WORLD TRADE ORGANIZATION

WT/DS427/R

2 August 2013

(13-3965)

Page: 1/168

Original: English

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

REPORT OF THE PANEL

BCI deleted, as indicated
[***]

TABLE OF CONTENTS

1 INTRODUCTION 17

2 FACTUAL ASPECTS 17

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 19

3.1 United States 19

3.2 China 21

4 ARGUMENTS OF THE PARTIES 21

5 ARGUMENTS OF THE THIRD PARTIES 21

6 INTERIM REVIEW 21

7 FINDINGS 34

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof 34

7.1.1 Treaty interpretation 34

7.1.2 Standard of review 34

7.1.3 Burden of proof 34

7.2 Procedural claims 35

7.2.1 Whether MOFCOM provided an opportunity for interested parties with adverse interests to meet as required under Article 6.2 of the Anti-Dumping Agreement 35

7.2.1.1 Introduction 35

7.2.1.2 Relevant provisions 35

7.2.1.3 Factual background 35

7.2.1.4 Main arguments of the parties 36

7.2.1.4.1 United States 36

7.2.1.4.2 China 36

7.2.1.5 Arguments of the third parties 37

7.2.1.6 Evaluation by the Panel 37

7.2.2 Whether MOFCOM required the Petitioner to provide non-confidential summaries as required under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement 38

7.2.2.1 Introduction 38

7.2.2.2 Relevant provisions 39

7.2.2.3 Factual background 39

7.2.2.4 Main arguments of the parties 39

7.2.2.4.1 United States 39

7.2.2.4.2 China 41

7.2.2.5 Arguments of the third parties 42

7.2.2.6 Evaluation by the Panel 43

7.2.2.6.1 Production and standing 44

7.2.2.6.2 Production capacity 45

7.2.2.6.3 Inventories, wages and employment, cash flow and labour productivity 45

7.2.2.6.4 Conclusion 46
7.2.3 Whether MOFCOM disclosed the "essential facts" as required by Article 6.9 of the Anti-Dumping Agreement 46
7.2.3.1 Introduction 46
7.2.3.2 Relevant provisions 46
7.2.3.3 Factual background 47
7.2.3.4 Main arguments of the parties 47
7.2.3.4.1 United States 47
7.2.3.4.2 China 48
7.2.3.5 Arguments of the third parties 49
7.2.3.6 Evaluation by the Panel 50
7.2.3.6.1 What constitutes "essential facts"? 50
7.2.3.6.2 Whether MOFCOM disclosed the "essential facts" to the respondents 52
7.2.3.6.2.1 Pilgrim's Pride 53
7.2.3.6.2.2 Tyson 54
7.2.3.6.2.3 Keystone 54
7.2.3.6.3 Conclusion 55
7.3 Substantive issues with respect to the determination of the anti-dumping and countervailing duties 55
7.3.1 Whether MOFCOM complied with Article 2.2.1.1 of the Anti-Dumping Agreement when it calculated the respondents' costs of production 55
7.3.1.1 Relevant provisions 56
7.3.1.2 Factual background 56
7.3.1.2.1 The respondents' books and records 56
7.3.1.2.2 MOFCOM's allocation methodology 59
7.3.1.3 Whether MOFCOM complied with the obligation in the first sentence of Article 2.2.1.1 to normally calculate costs on the basis of the producers' books and records 61
7.3.1.3.1 Main arguments of the parties 61
7.3.1.3.1.1 United States 61
7.3.1.3.1.2 China 64
7.3.1.3.2 Arguments of the third parties 67
7.3.1.3.3 Evaluation by the Panel 68
7.3.1.3.3.1 Whether there is an obligation for an investigating authority to explain its decision to decline to use a respondent's books and records 68
7.3.1.3.3.2 Whether MOFCOM correctly determined that the respondents' books and records did not "reasonably reflect the costs associated with production and sale of the product under consideration" 69
7.3.1.3.3.3 Conclusion 72
7.3.1.4 Whether MOFCOM complied with the obligations in the second sentence of Article 2.2.1.1 when it devised and applied its own allocation methodology 72
7.3.1.4.1 Main arguments of the parties 72
7.3.1.4.1.1 United States 72

7.3.1.4.1.2 China 73
7.3.1.4.2 Evaluation by the Panel 75
7.3.1.4.3 Conclusion 77
7.3.2 Whether MOFCOM made a fair comparison between normal value and export price as required by Article 2.4 of the Anti-Dumping Agreement when it adjusted Keystone's export price to account for freezer expenses 77
7.3.2.1 Introduction 77
7.3.2.2 Relevant provisions 78
7.3.2.3 Factual background 79
7.3.2.4 Main arguments of the parties on the Panel's terms of reference 80
7.3.2.4.1 China 80
7.3.2.4.2 United States 81
7.3.2.5 Evaluation by the Panel 81
7.3.3 Whether MOFCOM properly calculated the amount of subsidization as required by Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 84
7.3.3.1 Introduction 84
7.3.3.2 Relevant provisions 84
7.3.3.3 Factual background 85
7.3.3.4 Main arguments of the parties 86
7.3.3.4.1 United States 86
7.3.3.4.2 China 87
7.3.3.5 Arguments of the third parties 89
7.3.3.6 Evaluation by the Panel 89
7.3.4 Whether MOFCOM complied with Articles 6.8, 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement when it applied facts available to calculate the "all others" rate for unknown producers/exporters in the anti-dumping investigation 93
7.3.4.1 Introduction 93
7.3.4.2 Relevant provisions 93
7.3.4.3 Factual background 94
7.3.4.4 Main arguments of the parties 96
7.3.4.4.1 United States 96
7.3.4.4.1.1 Application of a facts available rate under Article 6.8 and Annex II of the Anti-Dumping Agreement 96
7.3.4.4.1.2 Disclosure of essential facts and public notice pursuant to Articles 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement 97
7.3.4.4.2 China 97
7.3.4.4.2.1 Application of a facts available rate under Article 6.8 and Annex II of the Anti-Dumping Agreement 97
7.3.4.4.2.2 Disclosure of essential facts and public notice pursuant to Articles 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement 98
7.3.4.5 Arguments of the third parties 99
7.3.4.6 Evaluation by the Panel 100
7.3.4.6.1 Whether MOFCOM applied facts available consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement 100

7.3.4.6.2 Whether MOFCOM disclosed the "essential facts" pertaining to the "all others" rate in the anti-dumping investigation as required by Article 6.9 of the Anti-Dumping Agreement 103

7.3.4.6.3 Whether MOFCOM disclosed in the public notices the rationale and relevant facts underlying its decision to apply facts available and the rate determined as required under Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement 105

7.3.5 Whether MOFCOM complied with Articles 12.7, 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement when it applied facts available to calculate the "all others" rate for unknown producers/exporters in the countervailing duty investigation 106

7.3.5.1 Introduction 106

7.3.5.2 Relevant provisions 106

7.3.5.3 Factual background 107

7.3.5.4 Main arguments of the parties 108

7.3.5.4.1 United States 108

7.3.5.4.2 China 109

7.3.5.5 Arguments of the third parties 109

7.3.5.6 Evaluation by the Panel 111

7.3.5.6.1 Whether MOFCOM applied facts available consistently with Article 12.7 of the SCM Agreement 111

7.3.5.6.2 Whether MOFCOM disclosed the "essential facts" pertaining to the "all others" rate in the countervailing duty investigation, as required by Article 12.8 of the SCM Agreement 113

7.3.5.6.3 Whether MOFCOM disclosed in the public notices the rationale and relevant facts underlying its decision to apply facts available and the rate determined as required under Articles 22.3, 22.4 and 22.5 of the SCM Agreement 113

7.4 Claims with respect to MOFCOM's injury determinations 114

7.4.1 Introduction 114

7.4.2 Whether MOFCOM properly defined the domestic industry for purposes of the injury determination 114

7.4.2.1 Introduction 114

7.4.2.2 Relevant provisions 114

7.4.2.3 Factual background 115

7.4.2.4 Main arguments of the parties 117

7.4.2.4.1 United States 117

7.4.2.4.2 China 119

7.4.2.5 Arguments of the third parties 121

7.4.2.6 Evaluation by the Panel 122

7.4.2.6.1 Whether an investigating authority must attempt to identify and seek information from all domestic producers 124

7.4.2.6.2 Whether MOFCOM's definition of the domestic industry involved a self-selection process which effectively excluded producers from the domestic industry causing material risk of distortion in the examination of injury 126

7.4.2.6.3 Conclusion 129

7.4.3 Whether MOFCOM's price effects analyses are consistent with Articles 3.1, 3.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2 and 22.5 of the SCM Agreement 129

7.4.3.1 Introduction 129
7.4.3.2 Relevant provisions 129
7.4.3.3 Factual background 130
7.4.3.4 Whether MOFCOM's findings of price undercutting are consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement 132
7.4.3.4.1 Main arguments of the parties 132
7.4.3.4.1.1 United States 132
7.4.3.4.1.2 China 134
7.4.3.4.2 Arguments of the third parties 136
7.4.3.4.3 Evaluation by the Panel 136
7.4.3.4.3.1 Whether MOFCOM ensured price comparability in terms of levels of trade in the investigations at issue 138
7.4.3.4.3.2 Whether MOFCOM ensured price comparability in terms of product mix in the investigations at issue 139
7.4.3.4.3.3 Conclusion on price comparability 140
7.4.3.5 Whether MOFCOM's findings of price suppression are consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement 141
7.4.3.5.1 Main arguments of the parties 141
7.4.3.5.1.1 United States 141
7.4.3.5.1.2 China 141
7.4.3.5.2 Arguments of the third parties 142
7.4.3.5.3 Evaluation by the Panel 142
7.4.3.6 Whether MOFCOM provided in the Determinations its reasons for rejecting the United States Government's argument concerning level of trade 145
7.4.3.6.1 Main arguments of the parties 147
7.4.3.6.1.1 United States 147
7.4.3.6.1.2 China 148
7.4.3.6.2 Evaluation by the Panel 148
7.4.4 Whether MOFCOM's findings that subject imports had an adverse impact on the domestic industry comply with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement 149
7.4.4.1 Introduction 149
7.4.4.2 Relevant provisions 149
7.4.4.3 Factual background 150
7.4.4.4 Main arguments of the parties 150
7.4.4.4.1 United States 150
7.4.4.4.2 China 152
7.4.4.5 Arguments of the third parties 153
7.4.4.6 Evaluation by the Panel 154
7.4.4.6.1 Introduction 154

7.4.5 Whether MOFCOM's causation analyses comply with Articles 3.1, 3.5, 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.5, 22.3 and 22.5 of the SCM Agreement 154
7.4.5.1 Whether MOFCOM's causation analyses are consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement 155
7.4.5.1.1 Relevant provisions 155
7.4.5.1.2 Factual background 155
7.4.5.1.3 Main arguments of the parties 156
7.4.5.1.3.1 United States 156
7.4.5.1.3.2 China 158
7.4.5.1.4 Arguments of the third parties 160
7.4.5.1.5 Evaluation by the Panel 160
7.4.5.2 Whether MOFCOM explained the reasons for its rejection of certain arguments as required under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement 161
7.4.5.2.1 Introduction 161
7.4.5.2.2 Relevant provisions 161
7.4.5.2.3 Factual background 161
7.4.5.2.4 Main arguments of the parties 162
7.4.5.2.4.1 United States 162
7.4.5.2.4.2 China 163
7.4.5.2.5 Evaluation by the Panel 164
7.4.5.2.5.1 Argument concerning market shares 164
7.4.5.2.5.2 Argument with respect to chicken paws 164
7.4.5.2.5.3 Conclusion 165
7.5 Consequential violations 165
8 CONCLUSIONS AND RECOMMENDATION 166

LIST OF ANNEXES
ANNEX A

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS AT THE SUBSTANTIVE MEETINGS OF THE PANEL

Contents		Page
Annex A-1	Integrated Executive Summary Submitted by the United States	A-2
Annex A-2	Integrated Executive Summary Submitted by China (BCI redacted)	A-49

ANNEX B

WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

Contents		Page
Annex B-1	Third-Party Statement of Chile	B-2
Annex B-2	Integrated Executive Summary Submitted by the European Union	B-4
Annex B-3	Integrated Executive Summary Submitted by Japan	B-9
Annex B-4	Integrated Executive Summary Submitted by Mexico	B-12
Annex B-5	Integrated Executive Summary Submitted by Norway	B-18
Annex B-6	Integrated Executive Summary Submitted by the Kingdom of Saudi Arabia	B-21
Annex B-7	Thailand's Responses to Panel Questions	B-24

ANNEX C

WORKING PROCEDURES FOR THE PANEL

Contents		Page
Annex C-1	Working Procedures for the Panel	C-2
Annex C-2	Additional Working Procedures of the Panel Concerning Business Confidential Information	C-7

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, circulated to WTO Members 26 February 2013 [adoption/appeal pending]
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

Short title	Full case title and citation
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, 2741
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R

Short title	Full case title and citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, 2623
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865

Short title	Full case title and citation
US – Softwood Lumber VI (Article 21.5 – Canada)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, adopted 9 May 2006, as modified by Appellate Body Report WT/DS277/AB/RW, DSR 2006:XI, 4935
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Title and short title used in the Report
USA-1	China Animal Agricultural Association, Petition for Anti-Dumping and Anti-Subsidy Investigation of Broiler Products (14 August 2009) ("Petition")
USA-2	MOFCOM, Preliminary Anti-Dumping Determination, Notice No. 8 [2010] (5 February 2010) ("Preliminary Anti-Dumping Determination")
USA-3	MOFCOM, Preliminary Countervailing Duty Determination, Notice No. 26 [2010] (28 April 2010) ("Preliminary Countervailing Duty Determination")
USA-4	MOFCOM, Final Anti-Dumping Determination, Notice No. 51 [2010] (26 September 2010) ("Final Anti-Dumping Determination")
USA-5	MOFCOM, Final Countervailing Duty Determination, Notice No. 52 [2010] (29 August 2010) ("Final Countervailing Duty Determination")
USA-6	MOFCOM, Notice of Initiation of the Anti-Dumping Investigation, Notice No. 74 [2009] (27 September 2009) ("Notice of Initiation of the Anti-Dumping Investigation")
USA-7	MOFCOM, Notice of Initiation of the Countervailing Duty Investigation, Notice No. 75 [2009] (27 September 2009) (Notice of Initiation of the Countervailing Duty Investigation")
USA-8	MOFCOM, Letter to Tyson Regarding Basic Facts Relied Upon for the Purpose of the Degree of Dumping Calculation in the Antidumping Preliminary Determination Against Broiler Products and Chicken Products ("Preliminary Anti-Dumping Disclosure to Tyson")
USA-9	MOFCOM, Letter to Pilgrim's Pride Corporation Regarding Basic Facts Relied Upon for the Purpose of Dumping Margin Calculation in the Antidumping Preliminary Determination Against Broiler Products and Chicken Products ("Preliminary Anti-Dumping Disclosure to Pilgrim's Pride")
USA-10	MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon for the Purpose of Dumping Margin Calculation in the Antidumping Preliminary Determination Against Broiler Products and Chicken Products ("Preliminary Anti-Dumping Disclosure to Keystone")
USA-11	MOFCOM, Letter to US Commercial Service Regarding the Disclosure of the Basic Facts on which the Dumping Margins are Based in the Final Determination of the Broiler Products and Chicken Products Antidumping Case, No. 141 [2010] (16 July 2010) ("Anti-Dumping Disclosure to the US Government")
USA-12	MOFCOM, Letter to Tyson Regarding the Disclosure of Basic Facts on which the Dumping Margins are Based in the Final Determination of the Broiler Products and Chicken Products Antidumping Case, No. 137 [2010] (16 July 2010) ("Final Anti-Dumping Disclosure to Tyson")
USA-13	MOFCOM, Letter to Pilgrim's Pride Corporation Regarding the Disclosure of Basic Facts on which the Dumping Margins are Based in the Final Determination of the Broiler Products and Chicken Products Antidumping Case, No. 136 [2010] ("Final Anti-Dumping Disclosure to Pilgrim's Pride")
USA-14	MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon for the Purpose of Dumping Margin Calculation in the Antidumping Final Determination Against Broiler Products, No. 138 [2010] ("Final Anti-Dumping Disclosure to Keystone")
USA-15	MOFCOM, Letter to Tyson Regarding Basic Facts Relied Upon for the Purpose Regarding the Basis of Basic Factual Disclosure Document of Ad Valorem Subsidy Rate Determination in the Preliminary Ruling of Countervailing Investigation ("Preliminary Countervailing Duty Disclosure to Tyson")
USA-16	MOFCOM, Letter to Pilgrim's Pride Corporation Regarding the Basis of Basic Factual Disclosure Document of Ad Valorem Subsidy Rate Determination in the Preliminary Ruling of Countervailing Investigation of Broiler Products ("Preliminary Countervailing Duty Disclosure to Pilgrim's Pride")
USA-17	MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon for the Purpose of Ad Valorem Subsidy Rate Calculation in the Countervailing Duty Preliminary Determination Against Broiler Products and Chicken Products ("Preliminary Countervailing Duty Disclosure to Keystone")
USA-18	MOFCOM, Letter to Tyson Regarding Basic Facts Relied Upon for the Purpose of Ad Valorem Subsidy Rate Calculation in the Countervailing Duty Final Determination Against Broiler Products and Chicken Products, No. 144 [2010] (16 July 2010) ("Final Countervailing Duty Disclosure to Tyson")

Exhibit	Title and short title used in the Report
USA-19	MOFCOM, Letter to Pilgrim's Pride Corp. Regarding the Basis of Basic Factual Disclosure Document of Relied Upon for the Purpose of Ad Valorem Subsidy Rate Calculation in the Countervailing Duty Final Determination Against Broiler Products and Chicken Products, No. 143 [2010] (16 July 2010) ("Final Countervailing Duty Disclosure to Pilgrim's Pride")
USA-20	MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon for the Purpose of Ad Valorem Subsidy Rate Calculation in the Countervailing Duty Final Determination Against Broiler Products and Chicken Products, No. 145 [2010] (16 July 2010) ("Final Countervailing Duty Disclosure to Keystone")
USA-21	USAPEEC, Opinions Regarding Industry Injury in the Antidumping and Countervailing Duty Investigations of Broiler Products and Chicken Products from the United States, Public Version (7 January 2010) ("USAPEEC's Injury Brief")
USA-22	United States, Letter from L. Wang to G. Peng & L. Weiping Re: *Antidumping and Countervailing Duty Investigations on Imported Broiler Productions or Chicken Products Originating in the United States/Request for Public Hearing* (12 July 2010) ("Hearing Request")
USA-24	MOFCOM Reply to the Hearing Request [2010] No. 131 (14 July 2010)
USA-25	Tyson's Comments on the Preliminary Anti-Dumping Disclosure (20 February 2010)
USA-26	Tyson's Further Comments on the Preliminary Anti-Dumping Determination (9 April 2010)
USA-27	Pilgrim's Comments on the Preliminary Anti-Dumping Determination (5 March 2010)
USA-28	Pilgrim's Pride Response to the First Supplemental Anti-Dumping Questionnaire (18 December 2009)
USA-29	Keystone's Comments on the Final Anti-Dumping Disclosure (26 July 2010)
USA-30	Keystone's Comments on the Preliminary Anti-Dumping Determination (9 April 2010)
USA-32	Pilgrim's Pride Anti-Dumping Questionnaire Response (3 December 2009)
USA-34	Keystone Anti-Dumping Questionnaire Response (3 December 2009)
USA-35	Keystone Supplemental Anti-Dumping Questionnaire Response (18 December 2009)
USA-36	Tyson Anti-Dumping Questionnaire Response (3 December 2009)
USA-37	MOFCOM, Response to the US Government's Comments on the Final Anti-Dumping Disclosure, [2010] No. 170 (13 August 2010)
USA-38	MOFCOM, Second Supplemental Countervailing Duty Questionnaire (29 January 2010)
USA-39	MOFCOM, Notice on Registration for Participating in Industrial Injury Investigation in the Anti-Dumping Investigation of Broiler Products and Chicken Products, [2009] No. 277 (27 September 2009) ("Notice of Registration for the Anti-Dumping Injury Investigation")
USA-40	Tyson Comments on the Final Anti-Dumping Disclosure (26 July 2010)
USA-41	US Government's Comments on the Final Disclosure (2 August 2010)
USA-42	MOFCOM, Reply to the US Government's Comments on the Final Disclosure, [2010] No. 170 (13 August 2010)
USA-43	Pilgrim's Pride Comments on the Preliminary Countervailing Duty Determination (18 May 2010)
USA-44	Tyson's Comments on the Preliminary Countervailing Duty Determination (18 May 2010)
USA-45	Pilgrim's Pride Comments on the Basic Facts Relied Upon for the Subsidy Rate Calculation (24 July 2010) "Pilgrim's Pride's Comments on the Countervailing Duty Disclosure")
USA-46	USAPEEC, Comments on the Preliminary Injury Determination (24 February 2010) ("USAPEEC's Comments on Preliminary Anti-Dumping Determination")
USA-48	Tyson's Comments Regarding the Disclosure of the Basic Facts for the Final Countervailing Duty Determination (26 July 2010) ("Tyson's Comments on the Countervailing Duty Disclosure")
USA-49	MOFCOM, Letter to US Commercial Service Regarding the Disclosure of the Basic Facts on which the Determination of the Ad Valorem Subsidy Rates are Based in the Final Determination of the Broiler Products and Chicken Products Countervailing Duty Case, No. 142 [2010] (16 July 2010) ("Countervailing Duty Disclosure to the US Government")
USA-52	United States, Letter from S. Sindelar to L. Yu, J. Chengsen, Y. Lijun, and L. Chunsheng Re: *Countervailing Duty Investigation on Imported Broiler Products or Chicken Products Originating in the United States / Certain Subsidy Calculation Error* (4 August 2010) ("Subsidy Calculation Letter")
USA-54	Keystone's Anti-Dumping Questionnaire Response, Form 6-3 ("Keystone's Form 6-3")

Exhibit	Title and short title used in the Report
USA-55	Keystone's Anti-Dumping Questionnaire Response, Form 6-5 ("Keystone's Form 6-5")
USA-57	Keystone's Anti-Dumping Questionnaire Response, Form 6-7 ("Keystone's Form 6-7")
USA-58	MOFCOM, Verification Report for Keystone
USA-60	Keystone's Table 6-4.
USA-62	Table Produced in Response to Panel Question No. 38 (Pilgrim's Pride)
USA-74	Pilgrim's Pride Response to the Second Supplemental Anti-Dumping Questionnaire (28 December 2009)
USA-79	Tyson Clarksville Plant Cost Flowchart
CHN-2	China Animal Agricultural Association, Petition for Anti-Dumping and Anti-Subsidy Investigation of Broiler Products (14 August 2009) ("Petition")
CHN-3	MOFCOM, Final Anti-Dumping Determination, Notice No. 51 [2010] (26 September 2010) ("Final Anti-Dumping Determination")
CHN-12	Tyson's First Supplemental Countervailing Duty Questionnaire Response
CHN-13	Tyson's Second Supplemental Countervailing Duty Questionnaire Response
CHN-16	Pilgrim's Second Supplemental Countervailing Duty Questionnaire Response
CHN-20	USDA, *China – Poultry and Products Annual* (2011)
CHN-25	Reports on Diverging Consumer Preferences
CHN-27	United States Talking Points on Injury Issues (20 July 2010)
CHN-31	Summary of Invoice Data and Copies of Invoices
CHN-32	Exhibit 2 from Petition
CHN-33	Exhibit 6 from Petition
CHN-34	Exhibit 9 from Petition
CHN-37	Tyson's Annex CS2-I-3
CHN-38	Pilgrim's Pride Annex II-S1-2
CHN-41	USAPEEC Injury Questionnaire Response (December 2009)
CHN-43	Summary of 21 Invoices with both Breast and Claw Prices
CHN-44	Excerpt from Fujian Sumner Financial Statement
CHN-45	USAPEEC Foreign Producer Response, Annex III-6
CHN-46	Tyson Cost Tables from Form 6-3 Submitted as Part of Initial Anti-Dumping Response and Again as Exhibit S2-5 of Second Supplemental Response Worksheets, Revised Underselling Margins ("Tyson Cost Comparison Tables")
CHN-47	MOFCOM, Notice of Initiation of the Anti-Dumping Investigation, Notice No. 74 [2009] (27 September 2009) (Chinese version)
CHN-48	MOFCOM, Notice of Initiation of the Countervailing Duty Investigation, Notice No. 75 [2009] (27 September 2009) (Chinese version)
CHN-49	Anti-Dumping Investigation Registration Form
CHN-50	Countervailing Duty Investigation Registration Form
CHN-51	Notification on Registration to Participate in the Injury Investigation for the Countervailing Duty Investigation on Broiler Product, [2009] No. 278 (27 September 2009) ("Notice of Registration for the Countervailing Duty Injury Investigation")
CHN-63	MOFCOM, Letter to the US Embassy on Initiation
CHN-64	Tyson Per Unit Cost Calculation from Form S2-5 (Revised) (Form 6-3)
CHN-66	Corrected Exhibit CS2-I-3
CHN-67	Tyson's Verification Exhibit 34 and Comparison Table
CHN-68	Pilgrim's Pride Verification Exhibit and Comparison Table
CHN-69	Pilgrim's Pride Revised Annex II-S1-2
CHN-70	Tyson's Verification Disclosure
CHN-71	Pilgrim's Pride Verification Disclosure
CHN-74	DaChan Injury Questionnaire Excerpts
CHN-75	Shandong Liuhe Injury Questionnaire Excerpts

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
CAAA	China Animal Agriculture Association
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	Period of Investigation
RMB	Renminbi
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USAPEEC	United States Poultry & Egg Export Council
USD	US dollar
Vienna Convention on the Law of Treaties	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1. On 20 September 2011, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade of 1994 (the "GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") with respect to China's measures imposing anti-dumping duties and countervailing duties on broiler products from the United States, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 8 [2010], Notice No. 26 [2010], Notice No. 51 [2010], and Notice No. 52 [2010], including any and all annexes.[1] Pursuant to this request, the United States and China held consultations on 28 October 2011. The consultations failed to resolve the dispute.

1.2. On 8 December 2011, the United States requested, pursuant to Article 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body ("DSB") establish a panel to examine this matter.[2]

1.3. At its meeting on 20 January 2012, the DSB established a panel pursuant to the request of the United States in document WT/DS427/2, in accordance with Article 6 of the DSU.

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS427/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5. On 14 May 2012, the United States requested the Director-General to compose the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 24 May 2012, the Director-General composed the Panel as follows:

Chairman:	Mr Faizullah Khilji
Members:	Mr Serge Fréchette Ms Claudia Orozco[3]

1.6. Chile, the European Union, Japan, Mexico, Norway, the Kingdom of Saudi Arabia and Thailand reserved their rights to participate in the Panel proceedings as third parties.

1.7. The Panel met with the parties on 27-28 September and 4-5 December 2012. The Panel met with the third parties on 28 September 2012. The Panel issued its interim report to the parties on 8 May 2013. The Panel issued its final report to the parties on 25 June 2013.

2 FACTUAL ASPECTS

2.1. The United States' claims concern various aspects of the anti-dumping and countervailing duty measures imposed by China on broiler products from the United States, set forth in MOFCOM Notice No. 8 [2010][4] (Preliminary Anti-Dumping Determination), Notice No. 26 [2010][5] (Preliminary Countervailing Duty Determination), Notice No. 51 [2010][6] (Final Anti-Dumping Determination) and Notice No. 52 [2010][7] (Final Countervailing Duty Determination) including their annexes, as well as various aspects of the investigations leading to the imposition of these measures.

[1] WT/DS427/1.
[2] WT/DS427/2.
[3] WT/DS427/3.
[4] Preliminary Anti-Dumping Determination, Exhibit USA-2.
[5] Preliminary Countervailing Duty Determination, Exhibit USA-3.
[6] Final Anti-Dumping Determination, Exhibit USA-4.
[7] Final Countervailing Duty Determination, Exhibit USA-5.

2.2. MOFCOM initiated the investigations on 27 September 2009[8], following the filing of a Petition by the China Animal Agriculture Association ("CAAA" or the "Petitioner") on 14 August 2009.[9] MOFCOM set the period of investigation ("POI") for the anti-dumping and countervailing duty investigations from 1 July 2008 to 30 June 2009, and the POI for injury to the domestic industry (in both investigations) from 1 January 2006 to 30 June 2009.[10]

2.3. On 13 October 2009, the Petitioner filed a supplemental petition alleging additional subsidy programmes. On 5 November 2009, MOFCOM announced that it would investigate these additional programmes in the countervailing duty investigation.[11]

2.4. MOFCOM published its Preliminary Anti-Dumping Determination on 5 February 2010. MOFCOM found that dumping had occurred with regard to broiler products from the United States during the POI and that these products had caused material injury to the domestic industry.[12] MOFCOM published its Preliminary Countervailing Duty Determination on 28 April 2010. It found that imported broiler products from the United States were subsidized and had caused material injury to the Chinese domestic broiler industry.[13] MOFCOM determined the following anti-dumping and countervailing duty rates in the Preliminary Determinations[14]:

Table 1: Preliminary Duty Rates

Respondent	Anti-Dumping Duty Rate	Countervailing Duty Rate
Pilgrim's Pride	80.5 %	4.9%
Tyson	43.1 %	11.2%
Keystone	44.0 %	3.8%
Firms that registered for the investigation but were not selected for individual examination	64.5 %	6.1%
"All others"[15]	105.4%	31.4%

[8] Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6; Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7. The scope of the investigation as set forth in the Notice of Initiation of the Countervailing Duty Investigation is as follows:

Scope of investigation: broiler products or chicken products originating in the US
Name of the subject merchandise: broiler products or chicken products
Specific description of the subject merchandise: chicken products into which alive broiler is slaughtered and processed, including whole chicken without cutting into pieces, cuts and offal, side product of chicken products, fresh, chilled or frozen. The product scope does not include live chicken, chicken products in can or other kinds of packages or preservations, the chicken sausage and like products, and cooked chicken products.
Major usage: Broiler products or chicken products are used in the domestic market of China for human food directly through markets and supermarkets by retail or wholesale and indirectly through catering.
HTS code in the Import and Export Tariff Code of the People's Republic of China: 02071100,02071200,02071311,02071319,02071321,02071329,02071411,02071419,02071421, 02071422,02071429,05040021.

Throughout the proceedings, where there were separate translations of the same document, parties, in accordance with para. 9 of the Panel's Working Procedures, could object to a translation. In the absence of an objection, the Panel has used the translation submitted first in time and not objected, which generally was the translation submitted by the United States. With respect to the scope of the investigation, despite making no specific objection under the Working Procedures, in its Comments on the Draft Descriptive Part, China took issue with the Panel using the version of the scope from the United States' translation of the Final Anti-Dumping Determination and cited to its own translation of the Final Anti-Dumping Determination in Exhibit CHN-3. In this instance, as the United States has provided a translation of the scope in the Notice of Initiation of the Countervailing Duty Investigation that is not materially different from the one China prefers, we utilize that version of the scope.

[9] Petition, Exhibit USA-1, pp. 1-2.

[10] Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6, p. 2; Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7, p. 2.

[11] Final Countervailing Duty Determination, Exhibit USA-5, p. 5.

[12] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 36.

[13] Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 77.

[14] Preliminary Anti-Dumping Determination, Exhibit USA-2, Appendix II, pp. 37-38; Preliminary Countervailing Duty Determination, Exhibit USA-3, Annex II, pp. 78-79.

[15] In each investigation, MOFCOM applied an "all others" rate to the US companies that failed to make an entry of appearance or failed to submit a questionnaire response. MOFCOM calculated these rates using facts available. Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 22; Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 62.

2.5. On 30 August 2010, MOFCOM published its Final Countervailing Duty Determination finding that imported broiler products from the United States were subsidized and had caused injury to the Chinese domestic broiler industry.[16] On 26 September 2010, MOFCOM published its Final Anti-Dumping Determination confirming the findings in the Preliminary Anti-Dumping Determination that US exporters were dumping and that this dumping caused injury to the domestic industry.[17] The final anti-dumping and countervailing duty rates determined by MOFCOM are as follows[18]:

Table 2: Final Duty Rates

Respondent	Anti-Dumping Duty Rate	Countervailing Duty Rate
Pilgrim's Pride	53.4%	5.1%
Tyson	50.3%	12.5%
Keystone	50.3%	4.0%
Firms that registered for the investigation but were not selected for individual examination	51.8%	7.4%
"All others"	105.4%	30.3%

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 United States

3.1. The United States requests that the Panel find as follows[19]:

a. With respect to alleged procedural violations, that:

i. MOFCOM acted inconsistently with Article 6.2 of the Anti-Dumping Agreement by denying a request by the United States Government for a hearing to present its concerns about the investigation and exchange views with parties with adverse interests;

ii. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by withholding essential facts from the respondents, particularly the calculations and data used to determine their respective dumping margins;

iii. MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement by allowing the Petitioner to put confidential information on the record without providing non-confidential summaries.

b. With respect to MOFCOM's reasoning and conclusions for its Anti-Dumping Determinations, that:

i. MOFCOM acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by: (i) rejecting, without any consideration and explanation, the costs kept in the books and records of US producers to calculate their normal values, even though those costs were in accordance with generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with the production and sale of the products subject to the investigation; (ii) applying a methodology which did not reasonably reflect the costs associated with the production and sale of the products subject to the investigation and failing to consider evidence that its allocation was not proper; and (iii) with respect to Tyson, including in its allocation methodology costs for products not subject to the investigation;

[16] Final Countervailing Duty Determination, Exhibit USA-5, p. 105.
[17] Final Anti-Dumping Determination, Exhibit USA-4, p. 60.
[18] Final Anti-Dumping Determination, Exhibit USA-4, Appendix II; Final Countervailing Duty Determination, Exhibit USA-5, Appendix II.
[19] United States' first written submission, paras. 2-5, 174, 243 and 320; and responses to Panel question Nos. 73 and 117.

ii. MOFCOM acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to conduct a fair comparison of normal value and export price for Keystone, a US respondent, because MOFCOM applied certain freezer storage fees in a manner that artificially inflated the dumping margin for Keystone;

iii. MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II of the Anti-Dumping Agreement by: (i) imposing an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary information or otherwise impede the dumping investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for MOFCOM's calculation of the "all others" rate; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact in relation to this calculation.

c. With respect to MOFCOM's reasoning and conclusions for its Countervailing Duty Determinations, that:

i. MOFCOM acted inconsistently with Articles 12.7, 12.8, 22.3, 22.4, and 22.5 of the SCM Agreement by: (i) imposing an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary information or otherwise impede the subsidy investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for MOFCOM's calculation of the "all others" rate; (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact in relation to this calculation[20];

ii. MOFCOM acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by failing to properly allocate the alleged subsidy in relation to subject merchandise.

d. With respect to MOFCOM's reasoning and conclusions for its injury determinations, that:

i. MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement by improperly limiting the definition of the domestic industry to domestic enterprises supporting the anti-dumping and countervailing duty investigations rather than identifying domestic producers as a whole, thereby rendering its analysis of volume, price, and impact inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement;

ii. MOFCOM acted inconsistently with Articles 3.1, 3.2, 6.4, 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 12.3, 22.3, and 22.5 of the SCM Agreement because its price effects analyses were based upon flawed price comparisons, which failed to account for differences in level of trade and product mix, and because MOFCOM did not disclose its methodology for adjusting subject import price data with respect to different levels of trade and/or failed to provide the reasons for its rejection of US interested parties' arguments concerning level of trade;

iii. MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement because its findings that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry were not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry" as they

[20] Although para. 4 of the United States' first written submission set forth a broader claim under Articles 22.4 and 22.5 of the SCM Agreement with respect to MOFCOM's reasoning and conclusions in its Countervailing Duty Determinations, in the remainder of its submissions to the Panel the United States only presented arguments under these provisions with respect to the "all others" rate.

were based on a faulty analysis of domestic industry capacity utilization and inventories and cannot be reconciled with evidence attesting to the overall health of the domestic industry during the period in which most of the increase in subject import volumes occurred.

iv. MOFCOM acted inconsistently with Articles 3.1, 3.5, 12.2, and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement because it: (i) based its causation analyses on its defective price effects analyses; (ii) ignored evidence that any increase in the market share did not come at the expense of the domestic industry; (iii) ignored evidence that industry performance improved during the bulk of the increase in subject imports; and (iv) failed to explain in its Final Determinations why it rejected the arguments respondents put forward regarding a lack of causation.

e. And, as a consequence of these violations, that:

i. MOFCOM's conduct in the anti-dumping investigation violated Article 1 the Anti-Dumping Agreement;

ii. MOFCOM's conduct in the countervailing duty investigation violated Article 10 of the SCM Agreement.

3.2. The United States further requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that China bring its measures into conformity with the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement.[21]

3.2 China

3.3. China requests that the Panel reject all of the United States' claims, finding instead that MOFCOM's Determinations in these investigations were fully consistent with China's WTO obligations.[22] In addition, China requests that the Panel determine that the United States' claim under Article 2.4 of the Anti-Dumping Agreement with respect to Keystone's dumping margin calculation falls outside the Panel's terms of reference.[23] China also considers that the United States' claims under Articles 12.2.2 of the Anti-Dumping Agreement and 22.5 of the SCM Agreement with respect to MOFCOM's price effects analyses are outside the Panel's terms of reference.[24]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are set out in their written submissions, oral statements to the Panel and responses to questions. The parties submitted integrated executive summaries of their arguments in two parts which are appended as addenda to this Report in Annexes A-1 and A-2 (see List of Annexes, page 8).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The third parties' written submissions, oral statements, and responses to questions or integrated executive summaries thereof are appended as addenda to this Report in Annexes B-1 – B-7 (see List of Annexes, page 8).

6 INTERIM REVIEW

6.1. On 8 May 2013, the Panel submitted its Interim Report to the parties. On 22 May 2013, the United States and China each submitted written requests for the review of precise aspects of the Interim Report. On 29 May 2013, each party submitted comments on the other's requests for review. Neither party requested an interim review meeting.

[21] United States' first written submission, para. 367.
[22] China's first written submission, para. 438.
[23] China's first written submission, para. 142.
[24] China's comments on the United States' response to Panel question No. 117.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. References to sections, paragraph numbers and footnotes in this section relate to this Report, except as otherwise noted.

Paragraphs 7.66-7.107

6.3. China expresses a general concern regarding the findings of the Panel on MOFCOM's failure to comply with Article 6.9 of the Anti-Dumping Agreement in respect of the calculation of the margins of dumping for the three mandatory respondents. China considers that while the United States' claim under Article 6.9 was extremely broad and generalized, the Panel engaged in an extremely particularized examination of the disclosures and made findings on specific facts and circumstances that had not been raised by the United States. China argues that this raises two concerns. First, because not all of the specific issues addressed by the Panel were raised during the panel proceeding, either by the Panel or by the United States, it never became necessary for China to explain and present evidence to the Panel that the level of disclosure provided by MOFCOM was sufficient for these three respondents to defend their interests. Second, in many respects the Panel tried to put itself in the place of the respondents to ascertain the possibility of understanding the level of disclosure when the Panel did not have the complete record that the respondents possessed during the investigation.

6.4. The United States argues that China mischaracterizes the United States' claim under Article 6.9 as overly broad. The United States submits that it explained in its first written submission that its claim was quite limited and that it had defined the issue in very specific terms. Thus the United States considers that there is no disconnect between the scope of its claim and the Panel's examination of that claim and that, therefore, the two concerns raised by China do not arise. With respect to the first of these concerns, the United States submits that China's suggestion that it never became necessary for China to explain and present evidence to the Panel that the level of disclosure was sufficient for the respondents to defend their interests is plainly contradicted by China's own submissions to the Panel. The United States argues that China's second concern – that the Panel tried to put itself in the place of the respondents to assess the level of disclosure without the complete record – is equally misplaced. The United States notes that China's specific comments on the interim report fail to identify any allegedly missing record evidence and if there were something the United States and the Panel were not made aware of, China had every opportunity to introduce that evidence during these proceedings.

6.5. The Panel considers that the record of this panel proceeding does not support China's assertions that there exists a discrepancy between the broad and generalized nature of the United States' claim, on the one hand, and the Panel's "particularized" examination of that claim, on the other, and that the Panel made findings on issues that had not been raised during the panel proceeding.

6.6. The Panel recalls that in its first written submission, the United States argued that the summary table of model-specific dumping margins in the disclosures "does not show how the product-specific export prices and normal values were determined" and that the disclosures precluded the interested parties from adequately defending their interests.[25] Throughout its submissions the United States contends that the essential facts include the data and calculations used to derive normal value and export price.[26]

6.7. The United States also addressed the exhibits presented by China that allegedly showed how the respondents would have been able to reconstruct the dumping margins from the disclosure documents. In particular, the United States pointed out that the exhibits were generated for the purposes of the panel proceedings and not provided to the respondents during the investigation, and, even if they had been provided during the investigation, the United States argued that they would still not satisfy the requirement in Article 6.9.[27] The United States went on to argue that

[25] United States' first written submission, para. 65.
[26] United States' opening statement at the first meeting of the Panel, paras. 15-18; response to Panel question No. 8; second written submission, paras. 13-20; and opening statement at the second meeting of the Panel, para. 12.
[27] United States' opening statement at the first meeting of the Panel, para. 17.

"[t]he US exporters were left unaware by MOFCOM as to the data actually used in MOFCOM's antidumping calculations, and despite MOFCOM's claims to the contrary, the US respondents did not have enough information from MOFCOM to derive those facts on their own."[28] Moreover, the United States repeatedly stated that the summary figures in the disclosure documents "do not allow the respondents to defend their interests – for example, they could not 'comment on the completeness or correctness of the facts' or 'correct perceived errors.'"[29]

6.8. The Panel recalls that China – in its first written submission and Exhibits CHN-4, 5, and 6 – divided the determinations of normal value, export price, and constructed export price into particular elements and explained how the disclosures allegedly allowed the respondents to understand how each of these elements was determined.[30] China's exhibits contained three columns: (i) the element at issue; (ii) the description, from the disclosure, of MOFCOM's actions; and (iii) the "source document" from which the actual information used was derived. China argued that "based on the explanations in the first two columns, each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margin if it so desired."[31]

6.9. In light of China's arguments, at the first meeting the Panel posed questions to China as to how the disclosure documents would enable the respondents to understand the essential facts regarding which sales had been eliminated from consideration for normal value because they had failed the below-cost test. The Panel pursued the same line of questioning in the written questions following that meeting.[32] The Panel also asked whether sales disregarded or excluded and the elements of constructed value were "essential facts" within the meaning of Article 6.9.[33] Thus, China was aware that the Panel was examining the disclosure documents to determine whether they disclosed the essential facts on the key elements of normal value, export price and the weighted-average dumping margin. Indeed, in conducting its evaluation the Panel essentially adopted China's analytical framework by examining each disclosure to determine whether it provided the essential facts for each of the key elements. Contrary to China's claim, the Panel is of the view that it did raise these issues with the parties.

6.10. As regards China's proposition that the Panel improperly placed itself in the position of the respondents without having the complete record, we recall that the Appellate Body explained that the crucial context for understanding the obligation in Article 6.9 is the purpose that it serves. Article 6.9 enables interested parties to defend their interests. Therefore, the crucial question in assessing compliance with Article 6.9 is whether a party could understand the basis for the decision whether or not to apply definitive measures from what was disclosed.[34] A panel must, therefore, examine the disclosure from the perspective of its intended audience, in this case the US respondents. China has not pointed to any specific evidence that the Panel was unaware of; rather China simply asserts that the respondents must have known which of their submissions MOFCOM was referring to in the disclosure documents. We also note that China had ample opportunity to present record evidence to the Panel on this issue and did not do so.

6.11. In light of the above, we consider that China's general comment on the Panel's findings under Article 6.9 does not call for changes to the Interim Report.

Paragraph 7.93

6.12. The United States requests that the Panel change its conclusion that the investigating authority must disclose "what data was used" in the determination of the various elements that make up the margin of dumping as well as the formulas that were applied to the data, to read that the investigating authority must disclose "the data used".

[28] United States' second written submission, para. 20.
[29] United States' first written submission, paras. 61-62 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.805); opening statement at the first meeting of the Panel, paras. 14-15; second written submission, paras. 15-17; opening statement at the second meeting of the Panel, paras. 11-12.
[30] China's first written submission, para. 34 (citing Exhibits CHN-4, 5, and 6).
[31] China's first written submission, para. 34.
[32] Panel question No. 8.
[33] Panel question No. 8 (c).
[34] Appellate Body Report, *China – GOES*, para. 240.

6.13. China opposes the United States' request. China notes that the Panel concluded in paragraph 7.95 that "where the essential facts the investigating authority is referring to are in the possession of the respondent in the form of their own questionnaire responses, a narrative description of what data was used from which sources cannot *ipso facto* be considered insufficient disclosure." According to China, the United States' proposal implies that the data must always be provided.

6.14. The Panel considers that using the term "the data used" could imply that an investigating authority was required to provide the actual print-outs of the data that it used in conducting its calculations. While the Panel recognized that this would be an efficient way to effectuate disclosure, the Panel concluded that Article 6.9 does not require disclosure in a specific form and that a narrative description of what data was used from which sources could suffice to comply with Article 6.9. The change requested by the United States is not necessary.

Paragraphs 7.97-7.100

6.15. China raises three specific points with respect to the Panel's evaluation of the disclosure documents provided to Pilgrim's Pride. First, China argues that the Panel's conclusion with respect to Pilgrim's Pride's knowledge of what expenses were included in constructed normal value is incorrect because the disclosure made Pilgrim's Pride aware that the "expenses" used were taken from the total production costs claimed in Table 6-3, Tab 3 of its first supplemental questionnaire. Second, China argues that the Panel incorrectly found that Pilgrim's Pride would not know how affiliated sales were adjusted, because Pilgrim's Pride only made sales to unaffiliated parties during the POI. Finally, China argues that the Panel assumes too much about the reference to "formula setup mistakes" that MOFCOM corrected. China maintains that because Pilgrim's Pride submitted a correction of the formula errors after the verification, there is no real dispute between MOFCOM and Pilgrim's Pride about what the formula mistakes were and the correction applied.

6.16. The United States does not address the first two of China's arguments with respect to the Panel's evaluation of the Pilgrim's Pride Disclosures. However, with respect to the formula setup mistakes, the United States argues that the Panel should disregard China's comments because China's reference to paragraph 7 of the Final Anti-Dumping Disclosure to Pilgrim's Pride does not support China's assertion that Pilgrim's Pride was aware of the formula setup mistakes and of the correction applied. The Disclosure does not refer to a correction submitted by Pilgrim's Pride or that the actual correction made by MOFCOM was the one allegedly suggested by Pilgrim's Pride. Furthermore, the United States argues that the statement that MOFCOM "took the initiative and adjusted the mistakes" suggests that contrary to China's assertion, MOFCOM made the adjustment on its own.

6.17. In light of China's comments, the Panel has reviewed the disclosure documents and its findings. The Panel has amended these paragraphs to reflect that the Final Anti-Dumping Disclosure to Pilgrim's Pride indicates that the total cost of production derived from the First Supplemental Questionnaire Response included "expenses". Furthermore, the Panel has also removed references to non-disclosure of treatment of sales to affiliated parties, as Pilgrim's Pride made all its sales to unaffiliated parties during the POI.

6.18. With respect to the "formula setup mistakes" the Panel's conclusions stand. The Final Anti-Dumping Disclosure to Pilgrim's Pride refers to the mistakes being discovered "after further review and on-site verification". Therefore, it is not apparent that Pilgrim's Pride would know that these were the same mistakes, if any, discussed during verification. The disclosure also refers to the investigating authority "taking the initiative" to adjust the formulas rather than accepting correction documents from Pilgrim's Pride after verification. Therefore, the Panel is of the view that the references to "formula setup mistakes" and MOFCOM taking the initiative to adjust them would not have been sufficient to disclose to Pilgrim's Pride the exact mistakes being referred to and that whatever action taken to correct them was based on what Pilgrim's Pride submitted after verification.

6.19. The United States requests that the Panel add to paragraph 7.100 the last sentence of paragraph 7.103 which refers to the fact that MOFCOM did not disclose to Tyson the formulas used to calculate normal value, export price, the dumping margins for each model, or the final total

weighted-average dumping margin. The United States notes that this conclusion is equally applicable to Pilgrim's Pride.

6.20. China argues that in light of its broader comments on the Panel's analysis, the proposed clarification is unnecessary.

6.21. As it is undisputed that MOFCOM did not disclose the formulas used to any of the respondents, the Panel has made the addition requested by the United States.

Paragraphs 7.101-7.104

6.22. China raises three points with respect to the Panel's evaluation of the disclosure documents provided to Tyson. First, China argues that the Panel erred in concluding that Tyson would be unable to determine what adjustments were made to normal value, because Tyson knew the substance of the documentation delivered to MOFCOM at verification as well as its revised Table 4-2 and thus knew exactly what the adjustments were and to which sales the adjustments were applied. Second, China argues that the Panel's suggestion that there was confusion over the source of the cost data is belied by the Disclosure, which clearly stated that the data came from Tyson's Second Supplemental Questionnaire Response. Finally, China argues that the Panel was incorrect that there was any uncertainty on Tyson's part with respect to adjustments to export price, because MOFCOM indicated in the Disclosure that it was accepting adjusted data submitted by Tyson after verification. Similarly, for other expenses, China submits that the Panel was wrong to conclude that Tyson would not know the substance of the information applied by MOFCOM, because MOFCOM made it clear that the expenses were sourced from what Tyson had itself reported and were fully accepted.

6.23. The United States submits that although the Disclosure does indicate an adjustment was made "based on" documents MOFCOM gained during verification, this does not contradict the Panel's finding that MOFCOM did not disclose the nature of the adjustment. According to the United States, China is urging the Panel to presuppose Tyson's knowledge of the details of MOFCOM's calculations absent evidence that MOFCOM disclosed those details. The United States maintains that MOFCOM's disclosure of the weight-based production cost is unclear and that even if MOFCOM used the data Tyson submitted in its Second Supplemental Questionnaire Response, MOFCOM failed to disclose the formulas and the underlying data. Finally, with respect to the adjustments to export price, the United States argues that China's assertion is incorrect and based on a passage of the Final Anti-Dumping Disclosure taken out of context. In the United States view, the language of the Panel is addressing the adjustments to normal value (namely expenses) and not export price.

6.24. The Panel's findings acknowledge that the Disclosure refers to the document the data was derived from to make the adjustments. Therefore, the Panel was not under any misapprehension that Tyson was aware that the source of the data was Table 4-2. Rather, the issue is that MOFCOM did not indicate that it was accepting the adjustments as presented by Tyson. Therefore, Tyson could not be certain as to how they were applied or to which sales. The Panel also notes that despite MOFCOM's explanation that it made adjustments to direct sales expenses, the per unit cost of production did not change from the Preliminary Determination to the Final Determination. This would cause Tyson uncertainty as to what adjustments had actually been made. With respect to the cost data coming from the Second Supplemental Questionnaire, the Panel has amended the language of its findings to clarify that this was the basis for the cost of production, other than expenses. Finally, the Panel has adjusted the language in paragraph 7.103 to note that MOFCOM indicated it was accepting Tyson's corrected export price data.

Paragraphs 7.105-7.106

6.25. China objects to the Panel's conclusion that Keystone would not have known what data MOFCOM used to calculate the cost of production used in constructed normal value. China argues that MOFCOM explained in the Disclosure that it used the weighted average cost of all models to calculate production cost and accepted the expenses as reported by Keystone. According to China, as Keystone only made one cost submission it was clear to which costs and expense data MOFCOM referred. China also notes that there were no factual changes between the Preliminary Determination and the Final Determination.

6.26. The United States submits that Keystone submitted two alternative cost calculations after the Preliminary Determination. The United States also argues that MOFCOM made various adjustments to Keystone's data after the Preliminary Determination, including to Keystone's reported freezer storage expenses and thus, the argument that there was no change from the Preliminary Determination to the Final Determination is misplaced.

6.27. The Panel disagrees with China. The Panel has made appropriate changes to paragraph 7.105 to clarify the basis for its conclusion that Keystone would have been unaware of the exact data used to calculate its cost of production.

6.28. The United States requests that the Panel add to paragraph 7.106 the last sentence of paragraph 7.103 which refers to the fact that MOFCOM did not disclose to Tyson the formulas used to calculate normal value, export price, the "dumping margins" for each model, or the final total weighted-average dumping margin. The United States notes that this conclusion is equally applicable to Keystone.

6.29. China argues that in light of its broader comments on the Panel's analysis the proposed clarification is unnecessary.

6.30. The Panel agrees with the United States that it is undisputed that MOFCOM did not disclose the formulas used to any of the respondents. Therefore, the Panel has made the addition.

Paragraph 7.118

6.31. The United States suggests a modification which it argues will better reflect the language in the cited exhibit. In particular the United States requests that the Panel clarify that there were two prior submissions of cost data. Further, the United States argues that the issue is not whether MOFCOM could understand Pilgrim's Pride's data, but whether it could be "read or accessed". Furthermore, the United States asks the Panel to add an additional sentence which indicates Pilgrim's Prides willingness to answer any further questions from MOFCOM.

6.32. China objects to the proposed modifications. China argues that the issue was not whether the information could be "read or accessed" as all versions had been submitted in Microsoft Excel, but that the data was not submitted in the standard format utilized by MOFCOM such that MOFCOM could not understand the data. China also objects to any addition to the paragraph to refer to Pilgrim's Pride's willingness to answer further questions as, in China's view, this will only confuse the relevant facts.

6.33. The Panel has clarified the sequence of submissions as requested by the United States. However, the Panel declines to make the other requested modifications to the paragraph. The Panel agrees with China that MOFCOM did not refer to being unable to access or read the data, i.e., if it was in a computer language MOFCOM could not read, but rather that it was unable to understand the data. The Panel does not find Pilgrim's Pride's statement of its willingness to answer additional questions from MOFCOM on the data already submitted to be relevant to the issue of whether it submitted data in an understandable format and thus declines to make the requested change.

Paragraph 7.156

6.34. The United States requests that the Panel add references to the arguments of the European Union with respect to whether the difference in value of products in the domestic and export markets is relevant to the question of sales in the domestic market and the allocation of costs to waste products.

6.35. China believes the additional sentences are unnecessary. However, if the Panel were to add them, China requests that the word "notes" not be used as this implies recognition of a fact rather than an argument.

6.36. The Panel has added the language requested to the summary of the European Union's arguments in order to fully reflect the position of the European Union. The Panel has refrained

from using the word "notes" to ensure that it is clear that these are the arguments of the European Union.

Paragraph 7.165

6.37. The United States requests that the Panel add language to the beginning of paragraph 7.165 to reflect its argument that the respondents put evidence on the record of the investigation that their reported costs were reasonable. The United States asks the Panel to delete references and reasoning relating to its arguments on whether consistency with GAAP is evidence of reasonableness under Article 2.2.1.1.

6.38. China objects to the deletion of the reference to the United States' arguments. According to China, the language of the interim report properly reflects the United States' arguments.

6.39. The Panel notes that the additional language the United States requests demonstrates that the Panel's understanding of the United States' argument is correct. The United States refers to evidence that the respondents' costs were calculated in a manner considered appropriate under international accounting standards as evidence in support of the respondents' arguments that their reported costs were reasonable. Therefore, while the Panel has added the requested language to the beginning of paragraph 7.165 the Panel has not deleted the reference to the arguments that were made by the United States with respect to GAAP.

Paragraph 7.167

6.40. The United States seeks three overall changes to paragraph 7.167. According to the United States the paragraph as drafted may give the impression that only two methodologies were at issue, whereas the record of the investigation demonstrates that additional permutations of these methodologies were possible. The United States also suggests additional description of MOFCOM's weight-based methodology. The United States also notes that the paragraph does not reflect that the respondents requested the use of their historically utilized value-based allocations while MOFCOM adopted a weight-based methodology.

6.41. The United States also seeks deletion of the sentence "Neither method is inherently unreasonable". The United States argues that it did not concede that a weight-based allocation was reasonable in the present situation, but rather that outside the context of non-homogeneous joint-products, it is a common cost methodology. The United States submits that it actually argued that a weight-based methodology could be an unreasonable method of calculating costs when it comes to joint products. Furthermore, in the view of the United States, as the Panel's finding is based on MOFCOM's failure to justify its determination, the language adds no value to any party to this dispute or to any WTO Members more generally. As a consequence of its suggestions, the United States also recommends moving footnote 292.

6.42. China, for its part, argues that the amendment proposed by the United States would add confusion to the facts surrounding the issue. China proposes its own amendments to the paragraph, which in its view reflect its submissions during the dispute that MOFCOM found severe discrepancies in the respondents' submissions of cost data and therefore MOFCOM had no choice but to reject that data and adopt a weight-based allocation.

6.43. The Panel notes that the first three sentences of the paragraph were referring to accounting methodologies generally rather than the specific methodologies used in the broiler products investigation. The Panel also notes that the third sentence of the paragraph was a conclusion of the Panel and not intended to be a reflection of the United States' arguments. The Panel has modified the language in the paragraph to clarify these issues. The Panel has also noted, as the United States requests, that the respondents adopted a value-based methodology while MOFCOM utilized a weight-based one. The Panel has not added further detail on MOFCOM's methodology as this is discussed in the ensuing paragraphs. Furthermore the Panel has not made the additions requested by China. China's proposed modifications to the text pre-suppose a conclusion about the reasonableness of the respondents' cost allocations and the necessity of MOFCOM's use of a weight-based methodology that the Panel did not reach, precisely because the findings referred to by China could not be demonstrated on the record of the investigation.

Paragraphs 7.171-7.172

6.44. The United States requests that the Panel consolidate the two paragraphs by moving one sentence from paragraph 7.172 to paragraph 7.171 and then deleting the second sentence of paragraph 7.172. In particular, the United States requests that the Panel delete its observation that it would not be unreasonable for an investigating authority, after considering the evidence, explanations, and possible alternatives, to determine to depart from using a producer or exporter's books and records based on the types of concerns China has expressed. The United States argues that it is unclear which concerns the Panel is referring to. The United States also seeks to ensure that there is no misunderstanding that the Panel is opining hypothetically on what an investigating authority should conclude with respect to particular types of cost allocations.

6.45. China argues that both parties made considerable efforts in presenting arguments and assessments on this issue and it is reasonable that the Panel decided to look into the factual aspect of this key issue in order to ensure the conclusion is objective. In China's view there is no need to alter the language in the Interim Report and the purpose of the amendments proposed by the United States is to conceal the respondents' deficiencies and contradictions in the course of the underlying investigation.

6.46. The Panel modified the text of the second sentence of paragraph 7.172 to reflect the fact that the statement made does not in any way opine on the consistency of an eventual conclusion of an investigating authority with the relevant obligations under the Agreement. The statement simply acknowledges that the types of concerns expressed by China during the Panel proceedings are concerns that an investigating authority may analyse when assessing the reasonableness of the cost allocation of respondents under Article 2.2.1.1.

Paragraph 7.174

6.47. The United States seeks a modification of paragraph 7.174 to avoid the implication that the United States affirmatively sought a finding under Article 6.8 of the Anti-Dumping Agreement. The United States argues that its position was that there was nothing in MOFCOM's Determinations to indicate that MOFCOM was applying facts available and that China cannot defend compliance under Article 2.2.1.1 by claiming the application of Article 6.8 absent any evidence that China applied facts available in the investigation.

6.48. China contends that the referenced paragraph fairly represent the facts of the case and the arguments of the parties with respect to Pilgrim's Pride. According to China, the United States did advance arguments in relation Article 6.8 of the Anti-Dumping Agreement for which no claim had been made and the Panel properly rejected these arguments. Further, China argues that the United States' characterization that the question of facts available arose late in the proceeding is simply incorrect. China refers to arguments in its first written submission which refer to MOFCOM's rejection of data provided by Pilgrim's Pride after the disclosure on the Preliminary Determination and that "in light of Pilgrim's failure to address its serious data problems in multiple supplemental responses and corrections, and its need to continue the investigation in a timely manner, it had to resort to an alternative basis for allocating costs." In China's view the underlying record is completely consistent with the Panel's findings.

6.49. The Panel has made some modifications to paragraph 7.174 to reflect the particular nuance of the United States' position. However, as China notes, its argument with respect to Pilgrim's Pride did not arise simply in response to a question from the Panel, but was consistent throughout its submissions. Therefore, we did not use the particular language suggested by the United States.

Paragraph 7.175

6.50. The United States notes that the Panel uses the word "explain" in paragraph 7.175 to refer to the obligation in Article 2.2.1.1 whereas the Panel uses the word "justify" in a similar context in paragraph 7.161. The United States suggests that the Panel modify paragraph 7.175 to be consistent with paragraph 7.161 by changing "explain" to "justify".

6.51. China submits that the two paragraphs are provided in different contexts, but that if the terms are harmonized, the word "explain" should be used as it better reflects the obligation of the authority in the context presented.

6.52. The Panel does not consider it necessary to make the modification requested by the United States.

Paragraph 7.192

6.53. The United States suggests revising the text of the first sentence of this paragraph so that the summary of the criteria set forth in the Appellate Body Report in *US – Softwood Lumber V* better tracks the language of the Appellate Body Report. The United States believes such a change would improve clarity.

6.54. China disagrees with the United States' proposal of replacing "any" with "sufficient". According to China, whether the evidence of consideration is sufficient or not is a case-by-case issue. The United States' proposal in fact requests the Panel to establish a standard of review which should be left for the specific panel in the specific dispute to decide.

6.55. The Panel recognizes that the use of either "any" or "sufficient" implies a standard of review that may not be appropriate in a situation where a case-by-case determination must be made. Therefore, the Panel has deleted "any", but has not added "sufficient".

