewed as a potential destination for global feed grain exports, including corn. As per capita incomes grew and diets shifted to meats and dairy over the period 1970–1999, many forecast that China would swing from being a large net exporter to becoming a large net importer of corn (Crook and Colby, 1996; US Department of Agriculture, 1997; Wailes et al., 1998). Lester Brown's 1995 report, *Who Will Feed China? Wake-up Call for a Small Planet* had dire warnings that China's rising consumption of animal protein and domestic resource limits would cause rapid growth in import demand and disrupt global grain markets.

China's accession to the WTO also generated projections, based on the principle of comparative advantage, that China would import more land-intensive crops (e.g., cereal grains and cotton) and export labor-intensive products (e.g., fruits and vegetables) (Gale et al., 2015). The general consensus of those forecasts was that China would import wheat and feed grains such as corn, but estimates varied widely. A 1996 study by Crook and Colby reviewed a dozen projections of China's grain imports for various years in the twenty-first century that ranged from 15 million tonnes to over 200 million tonnes (Crook and Colby, 1996).

In an analysis of the impact on WTO accession on US exports, a 2000 study by the US Department of Agriculture (USDA) concluded that accession would increase the value of annual US grain exports by about \$1 billion (5%) for 2000–2009 (Colby et al., 2000). In its analysis of the impacts of China's accession to the United States, the United States Trade Commission (USITC) concluded that wheat exports to China would increase by \$43 million (21% increase) while corn and other feed grains would increase by \$66 million (34%) (US International Trade Commission, 1999). It acknowledged that those gains would depend upon the role of state trading enterprises in administering the tariff rate quotas, China's agricultural support policies, and the competitiveness of US corn and wheat exports relative to third country suppliers such as Australia and Canada (wheat) and Argentina (corn).

By contrast, because of Chinese rice policies aimed at maintaining self-sufficiency, China remained a small, but significant net exporter of rice throughout the 30 years and was not viewed as a growing market for global rice exports (Colby et al., 2000). The USITC concluded that 'Prospects for the Chinese rice market are not as positive as for wheat and corn. Chinese per capita consumption of rice has been declining for several years, and China has itself been a substantial exporter of short and medium grain rice to adjacent markets, such as Japan and Korea.

Table 1. China annual net trade, by decade (1,000 tonnes)

Crop	1970–79	1980–89	1990–99	2000–09	2010–19
Corn					
Exports	857	727	646	162	3,828
Imports	146	2,760	6,474	5,614	46
Net trade	–711	2,033	5,828	5,452	–3,783
Rice:					
Exports	36	312	523	472	3,538
Imports	1,455	702	1,520	1,325	978
Net trade	1,419	390	997	853	–2,560
Wheat					
Exports	5,418	11,592	6,557	1,564	3,586
Imports	2	3	496	1,648	912
Net trade	–5,416	–11,589	–6,061	84	–2,675

Source: USDA, FAS (2020a).

Moreover, large rice exporters, such as Thailand, Vietnam, and Australia, enjoy substantial transportation advantages to China over US rice exporters' (US International Trade Commission, 1999). USDA analyses allowed that WTO accession could result in an increase in indica rice imports, but reasoned that they would largely be filled by other indica producers such as Thailand (Colby et al., 2000, pp. 11–16; Tuan and Hsu, 2001, pp. 5–8).

In anticipation of potential new sales, farmers were generally supportive of passage of Permanent Normal Trade Relations (PNTR) with China in 2000. At a House Committee on Agriculture hearing in May 2000, statements supporting PNTR were provided by the National Corn Growers Association, the National Association of Wheat Growers, and the American Farm Bureau Federation, among others (Detrick, 2000; Jensen, 2000; Stallman, 2000).

3. Experience Since 2001

While Chinese agricultural imports boomed after WTO accession, much of that growth came from oilseeds, which increased significantly as Chinese livestock, dairy, and poultry production modernized and shifted from backyard production using local feedstuffs to more concentrated feedlot operations using commercially mixed feeds (Gale, 2015). Almost all of the protein meal needs were met through imports of soybeans and to a less extent, soybean meal. Soybean imports increased from 10.4 million tonnes in the 2001/2002 marketing year to 52.3 million tonnes by 2010/2011.

Chinese grain imports did not follow soybeans. China continued to be a large net exporter of corn and rice from 2002 to 2009. While Chinese wheat imports totaled 3.7 million tonnes in 2003 and 6.7 million tonnes in 2004, over the rest of the decade it was a net exporter of wheat. The global food price crisis of 2007/2008 prompted changes in Chinese production subsidies (Gale, 2013). To be more compliant with WTO rules on domestic support, China had provided farmers with direct income subsidies payments that were tied to production costs. The weak incentives provided by subsidy payments prompted officials to raise price supports to stimulate production. From 2008 to 2013, price supports (in US dollar values) increased 30% for rapeseed, 63% for wheat, 66% to 69% for corn, and 92% to 105% for different types of rice (ibid.). To bolster prices, the Chinese government bought more production that went to fill government stockpiles. As a

Table 2. China Tariff Rate Quotas for Corn, Rice and Wheat

Item	Unit	Corn	Rice	Wheat
Total TRQ	1,000 tonnes	7,200	5,320 2,660 long grain 2,660 short/medium	9,636
In-quota tariff	Percent	1%	1%	1%
Over-quota tariff	Percent	40%	40%	65%
Allocated to State Trading Enterprise	Percent	60%	90% long grain 50% short/medium	90%

Source: Tuan and Hsu (2001).

result, Chinese grain prices remained above world prices and government grain stockpiles more than doubled relative to annual consumption. By 2016/2017, wheat and corn stocks were equal to over 10 months of consumption while rice stocks exceeded eight months of consumption (US Department of Agriculture, 2020a).