Paragraphs 7.196-7.197

6.56. With respect to the Panel's finding that MOFCOM improperly allocated all processing costs to all products, China argues that the Panel's discussion of what processing costs should be associated with certain products implies a firm understanding of where costs should be assigned even though there is no explicit rule on where costs associated with breast meat should be allocated. China also maintains that the Panel did not engage in an inquiry of product-specific costs and whether the company's allocations were reasonable and thus it would be imprudent for the Panel to provide examples that could be mistaken for the Panel endorsing a particular approach.

6.57. With respect to the Panel's conclusion that MOFCOM did not allocate costs to all products associated with the production of a chicken as implied by the chosen methodology, China argues that the Panel re-interprets a US argument to address a point not raised by the United States. Additionally, China argues that the Panel does not fairly address China's response to these arguments by focusing on Exhibit CHN-64, which was a summary of Table 6-3 rather than on Table 6-3 itself. According to China, Table 6-3 sought costs for production of subject merchandise so there could be no over-allocation of costs absent a failure by the respondents to report the correct data as requested.

6.58. The United States submits that China's comments, rather than requesting review regarding a specific aspect of the Interim Report, are asking that the Panel completely remove two significant findings: (i) the finding in paragraph 7.196 that MOFCOM breached its obligations under Article 2.2.1.1 through the "straight allocation of total processing costs to all products"; and (ii) the finding in paragraph 7.197 that MOFCOM breached its obligations with respect to the specific allocation of Tyson's costs. The United States considers that China's arguments in both respects are incorrect. According to the United States, the record of these proceedings demonstrates that the United States raised these issues; that the Panel inquired about them, including from China; and that the only party that did not properly address the issues was China. The United States argues that the Panel engaged China directly on these issues by asking it to explain how it accounted for processing costs and its treatment of Tyson.

6.59. With respect to processing costs, the United States argues that China's submissions do not support its current claim and that its current understanding (that Article 2.2.1.1 does not even operate to issue a finding that costs of production should only include costs that go into the production of a product) would render the provision of a nullity. With respect to the issue of Tyson's allocation, the United States contends that China does not say precisely how its argument is anything other than what the Panel has already noted: that China asserted that MOFCOM must

be right because it used Tyson's own data from Form 6-3 and that the summary table of Form 6-3 does not rebut the United States' *prima facie* case.

6.60. The Panel's conclusion about allocation of processing costs across all products is not a conclusion that the product-specific costs used by the respondents were or were not reasonable. As the Panel has stated, it is not its role to conduct a *de novo* review of MOFCOM's determination. Moreover, the Panel has noted that MOFCOM did not make any determinations with respect to the quality of the product-specific processing costs on the record of the investigation for the Panel to review. The Panel specifically asked China how MOFCOM had allocated processing costs and whether this meant that product-specific costs were allocated across all products.[35] It is the Panel's view that where there are product-specific processing costs such a straight allocation will inevitably result in the allocation of costs to one product that were specific to another. The reference to breast meat was merely to provide an example in the context of the present dispute rather than to imply a conclusion that the respondents' product-specific processing costs for breast meat in their books and records reasonably reflected the costs associated with production within the meaning of Article 2.2.1.1. The Panel has altered the language to clarify the nature of its finding and move the reference to product-specific costs for breast meat into a footnote and clarify that the reference is by way of an example of the problems that can arise when an investigating authority allocates all processing costs to all products.

6.61. The United States' claim with respect to this issue was that MOFCOM in allocating the costs of producing a whole broiler chicken across all products derived from that chicken should have allocated costs to products such as blood and feathers. However, the United States contended that the record of the investigation did not demonstrate that MOFCOM had done so. The United States referred to these products as "non-subject merchandise". The Panel, in evaluating the United States' claim, noted in a footnote that under the definition of the scope of the investigation set forth in MOFCOM's Determinations, by-products of broiler products, such as blood and feathers, are included within the scope. The fact that the Panel noted that the United States used incorrect terminology when referring to those products does not mean that the Panel re-interpreted the United States' argument to address a claim that had not been made. Regardless of whether the products at issue are "subject products" the United States' claim is that MOFCOM acted inconsistently with Article 2.2.1.1 because it allocated costs associated with the production and sale of certain products (namely costs for the production of blood and feathers) to other products Tyson produced. However, to avoid confusion, the Panel has modified the footnote to clarify this point.

6.62. The Panel disagrees with China that it did not fairly address China's response to these arguments by focusing on Exhibit CHN-64, which was a summary of Table 6-3 rather than on Table 6-3 itself. In its arguments, China averred that Exhibit CHN-64 demonstrated how MOFCOM had used the information from Table 6-3 to calculate total cost of production. Furthermore, other than two pages of excerpts in Exhibit CHN-46, China did not provide the actual Table 6-3. Therefore, the Panel stands by its conclusion that based on the evidence provided, China has not rebutted the United States' *prima facie* case on this issue. The Panel has added a footnote to the paragraph to indicate that China did not provide the complete Table 6-3.

6.63. The United States requests that the Panel modify paragraph 7.196 to remove any indication that it is of the view that a weight-based methodology is not inherently unreasonable. According to the United States its arguments did not concede a weight-based allocation was reasonable in the present situation, but rather that outside the context of non-homogeneous joint-products, it is a common cost methodology. In the United States' view a weight-based methodology could be an unreasonable method of calculating costs when it comes to joint products, particularly in scenarios such as the present one. Thus the United States requests that the first and third sentences of the paragraph be consolidated and the second sentence deleted.

6.64. China objects to the proposed deletion of the first sentence of paragraph 7.196 because the context surrounding the first sentence is not limited to the underlying investigation. In China's view the sentence describes a general scenario and the United States has submitted that a weight-based allocation is not inherently unreasonable outside the context of a joint-product scenario.

[35] China's response to Panel question Nos. 35 and 96.

6.65. As the issue of whether the parties agree whether a weight-based methodology is inherently unreasonable is not necessary for its analysis and findings under Article 2.2.1.1, the Panel made the deletion requested by the United States.

Paragraph 7.244

6.66. The United States requests modifying the first two sentences of paragraph 7.244 in a manner which it argues will improve clarity and track closer the language in its submissions.

6.67. China notes that the language concerned was summarized from the second written submission of the United States, and is repeated nearly verbatim. China asserts that the United States has kept silent on the respondents' failures to provide full responses to multiple questionnaires issued and why the respondents tried to excuse their failure to respond properly by claiming that MOFCOM asked wrong questions with an ambiguous definition of the subject product. Thus, China views the proposed amendments as an attempt by the United States to defend its silence on this issue. Therefore, China sees no need to alter the language as suggested by the United States.

6.68. The summary contained in paragraph 7.244 accurately reflects the arguments made by the United States in paragraph 90 of its second written submission. Therefore, the Panel declines to make the changes requested by the United States.

Paragraph 7.250

6.69. China seeks to clarify that it is not arguing that the term "broiler products" is *per se* ambiguous, but that in the context of the underlying investigation "broiler products" became unambiguous when the definition and the scope of the subject products are read together. China argues that in this context the term "broiler products" is synonymous with "subject products".

6.70. The United States argues that China's comments on paragraph 7.250 do not state what precisely in the paragraph is to be reviewed. The United States argues that China's request has not met the requirements of Article 15.2 of the DSU and can be rejected on that basis. Moreover, the United States notes that the Panel's statement is a nearly verbatim recitation of China's response to Panel question No. 100.

6.71. The Panel sees no need to change the paragraph as paragraph 7.250 is taken verbatim from China's response to Panel question No. 100 and therefore accurately reflects China's argument.

Paragraphs 7.308 and 7.313

6.72. China asks that the Panel reconsider whether it should make any findings concerning the second aspect of the United States' claim under Article 6.8 and Annex II of the Anti-Dumping Agreement, pertaining to the manner in which MOFCOM determined the "all others" rate. China questions whether the United States articulated a specific claim in this respect until its second written submission. This, in China's view, raises due process concerns. China argues that under paragraph 6 of the Panel's Working Procedures, the first written submission was the proper time for the United States to establish both its facts and arguments concerning the manner in which MOFCOM determined the "all others" rate.

6.73. The United States opposes China's request. The United States submits that its argument in its first written submission concerned not only MOFCOM's resort to facts available, but also its adverse application of such facts. The United States submits that MOFCOM's Determinations contained no explanations of the manner in which MOFCOM applied facts available and that such explanations were first provided, albeit *post hoc*, in China's submissions in this dispute. The United States also submits that China addressed this aspect of its claim at the first meeting of the Panel and in its responses to the first set of questions from the Panel, which is inconsistent with China's assertion that the issue was not raised until the United States' second written submission. The United States also notes that China waited until its comments on the interim report to raise this challenge.

6.74. The Panel first observes that China did not object to what it now argues is a procedural defect during the argumentation phase of the Panel proceedings, and only did so at the interim review stage. The Panel further notes that in support of its claim that MOFCOM acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, the United States argued in its first written submission not only that MOFCOM resorted to facts available in a situation in which unknown producers/exporters were not notified of the information required of them, but also that MOFCOM resorted to facts apparently adverse to these producers/exporters' interests. China had ample opportunity to respond to this argument during the course of the Panel proceedings such that its due process rights were respected. In addition, the DSU does not establish a general rule that a complainant must assert all relevant claims or present all relevant arguments in its first written submission[36] and paragraph 6 of the Panel's Working Procedures does not, as China suggests, establish a rule that each party must put forward all the facts and arguments pertaining to its claims in its first written submission (see, by contrast, paragraph 8 of the Panel's Working Procedures, establishing a general rule that factual evidence be submitted to the Panel no later than during the first substantive meeting). For the foregoing reasons, the Panel considers that the concerns expressed by China do no warrant reconsideration of its finding with respect to the manner in which MOFCOM determined the "all others" rate applied in the anti-dumping investigation.

Paragraph 7.359

6.75. China submits that the statement in paragraph 7.359 that MOFCOM "used a different approach in calculating the benefit for determining the 'all others' rate from the approach it used for individually-examined producers/exporters" mischaracterizes the facts before the Panel. China explains that for individually-examined producers/exporters, MOFCOM's methodology was to use the lesser of the "competitive benefit" and "pass through" amounts, which resulted in Pilgrim's Pride margin for the upstream subsidy program also being based on the "competitive benefit" approach. This being the case, China considers that it cannot be said that MOFCOM's use of the calculated "competitive benefit" amount from one of the respondents was a "different approach".

6.76. The United States objects this request. The United States notes that China itself explained before the Panel that MOFCOM followed one approach with respect to the individually-examined producers/exporters (using the lesser of the pass-through or competitive benefit amounts) and a different approach with respect to the "all other" producers/exporters (deriving only a competitive benefit amount). The United States suggests to retain the term "approach" to distinguish between the different methodologies MOFCOM followed with respect to the individually-examined producers and the "all others" producers/exporters, but suggests in the interest of clarity that the Panel refer to the "competitive benefit" and "pass-through" "analyses" rather than "approaches" in paragraph 7.358.

6.77. The Panel sees no need to revisit the statement in paragraph 7.359 that MOFCOM applied a different approach for the calculation of the countervailing duty for the "all others" compared to the approach it applied to calculate the countervailing duty margin of individually-examined producers/exporters. In the Panel's view, this statement accurately reflects the facts before the Panel and China's own explanations concerning the manner in which MOFCOM calculated the "all others" countervailing duty rate. The Panel has however made certain changes to paragraph 7.358 to improve clarity and to avoid confusion in the terminology used by the Panel.

Paragraph 7.378

6.78. China argues that paragraph 7.378 inadvertently implies that no domestic companies registered to take part in the injury investigation when in fact most of the largest producers had registered indirectly through CAAA as the industry association.[37]

6.79. The United States disagrees with China's comment and argues that China is seeking to introduce a new concept of "indirect registration" for a domestic producer. Regardless of the legal ramifications of such a characterization, the United States argues that it does not comport with the

[36] See, e.g. Appellate Body Reports, *EC – Bananas III*, paras. 145-147; *Chile – Price Band System*, para. 158; *Korea – Dairy*, para. 139; Panel Report, *China – Audiovisuals*, paras. 7.1049-7.1050.
[37] China's request for interim review, para. 26.

facts and that the Panel's current description accurately captures what occurred during the investigation and should not be altered.

6.80. The Panel notes that at no time prior to its comments on the Interim Report did China refer to these companies as being indirectly registered for the injury investigation. In its response to Panel question No. 84, submitted as Exhibit CHN-62, China indicated that the companies that were members of the CAAA were deemed registered. The Panel has added additional language to the relevant footnote to clarify this point.

Paragraph 7.466

6.81. China requests that the Panel specifically note the evidence it submitted to contradict the United States' assertion that the importer mark-up was positive.

6.82. The United States opposes China's request. The United States submits that the document contained in Exhibit CHN-40 was not on the record of the investigation and therefore could not have been considered by MOFCOM. In the event that the Panel includes a reference to Exhibit CHN-40, the United States suggests that it make clear China's acknowledgement that Exhibit CHN-40 was not on the record of the investigation and that it was therefore irrelevant to the Panel's analysis of the United States' claim.

6.83. The Panel has added a reference to Exhibit CHN-40 and to China's submissions citing to this Exhibit in the footnote to paragraph 7.466.

Paragraph 7.493

6.84. China submits that the Panel's logic in paragraph 7.492 is that since MOFCOM stated that it "does not need to consider" the extent of price comparability, MOFCOM could not justify its determination before the Panel by explaining how MOFCOM could have considered the issue. China submits that given this logic, the Panel need not address how MOFCOM needed to "consider" this issue. In addition, China argues that the language in the last sentence of paragraph 7.493 goes beyond the actual requirements of Articles 3.2 and 15.2 as interpreted in prior decisions (in particular the Appellate Body report in *China – GOES)*, and is not an appropriate statement of the conclusion the Panel seems to be reaching. For these reasons, China suggests either deleting the entire paragraph, or rewording its last sentence.

6.85. The United States opposes China's request to delete the paragraph. In the United States' view, the paragraph provides the logical conclusion of the Panel's analysis of the product mix issue and contains an accurate statement of China's obligations. Moreover, the United States argues, the paragraph contains the Panel's resolution of China's primary argument, i.e. that record evidence revealed that any price differences favoured US producers/exporters and underestimated the extent of price undercutting. The United States suggests alternative language for the last sentence of the paragraph should the Panel wish to mirror the language of the Appellate Body in *China – GOES*.

6.86. The Panel has decided to maintain paragraph 7.493, but has modified it in light of the concerns expressed by China.

6.87. In addition to the specific requests discussed above, the parties have asked the Panel to make changes of an editorial nature to improve clarity and accuracy or better reflect the language used in their submissions. The Panel has considered these requests and made the changes that it considered appropriate. After considering these requests, the Panel made changes to paragraphs 7.2, 7.20, footnote 75 to paragraph 7.24, 7.59, 7.66, 7.68, 7.69, 7.70, 7.71, 7.72, 7.73, 7.110, 7.111, 7.115 and footnote 192 to the same paragraph, 7.120, 7.144, 7.163, 7.166, 7.171, 7.224, 7.242, 7.257, 7.282, 7.324, 7.371, 7.397, and 7.425. In addition, the Panel also corrected typographical errors and made changes to other paragraphs to improve the clarity of the text and better express its reasoning.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Likewise, Article 17.6(ii) of the Anti-Dumping Agreement requires panels to interpret that agreement's provisions in accordance with the customary rules of interpretation of public international law. It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.2. Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

7.1.2 Standard of review

7.3. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.4. The Appellate Body has explained that where a Panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.[38] Furthermore, in addition to the obligation to conduct an objective assessment under Article 11 of the DSU, in anti-dumping disputes, Article 17.6(i) of the Anti-Dumping Agreement provides that:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

7.5. The Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[39] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[40]

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[41] Therefore, as the complaining party, the United States bears the burden of demonstrating that certain aspects of the anti-dumping and countervailing duty measures at issue are inconsistent with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a

[38] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS,* para. 186; see also Appellate Body Report, *US – Lamb*, para. 103.
[39] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[40] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada),* para. 93.
[41] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

prima facie case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[42] Finally, it is generally for each party asserting a fact to provide proof thereof.[43]

7.2 Procedural claims

7.2.1 Whether MOFCOM provided an opportunity for interested parties with adverse interests to meet as required under Article 6.2 of the Anti-Dumping Agreement

7.2.1.1 Introduction

7.7. The United States claims that China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement when MOFCOM denied a request by the United States Government for a public hearing[44] to present its views regarding the investigation in the presence of parties with adverse interests.[45]

7.2.1.2 Relevant provisions

7.8. Article 6.2 of the Anti-Dumping Agreement provides that:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.2.1.3 Factual background

7.9. The United States Government sent MOFCOM a letter on 12 July 2010 requesting a public hearing to discuss issues raised in the anti-dumping and countervailing duty investigations, in particular: (i) the procedures followed by MOFCOM in the investigations, including the time allowed for comments on MOFCOM's Preliminary Determinations and the lack of transparency in explaining legal conclusions; (ii) MOFCOM's domestic industry definition; (iii) MOFCOM's analysis of the price effects of the subject imports; and (iv) MOFCOM's analysis of the causal link between the subject imports and any injury to the domestic industry.[46]

7.10. MOFCOM responded to the United States Government in a letter of 14 July 2010, which reads in relevant part:

> The investigating authority has undertaken the investigations in a public, just and transparent manner in accordance with Chinese laws and regulations by providing the USG and respondents sufficient time to submit responses (supplemental responses) and comments. All the public versions of the submissions are accessible in the public reading room. In addition, after the preliminary determination and verification, the investigating authority disclosed the sufficient and timely information to the interested parties, including the USG.

---

[42] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[43] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[44] The parties use the term "public hearing" in their submissions but clarify that their use of this term does not imply anything different from, or greater than, the obligations set out in Article 6.2 of the Anti-Dumping Agreement. The United States in particular explains that it uses this term: (i) as a shorthand for the "opportunity" required under Article 6.2; (ii) because that is how MOFCOM titles its rules for hearings; and (iii) because the US request for a hearing in the underlying investigation was framed as such. (United States' response to Panel question No. 5; China's response to Panel question No. 5).
[45] United States' first written submission, para. 2.
[46] Hearing Request, Exhibit USA-22.

> Since the issues mentioned in the hearing request by the USG are not relevant to the interested parties directly, the investigating authority decides to hear the USG's opinions by a way of opinion presentation meeting. The opinion presentation meeting is expected to be held on July 20. Please provide an attendant list by July 16.[47]

7.11. The Final Determinations refer to the request by the United States Government, indicating that MOFCOM "accepted the application and held the hearing on July 20 of 2010", and noting that after the hearing, the US Embassy in China submitted materials relating to the hearing.[48]

7.12. It is not in dispute that the "hearing" referred to in the Final Determination is the "opinion presentation meeting" alluded to in MOFCOM's letter, which took place on 20 July 2010, and was attended by MOFCOM and United States Government officials, without the presence of Petitioner or other interested parties.[49]

7.2.1.4 Main arguments of the parties

7.2.1.4.1 United States

7.13. The United States argues that MOFCOM denied the US request for a hearing by deciding *ab initio,* without any further inquiry, that the issues identified in the request had no relevance for any of the other interested parties to the investigation and instead offering a closed forum where the United States Government could present its views to MOFCOM alone.[50] In the United States' view, Article 6.2 requires the authorities to provide interested parties with the opportunity to meet parties with adverse interests and exchange views, and the "opinion presentation meeting" held by MOFCOM does not satisfy these requirements.[51]

7.14. The United States disputes China's contention that MOFCOM contacted the Petitioner and all other interested parties having adverse interests via telephone and they indicated no interest in meeting with the US respondents, and that MOFCOM thus complied with the obligation in Article 6.2. First, the United States notes that China does not point to any evidence on the record showing that MOFCOM actually contacted those parties; the only document on the record addressing the US request, the letter from MOFCOM to the US Embassy of 14 July 2010, says nothing about this alleged communication.[52] Second, with respect to China's assertion that MOFCOM contacted *all* interested parties with adverse interests; the United States contends that China failed to identify who those parties were and explain the manner in which they were contacted.[53] The United States argues that while Article 6.2 does not compel parties with adverse interests to attend the meeting, this provision does not allow one party, such as the Petitioner, to decide whether the meeting will or will not take place.[54]

7.2.1.4.2 China

7.15. China submits that nothing in Article 6.2 mandates that a public hearing be held under any circumstances.[55] China argues that an investigating authority's obligation under Article 6.2 goes only so far as the obligation to provide the opportunity of a meeting between parties with interests adverse to one another. Thus, China argues, the investigating authority merely has to create the conditions necessary to facilitate such a meeting.[56] In China's view, an interested party's entitlement to a meeting where opposing views and rebuttals are offered is necessarily contingent upon the presence of adverse parties at the meeting – a circumstance which is not compelled by Article 6.2. In China's view, this interpretation is further reinforced by the express caveat in

[47] MOFCOM Reply to the Hearing Request, Exhibit USA-24.
[48] Final Anti-Dumping Determination, Exhibit USA-5, p. 10; Final Countervailing Duty Determination, Exhibit USA-4, p. 9.
[49] United States' first written submission, para. 40; China's first written submission, paras. 9-10.
[50] United States' first written submission, paras. 40, 43 and 50; response to Panel question No. 6.
[51] United States' first written submission, paras. 45-51.
[52] United States' opening statement at the first meeting of the Panel, paras. 4-9; second written submission, paras. 4-6 (citing MOFCOM Reply to the Hearing Request, Exhibit USA-24); opening statement at the second meeting of the Panel, para. 7.
[53] United States' comments on China's response to Panel question No. 87.
[54] United States' opening statement at the second meeting of the Panel, paras. 7-8.
[55] China's first written submission, paras. 7 and 12-13.
[56] China's first written submission, paras. 8 and 12-13; second written submission, para. 17.

Article 6.2 that "there shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case".[57]

7.16. China states that in light of the requirements in Article 6.2, a day after receiving the United States' request for a public hearing, MOFCOM contacted, by telephone, the Petitioner as well as all other interested parties it understood to have interests adverse to the United States Government to notify them of the request and to inquire as to whether they would attend the hearing.[58] China further states that these parties indicated no interest in attending the hearing, given that the issues raised by the United States Government in its hearing request had already been thoroughly addressed throughout the investigation and therefore had no relevance to them.[59] China argues that as there was no opposing party to receive the United States' presentation at a public hearing, MOFCOM rejected the United States' request and instead organized an "opinion presentation meeting" with the United States Government.[60] In light of these circumstances, China contends that the "opinion presentation meeting" did not limit the United States' opportunity to present its views, since parties with adverse interests would not be present in any event.[61] Consequently, China considers that MOFCOM provided an opportunity for adverse parties to meet, consistent with Article 6.2.[62]

7.2.1.5 Arguments of the third parties

7.17. The **European Union** submits that the key point in China's position is the factual assertion that MOFCOM contacted the Petitioner and the latter indicated no interest in meeting with the United States Government. In the European Union's view, if this assertion is legally relevant or even determinative, then consistent with the general principles allocating the burden of proof, China should adduce evidence in support of it. In the event that the contact and response are not recorded in the file, the European Union argues, China's key factual assertion is not supported by evidence.[63]

7.18. **Norway** submits that Article 6.2 guarantees due process requirements and that under this provision, the authorities are obliged to "provide opportunities" for interested parties, upon their request, to meet those parties with opposing interests. In Norway's view, this obligation entails contacting the parties with adverse interests and asking them to take part in a meeting. Norway submits that the only viable reason not to provide such opportunities for a meeting is if all parties with opposing interests are contacted and decline the invitation.[64]

7.19. **Thailand** considers that when an interested party requests a hearing under Article 6.2, an authority should accept the request, provided that the request is raised within a reasonable period of time and does not cause a disruption of the proceedings.[65]

7.2.1.6 Evaluation by the Panel

7.20. Article 6.2 of the Anti-Dumping Agreement, second sentence, establishes an obligation for the authorities, on request, to provide opportunities for all interested parties to meet those parties with adverse interests so that opposing views may be presented and rebuttal arguments offered. As the introductory terms "[t]o this end" in the second sentence of Article 6.2 indicate, this obligation is informed by the overarching obligation in the first sentence of Article 6.2 that all interested parties have a full opportunity for the defence of their interests throughout an anti-dumping investigation. In this respect, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body clarified that Article 6.2 "set[s] out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews".[66] However, in the same report, the Appellate Body expressed the view that Article 6.2 does not provide for "indefinite"

[57] China's first written submission, paras. 8, 13 and 20; second written submission, para. 18.
[58] China's response to Panel question Nos. 7(a), (b) and 87; second written submission, para. 19.
[59] China's first written submission, para. 9; opening statement at the first meeting of the Panel, para. 2; second written submission, para. 19.
[60] China's first written submission, paras. 9-10 and 18-19.
[61] China's opening statement at the second meeting of the Panel, para. 7.
[62] China's first written submission, para. 19; second written submission, para. 19.
[63] European Union's third-party response to Panel question No. 1.
[64] Norway's third-party submission, paras. 7-8; third-party response to Panel question No. 1.
[65] Thailand's third-party response to Panel question No. 1.
[66] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 241.

rights and indicated that the "opportunities" provided for under this provision must be balanced against other considerations such as the investigating authority's ability to complete the investigation in an expeditious manner.[67] Hence, we understand that the obligation to provide opportunities is not absolute. This is further supported by the fourth sentence of Article 6.2, which explicitly states that there is "no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case."

7.21. There is no disagreement between the parties as to whether the United States Government requested an opportunity to meet those parties with adverse interests as contemplated in Article 6.2.[68] There is also no disagreement that neither the Petitioner nor other interested parties having interests adverse to the United States Government were present at the "opinion presentation meeting" MOFCOM arranged.[69] Therefore, the issue is not whether a meeting took place, but whether MOFCOM provided an opportunity for it to occur, consistent with Article 6.2.

7.22. China asserts that, a day after receiving the US request for a public hearing, MOFCOM informed the Petitioner as well as all other interested parties with interests adverse to the United States Government of the request via telephone.[70] According to China, these parties indicated no interest in attending the hearing and declined MOFCOM's invitation.[71] According to China, in light of the right of interested parties to refuse to attend any meeting, MOFCOM's communications with the interested parties were sufficient to satisfy China's obligations under Article 6.2.

7.23. China does not point to any evidence on the record[72] that supports its assertion. The only record evidence the Panel has before it is MOFCOM's letter to the United States Government, which contains no indication that MOFCOM contacted the Petitioner or other interested parties.[73] The letter states that "since the issues mentioned in the hearing request by the USG are not relevant to the interested parties directly, the investigating authority decides to hear the USG's opinions by way of opinion presentation meeting".[74]

7.24. We recall that we must conduct our review of MOFCOM's actions in the investigations at issue on the basis of the record MOFCOM developed in the course of its investigation.[75] In these circumstances where there is no record evidence that other interested parties with interests adverse to those of the United States Government declined to attend the meeting, we conclude that MOFCOM failed to satisfy the requirements of Article 6.2 of the Anti-Dumping Agreement due to its failure to provide opportunities for interested parties with adverse interests to meet and present opposing views and offer rebuttal arguments.

7.25. The Panel therefore finds that China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

7.2.2 Whether MOFCOM required the Petitioner to provide non-confidential summaries as required under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement

7.2.2.1 Introduction

7.26. The United States claims that MOFCOM failed to require the Petitioner to provide adequate non-confidential summaries in the anti-dumping and countervailing duty investigations, contrary to

[67] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* paras. 241-242.
[68] Hearing Request, Exhibit USA-22.
[69] United States' first written submission, para. 40; China's first written submission, paras. 9-10.
[70] China's response to Panel question Nos. 7(a), (b) and 87.
[71] China's second written submission, para. 19.
[72] Such as contemporaneous memoranda summarising the calls, e-mails, or letters. China admits that MOFCOM has no official records of the alleged communication (China's response to Panel question No. 7(c)).
[73] MOFCOM Reply to the Hearing Request, Exhibit USA-24.
[74] MOFCOM Reply to the Hearing Request, Exhibit USA-24.
[75] See above, paras. 7.4-7.5. Given the absence of evidence on record to support China's contention that the reason no meeting was held is that the Petitioner and other interested parties with interests adverse to the United States Government declined to attend, we do not need to resolve the interpretative question as to whether communications with such interested parties, as described by China, could have satisfied China's obligations under Article 6.2.

the requirements of Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement. The United States focuses on the alleged failure to provide non-confidential summaries of information with respect to six specific issues: (i) production and standing, (ii) production capacity, (iii) domestic inventory levels, (iv) cash flow, (v) wages and employment, and (vi) labour productivity.[76]

7.2.2.2 Relevant provisions

7.27. Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement provide:

> The authorities shall require [interested Members or] interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.[77]

7.2.2.3 Factual background

7.28. The CAAA (the Petitioner) filed a single Petition on behalf of the domestic industry requesting the initiation of both the anti-dumping and countervailing duty investigations. The Petitioner submitted two versions of the Petition to MOFCOM: a confidential version and a non-confidential version. The non-confidential version includes a section entitled "Confidentiality Application", which contains the following statement under the heading "Non-confidentiality summary":

> In order to help interested parties learn about the Petitioner and its exhibits, the petitioner hereby prepares the non-confidential version of the Petitioner and its exhibits, and particularly explains the data and information applied for confidentiality or provides a non-confidentiality summary in such non-confidential version.[78]

7.29. The non-confidential version redacts information pertaining to various issues, including the issues identified by the United States.[79] Where information is redacted, the non-confidential version of the Petition states that: "Confidentiality is applied as the trade secrets of the petitioner are involved if disclosing relevant data, which may have seriously adverse effect on the petitioner".[80]

7.2.2.4 Main arguments of the parties

7.2.2.4.1 United States

7.30. The United States argues that MOFCOM failed to require the Petitioner to furnish non-confidential summaries of the information it had submitted in confidence even though the Petitioner did not present to MOFCOM any particular circumstances, let alone exceptional ones, that justified why the information in question was not susceptible to non-confidential summarisation.[81] The United States argues that the obligation to either provide a non-confidential

[76] The United States' claim is limited to the non-confidential summaries of information pertaining to these six issues. (United States' response to Panel question No. 13).

[77] Article 12.4.1 of the SCM Agreement includes the bracketed text, Article 6.5.1 of the Anti-Dumping Agreement does not.

[78] Petition, Exhibit CHN-2, Part 2, p. 98. The United States' translation of the Petition (Exhibit USA-1) omits this Part 2, as well as a Part 3 to the Petition, containing the list of the 19 exhibits attached to the Petition. In addition, the version submitted by the United States to the Panel is incomplete in other parts (some tables run over the margin of pages such that part of the information is missing). For this reason, we refer to both China's and the United States' versions in this section of our findings.

[79] Petition, Exhibit CHN-2, pp. 9-10, 70-72, 74-75 and 82-84; Petition, Exhibit USA-1, pp. 4-5, 68-70, 72-73 and 80-83.

[80] Petition, Exhibit CHN-2, pp. 9-10, 70-72, 74-75 and 82-84; see also Petition, Exhibit USA-1, pp. 4-5, 68-70, 72-73 and 80-83.

[81] United States' first written submission, para. 69-80; opening statement at the first meeting of the Panel, para. 27; second written submission, para. 22.

summary or an explanation of why summarisation is not possible rests on the interested party submitting the information, and not on the investigating authority. Thus, MOFCOM's own summaries cannot remedy its failure to require the Petitioner to provide the summaries.[82]

7.31. The United States considers that even accepting China's suggestion that the non-confidential version of the Petition contained summaries of the information submitted in confidence, such summaries are inadequate. The United States contends that the manner in which the purported summaries are presented in the non-confidential version of the Petition, without explaining which particular information should serve as non-confidential summary, is inconsistent with Articles 6.5.1 and 12.4.1. The United States argues that even though there is no obligation to label summaries in Articles 6.5.1 and 12.4.1, the reader must nevertheless be given an indication of which information is meant to provide an understanding of the substance of the confidential information so that interested parties are not required to guess what the redacted information might be.[83] The non-confidential version of the Petition contains no indicia that would let an interested party know what information was intended to serve as non-confidential summary.[84] The United States adds that the panel in *Mexico – Olive Oil* rejected a similar attempt to present the public versions of documents as "summaries".[85]

7.32. The United States disagrees with China's suggestion that the obligation to provide adequate non-confidential summaries should be assessed in light of particular substantive provisions, and notes that the relevant substantive provisions contain no cross-reference to Article 6.5.1 and *vice-versa*. In the United States' view, the obligation to provide adequate non-confidential summaries is an independent one.[86]

7.33. As regards confidential information concerning the Petition's data on **total production and standing**, the United States contends that the mere factual assertion that the production accounted for by the Petitioner represents more than 50% of total domestic production does not provide interested parties with an opportunity to challenge the validity of the confidential information underlying this assertion; in particular, the purported summary fails to disclose which Chinese producers the Petitioner represented, as well as their total output. In addition, the purported summary does not provide information about the source or data underlying the assertion of standing, which, the United States argues, could assist interested parties in defending their interests.[87] The United States recalls that the panel in *China – GOES* rejected the notion that the mere inclusion of conclusory statements meets the requirements of Articles 6.5.1 and 12.4.1.[88]

7.34. In relation to **production capacity**, the United States submits that it is impossible to discern from the information provided either whether there were any specific trends, or the magnitude of any such trends, given that the graphs provided in the Petition lack scales, and the year-over-year percentage changes purporting to supplement the graphs do not reveal the significance in the absolute changes. The United States contends that China's suggestion that by matching the unlabelled graphs with total production figures from a different section of the Petition one could infer both minimum and maximum capacity figures is precisely the same approach to summarisation that was rejected in *China – GOES*.[89]

7.35. The United States presents similar arguments with respect to **domestic inventory levels** and **wages and employment**, stating that the year-over-year percentage changes cited in the

[82] United States' first written submission, para. 73; opening statement at the first meeting of the Panel, para. 26; second written submission, paras. 23-24 (citing Panel Report, *China – GOES*, para. 7.190).
[83] United States' response to Panel question No. 14 (citing Panel Report, *China – GOES*, paras. 7.202, 7.213); opening statement at the second meeting of the Panel, paras. 14, 16.
[84] United States' response to Panel question No. 15; opening statement at the second meeting of the Panel, para. 17.
[85] United States' opening statement at the second meeting of the Panel, para. 17 (citing Panel Report, *Mexico – Olive Oil*, paras. 7.97-7.98).
[86] United States' second written submission, para. 25.
[87] United States' first written submission, para. 79; opening statement at the second meeting of the Panel, para. 19.
[88] United States' opening statement at the first meeting of the Panel, para. 22; second written submission, paras. 27-28 (citing Panel Report, *China – GOES*, para. 7.205); opening statement at the second meeting of the Panel, paras. 18-19.
[89] United States' second written submission, paras. 29-30 (citing Panel Report, *China – GOES*, para. 7.202).

Petition do not reveal the significance of the absolute changes.[90] Similarly, regarding **cash flow**, the United States argues that the graphs presented in the Petition lack scales, and that the narrative explanation in the same section of the Petition does not provide any percentage changes, apart from merely stating that during particular periods there was net cash outflow or inflow.[91]

7.36. Concerning **labour productivity**, the United States argues that the information is simply redacted, and that the only information provided in the Petition is that "since 2006, the employment figures related to like products in China have been [*sic*] fluctuated dramatically, but the labour productivity has remained stable as whole".[92]

7.2.2.4.2 China

7.37. China maintains that the Petitioner in fact provided adequate non-confidential summaries.[93] China argues that neither Article 6.5.1 nor Article 12.4.1 specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner, provided that due process is served based on the non-confidential summaries presented.[94] China argues that the panel report in *China – GOES* does not provide a definite answer to the question whether the two provisions impose any specific labelling requirement. China observes that one of the concerns in *China – GOES,* the need to rely on different discussions interspersed throughout the body of the Petition to derive a reasonable understanding of the substance of the redacted information, is not present in the case before this Panel.[95] In addition, China argues, the non-confidential summaries provided in the Petition were later supplemented by non-confidential analysis provided by MOFCOM in its Preliminary and Final Determinations. In this regard, China disagrees with the reasoning of the panel in *China – GOES* that supplemental summarisation by an investigating authority cannot fulfil the requirements of Articles 6.5.1 and 12.4.1.[96]

7.38. China notes that the very document the United States cites as lacking any indication of non-confidential summaries is in fact identified as "the non-confidential version of the Petition".[97] China argues that the Petitioner's discussion of the information submitted in confidence is provided in the precise location where that information was redacted or omitted, either in the immediately surrounding text or embodied in the graphs and tables included in the text.[98] China argues that the summaries provided by the Petitioner permitted a reasonable understanding of the information submitted in confidence, consistent with Articles 6.5.1 of the Anti–Dumping Agreement and 12.4.1 of the SCM Agreement.[99]

7.39. With respect to **production and standing**, China argues that the only issue this information is relevant to is whether the Petitioner had standing – i.e. that the Petition was made by or on behalf of the domestic industry within the meaning of Article 5.4 of the Anti-Dumping Agreement. In China's view, the summary permits a reasonable understanding of this issue since it: (i) shows that the yield represented by the Petitioner accounted for more than 50% of the gross yield in China throughout the POI; and (ii) presents a table containing, *inter alia*, the actual data on the gross industry yield.[100]

7.40. Concerning **production capacity**, China submits that the graphs provided in the non-confidential version of the Petition are to scale and that the initial scale line is labelled "zero". China notes that the graph presents two data bars for each period: (i) a bar representing production (yield), and (ii) a bar representing production capacity. China explains that since the Petition reports total production figures in relation to standing, and given Petitioners' statement that they represented more than 50% of total production, one may deduce the minimum and

[90] United States' second written submission, paras. 31 and 33.
[91] United States' second written submission, para. 32.
[92] United States' second written submission, para. 34.
[93] China's first written submission, para. 44.
[94] China's second written submission, paras. 37 and 46 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 542); response to Panel question No. 14; opening statement at the second meeting of the Panel, para. 18.
[95] China's response to Panel question No. 14.
[96] China's first written submission, para. 44 (citing Panel Report, *China – GOES,* para. 7.190).
[97] China's response to Panel question No. 14; second written submission, para. 38.
[98] China's response to Panel question No. 14.
[99] China's first written submission, paras. 59-60; second written submission, para. 49.
[100] China's first written submission, paras. 47-48; response to Panel question No. 15.

maximum capacity figures for each time period using the estimates on utilization. Given the points of reference provided by the zero line and the simultaneous representation of production and capacity, both trends and the magnitude of those trends could be easily discerned.[101] China adds that the resulting estimates are sufficient to understand any "actual or potential negative decline" in capacity utilization within the meaning of Article 3.4 of the Anti-Dumping Agreement.[102]

7.41. In China's view, the section of the Petition on **domestic inventory levels** provided an adequate explanation of relevant confidential information by indicating the year-over-year percentage of increase in domestic inventory levels – an issue directly relating to "actual or potential declines" in various factors discussed in Article 3.4 of the Anti-Dumping Agreement.[103]

7.42. Similarly, with regard to **wages and employment,** China argues that the public summary contained in the Petition provided the operative facts sufficient to understand the key issue under Article 3.4, i.e. "actual or potential negative effects" on employment or wages: the year-over-year rise and decline in employment figures and an explanation of the steady rise in average salary.[104]

7.43. Finally, China submits that the Petition adequately explained the actual and potential negative effects of imports on the net **cash flow** from operating activities of like products in China (the relevant factor under Article 3.4), showing its magnitude. China also argues that the Petition indicated that during the POI the **labour productivity** of employees remained stable on the whole.[105]

7.2.2.5 Arguments of the third parties

7.44. **Chile** submits that the importance of complying with Articles 6.5.1 and 12.4.1 lies in allowing interested parties to access the information contained in non-confidential summaries, thus securing them the right to properly defend their interests and ensuring the legitimacy of the investigation.[106]

7.45. In the **European Union**'s view, MOFCOM does not seem to have either requested non-confidential summaries of confidential information received, or an explanation as to why the confidential information was not capable of summarisation.[107] The European Union agrees with the reasoning of the panel in *China – GOES* and considers that investigating authorities are bound to require the interested parties submitting confidential information to avoid mismatches in the non-confidential summaries.[108]

7.46. **Japan** notes the finding of the panel in *China – GOES* that Articles 6.5.1 and 12.4.1 impose an obligation on an interested party submitting confidential information to furnish a summary of it, and that it is not for other interested parties to derive their own summary based on the context from which the information is redacted. Japan also agrees with the finding of the panel in the same case that a non-confidential summary must be explicit so that other interested parties are aware that the redacted information has in fact been summarised.[109]

7.47. **Saudi Arabia** submits that Articles 6.5 and 12.4 strike a balance between, on the one hand, respect for confidential information and, on the other hand, the need for transparency and a proper opportunity for other interested parties to review and comment on the information received in confidence. Saudi Arabia argues that the requirement of due process embodied into these provisions implies that interested parties have a meaningful right to see the evidence submitted or

[101] China's first written submission, paras. 49-50 (citing Petition, Exhibit CHN-2, pp. 71-72); response to Panel question No. 15.
[102] China's first written submission, para. 50.
[103] China's first written submission, paras. 51-52 (citing Petition, Exhibit CHN-2, p. 74).
[104] China's first written submission, paras. 55-56 (citing Petition, Exhibit CHN-2, p. 83); opening statement at the first meeting of the Panel, para. 5; second written submission, paras. 42-44.
[105] China's first written submission, paras. 53-54 and 57-58 (citing the Petition, Exhibit CHN-2, pp. 83-84).
[106] Chile's third-party statement, paras. 6-8.
[107] European Union's third-party submission, paras. 21-23.
[108] European Union's third-party response to Panel question No. 4 (citing Panel Report, *China – GOES*, paras. 7.202 and 7.213).
[109] Japan's third-party submission, para. 26 (citing Panel Report, *China – GOES*, paras. 7.213 and 7.224).

gathered in an investigation, and have an adequate opportunity for the defence of their interests.[110]

7.48. **Thailand** considers that the authority need not require the interested party to label a non-confidential summary; the means to comply with Article 6.5.1 is at the discretion of the investigating authority, provided that the non-confidential summary permits a reasonable understanding of the substance of information submitted in confidence.[111]

7.2.2.6 Evaluation by the Panel

7.49. The question before the Panel is whether MOFCOM required the Petitioner to provide non-confidential summaries of the confidential information redacted from the Petition consistent with the requirements of Articles 6.5.1 and 12.4.1. The United States argues that non-confidential summaries were not furnished by the Petitioner or that if they were, they do not meet the requirements of Articles 6.5.1 and 12.4.1. China's position is that the non-confidential version of the Petition does contain summaries in the form of graphs and explanations adjoining the redacted information, permitting a reasonable understanding of that information. There is no disagreement between the parties that the Petitioner did not invoke "exceptional circumstances" making summarisation impossible under Articles 6.5.1 and 12.4.1.

7.50. The Appellate Body has clarified the standard for assessing whether a non-confidential summary complies with Articles 6.5.1 and 12.4.1. In *EC – Fasteners (China)*, the Appellate Body stated that although the sufficiency of the summary will depend on the confidential information at issue, the summary must permit a reasonable understanding of the substance of the information withheld, and allow the other parties to the investigation a meaningful opportunity to respond and defend their interests.[112]

7.51. The United States contends that the purported summaries in the non-confidential version of the Petition were not properly identified as such and, therefore, entailed the type of "guess-work" for other interested parties that the panel in *China – GOES* found inconsistent with Articles 6.5.1 and 12.4.1. China responds that "[t]he very document the United States cites as lacking any indication of non-confidential summaries is in fact identified as the non-confidential version of the petition" and that the information surrounding the redacted information serves as the non-confidential summaries.[113]

7.52. We now turn to examine whether the non-confidential version of the Petition suffices as non-confidential summaries of the information pertaining to the six areas identified by the United States: (i) production and standing, (ii) production capacity, (iii) domestic inventory levels, (iv) cash flow, (v) wages and employment, and (vi) labour productivity.

7.53. Before we do so, we note China's argument that the non-confidential summaries included in the Petition were later supplemented by non-confidential analysis provided by MOFCOM in its Preliminary and Final Determinations.[114] In this respect, a number of previous panels have found that Articles 6.5.1 and 12.4.1 require that a non-confidential summary be furnished by the "interested parties providing confidential information", and not by the investigating authority.[115]

---

[110] Saudi Arabia's third-party submission, paras. 46-48 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 542).

[111] Thailand's third-party response to Panel question No. 4.

[112] Appellate Body Report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – GOES*, para. 7.188; *Mexico – Steel Pipes and Tubes*, paras. 7.379-7.380; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.133.

[113] United States' response to Panel question No. 14; China's response to Panel question No. 14.

[114] China's first written submission, para. 44.

[115] Panel Reports, *China – GOES*, paras. 7.189-7.190; *EU – Footwear (China)*, para. 7.708. In *China – GOES*, the Panel linked this question to the due process objective underlying Articles 6.5.1 and 12.4.1:

> Given the Appellate Body's statement that Article 6.5.1 of the Anti-Dumping Agreement affords "due process" to interested parties in an investigation, China's argument that non-confidential information submitted in the application can be summarized in the investigating authority's determination is problematic. In order to allow an interested party the opportunity to defend its interests, the summary of the confidential information needs to be provided before the investigating authority has reached its determination. (Panel Report, *China – GOES*, para. 7.190, citing Appellate Body Report, *EC – Fasteners (China)*, para. 542).

We concur with these panels that information, summary or analysis provided by the investigating authority cannot remedy the absence of, or shortcomings in, a summary provided by the interested party submitting the confidential information. This being the case, there is no need for us to take into consideration or address MOFCOM's own summarisation of the confidential information submitted by the Petitioner.

7.2.2.6.1 Production and standing

7.54. The information concerning production and standing is contained in Section I(I)4 of the Petition.[116] A table provides the figures for the gross yield in China in 2006, 2007, 2008, the first half of 2008, and the first half of 2009, but redacts out the data concerning the Petitioner's production yield as well as the Petitioner's share of the gross yield in China of broiler products during the same years. The table is followed by two notes indicating that the yield of broiler products represented by the Petitioner is detailed in Exhibit 2 to the Petition and that the gross yield of broiler products in China is detailed in Exhibit 6 to the Petition, both of which were provided as confidential information.[117] A narrative description explains that the yield represented by the Petitioner accounted for more than 50% of the gross yield during each of the reported years, and consequently, that the Petitioner has the right to submit the Petition on behalf of the broiler chicken industry of China.

7.55. In considering whether this information permits a reasonable understanding of the substance of the confidential information, such that it constitutes a "non-confidential summary" we note that the information provided is limited to an assertion that the companies composing the Petitioner represented somewhere between 50% and 100% of Chinese domestic production in each year and therefore produced between 50% and 100% of the "gross yield". In our view, a range between 50% and 100% does not permit a reasonable understanding of the redacted information about standing, particularly when the list of producers (in Exhibit 2) and the data concerning total yield in China (in Exhibit 6) were provided in confidence and not summarized.

7.56. We note China's argument that the redacted information is only relevant to the issue of whether the Petitioner had standing within the meaning of Article 5.4 of the Anti-Dumping Agreement, and thus an indication that it represents over 50% of total domestic production is sufficient to permit a reasonable understanding of the redacted information. We recall that the text of Articles 6.5.1 and 12.4.1 establishes the standard for a non-confidential summary in relation to the information which was redacted, without reference to the purpose for which that information will be used in the subsequent investigation, and does not refer to particular substantive obligations. Additionally, much of the information submitted in the Petition is relevant to determinations made under more than one provision or obligation. For instance, as discussed below, production yields are also relevant to understand trends in capacity utilization for the injury determination. Thus, the Panel assesses compliance with Articles 6.5.1 and 12.4.1 based on whether the non-confidential version of the Petition enabled interested parties to understand the substance of the redacted information, rather than whether the non-confidential version permitted the interested parties to understand that the Petitioner was asserting that it had standing under Article 5.4.

7.57. As discussed above, nothing in the non-confidential version summarises the redacted information pertaining to the production yields of the various companies that comprised the industry association that acted as the "Petitioner", their share of total domestic production, or the sources underlying that information. Moreover, a conclusory statement that the information was sufficient to demonstrate standing cannot replace the summary of the confidential information, particularly if such a statement does not provide interested parties with the means to challenge whether the confidential information in fact provided a basis for that conclusion.[118] Therefore, we consider that MOFCOM did not require the Petitioner to provide non-confidential summaries consistent with Articles 6.5.1 and 12.4.1 with respect to the information on production and standing.

[116] Petition, Exhibit CHN-2, pp. 9-10; Petition, Exhibit USA-1, pp. 4-5.
[117] China confirmed in its response to Panel question No. 88 that Exhibits 2 and 6 from the Petition were not made available to other interested parties. China submitted Exhibits 2 and 6 to the Panel as Exhibits CHN-32 and CHN-33.
[118] Panel Report, *China – GOES*, para. 7.205.

7.2.2.6.2 Production capacity

7.58. The information concerning production capacity of the domestic industry is contained in Section VI(II)3.2 of the Petition.[119] Three tables are included in this section, which provide information concerning production capacity, yield, and capacity utilisation in 2006, 2007, 2008, the first half of 2008, and the first half of 2009. All the yearly figures concerning production capacity, yield and capacity utilization are redacted from the non-confidential version. Only the numerical figures for the year-on-year change in capacity utilization are provided. The tables are followed by two graphs depicting the same information on production capacity, yield and capacity utilization side-by-side. The graphs contain lines but no figures. They are followed by a narrative description of the information therein from which relevant figures are redacted.

7.59. China's position is that because the Petition in other relevant sections reports total production figures, and given the Petitioner's statement that it represented more than 50% of total production in China, one may deduce both minimum and maximum production capacity figures for each time period using the estimates on utilization provided in this section of the Petition.[120] China argues that the resulting estimates suffice to identify "actual or potential" decline in capacity utilization for purposes of Article 3.4 of the Anti-Dumping Agreement.[121] In addition, China asserts that the graphs included in this section are to scale.[122] The United States notes that there is no indication that these graphs are intended to be to scale or what the units on the scale should be.[123]

7.60. We are of the view that the graphs and explanations included in the non-confidential version do not provide the summaries required under Articles 6.5.1 and 12.4.1. First, we have already rejected China's argument that compliance with Articles 6.5.1 and 12.4.1 must be assessed in the light of the substantive provision the information may be used to address. Second, the graphs included in this section of the Petition provide neither figures nor a range of figures of production capacity or capacity utilization in relevant years; rather the graphs are set to unmarked scale lines.[124] A partial estimation of redacted information on yearly capacity and capacity utilization could be constructed by connecting information from different parts of the Petition and then applying it to the graphs. The outcome of such an exercise, however, remains insufficient to provide an understanding of the redacted information and consequently does not fulfil the due process objective underlying the requirement to provide non-confidential summaries. Finally, the very exercise of calculating an approximate figure of production capacity through a series of operations requires interested parties to derive and piece together their own summary of the redacted information. Such an obligation is not contained in the text of Articles 6.5.1 and 12.4.1, which place the burden of providing an adequate non-confidential summary on the party submitting the confidential information.[125]

7.61. Therefore, we consider that MOFCOM did not require the Petitioner to provide a non-confidential summary consistent with Articles 6.5.1 and 12.4.1 with respect to the information on production capacity.

7.2.2.6.3 Inventories, wages and employment, cash flow and labour productivity[126]

7.62. The sections of the Petition concerning inventories, wages and employment, cash flow and labour productivity all follow a similar pattern. The sections on inventories and on wages and employment contain tables where the information on yearly amounts, as well as year-on-year changes during the years 2006, 2007, 2008, the first half of 2008 and the first half of 2009 is redacted. The percentages for year-on-year changes are provided. The sections on cash flow and labour productivity contain tables of yearly figures, which are redacted. Year-on-year changes are not provided. For every section except for labour productivity, graphs and explanations are

[119] Petition, Exhibit CHN-2, pp. 70-72; Petition, Exhibit USA-1, pp. 68-70.
[120] China's first written submission, paras. 49-50.
[121] China's first written submission, para. 50.
[122] China's response to Panel question No. 16.
[123] United States' response to Panel question No. 16.
[124] While we accept China's explanation that the graphs are to scale, there is no indication of this in the text of the Petition.
[125] See a similar finding in Panel Reports, *China – GOES*, para. 7.202; and *China – X-Ray Equipment*, para. 7.332.
[126] Petition, Exhibit CHN-2, pp. 74-75 and 82-84; Petition, Exhibit USA-1, pp. 72-73 and 80-83.

provided after the table. The graphs provide a linear depiction of the yearly trends, but no scale. Where information on year-on-year percentage changes is provided in the tables, the subsequent text contains a narrative description of the trend.

7.63. We are of the view that the information which remains in the non-confidential version of the Petition does not permit a reasonable understanding of the substance of the redacted information[127], because providing year-over-year changes in percentage terms without a non-confidential summary of what constitutes the baseline does not allow a reasonable understanding of the magnitude of the change. With respect to cash flow, the graph and explanation only show whether there was a net cash inflow or outflow in a given year. The graph purports to describe the magnitude of the net inflows or outflows but does so with columns against an unmarked scale and therefore provides no information on the order of magnitude of either the baseline or the changes.[128] In the case of labour productivity, a conclusory statement that the labour productivity has remained stable as a whole is provided in the explanation, but without any non-confidential summary of the redacted information.[129]

7.64. Therefore, we consider that MOFCOM did not require the Petitioner to provide non-confidential summaries consistent with Articles 6.5.1 and 12.4.1 with respect to the information on inventories, wages and employment, cash flow, and labour productivity.

7.2.2.6.4 Conclusion

7.65. In light of the above, we consider that the non-confidential version of the Petition does not permit a reasonable understanding of the substance of the confidential information that was redacted with respect to the six areas identified by the United States and thus does not constitute a non-confidential summary of that information within the meaning of Articles 6.5.1 and 12.4.1. Consequently, we conclude that MOFCOM failed to satisfy the obligation in those provisions to require the Petitioner to provide non-confidential summaries of the information that was submitted in confidence. Accordingly, we find that China acted inconsistently with Articles 6.5.1 and 12.4.1 in the investigations at issue.

7.2.3 Whether MOFCOM disclosed the "essential facts" as required by Article 6.9 of the Anti-Dumping Agreement

7.2.3.1 Introduction

7.66. The United States claims that China failed to comply with the obligation in Article 6.9 of the Anti-Dumping Agreement to disclose to interested parties the essential facts forming the basis of MOFCOM's decision to apply anti-dumping duties by failing to make available the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.[130]

7.2.3.2 Relevant provisions

7.67. Article 6.9 of the Anti-Dumping Agreement provides:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

[127] Again, the relevant question in our view is not, as China argues, whether the "summary" provides key information pertaining to the application of particular substantive provisions, but whether it permits a reasonable understanding of the redacted information.
[128] Petition, Exhibit CHN-2, pp. 82-83; Petition, Exhibit USA-1, pp. 80-82.
[129] Petition, Exhibit CHN-2, p. 84; Petition, Exhibit USA-1, p. 83.
[130] The United States has also made a claim with respect to the disclosure for the "all others" rate. The Panel addresses this claim in Section 7.3.4.6.2 below.

7.2.3.3 Factual background

7.68. The Final Anti-Dumping Disclosure for each mandatory respondent[131] provides a narrative description of how MOFCOM determined normal value, export price, and certain adjustments to normal value and export price. This description is accompanied by a table with company-specific figures relating to export volumes, export prices and normal values for various product categories of the subject merchandise and a total dumping margin for the subject merchandise as a whole. The disclosure documents show the weighted-average dumping margin calculation at its final stage i.e. the comparison of weighted-average export prices to weighted-average normal values on a model basis and the weight-averaging of the model-specific "margins" into a margin for the subject merchandise as a whole.

7.2.3.4 Main arguments of the parties

7.2.3.4.1 United States

7.69. The United States contends that the disclosure requirement in Article 6.9 serves an essential due process function, because unless an interested party is provided with these essential facts on a timely basis by the investigating authority, it cannot adequately defend its interests.[132] The United States argues that for the purposes of the investigating authority's dumping determination, the essential facts under Article 6.9 are the "indispensable and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, e.g. whether dumping has occurred and, if so, the magnitude of such dumping.[133]

7.70. Therefore, the United States argues, the "essential facts" include both the calculations and the data relied upon by the investigating authority.[134] In particular, the United States contends that in order to fulfil the obligation in Article 6.9, the calculations and related information MOFCOM should have made available include, but are not limited to: (i) all calculations performed with respect to the derivation of the normal value; (ii) all calculations performed with respect to the derivation of the export price; and (iii) all calculations performed with respect to the determination of costs of production.[135]

7.71. Moreover, the United States submits that "[f]or normal value, export price and costs of production MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM's elimination or rejection of data provided by each respondent."[136] The United States also argues that MOFCOM should have provided the actual files and spreadsheets created within any computer programme it used, along with the formulas used to calculate normal value and export price, and with any adjustments.[137]

7.72. Relying on dictionary definitions of the term "fact"[138], the United States maintains that data underlying the investigating authority's calculations consisting of various production costs and sales data submitted by the interested parties and adjusted, where appropriate, by the investigating authority are "facts" because they are things "known for certain to have occurred" and "events or circumstances as distinct from their legal interpretation." The United States adds

[131] See, e.g. Final Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-13, p. 9; Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 5; and Final Anti-Dumping Disclosure to Tyson, Exhibit USA-12, p. 4.

[132] United States' first written submission, paras. 61-62 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.805).

[133] United States' first written submission, paras. 55-56 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.796, where the panel concluded that essential facts included not only those facts supporting a determination, but encompassed "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority.")

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

[135] United States' first written submission, para. 66.

[136] United States' first written submission, para. 66.

[137] United States' first written submission, para. 66; see also response to Panel question Nos. 8 and 9; and second written submission, para. 11.

[138] United States' response to Panel question No. 12 (citing *New Shorter Oxford English Dictionary* (Clarendon Press, 1993) defining a fact as "[a] thing known for certain to have occurred or to be true; a datum of experience" and "[e]vents or circumstances as distinct from their legal interpretation."

that the investigating authority aggregates, disaggregates or otherwise applies this adjusted data to calculate the normal value and export price. The United States contends that the calculations similarly are "facts" because they also represent events or circumstances, as distinct from the investigating authority's legal interpretation of that data.[139]

7.73. The United States argues that without access to the actual calculations performed and the actual data used the interested parties could not, for example, check MOFCOM's methodology and math for errors or confirm that MOFCOM did what it purported to do. Likewise, without that information the interested parties could not "comment on the completeness and correctness of the facts being considered… provide information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts", consistent with the requirement to disclose the essential facts as described by the panel report in *EC – Salmon (Norway)*.[140]

7.74. With respect to the disclosures in the investigation in question, the United States accepts that MOFCOM provided tables with the weighted-average model-specific normal value, export price, and "dumping margin" as well as the total weighted-average dumping margin. However, the United States maintains that MOFCOM provided no disclosure of how these summary figures were derived and that the bare conclusory summaries of MOFCOM's methodologies, adjustments and calculations in its Preliminary Anti-Dumping Determination and Final Disclosures are insufficient to satisfy the requirements of Article 6.9 of the Anti-Dumping Agreement and preclude the interested parties from adequately defending their interests.[141]

7.2.3.4.2 China

7.75. China argues that Article 6.9 "clearly links 'essential facts' to the limited purpose of allowing interested parties to defend their interests". China explains that in its view, Article 6.9 does not require the type of expansive disclosure the United States calls for, which would seemingly oblige disclosure of every detail that comprised part of the authority's consideration of the matter, whether it be individual transaction data, the basic calculation methodology, any calculation worksheets, and the calculation programme itself.[142]

7.76. China recalls that disclosure under Article 6.9 is limited to facts, as opposed to the reasoning of the investigating authorities. Additionally, China notes that not all facts are *essential facts*. China argues that "essential facts" are those that established the basis of the authorities' decision whether to apply definitive measures; therefore Article 6.9 does not imply an obligation to disclose any and all aspects of an authority's dumping calculation.[143] In China's view, the obligation under Article 6.9 is more appropriately limited to the fact of the existence of margins of dumping and those other fundamental facts that provide an understanding of how the conclusion was reached.[144]

7.77. With respect to the disclosure documents in the investigation at issue, China maintains that MOFCOM provided all the facts necessary for the interested parties to defend their interests[145], because "one can trace the references made in the final disclosure documents to the specific adjustments and data contained in submissions made by the respondents in the case" and thus the interested parties could reasonably defend their interests.[146]

7.78. China argues that disclosure of the calculation program or worksheets was not necessary, because MOFCOM's manner of disclosing the essential facts by providing a detailed explanation of the methodology applied, and leaving it to respondents to replicate those steps if they wish to

[139] United States' first written submission, para. 59.
[140] United States' second written submission, para 16 (citing Panel Report, *EC – Salmon (Norway)*, para 7.805).
[141] United States' first written submission, para. 65.
[142] China's first written submission, para. 23.
[143] China's first written submission, paras. 25-28 (citing Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* para. 7.148; and Panel Report, *EC – Salmon (Norway)*, para. 7.796).
[144] China's first written submission, para. 28.
[145] China's first written submission, para. 23.
[146] China's first written submission, paras. 33-34.

recreate the details allowed the respondents to "defend their interests" and was consistent with the obligation in Article 6.9.[147]

7.79. China submits that the respondents were in control of their own facts, and were provided MOFCOM's basis for disregarding sales in terms of market viability and affiliated sales, or where sales were excluded as below cost. China argues that the disclosure provided to the individual US respondents goes well beyond the basic disclosure required by Article 6.9, as MOFCOM gave each respondent a particularized disclosure document that summarized MOFCOM's calculation, and provided the key benchmarks – normal value, c.i.f. price, and net export price – necessary for each respondent to see which products created what dumping margins, and sufficient for each respondent to cross check MOFCOM's calculations with the data that the respondent had provided.[148]

7.2.3.5 Arguments of the third parties

7.80. **Chile** considers compliance with the obligations set forth in Article 6.9 to be of vital importance as it is a fundamental rule of due process. In Chile's view, the obligation guarantees not only the parties' right to defend their interests, but also ensures the legitimacy of the authority's investigation and decision. Pursuant to Chile's understanding of Article 6.9, the role of the Panel is to verify that the information provided by the authority includes the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority and that the investigating authority provided those "essential facts" in sufficient time for parties to formulate their defence.[149]

7.81. The **European Union** agrees with the United States that "essential facts" includes the calculation method employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations as they are both "material for the authority's decision" and "important to the authority's determination".[150] The European Union maintains that access to this information is necessary to enable exporters to check the investigating authority's methodology and calculations for errors. The European Union submits that "essential" within the meaning of Article 6.9 is any fact on which the investigating authority bases its final determination, so that if it were not established or not taken into account, or if it were completed by other facts that were not taken into account, the final determination would be different. The European Union considers that the investigating authority's conclusions regarding the qualification and treatment of individual data, as well as the formal grounds and benchmarks underlying such conclusions, are facts that must be disclosed pursuant to Article 6.9 of the Anti-Dumping Agreement, and they should be distinguished from the detailed reasoning describing how the benchmarks were chosen and actually applied, which is not subject to disclosure.[151] The European Union argues that the information MOFCOM provided in this case would not enable exporters to check the calculations against the methodological explanations given.[152]

7.82. In **Japan**'s view, "essential facts" that must be disclosed to interested parties pursuant to Article 6.9 include the authority's actual dumping margin calculations and results of its application of the below-cost test. Japan argues that the fact-finding processes for normal value, export price, and adjustments thereof are all indispensable to the calculation of the margin of dumping and the conclusion of the existence of dumping. Therefore, according to Japan, the authorities are required to disclose facts found in the process of analysis of the raw data submitted by foreign producers.[153] Japan maintains that given that small adjustments in normal value or the sales included in the calculation can have significant impacts on the final finding of dumping, full disclosure of the dumping margin calculation is indispensable to interested parties to defend their interests.[154]

7.83. **Norway** contends that the "essential facts" are the facts necessary to the process of analysis and decision-making by the investigating authority, not only those that support the

[147] China's second written submission, para. 28.
[148] China's response to Panel question No. 12; second written submission, para. 26.
[149] Chile's third-party statement, para. 3-5.
[150] European Union's third-party submission, paras. 5-6 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 483; and Panel Report, *Guatemala – Cement II*, para. 8.229).
[151] European Union's third-party response to Panel question No. 3.
[152] European Union's third-party submission, paras. 5-8.
[153] Japan's third-party submission, para. 13.
[154] Japan's third-party submission, para. 14.

decision ultimately reached.[155] Norway argues that Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures.[156] Norway maintains that if the calculations performed to determine the existence and margin of dumping and the data underpinning these calculations are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner.[157]

7.84. **Saudi Arabia** maintains that a disclosure pursuant to Article 6.9 must concern the factual basis for making the determination of the existence of dumping or subsidization, injury and causation. According to Saudi Arabia, if domestic prices are rejected or cost data are disregarded, the factual basis for doing so must be disclosed.[158]

7.2.3.6 Evaluation by the Panel

7.2.3.6.1 What constitutes "essential facts"?

7.85. The questions before the Panel are what constitute "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement and whether MOFCOM disclosed those essential facts to the three respondents in the anti-dumping investigation on broiler products.