The consequences of those domestic support policies are the subject of another WTO dispute.¹ Of interest here is the implication of those policies for TRQ administration. With domestic prices in China far above world prices, China was an attractive market for wheat, corn, and rice exporters, but large imports would have undermined price supports.

Unlike soybeans and other goods, where purchases were made largely by commercial interests, China retained stricter control over grain imports. In its WTO accession, China agreed to tariff rate quotas (TRQs) for rice, wheat, and corn that allow limited quantities of each commodity to flow into the Chinese market at low tariffs. Low tariffs of 1% are set on imports up to the quota amount – set at approximately 5% of annual consumption – but imports outside the quota are assessed high tariffs of up to 65% (Table 2).

Significantly, most of the grain quotas were allocated to state-designated trading enterprises. In the case of long grain rice and wheat, only 10% of those quotas were allocated to commercial interests. State trading enterprises controlled 50% of short and medium grain rice imports and 60% of corn imports. The remainder of the quotas are distributed to thousands of potential importers in a cumbersome application process once a year. A 2015 study by Gale, Hansen, and Jewison cited criticism of China's TRQ system by the owner of China's largest feed company for favoring state-owned enterprises.

Fill rates for the tariff rate quotas for wheat, corn and rice are given in Table 3. With the exception of the wheat fill rates in 2004 and 2005, TRQ fill rates over 2002–2009 were below 15%. TRQ fill rates began to rise after 2009 due to changes in China's agricultural support policies. From 2007 to 2012, China more than doubled price supports for rice, and increased the wheat support price by 70%. China also introduced a price support program for corn (Gale, 2013). Over that period, China prices mirrored world prices, which were at nominal record levels as a result of short global crops and strong demand growth due to biofuels and other factors. As world prices began to fall in 2013, China prices remained high, bolstered by high price supports. As a result, TRQ fill rates began to rise.

Imported corn is used mainly for feed. With corn imports restricted, feed mills in China turned to other feedstocks such as sorghum and Distiller's dry grains with solubles or DDGS, a by-product of ethanol production, which entered China duty free. During 2014, a large increase in barley imports also reflected its increased use in animal feed. Significant amounts of domestic and imported wheat were also used as animal feed during 2012–2013, when corn prices exceeded wheat prices (Gale et al., 2015).

¹See, Ahn and Orden (forthcoming).

Table 3. Fill Rates for China Tariff Rate Quotas, 2002–2018

Year	Wheat	Corn	Rice
2002	7.5%	0.2%	5.9%
2003	5.0%	0.1%	5.6%
2004	75.3%	0.1%	14.5%
2005	36.7%	0.1%	9.8%
2006	6.3%	1.0%	13.7%
2007	1.0%	0.5%	9.2%
2008	0.4%	0.7%	6.2%
2009	9.4%	1.2%	6.7%
2010	12.8%	21.8%	7.3%
2011	13.1%	24.4%	11.2%
2012	38.4%	72.3%	44.5%
2013	57.4%	45.4%	42.8%
2014	31.2%	36.1%	48.5%
2015	31.8%	65.7%	63.5%
2016	35.4%	44.0%	67.0%
2017	45.9%	39.3%	75.7%
2018	32.2%	39.3%	57.8%

Source: WTO Agriculture Information Management System, <https://agims.wto.org/>.

Analysis conducted by the USITC in 2011 suggested that in the absence of tariffs, US wheat exports to China would have been \$489 million and \$1.2 billion higher. More recent analysis by Chen et al. (2020) suggests that tariff rate quota administration might have reduced China's quota fill rates for the grain commodities by 10% to 35%. Their findings suggest that wheat was particularly affected with US wheat imports 83% higher under a counter-factual simulation compared to observed values. Total simulated value of grain imports from all sources in 2017 was estimated at \$1.4 billion, or 40% higher than observed values.

From the standpoint of improving market access, it was thus important for the United States to take a case against both China's domestic support regime as well as against TRQ administration. As pointed out by Zhou and Kang (2009), any changes in the amount of TRQs, the management of TRQs, and the out-quota tariff rates, will be primarily influenced by China's domestic grain supply.

4. The Legal Complaint at the WTO

The United States requested WTO consultations in December 2016 and requested a panel in August of 2017. The panel was established by the DSB in September of 2017 and composed in February of 2018. The panelists were from Mexico, Iceland, and the Philippines and all had previous experience serving on WTO panels. The Panel circulated its report in April of 2019 and it was adopted in May of 2019.

As explained by the Panel, China's TRQ administration operates on an annual basis. The TRQ amounts are allocated and TRQ certificates are issued before 1 January of the year in which they have to be used. Unused TRQ amounts must be returned by 15 September if the applicant receiving the TRQ allocation is unable to contract for importation, or has contracted but is unable to

complete importation, under its allocated TRQ amounts. Returned TRQ amounts are then made available for reallocation. The National Development and Reform Commission of China (NDRC), in conjunction with the Ministry of Commerce of China (MOFCOM), is responsible for allocating the TRQ amounts (*China-TRQ Administration*, paras. 2.1–44).²

The WTO dispute focused on China's administration of its tariff rate quotas (TRQs) for wheat, rice, and corn, rather than on whether those quotas were filled. For there to be a WTO violation, China had to be acting in a way that violated specific rules; it would not be enough to show that the quotas were unfilled. The United States made claims under Paragraph 116 of China's Working Party Report, as incorporated by its Accession Protocol,³ and also under Articles X:3 (a), XI:1 and XIII:3(b) of the GATT (*China-TRQ Administration*, para. 7.5). The Panel rejected the claim under Article XIII:3(b) and exercised judicial economy in respect of the claims under Articles X:3(a) and XI:1. We focus our analysis here on the Paragraph 116 claims, in particular the claims for which the Panel found a violation as it is these findings that give rise to an implementation obligation.⁴

In paragraph 116 of its Working Party Report, China promised 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' ('Report of the Working Party on the Accession of China')⁵.

At the outset, the Panel explained that paragraph 116 contains 'multiple obligations, which may be grouped into three categories', which concern: (1) 'the basis of China's TRQ administration, and requires this basis to be transparent, predictable, uniform, fair, and non-discriminatory'; (2) 'the timeframes, administrative procedures and requirements China uses in its TRQ administration', and requires them to be 'clearly specified'; and (3) 'the effects of the aforementioned time frames, administrative procedures and requirements, and requires that they provide effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit the filling of each TRQ'. The Panel divided up its analysis based on the following aspects of the measures challenged by the United States: the basic eligibility criteria; the allocation principles and reallocation procedures; the public comment process; the state-trading enterprises and non-state-trading enterprises portions of the TRQ; and the usage requirements for wheat, rice, and corn imported under the TRQ allocations.

4.1 Basic Eligibility Criteria

The US claimed that 'four of the basic criteria for eligibility to receive wheat, rice, and corn TRQs are inconsistent with four obligations set forth in Paragraph 116, namely, the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements'. The four criteria contained in the NDRC's 2017 Allocation Notice were as follows: (1) 'Possessing "a good financial condition"'; (2) 'Possessing "[a good] integrity situation"'; (3) 'Possessing "no record of violating regulations with respect to customs, industry and commerce, taxation, credit and loans, inspection and quarantine, grain distribution, environmental

²Panel Report (2019a) *China – Tariff Rate Quotas for Certain Agricultural Products (China-TRQ)*, WT/DS517/R, 18 April 2019, <https://dcs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517R.pdf&Open=True>.

³Paragraph 1.2 of China's Accession Protocol stipulates that certain commitments, including those in Paragraph 116, shall be an integral part of the WTO Agreement, and thus the Panel considered that China's commitments under Paragraph 116 'are enforceable under the DSU' (World Trade Organization (2001b) 'Accession of the People's Republic of China', WT/L/432, decision of 10 November 2001).

⁴Our summary is drawn in particular from paras. 7.23–173 of the panel report.

⁵World Trade Organization (2001a) 'Report of the Working Party on the Accession of China', WT/ACC/CHN/49, 1 October 2001, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/CHN49.pdf&Open=True>; *China-TRQ Administration*, paras. 7.1–2.

protection, and other areas”]; and (4) ‘having fulfilled social responsibilities associated with [their] operations’.

Beginning with the criteria that TRQ applicants must possess a ‘good integrity situation’ and have ‘fulfilled social responsibilities associated with their operations’, the Panel said that the ‘lack of ... guidance leaves potential applicants in the dark’, and without further clarification, the terms ‘may be interpreted in different ways’. On this basis, the Panel found these two criteria to be inconsistent with the obligations to administer TRQs: (1) ‘on a transparent basis because they are not easily understood or discerned by applicants and other interested parties’; (2) ‘on a predictable basis because they do not allow applicants and other interested parties to easily anticipate how the NDRC determines applicants’ integrity situation and their fulfillment of social responsibilities, and thus their eligibility to receive TRQ allocations’; and (3) ‘using clearly specified requirements because the requirements that these two criteria entail are not set out in plain or obvious detail’.

Turning to the criterion that applicants must possess a ‘good financial condition’, the Panel found this criterion to be inconsistent with the obligations to administer TRQs on the same three bases. Next, the Panel examined the criterion that applicants must have ‘no record of violation’. Due to ‘the vagueness in the reference to “other areas”’, the Panel found this criterion to be inconsistent with the obligations to administer TRQs on these three bases as well. The Panel ‘also consider[ed] that this practice renders China’s TRQ administration inconsistent with the obligation to administer TRQs on a fair basis’.

4.2 Allocation Principles and Reallocation Procedures

The Panel recalled that, once the NDRC determines which applicants are eligible to receive TRQ allocations, it then allocates the TRQ amounts in accordance with ‘the allocation principles, set out in the annual allocation notices published by the NDRC’. For the reallocation of unused TRQ amounts that are returned by recipients before 15 September, the NDRC then follows the ‘reallocation procedures’, which are set out in different parts of China’s legal instruments, with one instrument providing that they are reallocated according to a first-come-first-served method, and another establishing that reallocation is carried out according to the allocation principles mentioned above.

The US claimed that ‘the allocation principles are inconsistent with four obligations set forth in Paragraph 116, namely, the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures’. It also submitted that ‘the reallocation procedures are inconsistent with the obligation to administer TRQs using clearly specified administrative procedures’.