7.86. We agree with both the panels in *China – GOES* and *Mexico – Olive Oil* that in order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find three key elements: (i) dumping or subsidization, (ii) injury, and (iii) a causal link. Therefore, the "essential facts" underlying the findings and conclusions relating to these elements form the basis of the decision to apply definitive measures and must be disclosed.[159] Although Article 6.9 does not imply an obligation to disclose any and all aspects of an authority's dumping calculation[160], the provision does require the disclosure of "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority."[161]

7.87. In determining what constitutes "essential facts", we bear in mind that the second sentence of Article 6.9, which states that the disclosure of essential facts "should take place in sufficient time for the parties to defend their interests", provides context for interpreting the scope of the obligation in the first sentence.[162] As the Appellate Body explained in its decision in *China – GOES*, "essential facts":

> refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.[163]

7.88. Thus we agree with the panel in *EC – Salmon (Norway)* that disclosures of "essential facts" made pursuant to Article 6.9 of the Anti-Dumping Agreement must:

> provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the

[155] Norway's third-party submission, para. 14 (citing Panel Report, *EC Salmon (Norway)*, para. 7.807).
[156] Norway's third-party submission, para. 15.
[157] Norway's third-party submission, para. 16.
[158] Saudi Arabia's third-party response to Panel question No. 2.
[159] Panel Report, *China – GOES*, para. 7.652 (citing Panel Report, *Mexico – Olive Oil*, para. 7.110).
[160] Panel Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148; *EC – Salmon (Norway)*, para. 7.796.
[161] Panel Report, *EC – Salmon (Norway)*, paras. 7.796 and 7.805.
[162] Panel Report, *China – X-Ray Equipment,* para. 7.400.
[163] Appellate Body Report, *China – GOES*, para. 240.

> investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[164]

7.89. What constitutes "essential facts" must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine.[165] In the context of the determination of whether dumping exists, the magnitude of such dumping, and thus whether to apply definitive measures, the elements an authority is required to examine are those set forth in Article 2 of the Anti-Dumping Agreement, including, depending upon the authority's findings, the determination of normal value and export price under Article 2.1, constructed normal value under Article 2.2, constructed export price under Article 2.3, and the fair comparison between normal value and export price under Article 2.4.

7.90. We note China's argument that too broad an interpretation of the obligation to disclose the essential facts would seemingly require the disclosure of every detail the investigating authority considered. However, too restrictive an interpretation of what constitutes "essential facts" can, conversely, hinder the ability of interested parties to defend their interests. We agree that Article 6.9 does not require the disclosure of all facts, nor does it require the disclosure of reasoning.[166] However, in our view, "essential facts" are not simply the disclosure that a determination has been made, but rather the data that are the basis of the determination. Therefore, a declaration of the weighted-average dumping margin for a particular model will not suffice as a disclosure of essential facts under Article 6.9 without being accompanied by the data relied upon to reach that conclusion.[167]

7.91. Bearing in mind the requirements of Article 2, we find that in the context of the determination of dumping, the essential facts which must be disclosed include the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data.[168] Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made[169], would also have to be disclosed.[170] In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used[171], but also the formula being applied to compare them. What formula was applied is an essential element of a comparison of normal value to export price and is just as fundamental to an

---

[164] Panel Report, *EC – Salmon (Norway),* para. 7.805.

[165] Appellate Body Report, *China – GOES*, para. 241.

[166] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148.

[167] Appellate Body Report, *China – GOES*, para. 249 (citing Panel Report, *China – GOES,* para. 7.573, concluding that in order to allow the respondents to defend their interests, a summary of the "essential facts" supporting the finding of a "low price strategy" was required, rather than merely stating the conclusion that such a strategy existed).

[168] Panel Report, *China – X-Ray Equipment*, para. 7.417.

[169] I.e. whether it was transaction-to-transaction, weighted-average to weighted-average, or weighted-average to transaction (see Article 2.4.2).

[170] See e.g. Appellate Body Report, *China – GOES,* para. 247. In this case the Appellate Body found that the panel correctly concluded that the essential facts that MOFCOM should have disclosed with respect to the "low price" of imports "include the price comparisons between subject imports and the like domestic products" including the average unit values used for determining the prices. We are of the view that the same logic that applies to price comparisons to determine the impact of subject imports on the domestic industry as part of the inquiry as to whether injury exists also applies to the price comparisons between normal value and export price to determine whether dumping exists. As the panels in *Mexico – Olive Oil* and *China – GOES* noted, the essential facts underlying these determinations (injury and dumping) form the basis of the decision to apply definitive measures and must be disclosed.

[171] This identification could take the form of a spreadsheet or list containing the sales data or a narrative description that would enable the exporter to understand precisely which sales were used.

understanding of the establishment of the margin of dumping as the data reflecting the individual sales. The disclosure of the formulas applied is necessary to enable the respondent to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[172] Without these formulas, a respondent would have an insufficient understanding of what the authority has done with its information and how that information was being used to determine the dumping margin.[173]

7.92. The Panel is aware that the panel in *China – X-Ray Equipment*, when faced with a similar claim from the European Union, did not consider that the "actual mathematical determination" by which an investigating authority calculates a respondent's margin of dumping constitutes a "fact … under consideration", but rather that the mathematical determination is part of the "consideration" of those facts.[174] We note that in that case the European Union argued that the essential facts comprise the calculations as well as the data and adjustments underlying the calculations. To the extent that the panel in *China – X-Ray Equipment*'s reference to the "actual mathematical determination" was to the calculations themselves (including any files or spreadsheets created during the calculations), we agree that these are not "essential facts" that must be disclosed.[175] However, if the holding of the panel in *China – X-Ray Equipment* were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations, as explained above, we respectfully disagree.

7.93. In sum, with respect to a determination of the existence and margin of dumping, pursuant to Article 6.9, the investigating authority must disclose what data was used in: (i) the determination of normal value (including constructed normal value); (ii) the determination of export price; (iii) the sales that were used in the comparisons between normal value and export price; (iv) any adjustments for difference which affect price comparability; and (v) the formulas that were applied to the data.

7.2.3.6.2 Whether MOFCOM disclosed the "essential facts" to the respondents

7.94. With respect to the disclosures at issue in the anti-dumping investigation on broiler products, the Panel notes that MOFCOM provided a distinct disclosure document for each respondent for both the Preliminary and Final Anti-Dumping Determinations. The United States' arguments solely address the Disclosures for the Final Anti-Dumping Determination ("Final Anti-Dumping Disclosure"). Each Disclosure contains narrative descriptions of the methodological choices of the investigating authority as well as a table containing the weighted-average normal values, export prices, c.i.f. prices, model-specific "dumping margins" and the total weighted-average dumping margin for each company.

7.95. Article 6.9 does not prescribe a particular format for the disclosure of the essential facts under consideration. The standard by which to assess whether a disclosure satisfies the requirements of Article 6.9 is not whether it was provided in the respondent's preferred format, but whether it provided sufficient disclosure of the essential facts such that the respondent could defend its interests. In a situation, as the one here, where the essential facts the investigating authority is referring to are in the possession of the respondent in the form of their own questionnaire responses, a narrative description of what data was used from which sources cannot *ipso facto* be considered insufficient disclosure. The question for this Panel, therefore, is not the form of the disclosure, but whether the information in the three disclosure documents provided the

[172] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[173] China's second written submission, para. 32 ("the issue is whether the authority has provided enough information and explanation for the respondent to have understood was [*sic*] the authority had done with the respondents' information, and how that information was being used to determine the dumping margin").
[174] Panel Report, *China – X-Ray Equipment*, para. 7.420.
[175] We note that the disclosure of the computer programmes, spreadsheets, and actual calculations would undoubtedly be of value to interested parties and may be the most efficient way to disclose the essential facts, but other forms of disclosure could nevertheless be consistent with Article 6.9. For instance, if an investigating authority wishes to explain in a narrative fashion what formulas it applied to which data (by reference to the respondent's own questionnaire responses or data – such as by model number, sales ID number, or other identifying factor) and the final result of the calculation, this would suffice to fulfil the obligation in Article 6.9 so long as the respondent would be able to defend its interests based on the information disclosed.

necessary level of detail as to the data used in the calculations to satisfy the obligation in Article 6.9.

7.96. China provides to this Panel tables prepared for the purposes of this dispute which it argues demonstrate how the respondents could have deduced from the narrative statements in the disclosure documents what data MOFCOM used in the calculation and recreate the calculation themselves.[176] However, the information in the actual disclosure documents is not presented in this fashion and, as explained earlier, the Panel's determination must be based on the record developed by MOFCOM.[177]

7.2.3.6.2.1 Pilgrim's Pride

7.97. In the Final Anti-Dumping Disclosure to Pilgrim's Pride[178], MOFCOM explains that it has conducted a test to determine whether domestic sales were made in sufficient quantities and which models did not have a proportion of domestic sales quantity in excess of 5% of the quantity exported to China and would thus have their normal value constructed. MOFCOM then explains that to construct normal value it adopted the production cost plus reasonable expenses and profits of the products for which it decided to construct normal value. MOFCOM explains that for cost and expenses, it adopted the company's first supplemental response Form 6-3, Tab 3 and a 5% profit margin. MOFCOM then disclosed the resulting weighted average USD/tonne normal value.

7.98. In the Final Anti-Dumping Disclosure, MOFCOM states that it determined that there were partial formula setup mistakes in the spread-sheets submitted by the company and that MOFCOM took the initiative and adjusted the mistakes in the formula before performing the below-cost test. MOFCOM does not indicate precisely what the mistakes were or how they were fixed. Thus, MOFCOM does not divulge to Pilgrim's Pride what data was used to run the below-cost test and Pilgrim's Pride would have had no way to correct any perceived errors of MOFCOM's.

7.99. Furthermore, with respect to sales made below cost, MOFCOM indicates that for certain models such sales exceeded 20% of the domestic sales quantity and that the below-cost sales would be excluded. However, MOFCOM does not indicate which sales are being excluded from the calculation of normal value. Therefore, while Pilgrim's Pride knew that some of its sales of certain models had been excluded, it could not determine from the disclosure the universe of sales that were used to calculate normal value. For certain models MOFCOM indicates that it is excluding all sales. This is sufficient disclosure of the universe of sales used for the normal value for those models. However, without the formula for how MOFCOM performed the below cost test, Pilgrim's Pride would be unable to determine whether MOFCOM had correctly conducted the test. Furthermore, it is undisputed that MOFCOM also did not disclose the formulas used to calculate normal value, export price, the "dumping margins" for each model, or the final total weighted-average dumping margin.[179]

7.100. The sales under consideration and the normal value of those sales used to calculate aggregate normal value are essential facts under consideration which form the basis for the determination to apply definitive measures. Without the information as to what sales prices were being used to calculate normal value, Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests. Likewise, without the formulas used to calculate normal value, export price, and the weighted-average dumping margins Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations. Therefore, the Panel finds that MOFCOM did not disclose all of the essential facts underlying the determination

[176] Tyson Dumping Calculation Table, Exhibit CHN-4; Keystone Dumping Calculation Table, Exhibit CHN-5; and Pilgrim's Pride Dumping Calculation Table, Exhibit CHN-6. China explains that what MOFCOM used as the basis of the starting price and each adjustment for calculating normal value, export price, and constructed export price as disclosed to each of the respondents is listed in the second column of each table, along with a reference to the document containing such disclosure provided to each respondent. The source document for the actual information is listed in the third column. According to MOFCOM, based on the explanations in the first two columns, each respondent could go to the source information and reconstruct the exact calculation performed by MOFCOM to determine the margin if it so desired. (China's first written submission, para. 34).

[177] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188; see also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada),* para. 157.

[178] Final Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-13.

[179] Final Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-13.

that dumping exists, to Pilgrim's Pride and thus acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

7.2.3.6.2.2 Tyson

7.101. With respect to normal value, the Final Anti-Dumping Disclosure to Tyson contains a narrative description of what MOFCOM did.[180] MOFCOM indicates that it used domestic sales for those models whose domestic sales quantity exceeds 5%, but does not provide the actual normal value assigned to each individual sale, only an average normal value per model in a summary table at the end of the document. Because it was this weighted average normal value that was compared to the export price to determine whether there was dumping, it would be crucial for a respondent to know how this weighted average was arrived at. Without knowing the normal values for the individual sales, Tyson would be unable to determine whether MOFCOM's calculation of the average normal value for that model was correct.

7.102. With respect to the sales where MOFCOM determined that the domestic sales quantity was below 5%, the Final Anti-Dumping Disclosure to Tyson does specify the models and that constructed normal value will be based on the weighted average production cost plus a reasonable amount for expenses and 5% for profit margin. MOFCOM does disclose the per unit USD/pound production cost, and that this was taken from Tyson's Second Supplemental Questionnaire Response. The Disclosure also refers to MOFCOM making adjustments to certain expenses based on documents gained during verification. Although the Disclosure refers to the particular document the information was derived from, it does not say what the adjustments were or to which sales MOFCOM applied the adjustments. MOFCOM then refers to certain models for which more than 20% of the sales were below cost and indicates that it is excluding those lower-than-cost sales from normal value. However, MOFCOM does not identify how many or which sales failed the below-cost test. This would make it impossible for Tyson to know the universe of sales being used to determine normal value. We do note that for one model, MOFCOM indicates that it is excluding all sales. In this particular instance the disclosure on this item provides sufficient information.

7.103. With respect to export price, the Final Anti-Dumping Disclosure to Tyson indicates that MOFCOM will accept the company's data and calculate export price based on the data submitted after verification. The same is true with respect to adjustments, particularly for normal value. However, as noted above, Tyson could not know the universe of sales being used to calculate normal value and thus it could not completely understand the specific adjustment applied even though MOFCOM affirmed it was using the data Tyson submitted. Furthermore, it is undisputed that MOFCOM did not disclose the formulas used to calculate normal value, export price, the dumping margins for each model, or the final total weighted-average dumping margin.[181]

7.104. The sales under consideration and the normal value of those sales used to calculate aggregate normal value are essential facts under consideration which form the basis for the determination to apply definitive measures. Without the information as to what sales prices were being used to calculate normal value, Tyson would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests. Likewise, without the formulas used to calculate normal value, export price, and the weighted-average dumping margins, Tyson would not be able to ascertain the accuracy of MOFCOM's calculations. Therefore, the Panel finds that MOFCOM did not disclose all of the essential facts underlying the determination that dumping exists, to Tyson and thus acted inconsistently with Article 6.9 of the Anti-dumping Agreement.

7.2.3.6.2.3 Keystone

7.105. MOFCOM's Final Anti-Dumping Disclosure to Keystone explains that MOFCOM found that for all of Keystone's models, domestic sales quantities were less than 5% of the quantities of sales to China and that it would therefore apply constructed normal value to all sales.[182] MOFCOM explains that it used production costs plus reasonable expenses and 5% profit. MOFCOM does not indicate what data was used to determine the production cost nor what data was used for the reasonable expenses. In that regard, we note that Keystone submitted one set of cost data

[180] Final Anti-Dumping Disclosure to Tyson, Exhibit USA-12.
[181] Final Anti-Dumping Disclosure to Tyson, Exhibit USA-12.
[182] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14.

according to its normal books and records (i.e., using value-based allocations) and two alternative versions of costs with different weight-based methodologies after the Preliminary Determination. Without the knowledge of how the elements of the cost of production were derived, Keystone would be unable to correct any perceived errors in MOFCOM's calculation of normal value and thus would be unable to defend its interests.[183] Although MOFCOM indicated there were no factual changes between the Preliminary and Final Determinations, Keystone's dumping margin changed from 44% in the Preliminary Determination to 50.36% in the Final Determination. In the Final Anti-Dumping Disclosure to Keystone, MOFCOM indicates that it is making an adjustment to raw material prices and using an unaffiliated raw material purchase price rather than the one reported in its calculation of the cost of production. MOFCOM also explains that it is making adjustments to export price with respect to alleged errors in the reporting of freezer expenses.[184]

7.106. The sales under consideration and the normal value of those sales used to calculate aggregate normal value are essential facts under consideration which form the basis for the determination to apply definitive measures. Without the information as to what sales prices were being used to calculate normal value, Keystone would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests. Furthermore, it is undisputed that MOFCOM did not disclose the formulas used to calculate normal value, export price, the dumping margins for each model, or the final total weighted-average dumping margin.[185] Without these formulas, Keystone would not be able to ascertain the accuracy of MOFCOM's calculations. Therefore, the Panel finds that MOFCOM did not disclose all of the essential facts underlying the determination that dumping exists, to Keystone and thus acted inconsistently with Article 6.9 of the Anti-dumping Agreement.

7.2.3.6.3 Conclusion

7.107. For the reasons set forth above, the Panel finds that China acted inconsistently with Article 6.9 of the Anti-dumping Agreement as MOFCOM did not disclose all of the essential facts, in particular those pertaining to its determination of the existence and margins of dumping to the three relevant interested parties: Pilgrim's Pride, Tyson, and Keystone.

7.3 Substantive issues with respect to the determination of the anti-dumping and countervailing duties

7.3.1 Whether MOFCOM complied with Article 2.2.1.1 of the Anti-Dumping Agreement when it calculated the respondents' costs of production

7.108. The United States claims that China acted inconsistently with Article 2.2.1.1 because MOFCOM declined to use the respondents' normal books and records, most importantly their cost allocations, in constructing normal value.[186] The United States contends that the methodology for determining the cost of production for the purpose of constructing normal value that MOFCOM eventually used was itself inconsistent with Article 2.2.1.1. Furthermore, the United States claims that for one respondent, Tyson, MOFCOM included in its allocation methodology costs for products not subject to the investigation and that this represents an additional basis for finding that China acted inconsistently with Article 2.2.1.1.

7.109. China maintains that the respondents' normal books and records did not reasonably reflect the costs associated with the production and sale of the product under consideration and thus it was perfectly proper for MOFCOM to decline to utilize them in constructing normal value. China argues that MOFCOM's methodology complied with Article 2.2.1.1 and that MOFCOM did not allocate any costs for non-subject products to subject ones when constructing Tyson's cost of production.

[183] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14.
[184] We note that it is this adjustment that is the subject of the United States' claim under Article 2.4.
[185] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14.
[186] In its panel request, the United States referred to both Articles 2.2 and 2.2.1.1 with respect to this claim. However, in its written and oral submissions before the Panel, the United States did not seek a finding of inconsistency with respect to Article 2.2.

7.3.1.1 Relevant provisions

7.110. Article 2.1 states, in pertinent part, that a product is considered "dumped" "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

7.111. Article 2.2 provides that when there are no sales of the like product in the ordinary course of trade the margin of dumping shall be determined either "by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or *with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*." (emphasis added)

7.112. Article 2.2.1.1 explains that for purposes of Article 2.2:

> costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]
>
> > (*footnote original*) [6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

7.113. The Panel will first address the parties' arguments with respect to the scope and nature of the obligation in the first sentence of Article 2.2.1.1 and whether the United States has demonstrated that China acted inconsistently with that obligation. Subsequently, the Panel will address the parties' arguments with respect to the scope and nature of the obligation in the second sentence of Article 2.2.1.1 and whether the United States has demonstrated that China acted inconsistently with that obligation.

7.3.1.2 Factual background

7.3.1.2.1 The respondents' books and records

7.114. In the course of the investigation, MOFCOM issued anti-dumping questionnaires and supplemental questionnaires to all three respondents.[187] Each respondent reported that, given the nature of the production of chicken products – which all have common costs up to the point of the split-off of the various parts from the whole chicken – it had used a "relative sales value" allocation methodology – whereby pre-split-off cost of production were allocated to the various joint products according to the proportion of revenue generated by the sale of those products.[188]

7.115. Tyson explained that it allocated meat costs under its fully absorbed cost system as follows. Meat costs are allocated based on a value-based cost allocation. For wing tips, paws, and gizzards, the meat cost is assigned based on the offal market price. The offal market price is then

[187] See Final Anti-Dumping Duty Determination, Exhibit USA-4, pp. 3-4.
[188] Tyson Anti-Dumping Questionnaire Response, Exhibit USA-36, section VI; Keystone Anti-Dumping Questionnaire Response, Exhibit USA-34, pp. 85-97.

adjusted using a formula to account for freight and processing costs to arrive at a meat value for these products. This is called the "offal credit." For leg quarters, the meat cost is determined based on the market price for leg quarters. This is called the "dark meat credit." The remaining meat costs (total meat cost minus the offal credit and the dark meat credit) are assigned to the front half of the bird, i.e., the white/breast meat.[189]

7.116. Keystone explained that under its normal accounting systems, it assigns production costs [***].[190]

7.117. Pilgrim's Pride noted that:

> …the meat costs of the chicken are assigned to the prime value product, chicken breasts, with other pieces of the chicken receiving costs based upon their relative values in the marketplace. These by-products are assigned a meat value plus processing cost equal to the estimated future market value at the time of standard cost updates performed each quarter. The processing cost by meat type is determined by cost centres assigned by processing type to produce finished product. The cost centres are assigned actual (directly related) and allocated costs, such as utilities.[191]

7.118. MOFCOM asked Pilgrim's Pride to re-submit its cost allocation data in the second supplemental questionnaire, because the information submitted in response to the original Questionnaire and in response to the First Supplemental Questionnaire contained information that MOFCOM could not understand. In response, Pilgrim's Pride emphasized that it had provided all the information in response to the two earlier questionnaires.[192]

7.119. In the Preliminary Anti-Dumping Determination, MOFCOM determined that it would not use all three respondents' cost allocation methodologies as reflected in their books and records and would instead apply its own methodology which allocated the pre-split-off costs based on the weight of the various chicken products. With respect to Tyson and Keystone, MOFCOM concluded that the costs claimed did not reasonably reflect the production cost related to the subject products.[193] The Preliminary Anti-Dumping Disclosures to both Tyson and Keystone contained similar language to that in the Preliminary Anti-Dumping Determination.[194] With respect to

---

[189] Tyson Anti-Dumping Questionnaire Response, Exhibit USA-36, Section VI. Tyson also explained that during the POI it transitioned between a fully absorbed cost system and a standard cost. Under the standard cost system, the meat cost for paws, wing tips, and gizzards is also based on an offal credit. The offal credit is updated weekly. The meat costs for other products are based on market prices. Tyson uses weekly market price data collected by the Urner Barry commodities pricing service to determine the market value for the front half of the chicken (i.e., the breast meat). Tyson collects monthly market prices for the back half of the chicken (i.e., leg quarters). Tyson allocates the meat cost between the front half and back half based on their relative values.

[190] Keystone Anti-Dumping Questionnaire Response, Exhibit USA-34, pp. 85-97; see also Keystone Supplemental Anti-Dumping Questionnaire Response, Exhibit USA-35, pp. 20-21:

> [T]he company [***] Thus, [***].

[191] Pilgrim's Pride Anti-Dumping Questionnaire Response, Exhibit USA-32, p. 55; see also Pilgrim's Pride Response to the First Supplemental Anti-Dumping Questionnaire, Exhibit USA-28. Pilgrim's Pride included the actual data on costs and expenses related to the production and sale of the products under consideration in Pilgrim's Pride's Table 6-3, which was not provided to the Panel. The United States provides a summary of the total cost of production Pilgrim's Pride calculated for breasts, wing tips, leg quarters, and paws in Exhibit USA-62.

[192] Pilgrim's Pride Response to the Second Supplemental Anti-Dumping Questionnaire, Exhibit USA-74, pp. 5 and 7.

[193] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 17-18 (Tyson), and pp. 19-20 (Keystone).

[194] Preliminary Anti-Dumping Disclosure to Tyson, Exhibit USA-8, where MOFCOM informed Tyson that it had examined the production cost data submitted in the second supplemental questionnaire and that "the specification cost alleged by the company does not reasonably reflect the production cost related to subject merchandise." MOFCOM stated that it was using the data from the supplemental questionnaire response and taking the weighted average production cost of every "specification product" as the cost of production of subject merchandise and the like products. See also Preliminary Anti-Dumping Disclosure to Keystone, Exhibit USA-10, p. 2, where MOFCOM states:

> After the preliminary investigation, the authorities believe that the model basis costs as you claimed do not reasonably reflect the production costs related to the subject products and decide to temporarily use the weighted average of production costs for these models as the production costs for the subject products and like products in the preliminary determination…

Pilgrim's Pride, MOFCOM concluded that there were unexplained great differences in production volume of the subject and like products in Pilgrim's Pride questionnaire responses. MOFCOM explained that because it could not obtain production cost data for the different types of subject products, it was using a different cost allocation methodology than in Pilgrim's Pride's books and records.[195] In the Preliminary Anti-Dumping Disclosure to Pilgrim's Pride MOFCOM stated that it had found large discrepancies in the total production quantity of all types of subject merchandise reported and that Pilgrim's Pride had not provided a reasonable explanation for this discrepancy. Furthermore, MOFCOM stated that none of Pilgrim's Pride's questionnaire responses provided, based on the types it claimed, definite annual production costs and the expenses to be allocated concerning sales, general and administrative expenses, and overhead.[196]

7.120. All three respondents, in their Comments on the Preliminary Anti-Dumping Determination and Disclosure, argued that MOFCOM's determination not to accept their reported costs was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. In particular, the respondents noted that relative sales value-based allocations were standard accounting practice in industries that produce joint products.[197] Tyson also noted that the product-specific processing costs are not allocated as they are the actual costs incurred in the production of those specific products.[198] In its Comments, Pilgrim's Pride specifically addressed the discrepancies MOFCOM had identified and argued that they could be accounted for by changes in the unit of measure in their books and records (pounds) to the unit of measure MOFCOM required (metric tonnes) of some of the data while other data was not converted. Pilgrim's Pride also erroneously included intra-company transfers to an affiliate in sales data, and included some production data of a subsidiary purchased during the POI while excluding other data from the same company. Pilgrim's Pride provided revised tables in both tonnes and pounds. Pilgrim's Pride also noted that the number MOFCOM used for total annual cost was mistakenly derived because of the problem with the pounds to tonnes conversion.[199] Pilgrim's Pride asked MOFCOM to verify and accept the revised numbers.

7.121. MOFCOM verified all three respondents' responses after the Preliminary Determination. However, neither the United States nor China has provided the Panel with documentation of the substance of what occurred during the anti-dumping verifications.[200]

7.122. In the Final Anti-Dumping Disclosures, MOFCOM maintained its conclusions from the Preliminary Anti-Dumping Determination with respect to all three respondents and continued to use its own weight-based allocation methodology rather than the cost allocations that were kept in the respondents' normal books and records.[201] In particular, MOFCOM noted that neither Tyson nor Keystone had provided sufficient reasons to justify the reasonableness of their costs.[202] With

[195] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 15-16.

[196] Preliminary Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-9, Annex.

[197] Tyson's Comments on the Preliminary Anti-Dumping Disclosure, Exhibit USA-25 for example, noted that value-based cost allocations are used in numerous industries, including: poultry, beef, ham, citrus fruits (oranges and lemons), and petrochemicals. In support of its argument, Tyson provided a letter from its accountant, which explained that value-based cost allocations are a well-established approach to costs incurred in the production of joint products and referenced various accounting texts. (Tyson Accountant Letter, Exhibit USA-76). See also Keystone's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-30, pp. 1-7 (in particular, Keystone argues that: (i) it reported its costs on the same basis that it keeps its books and records in the normal course of business; (ii) its accounting and reporting methodologies tie to its audited financials which are in accordance with the GAAP in the United States; (iii) its cost of production methodology is a well-established and widely-recognized cost accounting practice, which is recognized as such in the United States and China; and (iv) its cost of production methodology accurately and reasonably captured its actual product-specific costs for the poultry products at issue.

[198] Tyson's Comments on the Preliminary Anti-Dumping Disclosure, Exhibit USA-25.

[199] In particular, Pilgrim's Pride noted that MOFCOM calculated total annual cost by [***].

[200] The United States did provide the Panel with the Verification Report for Keystone, Exhibit USA-58, and China provided the Verification Disclosures for Tyson and Pilgrim's Pride, Exhibits CHN-70 and 71. However, these documents simply provide a basic summary of the main topics covered and of who was present, without any evaluation of the documents examined at verification or the responses of the company officials to MOFCOM's questions.

[201] Final Anti-Dumping Disclosure to Tyson, Exhibit USA-12; Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 3; Final Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-13, pp. 7-8.

[202] Final Anti-Dumping Disclosure to Tyson, Exhibit USA-12; Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 3. Similar sentiments were expressed in the disclosure document provided to the US Government:

> The Authority examined the production cost and expenses of the company [Keystone]. In the Preliminary Determination, the Authority thinks the model-specific cost claimed by the company

respect to Pilgrim's Pride, MOFCOM noted that Pilgrim's Pride had provided corrected information to the discrepancies, but that the information was untimely and would not be utilized.[203]

7.123. All three respondents also provided comments on the Final Anti-Dumping Disclosure. Tyson responded to this disclosure and disputed MOFCOM's claim that it had not provided sufficient justification for the reasonableness of its allocations. Tyson noted that MOFCOM had not provided any logical explanation for its conclusion that value-based allocations are not reasonable.[204] Keystone disagreed with MOFCOM's characterisation that the submitted costs were unreasonable, because its costs were in accordance with books and records kept in the normal course of business, and consistent with US GAAP and International Accounting Standards. Keystone also noted that its officials explained at great length to the verifiers the company's operation strategy [***] which underpins its cost allocation system.[205] Pilgrim's Pride argued that because the revised tables submitted with its Comments on the Preliminary Disclosure were modified and supplemented rather than completely new and were true, accurate, and complete, MOFCOM should adopt them instead of "continuously using the wrong cost data as the basis for dumping margin calculation, which had made the dumping margin of the Company distorted completely."[206]

7.124. The United States Government also commented on the Final Anti-Dumping Disclosures, objecting to MOFCOM's lack of support for its determination that the reported costs did not reasonably reflect the actual costs of production.[207] MOFCOM did not address the arguments the respondents raised in their comments but did acknowledge that according to the respondents, the basis of distinguishing different broiler products is the physical cutting of the product. MOFCOM then concluded that "the investigating authority does not think the method accurately reflects difference of cost of the subject merchandise."[208]

7.125. The Final Anti-Dumping Determination contains nearly identical language to that in the Final Anti-Dumping Disclosures.[209]

7.3.1.2.2 MOFCOM's allocation methodology

7.126. MOFCOM applied the same cost allocation methodology to the data of all three respondents. MOFCOM explained in the Preliminary Determination that it would "take the weighted average production cost of various types as the production cost of the Subject Products and the like products."[210] In the Preliminary Disclosures, MOFCOM provided similar information. To Tyson, MOFCOM stated that it preliminarily determined to use the production cost plus reasonable expenses and profit to construct the normal value.[211] To Pilgrim's Pride, MOFCOM stated that it "decided to temporarily use the production costs plus reasonable expenses and profit (costs and expenses are determined based on the weighted average data contained in Tab 3 of Table 6-3 of

---

can't reasonably reflect the production cost relating to the Subject Goods, and determines the production cost of each model based on the average production cost reported by the company. After the Preliminary Determination, the company gave comment on the method adopted by the Authority, but it didn't give sufficient reason to justify the Subject Goods in different positions have different cost. After examination and on-the-spot verification, the Authority discovers there is no change to the facts found in the Preliminary Determination, and decides to maintain the decision made in the Preliminary Determination. (Anti-Dumping Disclosure to the US Government, Exhibit USA-11, p 10).

[203] Final Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-13, pp. 7-8. MOFCOM reiterated its position in the Final Anti-Dumping Disclosure to the US Government. (Anti-Dumping Disclosure to the US Government, Exhibit USA-11, p. 7).

[204] Tyson's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-40.

[205] Keystone's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-29. We note that the only document either party provided with respect to Keystone's verification is a brief disclosure letter related to the verification, which simply states "(1) Keystone has explained the calculation samples of cost of the subject product and it's like product. (2). Keystone has submitted manufacturing costs details of the subject product and it's like product" without any discussion of how MOFCOM evaluated the information it was provided at verification. (Verification Report for Keystone, Exhibit USA-58).

[206] Pilgrim's Pride Comments on the Final Anti-Dumping Disclosure, Exhibit USA-75, p. 9.

[207] US Government's Comments on the Final Disclosure, Exhibit USA-41.

[208] Response to the US Government Comments on the Final Anti-Dumping Disclosure, Exhibit USA-37.

[209] Final Anti-Dumping Determination, Exhibit USA-4.

[210] Preliminary Anti-Dumping Determination, Exhibit USA-2.

[211] Preliminary Anti-Dumping Disclosure to Tyson, Exhibit USA-8, p. 1.

its first supplemental questionnaire response)".[212] To Keystone, MOFCOM stated that it decided to "temporarily use the weighted average of production costs for these models as the production costs for the subject products and like products in the preliminary determination".[213]

7.127. China provides some additional detail in response to the Panel's questions about precisely how MOFCOM calculated the costs. China reports that for Tyson and Keystone, the constructed normal value consisted of weight-based production costs (total meat and processing) + reported model-specific SG&A + uniform reasonable profit of 5% determined by MOFCOM.[214] Looking specifically at Form 6-3, MOFCOM re-allocated those costs reported in "Total Production Costs" on a weight basis, and accepted "Total Relevant Expenses" on a model-specific basis as reported by the respondents.[215] For Pilgrim's Pride, China indicates that because the company did not provide SG&A in the format repeatedly requested by MOFCOM[216], all costs were weight-averaged.[217]

7.128. After MOFCOM used this methodology in the Preliminary Determination, the respondents provided comments on the methodology. For instance, Keystone argued that MOFCOM's methodology: (i) is contrary to how Keystone calculates its production cost in the normal course of business; (ii) is illogical and inconsistent with Article 2.1 of the Anti-dumping Agreement, since it attributes a single cost to products that have different values; and, importantly, (iii) disregards the fact that costs other than meat cost (i.e. cost incurred after the split-off point) are model-specific and cannot be allocated across board to all products.[218] Keystone expressed the view that MOFCOM's own method of cost allocation was unreasonable, illogical and contradicted WTO law. In this respect, it added to its Comments on the Preliminary Anti-Dumping Disclosure that MOFCOM's method unavoidably results in a consistent finding that a significant portion of the value of the chicken is sold outside of the ordinary course of trade due to prices far below the (average) cost of production, while the primary products are sold at a falsely astronomic profit. Furthermore, Keystone stated that MOFCOM's single cost method has the effect of attributing costs to almost entirely bone-in products sold to China which absolutely are not applicable to the production and sale of those products (e.g. the cost of de-boning to create a boneless product).[219]

7.129. In case MOFCOM decided to maintain its decision to reject Keystone's costs, Keystone offered two alternatives for calculating a more reasonable anti-dumping margin on the basis of the data available on the record. These alternatives suggested that MOFCOM: (i) allocate pre-split-off costs to all products on the basis of relative value[220]; or (ii) allocate pre-split-off costs to all products on the basis of total output.[221]

7.130. Tyson also argued against a weight-based methodology, but proposed a manner in which its data might be adjusted so that a weight-based approach would be more accurate.[222] Tyson also contended that it was inappropriate to average product-specific costs across all products. In particular, Tyson argued that MOFCOM's weight-based approach allocated total production costs incorrectly to the subject merchandise while allocating no costs to other products that result from the live chicken. Tyson argued that if MOFCOM insisted on maintaining a weight-based cost, it would be more accurate to divide the total cost incurred to raise live birds by the total weight of the live birds to obtain a cost per pound for the raw material. Tyson argued that the resulting

[212] Preliminary Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-9.
[213] Preliminary Anti-Dumping Disclosure to Keystone, Exhibit USA-10, p. 2.
[214] Preliminary Anti-Dumping Disclosure to Keystone, Exhibit USA-10, p. 2.
[215] Keystone's Form 6-3, Exhibit USA-54.
[216] Preliminary Anti-Dumping Disclosure to Pilgrim's Pride, Exhibit USA-9, p. 4.
[217] China's response to Panel question No. 96.
[218] Keystone's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-30.
[219] Keystone's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-29.
[220] United States' response to Panel question No. 29. The United States indicates that Keystone used [***] Although it is not clear from the United States' response, as Keystone did not use relative sales values for paws in its normal books and records, it appears that the United States is referring to the values used for the first alternative allocation proposed by Keystone. See e.g. United States' first written submission, para.100 (citing Keystone's Comments on the Preliminary Determination, Exhibit USA-30). We note that the United States acknowledged that it received this information directly from the respondents in an effort to answer the Panel's question. The United States contends that the information was not on the record of the investigation, because China never asked. (See United States' response to Panel question No. 94(b)).
[221] Keystone's Comments on the Preliminary Determination, Exhibit USA-30, pp. 8-11.
[222] See Tyson's Further Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-26.

USD/pound unit cost should be used as [***] whereas processing costs should be applied to the specific part they relate to and not allocated across all products.[223]

7.131. Pilgrim's Pride focused most of its comments on explanations for the original inaccuracies or incompleteness of its responses. However, it also requested that MOFCOM adopt the product-by-product costs recorded, calculated and maintained in its records, because "this product-by-product costing method, compared with the single-product cost, follows US GAAP, and is more in conformity with the actual cost in the broiler sector."[224] Pilgrim's Pride also requested additional disclosure from MOFCOM on the margin calculation because it could not deduce precisely how MOFCOM had derived certain normal values. Nevertheless, Pilgrim's Pride highlighted what it believed were potential errors in MOFCOM's calculations. In particular, Pilgrim's Pride noted that the domestic selling prices for certain products were lower than the single average cost of production MOFCOM determined and also argued that the normal value of other products was too high. Pilgrim's Pride argued that if MOFCOM were to make the corrections to the calculations of certain normal values without changing any other data, its margin would drop significantly; if MOFCOM were to confirm all of Pilgrim's Pride's revised tables and still use a single average cost method, the margin would be even lower; and if MOFCOM were to use Pilgrim's Pride's reported costs, the margin would be negative.[225]

7.132. MOFCOM continued to apply the same methodology for determining the cost of production and constructing the normal value in the Final Anti-Dumping Determination. MOFCOM noted that the parties had provided comments on the cost allocation issue, but that they did not provide sufficient reasons to prove the reasonableness of their own preferred cost allocation methodologies.[226]

7.3.1.3 Whether MOFCOM complied with the obligation in the first sentence of Article 2.2.1.1 to normally calculate costs on the basis of the producers' books and records

7.3.1.3.1 Main arguments of the parties

7.3.1.3.1.1 United States

Whether there is an obligation for an investigating authority to explain its decision to decline to use a respondent's books and records

7.133. The United States argues that the first sentence of Article 2.2.1.1 establishes the obligation of the investigating authority to "normally" calculate costs on the basis of records kept by the exporter or producer so long as certain conditions – conditions plainly met in this case – are present. The use of the term "shall" in the sentence signifies a sense of legal duty and the definitions for the term "normally" include "in the usual way" or "as a rule." Accordingly, the investigating authority must calculate costs on the basis of records kept by the exporter or producer *as a rule* whenever (i) the records are consistent with GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the subject merchandise.[227]

7.134. The United States contends that the second part of the first sentence contains an exception to how costs should "normally" be calculated and that in considering this exception, it is important to consider its relationship to the overall rule. Specifically, according to the United States it is the investigating authority that must comply with the rule of "normally" using a producer's costs.[228] The United States argues that Article 2.2.1.1 imposes a positive obligation[229]

[223] Tyson's Further Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-26.
[224] Pilgrim's Pride Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-27.
[225] Pilgrim's Pride Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-27, pp. 2-7 and 10-15.
[226] Final Anti-Dumping Determination, Exhibit USA-4, pp 29-30 (Tyson) and p. 32 (Keystone).
[227] United States' first written submission, paras. 91-92 (citing *Concise Oxford Dictionary*, (2009) p. 975; Appellate Body Report, *US – Clove Cigarettes*, para. 273 ("We observe that the ordinary meaning of the term 'normally' is defined as 'under normal or ordinary conditions; as a rule'"); and Panel Report, *Egypt – Steel Rebar*, para. 7.393).
[228] United States' first written submission, para. 94.

and that when an investigating authority seeks to establish that it met the requirements for derogation from a positive obligation, it must set forth its explanation in the investigation as to why derogation was appropriate.[230]

7.135. The United States finds further support for its contention that Article 2.2.1.1 contains an obligation for the investigating authority to explain its decision to reject the cost allocations of a respondent in the standard of review which focuses not on whether an investigating authority did the correct thing in the panel's view, but whether it has presented a reasoned and adequate explanation based on the facts on the record.[231] Furthermore, the United States argues that Article 2.2.1.1 must be read as a whole and that the sentences do not contain isolated separate obligations. Therefore, according to the United States, the obligation to "consider all available evidence on the proper allocation of costs" in the second sentence of Article 2.2.1.1 is relevant to making a finding under the prior sentence. As the investigating authority must *consider all available evidence* on the proper allocation, it must of course consider whether the producers' books and records are proper or not, e.g. not in accordance with GAAP or reasonably associated with the production and sale of the product under consideration.[232]

7.136. Additionally, the United States contends that MOFCOM improperly put the burden on the respondents to demonstrate that their historically-used and GAAP-consistent allocations were reasonable such that MOFCOM would use them. The United States argues that an interpretation that allows an investigating authority to choose without explanation to rely on costs other than those calculated on the basis of the producer or exporter's records would both be inconsistent with the text of the Agreement – which provides that reported costs shall normally be used – and would eviscerate the protections of the provision.[233]

7.137. With respect to the application of Article 2.2.1.1 in the broiler products investigation, the United States emphasizes that MOFCOM did not make a single finding in the investigation regarding why it rejected the US respondents costing systems. In particular, the United States contends that China has not provided any evidence that MOFCOM engaged in any consideration regarding the values utilized by respondents. The United States notes that China cannot produce a single sentence by MOFCOM suggesting it was actually interested in the issues it now claims to be so critical.[234] The United States hypothesizes that if MOFCOM was concerned, for example, that the values should have reflected global prices, it could have inquired about the basis for respondents' values and whether it was possible to make such adjustments. The United States notes that for at least some products in this investigation, the benchmark relative sales value used in the respondents' cost allocations was in fact global prices.[235] Notably, MOFCOM never solicited or analysed any record evidence on that point.[236] Indeed, the United States argues that all of China's concerns about Keystone's costs are *post hoc* rationalizations and cannot be found anywhere in the record of the investigation or in the Determinations.[237]

Whether MOFCOM correctly determined that the respondents' books and records did not "reasonably reflect the costs associated with production and sale of the product under consideration"

7.138. With respect to how to determine whether a respondent's books and records reasonably reflect the costs associated with the production and sale of the product under consideration, the United States clarifies that it is not arguing that if books and records are GAAP-consistent, they are *ipso facto* reasonable, but rather that – given the purposes of GAAP – consistency with GAAP may

[229] United States' first written submission, para. 104 (citing Panel Report, *US – Softwood Lumber V,* para. 7.237).
[230] United States' response to Panel question No. 31 (the United States cites the Panel Report in *Egypt – Rebar*, concluding that a responding Member would have a difficult time rebutting a *prima facie* case that it did not conduct an "evaluation" pursuant to Article 3.4 if there is no written record of said evaluation).
[231] United States' response to Panel question No. 31 (citing Appellate Body Report, *US – Lamb*, paras. 106-107).
[232] United States' response to Panel question No. 31.
[233] United States' first written submission, para. 105.
[234] United States' response to Panel question No. 90.
[235] United States response to Panel question No. 29. As noted in footnote 220, the information provided by the United States in response to this question was not on the record of the investigation.
[236] United States' comments on China's response to Panel question No. 89(a).
[237] United States' comments on China's response to Panel question No. 94(a).

also often indicate that a respondent's books and records reasonably reflect the costs associated with the production and sale of the product under consideration[238], but is not determinative of the question. The United States posited that reasonableness and GAAP-consistency were like a Venn diagram of two significantly overlapping circles.[239]

7.139. The United States disagrees with China's implication that a measure of whether costs based on relative sales values reasonably reflect the costs associated with the production and sale of the product under consideration is whether they are not "fair," i.e., too low compared to what China's investigating authority feels appropriate for its own market.[240] According to the United States, China's concerns are inconsistent with the objective of calculating the cost of production in the country of origin.[241] In particular, the United States points to two elements in Article 2.2.1.1 that, in its view, demonstrate that the relevant market for purposes of normal value must be the domestic market in the exporting Member. First, the United States notes that the relevant GAAP under Article 2.2.1.1 is that of the *exporting* country, not the importing country. Second, the United States points to the requirement in the second sentence of Article 2.2.1.1 for an investigating authority to consider a producer's historically-used allocations. According to the United States, such allocations will not have been prepared in light of their reasonableness in the context of an anti-dumping proceeding and are never going to reflect conditions in the importing market.[242] Finally, the United States contends that China's position contradicts the express preferences of in Article 2.2 of the Anti-Dumping Agreement for use of sales in the exporting market if they are made in the ordinary course of trade.

7.140. The United States contends that the ultimate conclusion of China's logic would be that any exporting country with weak domestic demand for a product would be engaged in dumping if it exports the product to a country where the product is highly valued. That is fundamentally against the notion that trade will naturally arise where relative costs and values differ.[243] According to the United States, the Anti-Dumping Agreement accepts the situation where a product's price in the exporting country is subject to less demand and is thus lower than in the importing country.[244] The United States contends that China's position would vitiate the "reasonably associated" requirement by destroying any boundaries on the application of the condition, because an investigating authority would be free to reject a producer's costs whenever the investigating authority believes they are unfair from its perspective, i.e. not capable of sustaining a dumping margin.[245]

7.141. The United States argues that Tyson fully explained that the "relative sales value approach," is appropriate in the situation of joint products (which are produced simultaneously by raising a live bird), in accordance with US GAAP, US and Chinese accounting texts, and international accounting standards.[246]

7.142. The United States disputes China's contentions that Tyson used fictional values in its allocation methodology. Specifically, with respect to Tyson's use of the "offal price" to value paws and other products, the United States notes that Tyson explained that the "offal price" was based on sales in the United States. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price – and that Tyson in fact sells paws as offal.[247]

[238] United States' response to Panel question No. 25.
[239] United States' opening statement at the second meeting of the Panel, para. 31.
[240] United States' response to Panel question No. 25 (citing China's first written submission, paras. 79, 88, and 104).
[241] United States' response to Panel question No. 25.
[242] United States' opening statement at the first meeting of the Panel, para. 46.
[243] United States' opening statement at the first meeting of the Panel, para. 45.
[244] United States' opening statement at the first meeting, para. 46 (citing Appellate Body Report, *US – 1916 Act*, para. 107).
[245] United States' response to Panel question No. 25.
[246] United States' first written submission, para. 98 (citing Tyson's Comments on the Preliminary Anti-Dumping Disclosure, Exhibit USA-25, p. 4; Tyson's Further Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-26, pp. 6, notes 5 and 8, explaining that such a methodology is appropriate when products are "produced in groups" and citing to Exhibit 3, Joel G. Singer, *GAAP-Handbook of Policies and Procedures*, (Prentice Hall, 2010), at 3.31).
[247] United States' comments on China's response to Panel question No. 89(a).

7.143. The United States contends that Keystone's costs reflect its business model [***] and are GAAP-consistent and reasonable.[248] The United States disputes China's characterization of Keystone's allocations as applying [***] to paws. The United States argues that, consistent with common accounting practice for by-products, while Keystone did apply [***]; it did record any profits from the sale of paws (revenue minus post-split-off specific processing costs) as the value of paws.[249]

7.144. The United States argues that Pilgrim's Pride explained how its books and records captured costs of production for the various models according to their respective values and that this allocation methodology is consistent with US GAAP and described in standard, widely-referenced accounting textbooks.[250] With respect to China's argument that MOFCOM decided not to accept Pilgrim's Pride reported costs, because there were "huge differences among production quantities reported in different parts of the responses and no reasonable explanation" and that it rejected the corrected information as untimely, the United States points out the lack of an explanation as to why the data is irreconcilable – or any discussion of the efforts by MOFCOM to understand the data. Furthermore, the United States argues that China glides over the fact that MOFCOM accepted Pilgrim's Pride data, let Pilgrim file submissions addressing its data, and subjected that data to verification and only three months after it was initially submitted, decided to reject it as untimely.[251] Finally, the United States argues that it was only after being asked directly by the Panel that China asserted that MOFCOM's rejection of Pilgrim's Pride's data meant that it had applied facts available. Furthermore, the United States argues that MOFCOM did not follow the steps necessary to apply facts available pursuant to Article 6.8 of the Anti-Dumping Agreement.[252]

7.3.1.3.1.2 China

Whether there is an obligation for an investigating authority to explain its decision to decline to use a respondent's books and records

7.145. China argues that the first sentence of Article 2.2.1.1 contains two independent conditions (GAAP-consistency and that the records "reasonably reflect" the costs of production and sale). According to China, if either condition is not met, the investigating authority need not use the producer/exporter's recorded costs. China's view, which is also expressed in the Determinations, is that the burden lies on the respondent to demonstrate that these two conditions are met or, at the very least, that the authority does not bear any special burden to demonstrate that the records do not reasonably reflect costs.[253] China finds support for its view in the fact that Article 2.2.1.1 refers to the calculation of costs in the passive voice. According to China, this means that the provision does not indicate any particular responsibility on the part of the investigating authority with respect to the calculation of costs.[254]

Whether MOFCOM correctly determined that the respondents' books and records did not "reasonably reflect the costs associated with production and sale of the product under consideration"

7.146. China argues that in determining whether an exporter's books and records reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority must look to the particular purpose of the Anti-Dumping Agreement. China submits that the overarching purpose of the Anti-Dumping Agreement is about establishing a fair price or, more specifically, about measuring the degree of any unfairness in price based on

[248] United States' first written submission, para. 100 (citing Keystone's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-29, pp. 21-23).
[249] See e.g. United States' responses to Panel question Nos. 34 and 38; second written submission, paras. 62-64; comments on China's response to Panel question No. 94(a); Keystone's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-30; Keystone Anti-Dumping Questionnaire Response , Exhibit USA-34; Keystone Supplemental Anti-Dumping Questionnaire Response, Exhibit USA-35; and Keystone, Table 6-4, Exhibit USA-60.
[250] Pilgrim's Pride Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-27, pp. 6-8, 10 (citing to J. Siegel & J. Shim, *Barron's Accounting Handbook* (3rd ed. 2000), p. 103).
[251] United States' second written submission, paras. 24-25.
[252] United States' comments on China's response to Panel question No. 99.
[253] China's first written submission, paras. 103, 113; response to Panel question No. 26; second written submission, paras. 71-76.
[254] China's response to Panel question No. 26; second written submission, paras. 73-76.

differences between normal value and export price. Therefore, according to China, any cost allocations must generate costs of production that allow an authority to use the costs in ways that make sense given the purpose to which they are being used in an anti-dumping case, and that make sense given the specific circumstances of each case.[255]

7.147. China states that anti-dumping investigations are not unlike "rate regulation" proceedings in that both are designed to determine a "fair" price for sellers and buyers alike. According to China, in the context of the Anti-Dumping Agreement, and much like a rate regulation proceeding, there has to be some objective and uniform basis for determining what is a "normal value." An improper methodology may defeat the entire purpose of the proceeding. Accounting texts note, for example, the problems associated with circularity and the use of value-based allocation methodologies. The use of a low price that may be outside the bounds of what is "fair" or "normal" to set a "fair" price or "normal" value amounts to circular reasoning and frustrates the purpose of the exercise. Thus, the appropriateness of the value being used to allocate a cost that comprises part of normal value must always be considered.[256]

7.148. China notes that the margin of dumping is the price difference determined in accordance with the comparisons described under Article VI:1 of the GATT 1994. This overarching purpose helps inform the plain meaning of "cost of production." To China, the issue is not cost of production generally or conceptually within the confines of a GAAP-consistent methodology; the issue is cost of production of a specific product and the specific normal value to be derived from that cost.[257] For this reason, China submits that that GAAP-consistency cannot be a proxy for reasonableness.[258]

7.149. According to China, the focus should be on what the producer had to pay to be able to produce the items at issue, and not on the revenues the producer might be able to gain by selling what has been produced. This distinction can be critical depending on the circumstances of a particular case. A producer might have very similar costs to produce two different versions of a product, but might be able to sell one for a much higher price than the other. Because the cost of production under Article 2.2.1.1 is a proxy for fairness, China believes that it must be sufficiently independent of both export price and home market price and that using sales values to determine the cost of production would create a circular situation that defeats the purpose of the exercise of comparing normal value to export price.[259]

7.150. In addressing the relative sales-value based allocation methodologies at issue in the broiler products investigation, China argues that, given that the goal under Article 2.2.1.1 is to determine the cost of all production in the country of origin, if a firm is to use relative sales values it must use the values of all sales, including those to export markets.[260] In China's view, not using global prices to assign the relative sales values would be an indicia that the allocations in the exporter's books and records do not reasonably reflect the costs associated with production and sale of the product under consideration.

7.151. China argues that all three respondents' cost allocation methodologies treated paws improperly by assigning too little of the cost of production to them. China argues that the respondents only used US sales values, rather than global sales values, to determine the appropriate apportionment of pre-split-off costs.[261] China argues that this is what led to the alleged distortion in the allocations whereby certain parts, e.g. paws, which account for most of their exports to China, were allocated a very small portion or none of the total costs incurred to produce the bird as a whole.[262] Furthermore, China contends that these low domestic sales values

[255] China's first written submission, paras. 61-62.
[256] China's first written submission, para. 62; response to Panel question No. 92; see also China's opening statement at the second meeting of the Panel, para. 30.
[257] China's first written submission, para. 79.
[258] China's first written submission, para. 65-66 (citing Panel Report, *US – Softwood Lumber V*, para. 7.237).
[259] China's first written submission, paras. 73-76.
[260] China's second written submission, paras. 50, 62 and 64.
[261] We note that the United States provided information as to what markets the companies used for their allocations in response to Panel question No. 29. As noted in footnote 220, the information provided by the United States in response to this question was not on the record of the investigation.
[262] China's first written submission, paras. 86-90.

do not even accurately reflect the respondents' actual experience in the US market, where they do sell paws and receive prices in the United States that are comparable to those received in China.[263]

7.152. With respect to Tyson, China presents three particular concerns. First, that although Tyson's accounting system was value-based, it did not use an appropriate product-specific value for paws, but rather used a single generic market price for offal which China contends was tailored to specific preferences in the US market and did not represent a true cost of production of the product concerned.[264] Second, China argues that Tyson did not use actual joint-product accounting for paws, but rather, its allocation reflected a by-product approach.[265] In particular, China argues that Tyson valued products like paws for allocation purposes as waste. China argues that using these prices, rather than an actual realized value or price of paws is distortive.[266] Finally, China raises doubts as to the reliability of the data Tyson provided.[267]

7.153. China maintains that Tyson never addressed its actual recorded costs or explained, for example, why its actual recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products as sold in the Chinese market (or the US market for that matter). Rather, Tyson emphasized that its methodology was reasonable because it was GAAP-consistent, and then essentially assumed that GAAP-consistency automatically meant "reasonably reflects" the cost of production. With respect to the letter from Tyson's auditor, China notes that that auditor never addressed Tyson's specific methodology or its actual costs, either generally or in the context of the anti-dumping proceeding in which Tyson was involved.[268]

7.154. China's main point with respect to Keystone is that Keystone's costs were facially unreasonable as they applied [***] to paws which was contrary to the circumstances of that product in the market.[269]

7.155. With respect to Pilgrim's Pride, China argues that the United States misrepresents the reasons why Pilgrim's Pride's costs were rejected as being the same as those for Tyson and Keystone.[270] China argues that MOFCOM determined that Pilgrim's Pride had not provided adequate or reliable information on costs within reasonable time limits and that the United States has not challenged this decision.[271] According to China, MOFCOM determined that in light of Pilgrim's Pride's failure to address its serious data problems in multiple supplemental responses and corrections, and its need to continue the investigation in a timely manner, it had to resort to an alternative basis for allocating costs.[272] China confirms in response to a question from the Panel, that the statements in the Preliminary and Final Anti-Dumping Determinations as well as in

[263] China's first written submission, paras. 104-105; response to Panel Question No. 34; second written submission, para. 65 (citing USAPEEC Foreign Producer Response, Exhibit CHN-45, Annex III-6 (pricing data for HTS code 0207.1422, frozen paws).

[264] China's first written submission, paras. 90 and 103; comments on United States' response to Panel question Nos. 89(a) and 90.

[265] China's second written submission, para. 69; response to Panel question No. 94(d); comments on United States' response to Panel question No. 94.

[266] China's second written submission, paras. 52, 59 and 69; response to Panel question No. 94(d); comments on United States' response to Panel question No. 94.

[267] China's second written submission, para. 90 (citing Tyson Cost Comparison Tables, Exhibit CHN-46). China argues that the cost data reported in Tyson's initial Form 6-3 and reported again in its second supplemental questionnaire responses as form S2-5 were significantly different.

[268] China's first written submission, para. 93.

[269] China's first written submission, paras. 110-112; opening statement at the first meeting of the Panel, paras. 12-13; second written submission, paras. 54-60; opening statement at the second meeting of the Panel, para. 28; response to Panel question No. 89(a).

[270] Despite maintaining that the basis for MOFCOM's rejection for Pilgrim's Pride was different than for Tyson and Keystone, China does note that Pilgrim's Pride cost allocation "...suffered from the same problems as the Tyson and Keystone methodologies." (China's opening statement at the first meeting of the Panel, para. 15).

[271] China's first written submission, para. 84 (citing to Final Anti-Dumping Determination, Exhibit CHN-3, pp. 27-28).

[272] China's first written submission, paras. 84, 115-117 (citing *inter alia* to Final Anti-Dumping Determination, Exhibit CHN-3, pp. 27-28); see also China's second written submission, paras. 58, 67 and 80. According to China, there were serious discrepancies in the original questionnaire response, forcing a supplemental submission, only to have Pilgrim's Pride provide substantial corrections yet again after the preliminary disclosure. China contends that despite two sets of corrections to the same data, Pilgrim's Pride's information remained internally inconsistent.

the Disclosure Documents reflect MOFCOM's decision to apply facts available under Article 6.8 of the Anti-dumping Agreement. [273]

7.3.1.3.2 Arguments of the third parties

7.156. The **European Union** disagrees with the United States' characterization of the first sentence of Article 2.2.1.1 as containing a general rule and an exception. Rather, the European Union considers that the sentence contains two conditions, introduced by the term "provided that". The structure of this provision is therefore, in the European Union's view, better characterised as "conditioned normality".[274] However, the European Union does agree with the United States that the determination should explain why the surrounding facts and circumstances of a particular case supported the conclusion that the value-based allocation methodology did not reasonably reflect the costs associated with the production and sale of the product under consideration.[275] The European Union also states that it is not clear why China's argument that paws are more valued in China than the United States is pertinent to the question of whether or not sales in the US domestic market are in the ordinary course of trade and permit a proper comparison. The European Union argues that "if in the ordinary course of trade" in the domestic market, one of the two parts separated from the whole has no value, and is in fact waste, it is not clear why one would allocate any costs to it at all.[276]

7.157. In **Mexico**'s opinion, Article 2.2.1.1 establishes a rebuttable (*juris tantum*) presumption consisting in that, unless proven otherwise, it will be considered that the records of the exporter or producer investigated reasonably reflect the costs of production and sale of the product under investigation. Therefore, it is the investigating authority that bears the initial burden of proving that the accounting records in question do not reasonably reflect the costs associated with the production and sale of the product under consideration.[277]

7.158. **Saudi Arabia** argues that the second condition, that the costs have to "reasonably reflect" the costs "associated with" the production and sale of the product under consideration, does not allow an authority to question the accuracy or "reasonableness" of the costs as such, but merely concerns their association with the product under consideration as compared with other products to which the costs may also be associated.[278] Saudi Arabia does agree that before rejecting the cost allocation evidence historically utilized by respondents as not "reasonably reflecting" costs associated with the production and sale of the particular product under consideration, the investigating authority must provide a compelling explanation as to why that methodology is not "reasonable". Saudi Arabia adds that a respondent's allocation methodology cannot be rejected simply because another, maybe equally reasonable methodology, would have been preferred by the investigating authority. Furthermore, it should not be rejected because it leads to less costs being allocated to a by-product or a waste product, even if that by-product or that waste product is of great value in the country of importation.

7.159. **Thailand** is of the view that the burden of proof in demonstrating that the record does not reasonably reflect the costs is initially with the investigating authority and the burden shifts to the interested party at the time when this issue is raised by the investigating authority within the context of the proceedings. This may occur following the questionnaire response as highlighted in the deficiency letter, during the on-site-verification or in response to the preliminary determination or essential facts.[279]

[273] China's response to Panel question No. 99.
[274] European Union's third-party submission, para. 35.
[275] European Union's third-party submission, paras. 36-37.
[276] European Union's third-party statement, paras. 13 and 15.
[277] Mexico's third-party response to Panel question No. 10.
[278] Saudi Arabia's third-party submission, para. 13 (citing to Panel Reports, *US – Softwood Lumber V*, para. 7.321; *EC – Salmon (Norway)*, para. 7.483; *Egypt – Steel Rebar*, paras. 7.393 and 7.422). See also Saudi Arabia's third-party response to Panel question No. 10.
[279] Thailand's third-party response to Panel question No. 10.

7.3.1.3.3 Evaluation by the Panel

7.3.1.3.3.1 Whether there is an obligation for an investigating authority to explain its decision to decline to use a respondent's books and records

7.160. Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation…" The panel in *US – Softwood Lumber V* explained that this imposes a positive obligation on an investigating authority to normally use the books and records of the respondents if two conditions are met: (i) the books and records are consistent with the generally accepted accounting principles (GAAP) of the exporting country, and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration.[280]

7.161. In our view, the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records. The Appellate Body observed in *US – Clove Cigarettes* that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule". According to the Appellate Body, "the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule"… [r]ather, the use of the term 'normally' … indicates that the rule … admits of derogation under certain circumstances."[281] As using the respondents' books and records is the rule and declining to do so is a derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations.

7.162. We recall that Article 17.6(i) of the Anti-Dumping Agreement indicates that the role of the Panel is to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If an evaluation is not evident on the record of the determination, it would be impossible for the Panel to complete its task.[282] This understanding is bolstered by the Appellate Body's interpretation of the obligation in Article 11 of the DSU, which also applies to disputes under the Anti-Dumping Agreement, that in conducting an "objective assessment" of an investigating authority's determinations, a panel must review whether competent authorities have provided a reasoned and adequate explanation of how the evidence on the record supports their factual findings and how the factual findings support their overall determination[283], in particular whether that reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence.[284]

7.163. China argues that MOFCOM had no obligation to explain its decision, because Article 2.2.1 only obligated MOFCOM to use the respondents' books and records if they demonstrated to MOFCOM's satisfaction that they met the two criteria. China supports its view by pointing to the use of the passive voice in Article 2.2.1.1. According to China, this means that the provision does not impose a particular obligation on the *investigating authority.*[285] The Panel finds the issue of who bears the burden before the investigating authority irrelevant to the matter at hand. Irrespective of whoever bore the initial burden of proof, an investigating authority is not excused from having to explain why it decided to deviate from the normal procedure outlined in Article 2.2.1.1 – i.e. using the respondent's books and records. If that decision results from an affirmative determination to reject the books or if it is because the respondent did not prove that

[280] Panel Report, *US – Softwood Lumber V*, para. 7.237.
[281] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[282] We note that the United States also contends that MOFCOM had an obligation to explain its reasoning for rejecting the respondents' books and records under the requirement in the second sentence of Article 2.2.1.1 to "consider all available evidence" on the proper allocation of costs. As the Panel finds that MOFCOM was required to explain its determination to reject the respondents' books and records under the first sentence of Article 2.2.1.1 and under the obligation to provide a basis for an objective assessment of its actions, we do not see the need to address the question of the relationship between the two sentences to provide a positive resolution to the dispute.
[283] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS,* para. 186; see also Appellate Body Report, *US – Lamb*, para. 103.
[284] See, e.g. Appellate Body Report, *US – Tyres (China)*, para. 280.
[285] China's response to Panel question No. 26; second written submission, paras. 73-76.

its books satisfy the two criteria[286], those reasons must be set forth in the record of the investigation and/or the published determinations, so as to allow for review of that decision.[287]

7.164. In sum, the Panel is of the view that although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so.

7.3.1.3.3.2 Whether MOFCOM correctly determined that the respondents' books and records did not "reasonably reflect the costs associated with production and sale of the product under consideration"

7.165. Article 2.2.1.1 states that an investigating authority will calculate costs on the basis of the producers books and records if those books and records (i) are consistent with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. China's arguments before the Panel with respect to why MOFCOM declined to use the respondents' books and records have focused on the second criterion. The United States, for its part emphasizes that in arguing that their reported costs were reasonable, US respondents put evidence on the record that their costs were calculated in a manner that is consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards. The United States further asserts that the US respondents also offered evidence that Chinese producers of broiler products use a value-based allocation methodology as well and that Chinese accounting literature substantiated that the use of a value-based allocation methodology can be reasonable.[288]

7.166. We note the United States' argument that GAAP-consistency and reasonableness are like a Venn diagram of overlapping circles, such that GAAP-consistent records could also reasonably reflect a firm's costs. However, there will be places where the two do not overlap. The two conditions in the first sentence of Article 2.2.1.1 are cumulative.[289] The very existence of the second criterion – reasonable reflection of cost of production and sale – in Article 2.2.1.1 is an acknowledgment that there is more to determining whether to use the books and records of the exporters than whether the books are appropriate for accounting purposes. Therefore, the fact that the respondents in the broiler products investigation maintained their books and records consistently with US GAAP[290] would not, in and of itself require MOFCOM to use them under Article 2.2.1.1.

---

[286] In our view, an explanation of the investigating authority's reasoning would be even more important in the latter situation. If investigating authorities could simply say they were unconvinced without being required to provide reasons why, it could lead to the exception (declining to use the books and records) becoming the norm.

[287] We note that this review could be conducted not only by a WTO panel or the Appellate Body, but also by a domestic court under Article 13 of the Anti-Dumping Agreement.

[288] United States' second written submission, para. 51.

[289] Panel Report, *EC – Salmon (Norway)*, para. 7.483:

> The first sentence of Article 2.2.1.1 establishes that the data sources to be privileged when calculating an investigated party's cost of production shall "normally" be the records kept by that party, provided that such records: (i) are consistent with GAAP of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. When the records kept by an investigated party evidence these characteristics, an investigating authority will "normally" be required to use them in the calculation of cost of production. In our view, the fact that GAAP-consistent records, which reasonably reflect costs "associated with the production and sale" of the like product, must "normally" be used to calculate cost of production, implies that the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product.

[290] We note that in its second written submission China argued that MOFCOM never made a determination that the US respondents' books and records were consistent with US GAAP. (China's second written submission, para. 71). However, China has never presented any argumentation that the books and

7.167. Both parties and the respondents in the investigation agree that in the case of joint products, which arise at a split-off point, pre-split-off costs cannot be directly assigned on a product-specific basis and must be allocated.[291] Of the two types of methodologies for doing so that were discussed in this case – one based on relative sales value ("value-based allocation")[292] and one based on the weight of the products ("weight-based allocation"), the Panel is of the view that neither method is in principle inherently unreasonable. The respondents in the broiler products investigation sought the use of the allocations maintained in their normal books and records, which were value-based. MOFCOM adopted a weight-based allocation whereby the recorded costs of the various products were averaged according to weight to generate a common cost of production for the various products. Before the Panel, China raised two main concerns with respect to the reasonableness of the respondents' cost allocations, which it argues justify MOFCOM's determination that the respondents' books and records did not reasonably reflect the costs associated with the production and sale of the product under consideration.

7.168. First, China contends that the respondents were using incorrect values to determine the proportion of pre-split off costs to allocate to each product. In particular, China argues that despite having significant global sales, the respondents only used revenue from US sales in determining the value based allocations. Given that MOFCOM had concluded that the volume of domestic sales was too small to permit a proper comparison with export price, China maintains that using the same data, which had already been considered to be inappropriate for the purpose of determining normal value, to calculate cost of production would insert circularity into the determination.[293] With respect to Tyson, China notes that it did not use the sales values it earned on paws and other products in its allocations, but rather used reference prices from a commodity pricing service, Urner Barry, which used one price for a basket of goods that included paws and other products such as wing tips, gizzards, and contaminated meat.

7.169. Second, China argues that, even though paws had value in both the domestic and export markets, the respondents treated them as by-products — allocating none of the pre-split off costs to these products — rather than as one of the main joint products.[294]

7.170. The United States contends that for some of the allocations, global sales values were indeed used[295] and that costs are not unreasonable simply because they are low.[296] The

---

records were not GAAP-consistent and MOFCOM's silence on the issue would indicate that the matter that concerned it was not that the books and records were inconsistent with US GAAP.

[291] United States' first written submission, paras. 84, 98 and 100 (citing *GAAP-Handbook of Policies and Procedures*, Joel G. Singer, Prentice Hall, 2010, 3.31 (quoted in Exhibit USA-26); *Barron's Accounting Handbook* 103 (3rd ed. 2000) by J. Siegel & J. Shim (quoted in Exhibit USA-27); International Accounting Standards No. 2 – Inventories (IASB Revised Dec. 2003), para. 14 (quoted in Exhibit USA-26 and Exhibit USA-29); and Statement 6 of Chapter 4, "Inventory Pricing," of Accounting Research Bulletin No. 43. Financial Accounting Standards Board and Accounting Standards Codification Code 905 360 30 p. 5, Financial Accounting Standards Board (quoted in Exhibit USA-29).

[292] Our understanding of the methodology is that companies producing joint or co-products which have a single production cost up to a certain point allocate that cost across the various resulting products according to the proportion of revenue those products will earn in the market. For example if a single chicken was divided up and the breast sold for $5, the thigh for $2, the wings for $2, and the paws for $1 then 50% of the pre-split-off production costs would be allocated to the breast, 20% to thighs and wings respectively and 10% to paws. However, if there were other products that were by-products, in that they were inevitably produced as part of making a chicken, but were not part of the commercial business of the firm – such as blood, feathers, gizzards, etc… then these would have none of the pre-split-off costs assigned to them and would only have specific post-split-off costs recorded (such as processing, disposal, or packaging).

[293] China's first written submission, paras. 73-76.

[294] We note that Keystone and Pilgrim's Pride affirmatively expressed that they treat paws as by-products. (Keystone Anti-Dumping Questionnaire Response, Exhibit USA-34, pp. 85-97; see also Keystone Supplemental Anti-Dumping Questionnaire Response, Exhibit USA-35, pp. 20-21; Pilgrim's Pride Anti-Dumping Questionnaire Response, Exhibit USA-32, p. 55; see also Pilgrim's Pride Response to the First Supplemental Anti-Dumping Questionnaire, Exhibit USA-28). China contends that Tyson did not use actual joint-product accounting for paws, but rather, its allocation reflected a by-product approach. (See China's second written submission, para. 69; response to Panel question No. 94(d); comments on United States' response to Panel question No. 94).

[295] United States' response to Panel question No. 29. The United States acknowledged that it received this information directly from the respondents in an effort to answer the Panel's question. The United States contends that the information was not on the record of the investigation, because MOFCOM never asked. (United States' response to Panel question No. 94(b)).

[296] United States' response to Panel question No. 32(b).

United States also argues that none of the concerns China now espouses were discussed on the record of the investigation.[297]

7.171. During the investigation MOFCOM did ask a series of questions about the cost accounting methods of the respondents over several questionnaires, which indicate a general concern with understanding the cost allocation methods of the respondents. However, MOFCOM's analysis of the answers is not evident in the determination or on the record. With respect to MOFCOM's determination for both Tyson and Keystone, the Preliminary Anti-Dumping Determination simply states that their costs have "not reasonably reflected the production cost related to the Subject Products".[298] In the Final Anti-Dumping Determination, MOFCOM acknowledges that Tyson and Keystone submitted comments with respect to this decision, but concludes that they did not "provide sufficient reason to prove the reasonableness of different parts of the subject merchandise having different production cost."[299] In both the Preliminary and Final Determinations MOFCOM makes a statement of its conclusion without providing the supporting reasoning. Therefore, even though the arguments China makes before us could serve as a basis for determining that Tyson and Keystone's books and records do not reasonably reflect their costs of production for paws, we cannot conclude – based on the record of the investigation – that the concerns expressed in China's arguments before the Panel were indeed the reasons why MOFCOM departed from the norm of using a respondent's books and records. Therefore, with respect to MOFCOM's determination to decline to use Tyson and Keystone's books and records, we find that China has acted inconsistently with the first sentence of Article 2.2.1.1.

7.172. For the reasons mentioned in the previous paragraph, the Panel takes no view on the reasonableness of the cost allocation method used by the US respondents and on China's concerns in that respect. Nonetheless, the Panel notes that the types of concerns that China has expressed are concerns that an investigating authority may assess under 2.2.1.1 to determine whether the records kept by the exporter or producer reasonably reflect the costs associated with the production and sale of the product under consideration.

7.173. With respect to Pilgrim's Pride, the question before the Panel is the same, i.e. whether MOFCOM properly declined to use Pilgrim's Pride's books and records under the first sentence of Article 2.2.1.1. However, the record with respect to MOFCOM's treatment of the issue in respect of Pilgrim's Pride differs markedly from the record with respect to Keystone and Tyson. Rather than a one sentence declaration that the costs were "unreasonable" without any further explanation, MOFCOM instead concluded that Pilgrim's Pride's data was incomplete and that efforts to correct it were untimely. In this instance, MOFCOM's basis for rejecting the costs as recorded in the respondent's books and records is not the unreasonableness of the allocation, but rather a specific determination that the data as originally submitted was irreconcilable and that the information to correct the errors was untimely. MOFCOM explains the numerous errors in Pilgrim's Pride's responses in its Preliminary Anti-Dumping Determination and the Preliminary Anti-Dumping Disclosure. Indeed, Pilgrim's Pride's Comments on the Preliminary Anti-Dumping Disclosure acknowledge and confirm that the data was incorrect as Pilgrim's Pride goes into great detail describing how the errors arose.[300] In the Final Anti-Dumping Disclosure to Pilgrim's Pride, MOFCOM informs it that the replacement information was untimely and would not be accepted.

7.174. As noted above, MOFCOM's reasons for rejecting Pilgrim's Pride's books and records are noted in the Preliminary and Final Determinations and in the accompanying Disclosure documents. China did confirm, in response to a question from the Panel, that MOFCOM's references in the Determinations and Disclosures to rejecting Pilgrim's Pride's data as untimely meant that MOFCOM had applied facts available under Article 6.8 of the Anti-Dumping Agreement. The United States responded that absent evidence that MOFCOM followed proper procedures to apply facts available under Article 6.8 of the Anti-Dumping Agreement, the only conclusion left is that MOFCOM's failure to examine Pilgrim's Pride's evidence resulted in a breach of Article 2.2.1.1.[301] The question before

[297] United States' response to Panel question No. 32; second written submission, paras. 35-42; and opening statement at the second meeting of the Panel, paras. 23-27.

[298] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 17-18 (Tyson) and pp. 19-20 (Keystone). Similar language is contained in the Preliminary Anti-Dumping Disclosures to both Tyson and Keystone, Exhibits USA-8 and USA-10.

[299] Final Anti-Dumping Determination, Exhibit USA-4. Similar language is contained in the Final Anti-Dumping Disclosures to both Tyson and Keystone, Exhibits USA-12 and USA-14.

[300] Pilgrim's Pride Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-27.

[301] United States' comments on China's response to Panel question No. 99.

the Panel is not whether MOFCOM complied with Article 6.8, but rather whether it acted consistently with Article 2.2.1.1, in particular whether it provided an explanation of why it derogated from the general norm in Article 2.2.1.1. The basis for MOFCOM's rejection is set forth in its Determinations and we consider that with respect to MOFCOM's determination to decline to use Pilgrim's Pride's books and records, MOFCOM has explained why it found that Pilgrim's Pride's books and records did not reasonably reflect the costs associated with production and sale of the product under consideration. Therefore, we find that the United States has not established that China acted inconsistently with the first sentence of Article 2.2.1.1 with respect to Pilgrim's Pride.

7.3.1.3.3.3 Conclusion

7.175. The Panel has determined that MOFCOM had an obligation, under the first sentence of Article 2.2.1.1, to explain any decision it made to depart from the norm established in the provision to utilize a respondent's books and records if they were GAAP-consistent and reasonably reflected the costs associated with the production and sale of the product under consideration. In the broiler products investigation, although China has expressed serious concerns about the reasonableness of Tyson and Keystone's books and records to the Panel, these concerns are not reflected on the record of the investigation. Therefore, the Panel finds that China acted inconsistently with the first sentence of Article 2.2.1.1 when MOFCOM declined to use Tyson and Keystone's books and records in calculating the cost of production for determining normal value. With respect to Pilgrim's Pride, the Panel finds that MOFCOM did explain its reasons for departing from the norm and declining to use Pilgrim's Pride books and records. Therefore, with respect to Pilgrim's Pride, the Panel finds that the United States has not established that China acted inconsistently with the first sentence of Article 2.2.1.1.

7.3.1.4 Whether MOFCOM complied with the obligations in the second sentence of Article 2.2.1.1 when it devised and applied its own allocation methodology

7.3.1.4.1 Main arguments of the parties

7.3.1.4.1.1 United States

7.176. The United States contends that, if the investigating authority decides to reject the reported costs, and use an alternative allocation, it must affirmatively demonstrate with relevant evidence that the allocation it is implementing is proper.[302] Furthermore, the United States cites to the panel report in *EC – Salmon (Norway)* for the premise "that any allocation of cost performed for the purpose of establishing cost of production must not result in the inclusion of costs not 'associated with the production and sale' of the like product during the period of investigation."[303]

7.177. The United States argues that the allocation MOFCOM used was itself inconsistent with Article 2.2.1.1 as it did not reasonably reflect the cost of production. In particular, MOFCOM attributed costs based on the weight of the products, not the value of the products. Therefore, the cost of production of products as diverse as breast meat, leg quarters, and chicken paws was determined on a per pound basis. The United States disputes China's claim that the weight-based methodology is neutral, instead arguing that it is tailored to find dumping in these particular circumstances.[304] The United States also notes that Keystone provided two alternative cost allocation methodologies which MOFCOM did not address. In particular, Keystone used the same data in its original questionnaire to do a traditional relative sales value methodology where it treated paws as one of the joint products rather than as a by-product.[305]

7.178. The United States argues that China also acted inconsistently with Article 2.2.1.1 because MOFCOM allocated costs for the production of all products only to those products subject to the investigation.[306] With respect to Tyson, the United States argues that there are several products derived from the chicken (such as blood, feathers, and organs) that generate revenue and should

[302] United States' first written submission, para. 94.
[303] United States' first written submission, footnote 140 para. 113 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.491).
[304] United States' opening statement at the second meeting of the Panel, para. 38; response to Panel question No. 93.
[305] United States' second written submission, para. 64.
[306] United States' first written submission, footnote 140.

absorb a proportionate share of production costs, but were not assigned costs under MOFCOM's calculations. According to the United States, MOFCOM's methodology unfairly assigns *all* of the costs incurred in producing the chickens to subject products (e.g. breasts, wings, and paws) which are only [***]% of the products derived from the chickens.[307] The United States points to Exhibit CHN-64, where China provides the worksheet for its allocation of costs by weight, which does not include the additional chicken "products" Tyson referred to. In other words, MOFCOM excluded the costs and values of these products, even though pursuant to MOFCOM's theory, a pound of chicken heads or a pound of chicken blood should cost the same as a pound of paws or breast meat.[308] The United States argues that by assuming all costs were borne by the subject merchandise, MOFCOM essentially allocated additional costs to that merchandise.[309]

7.179. According to the United States, MOFCOM did not address these arguments or similar ones made by the other respondents and the United States Government in its determination. The United States relies on the reasoning of the panel in *EC – Salmon (Norway)* to support its contention that this lack of a deliberative process is inconsistent with Article 2.2.1.1.[310] In particular, the panel in *EC – Salmon (Norway)*, concluded that "it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate the relevant [costs]" in the manner the investigating authority required, and that "[a]bsent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1."[311]

7.3.1.4.1.2 China

7.180. China recognizes that Article 2.2.1.1 imposes an obligation to "consider" all evidence for the proper allocation of costs. According to China, the issue is not what the authorities "should" do in such circumstances, but rather what limits, if any, exist in the text of Article 2.2.1.1 concerning what the authorities may decide to do. China argues that Article 2.2.1.1 contains only one affirmative obligation: "to consider all available evidence on the proper allocation of costs." Thus, according to China, if the foreign respondents' costs have been rejected as not "reasonably reflecting" the actual costs of production, the authority may re-allocate costs provided it has "considered" the evidence about cost allocations. China notes that the text of Article 2.2.1.1 does not stipulate any specific allocation method should the authority be required to re-allocate costs.[312] China posits that through this language, the Anti-Dumping Agreement recognises that in such situations the authorities may well have time constraints and limited information from the foreign respondents.[313] In China's view, the obligation to "consider" does not require an explanation of the investigating authority's reasoning.[314]

7.181. China submits that the weight-based cost allocation MOFCOM applied was a reasonable alternative cost allocation methodology. China argues that this methodology was neutral and not influenced by consumer perceptions in either China or the United States. Further, China argues that a weight-based allocation also reflected the fact that much of the costs were incurred uniformly for the whole bird prior to it being cut into pieces, and that weight-based allocation was listed as one of the reasonable alternatives in the reference materials cited by respondents (in particular Keystone) in the investigation.[315] According to China, MOFCOM's weight-based allocation avoided the serious distortions of the value-based methodology and was grounded in both the realities of raising live birds as well as accepted accounting practice as reflected in accounting texts presented by the respondents. As between these two approaches, MOFCOM's approach reflected a reasonable and "proper" allocation of costs while respondents' methodologies did not.[316]

[307] United States' first written submission, para. 113 (citing Tyson's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-40, pp. 5-6).
[308] Tyson Clarksville Plant Cost Flowchart, Exhibit USA-79.
[309] United States' comments on China's response to Panel question No. 91.
[310] United States' response to Panel question No. 93.
[311] United States' first written submission, para. 116 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.509).
[312] China's first written submission, paras. 137-138.
[313] China's response to Panel question No. 32.
[314] China's response to Panel question No. 30; second written submission, paras. 91-92 and 94-95.
[315] China's first written submission, paras. 129-136.
[316] China's second written submission, para. 87.

7.182. China argues that in the investigations at issue, the circumstances surrounding the respondents' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the market concerned. China maintains that MOFCOM considered all the evidence concerning costs allocation to reach a reasonable allocation methodology.[317] With respect to the two alternative methodologies Keystone presented to MOFCOM, China argues that one alternative was to allocate meat costs to all products on the basis of relative sales value but that Keystone did not reveal the precise basis or method upon which it determined the relative sales value and that its processing costs remained ill-defined.[318] According to China, the other alternative was to allocate meat costs to total output per tonne, which was identical to the method of MOFCOM. China contends that, since MOFCOM employed a weight-based approach, though not identical to that proposed by the respondents, it is difficult to argue that MOFCOM did not consider or "address" this alternative. Indeed, in the Final Anti-Dumping Disclosure MOFCOM specifically noted that it reviewed the comments submitted by the respondents on the cost-allocation issue, which would have included all alternatives they presented, and responded to those arguments.[319] China believes that this renders the United States' arguments that MOFCOM did not "address" the alternatives moot.[320]

7.183. China notes that Tyson also proposed an alternative methodology which was a weight-based allocation.[321] China interprets this proposal as Tyson agreeing with MOFCOM that weight-based allocation could be used to allocate the meat cost.[322] However, China claims that MOFCOM found Tyson's processing costs to be unreliable.[323]

7.184. In response to a question from the Panel, China argues that the reasonableness of MOFCOM's weight-based methodology is demonstrated in light of the following: (i) the respondents' meat costs were allocated based on arbitrary and clearly distortive valuations that did not reflect the price to be paid for the act of producing, consistent with the plain meaning of the cost of production as used in Article 2 of the Anti-Dumping Agreement; (ii) the respondents processing costs were not reasonable or not substantiated; (iii) weight-based allocations were cited as among those reasonable methods to be employed in rate regulation proceedings in the accounting texts submitted by the respondents[324]; (iv) the respondents also proposed weight-based allocations in their comments to MOFCOM[325]; and (v) a weight-based allocation reflected a neutral approach between the respondents' distorted value allocations reflecting preferences or perceptions in one market and the value placed on those same products in the Chinese market.[326]

7.185. China considers that the United States' argument that MOFCOM allocated costs of non-subject merchandise to subject merchandise is mistaken. China explains that MOFCOM's methodology was to take *total reported costs for the production of subject merchandise* and allocate those costs over *total reported weight of subject merchandise production*. Because there was no introduction of non-subject costs or non-subject weight, there could be no over-allocation of costs. This methodology was implemented using the data reported in Table 6-3 provided by the various respondents where such data was reported. Thus, there could be no over-allocation of costs to subject merchandise.[327]

[317] China's first written submission, paras. 137-138.
[318] China's response to Panel question No. 97.
[319] China's comments on the United States' response to Panel question No. 97.
[320] China's comments on the United States' response to Panel question No. 97.
[321] Tyson's Further Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-26, p. 12. In particular Tyson argued that MOFCOM should use [***].
[322] China's response to Panel question No. 97(a).
[323] China's response to Panel question No. 97(a).
[324] China's first written submission, paras. 134-136.
[325] Keystone's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-30, pp. 10-11; and Tyson's Further Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-26, p. 12.
[326] China's response to Panel question No. 94(d).
[327] China's response to Panel question No. 91; see also China's second written submission, para. 89; comments on the United States' response to Panel question No. 98. China refers the Panel to Exhibit CHN-64 - a summary table that condenses Exhibit S2-5-Revised – and argues that it demonstrates that the weight-average unit price calculated by MOFCOM was derived from reported costs and quantities of subject merchandise and that the calculated unit cost matches the unit cost disclosed by MOFCOM in its Final Anti-Dumping Disclosure.

7.3.1.4.2 Evaluation by the Panel

7.186. The issue before the Panel is whether MOFCOM, in applying its own cost allocation methodology, complied with the requirements in the second sentence of Article 2.2.1.1 to consider all available evidence to arrive at the proper allocation of costs. In particular, the Panel is faced with the questions of: (i) whether MOFCOM took into consideration "compelling evidence" with respect to the reasonableness of its own methodology and available alternatives; and (ii) whether MOFCOM improperly included costs not associated with the production and sale of the product under consideration in the costs it allocated to that product.

7.187. The Appellate Body, in *US – Softwood Lumber V* noted that the ordinary meaning of the term "consider" is, *inter alia,* to "look at attentively", "reflect on", or to "weigh the merits of".[328] With respect to the second sentence of Article 2.2.1.1, the Appellate Body read the term "consider" to mean that:

> an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on" and to "weigh the merits of" "all available evidence on the proper allocation of costs". As we stated above, the requirement to "consider" evidence would not be satisfied by simply "receiving evidence" or merely "tak[ing] notice of evidence".[329]

7.188. The Appellate Body found further support for its reading of the word "consider" in the second sentence of Article 2.2.1.1 from the fact that the provision requires the consideration of "all available evidence on the *proper* allocation of costs". (emphasis added) In the Appellate Body's view, the word "proper" suggests some degree of deliberation on the part of the investigating authority in "consider[ing] all available evidence"; so as to ensure that there is a proper allocation of costs. The Appellate Body also stated that the nature of this deliberative process will depend on the facts of a particular case before the investigating authority.[330]

7.189. Particularly pertinent to the case before this Panel, the Appellate Body also dealt with the issue of what the obligation in the second sentence of Article 2.2.1.1 requires when an investigating authority is presented with more than one potential allocation methodology. While recognizing that the precise nature of the obligation to "consider all available evidence" will vary case-by-case, the Appellate Body did conclude that in certain instances:

> such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs—the investigating authority may be required to "reflect on" and "weigh the merits of" evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence".[331]

7.190. Therefore, although an investigating authority will not always have to reflect on and weigh the merits of evidence relating to alternative allocation methodologies, in some instances the obligation in Article 2.2.1.1 will require such consideration. Furthermore, the panel in *EC – Salmon (Norway)*, concluded that "it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate the relevant [costs]" in the manner the investigating authority did so, and that "[a]bsent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1."[332]

7.191. Furthermore, in the recent *China – GOES* report, the Appellate Body stated – albeit with respect to another provision of the Anti-Dumping Agreement – that "an investigating authority's *consideration* … must be reflected in relevant documentation, such as an authority's final

[328] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 493.
[329] Appellate Body Report, *US – Softwood Lumber V*, para. 133.
[330] Appellate Body Report, *US – Softwood Lumber V,* paras. 133-134.
[331] Appellate Body Report, *US – Softwood Lumber V*, para. 138.
[332] Panel Report, *EC – Salmon (Norway)*, para. 7.509.

determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors."[333]

7.192. Pursuant to the analytical framework set forth by the Appellate Body, in determining whether MOFCOM satisfied the obligation in the second sentence of Article 2.2.1.1, the Panel must address three questions: (i) whether MOFCOM did more than simply receive evidence and take note of evidence; (ii) whether, in this particular instance, MOFCOM was required to reflect on and weigh the merits of the various allocation methodologies; and (iii) if so whether there is evidence of its consideration reflected in relevant documentation. The arguments of the parties also invite the Panel to reach a further conclusion – whether the methodology itself was indeed "proper". In that respect, we recall the reasoning of the panel in *EC – Salmon (Norway)*, "that any allocation of cost performed for the purpose of establishing cost of production must not result in the inclusion of costs not "associated with the production and sale" of the like product during the period of investigation."[334]

7.193. We recall the reasoning of the Appellate Body in *US – Softwood Lumber V* that in instances where there is "compelling evidence" available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs, the investigating authority may be required to "reflect on" and "weigh the merits of" evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence".[335] Given the explanations and alternative cost methodologies proposed to MOFCOM by the respondents, there was "compelling evidence" that more than one allocation methodology potentially may be appropriate. Therefore, MOFCOM was required to reflect on and weigh the merits of the various allocation methodologies.

7.194. The Panel must determine whether the required reflection and weighing is evidenced in relevant documentation from the investigation. China has not provided any citations to the record of the investigation where MOFCOM deliberated or explained the weight-based methodology it chose to apply or why it chose that methodology over the alternatives proposed by the respondents. All of the evidence of consideration that China points to in its submissions relates to MOFCOM's consideration of the original books and records of the respondents, rather than to the appropriateness of MOFCOM's allocations or the alternative methodologies that Keystone and Tyson proposed.[336]

7.195. The consideration of the appropriate cost allocation methodology necessarily includes the exercise of considering the methodologies used in the respondents' books and records. As noted above, the Panel finds that during the investigation MOFCOM not only received and took note of the evidence presented, but also asked a series of questions about the cost accounting methods of the respondents over several questionnaires, which indicates a general concern with understanding the cost allocation methods of the respondents. However, we see no evidence on the record of the investigation that the merits of the alternative allocation methodologies put forward by the respondents after the Preliminary Anti-Dumping Determination were weighed or reflected upon. Neither did MOFCOM explain the reasons why its own methodology led to a proper allocation of costs. Therefore, the Panel finds that China acted inconsistently with the obligation in the second sentence of Article 2.2.1.1 to consider all available evidence on the proper allocation of costs.

7.196. In terms of whether MOFCOM's weight-based methodology was a proper allocation of costs, the issue is not whether weight-based methodologies are appropriate for joint products in the abstract, but whether the particular application of the weight-based methodology that MOFCOM devised is consistent with Article 2.2.1.1. MOFCOM's straight allocation of total processing costs to all products[337] necessarily means that it included costs solely associated with processing certain products in its calculation of costs to all subject broiler products.[338] This is not a

[333]Appellate Body Report, *China – GOES,* para. 131 (citing e.g. Panel Reports, *Thailand – H-Beams*, para. 7.161; and *Korea – Certain Paper*, para. 7.253). (emphasis original)
[334] Panel Report, *EC – Salmon (Norway),* para. 7.491.
[335] Appellate Body Report, *US – Softwood Lumber V*, para. 138, cited above, para. 7.189.
[336] China's response to Panel question No. 30; second written submission, para. 93.
[337] China's response to Panel question No. 34(d).
[338] We note that as an example of the potential impact of such an allocation, the United States mentioned that generally processing breast meat involves procedures such as skinning, deboning and deveining which are more intensive and costly than for the production of other chicken parts.

reasonable reflection of the costs associated with production and sale of the product under consideration. Therefore, we conclude that MOFCOM impermissibly included costs not associated with the production and sale of the product under consideration in its allocations in contravention of Article 2.2.1.1.

7.197. With respect to the United States' arguments that, for Tyson, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and thus inflated the normal value, China argues that MOFCOM's conclusions are correct because it used Tyson's own data from Table 6-3. China provides the Panel with Exhibit CHN-64 – a summary table that condenses Tyson's model-specific quantities and costs – and contends that it demonstrates that the weight-average unit price calculated by MOFCOM was derived only from subject merchandise and thus it was appropriate for MOFCOM to assign that unit price to subject products.[339] Exhibit CHN-64 lists various products with a per product production quantity in pounds and a corresponding per product cost of production in USD. The sum of the product-specific costs of production is then divided by the sum of the product-specific production quantities to arrive at the per pound cost of production. The "non-subject"[340] products which Tyson argues are also produced from the live chicken are not listed in this breakdown. On its face, Exhibit CHN-64 does not indicate that the per pound costs assigned to each product were derived from total cost minus the costs associated with the production of the products derived from a chicken that are not in the list. The United States has made a *prima facie* case, not rebutted by China, that MOFCOM improperly allocated costs from certain products derived from a chicken to other products derived from a chicken (e.g. those in the summary table in Exhibit CHN-64) Therefore, with respect to this specific aspect of the allocation of Tyson's costs, we find that China has acted inconsistently with the second sentence of Article 2.2.1.1.

7.3.1.4.3 Conclusion

7.198. In sum, the Panel concludes that China acted inconsistently with the second sentence of Article 2.2.1.1 because (i) there was insufficient evidence of its consideration of the alternative allocation methodologies presented by the respondents, (ii) it improperly allocated all processing costs to all products, and (iii) it allocated Tyson's costs to produce non-exported products to the normal value of the products for which MOFCOM was calculating a dumping margin.

7.3.2 Whether MOFCOM made a fair comparison between normal value and export price as required by Article 2.4 of the Anti-Dumping Agreement when it adjusted Keystone's export price to account for freezer expenses

7.3.2.1 Introduction

7.199. The United States claims that MOFCOM acted inconsistently with the "fair comparison" requirement under Article 2.4 of the Anti-Dumping Agreement when it deducted freezer storage expenses incurred by Keystone from its export price.[341] The United States argues that the adjustment was unwarranted or that even if it was warranted, it produced an imbalance between the normal value and the export price. The United States explains in this regard that MOFCOM constructed Keystone's normal value on the basis of the cost of production reported by the company, which included freezer storage expenses; as a consequence, the adjustment meant that MOFCOM compared a normal value which included freezer storage expenses to an export price which included no such expenses, inconsistently with Article 2.[342]

7.200. China argues that the United States' request for consultations failed to include a claim under Article 2.4 with respect to MOFCOM's adjustment to Keystone's export price concerning freezer storage expenses. As a result, China argues, the United States could not include such a

[339] The Panel notes that with the exception of a few pages of excerpts in Exhibit CHN-46, China did not provide the actual Table 6-3 to the Panel.
[340] We note that the United States refers to these as "non-subject" products even though by-products of broiler products are included in the scope of the investigation. Nevertheless, the Panel finds that this misunderstanding of the scope of the investigation does not vitiate the fact that the United States has made a claim that MOFCOM improperly allocated the costs of those products to other subject products produced by Tyson.
[341] United States' first written submission, paras. 3, 118, 135-138.
[342] United States' first written submission, paras. 135-138.

claim in its panel request, the claim falls outside the Panel's terms of reference and the Panel should refrain from making any rulings and recommendations with respect to it.[343]

7.201. China also disputes the United States' claim on the merits. China submits that MOFCOM's adjustment was consistent with the requirement to perform a fair comparison; prior to the adjustment, there existed an imbalance between the normal value and the export price. China explains that Keystone had allocated its freezer expenses over all sales even though all its exports to China were of frozen broiler products whereas only a very small fraction of its domestic sales were of frozen products. China also submits that while MOFCOM recognized that Keystone had allocated some freezer costs to normal value the issue was discovered at a late stage of the anti-dumping proceedings and was a consequence of Keystone's failure to provide clear and complete information concerning the fees during the investigation.[344]

7.3.2.2 Relevant provisions

7.202. Article 2.4 of the Anti-Dumping Agreement reads in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

7.203. Article 4 of the DSU, which sets forth requirements applicable to consultations requests, provides in relevant part, that:

> 4.4 Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint. ...
>
> 4.7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute."[345] (emphasis added)

7.204. Article 6.2 of the DSU, the provision governing requests for the establishment of a panel, provides in relevant part that:

---

[343] China's first written submission, para. 139; opening statement at the first meeting of the Panel, para. 19; second written submission para. 105. We note that China has not formulated its objection in the form of a request for preliminary ruling.

[344] China's first written submission, paras. 140-141 and 159-177; opening statement at the first meeting of the Panel, paras. 21-22; second written submission, paras. 106-115.

[345] Article 17 of the Anti-Dumping Agreement also contains provisions regarding consultations in disputes under that Agreement, providing in relevant part:

> 17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement. ...
> 17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.
> 17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ('DSB'). (emphasis added)

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly… (emphasis added)

7.205. Article 7.1 of the DSU further establishes:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

7.3.2.3 Factual background

7.206. As noted above, this claim relates to an adjustment MOFCOM made to Keystone's export price[346] concerning certain freezer storage expenses Keystone incurred during the POI. Keystone incurred the freezer storage expenses in relation to the production or sale of *frozen* broiler products sold on the domestic, Chinese and other export markets. The facts before the Panel indicate that while all exports to China were of frozen products, most of Keystone's sales on the domestic US market were of fresh, i.e. unfrozen, products.[347]

7.207. In its questionnaire responses, Keystone reported the freezer storage expenses [***] or that these costs were only incurred in respect of certain sales or products. Keystone allocated the costs equally to all sales, which meant that the vast majority of the freezer storage expenses were allocated to domestic sales, even though most of those sales were not frozen.[348]

7.208. As noted above, the Preliminary Anti-Dumping Determination and the Preliminary Anti-Dumping Disclosure for Keystone state that MOFCOM constructed the normal value for Keystone on the basis of the company's costs of production, a reasonable amount for expenses, and a 5% profit. They also indicate that MOFCOM made various adjustments to the export price that had been claimed by Keystone. The adjustment with respect to freezer storage expenses is not mentioned.[349]

7.209. In the Final Anti-Dumping Disclosure for Keystone, MOFCOM indicates that it maintains its decision to construct the cost of production for Keystone.[350] In addition, MOFCOM indicates, under the section discussing adjustments to the export price, that "[d]uring verification, the authority found that your company did not report freezer storage expenses. The authority added such adjustment according to data collected during verification."[351] MOFCOM explains that it is allocating to Keystone's sales of the subject product to China an amount corresponding to the proportion (on a weight basis) of Keystone's sales of frozen products that were to the Chinese market.[352] Thus, we understand that MOFCOM applied an adjustment to Keystone's export price by

[346] In para. 3 of its first written submission, the United States submits that it cannot ascertain MOFCOM's treatment of the freezer expenses because MOFOM did not provide the dumping calculations for US respondents. In the remainder of its submissions to the Panel, however, the United States appears to accept that MOFCOM did in fact make the adjustment which is discussed in MOFCOM's Final Anti-Dumping Disclosure and Final Anti-Dumping Determination. Our analysis proceeds on this basis.

[347] China's response to Panel question No. 1; United States' response to Panel question No. 40.

[348] Keystone's Form 6-7, Exhibit USA-57; and Keystone's Form 6-5, Exhibit USA-55. In its response to Panel question No. 43, the United States explains that the allocation corresponds to the proportion of total sales to the various markets during the POI.

[349] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 19-20; Keystone Preliminary Anti-Dumping Disclosure, Exhibit USA-10.

[350] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 3.

[351] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 4; see also Final Anti-Dumping Determination, Exhibit USA-4, p. 33; China's second written submission, para. 111.

[352] MOFCOM then further allocates these costs among the four product types exported by Keystone to China. (Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 4).

which it deducted from the actual export price an amount corresponding to the freezer storage fees that would have been incurred in relation to exports of the subject product to China.

7.210. In its Comments on MOFCOM's Final Anti-Dumping Disclosure, Keystone objected to the adjustment. Keystone argued, *inter alia*, that MOFCOM should not have deducted the freezer fees from the export price as the fees were already included in the costs used by MOFCOM to construct its normal value; thus the "deduction resulted in double-counting of the freezer storage fees".[353]

7.211. The Final Anti-Dumping Determination explains that MOFCOM maintains the adjustment to the export price announced in the Final Anti-Dumping Disclosure, indicating that: "[d]uring the on-site verification, the Investigating Authority found the company did not report the expense for cold storage, so the Investigating Authority increased the adjustment according to the data obtained in the on-site verification".[354]

7.3.2.4 Main arguments of the parties on the Panel's terms of reference

7.212. As noted above, China objects to the United States' inclusion of the Article 2.4 claim in its panel request and argues that the claim is outside the Panel's terms of reference. We first consider this objection given that if China is correct, the Panel has no jurisdiction over the claim.

7.3.2.4.1 China

7.213. China acknowledges that prior decisions recognize that the provisions referred to in the request for the establishment of a panel need not be identical to those referred to in a complaining party's request for consultations. Yet, China submits, there are limits to this rule: in particular, in adding provisions to a panel request that were not in the consultations request, a complainant may not expand the scope of the dispute. A new legal basis may only be raised in a panel request if it may reasonably be said to have evolved from the legal basis that formed the subject of consultations.[355]

7.214. China explains why, in its view, the United States' claim under Article 2.4 may not reasonably be said to have evolved from the legal basis indicated in its consultations request and impermissibly expands the scope of the United States' complaint included in that request. China submits that Article 2.4 concerns methodological issues related to performing a fair comparison in dumping calculations. China submits that the only other provisions cited in the United States' request for consultations that impose obligations of a methodological nature are those under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement concerning the allocation of production costs. China submits that the focus of Articles 2.2 and 2.2.1.1 is dramatically different from that of Article 2.4. The former concern the proper identification and/or calculation of normal value, one of the two variables in the comparison, whereas the latter deals with the adjustments that need to be made to ensure that the comparison between both sides of the equation is fair. Moreover, China argues that Articles 2.2 and 2.4 of the Anti-Dumping Agreement are not derivative of each other, and that the United States' consultations request makes no reference to "fair comparison" that might imply a legal claim that could reasonably evolve into the Article 2.4 claim. China also contends that the factual basis relied on for the Articles 2.2 and 2.2.1.1 claims in the United States' request for consultations was narrow and pertained solely to MOFCOM's failure to calculate costs on the basis of the records kept by the US producers and to properly allocate production costs. By contrast, the Article 2.4 claim included in the United States' panel request pertains to freezer storage expenses, which have nothing to do with the respondents' cost records or how allocation of costs was effected.[356]

[353] Keystone's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-29, pp. 25-29.
[354] Final Anti-Dumping Determination, Exhibit USA-4, p. 32.
[355] China's first written submission, paras. 147-148, 151 (citing, *inter alia*, Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 138-139; *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293; *US – Continued Zeroing*, para. 228); opening statement at the first meeting of the Panel, para. 19; second written submission, paras. 97-98.
[356] China's first written submission, paras. 152-158; opening statement at the first meeting of the Panel, para. 20; closing statement at the first meeting of the Panel, para. 11; second written submission, para. 97; opening statement at the second meeting of the Panel, para. 22.

7.215. China submits that the record does not support the United States' argument that the United States had not understood how Keystone's freezer costs were treated prior to consultations and that it was clear from the Final Anti-Dumping Disclosure that MOFCOM had addressed the freezer costs issue by making an adjustment to the export price to effect a fair comparison, which is the subject of Article 2.4.[357]

7.3.2.4.2 United States

7.216. The United States submits that prior Appellate Body decisions have held that the provisions referred to in the panel and consultations requests need not be identical, provided that the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.[358] The United States argues that this condition is met in the case of its Article 2.4 claim. The United States explains that it was apparent at the time of its request for consultations that there was a problem with MOFCOM's treatment of Keystone's reported costs, including freezer storage expenses. Yet because of MOFCOM's flawed disclosures, it was unclear what adjustments MOFCOM had made or not made in respect of the normal value and export price. In fact, the United States argues, MOFCOM's discussion of the freezer storage expenses in the Final Anti-Dumping Disclosure and Final Anti-Dumping Determination could be read as suggesting that MOFCOM had allocated additional freezer storage costs both to the export price and to the normal value.[359] The United States submits that the consultations clarified that MOFCOM had made an adjustment to Keystone's export price, an issue falling properly under Article 2.4 of the Anti-Dumping Agreement.[360]

7.217. The United States responds to China's argument that the legal and factual bases for the claim cited in the panel request are unrelated to any of the legal and factual bases identified in the consultations request. With respect to the legal bases, the United States argues that the constructed normal value that is determined under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement is one of the two variables subject to the "fair comparison" to be conducted under Article 2.4 and that for this reason the two sets of provisions are not "unrelated". The United States also argues that the issue of MOFCOM's treatment of Keystone's costs of production in the construction of its normal value, including its treatment of Keystone's reported freezer storage costs, is directly related to the question of whether MOFCOM performed a fair comparison under Article 2.4.[361] The United States adds that China's insistence that MOFCOM's adjustment had nothing to with normal value and how costs were allocated to construct normal value conflicts with China's own *post hoc* explanation that MOFCOM made the adjustment precisely as a result of how these costs were allocated to normal value.[362]

7.3.2.5 Evaluation by the Panel

7.218. China's objection concerns the question of the relationship between, on the one hand, the claim(s) ("legal basis of the complaint"[363]) set out in the US request for consultations and, on the other hand, the claim(s) set out in the United States' panel request.

7.219. As set forth in Article 7.1 of the DSU, a panel's terms of reference are defined on the basis of the panel request. That being said, the Appellate Body has clarified that pursuant to the terms of Article 4 of the DSU, which set forth the requirements applicable to consultations and consultations requests, and those of Article 6.2 of the DSU, governing panel requests, the request

[357] China's second written submission, paras. 99-103; opening statement at the second meeting of the Panel, para. 23. In addition, China submits that whether a panel request has impermissibly expanded the scope of a dispute must be determined by exclusive reference to the written request for consultation, not from what is discussed at consultations.

[358] United States' opening statement at the first meeting of the Panel, paras. 55-57; and response to Panel question No. 39 (citing Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 136, 138; and *Brazil – Aircraft*, para. 132).

[359] United States' response to Panel question No. 39.

[360] United States' opening statement at the first meeting of the Panel, paras. 58; response to Panel question No. 39; and opening statement at the second meeting of the Panel, paras. 39-40.

[361] United States' second written submission, paras. 79-80.

[362] United States' opening statement at the second meeting of the Panel, para. 40. The United States considers that in contrast to China's arguments before the Panel, MOFCOM's Determination (erroneously) cite to Keystone's failure to report the freezer storage expenses as its reason for making the adjustment.

[363] Appellate Body Report, *Korea – Dairy*, para. 139.

for consultations constitutes a prerequisite for the panel request and as a result circumscribes the scope of the panel request.[364]

7.220. A number of prior panel and Appellate Body reports have examined this question of the relationship between the request for consultations and the request for the establishment of a panel. These decisions underline that the purpose of consultations is not only to reach a mutually acceptable solution, but also to clarify the matter in dispute. The Appellate Body has stated that consultations "provide the parties an opportunity to define and delimit the scope of the dispute between them".[365] Consequently, the Appellate Body has considered that:

> As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request.[366]

7.221. With respect to the specific question before us, that of the legal basis of the complaint, the Appellate Body considered in *Mexico – Anti-Dumping Measures on Rice* that:

> A complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.[367]

7.222. Consequently, the Appellate Body considered that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations; the addition of provisions must not have the effect of changing the essence of the complaint.[368]

7.223. We agree with this reasoning and note that the parties are in agreement that the relevant question which we must decide is whether the Article 2.4 claim included in the United States' panel request may reasonably be said to have evolved from the claims that were included in the United States' request for consultations.

7.224. Although necessarily dependent upon the specific circumstances of each case, the application of this test in prior disputes reveals that at the very least, some connection must exist between the claims set forth in the panel request and those identified in the request for consultations in terms of either the provisions cited, the obligation at issue or issue in dispute, or the factual circumstances leading to the alleged violation.[369]

7.225. We are guided by these general principles in our examination of the relationship between the claims included in the United States' request for consultations and the Article 2.4 claim included in the United States' panel request. Moreover, consistent with prior decisions on the issue, we conduct this analysis on the basis of the text of these documents without inquiring into the actual consultations that took place between the parties.[370]

---

[364] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 54 and 58.
[365] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[366] Appellate Body Report, *US – Upland Cotton*, para. 293 (citing Appellate Body Report, *Brazil – Aircraft*, para. 132). (footnotes omitted)
[367] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[368] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138. See also Panel Report, *Canada – Aircraft*, para. 9.12; Appellate Body Reports, *India – Patents (US)*, para. 94; *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293.
[369] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 141; Panel Reports, *China – Publications and Audiovisual Products*, paras. 7.121-7.131; *EC – Fasteners (China)*, para. 7.207 and 7.320-7.323.
[370] Appellate Body Reports, *Brazil – Aircraft*, para. 131; *US – Upland Cotton*, para. 285.

7.226. The Article 2.4 claim with respect to the freezer storage expenses adjustment is set out under paragraph 2 of the United States' panel request, pertaining to MOFCOM's calculation of anti-dumping margins. It reads:

> [The United States considers that China's measures are inconsistent with China's commitments and obligations under …] Article 2.4 of the AD Agreement because in calculating Respondents' dumping margins, including that of Respondent Keystone, MOFCOM precluded a fair comparison between the export price and normal value by improperly applying certain costs and expenses.

7.227. By contrast, the United States' request for consultations contains no reference either to the provision at issue (Article 2.4), the obligation (to make a "fair comparison" between the export price and the normal value) or the factual circumstances (MOFCOM's adjustment to Keystone's export price) implicated in the claim included in the panel request. As China points out, the US request for consultations is very precise in its identification of claims in respect of MOFCOM's dumping margins calculations (as opposed to, for instance, procedural violations), the only claims which could conceivably have evolved into the Article 2.4 claim included in the panel request. The request for consultations includes only two such claims, both of which challenge certain aspects of MOFCOM's actions in constructing the normal value for US producers.[371]

7.228. The first claim challenges a very specific aspect of MOFCOM's actions with respect to the determination of the normal value, MOFCOM's failure to calculate costs *on the basis of the records kept by the US producers* as required by Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, which is entirely distinct from MOFCOM's actions in adjusting Keystone's export price, and pertains to an obligation which has nothing in common with the obligation to perform a "fair comparison" under Article 2.4. As a result, this claim could not in our view reasonably be said to have evolved into the Article 2.4 claim included in the United States' panel request.

7.229. The second claim included in the consultations request challenges MOFCOM's failure "to properly allocate production costs" under Article 2.2.1.1. As noted above, Article 2.2.1.1 imposes obligations concerning the manner in which costs of production are to be calculated for the purpose of constructing the normal value in the circumstances provided for under Article 2.2. By contrast, Article 2.4 focuses on the relationship between the export price and the normal value, and requires, *inter alia*, that the investigating authority ensure price comparability in order to arrive at a "fair comparison" between the two. Hence, the obligations set forth under these two provisions are of a different nature and apply in respect of a different action of the investigating authority, the construction of the normal value, on the one hand, and the comparison of the normal value (constructed or not) with the export price, on the other hand.

7.230. We understand the United States to be arguing that China itself recognizes that the issues of MOFCOM's treatment of Keystone's costs of production and of MOFCOM's adjustment to Keystone's export price are closely linked because the adjustment was made in response to perceived problems with the costs of production. China's arguments before the Panel indeed suggest that MOFCOM may have decided to apply the adjustment because it considered that the manner in which Keystone had reported its freezer storage expenses led to the normal value being undervalued once MOFCOM constructed it on the basis of the costs reported by the company. Thus, we agree with the United States that, at least under China's explanations, the two issues are not unrelated. Yet the situation before us is one in which two different, albeit related, sets of facts lead to two distinct violations. The facts implicated in the United States' claim under Article 2.2.1.1 concern MOFCOM's actions in constructing the normal value; by contrast, the US claim under Article 2.4 target MOFCOM's actions to address the perceived imbalance (if that, indeed was the basis for MOFCOM making the adjustment). Once MOFCOM decided to address the perceived imbalance by applying an adjustment to the export price, the relevant claim to challenge this specific action no longer involved Article 2.2.1.1, a provision which exclusively deals with the normal value, but rather involved Article 2.4, which addresses the comparability between the export price and the normal value, including any adjustments made by an authority that affect

[371] Points 1 and 2 of the United States' request for consultations allege that the measures at issue are inconsistent with:

> 1. Articles 2.2 and 2.2.1.1 of the AD Agreement because China failed to calculate costs on the basis of the records kept by the US producers under investigation.
> 2. Article 2.2.1.1 of the AD Agreement because China failed to properly allocate production costs…

price comparability.[372] This does not exclude the possibility that the United States could have challenged the manner in which MOFCOM constructed the normal value in relation to the freezer expenses under Article 2.2.1.1; that would have been a different claim though.

7.231. Pursuant to the foregoing, we consider that if there is any connection, in terms of the provisions or obligation at issue or the factual circumstances leading to the alleged violation, between the claims included in the consultations request and the Article 2.4 claim, it is tenuous at best. Therefore, we cannot conclude that the Article 2.4 claim in the panel request reasonably evolved from the legal basis of the complaint identified in the United States' request for consultations.

7.232. We note the United States' argument that because of the vague explanations provided by MOFCOM, it had initially understood MOFCOM's treatment of the freezer storage expenses to be linked to, or to be part of, the broader issue of MOFCOM's construction of Keystone's normal value. This suggestion by the United States that it was under the impression that MOFCOM's treatment of the freezer storage expenses implicated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement cannot be reconciled with the facts before us. First, although the United States argues that it was apparent that there was something problematic with MOFCOM's treatment of the freezer storage expenses, the request for consultations does not mention MOFCOM's treatment of these expenses. Second, the issue of Keystone's freezer storage expenses is addressed in relation to "adjustments" to the "export price" in both the Final Anti-Dumping Disclosure and the Final Determination, which would have left the United States in no doubt that MOFCOM had addressed what it considered to be Keystone's failure to report the freezer storage expense by making an adjustment to its export price.[373] This is confirmed by Keystone's own Comments on the Final Anti-Dumping Disclosure, in which it refers to MOFCOM's "deduction of freezer fees from export price".[374] This being the case, the United States could not, at the time of the submission of its request for consultations, have been oblivious to the nature of MOFCOM's actions in respect of the freezer storage expenses or as to the provision of the covered agreements potentially implicated by these actions, Article 2.4 of the Anti-Dumping Agreement.

7.233. In light of the foregoing, we find that the United States' claim under Article 2.4 of the Anti-Dumping Agreement falls outside our terms of reference. This being the case, we do not consider the merits of the claim.

7.3.3 Whether MOFCOM properly calculated the amount of subsidization as required by Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

7.3.3.1 Introduction

7.234. The United States argues that China acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because MOFCOM improperly calculated the amount of subsidization per unit of the subsidized and exported product for two of the US producers, Tyson and Pilgrim's Pride. In particular, the United States contends that the numerators of the subsidy equation for Tyson and Pilgrim's Pride include a subsidy that benefited the production of non-subject merchandise, while their denominators reflect only the production of subject merchandise. According to the United States, this mismatch means that the countervailing duty rates for Tyson and Pilgrim's Pride are, on their face, greater than the alleged subsidies that each of these respondents received for the production of subject merchandise.[375]

7.3.3.2 Relevant provisions

7.235. Article VI:3 of the GATT 1994 sets forth the fundamental rule that:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of

[372] The United States' argument on the merits is, in part, that the adjustment to the export price resulted in an unfair comparison because the constructed normal value included some of the freezer fees.
[373] Final Anti-Dumping Disclosure to Keystone, Exhibit USA-14, p. 4; Final Anti-Dumping Determination, Exhibit USA-4, pp. 32-33.
[374] Keystone's Comments on the Final Anti-Dumping Disclosure, Exhibit USA-29, pp. 25-29.
[375] United States' first written submission, para. 226.

> an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

7.236. Article 19.4 of the SCM Agreement states:

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. (footnote omitted)

7.3.3.3 Factual background

7.237. MOFCOM initiated the countervailing duty investigation on 27 September 2009. Among the subsidies included in the investigation were alleged "upstream" subsidies to US corn and soybeans producers. The Petitioner alleged that these subsidies allowed US producers of broiler products to secure very low feed prices for the production of the subject product. Throughout the course of the investigation MOFCOM issued several questionnaires and supplemental questionnaires to the respondents and the United States Government that dealt with these alleged subsidies to corn and soybean producers.[376]

7.238. In the Preliminary Determination, which was published on 28 April 2010, MOFCOM concluded that the subsidies to corn and soybean producers passed through to US producers of broiler products. To determine the amount of the benefit received by producers of the subject product, MOFCOM multiplied the quantity of corn or soybean purchased by US respondents and the quantity of soybeans converted into soybean meal during the period of investigation by the possible subsidy that each ton of corn and soybeans might receive from the United States Government.[377] MOFCOM added this benefit to those received by respondents from other subsidy programmes and divided the result by the sales volume of the subject products during the period of investigation to arrive at the subsidy amount per tonne of the subject products. MOFCOM then divided this amount by the weighted average c.i.f. price of the subject products to arrive at the final *ad valorem* subsidy rate.[378] MOFCOM used the data reported in response to question I.4 of the Second Supplemental Questionnaire for Tyson[379] and question I.6 of the Second Supplemental Questionnaire with respect to Pilgrim's Pride for the purchase quantities that were used in the numerator of the subsidy calculation equation.[380]

7.239. After the Preliminary Countervailing Duty Determination, Tyson and Pilgrim's Pride submitted arguments to MOFCOM contending that MOFCOM's subsidy allocation was incorrect.[381] They explained that MOFCOM used the figures they had reported for corn and soybean purchases and consumption, but that these figures were for all chickens and that they used chickens to produce a significant quantity of non-subject merchandise.[382]

7.240. MOFCOM officials conducted verification in the countervailing duty investigation at Tyson and Pilgrim's Pride as well as with the United States Government in late May and early June 2010.

---

[376] See China's first written submission, paras. 201-215 (detailing questionnaires sent to Tyson and Pilgrim's Pride in October 2009, December 2009, and March 2010).

[377] Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 42; see also Preliminary Countervailing Duty Disclosure to Tyson, Exhibit USA-15; Preliminary Countervailing Duty Disclosure to Pilgrim's Pride, Exhibit USA-16; Preliminary Countervailing Duty Disclosure to Keystone, Exhibit USA-17.

[378] Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 62; see also China's response to Panel question Nos. 45 and 47; Final Countervailing Duty Disclosure to Tyson, Exhibit USA-18, p. 10; and Final Countervailing Duty Disclosure to Pilgrim's Pride, Exhibit USA-19, p. 52.

[379] Tyson's Second Supplemental Countervailing Duty Questionnaire Response, Exhibit CHN-13.

[380] Pilgrim's Pride Second Supplemental Countervailing Duty Questionnaire Response, Exhibit CHN-16.

[381] United States' first written submission, para. 225 (explaining that this issue did not arise for the third US respondent, Keystone, because it only produced subject merchandise during the POI).

[382] Pilgrim's Pride Comments on the Preliminary Countervailing Duty Determination, Exhibit USA-43, p. 9; Tyson's Comments on the Preliminary Countervailing Duty Determination, Exhibit USA-44, pp. 2-4.