4.3 Allocation Principles

The US argued that China’s legal instruments ‘do not explain what “other relevant commercial standards” entail, and that therefore applicants cannot discern how fulfilment of such standards may be demonstrated’. The Panel agreed with the US that ‘this is a vague and open-ended term that could cover a multitude of factors, which are unknown to applicants and other interested parties’. It also agreed with the US that the inclusion of the term ‘other relevant commercial criteria’ in China’s Schedule ‘does not “shield” China from complying with the obligations under Paragraph 116 to administer its TRQs on a transparent and predictable basis to use clearly specified administrative procedures’, nor does it ‘diminish these obligations’. In addition, in response to China’s argument that this residual category provides the NDRC with ‘the discretion it needs to adapt its allocation decisions to particular factual circumstances’, and that this is a common practice among WTO Members, the Panel disagreed that the legal standards in Paragraph 116 provide the Chinese authorities with ‘unfettered discretion’. Here, it found that the inclusion of this vague standard ‘runs counter to those obligations because it may potentially

entail a range of factors that cannot easily be understood or discerned by applicants and other interested parties’, in violation of the ‘transparent basis’ obligation. Similarly, the Panel was of the view that applicants and other interested parties cannot easily anticipate what information the NDRC will take into account, such that China also fails to administer its TRQs ‘on a predictable basis’. Finally, it concluded that ‘the vagueness of this notion shows that China fails to administer its TRQs using clearly specified administrative procedures because the procedures concerning the allocation of TRQs are not set out in plain or obvious detail in China’s legal instruments’.

Having concluded its assessment of the US claims regarding the allocation principles, the Panel then turned to ‘China’s statement regarding how the NDRC conducts its allocation process in practice’, namely, that the ‘NDRC gives the most weight to actual import performance, and that new applicants are only considered in the event that the entire non-STE portions of the TRQs are not fully allocated to applicants with historic import performance, in which case information concerning production capacity is a key factor’. In response, the Panel found that China did not submit evidence showing that applicants and other parties are made aware of this practice’, and it agreed with the US that this ‘practice is not easily understood or discerned by applicants and other interested parties’. Thus, the Panel found that the practice further shows that China fails to administer its TRQs on a transparent or predictable basis. Moreover, the Panel found that ‘this practice renders China’s TRQ administration inconsistent with its “fair basis” obligations’, noting that the ‘disparity between what is written in China’s legal instruments and what China states that the NDRC does in practice in allocating TRQ amounts does not represent administration in accordance with the applicable rules and standards’.

4.4 Reallocation Procedures

The US claimed that ‘the reallocation procedures in China’s legal instruments violate the obligation to administer TRQs using clearly specified administrative procedures’, pointing to the fact that the 2017 Reallocation Notice suggests that ‘reallocation will be carried out according to the Allocation Principles and the Allocation Rules’, which the US challenged as discussed above. After China explained that the 2003 Provisional Measures establish that reallocation occurs based on a first-come-first-served method, rather than the allocation principles, the US submitted that the reference to the varying methods violates the obligation to administer TRQs using ‘clearly specified administrative procedures’.

Examining the relevant instruments, the Panel considered that the 2003 Provisional Measures clearly sets out the first-come-first-served method, while the 2017 Reallocation Notice is ‘less clear’. Thus, it considered that the clarity of this aspect in the 2003 Provisional Measures is ‘diminished by the vagueness of the 2017 Reallocation Notice’, which contains ‘only an indirect reference to the first-come-first-served method’ and an ‘explicit reference to the allocation principles’. As a result, the Panel concluded that ‘the reallocation procedures are not set out in plain or obvious detail’, in violation of the obligation to administer TRQs using clearly specified administrative procedures.

4.5 Public Comment Process

The US claimed that ‘the public comment process is inconsistent with four obligations set forth in Paragraph 116, namely the obligations to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified administrative procedures’. As background, the Panel explained that ‘[t]he public comment process is mentioned only in the announcement of applicant enterprise data, which the NDRC publishes on its website after the receipt of TRQ applications in a given year’. It ‘includes a list of TRQ applicants as well as the relevant information they have submitted to the NDRC in their applications’, and it ‘indicates that the public is invited to provide “feedback with relevant opinions” if they disagree with the data applicants have submitted’.

The Panel observed that ‘China’s legal instruments do not provide any clarity on these aspects of the public comment process’, and it noted China’s assertion that, ‘in practice, applicants are informed of the public’s comments received, and are provided with an opportunity to rebut such comments’. However, the Panel considered that China did not submit ‘evidence of the existence of this alleged practice’. Turning to the United States’ specific claims, as to the ‘transparent basis’ obligation, the Panel ‘note[d] that the annual announcements of applicant enterprise data explicitly set out the possibility for the public to provide comments, but contain no language on any potential subsequent verification process and whether the NDRC allows applicants the opportunity to rebut such comments’. It found that the ‘absence of this important information leaves applicants and other interested parties unable to easily understand or discern the rules and principles through which the NDRC evaluates comments from the public, including whether applicants will have a chance to rebut such comments’. Moreover, it considered that ‘the lack of clarity regarding the public comment process is particularly problematic in light of the vagueness or open-endedness of certain basic eligibility criteria and allocation principles’ that it found the above to be inconsistent with China’s various obligations set forth in Paragraph 116. As a result, the Panel found that the public comment process is inconsistent with China’s obligation to administer TRQs: (1) ‘on a transparent basis’; (2) ‘on a predictable basis’ since ‘applicants and other interested parties cannot easily anticipate whether the NDRC will verify comments from the public and whether it will allow applicants an opportunity to rebut such comments’; and (3) ‘using clearly specified administrative procedures’, since ‘the procedure for public comments is not set out in plain or obvious detail in China’s legal instruments’. Finally, in respect of the obligation to administer TRQs on a fair basis, the Panel opined, ‘[a] system that allows entities with conflicting interests to comment on the information provided by applicants but does not clarify whether those applicants or other interested parties have an opportunity to learn about such comments and to rebut them, cannot ... be considered impartial and equitable’. Thus, it concluded that the public comment process violates China’s obligation to administer its TRQs on a fair basis.

4.6 State Trading Enterprise (‘STE’) and Non-State Trading Enterprise (‘non-STE’) Portions of TRQs

The US claimed that ‘China’s administration of STE and non-STE portions of its wheat, rice, and corn TRQs violates five obligations under Paragraph 116, namely the obligations to administer TRQs on a transparent, predictable, and fair basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ’. As background, the Panel recalled that Article 4 of the 2003 Provisional Measures ‘divides China’s wheat, rice, and corn TRQs into STE and non-STE portions and the annual allocation notices set out the portions of TRQs reserved for importation through STEs in any given year’. It also sets out the following procedures for importation of goods under STE and non-STE portions of TRQs: ‘State trading quotas must be imported through state trading enterprises; non-state trading quotas are imported through enterprises that have trading rights, and end-users that have trading rights may also import by themselves.’

The Panel began by assessing the parts of China’s legal instruments that pertain to the allocation of STE and non-STE portions of TRQs and the US claims concerning the so-called ‘single application process’ for these two portions. In response, the Panel noted that ‘China’s legal instruments explicitly distinguish between STE and non-STE portions of TRQs’. However, none of the legal instruments then ‘explain ... to applicants and other interested parties how the NDRC allocates these two portions of TRQs, nor are applicants provided the possibility to apply specifically for one portion or the other’. As a result, the Panel found that China does not administer its TRQs on: (1) a ‘transparent basis’, because ‘applicants and other interested parties are unable to easily understand or discern the set of rules or principles through which the NDRC allocates STE and non-STE portions of TRQs’; (2) on a ‘predictable basis’, because ‘applicants and other interested parties cannot easily anticipate how the NDRC allocates STE and non-STE portions of

TRQs'; and (3) 'using clearly specified administrative procedures', because 'the NDRC's process for allocating STE and non-STE portions of TRQs is not set out in plain or obvious detail'.

Next, the Panel addressed the 'implications of China's statement that the NDRC, in practice, allocates the entire STE portions of TRQs to COFCO [(the only designated STE for grains)] and does not require COFCO to return unused TRQ amounts'. At the outset, the Panel agreed with the US that 'a number of provisions in China's legal instruments suggest that STE portions of TRQs could be allocated to STE as well as non-STE applicants'. In this regard, it saw 'nothing, in China's legal instruments or elsewhere, that would alert applicants and other interested parties to the NDRC's stated practice of allocating the entire STE portion of TRQs only to COFCO'. Similarly, with respect to China's alleged practice of not requiring COFCO to return unused TRQ amounts, the Panel agreed with the US that 'the requirement to return unused TRQ amounts is set out in China's legal instruments as generally applicable to all recipients of TRQ allocations', and it saw nothing in China's legal instruments to suggest that 'an STE such as COFCO should not be considered an end-user and therefore should not be subject to the requirement to return unused TRQ amounts, insofar as that STE applies for and receives a TRQ allocation, including an allocation of STE portions of a TRQ'. Thus, the Panel considered that NDRC's practice 'differs from what is set out in China's legal instrument', and such a disparity 'demonstrates that applicants and other interested parties cannot easily understand or discern the set of rules or principles through which the NDRC, in practice, administers STE and non-STE portions of TRQs'. Similarly, it considered that this disparity supports its finding of inconsistency with the obligations to administer TRQs on a 'predictable basis', because applicants and other interested parties cannot easily anticipate how the NDRC, in practice, allocates STE and non-STE portions, and also the obligation to use 'clearly specified administrative procedures', because it shows that 'the NDRC, in practice, allocates STE and non-STE portions of TRQs in a manner that is not set out in plain or obvious detail'. In addition, the Panel found that this disparity 'demonstrates that the NDRC does not use the otherwise applicable rules when administering STE and non-STE portions', thereby demonstrating that China violates the obligation to administer its TRQs on a 'fair basis'. Finally, the Panel observed that, in respect of the implications of the NDRC's stated practice on the filling of the relevant TRQs, it agreed with the US that 'this practice would result in the exclusion of certain TRQ amounts that would otherwise be available to non-STE applicants'. As a result, it concluded that China's statement regarding the NDRC practice 'demonstrates that China's TRQ administration restrains the filling of its TRQs, in violation of the obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ'.

In addition, the US claimed that the procedure for non-STE recipients to import under STE portions of TRQs violates the obligations to administer TRQs 'on a predictable basis, to use clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ'. The Panel recalled that 'non-STE recipients of STE portions of TRQs must import through a designated STE or, if unsuccessful by 15 August, seek approval from the NDRC to import on their own or through any other enterprise'. The Panel observed that it is 'undisputed that COFCO is the only designated STE for grains, and that there is no requirement in China's legal instruments for COFCO to agree to contract with non-STE recipients of STE portions of TRQs', and also that 'there is no clarification, in China's legal instruments or elsewhere, of the procedure to be followed by non-STE recipients of STE portions when seeking approval to import without COFCO following 15 August'. As a result, the Panel found that 'applicants and other interested parties cannot easily anticipate how non-STE recipients are to import wheat, rice, and corn under STE portions of TRQs', in violation of China's obligation to administer TRQs on a 'predictable basis'. Similarly, it considered that 'the procedure for seeking approval to import without COFCO is not set out in plain or obvious detail, in violation of China's obligation to administer its TRQs using clearly specified administrative procedures'. As to the effects of this procedure on the filling of China's TRQs, the Panel noted that 'non-STE recipients are prevented from utilizing STE portions of their TRQ allocations if they do not