7.241. In the Disclosure for the Final Countervailing Duty Determination, MOFCOM maintained its subsidy allocation methodology.[383] The respondents and the United States Government submitted Comments on the Disclosure, again arguing that the subsidy calculation was incorrect because the numerator included feed consumed in the production of non-subject products. In their Comments, the US producers and the United States Government suggested ways in which the subsidy calculation could be modified to produce a more accurate result.[384] MOFCOM responded to the letter from the United States Government on 13 August 2010.[385] With respect to Pilgrim's Pride, MOFCOM asserted that it had used the "amount of corn and soybean meal the company purchased during the POI for subject merchandise production."[386] With respect to Tyson, MOFCOM stated that it had verified that "the amount of corn and soybean meal the company purchased during the POI matches the amount of corn and soybean meal consumed for subject merchandise production."[387] MOFCOM noted that because it "used the data the respondents reported in calculating their CVD margins" there was no mis-matching of data.[388]

7.242. MOFCOM made no change to its subsidy allocation in the Final Countervailing Duty Determination. MOFCOM noted that it had received comments from the interested parties and that it had seriously considered all the comments[389], but did not specifically refer to the issue of whether MOFCOM had properly allocated the benefit across both subject and non-subject merchandise.[390]

7.3.3.4 Main arguments of the parties

7.3.3.4.1 United States

7.243. The United States argues that a proper interpretation of the obligations in Articles 19.4 of the SCM Agreement and VI:3 of the GATT 1994 requires an investigating authority, at a minimum, to ensure that any countervailing duty reflect only the subsidies provided to the subject products and not to any other products.[391] The United States maintains that these obligations "are mandatory in nature and contain no exceptions."[392] According to the United States, even though the scope of the investigation explicitly excludes certain chicken products and live chickens from the investigation, MOFCOM took subsidies that benefited those non-subject products and allocated them to the subject merchandise. The United States argues that while the initial allocation may have been a misreading of the data respondents submitted, MOFCOM deliberately decided to perpetuate the error even after Tyson, Pilgrim's Pride and the United States Government brought it to MOFCOM's attention and proposed acceptable options for correcting it. As a result, MOFCOM's countervailing duty calculations for Pilgrim's Pride and Tyson are inconsistent with Articles 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[393]

7.244. In the United States' view, China is asserting some form of procedural default whereby respondents provided incorrect answers and now they must suffer the consequences. The United States argues that even if a procedural default on the part of the respondents excused China from its obligation, China's logic does not make sense as it would mean that respondents mislead MOFCOM in a manner that *increased* their countervailing duty rates.[394] Furthermore, the United States maintains that the respondents unquestionably provided all of the data needed to

[383] See Final Countervailing Duty Disclosure to Tyson, Exhibit USA-18; Final Countervailing Duty Disclosure to Pilgrim's Pride, Exhibit USA-19; Final Countervailing Duty Disclosure to Keystone, Exhibit USA-20.
[384] Pilgrim's Pride Comments on the Preliminary Countervailing Duty Determination, USA-43, providing its own calculation of the subsidy benefit in Appendix 6; Tyson's Comments on the Preliminary Countervailing Duty Determination, Exhibit USA-44, proposing that MOFCOM use Tyson's sales of all chicken products in the denominator.
[385] Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42.
[386] Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42, p. 4.
[387] Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42, p. 4.
[388] Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42, p. 4.
[389] Final Countervailing Duty Determination, Exhibit USA-5, p. 9.
[390] See Final Countervailing Duty Determination, Exhibit USA-5, pp. 48-58.
[391] United States' first written submission, paras. 228-231 (citing Panel Report, *US – Lead and Bismuth II,* paras. 6.51-6.52; and Appellate Body Reports, *US – Countervailing Measures on Certain EC Products,* para. 139; *US – Softwood Lumber IV*, para. 164, footnote 196; and *US – Anti-Dumping and Countervailing Duties (China),* para. 556).
[392] United States' second written submission, para. 91.
[393] United States' first written submission, para. 241.
[394] United States' second written submission, para. 90; and response to Panel question No. 49.

calculate a proper countervailing duty prior to the Preliminary Determination and expressly pointed out MOFCOM's error long before the Final Determination.[395] Finally, the United States contends that the authority has an affirmative obligation to reach the correct result; the authority cannot knowingly reach the wrong result simply because it is dissatisfied by some aspect of a questionnaire response.[396]

7.245. The United States disagrees with China that it has placed too much emphasis on a particular question in the second supplemental questionnaire and should instead focus on MOFCOM's holistic inquiry into the matter. The United States notes that during the investigation, to the extent MOFCOM referenced any questionnaire data, it was the data in the second questionnaire and that MOFCOM never referenced the other questions or responses China refers to in its first written submission.[397] Accordingly, the United States views these arguments as *post hoc* rationalizations.[398] Additionally, the United States argues that nothing China points to changes the fact that the respondents alerted MOFCOM to the "mismatch" and provided MOFCOM the potential remedy.[399] The United States notes that throughout the entire dispute, China has not bothered to explain why these remedies cannot be implemented.[400]

7.246. With respect to China's later contention that the questions in the Second Supplemental and other Questionnaires were specific to subject products and did not ask for data on corn and soybeans used to feed chickens that were processed into both subject and non-subject merchandise, the United States asserts that contrary to China's arguments, the wording of the questions (whether based on the United States' or China's translations) refers to "broilers" or "chickens" which is not synonymous with the subject merchandise and could include non-subject products. In particular, the United States contends that it was far from obvious to Tyson and Pilgrim's Pride that the questions, spread out over multiple documents, were aiming to calculate the proper subsidy benefit for only subject merchandise.[401] The United States argues that MOFCOM knew Tyson and Pilgrim's Pride produced both subject and non-subject merchandise and that MOFCOM failed to meet its obligations when it did not request information specific to the amounts of subsidized feed that benefited production in respect to both subject and non-subject merchandise.[402] Finally, it is the United States' view that even if there were any error in reporting on the part of respondents, this does not excuse MOFCOM's failure to try and correctly calculate the subsidy margin once the respondents recognized what MOFCOM was trying to accomplish and approached it with a viable solution.[403]

7.3.3.4.2 China

7.247. China agrees with the United States that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 set forth a fundamental rule that an investigating authority has an obligation under GATT 1994 and the SCM Agreement to align the numerator and denominator in calculating the appropriate subsidy margin.[404]

7.248. China contends that MOFCOM's subsidy margin calculation was proper and relied upon data provided by the respondents concerning the volume of feed purchased and consumed in the production of subject merchandise and the total weight of subject merchandise sales.[405] In China's view, there is no question that this calculation aligns the proper numerator and denominator for purposes of deriving a subsidy margin specific to subject merchandise.[406]

[395] United States' second written submission, para. 90.
[396] United States' comments on China's response to Panel question No. 100.
[397] United States' second written submission, para. 94 (citing Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42, p. 4; and United States' response to Panel question No. 49).
[398] United States' second written submission, para. 94.
[399] Tyson's Comments on the Countervailing Duty Disclosure, Exhibit USA-48; Pilgrim's Pride's Comments on the Countervailing Duty Disclosure, Exhibit USA-45; and Subsidy Calculation Letter, Exhibit USA-52, p. 1.
[400] United States' second written submission, para. 95.
[401] United States' response to Panel question No. 49.
[402] United States' second written submission, para. 96.
[403] United States' response to Panel question No. 49.
[404] China's first written submission, para. 195.
[405] China's response to Panel question No. 45.
[406] China's second written submission, para. 125.

7.249. In its first written submission, China argues that the United States places too much emphasis on the answer to a particular question in the Second Supplemental Questionnaire about the consumption of feed and that the responses to this question alone, contrary to the United States' assertions, would not have enabled MOFCOM to properly allocate the subsidy to subject and non-subject merchandise. China also argues that during the investigation, the respondents "struggled to provide all the information necessary to perform a precise calculation, and instead left MOFCOM to apply what respondents had themselves held out as the feed consumption data MOFCOM requested."[407] China later acknowledges that the answer in the Second Supplemental Questionnaire was indeed the sole source of the data MOFCOM utilized in the subsidy calculation.[408] In its second written submission, China argues that the information used was complete and appropriate for its purpose. China contends that the many questions and allegedly incomplete answers it referred to in its first written submission were MOFCOM assuring itself that the respondents had accurately reported the specific purchase and consumption data necessary for the per unit subsidy calculation.[409]

7.250. China argues that the Second Supplemental Questionnaire asked directly for total consumption for the production of the subject products, along with questions on total purchases and unit consumption.[410] China contends that the United States' argument that MOFCOM asked for information on "broiler products" as distinct from "subject products," is wrong.[411] According to China, "the meaning of 'broiler products' as subject merchandise was unambiguous, since it was expressly defined in MOFCOM's notice of initiation, and the question plainly relates to consumption and not purchases."[412] China argues that MOFCOM's findings at verification support its conclusions. In particular, China notes that MOFCOM found that the data in Tyson's consumption records for corn and soybean / soybean meal was roughly 10% higher than reported in the Questionnaire Response. China contends that this indicates that what was found at verification was total consumption of corn and soybean / soybean meal and the lower amount reported in the questionnaire related to production of subject merchandise.[413] With respect to Pilgrim's Pride, China maintains that it did not substantiate its arguments that some of the corn and soybean meal was used in the production of breeders and pullets, nor that its data was for total production rather than production of subject merchandise. In particular, China notes that the production data Pilgrim's Pride cited to in its arguments was on the record of the anti-dumping proceeding and not on the record of the countervailing duty proceeding.[414]

7.251. China maintains that MOFCOM did not ask for or use data related to *total* feed purchases. China points to the Final Disclosures to Tyson and Pilgrim's Pride for language that it contends supports its view that MOFCOM never stated: (i) any intent to use *total* purchases of feed, (ii) that

[407] China's first written submission, para. 200; see also paras. 216-217, explaining:
In its preliminary determinations, MOFCOM was presented with an imperfect record ... the full set of data required by MOFCOM to allow it to fully confirm the extent of the feed subsidies had not been provided by the respondents. Issues remained with respect to production volumes for live broilers, subject merchandise, and costs of production. Given the state of the record, MOFCOM had no real alternative but to take at face value the data reported by both companies in response to questions posed in the second supplemental questionnaire on the amount of feed consumed in the production of subject merchandise.

After its preliminary results, MOFCOM received arguments by both respondents. In both instances Tyson and Pilgrim's argued that MOFCOM had over-allocated feed subsidies to subject merchandise and sought to clarify that the feed information provided encompassed more than subject merchandise. In none of these arguments, however, did either respondent actually provide a basis for MOFCOM to discard the feed information used in the calculation.
For company-specific arguments, see China's first written submission, paras. 218-219 (Tyson) and paras. 221-224 (Pilgrim's Pride).

[408] China's response to Panel question No. 45.

[409] China's second written submission, para. 126.

[410] China's second written submission, para. 128.

[411] United States' response to Panel question No. 49.

[412] China's response to Panel question No. 100. See also China's second written submission, paras. 140-142; opening statement at the second meeting of the Panel, para. 53.

[413] China's response to Panel question No. 100.

[414] China's response to Panel question No. 100.

it used incomplete data, or (iii) that it used data it did not understand to be feed purchases for the production (i.e. consumption) of subject merchandise during the POI.[415]

7.252. With respect to the United States' argument that MOFCOM did not properly consider the respondents' arguments or correct its error once the respondents and the United States brought the issue to its attention, China notes that MOFCOM was well aware of respondents' arguments, but the arguments made by the respondents all focused on the wrong issue. According to China, the basis of all the respondents' arguments – that MOFCOM affirmatively used reported total purchases in the calculation – was incorrect and did not reflect MOFCOM's methodology.[416]

7.3.3.5 Arguments of the third parties

7.253. The **European Union** agrees with the United States that if the parallelism between the numerator and the denominator in the calculation of subsidisation per unit is broken, the countervailing duties determined on that basis are certain to exceed the ceiling imposed by Articles 19.4 and VI:3.[417]

7.254. **Saudi Arabia** points to the Appellate Body decision in *US – Anti-Dumping and Countervailing Duties (China)* for the premise that Article 19.4 "places a quantitative ceiling on the amount of a countervailing duty, which may not exceed the amount of the subsidization."[418] Therefore, both Articles 19.4 and VI:3 impose a minimum requirement on the investigating authority to ensure a proper and correct allocation of the total subsidy amount to the specific subject product.[419] Saudi Arabia considers that if a subsidy benefits several products, including but not limited to the product under consideration, it is improper to allocate the total subsidy amount to the subject product alone. If an investigating authority were to make such an improper allocation, it would likely impose countervailing duties that are in excess of the amount of subsidies benefitting the product.[420]

7.3.3.6 Evaluation by the Panel

7.255. The issue before the Panel is whether MOFCOM impermissibly countervailed more than the subsidies that benefited the production of subject imports in contravention of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. In particular, the Panel is presented with the question of whether MOFCOM used a data set relating to the purchase of subsidized corn and soybeans that benefited the production of live chickens and improperly allocated all of the benefit from that subsidy to the subject broiler products.

7.256. The panel in *US – Lead and Bismuth II* explained that the ordinary meaning of the text of Article 19.4 requires that "no countervailing duty may be imposed on an imported product if no (countervailable) subsidy is found to exist with respect to that imported product, since in such cases the amount of subsidy found to exist with respect to the imported product would be zero."[421] The panel went on to conclude that:

---

[415] China's second written submission, paras. 131-132. For Tyson: "Here, the investigation authority clarifies that the investigation authority uses the quantity of corn and soybean meal provided by your company in the response to the questionnaire as for the production of the subject product during the POI." Tyson Final Countervailing Duty Disclosure, Exhibit USA-18, p. 10; for Pilgrim's Pride: "Herein, it needs to be clear that investigating authority's calculation of your company's accepted subsidy benefits in the upstream subsidy program is based on the quantity of corn and soy purchased for the production of subject merchandise during the POI that was provided in your company's questionnaire response." (Final Countervailing Duty Disclosure to Pilgrim's Pride, Exhibit USA-19, p. 52).

[416] China's second written submission, para. 134; see Tyson's Comments on the Preliminary Countervailing Duty Determination, Exhibit USA-44, p. 1; Pilgrim's Pride Comments on the Preliminary Countervailing Duty Determination, Exhibit USA-43, pp. 7-9; Subsidy Calculation Letter, Exhibit USA-52, p. 1.

[417] European Union's third-party submission, para. 56 (citing Appellate Body Report, *US – Softwood Lumber IV*, para. 164, footnote 196), and paras. 63-64.

[418] Saudi Arabia's third-party submission, para. 35 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 554).

[419] Saudi Arabia's third-party submission, para. 37.

[420] Saudi Arabia's third-party submission, para. 37.

[421] Panel Report, *US – Lead and Bismuth II*, para. 6.52. (emphasis added)

> consistent with the fundamental premise underlying Articles 19.1, 19.4, and 21.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, and consistent with the object and purpose of countervailing duties envisaged by Part V of the SCM Agreement, we consider that a countervailing duty may only be imposed on an imported product if it is demonstrated that a (countervailable) subsidy was bestowed directly or indirectly on the manufacture, production or export of that merchandise.[422] (emphasis added)

7.257. With respect to Article VI:3 of the GATT 1994, the Appellate Body clarified in *US – Countervailing Measures on Certain EC Products* that, "under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation."[423] As the Appellate Body explained in *US – Softwood Lumber IV*, "the correct calculation of the countervailing duty rate would depend on *matching* the elements taken into account in the numerator with the elements taken into account in the denominator."[424]

7.258. Consequently, the Panel agrees with the parties that under Articles 19.4 of the SCM Agreement and VI:3 of the GATT 1994 China was obligated to accurately determine the per unit subsidy amount and not impose countervailing duties exceeding that amount. Therefore, the question before the Panel is not one of interpretation, but rather one of application. We recall that our role is neither to conduct a *de novo* review of the evidence nor to substitute our own conclusions for those of MOFCOM. However, neither should we simply accept MOFCOM's conclusions.[425] Our task is to review whether MOFCOM has provided a reasoned and adequate explanation of how the evidence on the record supports its factual findings and how the factual findings support its overall determination.[426] In particular, we must examine whether MOFCOM's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence.[427]

7.259. China confirmed that the data MOFCOM used for the total quantity of soybean and corn meal used to produce subject merchandise during the period of investigation was that reported in response to question I.4 of the Second Supplemental Questionnaire for Tyson and question I.6 of the Second Supplemental Questionnaire for Pilgrim's Pride.[428] Most of the parties' argumentation has centred on what MOFCOM specifically asked for in these questions. China maintains that the Second Supplemental Questionnaire clearly asked for consumption in the production of subject merchandise and thus MOFCOM used the correct data and its subsidy calculation was accurate.[429] By contrast, the United States argues that MOFCOM asked the respondents to report the total quantity of corn and soybean purchased during the period of investigation, without asking them to indicate how much feed was used for the production of subject merchandise. The United States contends that in response to this question, Tyson and Pilgrim reported data in the Second Supplemental Questionnaire that were for total consumption of corn and soybeans used in production of all products (including non-subject merchandise).[430]

7.260. China translates the relevant question from the Second Supplemental Questionnaire (I.4 for Tyson and I.6 for Pilgrim's Pride) as asking the respondents to provide "the specific name,

---

[422] Panel Report, *US – Lead and Bismuth II*, para. 6.57.

[423] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139 (footnote omitted). We note that in the present case, the United States is not challenging MOFCOM's determination that the upstream subsidies to corn and soybeans benefited the production of broiler products or the determination that the entire amount of the benefit passed through to producers of the subject product. Rather the United States' claim is limited to the allocation of that benefit between subject and non-subject broiler products.

[424] Appellate Body Report, *US – Softwood Lumber IV*, footnote 196. (emphasis original)

[425] Appellate Body Report, *US – Lamb,* para. 106; see also Appellate Body Report, *US – Cotton Yarn,* para. 74.

[426] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS,* para. 186; see also Appellate Body Report, *US – Lamb*, para. 103.

[427] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada),* para. 93 (citing Appellate Body Report, *US – Lamb*, para. 106).

[428] China's response to Panel question No. 45 (citing Pilgrim's Pride Second Supplemental Countervailing Duty Questionnaire Response, Exhibit CHN-16).

[429] China's first written submission, para. 207 (citing Tyson's First Supplemental Countervailing Duty Questionnaire Response, Exhibit CHN-12) and para. 214; second written submission, paras. 138-142.

[430] United States' first written submission, para. 240; see also United States' response to Panel question Nos. 52 and 100.

main ingredients, total quantities and value of the various feeds (for example, corns and soybeans etc.) consumed to produce the broiler products during POI."[431] Although the United States argues that the question referred to "chicken products"[432], the United States' version of the question translates the term as "subject merchandise".[433] We are not convinced that a reference to "chicken products" or "broiler products" in the context of this investigation unambiguously refers to the subject merchandise. We recall that the scope of the investigation refers to the terms "broiler products" or "chicken products" not only for included products, but also for excluded ones.[434] Furthermore, the debate over translations centres on what was clear or understandable to the *respondents* when they received the questionnaire. However, we do not know whether any of the translations presented to the Panel by the parties were what the respondents relied upon when they were actually preparing the data. In sum, we find the debate on translations a distraction from the main issue, which is whether MOFCOM provided a reasoned and adequate explanation of how the facts support its determination that the reported data was appropriate to use in the per unit subsidy calculation.

7.261. Under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, MOFCOM has an obligation to ascertain the precise amount of subsidy attributed to the imported products under investigation. This requires more effort on the part of an investigating authority than simply accepting data and using it. We find contextual support for our understanding in Article 10 of the SCM Agreement which requires Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with the provisions of Article VI and the terms of the SCM Agreement. Furthermore, the Appellate Body has clarified in *US – Wheat Gluten*, that authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – "must actively seek out pertinent information"[435] and may not remain "passive in the face of possible shortcomings in the evidence submitted."[436] Thus, MOFCOM needed to ensure that it had calculated the correct subsidy amount, rather than simply accept the information submitted by respondents, particularly as the respondents had alerted MOFCOM that they may have misunderstood the question and provided incorrect data.

7.262. MOFCOM was aware that the scope of the investigation specifically excludes certain broiler products such as live chickens and sausages and pre-cooked products. MOFCOM was also aware that both companies produced live chickens that were processed into products other than those included in the scope of the investigation. In their Comments on the Preliminary Countervailing Duty Disclosure and Determination Tyson, Pilgrim's Pride and the United States Government argued that the respondents' Responses to the Second Supplemental Questionnaire (I.4 for Tyson and I.6 for Pilgrim's Pride) included corn and soybean used in the production of all merchandise. Thus, MOFCOM was alerted to the possibility that the amount of subsidy it was allocating to subject merchandise might include subsidies to excluded products.

7.263. Despite these indications that there were alleged shortcomings in the evidence submitted, MOFCOM did not directly address the competing plausible explanations of the evidence. Nothing in the disclosure of what took place at verification, which occurred after MOFCOM had received the respondents' Comments on the Preliminary Countervailing Duty Disclosure and Determination, refers to MOFCOM verifying whether the data reported was for consumption of corn and soybean in the production of subject products. Indeed, the only issue mentioned under the heading relating to

[431] Tyson's Second Supplemental Questionnaire Response, Exhibit CHN-13; and Pilgrim's Pride Second Supplemental Questionnaire Response, Exhibit CHN-16.
[432] United States' response to Panel question No. 49.
[433] Second Supplemental Countervailing Duty Questionnaire, Exhibit USA-38.
[434] Preliminary Countervailing Duty Determination, Exhibit USA-3. We note that in every notice that was part of the investigation, the parties have provided slightly different translations of the text of the scope of the investigation. Although China did not raise a formal objection to the translation pursuant to the Panel's Working Procedures, it later argued that the proper translation to be utilized would be China's translation of the scope in the Final Anti-Dumping Determination in Exhibit CHN-3, or the United States' translation of the Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7. China's main concern with the translation relates to the headings used, not the main text of the paragraph. In Exhibit USA-3 for "Name of the Subject Products" the United States does not translate the Chinese characters, whereas in Exhibit CHN-3 China translates them as "white feather broiler products". Similarly, Exhibit USA-7 uses the term "broiler products or chicken products." The next heading provides the "English name of the Product". Exhibit USA-3 uses the term "white feather broiler products" here. By contrast, both Exhibits CHN-3 and USA-7 use the term "broiler products or chicken products."
[435] Appellate Body Report, *US – Wheat Gluten,* para. 53.
[436] Appellate Body Report, *US – Wheat Gluten*, para. 55.

verification of corn and soybean purchases is that the data would be placed simultaneously on the records of both the anti-dumping and countervailing duty investigations.[437] The issue is also not addressed in the Disclosure documents sent to Tyson and Pilgrim's Pride prior to the Final Countervailing Duty Determination.

7.264. MOFCOM did respond to the United States Government's Comments on the Final Disclosures in which the United States Government also argued that MOFCOM relied on incorrect data for the amount of corn and soybean meal utilized in the production of subject products. In its letter to the United States Government, MOFCOM answered that it used the amount of corn and soybean meal Pilgrim's Pride purchased during the POI for subject merchandise production reported in Pilgrim's Pride's Questionnaire Response. For Tyson, MOFCOM maintains that it requested, in the Second Supplemental Questionnaire, the company to provide the amount of corn and soybean meal the company purchased during the POI, as well as corn and soybean meal consumed for producing the subject products during the POI. MOFCOM states that it verified that the amount of corn and soybean meal the company purchased during the POI matches the amount of corn and soybean meal consumed in the production of subject products. On this basis, MOFCOM states that it used the data the respondents reported in calculating their countervailing duty margins and there is no mismatching of data.[438] MOFCOM does not address the arguments of the respondents with reference to the data provided in the Questionnaire Responses or the alternative methods proposed. MOFCOM maintains that it received the information it asked for and therefore there was no error.

7.265. China provides the Panel with exhibits from the verification and explains how they support its interpretation of the data.[439] China also provides a discussion of the various Questionnaire Responses in its written submissions.[440] Meanwhile, the United States points to record evidence which seems to indicate that the data submitted related to consumption of corn and soybeans for the production of live broilers, which are then further processed into both subject and non-subject merchandise.[441] The Panel will not conduct a *de novo* review of the evidence. China provided, in its submissions, a discussion of the questionnaire responses and of the exhibits taken during verification. This is the type of discussion that we would have expected to find on the record of the investigation. However, during the investigation MOFCOM confined itself to conclusory statements.

7.266. China accepts that MOFCOM was obligated under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 not to calculate a countervailing duty margin that exceeded the actual per unit subsidisation rate. To ensure that its calculation was correct, MOFCOM should have taken sufficient account of conflicting evidence and respond to competing plausible explanations of that evidence, but it did not do so. MOFCOM also did not provide a reasoned and adequate explanation as to why the facts supported the conclusions it reached with respect to the precise amount of the subsidy attributed to the imported products under investigation. Therefore, the Panel finds that China acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because MOFCOM did not ensure that the countervailing duty levied did not exceed the amount of the subsidization per unit of the subsidized and exported product.

---

[437] Tyson's Verification Disclosure, Exhibit CHN-70; and Pilgrim's Pride Verification Disclosure, Exhibit CHN-71. Given this statement, it is problematic that MOFCOM's reason for rejecting Pilgrim's Pride total production data, which it claims would enable MOFCOM to fix the error, is that it was only on the record of the anti-dumping proceeding.

[438] Reply to the US Government's Comments on the Final Disclosure, Exhibit USA-42, p. 4.

[439] China's response to Panel question No. 100; Corrected Exhibit CS2-I-3, Exhibit CHN-66; Tyson's Verification Exhibit 34 and Comparison Table, Exhibit CHN-67; Pilgrim's Pride Verification Exhibit and Comparison Table, Exhibit CHN-68; Pilgrim's Pride Revised Annex II-S1-2, Exhibit CHN-69; Tyson's Verification Disclosure, Exhibit CHN-70; and Pilgrim's Pride Verification Disclosure, Exhibit CHN-71.

[440] China's first written submission, paras. 200-215; response to Panel question No. 51; second written submission, paras. 124-132; and response to Panel question No. 100. China simultaneously asserts that the data provided on the one hand is incomplete and suspect, but on the other is complete and correct. (See e.g. China's first written submission, para. 216: "[i]n its preliminary determinations, MOFCOM was presented with an imperfect record. As discussed above, the full set of data required by MOFCOM to allow it to fully confirm the extent of the feed subsidies had not been provided by the respondents"; and China's second written submission, para. 129: "In response to question 4 of its second supplemental questionnaire on total consumption, Tyson provided the information necessary to perform the per unit subsidy rate calculation, i.e., the quantity of consumption of feed materials during the period of investigation for the production of subject merchandise.")

[441] Tyson's Annex CS2-I-3, Exhibit CHN-37; and Pilgrim's Pride Annex II-S1-2, Exhibit CHN-38.

7.3.4 Whether MOFCOM complied with Articles 6.8, 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement when it applied facts available to calculate the "all others" rate for unknown producers/exporters in the anti-dumping investigation

7.3.4.1 Introduction

7.267. The United States' claims with regard to the "all others" rate determined by MOFCOM in the context of the anti-dumping investigation concern a number of different provisions in the Anti-Dumping Agreement:

i. The United States claims that China acted inconsistently with Article 6.8 and Annex II, paragraph 1, of the Anti-Dumping Agreement by imposing an "all others" rate based on adverse facts available on producers/exporters that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary information or otherwise impede the anti-dumping investigation;

ii. The United States claims that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement due to MOFCOM's failure to inform the United States and other interested parties of the essential facts under consideration that formed the basis for the calculation of the "all others" rate; and

iii. The United States claims that MOFCOM did not disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact, as required by Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement.

7.3.4.2 Relevant provisions

7.268. Article 6.8 of the Anti-Dumping Agreement provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7.269. Paragraphs 1 and 7 of Annex II to the Anti-Dumping Agreement are particularly relevant to the claims under consideration. They provide:

> 1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.
>
> 7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

7.270. Article 6.9 mandates the disclosure of "the essential facts under consideration". Its text is set out in preceding sections of this Report.

7.271. Article 12.2 requires investigating authorities to give public notice:

> … of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

7.272. This obligation is further elaborated in the subparagraphs of Article 12.2 as follows:

> 12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
>
> > (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
> >
> > (ii) a description of the product which is sufficient for customs purposes;
> >
> > (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
> >
> > (iv) considerations relevant to the injury determination as set out in Article 3;
> >
> > (v) the main reasons leading to the determination.
>
> 12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.3.4.3 Factual background

7.273. Upon initiation of the anti-dumping investigation, on 27 September 2009, MOFCOM transmitted the Notice of Initiation to the US Embassy in China[442] and posted the Notice together with the relevant registration forms on its website.[443] In the Notice of Initiation, MOFCOM provided basic information concerning the investigation, required any interested party – including any US exporter – that wished to participate in the investigation to register with MOFCOM by 19 October 2009, and indicated that failure to participate and provide the information requested by MOFCOM could result in a determination based on facts available.[444] The Registration Form, attached to the Notice of Initiation, asked foreign producers/exporters to fill in certain information

[442] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 2; Letter to the US Embassy on Initiation, Exhibit CHN-63.
[443] Notice of Initiation of the Anti-Dumping Investigation, Exhibit CHN-47 (Chinese version containing the internet link); Anti-Dumping Investigation Registration Form, Exhibit CHN-49.
[444] Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6.

about their companies, including contact details and the quantity and value of broiler products exported to China during the POI.[445] MOFCOM received 36 separate entries of appearance from US producers/exporters (6 of which were listed in the Petition) and an entry of appearance from USAPEEC, a US industry association.[446]

7.274. MOFCOM limited its examination to three producers: Keystone, Tyson, and Pilgrim's Pride. On 20 October 2009, MOFCOM sent anti-dumping questionnaires to those "mandatory respondents", as well as to an additional producer/exporter, Sanderson, whom China refers to as a "selected, non-mandatory respondent".[447] On the same day, 20 October 2009, MOFCOM posted the anti-dumping questionnaires on its website.[448]

7.275. In its Preliminary Determination, MOFCOM determined the following anti-dumping rates for the selected mandatory respondents: Keystone, 44%; Tyson, 43.1%, and Pilgrim's Pride, 80.5%. MOFCOM applied the weighted-average of these dumping margins, 64.5%, to the US companies that registered with MOFCOM, but were not investigated, including Sanderson.[449]

7.276. MOFCOM preliminarily assigned a rate of 105.4% to "all other" US companies that did not register with MOFCOM (and as a consequence, also did not file a questionnaire response).[450] The Preliminary Anti-Dumping Determination indicates that:

> As to all other companies in the U.S. that neither make an entry for appearance nor provides a questionnaire response, according to Article 21 of the AD Regulations, the Investigating Authority decides to make determination related to the dumping and dumping margin using facts that have been obtained and the best information that can be obtained.[451]

7.277. Prior to the issuance of its Final Determination, MOFCOM issued to the United States Government a Disclosure document explaining the basic facts on which it was reached. In this Disclosure document, MOFCOM explained that:

> For other American companies which didn't respond to the investigation and didn't submit an answer sheet, according to Article 21 of the Antidumping Regulations, the Authority decides to use the normal value and export price of a model from the sampled companies to determine their dumping margins.[452]

7.278. In the Final Determination, MOFCOM made the following changes to its rates: Keystone, 50.3%, Tyson, 50.3%; Pilgrim's Pride, 53.5%; and sampled companies (that registered but were not investigated), 51.8%.[453] MOFCOM followed the same approach to determining the "all others" rate as in the Preliminary Determination and confirmed the 105.4% rate applied to "all other" US producers.[454] The Final Determination indicates that:

> As to all other companies in the U.S. that neither make an entry for appearance nor provides a questionnaire response, according to Article 21 of the AD Regulations, the Investigating Authority decides to determine their respective normal value and export price using facts that have been obtained and the best information that can be obtained.[455]

[445] Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6; Anti-Dumping Investigation Registration Form, Exhibit CHN-49.
[446] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 2-3.
[447] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 3. As a voluntary respondent, Sanderson submitted questionnaire responses, as did the three examined respondents.
[448] China's response to Panel question No. 80.
[449] Preliminary Anti-Dumping Determination, Exhibit USA-2, section 1.2.3, 4.1.D and Appendix II.
[450] Preliminary Anti-Dumping Determination, Exhibit USA-2, section 4.1.E and Appendix II.
[451] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 20-21.
[452] Anti-Dumping Disclosure to the US Government, Exhibit USA-11, p. 11.
[453] Final Anti-Dumping Determination, Exhibit USA-4, Appendix II.
[454] Final Anti-Dumping Determination, Exhibit USA-4, p. 62.
[455] Final Anti-Dumping Determination, Exhibit USA-4, p. 33.

7.3.4.4 Main arguments of the parties

7.3.4.4.1 United States

7.3.4.4.1.1 Application of a facts available rate under Article 6.8 and Annex II of the Anti-Dumping Agreement

7.279. The United States argues that MOFCOM failed to notify "all other" US producers/exporters of: (i) the initiation of the investigation, (ii) the information required, and (iii) the fact that failure to participate and provide certain information would result in a determination based on facts available.[456] As a consequence, MOFCOM could not consider that failure of these producers/exporters to register justified resorting to facts available under Article 6.8. The United States contends that an exporter that is unknown to the investigating authority is not notified of the information required of it, and is thus denied an opportunity to provide it; it adds that MOFCOM never sent copies of the questionnaires to the unknown producers/exporters.[457] The United States understands China to argue that MOFCOM applied a facts available "all others" rate to induce cooperation. Yet, in the United States' view this incentive can only work if companies were aware of the investigation, but declined to participate, which was not the case.[458] Consequently, the United States submits, MOFCOM resorted to facts available inconsistently with Articles 6.8 and Annex II, since the unknown producers/exporters cannot be said to have: (i) refused access to, or (ii) otherwise failed to provide necessary information, or (iii) impeded the investigation, as provided in Article 6.8.[459]

7.280. The United States comments on China's argument that MOFCOM attempted to notify all producers/exporters by: (i) posting a public notice on MOFCOM's website; (ii) placing a copy of the initiation notice in a reading room in Beijing; and (iii) contacting the US Embassy in China. First, in the United States' view, posting a public notice on MOFCOM's website is not likely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website at least once every 20 days, given that MOFCOM required them to register within 20 days from the initiation of the investigation. The United States' position is that the internet is not a specific locale that would confer knowledge to interested parties of the existence of the initiation notice. The United States adds that had MOFCOM sent a targeted communication to producers/exporters, there may be some validity to China's argument. Second, the United States argues that placing a copy of the Notice of Initiation in a reading room is even less likely to ensure that an exporter or producer is notified of the investigation. Third, the United States rejects China's contention that MOFCOM's letter to the US Embassy in China requested the United States Government to identify or contact US producers or exporters of the subject products, including "all others" producers/exporters. But in any event, the United States submits, the obligation to notify interested parties is on the investigating authority – not the Member where those exporters or producers might be located.[460]

7.281. The United States claims that MOFCOM applied an "all others" rate which was "apparently adverse" to the interests of the producers/exporters concerned in violation of Article 6.8 of the

[456] In its first written submission the United States mainly argues that MOFCOM failed to notify the "all other" exporters of the information required from them. In subsequent submissions, the United States adds that those exporters were also not notified of the investigation itself and the fact that non-cooperation on their part may result in the determination based on facts available. (United States' first written submission, paras. 145-146, 154; second written submission, para. 100; opening statement at the second meeting of the Panel, para. 44).

[457] United States' first written submission, paras. 151-152 and footnotes 169 and 170, and second written submission, para. 111 (citing to *inter alia*, Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, footnote 211; and *China – GOES*, para. 7.393; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 258-264); United States' opening statement at the first meeting of the Panel, paras. 32-33.

[458] United States' opening statement at the first meeting of the Panel, para. 33; second written submission, para. 114. The United States notes that the facts available "all others" rate determined by MOFCOM applies not only to companies that exported to China during the period of investigation and did not register, but also to companies that began shipping after MOFCOM initiated the investigation, or even after the conclusion of that investigation. The United States argues that the latter could not possibly be said to have failed to provide information or impeded MOFCOM's investigation. (United States' second written submission, para. 116).

[459] United States' first written submission, paras. 150-152; second written submission, paras. 101-102.

[460] United States' second written submission, paras. 103-110; comments on China's response to Panel question No. 85 (citing Letter to the US Embassy on Initiation, Exhibit CHN-63).

Anti-Dumping Agreement.[461] The United States relies for this argument on the fact that the "all others" rate was more than twice as high as any of the individual margins or the rate applied to companies that registered but were not investigated[462], and on the fact that MOFCOM failed to explain how it had arrived at this rate.[463]

7.3.4.4.1.2 Disclosure of essential facts and public notice pursuant to Articles 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement

7.282. The United States claims that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement since MOFCOM did not identify the essential facts that formed the basis for its imposition of the 105.4% "all others" dumping rate.[464] Although MOFCOM did explain in the Disclosure document that it derived this rate from the normal value and export price of "a model from the investigated companies", MOFCOM did not disclose either which model it used, the facts that led MOFCOM to conclude that the use of this single model was appropriate, or the facts underpinning the calculation of the 105.4% rate, including the details of the calculation itself.[465] According to the United States, these facts are "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement and without the disclosure of these facts, the interested US companies could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate.[466]

7.283. Further, the United States contends that MOFCOM's failure to disclose in the Preliminary Determination, the Anti-Dumping Disclosure to the United States Government, or the Final Determination the rationale for its decision to apply facts available in calculating the "all others" dumping rate violates Articles 12.2, 12.2.1, and 12.2.2 of the Anti-Dumping Agreement. According to the United States, the factual and legal bases for MOFCOM resorting to facts available constitute "material issues of fact and law considered", and are essential in determining which dumping margin to apply to the "all others" companies. The United States adds that the decision to resort to facts available is a significant step in the process leading to the imposition of a final measure. The United States mentions the following among the particular issues that MOFCOM should have, but failed to disclose: the relevant facts underlying its determination that recourse to facts available was warranted and an explanation of the methodology it used in the establishment and comparison of the export price and normal value for "all other" respondents.[467] The United States submits that the first explanation of MOFCOM's calculation of the "all others" rate was provided by China during its statement at the first Panel meeting, when it indicated that the margin consisted of the "highest calculated normal value and the lowest recorded export price", and that a similar explanation is found nowhere on the record.

7.3.4.4.2 China

7.3.4.4.2.1 Application of a facts available rate under Article 6.8 and Annex II of the Anti-Dumping Agreement

7.284. China contends that Article 6.8 and Annex II of the Anti-Dumping Agreement apply to unknown producers that otherwise do not provide necessary information within a reasonable period.[468] China submits that given MOFCOM's comprehensive Notice of the Initiation of the Investigation and given the non-cooperation of "unknown" exporters, it was appropriate for MOFCOM to resort to facts available for determining the latter's dumping rate.[469] China further argues that MOFCOM's public Notice of the Initiation of the Anti-Dumping Investigation made it clear that all producers should register with the Ministry, and would be subject to an anti-dumping rate based on facts available if they failed to register and/or fully participate in the investigation. In addition, the notice specified the deadline for registration and the information required by the

[461] United States' first written submission, para. 146; second written submission, para. 117 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291 and 294).
[462] United States' second written submission, para. 118.
[463] United States' second written submission, paras. 118-120.
[464] United States' first written submission, paras. 159 and 165.
[465] United States' first written submission, paras. 144 and 161; opening statement at the first meeting of the Panel, para. 34.
[466] United States' first written submission, paras. 162-164.
[467] United States' first written submission, paras. 169-173.
[468] China's second written submission, para. 117; response to Panel question Nos. 17(a) and (b).
[469] China's first written submission, paras. 183-184.

authority.[470] China notes that the United States acknowledges the fact that the Notice of Initiation was provided to the six US known producers/exporters and the US Embassy. Furthermore, a public notice was posted on MOFCOM's website and was available in a reading room at MOFCOM.[471] According to China, these actions provided the necessary notice to all producers/exporters required by Articles 6.1 and 6.8 of the Anti-Dumping Agreement, as is evidenced by the 37 entries of appearance received by MOFCOM.[472]

7.285. China argues that MOFCOM's approach to notifying producers/exporters in the investigations at issue differs from the one that was found inconsistent with Article 6.8 in *Mexico – Anti-Dumping Measures on Rice*. China argues that whereas in *Mexico – Anti-Dumping Measures on Rice,* the authority notified the US Embassy and the two known exporters but apparently took no other action, in the present case, MOFCOM disseminated the initiation notice and registration document across the internet. China also disagrees with the statement by the *China – GOES* panel that internet distribution arguably does not provide sufficient notice, and submits that this issue warrants reconsideration by this Panel.[473]

7.286. China maintains that MOFCOM's decision to apply an "all others" dumping rate of 105.4% conforms to the requirements of paragraph 7 of Annex II, establishing that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." China states that the "all others" rate was based on the best information available, derived from confidential sources, consisting of the highest calculated normal value and the lowest recorded export price.[474] China submits that if MOFCOM were to apply an "all others" rate based on the rate applied to one of the cooperating respondents or to a party known to MOFCOM, there would be no incentive for unknown companies who had been given effective notice to make themselves known.[475]

7.3.4.4.2.2 Disclosure of essential facts and public notice pursuant to Articles 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement

7.287. China rejects the United States' argument that MOFCOM did not adequately disclose the essential facts consistent with the requirements of Article 6.9 of the Anti-Dumping Agreement. China's position is that MOFCOM disclosed its proposed "all others" rate in the Preliminary Determination, leaving enough time for the parties to consider it and comment if they wished. Consequently, China argues, the only issue before the Panel is whether the disclosure was sufficient to qualify as providing the "essential facts". In China's view the only "essential fact" regarding the "all others" rate is the rate itself.[476] China adds that non-participating parties have no need for additional details.[477]

7.288. China argues that as the "all others" rate was based on information derived from confidential sources, MOFCOM was under no obligation to prepare a summary of the information obtained from the confidential sources. China submits in this respect that the obligation to furnish non-confidential summaries pursuant to Article 6.5.1 of the Anti-Dumping Agreement applies to interested parties providing confidential information, as opposed to an investigating authority.[478]

7.289. Concerning the United States' claims under Articles 12.2, 12.2.1, 12.2.2 of the Anti-Dumping Agreement, China submits that the Preliminary and Final Determinations disclosed that: (i) MOFCOM had relied on the facts available in calculating the "all others" rate, and (ii) the "all others" rate was based on the normal value and export price of a model from the sampled

[470] China's first written submission, para. 180 (citing Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6).
[471] China's first written submission, para. 180.
[472] China's first written submission, paras. 119 and 181.
[473] China's first written submission, para. 182 (citing Panel Report, *China – GOES*, para. 7.386).
[474] China's first written submission, para. 185; opening statement at the first meeting of the Panel, para. 24.
[475] China's first written submission, para. 183.
[476] China's response to Panel question No. 20; opening statement at the second meeting of the Panel, para. 47.
[477] China's response to Panel question No. 20.
[478] China's response to Panel question No. 20.

companies. This information, in China's view, was sufficient to satisfy the relevant requirements of the above provisions.[479]

7.3.4.5 Arguments of the third parties

7.290. In the **European Union**'s view the United States does not explain how an investigating authority could give a notice to producers that exist but are not known and do not make themselves known to the investigating authority.[480] The European Union submits that it is possible that the United States' claim does not raise a general question of how investigating authorities can give a "notice" to this type of producers, but rather is limited to the narrower proposition that the steps taken by MOFCOM in the case at hand did not constitute sufficient notice. The European Union suggests that the Panel focus on the latter.[481]

7.291. The European Union agrees with the United States that China acted inconsistently with Articles 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement, given the apparent absence of any meaningful disclosure or explanations by MOFCOM.[482]

7.292. **Japan** argues that the panel in *China – GOES* found that the authorities may not apply facts available to determine dumping margins of unknown producers and agrees with this reasoning.[483] In particular, Japan submits that Article 6.1 and paragraph 1 of Annex II of the Anti-Dumping Agreement obligate the investigating authorities to notify the exporter or foreign producer of the specific information which they require from the exporter or producer. Therefore, mere inaction by producers/exporters who were unknown to make themselves known to the authorities would not be a valid reason for the importing Member to apply facts available.[484]

7.293. In relation to the alleged non-disclosure of the essential facts, Japan argues that investigating authorities must explain in sufficient detail the factual basis for applying facts available, including facts relevant to the determination of normal value, export price, and the facts upon which the authorities found that the interested party did not provide necessary information.[485]

7.294. With regard to the United States' claim concerning public notices, Japan cites the ruling of the panel in *EU – Footwear (China)* for the proposition that whether an issue is "relevant" or "material" within the meaning of Article 12 and, therefore, must be sufficiently explained, has to be reviewed from the perspective of the authorities' final determination. Further, Japan points out that the obligation set forth in Article 12.2 and elaborated in Articles 12.2.1 and 12.2.2 must be understood in the light of the restrictions imposed by the confidentiality requirement in these provisions. Finally, Japan submits that Article 12 of the Anti-Dumping Agreement is a procedural provision, which does not discipline the substantive adequacy of an investigating authority's reasoning.[486]

7.295. **Saudi Arabia** submits that the conditions for the use of facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement effectively mean that (i) an active approach on the part of the investigating authority is required in order to ensure that interested parties have been contacted and adequately notified as a precondition for resorting to facts available, and (ii) in the event of the failure to identify and notify an exporter or foreign producer, no facts available may be used in respect of this producer/exporter.[487] Further, Saudi Arabia submits that "facts available"

[479] China's second written submission, para. 120.
[480] European Union's third-party submission, paras. 39-40.
[481] European Union's third-party submission, para. 41.
[482] European Union's third-party submission, paras. 42-43.
[483] Japan's third-party submission, para. 33 (citing Panel Report, *China – GOES,* paras. 7.386 and 7.388).
[484] Japan's third-party submission, paras. 33-34.
[485] Japan's third-party submission, paras. 18-20 (citing Panel Report, *China – GOES,* para. 7.408).
[486] Japan's third-party submission, paras. 40-45 (citing Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.424; *EU – Footwear (China)*, para. 7.844; and *China – GOES,* para. 7.356).
[487] Saudi Arabia's third-party submission, paras. 25-27 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 259, 287-288).

should only be used to fill in gaps in the necessary information and cannot be used in a punitive manner.[488]

7.296. In regard to disclosure requirements, Saudi Arabia argues that it is very important that interested parties be able to review and comment on the facts used to replace the missing information.[489] In Saudi Arabia's view, these facts are the factual basis for making the dumping determination and are clearly part of the "essential facts under consideration" under Article 6.9.[490]

7.297. Saudi Arabia also submits that the factual basis for the dumping margin calculation, which includes the factual basis for considering that resort to facts available was necessary, is an important issue of facts and law considered material by the investigating authorities within the meaning of Article 12.2 of the Anti-Dumping Agreement, and, therefore, a sufficiently detailed explanation of this factual basis must be included in the public notice of the determination.[491]

7.3.4.6 Evaluation by the Panel

7.3.4.6.1 Whether MOFCOM applied facts available consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement

7.298. The United States argues that MOFCOM did not fulfil the conditions prescribed by Article 6.8 and Annex II for resorting to facts available and that the "all others" rate applied by MOFCOM was adverse to the interests of these producers/exporters, contrary to Article 6.8.[492]

7.299. We first consider the United States' argument that MOFCOM's actions to inform interested parties failed to provide adequate notice to "all other", unknown producers/exporters regarding the initiation of the investigation, the information required of these parties[493], and the fact that failure on their part to provide that information would result in a determination based on facts available.

7.300. In the anti-dumping investigation at issue, MOFCOM: (i) issued a Notice of Initiation, which it posted on its website along with the registration form[494]; (ii) placed the Notice in the public reading room at MOFCOM; and (iii) sent the Notice of Initiation to the US Embassy in China.[495] The Notice of Initiation required interested parties, including US producers/exporters, to register with MOFCOM within 20 days and indicated that in case of failure to do so, MOFCOM would be entitled to reject information subsequently submitted and make determinations on the basis of information available.[496] The registration form ("application to respond") posted on MOFCOM's website requested that each US exporter/producer identify itself to MOFCOM and provide certain information concerning the volume and value of its exports to China.[497]

7.301. In considering the United States' claim, we recall that the text of Article 6.8 allows an authority to resort to facts available in circumstances in which an interested party refuses access to, or otherwise does not provide "necessary information" within a reasonable period, or significantly impedes the investigation. Pursuant to paragraph 1 of Annex II, such possibility is subject to the investigating authority having "specif[ied] in detail the information required", and having ensured that the party is aware that if information is not supplied within reasonable time, it may resort to facts available. Neither Article 6.8 nor Annex II specify what form the request for information should take or how the authority should communicate its request to the interested party concerned.

---

[488] Saudi Arabia's third-party submission, paras. 28-29 (citing Panel Report, *China – GOES*, paras. 7.296, 7.302 and 7.450; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 289 and 293).
[489] Saudi Arabia's third-party submission, para. 30.
[490] Saudi Arabia's third-party submission, para. 32.
[491] Saudi Arabia's third-party submission, para. 32.
[492] United States' first written submission, para. 146; second written submission, para. 117.
[493] The United States does not challenge that the information requested by MOFCOM was "necessary" information.
[494] Subsequently, MOFCOM also posted the questionnaires on its website, after transmitting them to the respondents it had selected for individual examination.
[495] The letter conveying the Notice of Initiation to the US Embassy in China was provided to the Panel in Exhibit CHN-63.
[496] Notice of Initiation of Anti-Dumping Investigation, Exhibit CHN-6.
[497] Anti-Dumping Investigation Registration Form, Exhibit CHN-49.

7.302. We must interpret the text of Article 6.8 in context. In this respect, Article VI of the GATT 1994 as well as the Anti-Dumping Agreement permit the imposition of an anti-dumping duty with respect to all imports that are found to have been dumped and to have caused injury. In our view, the fact that injury is determined on the basis of an assessment of all imports of the subject product justifies the application of duties to all such imports. This includes imports from those producers/exporters who were not individually identified, for example due to their non-cooperation or the lack of information about them. In addition, Article 9.5 of the Anti-Dumping Agreement implicitly recognises that an anti-dumping duty may be applied even to the category of producers/exporters who did not exist, or did not export during the POI, until they request an individual rate through a new-shipper review.[498]

7.303. It is generally recognised and accepted that the manner to inform unknown interested parties in an administrative or judicial proceeding is by way of public notices, including notices published in an official gazette or on the internet. A similar concept is reflected in Article X of the GATT 1994 (providing that certain laws, regulations, decisions, etc. of general application "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them") as well as in Article 12 of the Anti-Dumping Agreement, requiring the issuance of public notices of preliminary and final determinations. These provisions rely on the notion that the intended recipients will consult the relevant documents emanating from national authorities of the countries where they conduct business. An investigating authority which has no other, more direct, means of reaching certain producers/exporters, may have no choice but to similarly proceed through communications to the general public to request information from the parties it is unable to identify.

7.304. The United States has cited to the Appellate Body decision in *Mexico – Anti-Dumping Measures on Rice* in support of its argument that the actions taken by MOFCOM in the present case would not suffice to notify the unknown US producers/exporters. Insofar as the United States may be suggesting that the Appellate Body Report in that dispute stands for the general proposition that a public notice, as opposed to a "targeted" communication[499], is not an acceptable form of requesting information, then we must differ. We do not read the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* as establishing a general rule that in all circumstances a request for information must be conveyed through a "targeted", or individualized, communication. The Appellate Body in that decision was addressing a specific factual situation which differs from the situation in this case. In the current case, MOFCOM published a notice of initiation which contained a description of the information required and the consequences of not providing such information, whereas in *Mexico – Anti-Dumping Measures on Rice* there is no indication that the public notice warned interested parties that the authority would resort to facts available in case of failure to submit the information, if any was in fact requested.[500]

7.305. The United States' line of argumentation would make it difficult, if not impossible, for a Member to determine an appropriate anti-dumping duty rate for certain unknown producers/exporters and thus apply anti-dumping measures with respect to their imports. Moreover, it could create an incentive for an exporter/producer not to cooperate with the investigation as it would benefit from the consequences of its non-cooperation, which would be no anti-dumping measure. Such an outcome does not reflect an appropriate reading of Article 6.8. Nor do we believe that such consequences were envisioned by the Appellate Body in its report in *Mexico – Anti-Dumping Measures on Rice*.

[498] In many investigations, notwithstanding its best endeavours in identifying all foreign producers/exporters, the authority will be unable to satisfy itself that it has effectively identified all of them. This will particularly be the case in a situation in which the number of foreign producers is large or the industry highly fragmented. In addition, the authority will by definition be unable to identify producers/exporters who do not exist or who have yet to start shipping. In fact, the investigating authority typically is not in a position to differentiate between the two types of "unknown" producers/exporters (those who exist and are shipping but do not appear and those who are not shipping) at the time when it imposes the measures.

[499] See United States' second written submission, para. 105.

[500] See, e.g. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.197, indicating that "the application referred to two US exporters, Producers Rice, and Riceland. The Mexican authorities, upon initiation of the investigation, sent a copy of the application, together with the notice of initiation, to these two exporters as well as to the US authorities in Mexico City. Questionnaires were sent to the two US exporters mentioned in the application. The notice to the US authorities included a form by which interested parties could make themselves known …".

7.306. In the case at hand, MOFCOM posted on its website the Notice of Initiation and Registration Form, communicating the information required from interested parties, including producers/exporters. The Notice included a warning that facts available could be resorted to in the case of failure to register. The failure of certain producers/exporters to register and provide the required information meant that MOFCOM had no basis on which to determine their margin of dumping.[501] In these circumstances, MOFCOM reasonably considered that the failure to register meant that an interested party failed to "otherwise … provide … necessary information" within the meaning of Article 6.8.[502] Furthermore, on the basis of the information before us, we have no reason to believe that MOFCOM knew of producers/exporters other than those who registered, and thus that it assigned a facts available rate to any producer/exporter which it could have contacted through other means.[503]

7.307. In light of the above facts, we consider that MOFCOM fulfilled the conditions set forth under Article 6.8 and Annex II, allowing it to resort to facts available for the calculation of the anti-dumping duty applied to US producers/exporters who failed to register.

7.308. The second aspect of the United States' claim concerns the manner in which MOFCOM determined the "all others" rate, by using facts apparently adverse to the interests of the unknown producers/exporters.

7.309. Concerning the manner in which facts available may be applied, paragraph 7 of Annex II establishes that the authority must use "special circumspection" when they base their findings on information from a secondary source.

7.310. In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body clarified that the authority's discretion when using facts available to replace missing information is not unlimited. The Appellate Body agreed with the panel's statement in that case that:

> The use of the term "*best* information" [in Annex II] means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains.[504] (emphasis original)

7.311. Further, in the context of Article 12.7 of the SCM Agreement, the panel in *China – GOES* considered, and rejected, an argument similar to the one China makes before us:

> In our view, the use of facts available should be distinguished from the application of adverse inferences. While paragraph 7 of Annex II of the Anti-Dumping Agreement states that non-cooperation by an interested party "could lead to a result which is less favourable to the party than if the party did cooperate", we see no basis in Annex II for the drawing of adverse inferences. In our view, the purpose of the facts available mechanism is not to punish non-cooperation by interested parties. As explained by the Appellate Body, the purpose of Article 12.7 of the SCM Agreement is rather to "ensure

[501] In our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling. For a similar view, see Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.263-7.264. The panel in *China – GOES* appeared to come to the opposite conclusion. (Panel Report, *China – GOES*, para. 7.386).

[502] In these circumstances, we need not consider whether additional actions taken by MOFCOM – i.e. making the Notice of Initiation available in a reading room and transmitting it to the US Embassy in China provided sufficient notice to unknown US producers/exporters.

[503] We note in particular that the United States does not allege that there were additional producers/exporters known to MOFCOM, and that China has indicated that the Chinese Government (including any of its agencies) did not, at relevant times, maintain information with respect to importation of goods that identifies the exporters of those goods for customs, sanitary or other purposes. (China's response to Panel question Nos. 18 and 104).

[504] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289 (citing Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).

> that the failure of an interested party to provide necessary information does not hinder an agency's investigation", in the sense that "the provision permits the use of facts on record solely for the purpose of replacing information that may be missing". While non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation.[505]

7.312. We agree that the rate based on facts available must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts.

7.313. In the present case, the limited explanation provided by MOFCOM does not allow an understanding of which facts on the record it used to calculate the "all others" rate.[506] Therefore we cannot determine whether MOFCOM acted consistently with the principles identified above in calculating the "all others" rate. In light of these facts, we consider that the United States has made a *prima facie* case that MOFCOM acted inconsistently with Article 6.8, which is not rebutted by China. Therefore, we find that China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement when MOFCOM calculated the "all others" rate of 105.4% on the basis of facts available.

7.3.4.6.2 Whether MOFCOM disclosed the "essential facts" pertaining to the "all others" rate in the anti-dumping investigation as required by Article 6.9 of the Anti-Dumping Agreement

7.314. The United States claims that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose "the essential facts under consideration" pertaining to the "all others" rate.

7.315. We have noted above that the first sentence of Article 6.9 of the Anti-Dumping Agreement requires the investigating authority to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. This obligation is further informed by the second sentence in Article 6.9, requiring that the disclosure take place in sufficient time for the parties to defend their interests.[507] In *China – GOES*, the Appellate Body clarified that the essential facts are those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures; and that what constitutes an "essential fact" must be answered by referring to the content of the findings needed to satisfy the substantive obligations in the Anti-Dumping Agreement.[508]

7.316. Article 6.8 limits the application of facts available to circumstances where an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation. Further, Annex II establishes certain requirements which must be satisfied in the application of facts available, including the obligation to specify in detail the information required from an interested party, and to use the "best information" on the record for replacing the missing information.[509]

7.317. Interpreting Article 6.9 in the light of Article 6.8, the "essential facts" that MOFCOM was expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information. In our view, the above information is facts under consideration in MOFCOM's determination to apply facts available. Furthermore, this information formed the basis for MOFCOM's determination, on the basis of facts available, of the "all others" rate of 105.4%; therefore, it was essential for the interested parties to know whether the authority's application of facts available conformed to the requirements of Article 6.8 and to properly defend their interests in this regard.

---

[505] Panel Report, *China – GOES*, para. 7.302 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293). (footnote omitted)
[506] See below, para. 7.319.
[507] Panel Report, *China – X-Ray Equipment*, para. 7.400.
[508] Appellate Body Report, *China – GOES*, paras. 240-241.
[509] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 287-289, 294.

7.318. We are of the view that MOFCOM's disclosure of the essential facts does not satisfy the requirements of Article 6.9 because it is essentially reduced to a conclusory statement, instead of providing the essential facts underlying the authority's decision. In this regard, as discussed in paragraph 7.90 above, pursuant to Article 6.9, the authority has an obligation to disclose the actual data underlying its decision.

7.319. Contrary to that requirement, MOFCOM's Disclosure does not explain the data that the authority used for replacing the missing information. In particular, MOFCOM's Disclosure is silent on the particular model upon which the "all others" rate was based.[510] The Disclosure states that MOFCOM used the normal value and export price of a model from the sampled companies, but does not specify whether the normal value and export price were taken from the same model or from different models and whether from one or from different "sampled companies". If, as the use of the plural implies, it was more than one company, it would not be possible to check MOFCOM's calculation in averaging the rates.

7.320. China states, before the Panel, that the "all others" rate consisted of the highest calculated normal value and the lowest recorded export price, but acknowledges that an interested party would be unable to determine that from the Disclosure.[511] We, therefore, do not need to take this explanation into account in considering the consistency of MOFCOM's Disclosure with Article 6.9 China also argues that the information underlying MOFCOM's calculation of the facts available rate was derived from confidential sources and, therefore, could not be disclosed.

7.321. Article 6 of the Anti-Dumping Agreement, in its paragraphs 5 and 9 respectively, strikes a balance between the duty imposed on the investigating authority to protect any confidential information on the one hand, and the duty to disclose the "essential facts under consideration" on the other hand. In *China – GOES*, both the Appellate Body and the panel clarified that when confidential information constitutes "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts.[512] In other words, a non-confidential summary of the information from the respondents underlying the "all others" dumping rate should be disclosed for the purposes of Article 6.9 of the Anti-Dumping Agreement. We subscribe to this view. The duty imposed under Article 6.5 on the investigating authority to protect confidential information provides a limited exception to its disclosure obligations under Article 6.9. If the relevant essential facts included confidential information, MOFCOM may have met its obligation under Article 6.9 by disclosing such information in the form of a non-confidential summary.

7.322. Finally, China argues that MOFCOM disclosed its proposed "all others" rate in the Preliminary Determination, leaving enough time for the parties to consider it and comment if they wished.[513] We see no basis for China's argument. As noted by the panel in *China – GOES*, Article 6.9 is not a means by which authorities respond to arguments made by interested parties. Moreover, a lack of comments on the Preliminary Determination is not proof that the essential facts were properly disclosed.[514] Thus, the relevant question would not be whether interested parties commented after the Preliminary Determination, but whether the Preliminary Determination disclosed the "essential facts". In this case, it did not.

7.323. In sum, we find that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to disclose certain "essential facts" forming the basis of its determination of the "all others" rate of 105.4%, and in particular the facts pertaining to the data relied upon by MOFCOM in calculating this rate.

[510] Anti-Dumping Disclosure to the US Government, Exhibit USA-11, p. 11.
[511] China's first written submission, paras. 184-85; opening statement at the first meeting of the Panel, para. 24; response to Panel question No. 21.
[512] Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – GOES*, para. 7.410.
[513] China's response to Panel question No. 20.
[514] Panel Report, *China – GOES*, para. 7.651.

7.3.4.6.3 Whether MOFCOM disclosed in the public notices the rationale and relevant facts underlying its decision to apply facts available and the rate determined as required under Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement

7.324. The United States argues that China acted inconsistently with its obligations under Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement by not providing the rationale for its decision to apply "facts available". In particular, according to the United States, MOFCOM did not provide in sufficient detail the findings and conclusions that led to the application of facts available, a full explanation of the methodology used to establish the export price and normal value used for "all other" respondents, or all relevant information underlying its determination.[515] China contends that MOFCOM disclosed sufficient information to satisfy the requirements of Articles 12.2, 12.2.1 and 12.2.2.[516]

7.325. We note that a number of other panels have exercised judicial economy in relation to claims under Articles 12.2 or 12.2.2 of the Anti-Dumping Agreement in circumstances where a substantive inconsistency with another provision of the Anti-Dumping Agreement had been found.[517] In the circumstances of this case, however, we are of the view that findings under the public notice provisions may be relevant for the purposes of implementation. Therefore, we proceed to examine the United States' claims in this regard.

7.326. In both the Preliminary and Final Anti-Dumping Determinations, MOFCOM explained that it determined the dumping rate for "all other" US companies who neither registered nor provided a questionnaire response by using facts that had been obtained and the best information that could be obtained.[518] Although the United States' claims relate to both the Preliminary and Final Determinations, given that their language is not substantially different[519], we consider it appropriate to make findings only in relation to the latter. In any event, we believe that, in the circumstances of this case, making a finding in relation to the Preliminary Determination would not contribute to securing a positive solution to the dispute.

7.327. Article 12.2 of the Anti-Dumping Agreement requires that a public notice be given of any preliminary or final determination and that each such notice set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. Further, Article 12.2.2 elaborates on this requirement by establishing, *inter alia*, that the public notice must contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. The meaning of the term "issue of fact and law considered material" in Article 12.2 has been clarified by a number of previous panels as "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".[520] Furthermore, in *China – GOES*, the Appellate Body clarified that the issues of fact and law that the authority may consider material are determined by the framework of the substantive provisions of the Anti-Dumping Agreement.[521]

7.328. In relation to the obligation under Article 12.2.2, the Appellate Body in *China – GOES* noted that the disclosure must allow an understanding of the factual basis that led to the imposition of final measures and give a reasoned account of the factual support for an authority's decision.[522] The Appellate Body has further explained that Article 12.2.2 captures the principle that

[515] United States' first written submission, paras. 169-72. The United States argues that MOFCOM failed to provide the required information in the Preliminary and Final Determinations as well as in the Disclosure to the US Government. The latter does not, in our view, constitute a "public notice" within the meaning of Articles 12.2, 12.2.1 and 12.2.2. We therefore do not take it into consideration in the assessment of the United States' claims.

[516] China's second written submission, para. 120.

[517] See Panel Reports, *EC – Bed Linen*, para. 6.259; *EC – Fasteners (China)*, para. 7.548.

[518] Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 20-21; Final Anti-Dumping Determination, Exhibit USA-4, p. 33.

[519] The only difference is that whereas the Preliminary Determination reads: "… the Investigating Authority decides to make determination related to the dumping and dumping margin using …", the Final Determination states: "… the Investigating Authority decides to determine their respective normal value and export price using …". Preliminary Anti-Dumping Determination, Exhibit USA-2, pp. 20-21; Final Anti-Dumping Determination, Exhibit USA-4, p. 33.

[520] See Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.424; *EU – Footwear (China)*, para. 7.844.

[521] Appellate Body Report, *China – GOES*, para. 257.

[522] Appellate Body Report, *China – GOES*, para. 256.

those parties whose interests are affected by the imposition of final anti-dumping duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties, and seeks to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the Anti-Dumping Agreement.[523] In *China – X-Ray Equipment*, the Panel clarified that the level of detail of the description of the authority's findings and conclusions required under Article 12.2.2 must be sufficient to allow interested parties to assess the conformity of those findings and conclusions with domestic law and the WTO Agreement.[524] We agree with the reasoning of the Appellate Body and previous panels in these disputes and adopt it as our own.

7.329. In the Panel's view, MOFCOM's Final Determination does not provide the findings and conclusions reached on all issue of fact and law considered material as it does not set forth the relevant matters of fact leading to the conclusion that 105.4% was the appropriate anti-dumping rate for "all other" exporters. Although the Final Determination states that the best information available was used, it does not explain the factual bases underlying the rate.

7.330. Finally, as under Article 6.9, the fact that confidential information may have been part of the relevant information that had to be disclosed does not excuse failure to comply with Articles 12.2 and 12.2.2. Rather, in such circumstances, the investigating authority should meet its disclosure obligations by providing non-confidential summaries of the confidential information.[525]

7.331. Consequently, we conclude that MOFCOM did not disclose "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" or "all relevant information on matters of fact". We, therefore, find that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

7.3.5 Whether MOFCOM complied with Articles 12.7, 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement when it applied facts available to calculate the "all others" rate for unknown producers/exporters in the countervailing duty investigation

7.3.5.1 Introduction

7.332. The United States' claims with respect to MOFCOM's determination of the "all others" countervailing duty rate in the countervailing duty investigation are similar to its claims with respect to the "all others" rate in the anti-dumping investigation. They concern a range of provisions in the SCM Agreement – Articles 12.7, 12.8, 22.3, 22.4 and 22.5 – which correspond to Articles 6.8, 6.9, 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement. In particular, the United States claims that:

a. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM imposed an "all others" rate based on adverse facts available on producers/exporters that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary information or otherwise impede the subsidy investigation;

b. China acted inconsistently with Article 12.8 of the SCM Agreement due to MOFCOM's failure to inform the United States and other interested parties of the essential facts under consideration that formed the basis of its calculation of the "all others" rate; and

c. China acted inconsistently with Articles 22.3, 22.4, and 22.5 of the SCM Agreement due to MOFCOM's failure to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact.

7.3.5.2 Relevant provisions

7.333. Article 12.7 of the SCM Agreement sets forth the conditions under which an investigating authority may apply facts available. It provides:

[523] Appellate Body Report, *China – GOES*, para. 258.
[524] Panel Report, *China – X-Ray Equipment*, para. 7.459.
[525] Appellate Body Report, *China – GOES*, para. 259.

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.334. Article 12.8 of the SCM Agreement requires that:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.335. Articles 22.3, 22.4 and 22.5 set forth the requirement to give public notice of certain actions or determinations in a countervailing duty investigation:

> 22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.
>
> 22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
>
> (i) the names of the suppliers or, when this is impracticable, the supplying countries involved;
>
> (ii) a description of the product which is sufficient for customs purposes;
>
> (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
>
> (iv) considerations relevant to the injury determination as set out in Article 15;
>
> (v) the main reasons leading to the determination.
>
> 22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

7.3.5.3 Factual background

7.336. As in the anti-dumping investigation, upon the initiation of the countervailing duty investigation, on 27 September 2009, MOFCOM notified the US Embassy of the initiation of the

investigation, and posted the Notice of Initiation together with the relevant Registration Forms on its website.[526]

7.337. MOFCOM limited its examination to three producers: Keystone, Tyson, and Pilgrim's Pride.[527] In the Preliminary Countervailing Duty Determination, MOFCOM determined the following countervailing duty rates for the selected mandatory respondents: Keystone, 3.8%; Tyson, 11.2%; and Pilgrim's Pride, 4.9%. MOFCOM applied the weighted average of these three rates, 6.1%, to the US companies that registered with MOFCOM but were not investigated, including Sanderson, the alternate respondent.[528]

7.338. MOFCOM assigned a 31.4% countervailing duty rate to "all other" US companies that "failed to make an entry for appearance or failed to submit ... questionnaire responses". It calculated this rate "on the basis of the already obtained facts and the obtainable best information".[529]

7.339. Prior to the issuance of its Final Countervailing Duty Determination, MOFCOM issued to the United States Government a Disclosure Document explaining the basic facts on which the Determination was reached. The Disclosure explains that:

> According to Article 21 of the *CVD Regulations*, with respect to other American companies which have not registered and submitted answer sheets, the investigation authority determines to adopt available facts to make a determination on ad valorem countervailing duty rate.
>
> The Authority chooses a sampled company and uses competitive benefit method to calculate the benefit passed-through from upstream subsidy and received by the company, and obtains the company's ad valorem subsidy rate on this basis. In the final determination, the Authority uses this tax rate as other responding companies' ad valorem subsidy rate.[530]

7.340. In the Final Determination, MOFCOM revised the rates determined in the Preliminary Determination as follows: Keystone, 4%; Tyson, 12.5%; Pilgrim's Pride, 5.1%; and companies that registered but were not selected for individual examination, 7.4%.[531] MOFCOM's explanation concerning the "all others" rate in the Final Determination is identical to its discussion of the issue in the Preliminary Determination but revises the rate from 31.4% to 30.3%.[532]

7.3.5.4 Main arguments of the parties

7.3.5.4.1 United States

7.341. The United States' arguments concerning MOFCOM's determination of the "all others" subsidy rate are similar to its arguments in support of its corresponding claims under the Anti-Dumping Agreement.[533] The United States argues that in the absence of being notified of the "necessary information", unregistered producers/exporters cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation within the meaning of Article 12.7 of the SCM Agreement.[534]

7.342. Furthermore, as in the context of the anti-dumping investigation, the United States claims that MOFCOM violated Article 12.7 of the SCM Agreement by determining an adverse "all others"

[526] Preliminary Countervailing Duty Determination, Exhibit USA-3, section 2.2.1; Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7; Notice of Initiation of the Countervailing Duty Investigation, Exhibit CHN-48 (Chinese version containing the internet link); Countervailing Duty Investigation Registration Form, Exhibit CHN-50; Letter to the US Embassy on Initiation, Exhibit CHN-63.
[527] Preliminary Countervailing Duty Determination, Exhibit USA-3, section 2.2.3, p. 4.
[528] Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 62 and Appendix II.
[529] Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 62 and Appendix II.
[530] Countervailing Duty Disclosure to the US Government, Exhibit USA-49, p. 42.
[531] Final Countervailing Duty Determination, Exhibit USA-5, Appendix II.
[532] Final Countervailing Duty Determination, Exhibit USA-5, p. 78, Appendix II.
[533] United States' first written submission, paras. 184-223.
[534] United States' first written submission, para. 194; second written submission, para. 105.

rate that significantly exceeded the highest rate determined for individually-examined companies, and provided no sufficient explanation of such a rate.[535] The United States argues that given that the highest countervailing duty rate calculated for an investigated company in the Final Determination was 12.5%, the only way in which a "facts available" rate of 30.3% could be obtained was for MOFCOM to include non-countervailable programmes in the calculation of the rate. The United States argues that to the extent that such programmes are factored into MOFCOM's calculation of the "all others" rate, MOFCOM ignored substantiated facts on the record.[536] The United States contests China's response to this argument that the Disclosure explained that the "all others" countervailing duty rate was based on an upstream subsidy feed programme, and notes that the Disclosure refers to an "upstream subsidy" but not to a "feed" programme.[537]

7.343. The United States' arguments in support of its claim under Article 12.8 of the SCM Agreement are similar to its arguments with respect to its claim under Article 6.9 of the Anti-Dumping Agreement. Among the "essential facts" within the meaning of Article 12.8 that MOFCOM allegedly failed to disclose, the United States mentions: (i) the facts that led MOFCOM to conclude that resorting to the use of facts available adverse to a company's interests was appropriate; (ii) the facts that led MOFCOM to conclude that a 30.3% countervailing duty rate was an appropriate rate to apply to "all other" companies, especially given the fact that the countervailing duty rates for the investigated companies were substantially lower than 30.3%; and (iii) the facts underpinning the calculation of the 30.3% countervailing duty rate, including the details of the calculation itself.[538]

7.344. Finally, the United States' arguments concerning MOFCOM's violation of Articles 22.3, 22.4 and 22.5 of the SCM Agreement are similar to its arguments with respect to Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement. Concerning the "issues of fact and law considered material" that MOFCOM allegedly failed to disclose, the United States refers to the same three facts cited in the context of the disclosure obligation under Article 12.8.[539]

7.3.5.4.2 China

7.345. China's response to the United States' claims under Articles 12.7, 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement is substantially the same as its response to the arguments it makes under the corresponding claims under the Anti-Dumping Agreement.[540]

7.346. China explains that to calculate the "all others" countervailing duty rate, MOFCOM chose a sampled company and calculated the benefit passed through from the upstream subsidies by using the competitive benefit method. As in the anti-dumping investigation, the information relied upon was not disclosed because it came from confidential sources.[541] China argues that the subsidy programme used for determining the "all others" rate was a countervailable "feed" programme[542], and that the reference to an "upstream subsidy" in the disclosure document was in fact a reference to this feed programme.[543]

7.3.5.5 Arguments of the third parties

7.347. The **European Union** argues that textual differences between Articles 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement must be taken into account by the Panel in assessing the United States' Article 12.7 claim. In particular, the European Union notes that while Articles 6.1 and 6.8 of the Anti-Dumping Agreement refer to "interested parties", which

[535] United States' first written submission, paras. 195-200; second written submission, paras. 117 and 121-125.
[536] United States' first written submission, paras. 184 and 199.
[537] United States' response to Panel question No. 103; comments on China's response to Panel question No. 103.
[538] United States' first written submission, para. 208; second written submission, para. 121; opening statement at the first meeting of the Panel, para. 34.
[539] United States' first written submission, paras. 220-221; second written submission, para. 128.
[540] China's first written submission, paras. 187-194; second written submission, para. 121.
[541] China's first written submission, para. 194; second written submission, paras. 122-123.
[542] China's response to Panel question Nos. 23 and 24.
[543] China's response to Panel question No. 103; comments on the United States' response to Panel question No. 103.

includes the government of the exporting Member, Articles 12.1 and 12.7 of the SCM Agreement directly refer to "interested Member" and "interested party".[544] The European Union submits that there could be cases, such as when a recipient of a subsidy is known to a Member, where a notice to that Member would suffice for the purposes of the use of facts available under Article 12.7.[545]

7.348. The European Union's arguments with respect to the Unites States' claims under Articles 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement are similar to the arguments it makes with respect to the corresponding claims under the Anti-Dumping Agreement.[546]

7.349. **Japan** argues that the authorities have substantial discretion in deciding how to determine a countervailing duty rate applicable to individual exporters given that the SCM Agreement does not stipulate whether an investigating authority must determine the existence of subsidisation and the per-unit rate with respect to each known producer/exporter.[547] However, Japan argues, this discretion is limited by the provisions of the SCM Agreement, such as Article 12.1, establishing a due process requirement to give notice of the information required by the investigating authorities, by the obligation to determine the total amount of subsidy and countervailing duty rate consistently with the provisions of the Agreement, and by Article 12.7, which permits reliance on facts available in certain limited circumstances.[548]

7.350. With regard to Article 12.8 of the SCM Agreement, Japan submits that under this provision the authorities must disclose the body of facts underpinning their finding of the financial contribution, benefit, specificity, the calculation of per-unit *ad valorem* rate of subsidization, and the facts leading to the conclusion that the application of facts available was warranted.[549]

7.351. Japan's arguments with respect to the United States' claims under Articles 12.2, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement equally apply with respect to the claims under Articles 22.3, 22.4 and 22.5 of the SCM Agreement.[550]

7.352. **Saudi Arabia** argues that despite the fact that the SCM Agreement does not contain an equivalent to Annex II of the Anti-Dumping Agreement, Articles 6.8 and 12.7 establish similar requirements concerning the investigating authority's use of facts available. Consequently, Annex II can serve as relevant context for evaluating claims under Article 12.7 of the SCM Agreement. In Saudi Arabia's view, this vision of the relationship between Articles 6.8 and 12.7 is supported by the Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, adopted by the Trade Negotiations Committee on 15 December 1993, declaring the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures, and by the Appellate Body's ruling in *Mexico – Anti-Dumping Measures on Rice*.[551]

7.353. Saudi Arabia's arguments with respect to the United States' claims under Articles 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement are similar to those it makes with respect to the corresponding claims under the Anti-Dumping Agreement.[552]

[544] European Union's third-party submission, paras. 48-50; third-party response to Panel question No. 5.
[545] European Union's third-party response to Panel question No. 5.
[546] European Union's third-party submission, paras. 53-54.
[547] Japan's third-party submission, para. 36 (citing Appellate Body Report, *US – Softwood Lumber IV*, para. 152).
[548] Japan's third-party submission, paras. 37-38 and footnote 42 (citing Appellate Body Reports, *US – Softwood Lumber IV*, para. 154; *Mexico – Anti-Dumping Measures on Rice,* paras. 290 and 295).
[549] Japan's third-party submission, paras. 22-24 (citing, *inter alia*, Panel Reports, *Mexico – Olive Oil*, para. 7.110; *China – GOES*, paras. 7.463-7.464).
[550] Japan's third-party submission, para. 44.
[551] Saudi Arabia's third-party submission, para. 27 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295); third-party response to Panel question No. 6.
[552] Saudi Arabia's third-party submission, paras. 31-32.

7.3.5.6 Evaluation by the Panel

7.3.5.6.1 Whether MOFCOM applied facts available consistently with Article 12.7 of the SCM Agreement

7.354. The first aspect of the United States' claim under Article 12.7 concerns the basis for MOFCOM's decision to use facts available in determining the "all others" countervailing duty rate. The claim and the parties' arguments in this respect are identical to the claim and arguments under Article 6.8 of the Anti-Dumping Agreement. Moreover, the facts are, for all relevant purposes, identical to those we considered in respect of the United States' claim under Article 6.8.

7.355. The text of Article 12.7 of the SCM Agreement largely mirrors that of Article 6.8 of the Anti-Dumping Agreement. There are, however, certain differences, notably the absence of an equivalent to Annex II in the SCM Agreement. Notwithstanding these differences the Appellate Body and previous panels have interpreted these provisions as imposing similar disciplines concerning the circumstances under which an authority may resort to facts available.[553] We agree with this approach to the interpretation and application of Article 12.7 and note that the parties to this dispute, as well as certain third parties agree that the textual differences between Articles 6.8 and 12.7 are not significant.[554]

7.356. Consequently, we find it appropriate to transpose our reasoning and conclusions concerning the parallel US claim under Article 6.8 *mutatis mutandis* to the United States' claim under Article 12.7.[555] For the reasons discussed above, we find that MOFCOM, having posted the Notice of Initiation (including the warning that facts available could be resorted to in the case of failure to register) and Registration Form on its website, could consider the failure to register and to provide the requested information as a failure to "otherwise … provide … necessary information" within the meaning of Article 12.7. MOFCOM, therefore, could determine the "all others" rate on the basis of available facts on the record of the investigation.

7.357. The second aspect of the United States' claim concerns the question whether MOFCOM applied an adverse rate, and in the affirmative, whether doing so was consistent with Article 12.7. In the preceding section, we indicated that a rate determined on the basis of facts available under Article 6.8 of the Anti-Dumping Agreement must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts. Article 12.7 of the

[553] See, *inter alia*, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291-298; Panel Report, *China – GOES*, para. 7.446, 7.450.

[554] United States' response to Panel question No. 22; China's response to Panel question No. 22 and second written submission, para. 121; Saudi Arabia's third-party response to Panel question No. 6; Japan's third-party submission, para. 38, footnote 42. The European Union argues that the explicit reference to "Members" in Article 12.7, which is lacking under the Anti-Dumping Agreement, could in certain circumstances mean that a request for information addressed to the Member, requesting the name of beneficiaries of the subsidy programmes at issue, would satisfy the requirements of Article 12.7. (European Union's third-party submission, paras. 48-50; third-party response to Panel question No. 5). We note however that in the case at hand, the subsidy programmes that MOFCOM found to be countervailable were indirect upstream subsidies provided by the US Government to US corn and soybean producers. (Final Countervailing Duty Determination, Exhibit USA-5, pp. 77-78). Therefore, although the US Government might know the identity of the direct beneficiaries of the subsidies at issue (i.e. US corn and soybean producers), it does not logically follow that the US Government would know the identity of indirect beneficiaries (i.e. all corn and soybean producers' customers, including all US broiler producers who export subject merchandise to China). For this reason, we need not consider the European Union's argument further.

[555] As in the context of the imposition of anti-dumping measures, we consider that the SCM Agreement envisages the possibility to apply a countervailing duty rate to exporters who were not individually examined, even if they were "unknown" to the authority. We further note in this respect that the Appellate Body has held that Article 19 of the SCM Agreement authorises Members to perform an investigation on an aggregate basis. (See Appellate Body Report, *US – Softwood Lumber IV*, paras. 152-154). The Appellate Body reached this conclusion in the light, *inter alia*, of Article 19.3, which provides that:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

SCM Agreement imposes disciplines similar to those under Article 6.8[556], and therefore permits determining a rate on the basis of the information on the record under the same conditions.[557]

7.358. The United States argues that the fact that the "all others" rate is four times higher than that of any individually-examined producer/exporter strongly suggests that MOFCOM relied on non-countervailable programmes in calculating it. China responds that MOFCOM only relied on programmes that were found to be countervailable (subsidy programmes benefiting corn and soybean producers, the benefits of which MOFCOM found to have passed through to producers of broiler products). China also explains that for individually-examined producers/exporters, MOFCOM calculated the countervailing duty margin under two alternative methods ("competitive benefit" and "pass-through") and retained the lowest margin so calculated. By contrast, for producers who failed to register, MOFCOM calculated the countervailing duty rate based on the "competitive benefit" amount calculated for one of the individually-examined companies that had their subsidy rate determined using the pass-through methodology.[558] In China's view, this difference explains why the "all others" rate well exceeds the rate calculated for individually-examined producers/exporters.[559]

7.359. MOFCOM's discussion of its calculation of the "all others" rate in the Disclosure and Determinations does not indicate precisely which programmes MOFCOM took into consideration in calculating the "all others" rate.[560] The "all others" rate, at 30.3%, does not appear to have any logical relation with the highest individual rate, which stands at 12.5%. Furthermore, MOFCOM used a different approach in calculating the benefit for determining the "all others" rate from the approach it used for individually-examined producers/exporters, without explaining the reasons underlying this methodological choice. Consequently, it is not possible to establish that MOFCOM has determined the "all others" rate consistently with the principles of Article 12.7. In these circumstances, and given the limited information before us as to how MOFCOM determined the "all others" rate, we find that the United States has made a *prima facie* case of violation, which has not been rebutted by China.

7.360. We, therefore, uphold the United States' claim that China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied an "all others" rate determined on the basis of facts available to US producers/exporters who failed to register.

---

[556] See above, para. 7.355.

[557] We note that the use by the authority of the best information for determining a subsidy rate ensures that a countervailing duty ultimately levied on an imported product does not exceed the amount of the subsidy received by the producer/exporter at issue, as required by Article 19.4 of the SCM Agreement.

[558] China's second written submission, para. 123 and response to Panel question Nos. 24 and 103. In the latter, China indicates that:

> … MOFCOM calculated the *ad valorem* "all others" rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This approach resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). … (footnotes omitted)

The Disclosure itself only indicates that MOFCOM applied the "competitive benefit method" to one of the individually-examined companies' data. (Countervailing Duty Disclosure to the US Government, Exhibit USA-49, pp. 8-30 and 42).

[559] China's response to Panel question Nos. 24 and 103.

[560] We read MOFCOM's Disclosure as indicating that it derived the "all others" subsidy rate from the upstream subsidy programmes which MOFCOM found conferred a benefit on US producers of corn and soybean, which benefit subsequently passed through to US producers of broiler products. The Disclosure document and Determinations identify two countervailable upstream programmes, the direct payment subsidy program and the crop insurance subsidy programme. Countervailing Duty Disclosure to the US Government, Exhibit USA-49, pp. 8-30 and 42.

7.3.5.6.2 Whether MOFCOM disclosed the "essential facts" pertaining to the "all others" rate in the countervailing duty investigation, as required by Article 12.8 of the SCM Agreement

7.361. We have earlier explained the nature of the obligation to disclose the "essential facts under consideration" in Article 6.9 of the Anti-Dumping Agreement, which in our view is the same as the obligation under Article 12.8 of the SCM Agreement.[561] The only relevant difference between the two provisions and the obligation they impose is that in the context of a countervailing duty investigation, the relevant "essential facts" concern information regarding subsidization (rather than dumping), in addition to injury and the causal link.[562]

7.362. The Panel sees a number of problems arising from MOFCOM's disclosure. In particular, it is not clear from any of the documents that might serve as the basis for a disclosure of the essential facts (e.g., the Disclosure to the US Government and the Preliminary Determination) precisely which programme(s), and which underlying data MOFCOM relied upon to determine the "all others" rate. We recall that, in *China – GOES*, the Appellate Body clarified that a mere conclusion is not sufficient to satisfy the obligation in Article 12.8; in order to enable the respondents to defend their interests, the disclosure must contain the "essential facts" *supporting* the authority's finding.[563] As in the context of the anti-dumping investigation[564], we are not convinced that either the mere fact that the "all others" rate was derived from confidential sources or the fact that interested parties had an opportunity to comment on the Preliminary Determination exempt MOFCOM from its obligation under Article 12.8.

7.363. On the basis of the foregoing, we find that China acted inconsistently with Article 12.8 of the SCM Agreement due to MOFCOM's failure to disclose certain essential facts underlying its decision to apply an "all others" countervailing duty rate of 30.3%.

7.3.5.6.3 Whether MOFCOM disclosed in the public notices the rationale and relevant facts underlying its decision to apply facts available and the rate determined as required under Articles 22.3, 22.4 and 22.5 of the SCM Agreement

7.364. The United States' claims under Articles 22.3, 22.4 and 22.5 of the SCM Agreement concern MOFCOM's explanation of the "all others" countervailing duty rate for unknown producers/exporters.

7.365. In considering these claims, we adhere to our reasoning and approach taken with respect to the claims of the United States concerning the corresponding provisions in the Anti-Dumping Agreement. We recall that Article 22.3 of the SCM Agreement requires that a public notice be given of any preliminary or final determination, which sets forth, or otherwise makes available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material. Article 22.5 elaborates this requirement by establishing, *inter alia*, that the public notice must contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures.

7.366. Contrary to the above requirements, MOFCOM's Final Countervailing Duty Determination does not set forth in sufficient detail the findings and conclusions reached on all issues of fact considered material, and all relevant information on the matters of fact.[565] Although the determination states that the "best information" available was used in determining the "all others" countervailing duty rate of 30.3%, it does not explain the factual bases underlying MOFCOM's determination of the rate. Consequently, the information provided by MOFCOM in its Final Determination is not sufficient to enable interested parties to verify the conformity of that Determination with the relevant domestic law and the SCM Agreement, and, if necessary, pursue judicial review of that Determination.

---

[561] See, above sections 7.2.3 and 7.3.4.6.2.

[562] See Appellate Body Report, *China – GOES*, para. 241; Panel Reports, *Mexico – Olive Oil*, para. 7.110; and *China – GOES*, para. 7.652.

[563] Appellate Body Report, *China – GOES*, para. 249.

[564] See paragraph 7.321 above.

[565] As for the corresponding claims of the United States under the Anti-Dumping Agreement, we do not consider it necessary for the resolution of the dispute between the parties to make findings with respect to the Preliminary Countervailing Duty Determination.

7.367. For these reasons, we find that China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement.

7.4 Claims with respect to MOFCOM's injury determinations

7.4.1 Introduction

7.368. The United States makes a series of claims challenging MOFCOM's injury determinations in the anti-dumping and countervailing duty investigations at issue. The United States alleges violations of both substantive and procedural obligations concerning the following aspects of MOFCOM's injury determinations:

i. MOFCOM's definition of the domestic industry in the investigations;

ii. MOFCOM's price effects analyses (findings of price undercutting and price suppression) in the Final Determinations;

iii. MOFCOM's analyses of the impact of subject imports on the domestic industry in the Final Determinations;

iv. MOFCOM's causation analyses in the Final Determinations.

7.369. We address each of these claims in turn in the following sections.

7.4.2 Whether MOFCOM properly defined the domestic industry for purposes of the injury determination

7.4.2.1 Introduction

7.370. The United States claims that China acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement in the manner in which it defined the domestic industry for purposes of the investigations.

7.371. The United States contends that MOFCOM's determination of what group of producers constituted the domestic industry was inconsistent with Articles 4.1 and 16.1 because it did not:

i. first seek to define the domestic industry as a whole before turning to define the domestic industry as producers of a major proportion of the total domestic output of the like products;

ii. it did not make independent efforts to determine the extent of the domestic industry, in particular by not investigating the possible existence of domestic producers other than those made known to it by the Petitioner; and

iii. it limited the domestic industry to those supporting the Petition.

7.372. The United States argues that these flaws in the determination of the scope of the domestic industry resulted in MOFCOM acting inconsistently with Articles 3.1 and 15.1 because MOFCOM's improper exclusion of producers from the domestic industry resulted in an injury analysis that was not based on positive evidence or an objective examination of the effects of the subject imports on the domestic industry.

7.4.2.2 Relevant provisions

7.373. Article 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement both read:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped [subsidized] imports and the effect of the dumped [subsidized] imports on

> prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (footnotes omitted)

7.374. Article 4.1 of the Anti-Dumping Agreement provides that:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:
>
> > (i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
> >
> > (footnote original) [11] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.
> >
> > (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

7.375. Article 16.1 of the SCM Agreement sets forth a substantially similar definition of the domestic industry for purposes of the SCM Agreement. Specifically, Article 16.1 states that:

> For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2[566], be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related(48)[567] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

7.4.2.3 Factual background

7.376. MOFCOM published Notices of Initiation of the Anti-Dumping Investigation and of the Countervailing Duty Investigation on 27 September 2009. The wording of the two Notices is substantially the same. Both investigations were initiated upon the application of the same Petitioner (the CAAA) and MOFCOM determined that the same group of companies had standing to

[566] Paragraph 2 refers to the exceptional circumstance of dividing the territory of a Member into two or more markets with different domestic industries.

[567] Footnote 48 of the SCM Agreement is identical to footnote 11 of the Anti-Dumping Agreement set forth in paragraph 7.374.

file the Petition "on behalf" of the domestic industry. MOFCOM noted in the Notices of Initiation that the companies comprising the CAAA accounted for 50.7% (2006), 55.1% (2007), 56.5% (2008), and 62.5% (first half of 2009) of total domestic production.[568]

7.377. In the Notices of Initiation, MOFCOM stated:

> For the industry injury investigation, any interested party and interested government can apply for response to the Investigation Bureau of Industry Injury ("IBII") of MOFCOM within 20 days from the date of this Notice. The application to the IBII shall contain the information regarding production capacity, output, inventory, and producer' production in construction and expansion plan, as well as its respective volume and value of exports to Mainland China of the subject merchandise during the POI for injury part. The Application Form can be downloaded from Column "Response Registration" at http://www.cacs.gov.cn.[569]

7.378. On the same day as it published the Notices of Initiation, MOFCOM published Notices of Registration for participating in the injury portion of the investigation in the anti-dumping and countervailing duty investigations.[570] The Notices required that interested parties and their governments apply to and register with MOFCOM for participating in the investigation within 20 days.[571] MOFCOM did not receive any application or registration from domestic producers by the deadline of 17 October 2009.[572]

7.379. In the Preliminary and Final Determinations, MOFCOM indicates that on 20 October 2009, MOFCOM distributed a domestic producer's questionnaire to all known domestic producers (i.e. 9 companies listed in the body of the Petition and the 20 additional companies listed in Exhibit 2 to the Petition).[573] MOFCOM also posted the questionnaire on the website "China Trade Remedy Information," where it could be downloaded, completed and returned to MOFCOM. MOFCOM received 17 questionnaire responses by the deadline. Those filling out the questionnaire included 15 of the 29 companies listed in the Petition and 2 additional companies that had not been made known to MOFCOM by the CAAA. All of them supported the investigations.[574]

7.380. In the Preliminary and Final Determinations, MOFCOM determined that the aggregate output of the producers who responded to the questionnaire accounted for 45.53% (2006), 50.72% (2007), 50.82% (2008) and 52.59% (first half of 2009) of the total output volume of domestic like products.[575] Accordingly, MOFCOM found that the 17 producers represented the main part of the total domestic production of the like products and determined that they "can represent the Chinese domestic industry of broiler products."[576]

7.381. In its brief on injury, the US industry association – USAPEEC – provided MOFCOM with information about companies that it believed were domestic producers that had not been identified

[568] Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7, p. 1; Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6, p. 1.
[569] Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7, p. 3; Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6, p. 3.
[570] Notice of Registration for the Anti-Dumping Injury Investigation, Exhibit USA-39; Notice of Registration for the Countervailing Duty Injury Investigation, Exhibit CHN-51.
[571] Notice of Registration for the Anti-Dumping Injury Investigation, Exhibit USA-39; Notice of Registration for the Countervailing Duty Injury Investigation, Exhibit CHN-51.
[572] Final Anti-Dumping Determination, Exhibit USA-4, p. 25; Final Countervailing Duty Determination, Exhibit USA-5, p. 27. China indicates in Exhibit CHN-62 that members of the CAAA were deemed registered.
[573] China's response to Panel question No. 56 (citing Exhibit CHN-32).
[574] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 14; Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 16.
[575] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 14; Preliminary Countervailing Duty Determination, Exhibit USA-3, p. 16; Final Anti-Dumping Determination, Exhibit USA-4, p. 24; Final Countervailing Duty Determination, Exhibit USA-5, p. 27.
[576] Final Anti-Dumping Determination, Exhibit USA-4, p. 26. MOFCOM does not specify the output percentages of the domestic enterprises supporting the investigation in the Countervailing Duty Determination. However, the ultimate definition of the domestic industry in both investigations is identical. (Final Countervailing Duty Determination, Exhibit USA-5, p. 27).

in the Petition and that MOFCOM had not contacted.[577] MOFCOM did not take any additional steps in response to receiving this information from USAPEEC.[578]

7.4.2.4 Main arguments of the parties

7.4.2.4.1 United States

7.382. The United States argues that an investigating authority cannot comply with the obligations in Articles 3.1 and 15.1 to base its injury determination on an objective examination of positive evidence if the process for defining the domestic industry results in an examination of only producers selected or identified by the Petitioner.[579] According to the United States, because MOFCOM's erroneous definition of the domestic industry prevented an objective examination of positive evidence with respect to the impact of subject imports on the domestic industry, it would have also tainted the analyses required in Articles 3.2, 3.4 and 3.5.[580]

7.383. In the United States' view, MOFCOM acted inconsistently with Articles 3.1 and 15.1, because it did not make active efforts to collect data on all known domestic producers or data from a representative sample of producers.[581] Instead, according to the United States, MOFCOM effectively allowed the Petitioner to control which producers would be included in the domestic industry.[582]

7.384. The United States contends that, when it only included in the domestic industry those producers who "volunteered" by filling out the domestic producer questionnaire, MOFCOM allowed a self-selection process among the domestic producers that introduced a "material risk of distortion" in breach of Articles 3.1 and 15.1.[583] The United States argues that MOFCOM's approach was, thus, similar to the one the European Commission took in *EC – Fasteners (China)* that the Appellate Body found imposed a self-selection process that introduced a material risk of distortion into the injury analysis.[584]

7.385. The United States argues that MOFCOM's process effectively excluded producers from the domestic industry, because: (i) the 27 September 2009 Notices did not notify domestic producers that they would need to register for participation in the injury investigations to receive a blank domestic producer questionnaire; (ii) the notices did not invite domestic producers to complete the domestic producer questionnaire or let them know that it was available on the China Trade Remedy Information website; (iii) MOFCOM only provided blank domestic producer questionnaires to the Petitioner and "known producers" listed in the Petition; and (iv) the Notices did not explain that only domestic producers that completed domestic producers' questionnaire responses would be included in the domestic industry for purposes of the investigation.[585] Via these actions, the United States contends, MOFCOM insured that only petition supporters would complete questionnaire responses and be included in the domestic industry for purposes of its material injury analysis and MOFCOM thus excluded from consideration producers that could account for approximately half of domestic production.[586]

7.386. The United States argues that MOFCOM's definition of the domestic industry was also inconsistent with both Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. According to the United States, these Articles make clear that investigating authorities are obligated to make active, independent efforts to identify the universe of domestic

[577] USAPEEC Injury Brief, Exhibit USA-21, p. 3.
[578] China's response to Panel question No. 111(a).
[579] United States' response to Panel question No. 64.
[580] United States' first written submission, para. 267 (citing Panel Report, *Mexico – Olive Oil*, paras. 7.197-7.201).
[581] United States' first written submission, para. 262 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 416; and Panel Report, *EC – Salmon (Norway)*, para. 7.130).
[582] United States' first written submission, paras. 258-259.
[583] United States' first written submission, para. 260 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 427); see also second written submission, paras. 137-139.
[584] United States' first written submission, paras. 256 and 261 (citing Appellate Body Report, *EC – Fasteners (China),* para. 427); second written submission, para. 156.
[585] United States' first written submission, paras. 258-259. (footnote omitted)
[586] United States' first written submission, para. 273 (citing Final Anti-Dumping Determination, Exhibit USA-4, Sec. 3.2; Final Countervailing Duty Determination, Exhibit USA-5, Sec. 4.2).

producers of the like product. The United States argues that this is because an investigating authority may not exclude any known domestic producer that does not fall within the two specified exceptions that are set out in subsections (i) and (ii) of Articles 4.1 and in Articles 16.1 and 16.2.[587] The United States argues that if an investigating authority does not make active efforts to collect the information necessary to define the domestic industry as producers as a whole of the like product, it effectively excludes domestic producers from the definition for reasons other than those in the two specified exceptions.[588]

7.387. Furthermore, the United States argues that an investigating authority cannot be excused from the obligation to seek out the whole industry simply because the petitioners represent a "major proportion" of total domestic production.[589] In the United States' view, pursuant to Articles 4.1 and 16.1, an investigating authority is always required to first attempt to define the domestic industry as "domestic producers as a whole of the like products" and only if this proves unsuccessful may the authority resort to the alternative, secondary definition of the domestic industry, i.e. domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products."[590] The United States finds this requirement in the fact that the provisions list "the domestic producers as a whole of the like products" first. According to the United States, if investigating authorities were free to define the domestic industry to include no more than producers accounting for "a major proportion of the total domestic production" at their option, the Agreements would not have included the more stringent definition of domestic industry, and would certainly not have listed the more stringent definition first. Therefore, according to the United States, regardless of whether the ultimate domestic industry is a major proportion of total domestic production, an investigating authority would always have to make efforts to identify the entire universe of domestic producers.

7.388. The United States does not provide a specific list of what actions are required to comply with the alleged obligation to seek out the whole industry, but argues that "where, as in this investigation, respondents have identified additional domestic producers, the investigating authority has an obligation to seek to gather data from those domestic producers."[591] The United States argues that even if the petitioners purport to represent a major proportion of the domestic industry, such efforts are still required, because without seeking information that allows it to determine the universe of the domestic industry, the authority simply may not know the amount of total domestic production.[592]

7.389. The United States argues that in the broiler products investigation MOFCOM was capable of procuring data on total domestic production which could have been used to send questionnaires to substantially all domestic producers with a view to objectively defining the domestic industry so that it included a broad range of domestic producers in terms of performance and positions concerning the anti-dumping and countervailing duty petitions.[593]

7.390. The United States does not dispute China's point that it may be difficult to obtain information on domestic producers in the situation of a fragmented industry.[594] Nevertheless, the United States contends that a fragmented industry does not relieve an investigating authority from the obligation to strive to collect data from a representative sample of domestic producers.[595] In

[587] United States' first written submission, para. 271 (citing Panel Report, *EC – Salmon (Norway)*, para. 7.112). The United States also cites the Appellate Body Report in *EC – Fasteners (China)*, para. 430, in support of its argument that exclusion of producers from the domestic industry for reasons other than those set out in Article 4.1 of the Anti-Dumping Agreement was a violation of that provision. The United States argues that the same reasoning is applicable *mutatis mutandis* to Articles 16.1 and 16.2 of the SCM Agreement (United States' response to Panel question No. 55).

[588] United States' response to Panel question No. 55; second written submission, paras. 142-143.

[589] United States' response to Panel question No. 64.

[590] United States' response to Panel question No. 58; second written submission, para. 141.

[591] United States' response to Panel question No. 55.

[592] United States' response to Panel question No. 55.

[593] United States' first written submission, paras. 265, 266 and 270 (citing Final Anti-Dumping Determination, Exhibit USA-4, Sec. 3.2; Final Countervailing Duty Determination, Exhibit USA-5, Sec. 4.2).

[594] The United States cites Appellate Body Report, *EC – Fasteners (China),* para. 435. (United States' first written submission, footnote 265).

[595] The United States cites Appellate Body Report, *EC – Fasteners (China),* para. 416 and Panel Report, *EC – Salmon (Norway)*, para. 7.130. (United States' first written submission, para. 266).

addition, the United States argues that there is no evidence on the record that the Chinese broiler industry is fragmented.[596]

7.391. In response to China's defence of MOFCOM's process for defining the domestic industry, the United States argues that (i) general press coverage on the existence of the investigation cannot fulfil the obligation of the investigating authority to seek out evidence of other domestic producers[597]; and (ii) the responses from two unknown domestic producers cannot serve as evidence of the success of MOFCOM's generic notice because the only apparent way these producers could have received blank domestic producers' questionnaires is if they received them from the Petitioner as they did not receive them from MOFCOM.[598] The United States also contends that due to the small amount of production these two producers accounted for, the domestic industry was still effectively limited to the Petitioner.[599] Furthermore, the United States disputes China's justification for MOFCOM's admitted inaction when USAPEEC apprised it of four additional Chinese poultry producers that were omitted from the Petition.[600] In particular, the United States does not agree with China that two of the companies USAPEEC identified (Da Chan (Asia) Foods, Ltd. and New Hope Group, Ltd.) filed questionnaire responses under different names.[601] Furthermore, the United States argues that China's assertion that one of those companies (Fujian Sunner Development Co., Ltd.) knew about the pending case and decided not to cooperate, is without citation to any record evidence.[602]

7.392. The United States does not dispute that the domestic industry, as defined by MOFCOM, represents a major proportion of domestic production. Rather, the United States argues, by deliberately confining its domestic industry definition almost exclusively to Petition supporters, MOFCOM breached Articles 3.1 and 4.1 and Articles 15.1 and 16.1.[603] Therefore, the United States argues, even if the Panel were to find that MOFCOM properly defined the domestic industry under Articles 4.1 and 16.1 it would still have acted inconsistently with Articles 3.1 and 15.1 by defining the domestic industry in a manner that was clearly biased in favour of Petitioners, and hence not objective.[604]

7.4.2.4.2 China

7.393. China does not dispute that MOFCOM was required to conduct an objective examination based on positive evidence of the domestic industry under Articles 3.1 and 15.1. China argues that "objective examination" under Articles 3.1 and 15.1 does not require an impractical quest for perfection. Rather, "objective examination" – particularly in an area such as deciding how much investigation is enough in the context of defining a highly fragmented domestic industry – allows flexibility.[605] China argues that, given the nature of the industry, MOFCOM took reasonable and practicable steps to determine the scope of the domestic industry, did not exclude any data it received, and defined the domestic industry to include more than 50% of domestic production.

[596] United States' first written submission, para. 265, footnote 266.
[597] United States' second written submission, para. 146.
[598] United States' second written submission, para. 148 (citing China's first written submission, para. 246).
[599] United States' second written submission, para. 149 (citing China's response to Panel question Nos. 56 and 64). The United States notes that these two Petitioners only began producing the domestic like product in the first half of 2009 and accounted for a very small amount of domestic production during that period. Thus, all the data on domestic industry performance during the 2006-2008 period and substantially all the data for the first half of 2009 would have been collected from the 15 Petitioners.
[600] United States' response to panel question No. 54 (citing USAPEEC Injury Brief, Exhibit USA-21).
[601] United States' response to Panel question No. 54 (citing Final Anti-Dumping Determination, Exhibit USA-4, Sec. 1.2.2.3; Final Countervailing Duty Determination, Exhibit USA-5, Sec. 2.2.2.3). The United States points out that MOFCOM did not list either producer among those that completed questionnaire responses.
[602] United States' response to Panel question No. 54 (citing China's first written submission, para. 248).
[603] United States' response to Panel question No. 58. Although the United States does not contest that the Petitioners constitute a major proportion of domestic production, it does raise some questions about whether MOFCOM's conclusion is consistent with other record information (see United States' second written submission, para. 150, comparing Final Anti-Dumping Determination, Exhibit USA-4, Secs. 3.2, 5.3.11, *and* Final Countervailing Duty Determination, Exhibit USA-5, Secs. 4.2, 6.3.11, *with* China's first written submission, para. 238).
[604] United States response to Panel question Nos. 60 and 64.
[605] China's first written submission, para. 262.

7.394. With respect to the efforts it took to define the domestic industry, China notes that even though the Petitioner, on its face, represented more than 50% of total domestic output, MOFCOM not only sent the domestic producer questionnaire to those producers listed in the Petition, but also published its Notices of Initiation of the Investigations, which invited all interested parties to participate in the investigations and register with the authorities.[606] China also placed the domestic producer questionnaire on its web site, inviting any interested parties who produced broiler chicken during the period of investigation to complete it. China argues that any Chinese company that turned to the MOFCOM website or called MOFCOM officials could easily obtain the questionnaire and any other information it needed.[607] In addition to MOFCOM's efforts, China notes that the investigations were widely publicised in the Chinese press and TV news channels.[608]

7.395. China notes that two producers not identified in the Petition submitted responses to MOFCOM's questionnaire and that MOFCOM used those responses in its injury analysis.[609] China maintains that MOFCOM defined the domestic industry as a "major proportion" after it had received 17 responses, and was unlikely to receive any more. China notes that MOFCOM used the data from all the 17 responding domestic producers and that they constituted more than half of the total domestic production and thus accounted for a major part of the total production quantity of the domestic like product.[610] Furthermore, China states that MOFCOM calculated market share and total apparent domestic consumption based on the available information on estimated total domestic production rather than on the smaller set of responding domestic producers.[611]

7.396. China contends that the United States' arguments about MOFCOM's ability to procure data on other producers in China does not take into account the fact that China's domestic industry is highly fragmented and consists of millions of producers, including hundreds of large producers, thousands of medium-sized producers, and millions of smaller producers, such as small village cooperatives and family farms.[612] China argues that the Appellate Body has specifically recognized that in highly fragmented industries, the "major proportion" test in Article 4.1 "provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible."[613]

7.397. China argues that the United States does not have any evidence to support the US argument that MOFCOM was in a position to collect information from all domestic producers and then take a representative sample of the domestic industry.[614] China argues that Exhibit 6 to the Petition, which contained estimates on total production compiled by a consultant, did not have information on how to contact specific producers.[615] Furthermore, China notes that there was no Ministry of Agriculture data that identified individual producers, and the United States has not identified any known databases in China that would have provided this information to MOFCOM.[616] China argues that under the circumstances of this case, MOFCOM had neither the time nor the resources to undertake such a massive project as identifying all Chinese producers, because of the obligation to conduct the investigations within the prescribed deadlines.[617]

7.398. With respect to the names of the four allegedly unknown producers identified in USAPEEC's Injury Brief, China argues that three of these producers were in fact already known to MOFCOM[618] and that all four companies knew about the investigation. According to China, Da Chan (Asia Food)

[606] China's first written submission, para. 241; Notice of Initiation of the Countervailing Duty Investigation, Exhibit USA-7, p. 3; and Notice of Initiation of the Anti-Dumping Investigation, Exhibit USA-6, p. 3.
[607] China's first written submission, paras. 244-245.
[608] China's first written submission, para. 242; USAPEEC's Injury Brief, Exhibit CHN-21.
[609] China's first written submission, para. 246.
[610] China's response to Panel question No. 106 (citing Final Anti-Dumping Determination, Exhibit CHN-3, pp. 25-26). The share was 45.53% in 2006, 50.72% in 2007, 50.82% in 2008, and 52.59% in the first half of 2009.
[611] China's first written submission, paras. 259-261.
[612] China's first written submission, paras. 236-39(citing USDA, *China – Poultry and Products Annual* (2011), Exhibit CHN-20, p. 3).
[613] China's response to Panel question No. 64 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 415).
[614] China's first written submission, para. 257; second written submission, para. 151.
[615] China's response to Panel question Nos. 53 and 61.
[616] China's response to Panel question No. 61; second written submission, para. 151.
[617] China's first written submission, para. 257.
[618] China's first written submission, para 248.

Ltd responded to the questionnaire on a consolidated basis under the name DaChan Wanda (Tianjin), and from New Hope responded on a consolidated basis under the name Shandong Liuhe.[619] China argues that as a member of CAAA, Shandong Xinchang was directly sent a questionnaire from MOFCOM and chose not to respond.[620] China acknowledges that MOFCOM did not make any attempts to contact Fujian Sunner. However, China argues that this producer knew about the investigation, because it discussed the investigation in its annual financial statement.[621]

7.399. According to China, the steps taken by MOFCOM correspond with the Appellate Body's guidance in *EC – Fasteners (China)* and thus China complied with the "objective examination" requirement in Articles 3.1 and 15.1.[622]

7.400. China argues that the United States' interpretation that the authority must start by making every conceivable effort to include every domestic producer ignores the plain text of Articles 4.1 and 16.1. China notes that nowhere does the text of these provisions state that authorities must start with the whole, and only turn to the alternative after exhausting all options for collecting data from every producer. Rather, the text recognizes that in many cases (perhaps most cases), including every domestic producer will be impossible. That is why the text uses the term "or" to present the two options – (i) the domestic producers as a whole; and (ii) a major proportion of those domestic producers – as equal alternatives.[623] China contends that, contrary to the United States' view, the existence of the two exceptions in Articles 4.1 and 16.1 does not exclude the option of basing the domestic industry on those producers whose output constitutes a "major proportion."

7.401. China does not dispute that an investigating authority must make some efforts to ensure that it properly defines the domestic industry, but in China's view, once the authority has established that the responding producers themselves represent a "major proportion" of the total domestic industry, the obligation on the authority to gather additional responses is limited. When the responding producers themselves are a majority – beyond a "major proportion" – of the domestic industry, the obligation is even more limited. The obligation would include gathering responses from other known domestic producers. The obligation would not extend to searching for more unknown domestic producers.[624]

7.402. Therefore, China argues, MOFCOM acted consistently with its obligations and did not introduce any "self-selection bias" into the investigation. China maintains that there are no specific steps that MOFCOM needed to take that were not taken, and adds that the United States has not identified any.[625] According to China, because the United States does not contest that the Petitioners do represent a major proportion of total domestic production, the United States' claim is that somehow MOFCOM should have identified unknown producers and tried to obtain responses even though there was no need to compel their responses.[626]

7.4.2.5 Arguments of the third parties

7.403. The **European Union** does not see any direct relationship between Articles 4.1 and 16.1, on the one hand, and Articles 3.1 and 15.1, on the other hand. According to the European Union, if the domestic industry is a major proportion of total domestic production, then Articles 4.1

[619] China's second written submission, para. 146 (citing Final Anti-Dumping Determination, Exhibit CHN-3, p. 5)
[620] China's response to Panel question No. 64. China, citing to Exhibit 2 from Petition (Exhibit CHN-32) notes that Shandong Xinchang was a member of the Petitioner, CAAA. China hypothesizes that Shandong Xinchang did not respond because of its affiliation with Tyson.
[621] China's second written submission, para. 146 (citing Exhibit CHN-44, which is an excerpt from the 2009 Annual Report of Fujian Sunner, published in March 2010, referring to the 5 February 2010 publication of the Preliminary Anti-Dumping Determination).
[622] China's first written submission, para. 262.
[623] China's first written submission, para. 264 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 411); second written submission, para. 163.
[624] China's response to Panel question No. 64.
[625] China's second written submission, para. 159.
[626] China's second written submission, para. 158.

and 16.1 are complied with. The obligations in Articles 3.1 and 15.1 then pertain to the domestic industry, as defined. The investigating authority is not under any obligation to do more.[627]

7.404. **Mexico** considers that if an investigating authority defines a domestic industry in a manner inconsistent with Article 4.1 or 16.1, the authority, in basing its injury analysis on an industry that had been incorrectly defined, would be acting in a manner inconsistent with Articles 3.1 and 15.1, because injury would not have been proved with respect to the proper "domestic industry".[628]

7.405. Mexico argues that given that the definition of the domestic industry is an element that forms part of an investigation, as explained by the Appellate Body in *US – Wheat Gluten*, the investigating authority should carry out a "systematic inquiry" or a "careful study" where they "actively seek out pertinent information."[629] Mexico argues that this standard applies regardless of whether the domestic industry is defined as the domestic producers as a whole or as a major proportion of those producers. Consequently, an investigating authority should, within reason, make the efforts necessary to seek to identify as many producers as possible so as to define the domestic industry and, subsequently, conduct its injury analysis.[630] Mexico argues that the actions an investigating authority could take in defining the domestic industry include, but are not limited to, questioning government agencies at local level and producers' associations, checking lists of beneficiaries of subsidy programmes, consulting zoosanitary control agencies, etc.[631]

7.406. **Saudi Arabia** states that Articles 3.1 and 15.1 establish an "overarching" obligation to conduct an objective injury examination based on positive evidence, which "permeates all aspects of the injury and causation investigation, including the definition of the domestic industry to be examined".[632] According to Saudi Arabia, "an injury examination can only be objective if the process that led to the definition of the domestic industry was equally objective".[633] Therefore, Articles 3.1 and 15.1 impose an active and independent approach on the process of identifying the domestic producers to be included in the definition of the domestic industry, involving a major proportion of domestic producers.[634]

7.4.2.6 Evaluation by the Panel

7.407. The United States claims implicate two sets of provisions, Article 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, which require an investigating authority to make an objective examination of the evidence of injury to that domestic industry, and Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement, which set forth how to determine the composition of that domestic industry.

7.408. Articles 4.1 and Article 16.1 set forth the definition for the domestic industry for purposes of each Agreement, either as the domestic producers as a whole or those of them whose collective output represents a major proportion of total domestic production. Investigating authorities may exclude producers that might otherwise fall within the definition, if they fall within one of the two listed exceptions. The domestic industry defined under those provisions forms the basis of an investigating authority's injury determination which is governed by Articles 3.1 and 15.1.[635] Thus the two sets of provisions are inextricably linked.

7.409. The Appellate Body, in *Thailand – H-Beams*, explained that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the

[627] European Union's third-party response to Panel question No. 11.
[628] Mexico's third-party response to Panel question No. 11.
[629] Mexico's third-party response to Panel question No. 11 (citing Appellate Body Report, *US – Wheat Gluten*, para. 53).
[630] Mexico's third-party response to Panel question No. 11.
[631] Mexico's third-party response to Panel question No. 11.
[632] Saudi Arabia's third-party submission, para. 39 (citing Appellate Body Reports, *Thailand – H-Beams*, para. 106; *US – Hot-Rolled Steel*, para. 192).
[633] Saudi Arabia's third-party submission, para. 40 (citing Appellate Body Report, *EC – Fasteners (China)*, paras. 414-417).
[634] Saudi Arabia's third-party submission, para. 40.
[635] Appellate Body Report, *EC – Fasteners (China)*, para. 413 (citing footnote 9 to Article 3 of the Anti-Dumping Agreement).

injury determination.[636] The Appellate Body expounded that this general obligation "informs the more detailed obligations" in the remainder of Article 3.[637] The thrust of the investigating authorities' obligation in Article 3.1 lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination".[638]

7.410. In its Report on *US – Hot-Rolled Steel,* the Appellate Body explained that the term "positive evidence" relates to the quality of the evidence that authorities may rely upon in making a determination while "objective examination" is concerned with the investigative process itself, i.e. the way in which the evidence is gathered, inquired into and, subsequently evaluated.[639] The use of the word "positive" to qualify the word evidence means that the evidence "must be of an affirmative, objective and verifiable character, and that it must be credible"[640], while the qualification of the word "examination" with "objective" indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.

7.411. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.[641] Thus, for an examination to be "objective", the identification, investigation and evaluation of the relevant factors must be "even-handed" and the investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will reach a certain determination.[642]

7.412. The Appellate Body explained the relationship between the definition of the domestic industry in Article 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement and the obligation to base injury determinations on an "objective examination" in *EC – Fasteners (China).* In particular, the Appellate Body clarified that to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product.[643]

7.413. We note that in *EC – Fasteners (China)*, the Appellate Body did not explicitly state that an improper definition of domestic industry could result in a violation of Articles 3.1 and 15.1, independent from the obligations in Articles 4.1 and 16.1. Indeed, the only violation it found was with respect to Article 4.1 of the Anti-Dumping Agreement.[644] However, it did leave open the possibility that such a claim could be made.[645] In the Panel's view, the obligation to conduct an objective examination in Articles 3.1 and 15.1 would require an investigating authority to assess the significance, if any, of information it is made aware of during the process of defining the domestic industry for its assessment of injury. This would include, for instance, information related

[636] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[637] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[638] Appellate Body Report, *US – Hot-Rolled Steel,* para. 192.
[639] Appellate Body Report, *US – Hot Rolled Steel,* paras. 192-193.
[640] Appellate Body Report, *US – Hot-Rolled Steel,* para. 192. We note that in its arguments, the United States has focused on the requirement to conduct an "objective examination" and not on whether the evidence MOFCOM considered was "positive."
[641] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[642] Appellate Body Report, *US – Hot Rolled Steel,* para. 196.
[643] Appellate Body Report, *EC – Fasteners (China),* para. 414.
[644] Appellate Body Report, *EC – Fasteners (China),* para. 430 (finding that the panel erred in finding that the European Union did not act inconsistently with Article 4.1 in defining a domestic industry comprising producers accounting for 27% of the total estimated EU production of fasteners).
[645] Appellate Body Report, *EC – Fasteners (China),* para. 438:
> We note that China's above claims concern the issue of whether the sample *itself* selected in the investigation was consistent with Article 3.1 of *the Anti-Dumping Agreement*. In declining to uphold China's claim, therefore, our finding is limited to the issue of whether the *sample* was inconsistent with Article 3.1 of *the Anti-Dumping Agreement*, and does not address the issue of whether *the domestic industry defined by the Commission* in the fasteners investigation was consistent with this provision. (emphasis original)

to known domestic producers, which may affect its analysis of the various economic factors and causation under Articles 3 and 15.[646]

7.414. We now move to address the United States' specific claims of inconsistency. The United States argues that a flaw in the process of defining the domestic industry can lead to an inconsistency not only with Articles 4.1 and 16.1, but also with the obligation to base the injury determination on an objective assessment in Articles 3.1 and 15.1. The United States has not argued that MOFCOM did not properly determine total domestic production or properly conclude that the 17 responding producers constituted a major proportion of that production.[647] Rather, the bases of the United States claims are that: (i) under Articles 4.1 and 16.1, MOFCOM was required to attempt to identify and seek information from all domestic producers which it did not do; and (ii) that because, in the process of defining the domestic industry, MOFCOM considered information only from a self-selected subset of domestic producers it effectively excluded producers from consideration in a biased manner. The Panel will address each of these possible bases for an inconsistency in turn.

7.4.2.6.1 Whether an investigating authority must attempt to identify and seek information from all domestic producers

7.415. The texts of Articles 4.1 and 16.1 do not contain explicit instructions on how investigating authorities are to determine whether the domestic industry will be comprised of the domestic producers as a whole or those whose output represents a major proportion of total domestic production. The United States contends that investigating authorities have a positive obligation to make active, independent efforts to identify the universe of domestic producers of the like product. This is because, the United States contends, the investigating authorities may not freely choose between the two possible definitions in Articles 4.1 and 16.1, but rather must first attempt to define the domestic producers as a whole and only if that proves impossible may they move to define the domestic industry as those producers representing a major proportion of the total domestic production.

7.416. Although the texts of Articles 4.1 and 16.1 do list one definition before the other, we see nothing that explicitly indicates a hierarchy or sequencing between the two definitions. Indeed, the texts of the provisions use the term "or" rather than terms that would indicate a hierarchy, such as "first" or "if not, then". The use of the term "or" indicates the flexibility the agreements provide to investigating authorities with respect to defining the domestic industry.[648] Moreover, the Appellate Body has confirmed that the use of "a major proportion" within the meaning of Article 4.1 provides an investigating authority with flexibility to define the domestic industry in the light of what is reasonable and practically possible.[649] This inherent flexibility means that investigating authorities are not required by the agreements to first attempt to identify every domestic producer before they can define the domestic industry as those producers whose output constitutes a major proportion of total domestic production.

7.417. We do not agree with the United States that such an understanding would render the "domestic producers as a whole" option redundant, as investigating authorities would always take the "easier" course of defining the domestic industry as a "major proportion".[650] Domestic industries vary widely from investigation to investigation and what would be "easier" in one situation may not be in another. For example, the claim in the *Mexico – Olive Oil* dispute was that the investigating authority had improperly relied on one company as the entire domestic industry without sufficiently determining the existence of other domestic producers.[651]

7.418. Furthermore, treating the two definitions as equal options does not put at risk the ability of an investigating authority to conduct a proper injury analysis based on an objective examination of

[646] For instance, changes in market share between domestic producers included in the domestic industry and those that were not could be relevant to the analysis of the impact of the subject imports on the domestic industry (Article 3.4) and whether it is the imports that are causing injury (Article 3.5).
[647] United States' response to Panel question No. 58.
[648] We agree with the panel in *EC – Salmon (Norway)* that the most common grammatical function of the term "or" is the introduction of two or more alternatives into a phrase or sentence. (Panel Report, *EC – Salmon (Norway)*, para. 7.165 (citing *New Shorter Oxford English Dictionary* (Clarendon Press, 1993)).
[649] Appellate Body Report, *EC – Fasteners (China)*, paras. 412-415.
[650] United States' response to Panel question No. 107(b).
[651] See e.g. Panel Report, *Mexico – Olive Oil,* paras. 7.239-7.248.

positive evidence as the United States contends. In particular, the United States argues that exclusion of non-petitioning producers could affect the injury analysis (with respect to volume, price, and impact) and might also be relevant to the causation analysis when non-petitioners outperform petitioners for reasons other than subject import competition.[652] The implication of the United States' argument is that if the investigating authority can opt to define the domestic industry as a major proportion, then it is more likely that un-injured domestic producers will not be considered in the injury analysis.