succeed in contracting with COFCO or obtaining approval from the NDRC to import without COFCO'. It also agreed with the US that 'the effects go beyond the possibilities for non-STE recipients to utilize STE portions of their TRQs allocations', as non-STE recipients that are prevented from utilizing STE portions of their TRQs allocations would not be eligible to apply for reallocation and they may face penalties for non-use. The Panel considered that these restrictions and the implications on their ability to participate in reallocation and to receive the full amount of TRQ allocations in future years would violate China's obligation to administer its TRQs in a manner that would not inhibit the filling of each TRQ.

4.7 Usage Requirements for Wheat, Rice, and Corn Imported under TRQ Allocations

The US claimed that 'China's imposition of usage requirements in respect of wheat, rice, and corn imported under TRQ allocations violates the obligation under Paragraph 116 to administer TRQs in a manner that would not inhibit the filling of each TRQ'. In addition, the US submitted that 'the NDRC's stated practice on enforcing the usage requirements for wheat and corn demonstrates a violation of the obligations under Paragraph 116 to administer TRQs in a predictable manner and to use clearly specified administrative procedures'.

The Panel began its analysis with the usage requirements for *wheat and corn* imported under TRQ allocations. It observed that, under these requirements, 'a recipient of a wheat or corn TRQ allocation is required to process the imported wheat or corn in its own plant'. For group enterprises, 'the imported wheat or corn must be processed separately in each processing plant that has applied for and received wheat or corn TRQ allocations'. The US claimed that 'these usage requirements violate the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ'.

The Panel agreed with the US that 'these requirements restrain recipients' ability to use wheat or corn imported under their TRQ allocations in the most efficient or commercially preferable manner', and it considered that 'circumstances in the market may sometimes make it more efficient or commercially preferable for a TRQ recipient to contract with another enterprise for the processing of its imported wheat or corn, or to sell that wheat or corn without processing'. Similarly, it stated, 'there may be circumstances where it would be more efficient or commercially preferable for a group enterprise to have its imported wheat or corn processed in a plant different than that which applied for a TRQ allocation'. In this way, '[t]he usage requirements for wheat and corn set out in China's legal instruments would prevent TRQ recipients from pursuing these business options'. The Panel also observed that '[t]he operation of the usage requirements for wheat and corn is such that applicants know that they must process wheat and corn imported under TRQ allocations in their own plant and will therefore import the amounts of wheat and corn that they can process in their own plant' and also that 'the operation of the penalties for non-use of TRQ allocations is such that applicants know that they will face deductions to their TRQ allocations in the following year if they do not import the full amounts of wheat or corn under their TRQ allocations'. Thus, the operation of these requirements, in conjunction with the penalties for non-use, 'is such that applicants will apply for TRQ amounts that they know they can process in their own plant'. According to the Panel, 'this would cause applicants to be overly cautious in deciding the TRQ amounts that they will apply for', and it found convincing the argument that, 'in the absence of such requirements, applicants would apply for larger TRQ amounts'. Thus, the Panel found that these usage requirements 'restrain the filling of China's wheat and corn TRQs and therefore violate the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ'.

4.8 Overall Assessment of China's TRQ Administration under Paragraph 116

The Panel provided 'a holistic assessment of the compatibility of China's TRQ administration with the obligations set forth in Paragraph 116, by synthesizing [its] analyses regarding the

individual aspects of China's TRQ administration'. After recalling the operation of China's TRQ regime and its findings above regarding each specific aspect of it, the Panel concluded that those findings 'demonstrate that China's TRQ administration contains legal flaws from the beginning through to the completion of the process'. On this basis, it concluded that 'China's TRQ administration, as a whole, is inconsistent with the obligations, set forth in Paragraph 116, to administer TRQs on a transparent, predictable, and fair basis, using clearly specified administrative procedures and requirements that would not inhibit the filling of each TRQ'.

5. China's Response to the Panel's Ruling

The panel report was issued on 18 April 2019. Given the state of the Appellate Body at that time, it would not have been surprising if China had appealed, hoping to take advantage of the long delays in issuing Appellate Body reports (due in part to the appointments crisis), or even sending the dispute into permanent limbo if that crisis could not be resolved. But at the 28 May DSB meeting, China allowed the report to be adopted.⁶ Perhaps China's decision not to appeal was intended to ease tensions with the US–China relationship and trade talks, but it is hard to say for sure.

With regard to the reasonable period of time for implementation, China and the United States initially agreed on a little over seven months from adoption, with the period expiring on 31 December 2019.⁷ That period was later extended several times, though, with the expiration date ultimately set for 8 October 2020.⁸

In February of 2020, China provided a status report in which it claimed it had come into compliance. It stated: 'As of 31 December 2019, China had fully implemented the recommendations and rulings of the DSB in this matter. On 16 January 2020, China and the United States agreed to extend the reasonable period of time to 29 February 2020 to allow the United States additional time to evaluate China's compliance measures'.⁹ In this status report, China explained that, pursuant to the compliance measures it has taken, 'the overall objective of China's administration of the TRQs is to achieve full utilization of both the STE and non-STE portions of each TRQ, consistent with market conditions. China's TRQs for wheat, rice and corn for the year 2020 have been fully allocated to end-users. In accordance with China's measures, all unused and returned TRQ amounts will be reallocated and penalties for non-use will be imposed in accordance with the Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products.'

The status report was discussed at the DSB meeting of February 28/March 5, where the United States responded as follows:

⁶Dispute Settlement Body, Minutes of meeting held in the Centre William Rappard, WT/DSB/M/429, 28 May 2019, para. 7.3. China said the following at the DSB meeting: 'Though disappointed with some of the Panel's findings, China chose to let the Panel Report to be adopted at the present meeting in order to settle this dispute'.

⁷World Trade Organization (2019) 'China – Tariff Rate Quotas for Certain Agricultural Products – Agreement Under Article 21.3(B) of the DSU', WT/DS517/10, 4 July 2019. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517-10.pdf&Open=True>.

⁸World Trade Organization (2020) 'China – Tariff Rate Quotas for Certain Agricultural Products – Modification of the Agreement Under Article 21.3(B) of the DSU', WT/DS517/11, 20 January 2020, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517-11.pdf&Open=True>; World Trade Organization (2020) 'China – Tariff Rate Quotas for Certain Agricultural Products – Modification of the Agreement Under Article 21.3(B) of the DSU', 20 March 2020, WT/DS517/13, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517-13.pdf&Open=True>; World Trade Organization (2020e) 'China – Tariff Rate Quotas for Certain Agricultural Products – Modification of the Agreement Under Article 21.3(B) of the DSU', 4 June 2020, WT/DS517/14, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517-14.pdf&Open=True>.

⁹World Trade Organization (2020) 'China – Tariff Rate Quotas for Certain Agricultural Products – Status Report Regarding Implementation of the DSB Recommendations and Rulings by China', WT/DS517/12, 18 February, 2020, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/517-12.pdf&Open=True>.

1.36. ... The United States had requested from China additional information to verify this allocation information and looked forward to meaningful engagement from China. China's status report also asserted that all unused and returned TRQ amounts would be reallocated and penalties for non-use would be imposed in accordance with the recently amended measures. The United States would be monitoring the reallocation process closely and looked forward to further updates from China regarding its administration. The United States noted that China's status report asserted that, as of 31 December 2019, China had fully implemented the DSB's recommendations and rulings in this matter. The United States was not in a position to agree with China's claim of compliance at this time. As set out in this statement, the United States looked forward to continuing engagement with China on the information requested and on China's administration of its tariff-rate quotas.¹⁰

6. Prospects for Implementation: The US–China Trade War, the Phase 1 Trade Deal, and the Experience so far in 2020

In July of 2018, China announced increased tariffs on a number of agricultural products, including corn and wheat, in retaliation for actions taken by the Trump Administration against Chinese imports based on an investigation of unfair trade practices related to technology transfer, intellectual property, and innovation under Section 301 of the Trade Act of 1974 (Bown and Kolb, 2020). As a result, US exports of corn and wheat to China were negligible in the second half of 2018 and for most of 2019.

A trade deal was announced between China and the United States in December 2019. The so-called Phase 1 Agreement had a number of provisions that are germane here. Chapter 3 of the agreement contained several provisions covering agriculture including provisions where China agreed to comply with the Panel findings in *China–Agriculture Subsidies*¹¹ and *China–TRQ Administration*. China agreed to comply with its WTO obligations and to make specific improvements to its administration of wheat, corn, and rice tariff-rate quotas (TRQs), including the allocation methodology, treatment of non-state trading quota applicants, and increased transparency.¹² Specifically, for rice, China committed to authorize the importation of US rice from

¹⁰World Trade Organization (2020a) 'Dispute Settlement Body – Minutes of Meeting Held in the Centre William Rappard on 28 February and 5 March 2020', WT/DSB/M/441, <http://worldtradelaw.net/document.php?id=dsbminutes/M441.pdf>.

¹¹World Trade Organization, *China–Domestic Support for Agricultural Producers*, WT/DS511.

¹²Annex 14 to Chapter 3 states:

Annex 14. Tariff Rate Quotas

1. China shall ensure that, from 31 December 2019, its TRQ measures for wheat, rice, and corn are in conformity with the Panel Report in *China – Tariff Rate Quotas for Certain Agricultural Products* and the WTO agreements, including China's commitments under the Protocol on the Accession of the People's Republic of China to the WTO and China's Schedule CLII, Part I, Section 1(B).
2. The entirety of China's TRQs for wheat, rice, and corn (WRC TRQs) for each year shall be allocated by January 1 of that year to end-users. China shall ensure that it does not inhibit the filling of its WRC TRQs.
3. China's requirements for WRC TRQ eligibility, allocation, return, reallocation, and penalties shall not discriminate between State Trading Enterprises (STEs) and non-STEs and shall apply equally to the STE share of the WRC TRQ and the non-STE share of the WRC TRQ. For the purposes of China's WRC TRQ administration measures, "end-users" and "enterprises" include STEs when allocated a WRC TRQ.
4. China shall reallocate all unused and returned WRC TRQ amounts, including all unused and returned amounts allocated to STEs or designated as part of the "STE share," by October 1 of each year. Only new applicants and entities other than those returning unused quotas shall be eligible to receive reallocated WRC TRQ amounts.
5. China shall make all WRC TRQ allocations in commercially viable shipping amounts.
6. China shall clearly specify and publish all eligibility criteria for its WRC TRQs and all allocation principles for its WRC TRQ administration, and the allocation principles shall be relevant to the importation, processing, or sale of the commodity subject to the WRC TRQ. China shall ensure that a sufficient number of STE and

any USDA-approved rice facility within 20 business days of China's receipt of notification from the United States that USDA had approved the facility as compliant with the phytosanitary protocol agreed to by the United States and China.