7.419. We do not see how requiring investigating authorities to first try to define the domestic industry as a whole would require the inclusion of non-petitioning producers in the domestic industry as even pursuant to the United States' own interpretation, an investigating authority may still ultimately use a "major proportion" for its injury analysis. Additionally, an investigating authority is not allowed to ignore the situation of other domestic producers in its injury determination. An investigating authority will make its analysis under Articles 3.2 and 3.4 with reference to the defined domestic industry, but will still need to assess the situation of other domestic producers in its evaluation of whether it is the impact of the subject imports that have explanatory force for the changes in the various economic factors and whether the strength of other domestic producers could be a possible separate cause of injury to the defined "domestic industry."[653]

7.420. For the foregoing reasons, Articles 4.1 and 16.1 do not require the investigating authority at the outset to attempt to define the domestic industry as the domestic producers as a whole or to have to make efforts to identify all domestic producers before then defining the domestic industry as producers whose output represents a major proportion of total production. Nevertheless, the determination that a group of producers represents a "major proportion" of total domestic output must necessarily be determined in relation to the production of the domestic producers as a whole.[654]

7.421. It is only after establishing total domestic production that an investigating authority can determine whether it can define the domestic industry as the domestic producers as a whole; or those producers that represent a major proportion of total domestic production; or conclude that it does not have information on a "domestic industry" within the meaning of Articles 4.1 and 16.1.[655] This holds even if the petitioners claim to represent a major proportion of total domestic production, as without an understanding of the total universe of production an investigating authority will not be able to verify such an assertion. In light of the links between the definition of the domestic industry and the substantive provisions which require an analysis of that domestic industry, it is our view that the investigating authority must establish total domestic production in the same manner it would conduct any other aspect of the investigation, by actively seeking out pertinent information and not remaining passive in the face of possible shortcomings in the evidence submitted.[656]

7.422. This does not mean that investigating authorities may not rely on information provided to them by petitioners, particularly if it was gathered from independent sources.[657] Investigating

[652] United States' response to Panel question No. 108(c).

[653] We note that the United States itself makes a similar point in its claims against MOFCOM's causation analysis. Namely that once MOFCOM had settled on one domestic industry, its injury determination could not be made with reference to the other producers and that their situation could be a separate cause of injury other than the subject imports.

[654] Appellate Body Report, *EC – Fasteners (China),* para. 412.

[655] We note that under the obligation in Articles 5.3 of the Anti-Dumping Agreement and 11.3 of the SCM Agreement to review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation, an investigating authority would have to verify the accuracy and adequacy of data on total domestic production. However, the Appellate Body explained in *EC – Fasteners (China)* that the determination of standing under Articles 5.4 and 11.4 is a distinct determination from the definition of the entire universe of the domestic industry under Articles 4.1 and 16.1. (See Appellate Body Report, *EC – Fasteners (China),* para. 418). Therefore, verifying the accuracy and adequacy of the petition for purposes of determining standing would not necessarily be sufficient for an investigating authority to comply with the obligation in Articles 4.1 and 16.1 to ensure that the information it is relying upon for the extent of total domestic production in defining the domestic industry is accurate.

[656] Appellate Body Report, *US – Wheat Gluten,* paras. 53-55.

[657] See Panel Report, *Mexico – Olive Oil,* para. 7.226. In this case, China explained, MOFCOM ascertained total domestic production from Exhibit 6 of the Petition, which is a consultant's estimate of

authorities must take reasonable and practicable efforts to assure themselves that the information they are relying on, whether derived from a petition or other sources, is accurate.[658] However, as noted above, the United States has not argued that MOFCOM did not properly determine total domestic production nor does it contest that the 17 responses to the domestic producers' questionnaire constitute a major proportion of total domestic production.[659]

7.423. We recall our view above that in defining the domestic industry investigating authorities are not required to attempt to identify all domestic producers so long as they can establish the amount of total domestic production and assure themselves that they have information on producers whose collective output constitutes a major proportion of that production. It is the industry defined pursuant to Articles 4.1 and 16.1 that the investigating authority must assess in making its injury determination under Articles 3 and 15. Therefore, the United States has not established that China acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement because MOFCOM did not seek to identify all domestic producers in the process of defining the domestic industry.

7.424. We now turn to the second possible basis for an inconsistency alleged by the United States – that in the process of defining the domestic industry MOFCOM effectively excluded producers from the domestic industry such that its injury determination could not be objective.

7.4.2.6.2 Whether MOFCOM's definition of the domestic industry involved a self-selection process which effectively excluded producers from the domestic industry causing material risk of distortion in the examination of injury

7.425. The United States presents two arguments to support its view that MOFCOM's process for defining the domestic industry involved a self-selection process whereby those companies that supported the Petition would be more likely to be included in the domestic industry definition, thus introducing a "material risk of distortion". First, the United States compares MOFCOM's actions to those of the European Commission which the Appellate Body found inconsistent with these provisions in *EC – Fasteners (China)*. Second, the United States argues that China ignored information on the record that would have allowed it to collect data that would have represented the broad range of known domestic producers in terms of performance and positions concerning the antidumping and countervailing duty petitions.[660]

7.426. Addressing the first of the United States' arguments, we note that in *EC – Fasteners (China)* the European Commission contacted and received information from a large number of domestic producers and from that number it excluded those who did not indicate a willingness to be part of the sample. The European Commission concluded that this smaller group nevertheless constituted a "major proportion" because it represented more than 25% of total domestic production. The European Commission thus determined that this group of domestic producers constituted the domestic industry for purposes of the injury determination.[661] The European Commission then sampled these remaining producers and used the data from the sample to evaluate "microeconomic" injury factors, while obtaining information from the defined

production based on "updating quantity" of chicken breeding pairs. (China's response to Panel question No. 53(c), citing Exhibit 6 from Petition, Exhibit CHN-33).

[658] What constitute reasonable and practicable efforts may vary from case to case depending on the nature of the information and the industry in question. We note that Mexico provided an illustrative list of possible actions an investigating authority could take to identify domestic producers, including questioning government agencies at local level and producers' associations, checking lists of beneficiaries of subsidy programmes, and consulting zoosanitary control agencies. Although investigating authorities are not required to identify all domestic producers, such actions could be useful in verifying information on total domestic production. (See Mexico's third-party response to Panel question No. 11; and United States' and China's responses to Panel question No. 108).

[659] United States' response to Panel question No. 58.

[660] United States' first written submission, paras. 265, 266 and 270 (citing Final Anti-Dumping Determination, Exhibit USA-4, Sec. 3.2; Final Countervailing Duty Determination, Exhibit USA-5, Sec. 4.2).

[661] We note that the European Commission made this determination because it found that any group of producers that met the minimum benchmark for standing to file a petition under Article 5.4 of the Anti-Dumping Agreement would also be a "major proportion" under Article 4.1. The Appellate Body clarified that the benchmark in Article 5.4 concerns the issue of standing and does not address the question of how the entire universe of the domestic industry should be defined and thus is wholly unrelated to the proper interpretation of the term "major proportion". (Appellate Body Report, *EC – Fasteners (China)*, paras. 418 and 425).

domestic industry (i.e. those who had indicated a willingness to be part of the sample) for "macroeconomic" injury factors.[662] The Appellate Body found that through this process the European Union acted inconsistently with Article 4.1[663], because the Commission failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by relying on a minimum benchmark irrelevant to the issue of what constitutes "a major proportion", and by excluding certain known producers on the basis of a self-selection process among the producers.[664]

7.427. The United States has not shown that MOFCOM's actions in the broiler products investigation create the same inconsistencies as those identified by the Appellate Body in *EC – Fasteners (China).* We see several pertinent distinctions.

7.428. MOFCOM provided public notice of the initiation and of the requirement to register. Those notices contained information about how to contact the responsible MOFCOM officials. In addition, MOFCOM placed information about the investigation and the questionnaire itself on its website. Given the multiple steps that must be carried out in an anti-dumping or countervailing duty investigation and the time constraint on an investigation, an investigating authority must be allowed to set various deadlines to ensure an orderly conduct of the investigation.[665] Therefore, it is reasonable for an investigating authority to set a deadline by which producers are required to make themselves known.[666] Furthermore, two companies which MOFCOM did not notify directly responded to the questionnaire. The United States argues that the only way they could have received the questionnaire, if not from MOFCOM, would have been from the Petitioner.[667] However, the United States omits the equally likely possibility that the companies read the Notice and the website and downloaded the questionnaire. The United States has not proven that MOFCOM's Notices effectively excluded any producers from participating in the investigation.

7.429. Unlike the European Commission in *EC – Fasteners (China),* MOFCOM did not apply a minimum threshold (in *Fasteners* 25%) after which it considered it had information on producers constituting a "major proportion". Rather, in the broiler products investigation, MOFCOM received information from domestic producers whose collective output constituted more than 50% of total domestic production and then determined that they represented a major proportion of that production.

7.430. Moreover, MOFCOM's process of defining the domestic industry did not involve a selection of companies through sampling. Although MOFCOM required producers to register and submit information within specified deadlines, it did not exclude any of the information it received – even from companies that had not registered. This is not equivalent to receiving information from a company and then declining to use it because the company had not volunteered to be part of a sampling process. Additionally, MOFCOM did not affirmatively reject responses that did not support the application, but rather all responses were supportive of the application.

7.431. The United States also points to three possible sources of data that it argues would have enabled MOFCOM to collect information from all domestic producers for purposes of the injury analysis, but were ignored: (i) the consultant's report in Exhibit 6 to the Petition; (ii) the Ministry of Agriculture; and (iii) the domestic producers mentioned by USAPEEC.

7.432. Exhibit 6 to the Petition, which was redacted from the non-confidential version provided to interested parties[668], contains production estimates based on the "updating quantity" of breeding

[662] Appellate Body Report, *EC – Fasteners (China)*, para. 429.
[663] Although the United States argues that such actions are inconsistent with both Articles 3.1 and 4.1 of the Anti-Dumping Agreement and 15.1 and 16.1 of the SCM Agreement, we note that the Appellate Body only found an inconsistency with respect to Article 4.1 in the *EC – Fasteners (China)* dispute.
[664] Appellate Body Report, *EC – Fasteners (China)*, paras. 422 and 427.
[665] Appellate Body Report, *EC – Fasteners (China),* para. 460.
[666] Appellate Body Report, *EC – Fasteners (China)*, para. 460 (upholding Panel Report, *EC – Fasteners (China)*, para. 7.219).
[667] United States' second written submission, para. 148.
[668] See para. 7.54 above. The fact that there was no non-confidential summary that provided a reasonable understanding of the contents of the confidential exhibits to the Petition may have affected the respondents' ability to defend their interests before MOFCOM and the United States' ability to make claims with respect to China's compliance with its WTO obligations. This further highlights the importance of compliance with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.

chickens. It does not contain names or other identifying information regarding specific producers.[669] China explains that the Ministry of Agriculture does not maintain information on all producers in China, but rather relies on aggregated statistical reports from provincial agricultural authorities to compile its estimates of the number of firms and total output in China.[670] With respect to these two sources, the United States has not demonstrated that MOFCOM had information on other domestic producers that it ignored.

7.433. USAPEEC provided four names to China.[671] One of these companies was listed in Exhibit 2 to the Petition and the United States does not dispute that China sent the domestic producer questionnaire to all known domestic producers identified in the Petition. China provides the Panel with information to show that two other companies USAPEEC identified responded on a consolidated basis with two of the companies listed in the Final Determination.[672]

7.434. With respect to one of the four companies, Fujian Sunner, China acknowledges that MOFCOM made no efforts to contact it after USAPEEC identified it in January 2010.[673] China argues that Fujian Sunner knew of the investigation and was uninterested in participating. Although China provides evidence that Fujian Sunner knew in March 2010 that preliminary duties were imposed in February of that year[674], China does not provide any contemporaneous record evidence to demonstrate that MOFCOM knew that Fujian Sunner was aware of the initiation of the investigation at the time, and was uninterested in participating.

7.435. We would have expected MOFCOM to contact Fujian Sunner and gather information on its share of total domestic production and its position on the imposition of anti-dumping and countervailing duties. However, at the time USAPEEC mentioned Fujian Sunner to MOFCOM, MOFCOM had already received information from producers accounting for approximately 50% of total domestic production. MOFCOM also had information from the Petition indicating the identities of producers accounting for an additional 10% of domestic production.[675] Furthermore, as noted above, MOFCOM did not take any actions that would have excluded Fujian Sunner from participating in the investigation if it had chosen to do so. Although USAPEEC refers to Fujian Sunner as a "major producer"[676], it does not provide any estimates as to Fujian Sunner's share of total domestic production. Therefore, although MOFCOM's actions were not ideal, we see no basis to conclude that its decision not to contact Fujian Sunner in January 2010 gave rise to a material risk of distortion in the injury determination.[677]

7.436. In light of the above, we conclude that the United States has not demonstrated, as a matter of fact, that MOFCOM's actions effectively excluded domestic producers from the investigation creating a self-selection process bias that gave rise to a material risk of distortion in the injury determination. Therefore, the United States has not established that MOFCOM's process for defining the domestic industry was inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

7.437. The United States argues that even if the Panel were to find that MOFCOM properly defined the domestic industry, it would still have acted inconsistently with Articles 3.1 and 15.1 by defining the domestic industry in a manner that was biased in favour of Petitioners, and hence not objective, and that did not permit an injury analysis based on positive evidence of the industry's condition.[678] The United States does not offer any argumentation to support this claim other than its arguments on self-selection, exclusion and bias that we have already addressed. As we have found that the United States did not establish that MOFCOM acted in a manner to exclude producers from the domestic industry creating a self-selection bias that gave rise to a material risk of distortion in the injury determination, we find that the United States has not established that

[669] Exhibit 6 from Petition, Exhibit CHN-33; China's response to Panel question No. 53.
[670] China's response to Panel question No. 61.
[671] USAPEEC Injury Brief, Exhibit USA-21, p. 3.
[672] China's response to Panel question No. 111(c) (citing DaChan Injury Questionnaire Excerpts, Exhibit CHN-74; and Shandong Liuhe Injury Questionnaire Excerpts, Exhibit CHN-75).
[673] China's response to Panel question No. 112.
[674] Excerpt from Fujian Sunner Financial Statement, Exhibit CHN-44.
[675] These are the 14 companies listed in the Petition or its Exhibits that did not respond to the domestic producers' questionnaire.
[676] USAPEEC Injury Brief, Exhibit USA-21, p. 3.
[677] Appellate Body Report, *EC – Fasteners (China),* para. 414.
[678] United States' response to Panel question Nos. 60 and 64.

MOFCOM's injury analysis was inconsistent with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

7.4.2.6.3 Conclusion

7.438. In sum, although investigating authorities have an obligation to seek out pertinent information with respect to total domestic production when defining the domestic industry, China was not required, under Articles 4.1 and 16.1 to seek to identify all domestic producers. Furthermore, the Panel also finds that the United States did not demonstrate that MOFCOM acted to effectively exclude domestic producers from consideration as part of the domestic industry creating a self-selection bias which gave rise to a material risk of distortion of the injury analysis. Therefore, the Panel finds that the United States has not established that China acted inconsistently with the obligations in Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement in the process of defining the domestic industry.[679]

7.4.3 Whether MOFCOM's price effects analyses are consistent with Articles 3.1, 3.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2 and 22.5 of the SCM Agreement

7.4.3.1 Introduction

7.439. The United States claims that MOFCOM's price effects analyses in the Final Anti-Dumping and Countervailing Duty Determinations are inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. Specifically, the United States argues that:

a. MOFCOM's price undercutting analyses are based upon flawed price comparisons due to MOFCOM's comparison of average unit prices (AUVs): (i) at different levels of trade[680]; and (ii) comprising different product mixes; and

b. MOFCOM's findings of price suppression are based on MOFCOM's flawed price undercutting findings and MOFCOM failed to determine that the price suppression was "the effect of" subject imports.

7.440. In addition, the United States claims that MOFCOM failed to disclose its methodology for adjusting subject import price data with respect to different levels of trade and failed to provide in its Determinations the reasons for rejecting parties' arguments with respect to the same issue of differences in levels of trade, thereby acting inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement.

7.441. China contests each of these claims.

7.4.3.2 Relevant provisions

7.442. The texts of Articles 3.1 of the Anti-Dumping Agreement and of 15.1 of the SCM Agreement are set out in paragraph 7.373 above. Article 3.2 of the Anti-Dumping Agreement provides as follows:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in

[679] We note that the United States has argued that a deficiency in the definition of the domestic industry would vitiate the injury analysis conducted under Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement and 15.2, 15.4 and 15.5 of the SCM Agreement. (United States' first written submission, para. 267, citing Panel Report, *Mexico – Olive Oil*, paras. 7.197-7.201). These claims were not specifically raised in the United States' request for establishment of a panel. However, as we have found no inconsistency with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement, we need not address these claims and whether they are within our terms of reference.

[680] The United States defines "levels of trade" as "the different market stages at which goods are traded, such as sales from manufacturer to wholesaler, from wholesaler to retailer, and from retailer to consumer", and adds that "[t]he price of a good varies depending on the level of trade at which the good is offered for sale". (United States' first written submission, para. 288).

> absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.443. The text of Article 15.2 of the SCM Agreement is, for all relevant purposes, identical to that of Article 3.2 of the Anti-Dumping Agreement, except that it uses the terms "subsidized imports" rather than "dumped imports".

7.4.3.3 Factual background

7.444. MOFCOM's price effects analyses in its Final Anti-Dumping and Countervailing Duty Determinations are virtually identical. Moreover, MOFCOM's price effects analysis in each Final Determination is also almost unchanged from the price effects analysis in the corresponding Preliminary Determination. In each case, MOFCOM analyses trends in the average unit price of subject imports and in the price of the domestic like product, and then compares the two on a yearly basis (for 2006, 2007, 2008 and the first half of 2009).

7.445. With respect to the price of subject imports, the Determinations state that MOFCOM used the "export price to China (CIF price)" according to statistics data from the Chinese customs authorities.[681] MOFCOM reports two sets of yearly values, one in USD and one in RMB, the latter of which it subsequently compares to the AUV of domestic like products. In response to a question from the Panel, China indicated that the prices used by MOFCOM were the "CIF, duty-paid prices, without any handling or customs clearance fee", based on statistics data from Chinese customs authorities, to which it adjusted for customs duties paid.[682]

7.446. With respect to the price of the domestic like product, the Final Determinations indicate that MOFCOM used the "average sales price of the domestic like product".[683] China explains that MOFCOM calculated this average unit price by dividing the total sales quantity by the total sales values that were reported by domestic producers in their questionnaire responses.[684] China further explains that the prices used were the average ex-factory unit sales prices of the domestic like products to the first customer "without any loading, handling, or freight fees included".[685]

7.447. The Final Determinations indicate that upon comparing the two AUVs on a yearly basis, MOFCOM found that during the POI, the price of subject imports followed the same trend as the price of domestic like products, and that:

> During the POI, the RMB price of the Subject Products is always lower than average sales price of the domestic like products. In 2006, 2007, 2008 and the first half of 2009, the RMB price of the Subject Products is 569.51 Yuan/ton, 54.64 Yuan/ton, 515.57 Yuan/ton and 232.79 Yuan/ton lower than average sales price of the domestic

[681] Final Anti-Dumping Determination, Exhibit USA-4, pp. 34-35; Final Countervailing Duty Determination, Exhibit USA-5, pp. 79-80.

[682] China's first written submission paras. 274, 289 and 303; response to Panel question Nos. 65 and 114. China explains that the values are the same as in the Petition. The Panel notes that although the Determinations do not cross-reference the Petition, the values used by MOFCOM are identical or virtually identical to the values provided in the Petition. The Petition indicates that the unit values in USD were arrived at by dividing the aggregate import price by the aggregate quantity for 12 tariff lines of imported US broiler products. In its submissions, China explains that the USD unit values reported in the Petition are exclusive of customs duties and that the Petitioner added the customs duties paid to arrive at the AUV in RMB. (China's first written submission, para. 305). These explanations are consistent with the explanations provided in the Petition itself.

[683] Final Anti-Dumping Determination, Exhibit USA-4, pp. 34-35; Final Countervailing Duty Determination, Exhibit USA-5, pp. 79-80.

[684] China's first written submission, paras. 274 and 289.

[685] China's first written submission paras. 274, 289 and 303; response to Panel question Nos. 65 and 114.

> like products. The Subject Products have caused obvious price cuts for the domestic like products.[686]

7.448. In each investigation, MOFCOM also made a finding of price suppression, which we discuss below when considering the United States' claims concerning that finding in each of the Determinations.[687]

7.449. In its Questionnaire Response, Injury Brief and Comments on MOFCOM's Preliminary Injury Determination, USAPEEC argued that it was inappropriate for MOFCOM to compare an average US import price with an average Chinese price given differences in product mix between the two and the fact that different broiler products have different prices. USAPEEC argued that the range of chicken products exported by US producers differed from the range of chicken products sold by Chinese producers in China and that over 97% of the US imports in the POI consisted of four products among the lowest-priced ones (paws, chicken cuts with bones – generally leg quarters, mid-joint wings, and other offal).[688] The United States Government made additional comments in its meeting with MOFCOM after the Preliminary Determination with respect to the product mix issue. It also questioned whether MOFCOM had made the comparison at the correct level of trade. In respect of the latter, the United States Government argued that subject import prices based on official import statistics were at a level of trade different than that of domestic like product prices, and that the former would be lower than the latter because import statistics do not include the importer's mark-up.[689]

7.450. MOFCOM noted the US respondents' arguments concerning the product mix and level of trade in its Final Determinations. MOFCOM rejected the argument on product mix on the following grounds:

> The Investigating Authority holds the view that in the practice of anti-dumping investigation the scope of the Subject Products and like products may vary and be divided into different types or specifications due to different characteristics, usages, quality, and other factors of the products; however, such difference does not prevent the Investigating Authority from deeming the products of different types or specifications as "products of same category" or "identical products".
>
> In this case, both the Subject Products and the domestic like products are [broiler] products. Different specifications of the broiler products belong to one category including the claws and other specifications of broiler products as well. The interested parties have made no objection to this.
>
> In this case, both the Subject Products and the domestic like products are sold in the Chinese market, competing with each other and affected by the situation of the market. The competitive conditions are the same, the two can substitute each other and the prices of the two in the Chinese market are comparable. Thus, in assessing the injury in this case, the Investigating Authority does not need to consider the corresponding relationship among different specifications of the Subject Products and the domestic like products and to segment the market to make comparison and assessment. The Investigating Authority may assess to find out whether the Subject Products caused injury to the domestic industry on the basis of the "the same category of product".[690] (emphasis added)

7.451. With respect to the argument on level of trade, the Final Determinations state that:

---

[686] Final Anti-Dumping Determination, Exhibit USA-4, p. 35; Final Countervailing Duty Determination, Exhibit USA-5, p. 80.

[687] See below, section 7.4.3.5.

[688] USAPEEC's Injury Brief, Exhibit USA-21, p. 19; USAPEEC's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-46, pp. 5-8; Part II of USAPEEC Injury Questionnaire Response, Exhibit CHN-41, p. 12.

[689] United States Talking Points on Injury Issues, Exhibit CHN-27, p. 5.

[690] Final Anti-Dumping Determination, Exhibit USA-4, p. 47. The language in the Final Countervailing Duty Determination, Exhibit USA-5, pp. 92-93, is virtually identical.

> At the same time, when comparing the import price of the Subject Products and the sales price of the domestic like products, the Investigating Authority has taken the difference in sales levels into consideration, adjusting the import price based on the Customs data accordingly. With respects to the data of the adjusted import price and the price under-cutting on the domestic like products, the interested parties have made no objection to this.[691] (emphasis added)

7.452. The United States initially relied on this statement as an indication that MOFCOM had purported to make an adjustment to account for differences in the levels of trade between the prices of subject imports and the prices of domestic like products. China, for its part, contends that while this paragraph reflects MOFCOM's consideration of the level of trade issue, MOFCOM did not make any level of trade adjustment and the statement in fact refers to MOFCOM adding the customs duties paid to the c.i.f. price of the subject products.[692] The Panel does not understand the United States to challenge China's assertion that MOFCOM did not in fact make any level of trade adjustment.

7.4.3.4 Whether MOFCOM's findings of price undercutting are consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.453. We first consider the United States' claim that MOFCOM's failure to control for differences in product mix and level of trade means that MOFCOM's finding of price undercutting in each of the investigations was: (i) not based on an "objective examination" of "positive evidence" as required by Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement; and (ii) inconsistent with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement as it meant that the data relied upon by MOFCOM did not allow it to consider whether there had been significant price undercutting by the allegedly dumped and subsidized imports.

7.4.3.4.1 Main arguments of the parties

7.4.3.4.1.1 United States

7.454. The United States argues that to conduct a price effects analysis consistent with the objectivity and positive evidence requirements under Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, an investigating authority must use domestic and subject import pricing data that permit reasonably accurate price comparisons.[693] The United States submits that the Appellate Body in *China – GOES* found that a failure to ensure price comparability would be inconsistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products.[694]

Level of trade

7.455. The United States notes that Article 2.4 of the Anti-Dumping Agreement requires that the comparison of export price and normal value for the purpose of calculating the margin of dumping be at the same level of trade. The United States submits that the same principle applies to the comparison of subject import and domestic like product prices in the context of a price effects

[691] Final Anti-Dumping Determination, Exhibit USA-4, pp. 47-48. The Final Countervailing Duty Determination, Exhibit USA-5, p. 93, states that "the Investigating Authority has taken the difference in sales links into consideration and adjusted the Subject Products' import price based on the customs' statistical data accordingly."

[692] China's first written submission, para. 304.

[693] United States' first written submission, paras. 281-285.

[694] United States' first written submission, paras. 285-286 (citing Panel Report, *China – GOES*, paras. 7.528, 7.530 and 7.554); second written submission, paras. 164-166 (citing the same paragraphs of the Panel Report in *China – GOES* as well as Appellate Body Report, *China – GOES*, paras. 197 and 200). The Appellate Body report in *China – GOES* was circulated after the first meeting of the Panel, but before the parties' second written submissions. For this reason, the parties discuss the findings of the *China – GOES* panel in their first written submissions and answers to questions following the first meeting of the Panel, and discuss the relevant portions of the Appellate Body Report in the same dispute in their subsequent submissions to the Panel.

analysis.[695] The United States argues that the two sets of AUVs MOFCOM compared are at different levels of trade and that, as a result, the undercutting margins MOFCOM relied upon are not a reflection of the actual price undercutting, but rather also reflect the different levels of trade at which subject import prices and domestic like product prices were collected.[696] The United States argues that domestic producers' sales prices do not compete with c.i.f. prices but rather compete with imports that are offered to the importers' first arm's-length customers. The latter are sold at prices that reflect not only the c.i.f. price but also additional transportation costs from the border to the importer's warehouse and the importer's mark-up for selling, general and administrative expenses and profit. The United States argues that MOFCOM should have added this importer's mark-up to the AUV of subject imports on a c.i.f. basis to render it comparable to the AUV of domestic prices used by MOFCOM.[697]

7.456. The United States takes issue with China's assertion that the evidence on the record showed that some of the customers of US exporters were distributors or end-users and with China's estimation that 80% of importers were distributors. The United States argues that these assertions have no evidentiary support, and that the flip side of China's argument is that some of the importers were not distributors or end-users. The United States also rejects as unsupported by evidence and contrary to market economics China's argument that importers may be reselling at a loss, and notes that importers' prices to first arms-length customers would include not only profit, but also transportation from the border to the importer's warehouse, as well as selling, general and administrative expenses.[698]

7.457. The United States further argues that MOFCOM made no effort to collect information from importers other than to post a copy of the importers' questionnaire on its website, adding that importers would not have been aware of these questionnaires as the Notices of Initiation made no mention of them.[699] The United States also finds China's defence that MOFCOM had no way of identifying importers to be untenable in the light of the submission, by US exporters, of listings of their customers/importers. Moreover, the United States argues, MOFCOM could have obtained information on importers from Chinese Customs. In any event, the United States considers that inability or difficulty in collecting information from importers does not dispense an authority from meeting its obligations under Articles 3.1/15.1 and 3.2/15.2.[700]

Differences in product mix

7.458. The United States argues that when the subject product comprises a heterogeneous range of models with different characteristics corresponding to different prices, the comparability of the AUV of subject import shipments with the AUV of domestic industry shipments will depend in significant part on ensuring the comparability of the product mix between the two. The United States argues that MOFCOM's failure to control for obvious differences in product mix between subject imports and domestic industry shipments renders its price comparison defective.[701]

7.459. The United States claims that the record before MOFCOM demonstrated that different chicken parts command substantially different prices in the Chinese market and that the product mixes of subject imports and the domestic like product differed significantly.[702] The United States argues in this respect that the overwhelming majority of subject imports consisted of lower-value chicken products, such as chicken paws (which accounted for 40% of total imports of the subject product) and wing-tips, whereas Chinese domestic producers' shipments consisted of a distribution

[695] United States' first written submission, para. 289.
[696] United States' first written submission, paras. 275 and 296.
[697] United States' first written submission, para. 294; opening statement at the first meeting of the Panel, para. 68; second written submission, paras. 168-169.
[698] United States' second written submission, para. 169; opening statement at the second meeting, para. 64.
[699] United States' second written submission, para. 173.
[700] United States' opening statement at the first meeting of the Panel, para. 82; second written submission, para. 174-176; response to Panel question Nos. 69(b) and 70.
[701] United States' first written submission, para. 297.
[702] United States' first written submission, para. 298; opening statement at the first meeting of the Panel, paras. 83-88; response to Panel question 65(a) (citing USAPEEC's Injury Brief, USA-21, p. 19; USAPEEC's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-46, pp. 5-6).

of low and high value products including breast meat.[703] The United States also notes that MOFCOM did not deny or refute this evidence of different pricing during the investigation; rather, it claimed that it was under no obligation to take the product mix into account.[704]

7.460. The United States argues that evidence submitted by China to the Panel purporting to demonstrate that subject imports in fact consisted of a higher value mix than domestic sales constitutes a *post hoc* rationalization.[705] The United States also argues that the evidence is not representative and does not constitute positive evidence, notably because it relies on a small number of invoices collected by MOFCOM during the investigation.[706]

7.4.3.4.1.2 China

7.461. China considers that MOFCOM's price comparisons were consistent with its obligations. China submits that Articles 3.2 and 15.2, as well as, more generally, Articles 3.1 and 15.1, do not specify any particular methodology and afford investigating authorities a broad discretion in choosing their own methods of pricing analysis, provided that they represent an "objective examination" of "positive evidence".[707] China further submits that the obligation to consider price comparability arises only based on the facts and circumstances of a particular case.[708]

7.462. China argues that MOFCOM used standard, neutral methodologies, and the United States' arguments assume without evidence that the product mix and levels of trade differed between the two sets of AUVs compared by MOFCOM.[709] China adds that the approach advocated by the United States on both product mix and levels of trade would have resulted in higher price undercutting margins than those calculated by MOFCOM. China considers that product or levels of trade differences only matter if they lead to distortions that are adverse to importers; only where a methodology increases the likelihood of an affirmative determination does it cease being an "objective examination".[710]

Level of trade

7.463. China argues that the concept of level of trade in Article 2.4 of the Anti-Dumping Agreement cannot casually be extrapolated to other provisions and that the absence of a similar requirement in Article 3.2 suggests that an investigating authority is not required to consider the level of trade in the context of conducting a price effects analysis.[711]

7.464. China submits that the statement in the Final Determinations cited by the United States as indicating that MOFCOM purported to take level of trade differences into account was in fact a reference to MOFCOM having added the customs duties paid to the c.i.f. price. However, China also submits that the paragraph at issue reflects MOFCOM's consideration of the level of trade issue. In its responses to the Panel's questions after the second meeting, China argues that MOFCOM addressed the issue of the level of trade in the context of its discussion of the "like product" in its Preliminary and Final Determinations; in this discussion, China explains, MOFCOM found that imports and domestic broiler products shared the same sales channels.[712]

7.465. China argues that MOFCOM's methodology of comparing both subject imports and domestic prices on a duty-paid, landed basis (i.e. on the basis of products "physically in China ready for resale") compares sales at the same level of trade. China also argues that MOFCOM's use

[703] United States' first written submission, para. 301; opening statement at the first meeting of the Panel, para. 83.
[704] United States' opening statement, para. 84 (citing Final Anti-Dumping Determination, Exhibit USA-4, Sec. 6.2.2).
[705] United States' opening statement at the first meeting of the Panel, para. 89; second written submission, para. 179.
[706] United States' second written submission, paras. 182-189; comments on China's response to Panel question No. 118.
[707] China's first written submission, paras. 281-282.
[708] China' second written submission, paras. 169, 221-225; response to Panel question No. 65(a).
[709] China's response to Panel question No. 65(c); second written submission, para. 167.
[710] China' second written submission, paras. 167-169, 172, 185 *et seq*.
[711] China's first written submission, paras. 291-292. China also notes that the SCM Agreement includes no reference to the concept of level of trade.
[712] China's response to Panel question No. 113.

of landed prices in China allowed it to compare domestic prices and import prices on a comparable basis without the more difficult administrative burden of determining comparable prices at a later stage in the distribution chain.[713]

7.466. China argues that MOFCOM's methodology does not make any assumptions about whether subject merchandise is being imported by importers, distributors, or end-users.[714] By contrast, China argues, the United States' argument makes two assumptions: that the importer is an intermediary as opposed to a distributor or end-user, and that the importer's mark-up is a positive number. China argues that there is no factual basis for either of these assumptions.[715]

7.467. Moreover, China argues that the United States wrongly assumes that MOFCOM could easily access all information on the level of trade of US imports and domestic producers.[716] China submits that imported and domestic products may be sold through different channels of trade that are not easily compared and that in injury investigations authorities are dealing with many companies and make price comparisons across entire industries. Without some reasonable simplifying assumptions, China submits, the task of making such comparisons is a daunting one.[717] China further argues that importers may have no incentive to cooperate in the investigation and notes that in the investigations at issue, MOFCOM received no questionnaire response from any importer. China submits that US exporters themselves were uncertain of their customers in China.

Differences in product mix

7.468. Concerning the United States' argument that MOFCOM's pricing comparisons did not take into account differences in product mix, China submits that MOFCOM's methodology struck a reasonable balance between the information available to it and the need to conduct an objective examination of relative prices of various broiler chicken products being sold in China. China submits that MOFCOM properly considered the issue of product mix and then decided that comparing overall average prices made the most sense.[718] China explains that MOFCOM conducted its analysis on an overall basis because all types of chicken competed with each other in the Chinese market; MOFCOM's methodology allows it to capture all sales as opposed to just certain products and recognises the substitutability among different types of products.[719] China adds that where the investigating authority has defined a single like product, and that finding has not been challenged; nothing in the "objective examination" requirement forces the authority to conduct a price comparison on the basis of product segments within the single like product.[720]

7.469. China takes issue with the United States' assertion that the US exports to China comprised mostly lower-valued parts whereas domestic products consisted of higher-value chicken parts. China argues that the data submitted by the United States in support of this assertion is unreliable and focuses on US exports rather than on pricing in China.[721] China argues that Chinese customers value all parts of the chicken and that it is not at all obvious that there are differences between the prices of different parts on the Chinese market that would matter for the purpose of the price comparison. China also argues that the parts exported by US producers in fact attract a higher value on the Chinese market than the parts sold by Chinese producers and that, as a result, contrary to what the United States argues, MOFCOM's methodology in fact understates the price undercutting.[722] China argues that a series of invoices, collected during verification of domestic producers, confirm the point of common knowledge that in China, chicken paws command a higher price than chicken breast. In its second written submission, China provides a product-specific price

[713] China's first written submission, para. 282.
[714] China's second written submission, para. 204.
[715] China's first written submission, paras. 202, 285, 296. China submits, as evidence to contradict the second assumption, a report from the US Department of Agriculture Foreign Agricultural Service indicating that during 2008, the vast majority of importers in China were reselling imported broiler chicken at 20-30% losses. (USDA GAIN Report CH9601 (January 2009), Exhibit CHN-40; China's response to Panel question 65(c) and second written submission, para. 213). China acknowledges that this specific document was not on the record before MOFCOM.
[716] China's first written submission, para. 293.
[717] China's first written submission, para. 293.
[718] China's first written submission, para. 312.
[719] China's first written submission, paras. 283, 313-316.
[720] China's response to Panel question No. 66.
[721] China's first written submission, paras. 319-322.
[722] China's first written submission, paras. 325-326.

undercutting calculation for three cuts (paws, wings and legs) relying on price data contained in the invoices, which arrives at a margin of undercutting exceeding that calculated by MOFCOM in the investigations.[723]

7.4.3.4.2 Arguments of the third parties

7.470. The **European Union** argues that whenever a price effects analysis resorts to a price comparison between domestic and imported goods, the comparison must necessarily take into account possible discrepancies between the prices compared in terms of product mix and level of trade. Based on the specific facts before it, the investigating authority has to determine if such discrepancies have an actual impact on the comparability of prices, and if necessary, make necessary adjustments.[724] In relation to the product mix issue, the European Union considers that a methodology that compares AUVs for different products under investigation may be appropriate for the purposes of a price undercutting analysis only where these products are relatively homogeneous and sufficiently comparable.[725] The European Union considers that differences in level of trade may prevent a proper price comparison and that the principles expressed in Article 2.4 of the Anti-Dumping Agreement should be extended by analogy to the provisions governing the price effects analysis.[726] The European Union agrees with the United States that the AUVs used by MOFCOM in the broilers investigations were at different levels of trade given that c.i.f. price of subject imports excludes a series of additional costs and that in the absence of sufficient explanations on the level of trade issue in the Determinations, China can be found in breach of Articles 3.2 and 15.2.[727]

7.471. **Mexico** argues that the price comparison for the purposes of the injury analysis must be conducted at the same level of trade and that the investigating authority may need to make necessary adjustments to ensure that the comparison is objective and fair. Mexico argues on this basis that MOFCOM's price undercutting analysis is inconsistent with Articles 3.1 and 2.4 of the Anti-Dumping Agreement, in relation with Article 3.2 of the Anti-Dumping Agreement.[728] Mexico also agrees with the United States that where average prices are used, a significant difference between the values of the baskets of products compared could lead to a biased conclusion regarding the level of price undercutting. Mexico considers that MOFCOM should have performed a disaggregated comparison of products "of the same species", not a comparison of products "of the same genus".[729]

7.472. **Saudi Arabia** argues that an injury determination in accordance with Articles 3.2 or 15.2 needs to account for important differences between the subject product and the like product, such as the product mix, and must compare prices at the same level of trade.[730]

7.4.3.4.3 Evaluation by the Panel

7.473. The principal question before the Panel is whether MOFCOM ensured the comparability of the two sets of prices that it compared for the purpose of determining price undercutting in the context of Articles 3.2 and 15.2.

7.474. We note that neither Articles 3.1 and 15.1 nor Articles 3.2 and 15.2 impose a specific methodology on an investigating authority in performing its price effects analysis. In fact, prior panel and Appellate Body decisions recognize that the investigating authority is afforded a certain level of discretion in choosing a methodology it considers appropriate in conducting the examination envisioned by Articles 3.2 and 15.2.[731]

[723] China's second written submission, paras. 191-196.
[724] European Union's third-party response to Panel question No. 14.
[725] European Union's third-party submission, paras. 66-67; third-party response to Panel question No. 15.
[726] European Union's third-party submission, paras. 76-77.
[727] European Union's third-party submission, paras. 78-81.
[728] Mexico's third-party statement, paras. 35-41; third-party response to Panel question No. 14.
[729] Mexico's third-party statement, paras. 42-44; third-party response to Panel question No. 14.
[730] Saudi Arabia's third-party submission, para. 41.
[731] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113 (discussing the related issue of the authority's examination of the volume of imports); Panel Report, *China – X Ray Equipment*, para. 7.41.

7.475. Nonetheless, Articles 3.2 and 15.2 require the investigating authority to consider "whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member". There can be no question that the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of price undercutting *by* the dumped or subsidized imports *as compared with* the price of the domestic like product, which may then be relied upon in assessing causality between subject imports and the injury to the domestic industry.[732]

7.476. The authority's discretion is also circumscribed by the overarching obligation under Articles 3.1 and 15.1 that the determinations of injury "be based on positive evidence and involve an objective examination". A comparison of prices that are not comparable would not, in our view, satisfy the requirement for the investigating authority to conduct an "objective examination" of "positive evidence".

7.477. The issue of price comparability was considered in two recent disputes. The panel and the Appellate Body in *China – GOES* and the panel in *China – X-Ray Equipment* held that Articles 3.1 and 15.1 and 3.2 and 15.2 require that an investigating authority performing a price comparison in the context of a price effects analysis ensure that the two prices it relies upon are comparable.[733] In *China – GOES*, the Appellate Body explained that:

> … although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products.[734]

7.478. In addition, the Appellate Body explained that the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination", meaning that the requirement to ensure price comparability does not depend on the respondents having raised the issue before the investigating authorities.[735]

7.479. These decisions stand for the proposition that price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis, yet also recognize that the need for adjustments necessarily depends on the factual circumstances of the case and the evidence before the authority. We agree.

7.480. We note that several factors determine the sales price in a given transaction, and that, consequently, price comparability has to be ensured in terms of the various features of the products and transactions being compared. In particular, the sales price of a product reflects the commercial transactions and circumstances in which the product is traded. It is made of different pricing components that reflect the particular conditions or circumstances of the sale, starting with an amount that represents the cost of production and sale of the product, to which is added an amount for profit. Depending on the particular realities of the relevant market, additional pricing elements – generally an amount for additional costs and profit for each of the successive participant in the distribution chain – are added as the product gets traded further down the distribution chain, from producer to wholesaler, from wholesale to retailer, and from retailer to end-user.

---

[732] In *China – GOES*, the Appellate Body indicated that the different paragraphs of Articles 3 and 15 contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination and that the outcomes of the inquiries set forth in Articles 3.2 and 15.2 and the examination required in Articles 3.4 and 15.4 form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.

[733] Panel Report, *China – GOES*, para. 7.528; Appellate Body Report, *China – GOES*, paras. 197-203; Panel Report, *China – X-Ray Equipment*, paras. 7.49-7.50.

[734] Appellate Body Report, *China – GOES*, para. 200. (footnotes omitted)

[735] Appellate Body Report, *China – GOES*, para. 201 (citing Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109; and Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259). The panel in *China – X-Ray Equipment* reached the same conclusion on the basis that under WTO law, a Member's claims before a panel are not limited to the claims that were made during the investigation (Panel Report, *China – X-Ray Equipment*, paras. 7.39-7.40).

7.481. Hence, the level of trade at which a transaction takes place – whether the sale takes place between a producer and a wholesaler or between a wholesaler and a retailer for example – is an important characteristic of a transaction as it determines which pricing components are included in the sales price. In our view, for a price comparison to be informative of the level of price undercutting by subject imports, it must compare transactions that include the same pricing components (insofar as pricing components have an impact on the price). This means that it must compare transactions at the same level of trade. Alternatively, if the transactions are at different levels of trade, the authority must apply appropriate adjustments to render them comparable in terms of the pricing components that they include.

7.482. For these reasons, the concept of level of trade is relevant to the price comparison even though it is not specifically referred to in the various paragraphs of Article 3, in contrast to Article 2.4 of the Anti-Dumping Agreement.[736]

7.483. Another fundamental determining factor of the price is the physical characteristics of the product. Articles 3.1/15.1 and 3.2/15.2 mandate an analysis of the effects of prices on the domestic market of the "like product". Yet, in our view, ensuring that the products being compared are "like products" will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product.[737]

7.484. We will now consider the specific allegations of the United States that MOFCOM failed to ensure price comparability in terms of: (i) the level of trade, and (ii) the product mix of the AUVs compared in the investigations at issue. In doing so, we recall the general principle that a panel must review an investigating authority's application of the covered agreement on the basis of the record developed by the authority in the investigation at issue and of the authority's determinations. In addition, with respect to the specific question before us, the Appellate Body in *China – GOES* stressed that an authority's "consideration" of the price effects of subject imports "must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors."[738]

7.4.3.4.3.1 Whether MOFCOM ensured price comparability in terms of levels of trade in the investigations at issue

7.485. We have explained above that, to ensure price comparability, an authority must consider whether the transactions that are related to the prices being compared include the same pricing components or elements, which reflect the "level of trade" of the transaction as this term is used by the United States. The United States' challenge of this aspect of MOFCOM's price comparison is limited to the fact that, in its view, the two sets of prices compared by MOFCOM, import prices on a c.i.f. basis and domestic prices on an ex works basis, are not at the same level of trade.

7.486. The United States has not convinced us that MOFCOM needed to add a mark-up corresponding to the importer's costs and profit to the subject import AUV to render that AUV

[736] Similar conclusions were reached by the panels in *EC – Tube or Pipe Fittings,* paras. 7.292-7.293; and *EC – Fasteners (China),* para. 7.328.

[737] An authority only needs to make an adjustment where the difference in physical or other characteristics of the products affects their competitive relationship. Because the focus of the comparison performed under Articles 3.2 and 15.2 is on the competitive relationship between subject imports and domestic like products in the market of the importing Member, price comparability needs to be ensured in terms of the perceived importance of potential differences to consumers in that market, not the market of the exporting Member. (See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.293).

[738] Appellate Body Report, *China – GOES*, para. 131. (emphasis original)

comparable to the domestic price AUV. All else being equal, the Panel is of the view that a c.i.f. price to which appropriate adjustments are made to reflect the price paid by the first purchaser in the country of import (i.e. the importer) is comparable to an ex works price to the first purchaser in the importing country. Both prices are situated at the first point at which a purchaser may take delivery of the product in the country of importation and both contain pricing elements that reflect the first point in the distribution chain where imported and like domestic products enter into competition. Expressed differently, they are the prices upon which the "first" purchaser in the country of import will base its purchasing decision to either import directly or to buy directly from domestic producers. For these reasons, we are of the view that the two prices are, in principle, at the same level of trade.

7.487. The pricing elements that the United States suggests MOFCOM should have added to the AUV of subject imports derived from prices on a c.i.f. basis, i.e. transportation costs to the importer's warehouse and an amount to cover the importer's eventual profit, are not by definition contained in the domestic producer's ex works price as the United States argues. Therefore, the AUV value calculated on the basis of c.i.f. prices should not have to be adjusted any more than to reflect the total costs that are associated with bringing the imported good past the border, into the Chinese territory, ready to be taken possession of by the importer.

7.488. In light of the foregoing, we conclude that the United States has not made a *prima facie* case that MOFCOM's finding of price undercutting in the anti-dumping investigation was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and that its finding of price undercutting in the countervailing duty investigation was inconsistent with Articles 15.1 and 15.2 of the SCM Agreement due to its failure to compare prices at the same level of trade.

7.489. We note that this conclusion is circumscribed by the limits set by the United States' claim regarding this aspect of MOFCOM's price comparison. In particular the United States does not contest that MOFCOM used, as the price of the domestic like product, an AUV derived from the prices at which domestic producers sold their products to their first customers on an ex-works basis, i.e. exclusive of shipment or any other costs beyond the factory.

7.4.3.4.3.2 Whether MOFCOM ensured price comparability in terms of product mix in the investigations at issue

7.490. Turning to the second argument of the United States, we have explained above that if the product mix between the two sets of prices being compared varies, there is a high risk that the differences in AUVs reflect these variations in product mix, rather than actual differences in pricing. It is not in dispute that the product mix varied considerably between the two sets of data compared by MOFCOM in the investigations at issue. The parties agree that US imports were limited to certain chicken parts, and in fact included a high proportion of paws, wings, and legs, whereas sales from domestic producers included all other parts of the chicken, including breast meat. Moreover, the information before MOFCOM – be it Chinese Customs' import data[739], the price listings submitted by USAPEEC in support of its comments on injury[740], or invoices collected by MOFCOM at verification, revealed important price differences between the different broiler products. This meant that the differences in product mix just mentioned risked affecting price comparability and distorting any price effects analysis if steps were not taken to control for product mix, or necessary adjustments made.

7.491. China has explained to the Panel that MOFCOM's methodology understated the extent of price undercutting given the well-known fact, in China, that cuts such as paws command a higher price than cuts such as breasts on the Chinese market. China argues that this would have been obvious to MOFCOM and that in addition, invoices collected by MOFCOM revealed the same customer preferences and supported the notion that the import side of MOFCOM's price

[739] Chinese Customs data distinguished between various cuts such that MOFCOM would have known the prices at which US imports of different cuts took place. Both parties have sought to rely on this import data in support of their own arguments. (See China's first written submission, paras. 328-329).

[740] USAPEEC provided price listings to MOFCOM in support of its arguments on product mix. The listings report average price by HTS number, broken down between domestic prices, export prices to China, and export prices to third countries. The listings show that the prices at which US exporters sold their products, even on the Chinese market, varied significantly depending on the chicken part concerned. (USAPEEC Foreign Producer Response, Exhibit CHN-45; and USAPEEC Injury Questionnaire Response, CHN-41).

comparison consisted of mostly higher value products, whereas the domestic side included a large portion of lower value products.[741] China argues on this basis, and with the support of product-specific price comparisons it prepared for this panel proceeding[742], that MOFCOM's methodology understated the margin of undercutting. China argues that there can be no violation of Articles 3.2 and 15.2 where differences in price comparability favour foreign respondents.

7.492. We recall that in the Determinations, MOFCOM rejected US interested parties' arguments on product mix on the basis that it was under no obligation to conduct a disaggregated price comparison or take the composition of the two AUVs into consideration because the different chicken parts were all within the scope of the "like product" and in competition with one another, and because their price were "comparable". This contradicts China's explanations before the Panel. For this reason, we agree with the United States that the rationale offered by China in these proceedings amounts to *post hoc* rationalization which is irrelevant for the purposes of our assessment of MOFCOM's actions.

7.493. But even if China's depiction of MOFCOM's consideration of the issue were accepted, MOFCOM could not in our view have assumed on the face of evidence such as the relatively small sample of invoices produced before the Panel or even well-known market realities that price differences between different chicken parts would favour US producers/exporters and underestimate the extent of price undercutting. Rather, such evidence should in our view have alerted MOFCOM to the fact that the outcome of its price comparison would be affected by the composition of each of the product "baskets". It would by consequence have required MOFCOM to take necessary steps to ensure price comparability.[743]

7.4.3.4.3.3 Conclusion on price comparability

7.494. On the basis of the above, we conclude that:

i. The United States has not established that China acted inconsistently with Articles 3.1/15.1 and 3.2/15.2 because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values at different levels of trade; and

ii. China acted inconsistently with Articles 3.1/15.1 and 3.2/15.2 because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values that included different product mixes without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments.

[741] China's second written submission, para. 187.

[742] China provided the Panel with 63 invoices collected by MOFCOM during its verification of domestic producers in Exhibit CHN-31. China submitted a breakdown of the data from these invoices in Exhibit CHN-43, which provides a comparison of the price differential between domestic shipments of breast and paws for each of the 21 invoices that included both breasts and paws. China also submits as exhibits a number of press reports to support its argument that it is a well-known fact in China that chicken paws sell at a higher price than breasts in China. (China's first written submission, para. 325; and Reports on Diverging Consumer Preferences, Exhibit CHN-25). In its second written submission, on the basis of the prices reported in the 63 invoices collected by MOFCOM, China provides a price comparison on a product-type basis for three types of products (wings, paws, legs) which China asserts represent 80% of the US exports to China (and 28% of domestic sales). These comparisons arrive at a higher undercutting margin for each of the categories than the comparison performed by MOFCOM in the investigation. (See China's second written submission, paras. 191 *et seq.*).

[743] For a similar conclusion, see Panel Report, *China – GOES*, footnote 506. We would further note that the United States contests the representativeness of the 63 invoices and that China confirms that the 63 invoices it relies upon represent a very small fraction of the relevant sales of domestic producers.

7.4.3.5 Whether MOFCOM's findings of price suppression are consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

7.495. We now consider the United States' claim that MOFCOM's findings of price suppression in the two investigations are also inconsistent with, respectively, Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[744]

7.4.3.5.1 Main arguments of the parties

7.4.3.5.1.1 United States

7.496. The United States submits that while, in theory, an investigating authority could find significant price suppression without finding that significant price undercutting exists, in the present instance, MOFCOM based its price suppression[745] analysis entirely on its WTO-inconsistent price undercutting analysis. The United States adds that MOFCOM made no finding that the volume and market share of subject imports alone could have suppressed domestic prices to a significant degree, and that the record would not have supported such a finding.[746] As MOFCOM's finding of significant price undercutting is unsupported by an objective evaluation of positive evidence, MOFCOM's price suppression finding was inconsistent with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.[747] Moreover, the United States submits that the absence of any valid price comparisons or positive record evidence that subject imports influenced domestic like product prices made it impossible for MOFCOM to consider properly whether subject imports had the effect of depressing or suppressing domestic like product prices, as required under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.[748]

7.497. Moreover, the United States also argues that the *existence* of price suppression is not sufficient to support a finding of adverse price effects and that Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement require the investigating authority, in addition, to establish that any significant price suppression is *the effect of such imports*. The United States argues that because the only evidence cited by MOFCOM linking subject imports to price suppression was its deficient price undercutting analysis, MOFCOM failed to establish that any price suppression was the effect of subject imports.[749]

7.4.3.5.1.2 China

7.498. China disagrees with the United States' contention that MOFCOM's finding of price suppression was predicated entirely on its defective finding of significant price undercutting.[750] China argues that under Articles 3.2 and 15.2, price undercutting, price depression and price suppression are three distinct analytical techniques for the authority to find adverse price effects. China argues that any of them alone can suffice and that the text of Articles 3.2 and 15.2 expressly sets out price suppression as an adverse price effect that may exist even in the absence of a price undercutting finding.[751]

---

[744] United States' first written submission, paras. 309-310.

[745] The United States argues that MOFCOM's adverse price effects analysis appears to have been limited to finding of price suppression, and included no finding of price depression. In addition, the United States writes, in a footnote, that "[r]ecord evidence clearly showed that subject import price competition did not "depress" domestic like product prices". (United States' first written submission, para. 306 and footnote 311).

[746] United States' first written submission, paras. 277, 305; opening statement at the first meeting of the Panel, paras. 91-92; second written submission, paras. 192-197; and response to Panel question No. 72. The United States adds, in its opening statement at the second meeting of the Panel, para. 67, that the record would not have supported a finding that "volume effects" or "market share effects" suppressed domestic prices given evidence on the record that the increase in subject import volume and market share did not come at the expense of the domestic industry, which gained more market share than subject imports.

[747] United States' first written submission, para. 309.

[748] United States' first written submission, para. 310.

[749] United States' opening statement at the first meeting of the Panel, para. 93; second written submission, paras. 190-191 (citing Appellate Body Report, *China – GOES*, paras. 142, 159).

[750] China's first written submission, para. 333.

[751] China's first written submission, paras. 333-338, 340. China submits that in the investigations at issue, MOFCOM considered all three categories of price effects but focused its discussion on the two adverse

7.499. China argues that, as a factual matter, MOFCOM's finding of price suppression was not dependent on the existence of undercutting, but was an additional effect.[752] China argues that in analysing price suppression, MOFCOM relied on: (i) the volume effects of subject imports (which China contends were not challenged by the United States); (ii) market share effects; and (iii) the erosion of profit margins. China argues that MOFCOM's discussion of the issue shows that MOFCOM expressly set price suppression as an independent and adverse price effect – price suppression did not exist solely because of price undercutting, but rather existed in addition to price undercutting.[753]

7.500. In its first written submission and opening statement at the first meeting of the Panel, China argued that Articles 3.2 and 15.2 only require a showing that adverse price effects exist, and do not require the investigating authority to find that subject imports caused or affected the price suppression.[754] In its second written submission, China asserted that MOFCOM's Final Determination in fact explained how subject imports had "explanatory force" with regard to the suppression of domestic prices through the adverse volume effects that were independent of the price effects".[755]

7.4.3.5.2 Arguments of the third parties

7.501. The **European Union** argues that, consistent with Articles 3.2 and 15.2, findings of price suppression or price depression may be made independently from a finding of price undercutting. The European Union explains that this would be the case, where, for instance, due to consumer preferences or other non-price related factors, imported goods are in a position to exert a downward pressure on the domestic prices even if they are higher than the domestic prices. The European Union is of the view that MOFCOM's finding of price suppression is insufficiently substantiated, because: (i) to make a finding of price suppression, it is necessary to establish that prices have not been able to match increases in costs, and the file reveals no indication of cost increases during the period of investigation, making it questionable whether MOFCOM's factual findings meet the very definition of price suppression; (ii) parallel evolution of domestic and import prices is not, in itself, sufficient to establish causation as it can result from a number of factors and in the investigations at issue, MOFCOM has not demonstrated that price suppression, if it existed, was caused by subject imports.[756]

7.4.3.5.3 Evaluation by the Panel

7.502. We note at the outset that our analysis below is limited to MOFCOM's finding of price suppression. While China has argued that MOFCOM noted a decrease in domestic prices in 2009, we do not understand China to be taking the position that MOFCOM reached a conclusion that subject imports had the effect of depressing domestic prices over the period considered, and the United States is not seeking findings with respect to any such conclusion.

7.503. MOFCOM's finding of price suppression is found in section 5.2.3 of the Final Anti-Dumping Determination (6.2.3 of the Final Countervailing Duty Determination) entitled "The effect of the import price of the product concerned on the price of the domestic like product of the domestic industry", immediately following MOFCOM's conclusion that during the period considered,

---

effects that were the most pronounced, price undercutting and price suppression. With respect to third effect, price depression, China agrees with the United States that there was no price depression in the 2006-2008 period, but argues that there was price depression in the first half of 2009, when compared to the same period in 2008. China argues that the United States misleadingly compares data for 2006 to 2009, which comparison reveals no price depression. China notes that although MOFCOM did not make any specific conclusion about price depression in the first half of 2009, it did specifically note the decline in prices of subject imports and domestic like products in that period as part of the parallel trends of imports and domestic pricing. (China's first written submission, paras. 274-280 and footnote 248; opening statement at the first meeting of the Panel, para. 38).

[752] China's first written submission, paras. 339-341, and 347.

[753] China's first written submission, paras. 342-348; opening statement at the first meeting of the Panel, paras. 38-39 and 45; second written submission, paras. 226-227 (citing Appellate Body Report, *China – GOES*, para. 137).

[754] China's first written submission, paras. 337-338; opening statement at the first meeting of the Panel, para. 38.

[755] China's second written submission, para. 227.

[756] European Union's third-party response to Panel question No. 13.

the price of subject import was always lower than the price of the domestic like products. The United States' translation of the relevant language in the Determinations reads as follows:

> The lower price of the Subject Products has also suppressed sales price of the domestic like products. Evidences from the investigation suggested that during the POI (with year 2007 as the only exception), sales price of domestic like products had been lower than their production costs for a quite long time, while gross profit margin of the domestic like products in 2007 remained at a fairly low level. As a result, the domestic like products sector had been losing money for a long time. Particularly since 2008, further price cuts on the part of the Subject Products have resulted in a loss in money of the domestic like products sector.
>
> To sum up, the continual expansion of the market shares of the Subject Products in China is closely related to the continual export to China in a large amount at a low price, and selling of the Subject Products in a large amount at a low price across China not only has a cut-down effect on price of the domestic like products, but also leads to a reduced profitability of the domestic like products.[757]

7.504. MOFCOM repeats its finding of price suppression in the context of its causation analysis[758], and also mentions price suppression when addressing US respondents' comments on the Preliminary Determinations.[759]

7.505. China has provided its own translation of the paragraphs of the determinations containing MOFCOM's finding of price suppression. China objects to the United States' translation, which in its view mistakenly uses the term "lower price" in the opening sentence of the first paragraph, whereas the correct translation would use the term "low-priced".[760] China's translation reads as follows:

> The low-priced sales of the product concerned also suppressed the selling price of the like product of the domestic industry. The investigation evidence indicates that, during the investigation period, except for the year 2007, the selling price of the like product of the domestic industry remained below the sales cost for a long time. In 2007, the gross profit margin of sales of the like product of the domestic industry was at a low level, the like product of the domestic industry were in a state of loss for a long time. In particular, since 2008 the like product of the domestic industry was in a loss because the further price undercutting of the product concerned.
>
> Taking all the above into consideration, the continuous expansion of the market share of the product concerned in Chinese market was closely linked to the continuous low-priced exports of the product concerned in large quantity to China. The low-priced sales of the product concerned in a large quantity in Chinese market not only apparently undercut the price of the like product of the domestic market, but also resulted in the decrease of profit level of the like product of the domestic industry.[761]

7.506. China argues that the terms "low-priced sales of the product concerned" is a stock Chinese language phrase to refer to dumped/subsidized imports and therefore that the reference in the

[757] Final Anti-Dumping Determination, Exhibit USA-4, pp. 34-35. The Final Countervailing Duty Determination uses quasi-identical language (Exhibit USA-5, pp. 80-81).

[758] Final Anti-Dumping Determination, Exhibit USA-4, pp. 42-44; Final Countervailing Duty Determination, Exhibit USA-5, pp. 87-89.

[759] Final Anti-Dumping Determination, Exhibit USA-4, pp. 44-51; Final Countervailing Duty Determination, pp. 89-96. MOFCOM also refers to the suppression of domestic prices in its discussion of the "selling price" in the section of the determination concerning the "impact" on the domestic industry and refers to domestic prices being undercut and suppressed in the section concerning pre-tax profits of the impact analysis and in the concluding discussion on impact. (Final Anti-Dumping Determination, Exhibit USA-4, pp. 36-40; Final Countervailing Duty Determination, Exhibit USA-5, pp. 81-84).

[760] We note that China did not avail itself of the procedures for objecting to a translation submitted by the other party set forth in para. 9 of the Panel's Working Procedures. We nonetheless have taken China's translation of the Anti-Dumping Determination into consideration given that the United States did not object to it and that, in any event we conclude that the differences between the two translations are immaterial to our resolution of the United States' claims.