Of interest to corn exporters, China agreed to implement a transparent, predictable, efficient, science- and risk-based regulatory process for the evaluation and authorization of products of agricultural biotechnology. China's time frame for review and authorization for products for feed or further processing will be an average of 24 months. China also agreed to certain administrative improvements in the application process, to certain steps to address situations of low-level presence, and to develop safety assessment procedures for approval of food ingredients that are derived from genetically modified microorganisms.

In addition to those more structural provisions, China agreed to purchase and import on average at least \$40 billion of US food, and agricultural and seafood products annually for a total of at least \$80 billion over 2020 and 2021. While specific commodities totals were not given, corn, wheat, and rice were listed as commodities of specific interest.

Through August of 2020, Chinese customs data suggest that China wheat imports from all sources were 4.8 million tonnes (50% fill rate), corn imports were 5.6 million tonnes (78% fill rate), and rice imports 1.5 million tonnes (28% fill rate) (Global Trade Atlas, 2020). Through August, the US accounted for 11% of total China wheat imports, 12% of total corn imports, and no rice imports. The US Department of Agriculture Export Sales Reports as of 8 October 2020 show that outstanding sales of wheat to China for the 2020/2021 marketing year¹³ total 311,000 tonnes and outstanding corn sales total 8,744,700 tonnes (US Department of Agriculture, 2020b). Whether all of the outstanding sales will be finalized or shipped to China before the end of the 2020 calendar year is unknown. Nonetheless, the quantities suggest fill rates for corn and wheat should be high for 2020 and perhaps 2021 as well.

The specific breakdown between various import sources will be of interest, as it is possible that some of the benefits of Chinese market-opening go to countries other than the United States. Third parties to the dispute, such as Australia, Brazil, and Canada, are competitors of the United States for these export products, and are no doubt to seeking to increase their own exports based on the WTO panel ruling (Bloomberg News, 2020).¹⁴ In terms of a general benefit to open trade, the US complaint would be a success if overall Chinese imports increased. However, for the US producers who pushed for the complaint, it would be a disappointment if much of the benefit accrued to their foreign competitors.

7. Conclusions

Whether the experience of 2020 marks a turnaround in TRQ administration and increased Chinese market access for grain exporters will depend largely on Chinese demand and

non-STE entities, including new quota applicants, are eligible to receive WRC TRQ allocations, and that the full utilization of its WRC TRQs is not inhibited.

7. Consistent with China's WTO obligations, at the request of the United States, China shall provide the relevant WRC TRQ allocation and reallocation information requested.
8. Each Party shall make available on a public website existing laws, regulations, and announcements on its administration of WRC TRQs, if any, and publish any change to them in a timely manner. Upon request of a Party, the Parties shall hold consultations on TRQ administration pursuant to the Bilateral Evaluation and Dispute Resolution Chapter.

¹³The marketing year begins 1 June for wheat, 1 September for corn, and 1 August for rice.

¹⁴See, e.g., 'China Buys Australian and Canadian Wheat as US Waits Turn', Bloomberg News, 27 January 2020 ('China has purchased Australian, Canadian and French wheat as Beijing looks to fill import quotas set by the World Trade Organization, according to people familiar with the matter ... The move may signal China will make good on its promise to administer its tariff-rate quotas for wheat, rice and corn after losing a WTO battle last year that was brought by the US'), www.bloomberg.com/news/articles/2020-01-27/china-buys-australian-and-canadian-wheat-as-u-s-waits-its-turn.

Chinese domestic support policies. Baseline forecasts by US Department of Agriculture, OECD/FAO, and others point to increased meat, poultry, and dairy consumption in China, which, presuming much of the increased consumption is met by increased domestic production, means more corn imports to meet feedstock needs. Recent reforms in China's grain programs should reduce production distortions, which have insulated Chinese producers from global market prices in the past. Of the three grains, rice is perhaps the most problematic since per capita consumption has been declining and China's population growth rates are flattening and expected to begin to turn negative over the next 20 years (United Nations, *n.d.*).

With regard to the big questions asked at the outset, we have now reached the current end of the implementation period and a number of questions remain.

First, how will the United States judge compliance here? The Panel's legal findings do not require a certain amount of US products to be sold in China. Rather, China may comply by making process changes (e.g. to the public comment process) that do not result in increased US exports. How will the United States react if that is how things play out? What will the United States think if Chinese imports increase, but those imports come from other countries instead of the United States? (And if exports of these products from other countries to China increase, will that open new markets elsewhere for US products?) As of this writing, the United States has not put forward any views on whether it believes China has come into compliance. The Trump administration was arguably more focused on the Phase 1 deal than the WTO ruling. A Biden administration may take a different approach.

In terms of evaluating the impact of the WTO ruling on China's TRQ administration, the existence of the Phase 1 deal complicates the issue. If China does change its practices, and the TRQs are now filled, we will not be certain what the specific cause was: the WTO ruling or the Phase 1 deal. And more broadly, if the US–China trade war continues, the full scope of US–China trade will be distorted. These factors may limit our ability to draw broad conclusions from the Chinese actions in this case.

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