[761] Final Anti-Dumping Determination (China's translation), Exhibit CHN-3, pp. 36-37.

opening language of the paragraph is not to undercutting, supporting its argument that MOFCOM's price suppression determination was not dependent on its price undercutting analysis.[762] In essence, we understand China to argue that the two findings, of price undercutting, and of price suppression, were independent of one another and that MOFCOM found that imports of the subject product in important quantities and at low prices led to price undercutting, and the same causes led in addition to price suppression.[763]

7.507. China's explanation that MOFCOM's use of the terms "low-priced sales" was only intended as shorthand for "dumped" or "subsidized" "imports" raises a number of questions. We need not resolve these questions as China elsewhere acknowledges that MOFCOM's finding of price suppression was *partly based* on its finding of price undercutting. In particular, China argues that "*[t]he fact that MOFCOM also noted the effect of price undercutting on price suppression* does not mean that subject import volume and market share were not also causing price suppression"[764] and that "China's position has been the finding of price suppression did not rest *solely* on price undercutting, which has been the US argument. Rather, *MOFCOM's price suppression finding rested on both the volume effects (absolute increase and market share) and the price effects (price undercutting)*."[765] The latter is a reference by China to the sentence in the paragraphs quoted above that, "[i]n particular, since 2008 the like product of the domestic industry was in a loss because the further price undercutting of the product concerned." This statement in the Final Determination as well as China's own reading of MOFCOM's conclusions before this Panel lead us to conclude that MOFCOM found that price suppression was, at least in part, caused by price undercutting.

7.508. Other statements also show that for MOFCOM, the issues of price undercutting and price suppression were closely interlinked. In particular, in the section of its Determinations containing its causation analysis, MOFCOM writes:

> In 2007, although the like product of the domestic industry reduced its losses, however, because the import volume of the product concerned increased continuously afterwards, the import price <u>further undercut the price of the like product of the domestic industry, resulted in the selling price of the like product of the domestic industry was further suppressed</u>, the selling price dropped again below the sales cost, the domestic industry could not further reduce its losses or turn losses into profits, and both the pre-tax profit rate and the rate of return on investment were in an extremely low level.[766] (emphasis added)

7.509. It follows that MOFCOM's finding of price suppression is at least partly dependent on its earlier finding of price undercutting. As we have found that MOFCOM's finding of price undercutting is inconsistent with Articles 3.1, 3.2 and 15.1 and 15.2, we now need to consider China's argument that the finding of price suppression can stand independently on the basis of MOFCOM's findings on volume and market share effects.

7.510. We note that in *China – GOES*, the Appellate Body found that in such a situation in which the investigating authority relies on both subject import prices and volume, a panel must still allow for the possibility that *either* prices or volumes were sufficient *in themselves* to sustain a finding of price suppression or price depression.[767] In *China – GOES*, the Appellate Body noted that MOFCOM had referred to both volume and price effects but had provided no explanation or reasoning as to whether or how the prices and volume of subject imports interacted to produce an effect on domestic prices. This being the case, the Appellate Body noted that the panel was itself unable to disentangle the relative contribution of these effects in MOFCOM's Final Determination without substituting its judgement for that of the authority. The Appellate Body agreed with the panel that it was "not possible to conclude that MOFCOM's finding that price depression was an effect of

[762] China's first written submission, paras. 333-348; opening statement at the second meeting of the Panel, para. 101.
[763] China's opening statement at the second meeting of the Panel, para. 99.
[764] China's opening statement at the second meeting of the Panel, para. 97. (emphasis added)
[765] China's response to Panel question No. 120. (emphasis added)
[766] The language is that of China's translation of the Final Anti-Dumping Determination (Exhibit CHN-3, pp. 44-45).
[767] Appellate Body Report, *China – GOES*, para. 216.

subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports."[768]

7.511. We reach a similar conclusion. MOFCOM's Determinations do not separately or independently discuss the impact of the volume and increased market share of subject imports on the ability of domestic producers to sell at prices that would cover their costs of production. In these circumstances, we find ourselves unable to disentangle the respective contribution, in MOFCOM's determinations, of price undercutting and of volume and market share effects on the resulting price suppression. In these circumstances, we cannot uphold the findings of price suppression given our earlier findings that MOFCOM's findings of price undercutting are inconsistent with Articles 3.1 and 15.1 and 3.2 and 15.2.

7.512. In light of this conclusion, we do not need to examine any further the second argument of the United States, that MOFCOM acted inconsistently with Article 3.2 and 15.2 because it failed to determine that any price suppression was an "effect" of subject imports.[769]

7.513. In light of the foregoing, we find that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement as a result of MOFCOM's finding of price suppression in the Final Anti-Dumping Determination and acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement as a result of MOFCOM's finding of price suppression in the Final Countervailing Duty Determination.

7.4.3.6 Whether MOFCOM provided in the Determinations its reasons for rejecting the United States Government's argument concerning level of trade

7.514. The United States claims that MOFCOM's failure to provide in the Final Determinations the reasons for its rejection of the United States Government's argument concerning level of trade is in breach of Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement.[770]

7.515. Before we proceed to examine these claims, we must address China's argument that they are outside our terms of reference because they are not referenced in the United States' panel request. China made this argument at the very end of the panel proceedings, in the context of commenting on the United States' clarification of its claims in its responses to the Panel's questions following its second meeting[771], and the United States has not had the opportunity to

[768] Appellate Body Report, *China – GOES*, para. 220-221 (quoting Panel Report, *China – GOES,* para. 7.542).

[769] The United States cites to the Appellate Body Report in *China – GOES*, where the Appellate Body found that an investigating authority's price effects analysis must include a "consideration" not only of the existence of price suppression or price depression, but also of the "explanatory force" of the subject imports in relation to the significant price depression or suppression. (Appellate Body Report, *China – GOES*, paras. 129-131). The United States did not explain whether it wished us to examine this argument merely as support for its principal argument that MOFCOM's finding of price suppression was predicated on its finding of price undercutting or rather, considered that it provided a distinct basis on which to conclude that MOFCOM acted inconsistently with the provisions cited.

[770] United States' response to Panel question Nos. 73 and 117. The United States' claim is closely linked to MOFCOM's statement in the Final Determinations that it had taken differences in "sales levels" into account in its price comparison. The United States initially read this statement as an indication by MOFCOM that it was making an adjustment to control for differences in levels of trade. In its first written submission, the United States stated that, assuming that MOFCOM did in fact make a level of trade adjustment, MOFCOM was in breach of Articles 6.4, 12.2, 12.2.2 of the Anti-Dumping Agreement and Articles 12.3, 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to disclose its methodology for making the adjustment. The United States subsequently conceded that if it were the case that MOFCOM did not make a level of trade adjustment, as China appeared to argue, then MOFCOM would have had no methodology for making such an adjustment to disclose to the parties in accordance with Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement, and thus the United States would not have a claim on this basis. The United States added, however, that in this case MOFCOM's failure to provide the reasons for its apparent rejection of the United States' argument concerning level of trade was nevertheless in breach of Articles 12.2.2 and 22.5. (United States' response to Panel question Nos. 73 and 117). In light of these clarifications, and given China's confirmation – consistent with the facts before us – that MOFCOM did not apply a level of trade adjustment, we only examine these latter claims and not the United States' initial claims that MOFCOM failed to disclose the methodology it employed to adjust import prices for differences in levels of trade.

[771] China's comments on the United States' response to Panel question No. 117.

respond to it.[772] It is nonetheless appropriate for the Panel to consider China's argument; given that the vesting of jurisdiction in a Panel is a fundamental prerequisite for lawful proceedings, a Panel must satisfy itself that the claims before it are properly within its terms of reference even in the absence of objections from the parties.[773]

7.516. We recall that Article 6.2 of the DSU sets forth the requirements pertaining to a complaining party's request for the establishment of a panel. It provides that the request shall, *inter alia*, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Together with the identification of the specific measures at issue, the provision of a brief summary of a complaint constitute the "matter" referred to the DSB; if either of them is not properly identified, the matter is not within the panel's terms of reference.[774] This requirement to identify the measures at issue in a dispute and to provide a brief summary of the legal basis of the complaint serves the dual purposes of defining the outer bounds of the panel's jurisdiction and of notifying the responding party (and third parties) of the nature of the complainant's case.[775] Prior decisions have also clarified that compliance with Article 6.2 must be demonstrated on the face of the request for the establishment of a panel, reading it as a whole, in light of the attendant circumstances, and without regard to subsequent developments, for instance the parties' submissions.[776]

7.517. The United States' panel request contains a section entitled "Injury Determination: Price Effects Analysis", setting out in four separate paragraphs the United States' claims pertaining to price effects. Paragraphs 16 and 17 of the panel request set forth claims with respect to alleged procedural violations by MOFCOM. Paragraph 16 is relevant to the claim now considered.[777] It indicates that the United States considers that the measures at issue are inconsistent with:

> Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement because MOFCOM did not disclose its methodology for adjusting import prices to reflect their different level of trade or explain its rejection of respondent arguments concerning price effects.

7.518. China argues that paragraph 16 of the United States' panel request does not refer to Articles 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement. China considers that the United States cannot raise such new claims at this very late stage of the proceedings.[778] China's argument pertains to the second requirement under Article 6.2 of the DSU, the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body has found that the term "legal basis of the complaint" in Article 6.2 of the DSU refers to the claim made by the complaining party which "sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."[779] To comply with the obligation to "present the problem clearly" the panel request must set forth the complainant's view that the respondent party has violated an identified provision of a particular agreement.[780]

7.519. The United States identified Articles 12.2 and 22.3 in paragraph 16 of its panel request with respect to the issue of MOFCOM's adjustment of import prices for level of trade. Yet, in its

[772] We note that the United States did not approach the Panel to seek leave to comment on China's argument.

[773] In this respect, the Appellate Body considered in *US – 1916 Act* that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it". Appellate Body Report, *US – 1916 Act*, footnote 30. See also Appellate Body Reports, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36 and *US – Carbon Steel*, para. 123; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.149.

[774] See, e.g. Appellate Body Report, *China – Raw Materials*, para. 219.

[775] Appellate Body Report, *US – Carbon Steel*, para. 126. The Appellate Body has, in recent decisions, clarified that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction." (Appellate Body Reports, *China – Raw Materials*, para. 233; *EC and certain member States – Large Civil Aircraft*, para. 640).

[776] See, e.g. Appellate Body Report, *China – Raw Materials*, para. 233.

[777] Paragraph 17 sets forth the related claim concerning MOFCOM's alleged failure to provide interested parties an opportunity to see its methodology for making the level of trade adjustment which the United States is not pursuing in the light of China's clarification that MOFCOM did not make a level of trade adjustment.

[778] China's comments on the United States' response to Panel question no. 117.

[779] Appellate Body Report, *Korea – Dairy,* para. 139.

[780] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162.

submissions the United States claims that these actions by MOFCOM are inconsistent with Articles 12.2.2 of the Anti-Dumping Agreement and 22.5 of the SCM Agreement. Therefore, the Panel must consider whether the United States' identification of the claim in the panel request was sufficient to place a claim under these provisions within its terms of reference and to notify China of the case it had to answer.

7.520. We recall that we must assess the United States' panel request not by reading each of its paragraph in isolation, but rather in the light of the request read as a whole, i.e. reading the different claims in the request for establishment in context.[781] This being the case, we note that the United States' panel request contains a section setting forth its claims concerning "Evidentiary Issues". The third paragraph of this section – paragraph 25 – sets forth claims under:

> Articles 12.2, 12.2.1, and 12.2.2 of the AD Agreement and Articles 22.3, 22.4, and 22.5 of the SCM Agreement because China failed to provide in sufficient detail all relevant information on the matters of fact and law and reasons which led to the imposition of final measures, including the reasons for the acceptance or rejection of relevant arguments or claims.

7.521. We find it relevant that the obligations set forth under the different sub-paragraphs of Articles 12.2 of the Anti-Dumping Agreement (including 12.2.1 and 12.2.2) and Article 22 of the SCM Agreement (including 22.3 and 22.5), respectively, are not independent of one another. Rather, much like the various sub-paragraphs of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement which present more detailed obligations as part of an overarching fundamental obligation with respect to an injury determination, the sub-paragraphs of Article 12.2 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement provide more detailed obligations of the overarching fundamental obligation to notify interested parties of the reasoning behind anti-dumping and countervailing duty determinations. The provisions are inter-related, such that compliance with Article 12.2 is in part determined by compliance with Article 12.2.1 or 12.2.2 and compliance with Article 22.3 is in part determined by compliance with Articles 22.4 or 22.5.

7.522. Although the United States did not reference Articles 12.2.2 and 22.5 in paragraph 16 of the panel request when it referred to the level of trade issue and MOFCOM's failure to explain the reasons for its rejection of arguments on price effects, these are the provisions that contain the obligation to provide, in the public determination, "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers" which is in the narrative description of the obligation in this paragraph 16. Furthermore, these provisions are also referred to in paragraph 25, which contains a general claim of the United States with respect to MOFCOM's provision of reasoning in all aspects of the investigation, which as mentioned above includes the level of trade issue. Therefore, while the drafting of the panel request is not ideal, considering it as a whole and the claims in their context, it does in our view succeed in signalling the United States' intention to pursue claims concerning MOFCOM's failure to explain the reasons for its rejection of US respondents' arguments concerning price effects, including the question of the difference in levels of trade, under not only the provisions listed under paragraph 16, but also under those cited under paragraph 25 of the panel request. For this reason, we find that the United States' claims under Articles 12.2.2 and 22.5 are within our terms of reference.

7.523. We now proceed to examine the merits of the United States' claims.

7.4.3.6.1 Main arguments of the parties

7.4.3.6.1.1 United States

7.524. The United States argues that the United States Government's argument concerning the need for proper price comparisons is a very relevant argument that goes to the heart of the pricing analysis relied upon by MOFCOM.[782] The United States notes that in its Determinations, MOFCOM seemed to acknowledge that its import price data was at a different level of trade than its domestic price data and indicated that it was adjusting import prices accordingly. In light of China's insistence that MOFCOM made no level of trade adjustment and the importance of level of

[781] Panel Report, *Mexico – Anti-dumping Measures on Rice*, para. 7.31.
[782] United States' response to Panel question No. 73.

trade to MOFCOM's underselling analysis, MOFCOM's failure to provide the reasons for its apparent rejection of the United States' argument concerning level of trade was in breach of Articles 12.2.2. and 22.5.[783]

7.4.3.6.1.2 China

7.525. China argues that the Final Determinations discussed at length the reasons for rejecting the US arguments concerning product mix and level of trade – the arguments were first summarized and then discussed in some detail. China adds that Articles 12.2.2 of the Anti-Dumping Agreement and 22.5 of the SCM Agreement only require the authority to include the reasons in the disclosure and say nothing about the sufficiency of the reasons, which is a substantive obligation that must be resolved based on the substantive provisions of the Agreement.[784]

7.4.3.6.2 Evaluation by the Panel

7.526. Articles 12.2, 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their final determinations that include, *inter alia*, the reasons for the investigating authority's acceptance or rejection of relevant arguments or claims made by the exporters or importers. The United States' claims focus on this component of the public notice requirement under Articles 12.2.2 and 22.5.

7.527. We agree with the panel in *China – X-Ray Equipment* that "'relevant' arguments or claims are those that relate to the issues of fact and law considered material by the investigating authority".[785] As we have noted above, the "issues of fact and law considered material" are those issues that have arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination.[786]

7.528. Concerning the explanations that must be provided by the authorities for their acceptance or rejection of relevant arguments, the *China – X-Ray Equipment* panel considered, aptly in our view, that:

> Since this provision concerns the arguments and claims made by exporters and importers, whose interests will be adversely affected by an affirmative determination, it is particularly important that the "reasons" for rejecting or accepting such arguments should be set forth in sufficient detail to allow those exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement.[787]

7.529. Finally, we recall that the panel in *China – GOES* found that the provisions at issue here impose procedural obligations, and not substantive ones. This suggests that in examining the sufficiency of the notices provided, the Panel should focus on whether they reveal "findings and conclusions" actually reached by MOFCOM, not those that should have been reached by MOFCOM.[788] This stresses the importance of distinguishing the United States' substantive claims under Articles 3.1/15.1 and 3.2/15.2 from its claims of procedural violations under Articles 12.2.2 of the Anti-Dumping Agreement and 22.5 of the SCM Agreement.

7.530. Consistent with these principles, elaborated by previous panels, and which we adopt as our own, we must address the two following questions: (i) whether the United States Government's

[783] United States' response to Panel question Nos. 73 and 117. See also the United States' argument that the methodology for MOFCOM's alleged level of trade adjustment was an integral part of MOFCOM's pricing analysis, which was central to its finding of causation and consequently, MOFCOM's choice of a methodology was an issue that had to be resolved before MOFCOM could render an affirmative injury determination. (United States' first written submission, para. 320; opening statement at the first meeting of the Panel, para. 96).

[784] China's second written submission, paras. 228-231; comments on the United States' response to Panel question No. 117.

[785] Panel Report, *China – X-Ray Equipment,* para. 7.472.

[786] See above, para. 7.327.

[787] Panel Report, *China – X-Ray Equipment,* para. 7.472.

[788] Panel Report, *China – GOES*, para. 7.356.

argument concerning levels of trade addressed "issues of fact and law considered material" by MOFCOM from the perspective of the determinations at issue; and if so, (ii) whether MOFCOM's Final Determinations set forth the reasons for rejecting or accepting each of these arguments in sufficient detail to allow the United States Government to understand why its level of trade argument was treated as it was, and to assess whether or not MOFCOM's treatment of the issue was consistent with domestic law and/or the WTO Agreement.

7.531. Considering the first question, we are satisfied that the argument is a relevant one, and which MOFCOM was obligated, under Articles 12.2.2 and 22.5, to address in the public notices of its Final Determinations. As we have discussed in our consideration of the United States' claims under Articles 3.1/15.1 and 3.2/15.2, comparability of the prices compared is a fundamental component of a price undercutting analysis, which in turn forms part of an investigating authority's further consideration of injury under Articles 3 and 15. Our findings above further make it clear that the issue of level of trade was a material one in the context of MOFCOM's injury determination.

7.532. We now turn to the second question, i.e. whether MOFCOM provided the reasons for its rejection or acceptance of the level of trade argument. We have explained, in the context of our examination of the United States' claims under Articles 3.1/15.1 and 3.2/15.2, that MOFCOM acknowledged the United States Government's argument concerning levels of trade in its Final Determinations. However, MOFCOM does not provide the reasons underlying its treatment of the level of trade issue. For this reason, we uphold the claim and find that China acted inconsistently with Articles 12.2.2 and 22.5 due to MOFCOM's failure to disclose, in the public notice of its Final Determinations or separate report, its reasons for the rejection of this argument.

7.4.4 Whether MOFCOM's findings that subject imports had an adverse impact on the domestic industry comply with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

7.4.4.1 Introduction

7.533. The United States claims that MOFCOM's findings in each of the investigations that subject imports had an adverse impact on the domestic industry were not based on an "objective examination" of "all relevant economic factors and indices having a bearing on the state of the industry" in violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.[789]

7.534. China asks the Panel to reject these claims.

7.4.4.2 Relevant provisions

7.535. The text of Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement is set out above.

7.536. Article 3.4 of the Anti-Dumping Agreement reads:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.537. Article 15.4 of the SCM Agreement provides as follows:

> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a

[789] United States' first written submission, para. 321.

> bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.4.4.3 Factual background

7.538. In its analysis of the situation of the domestic industry in the Final Determinations, MOFCOM first examines individual factors. For most indicators, MOFCOM examines and discusses relevant yearly figures and year-over-year growth or decline, for the period 2006-2008 as well in the first half of 2009, which it compares to data for the first half of 2008. MOFCOM then provides its overall assessment of the state of the domestic industry:

> The above evidences show that during the POI, for the purpose of satisfying a demand increase at the Chinese market, the domestic like products sector recorded certain growth from 2006 through 2008 in terms of output capacity, output volume, sales quantity as well as market share, number of employees, per capita payroll, labor productivity and other economic indicators. However, during the same period, capacity utilization rate of the domestic like products sector had always been fairly low, and ending inventory across the industry kept rising. As sales price of the domestic like products remained lower than their production cost for a long term, the domestic like products sector could not gain a reasonable profit margin, so profit before tax for the domestic like products remained negative during the POI. Though the domestic like products sector once reduced its amount of loss in 2007, but sales price of the domestic like products encountered further cuts and suppressions thereafter, resulting in a second occurrence of a phenomenon where sales price of the domestic like products is lower than their production cost, and profit before tax and ROI in the trade were extremely low. During the POI, net cash flows from operating activities in the domestic like products sector witnessed significant fluctuations, which brought about some impacts on investing and financing activities in the trade. In the first half of 2009, economic indicators of the domestic industry continued to deteriorate. Although there was a continuous increase from demand side of the domestic market, capacity utilization rate of the domestic like products sector declined to 66%, and in addition to that, such economic indicators as output volume, sales quantity, market share, sales income and number of employees in the said industry recorded declines to different extents. As an ongoing phenomenon, sales price of the domestic like products was still lower than their production cost, resulting more severe losses; and the amount of loss across the trade for the first half of 2009 was almost equivalent to that for the whole year of 2008.
>
> In summary, the Investigating Authority determines that the domestic industry has encountered a material injury.[790]

7.539. MOFCOM next considers the output capacity and exporting capability of the US industry, as well as "possible further impacts on domestic industry in China" and concludes that it is "very possible for the US broiler producers to expand their export to China and to affect the domestic industry adversely."[791]

7.4.4.4 Main arguments of the parties

7.4.4.4.1 United States

7.540. The United States contends that contrary to the requirements of Articles 3.1/15.1 and 3.4/15.4, MOFCOM's injury analyses ignored that nearly all the economic evidence

[790] Final Anti-Dumping Determination, Exhibit USA-4, p. 40; the text of the Final Countervailing Duty Determination (Exhibit USA-5, p. 85) is virtually identical.
[791] Final Anti-Dumping Determination, Exhibit USA-4, pp. 40-42; the corresponding finding in the Final Countervailing Duty Determination, Exhibit USA-5, is on pp. 85-87.

demonstrated that the performance of the domestic industry was actually robust and improving between 2006 and 2008. The United States alleges that MOFCOM's finding of adverse impact is primarily based on its flawed findings regarding two indicators, production capacity utilization and end-of-period inventories.[792]

7.541. The United States argues that MOFCOM's finding that the subject imports had an adverse impact on the domestic industry's rate of capacity utilization over 2006-2008 does not reflect an "objective examination" because it is contradicted by record evidence demonstrating that between 2006 and 2008 the domestic industry's rate of capacity utilization increased slightly.[793] The United States argues that MOFCOM also failed to take into account the domestic industry's increase in capacity, which was well in excess of demand growth and was the true reason for the alleged decline in capacity utilization.[794] Finally, the United States argues that subject import competition could not have reduced domestic industry output and capacity utilization between 2006 and 2008 because subject imports increased their share of apparent consumption entirely at the expense of non-subject imports, not at the expense of the domestic industry.[795]

7.542. According to the United States, MOFCOM, while focusing its attention on the purported increase in end-of-period inventories, failed to consider the relative insignificance of that increase *vis-à-vis* the domestic industry's actual performance, in particular, the increase in the domestic industry's production and shipments.[796] The United States argues in this respect that the absolute increase in domestic industry end-of-period inventories from 2006 to 2008 was dwarfed by the absolute increase in domestic industry output and shipments.[797] The United States further notes that end-of-period inventories as a share of domestic industry production increased only from 2.9% in 2006 to 3.3% in 2008, and end-of-period inventories as a share of domestic industry shipments increased only from 3.2% in 2006 to 3.5% in 2008.[798] On the basis of this data, the United States argues that MOFCOM's finding that the increase in inventories was significant was not based on an objective examination of positive evidence.

7.543. The United States contends that all of the other indicators demonstrate that the domestic industry was doing well. Specifically, the United States notes that between 2006 and 2008, the domestic industry increased its production capacity by 26.2%; its output by 28.2%; its sales quantity by 31.2%; its sales revenues by 88.6%; its market share from 37.81% to 42.42%; its employment by 10.3%; and that its pre-tax loss decreased from 7.9% of sales income in 2006 to 4.7% of net income in 2008. The United States notes that MOFCOM itself noted the domestic industry's growth in these respects. The United States argues that MOFCOM's findings in respect of these indicators cannot be reconciled with the evidence on the record before it.[799]

7.544. The United States also challenges what it considers to be MOFCOM's improper reliance for its analysis on only part of the POI, the first half of 2009. The United States argues that an investigating authority must examine the impact of subject imports on the domestic industry over the entire period for which data was collected. In addition, the United States argues that MOFCOM focused on the only period in which the domestic industry's performance weakened. The United States adds that the domestic industry' lagging performance in this period could not have been the result of subject imports since the bulk of the increase in subject volume coincided with a strengthening domestic industry performance in 2006-2008.[800] The United States argues that in light of this evidence, MOFCOM could not find, without adequate explanations, that subject imports had an adverse impact on the domestic industry based on domestic industry performance in the first half of 2009 alone. The United States notes in this respect that in *China – GOES*, the Appellate Body held that Articles 3.4 and 15.4 require not only an examination of the state of the domestic

[792] United States' first written submission, paras. 325-338; second written submission, paras. 199-201.
[793] United States' first written submission, para. 329.
[794] United States' first written submission, para. 330.
[795] United States' first written submission, para. 331. The United States explains that the domestic industry increased its share of apparent consumption from 37.81% in 2006 to 42.42 per cent in 2008.
[796] United States' first written submission, para. 333.
[797] United States' first written submission, para. 334.
[798] United States' first written submission, para. 335.
[799] United States' first written submission, paras. 326-327; second written submission, para. 202.
[800] United States' second written submission, para. 205.

industry but contemplate that an investigating authority must derive an understanding of the *impact* of subject imports on the basis of such an examination.[801]

7.545. Finally, the United States notes China's argument that MOFCOM also relied on projections of future imports from the United States in support of its finding that subject imports caused an adverse impact. The United States argues that future increases in imports leading to adverse impact to the domestic industry in the future are irrelevant to the impact analysis under Articles 3.4 and 15.4 and therefore, MOFCOM's consideration of potential future imports volumes and impact in no way remedies the defects in MOFCOM's impact analysis.[802]

7.4.4.4.2 China

7.546. China asserts that the United States' arguments rest on an inaccurate and misleading reading of the Final Determinations and a number of analytical errors.

7.547. First, China disputes the United States' interpretation of the evidence in respect of capacity utilization and end-of-period inventories.[803] China contends that, with respect to capacity utilization, MOFCOM made a simple point that it was persistently low over the period of investigation and dropped sharply in the first half of 2009.[804] China argues that in its evaluation of MOFCOM's findings, the United States made a number of mistakes. In particular, the United States focused on causation (not relevant to Articles 3.4 and 15.4), selectively used periods of assessment (i.e., 2006-2008 period, without considering the first half of 2009), and made an unsubstantiated allegation that the domestic industry's capacity had grown in excess of the increasing consumption.[805] With respect to end-of-period inventories, China criticizes the United States' evaluation of the "significance" of their increase, and what China characterizes as a selective use of periods of assessment, focusing on the 2006-2008 period without considering the first half of 2009.[806] China submits that Articles 3.4 and 15.4 do not specify any methodology for how this factor should be evaluated, and do not require that any of the factors listed thereunder individually or collectively be "significant".

7.548. Second, China argues that there is no support in the Determinations for the United States' argument that MOFCOM found capacity utilization and inventories to be decisive factors. China submits that, contrary to what the United States argues, in its overall evaluation of the Chinese domestic industry, MOFCOM considered many other factors which were at least as important and even more important than capacity utilization and inventories.[807] In particular, China argues, the United States disregards MOFCOM's discussion of financial indicators ("profits", "return on investments", "cash flow", and "ability to raise capital or investments"). China argues that MOFCOM's consideration of these factors, which showed a negative trend, was a key part of MOFCOM's finding of material injury.[808] China adds that Articles 3.4 and 15.4 provide that no one or several of the relevant economic factors necessarily give decisive guidance and that these provisions do not impose any requirement on how relevant economic factors are to be evaluated. Rather, they require only that the evaluation be comprehensive. That evaluation is properly left to the discretion of the authority, based on the particular facts. China argues that the United States' argument elevates two factors and tries to make them decisive, not giving any consideration to many other factors that were at least as important and even more important in MOFCOM's evaluation of the overall condition of the domestic industry.[809]

7.549. Third, China makes the point that the United States focuses on an earlier period, the period of 2006-2008, and ignores the sharp declines in various indicators during the most relevant and most recent period, the first half of 2009, which MOFCOM considered in the Final

[801] United States' second written submission, para. 206 (citing Appellate Body Report, *China – GOES*, para. 149).
[802] United States' second written submission, para. 208-210.
[803] China's first written submission, paras. 369-70; opening statement at the first meeting of the Panel, paras. 41-43; opening statement at the second meeting of the Panel, paras. 103-105.
[804] China's first written submission, paras. 372 and 377.
[805] China's first written submission, paras. 371-77.
[806] China's first written submission, paras. 378-382.
[807] China's first written submission, paras. 370, 385-387.
[808] China's first written submission, para. 366.
[809] China's first written submission, paras. 380-381.

Determinations.[810] China responds to the United States' argument that MOFCOM improperly focused on the last six months of the POI that under the Anti-Dumping and the SCM Agreements, authorities have discretion to set an appropriate period of investigation, and then "to focus their investigations accordingly", adding that no WTO decision has ever criticized an authority for focusing on the most recent period of time, as long as relevant data before the authorities was not being ignored.[811] China adds that following the United States' reasoning would allow growth earlier in the period to mask material injury being suffered at the end of the period. China submits that strong growth in apparent domestic consumption over the 2006 to 2007 period led to some improved financial results in 2007, and the domestic industry did not have operating profits, but at least the losses were more limited. This improvement reversed in 2008 and then the situation of the domestic industry deteriorated more sharply in early 2009. Moreover, China disputes the United States' contention that the domestic industry was doing well even if 2006 is used as the baseline; China submits that the domestic industry's financial performance was bad in 2006, improved briefly in 2007, and then worsened in 2008 and 2009.[812]

7.550. Finally, China argues that the United States ignores MOFCOM's findings that US exporters may expand exports to China and will cause further adverse effects to the domestic industry.[813] China argues that Articles 3.4 and 15.4 instruct authorities to evaluate "all relevant economic factors", including the "actual and potential decline" in a number of specifically enumerated factors.[814]

7.4.4.5 Arguments of the third parties

7.551. The **European Union** submits that, under Articles 3.4 and 15.4, an investigating authority must assess the role, relevance and relative weight of each factor.[815] For the European Union, an objective evaluation of factors means examination of both the particular evolution of the data pertaining to each factor individually, and *vis-à-vis* other factors.[816] The European Union notes that although there is under Article 3.4 no obligation that each and every factor individually be indicative of injury, the investigating authorities must explain its conclusion as to the lack of relevance or significance of each particular factor.[817] It adds that an overall contextual evaluation of all factors, with "thorough and persuasive" explanation of their relevance and weight, becomes even more pertinent in cases where several factors show positive trends.[818] The European Union agrees with the United States that, contrary to Articles 3.1/15.1 and 3.4/15.4, MOFCOM appears to have based its findings in the context of its impact analysis predominantly on the assessment of two of the factors, production capacity and end-of-period inventories, despite other factors demonstrating a positive trend for the domestic industry. Furthermore, the European Union considers that MOFCOM's findings did not engage an in-depth analysis of the particular relevance and relative weight of all injury factors.[819]

7.552. **Saudi Arabia** submits that, according to Articles 3.4 and 15.4, an injury determination that is based on negative developments in only one or two of the factors is unlikely to be objective, unless a very convincing explanation is provided of why these exceptional negative trends outweigh the positive trends in respect of the other factors.[820]

---

[810] China's first written submission, paras. 358-360; opening statement at the first meeting of the Panel, para. 40.
[811] China's first written submission, para. 361.
[812] China's second written submission, paras. 232-236.
[813] China's first written submission, para. 362.
[814] China's first written submission, paras. 363-364 (citing to Panel Report, *EC – Fasteners (China)*, para. 7.402).
[815] European Union's third-party submission, para. 85 (citing Panel Reports, *Egypt – Steel Rebar*, para. 7.51; *EC – Tube or Pipe Fittings*, para. 7.314).
[816] European Union's third-party submission, para. 86 (citing Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.314; and *EC – Bed Linen (Article 21.5 – India)*, para. 6.162).
[817] European Union's third-party submission, para. 86.
[818] European Union's third-party submission, para. 87 (citing Panel Reports in *Thailand – H-Beams*, paras. 7.249 and 7.255; and *Korea – Certain Paper*, para. 7.273).
[819] European Union's third-party submission, paras. 91-92.
[820] Saudi Arabia's third-party submission, para. 42 (citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 117.

7.4.4.6 Evaluation by the Panel

7.4.4.6.1 Introduction

7.553. The United States' claims focus on MOFCOM's treatment of two factors, capacity utilization and inventories. The United States alleges that MOFCOM's treatment of these two factors was not objective as required by Articles 3.1 and 15.1 and was inconsistent with Articles 3.4 and 15.4 and that MOFCOM improperly focused on these factors and disregarded other factors that were not indicative of injury.[821]

7.554. The United States' arguments raise the question of the manner in which an investigating authority should assess the situation of the domestic industry in light of the relevant economic factors and indices. We recall in this respect that pursuant to Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, an investigating authority's assessment of the evidence must be objective. This may require the authority to place the relevant data in context in a manner that it is informative of the injury, if any, suffered by the domestic industry rather than simply review evolution in yearly figures. Furthermore, to comply with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement, the authority must also evaluate the relevant factors and indices in a manner which allows it to determine whether relevant trends in these relevant factors and indices result from subject imports.[822]

7.555. In the specific circumstances of this dispute, we do not find it necessary to decide whether MOFCOM's treatment of capacity utilization and inventories conforms to the relevant disciplines. We recall that we have found in a preceding section that MOFCOM's findings of price undercutting and of price suppression are inconsistent with Articles 3.1/15.1 and 3.2/15.2. The United States has not alleged that MOFCOM's analysis of the impact of dumped imports on the domestic industry is inconsistent with Articles 3.1/15.1 and 3.4/15.4 as a consequence of these inconsistencies. Nonetheless, MOFCOM's examination of the situation of the domestic industry is inextricably linked to its earlier analysis of the price effects of subject imports. Implementing the Panel's findings with respect to MOFCOM's price effects analysis will require China to re-examine MOFCOM's Determination concerning the impact of subject imports on the domestic industry. This being the case, we are of the view that making additional findings with respect to MOFCOM's analysis of the impact of the subject imports on the domestic industry would not assist in the resolution of the dispute between the parties.

7.556. In light of the foregoing, we do not make findings with respect to the United States' claims that MOFCOM's finding that subject imports had an adverse impact on the domestic industry was not based on an "objective examination" of "all relevant economic factors and indices having a bearing on the state of the industry" in violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

7.4.5 Whether MOFCOM's causation analyses comply with Articles 3.1, 3.5, 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 15.1, 15.5, 22.3 and 22.5 of the SCM Agreement

7.557. The United States makes two series of claims regarding MOFCOM's findings of causation in the Final Anti-Dumping and Countervailing Determinations.

7.558. First, the United States claims that MOFCOM's causation analyses are inconsistent with China's substantive obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because:

[821] In response to China's arguments, the United States also alleges that MOFCOM improperly focused its analysis on the situation in the first six months of 2009 and failed to explain how the domestic industry's lagging performance in this period could have been the result of subject imports given that the bulk of the increase in subject imports coincided with a strengthening of the domestic industry in the 2006-2008 period.

[822] In *China – GOES*, the Appellate Body indicated that Articles 3.4 and 15.4 "do not merely require an examination of the state of the domestic industry", but include a requirement that the investigating authority pay attention to the "explanatory force" of subject imports for the state of the domestic industry. (Appellate Body Report, *China – GOES*, para. 149).

i. MOFCOM ignored record evidence that the increase in subject import volumes and market share was not at the expense of the domestic industry;

ii. MOFCOM's causation analyses were based on its flawed findings of price undercutting; and

iii. MOFCOM failed to reconcile its analyses with record evidence that the domestic industry's performance had improved as subject import volume and market share increased in 2006-2008.

7.559. Second, the United States claims that China acted inconsistently with procedural obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement because in the public notices of the Final Anti-Dumping and Countervailing Duty Determinations, MOFCOM failed to explain the reasons for its rejection of two arguments raised by US interested parties with respect to causation.[823]

7.560. For its part China asks that the Panel reject these claims.

7.561. We first consider the United States' claims of alleged violation of substantive provisions.

7.4.5.1 Whether MOFCOM's causation analyses are consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

7.4.5.1.1 Relevant provisions

7.562. Article 3.5 of the Anti-Dumping Agreement reads as follows:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.563. The text of Article 15.5 of the SCM Agreement is virtually identical, with references to "subsidized imports" and "subsidies", rather than "dumped imports" and "dumping".

7.4.5.1.2 Factual background

7.564. MOFCOM's Final Anti-Dumping and Countervailing Duty Determinations conclude that there is a causal link between subject imports and the injury suffered by the domestic industry.[824] In the Determinations, MOFCOM observes that the "continuous and sharp increase" in the quantity of subject imports and "continuous growth" of their market share have caused significant impacts on the price of domestic like products. MOFCOM also notes that the prices of subject imports and of domestic like products have moved in parallel, but that the former have always been lower than the latter, and have caused obvious "price cuts" in the price of domestic like products, which cuts had been increasing since 2008. MOFCOM further indicates that as subject imports were selling in great volume at low prices during the POI, the price of domestic like products was suppressed and remained below costs of production, with the consequence that the sector was losing money. MOFCOM also mentions that capacity utilization remained at a fairly low level for a long time; that

[823] United States' first written submission, paras. 5, 339-343.
[824] Final Anti-Dumping Determination, Exhibit USA-4, pp. 42-44. Nearly identical text is found in the Final Countervailing Duty Determination, Exhibit USA-5, pp. 87-89.

even though losses were reduced in 2007, a continuous growth in import quantities thereafter caused further price cuts and price suppression and a consequent impact on profit before tax and return on investment, which were extremely low.[825]

7.565. MOFCOM adds that the quantity of subject imports increased again in the first half of 2009, at decreasing prices, which impacted the domestic industry – capacity utilization "declined drastically", and other indicators such as output volume, sales quantities, market share, sales income and employment level declined, resulting in a loss for the first half of 2009 which was almost equivalent to that of the whole year in 2008.[826]

7.566. MOFCOM concludes its causation analysis as follows:

> Through the analysis o[f] the overall situation during the entire POI, there is an outstanding relevance between the change of imports of the Subject Products and the situation of operation of the domestic industry. As the demand of the domestic market was increasing constantly, the imports of the Subject Products were increasing constantly on the one hand, while on the other hand the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly.
>
> During the POI, the increase of the import volume of the Subject Products was gained by selling at low price. This kind of sales constituted price-undercut to the sales of the like products of the domestic industry, and further seriously depressed the price of the like products of the domestic industry.[827] Thus the domestic like products could not gain the profit margin as it should, presenting substantial loss, which was getting worse.
>
> In the first half 2009, the relevance between the Subject Products and the domestic like products was even more obvious. The production volume, sales volume of the domestic like products presented a reverse relationship with the import volume of the Subject Products; the market share of the domestic like products presented a reverse relationship with that of the Subject Products; the price of the domestic like products presented a reverse relationship with that of the Subject Products. All of these *led* to the substantial decrease of the sales price of the domestic like products and incurred worse loss.
>
> The above situation shows that the volume and price changes of the imported Subject Products have directly affected the operational situation and economic benefit of the domestic like products.
>
> To sum up, the Investigating Authority holds that based on the current evidence presented, during the POI the huge volume of export of the boiler products of the US to China at a low price has caused material injury to the domestic broiler industry. There is causal link between the dumped imports and the material injury.[828]

7.4.5.1.3 Main arguments of the parties

7.4.5.1.3.1 United States

Whether MOFCOM ignored evidence that subject import volume did not increase at the expense of the domestic industry

7.567. The United States argues that MOFCOM's causation determination rests on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. The United States argues that the record evidence shows that the domestic industry actually gained market share at the same time as

[825] Final Anti-Dumping Determination, Exhibit USA-4, p. 42.
[826] Final Anti-Dumping Determination, Exhibit USA-4, p. 42.
[827] China's translation of the Final Anti-Dumping Determination refers to price suppression rather than price depression as the United States' translation does. (Exhibit CHN-3, p. 45)
[828] Final Anti-Dumping Determination, Exhibit USA-4, pp. 43-44; Final Countervailing Duty Determination, Exhibit USA-5, pp. 88-89.

subject imports did, which contradicts MOFCOM's finding. The United States argues that this means that the increase in subject import volume and market share, however significant when considered in isolation, did not negatively impact the domestic industry. The United States argues that the entire increase in subject import market share between 2006 and the first half of 2009 came at the expense of non-subject imports.[829] The United States notes that when US respondents raised this issue, MOFCOM responded by saying that Chinese law allowed it to consider either the absolute volume increase or relative volume increase, but did not oblige it to consider both.[830] The United States claims that, by ignoring this important question, China failed to conduct an "objective examination" of "positive evidence" and did not examine "all relevant evidence", in breach of Articles 3.1/15.1 and 3.5/15.5.[831]

7.568. With respect to China's argument that the increase in market share of subject imports was gained at the expense of non-investigated Chinese producers, rather than at the expense of third country imports, the United States makes two points. First, the United States argues that China's arguments concerning the market share of non-investigated Chinese domestic producers constitute *post hoc* rationalisation.[832] Second, the United States notes that the investigating authority is required under the Agreements to rely on a consistent definition of the "domestic industry" in its consideration of various injury indicators and that China's explanation does not rebut the fact that the "domestic industry" that MOFCOM investigated actually gained market share during the period of investigation or answer the question of how the domestic industry could have been injured by subject imports if the domestic industry itself gained market share.[833] On this last point, the United States submits that MOFCOM collected no data from those Chinese producers who lost market share and, therefore, possessed no positive evidence to examine the causal relationship between subject imports and the performance of those producers.[834]

Whether MOFCOM relied upon a flawed price effects analysis

7.569. The United States recalls its claim that MOFCOM's findings of price underselling and price suppression are WTO-inconsistent and its argument that there was no evidence of price depression. The United States argues that in the absence of any of these price effects, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence as required by Articles 3.1/15.1 and 3.5/15.5. In addition, the United States submits that by failing to establish that subject imports had any adverse price effects, MOFCOM failed to establish that the "effects" of subject import price competition are what caused injury to the domestic industry, as required under Articles 3.5 and 15.5.[835]

7.570. The United States responds to China's argument that the Panel could uphold MOFCOM's causal link analysis based on MOFCOM's analysis of subject import volume effects alone. The United States argues that MOFCOM made no finding and provided no explanation as to how subject import volume alone could have suppressed domestic like product prices to a significant degree. In addition, the United States submits that it has challenged MOFCOM's discussion of adverse volume effects in the Final Determination through its arguments that subject imports did not gain market share at the expense of the domestic industry, and that MOFCOM failed to reconcile its impact and causation findings with the increase in subject imports volume trends in 2006-2008 and the first half of 2009. The United States rejects as *post hoc* rationalization China's argument that MOFCOM found subject import volumes to have had both "direct" and "indirect" effects on the domestic industry.[836] In addition, the United States argues that if an investigating

[829] United States' first written submission, paras. 349-350. The United States submits, using MOFCOM's data, that non-subject imports lost 3.92% in market share to subject imports and an even greater 4.38% in market share to the domestic industry during this period.
[830] United States' first written submission, para. 352.
[831] United States' first written submission, paras. 353-354.
[832] United States' opening statement at the first meeting of the Panel, para. 108; second written submission, para. 212.
[833] United States' comments on response to Panel question No. 122(c).
[834] United States' second written submission, paras. 212, 217; opening statement at the first meeting of the Panel, para. 114; opening statement at the second meeting of the Panel, paras. 72-74; comments on China's response to Panel question No. 122(b).
[835] United States' first written submission, paras. 355-357.
[836] United States' second written submission, paras. 219-231.

authority relies on the increase in subject import volume to make an affirmative material injury determination, it must establish a causal link between that volume increase and material injury.[837]

Alleged failure to reconcile causation analysis with evidence that the domestic industry's performance improved as subject import volume and market share increased

7.571. The United States argues that MOFCOM's causal link analysis was flawed because it failed to address record evidence that the increase in subject import volumes and market share coincided with a strengthening domestic industry performance. The United States argues that as a result, MOFCOM failed to predicate its causation analysis on an objective examination of positive evidence, in breach of Article 3.1 and 15.1, or on "an examination of all relevant evidence," in breach of Article 3.5 and 15.5, and also failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury," in breach of Article 3.5 and 15.5.[838] The United States argues in this respect that almost all indicators showed an improvement in the domestic industry's performance between 2006 and 2008, at the same time as subject import volumes increased the most.

7.572. The United States adds that MOFCOM failed to explain how the small increase in subject imports volumes in the first half of 2009 could have contributed to the domestic industry's performance trends given the lack of correlation in the 2006-2008 period.[839] The United States also argues that many performance indicators in fact showed an improvement when the 2006 figures are compared to those for the first half of 2009. The United States submits that these figures show that the domestic industry's worst performance of the period examined occurred in 2006, before any increase in subject import volume and market share. Finally, the United States also argues that MOFCOM predicated its causal link analysis entirely on developments in the first half of 2009 whereas Articles 3.1/15.1 and 3.5/15.5 required it to examine the causal relationship in relation to the entire period of investigation, not just during a selective period.[840]

7.4.5.1.3.2 China

Whether MOFCOM ignored evidence that subject import volume did not increase at the expense of the domestic industry

7.573. China submits that, contrary to what the United States argues, MOFCOM properly analysed evidence about market share. China submits that the market share gained by subject imports (3.92% from 2006 to the first half of 2009) was almost twice the loss of the market share of third country imports (1.90% during the same period). China explains that the remainder of the gain by subject imports was at the detriment of Chinese producers who were not examined by MOFCOM because they did not submit domestic producer questionnaire responses. According to China, this category lost 6.5% of its market share, meaning that overall, the domestic industry lost almost 2% in market share to the subject imports. China argues that these facts should have been readily apparent to the United States given that the market share figures in MOFCOM's Final Determinations did not add up to 100%.[841]

7.574. China argues that although MOFCOM did not have complete questionnaire data for other domestic producers, it did have record evidence on the total size of domestic production and as a result was able to determine the market share held by the 17 responding domestic producers, as well as the market share of the remaining domestic producers.[842] China also argues that the "key point" that the 1.90% in market share gained by subject imports could not be explained by the loss in market share of third country imports was on the record, both in the form of the publicly available imports statistics in Exhibit 9 of the Petition, and in the Final Determination itself.[843] China also submits that, contrary to what the United States argues, MOFCOM in fact acknowledged

[837] United States' second written submission, paras. 219-231.
[838] United States' first written submission, paras. 358-361; opening statement at the first meeting of the Panel, para. 111.
[839] United States' opening statement at the first meeting of the Panel, para. 111.
[840] United States' second written submission, paras. 232-240 (citing Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 183, 187-88; *Argentina – Footwear (EC)*, paras. 145-146; and *US – Lamb*, para. 138; and Panel Report, *Argentina – Footwear (EC)*, para. 8.243).
[841] China's first written submission, paras. 398-402.
[842] China's second written submission, para. 239.
[843] China's second written submission, para. 242.

and discussed the increase in the 17 responding domestic producers' market share. China argues that the existence of a causal link must rest on all the evidence before the investigating authority, and that the evidence before MOFCOM showed that the Chinese domestic industry as a whole lost market share to subject imports. China adds that the fact that MOFCOM may not have had full questionnaire responses from the non-investigated domestic producers did not require, or even allowed, MOFCOM to ignore the evidence about the total industry.[844]

Whether MOFCOM relied upon a flawed price effects analysis

7.575. China submits that MOFCOM's price undercutting analysis was not flawed. But even if it were, China submits, MOFCOM's price suppression finding would stand. China argues in this respect that MOFCOM did not need to show that price suppression resulted solely from price undercutting. Rather, China argues, MOFCOM needed only to show that subject imports contributed to price suppression and ultimately, to injury to the domestic industry, through volume effects, price effects, or some combination of these effects.[845]

7.576. China argues that the United States has not challenged MOFCOM's findings concerning volume effects, and that those unchallenged adverse volume effects contributed meaningfully to the adverse condition of the industry. China considers that MOFCOM found that subject imports had two types of volume effects: an direct effect, i.e. that if not for subject imports, domestic producers would have sold more broiler products, and an indirect effect, i.e. that domestic producers lowered their prices to avoid further loss of volume and market shares.[846]

7.577. China adds that MOFCOM showed causation by analysing other factors: (i) the parallel pricing trends between subject imports and domestic like products; and (ii) the causal link between the decline in subject import prices in the first half of 2009 on one hand, and the decline in domestic prices resulting in domestic prices below cost on the other. China argues that in MOFCOM's view, both of these factors led to the price suppression which contributed meaningfully to the adverse condition of the domestic industry.[847] In this respect, China argues that MOFCOM specifically referenced the domestic producers' need to sell below costs so as to stabilise their market share; with or without any finding of price undercutting, the domestic producers had to lower their prices to stabilize the market share.[848] China argues on this basis that MOFCOM's conclusions about import volume and price suppression can stand and sufficiently support MOFCOM's analysis of causal link regardless of the Panel's findings about price undercutting.[849]

Alleged failure to reconcile causation analysis with evidence that the domestic industry's performance improved as subject import volume and market share increased

7.578. China argues that the United States downplays the decline in performance of the domestic industry in the first half of 2009. China argues that MOFCOM drew a causal link between the increasing subject imports and the declining condition of the domestic industry in this period. With respect to the United States' comment that non-financial indicators in the first half of 2009 were higher than in 2006, China considers that comparing 2006 figures to figures for the first half of 2009 is inappropriate and that the more appropriate way to control for seasonality is to compare the first half of 2009 to the first half of 2008, a comparison that reveals sharp declines in most indicators. Furthermore, China argues that the United States' comparison of 2009 to 2006 figures focuses on volume indicators and ignores financial indicators, which showed a weak industry financial performance.

7.579. China argues that the only comment of the United States about financial performance is to observe that "the operating losses had been somewhat reduced in 2008 compared to 2006". China disagrees with this statement, arguing that: (i) the operating losses had grown, from 1.208 billion RMB in 2006 to 1.359 billion RMB in 2008; (ii) the cumulative effect of continuing losses had a severe impact on the domestic industry; and (iii) the operating losses increased from 7.9% of sales in 2006 to a more serious 10.5% of sales in the first half of 2009. China adds that MOFCOM

[844] China's second written submission, paras. 243-245.
[845] China's first written submission, para. 404-406.
[846] China's first written submission, para. 409.
[847] China's first written submission, paras. 410-412; second written submission, para. 250.
[848] China's second written submission, para. 250.
[849] China's first written submission, para. 413; second written submission, paras. 249-250.

specifically noted the existing connection between the financial factors and price suppression. Thus, China argues, while some indicators were positive, the cumulative assessment of all the economic indicators showed that the financial status of the domestic industry deteriorated. The same is true in respect of the 2006-2008 period and the domestic industry was, contrary to the United States' assertions, also injured during this period, particularly with respect to financial results.[850]

7.4.5.1.4 Arguments of the third parties

7.580. The **European Union** argues that MOFCOM's causation analysis, developed on the basis of its flawed price undercutting and/or impact analysis, is necessarily flawed as a result.[851] Concerning MOFCOM's analysis of volume and market share indicators, the European Union submits that although the evolution of sales volumes and market shares presented by the United States can be sufficient to make a *prima facie* case that US imports did not increase at the expense of the domestic industry, it is not sufficient in itself to justify a definitive conclusion to that effect. The European Union notes that, apart from eroding the volume and share of third-country imports, US imports could result in preventing domestic product sales from increasing at an even higher rate in view of the production capacity and capacity utilization levels.[852]

7.581. **Saudi Arabia** submits that, under Articles 3.5 and 15.5, investigating authorities are required to establish a "genuine" and "substantial" causal link between the dumped or subsidised imports and the injury.[853] Saudi Arabia also submits that the non-attribution requirement in Articles 3.5 and 15.5 requires the authorities to "separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors, such as decisions on capacity expansion and other business decisions that are unrelated to the dumped or subsidized imports".[854]

7.4.5.1.5 Evaluation by the Panel

7.582. Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement require that it be demonstrated that the dumped or subsidized imports are, through the effects of dumping or subsidies, as set forth in Articles 3.2/15.2 and 3.4/15.4, causing injury.

7.583. We have concluded in a previous section that MOFCOM's findings of price undercutting and of price suppression in the Final Anti-Dumping and Countervailing Duty Determinations are inconsistent with, respectively, Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

7.584. Having concluded that MOFCOM's findings on price effects are inconsistent with the relevant obligations and in the light of the relationship between the analysis envisioned under Articles 3.2 and 15.2 and the causation analysis under Articles 3.5 and 15.5, we would not be in a position to find that MOFCOM properly concluded to the existence of a causal link between the subject imports and the injury to the domestic industry. Furthermore, China's implementation of our findings concerning MOFCOM's findings of price effects will necessarily require that it reconsider MOFCOM's findings of causation.

7.585. For the foregoing reasons, making findings with respect to the United States' claims under Articles 3.1/15.1 and 3.5/15.5 would not contribute to the resolution of the dispute between the parties. We therefore abstain from ruling on the United States' claims that MOFCOM's findings of causation in the Final Determinations are inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

---

[850] China's first written submission, paras. 414-425; second written submission, paras. 253-256.
[851] European Union's third-party submission, para. 94.
[852] European Union's third-party submission, para. 96.
[853] Saudi Arabia's third-party submission, para. 43 (citing Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913, footnotes 1865-1866).
[854] Saudi Arabia's third-party submission, para. 44.

7.4.5.2 Whether MOFCOM explained the reasons for its rejection of certain arguments as required under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

7.4.5.2.1 Introduction

7.586. The United States claims that MOFCOM failed to address in its Final Anti-Dumping and Countervailing Duty Determinations two arguments raised by USAPEEC concerning causation, namely: (i) that there could be no causal link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports and did not take any market share from the domestic industry; and (ii) that subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.[855]

7.587. The United States argues that in doing so, MOFCOM acted in breach of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement, which require investigating authorities to issue public notices of their final determinations that include, *inter alia*, the reasons for the investigating authority's rejection of relevant arguments made by interested parties.

7.588. China argues that MOFCOM did, in fact, address US interested parties' arguments concerning market shares and chicken paws and in any event, neither of these arguments was "material".

7.4.5.2.2 Relevant provisions

7.589. The texts of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and of Articles 22.3 and 22.5 of the SCM Agreement are set forth in preceding sections of this Report.

7.4.5.2.3 Factual background

7.590. In its Injury Brief submitted in the two investigations, USAPEEC argued that during the POI, the subject products only accounted for a very small and stable market share in the domestic market of China, that the volume of imports of the subject products in absolute term had not considerably increased, and that the increase had just filled the gap in the Chinese market left by other foreign producers.[856] The USAPEEC reiterated these views in its Comments on the Preliminary Injury Determination.[857]

7.591. MOFCOM addressed this argument in its Final Anti-Dumping and Countervailing Duty Determinations as follows:

> According to the relevant laws of China, when the Investigating Authority analyzes the volume of the dumped imports, they may either analyze "whether increasing considerably in absolute terms", or "whether increasing considerably in relative terms"; the laws do not require considering the absolute import volume and the relative import volume at the same time. In this case, USAPEEC did not raise objection to the considerable increase of the import volume of the Subject Products in absolute terms in USAPEEC Comments on Preliminary Injury Determination.
>
> ...
>
> Regarding the above arguments, the Investigating Authority holds that from 2006 to 2008, although the broiler products have been in great demand in the domestic market and the domestic like products did gain a certain market space, this cannot show that the domestic industry did not suffer injury. On the contrary, because the import volume of the Subject Products increased considerably and the import price

[855] United States' first written submission, paras. 5, 339-343.
[856] USAPEEC's Injury Brief, Exhibit USA-21, pp. 16-18; Final Anti-Dumping Determination, Exhibit USA-4, p. 44; Final Countervailing Duty Determination, Exhibit USA-5, pp. 89-90.
[857] USAPEEC's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-46, pp. 3-5.

> was low, which constituted serious suppression on the sales price of the domestic like products, the domestic like products were forced to be sold at prices below the production cost in order to maintain the market share. At the same time, the capacity utilization of the domestic like products remained on a relatively low level, and the inventory presented an upward trend.[858]

7.592. In its Injury Brief, USAPEEC also argued that subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. USAPEEC explained that Chinese domestic producers sell their entire chicken paws production and cannot increase their production of paws without also increasing their production of other chicken parts to uneconomic levels. USAPEEC concluded that US paws imports do not compete for sales with domestic products. On the contrary, US imports were required to meet domestic demand in China during the POI.[859]

7.593. The parties agree that MOFCOM at least intended to address this argument in its Preliminary Determinations.[860] MOFCOM noted that there are some differences between the subject products and the domestic like products in terms of specific feature, usage and quality, "and the relationship between them does not necessarily constitute a one-to-one correspondence". MOFCOM added that these differences did not preclude it from treating products of different types or specifications as the same category of product for the purpose of the investigation, adding that "[i]n this case, chicken feet are included in scope of the Subject Products, therefore, the Investigating Authority has carried out investigation on import of all Subject Products including chicken feet, and has analysed and examined injuries brought to the domestic industry by the Subject Products."[861]

7.594. In its Comments on Preliminary Injury Determination, USAPEEC returned to this issue. It argued that in its Preliminary Determinations, MOFCOM had misunderstood its argument and therefore failed to respond to it. USAPEEC wrote that its argument was not that chicken paws were not part of the product scope/domestic like product, or that MOFCOM should not evaluate the effect of all investigated products. Rather, its argument was that as the largest segment of the investigated products, paws could not cause injury to the domestic industry because their import was required to supplement inadequate domestic capacity.[862]

7.4.5.2.4 Main arguments of the parties

7.4.5.2.4.1 United States

7.595. The United States submits that the two arguments were material to MOFCOM's causal link analysis and that MOFCOM rejected them without providing a sufficiently detailed explanation of its reasoning in the public notices of the Final Determinations.[863] The United States submits that simply providing a conclusory rejection of a respondent's argument raising a material issue does not satisfy the requirements of Articles 12.2 and 22.3 as further elaborated in Articles 12.2.2 and 22.5 respectively.[864]

7.596. With respect to the market share issue, the United States argues that MOFCOM avoided addressing respondents' arguments and instead indicated that Chinese law does not require it to examine both volume and market share developments. The United States submits, however, that US respondents were not arguing that subject imports did not increase, but rather their point was that the increase was not at the domestic industry's expense. The United States argues that the respondents raised a material issue because MOFCOM could not reach its decision on causality

[858] Final Anti-Dumping Determination, Exhibit USA-4, p. 44-46; Final Countervailing Duty Determination, Exhibit USA-5, pp. 89-91.
[859] USAPEEC's Injury Brief, Exhibit USA-21, pp. 29-30.
[860] United States' first written submission, footnote 357 (citing Preliminary Anti-Dumping Determination, Exhibit USA-2, section 6.1; Preliminary Countervailing Duty Determination, Exhibit USA-3, section 7.1); China's first written submission, paras. 431-432.
[861] Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 31.
[862] USAPEEC's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-46, p. 22.
[863] United States' first written submission, paras. 362-366; second written submission, para. 241; opening statement at the first meeting of the Panel, paras. 116-120.
[864] United States' second written submission, paras. 243-244.

consistently with its relevant substantive obligations under the Agreements without reconciling evidence that subject import volume did not increase at the expense of the domestic industry.[865]

7.597. As regards the issue concerning chicken paws, the United States notes China's acknowledgement that MOFCOM did not explicitly address this issue in its Final Determinations.[866] The United States disagrees with China's suggestion that the issue was sufficiently addressed in the Preliminary Determinations, given that MOFCOM's discussion in the Preliminary Determination was based on a fundamental misunderstanding of the argument. USAPEEC's main point was that paws could not cause injury to the domestic industry since the latter could not supply the market, but MOFCOM's response was that paws were covered by the scope of the investigation.[867] The United States argues that in the light of USAPEEC's Comments on the Preliminary Determinations, China cannot credibly argue that MOFCOM did not believe that respondents had provided any new information on the issue, such that it did not need to address this issue in its Final Determinations.[868] Moreover, the United States rejects China's explanation that MOFCOM was under no obligation to address this argument because MOFCOM did not consider it "material". The United States submits that this argument of China is a *post hoc* rationalization, and that, in any event, given that the US respondents alleged that nearly half of subject imports could have had no adverse impact on the domestic industry the issue was material and had to be resolved in order for MOFCOM to reach its final determination.[869]

7.4.5.2.4.2 China

7.598. China argues that MOFCOM provided a sufficiently detailed explanation in response to the US respondent's arguments regarding market shares and chicken paws. In China's view, the fact that the United States disagrees with MOFCOM's reasons for rejecting the arguments is irrelevant, and does not demonstrate that MOFCOM's final determinations did not contain "reasons" within the meaning of Articles 12.2 and 12.2.2 and 22.3 and 22.5. In China's view, these provisions say nothing about the substantive nature of the "reasons".[870]

7.599. With respect to the issue concerning market shares, in China's view, MOFCOM provided its reasons for rejecting USAPEEC's argument in its Final Determinations, sufficient to meet its obligations under Articles 12.2 and 12.2.2, and 22.3 and 22.5.[871] China adds that the obligation is only to address the arguments, not to address them to the satisfaction of the party making them.[872]

7.600. China acknowledges that MOFCOM did not explicitly address the second issue, concerning the lack of domestic industry capacity for chicken paws, in its Final Determinations. China argues that MOFCOM had sufficiently dealt with the issue in the Preliminary Determinations and that US respondents did not provide any new information on this issue after the Preliminary Determinations, thereby making it unnecessary for MOFCOM to address it again in the Final Determinations.[873] In addition, China argues that MOFCOM did not regard this particular issue as material, given its analytical approach to examining causation based on the like product as a whole, as opposed to market segments.[874] China explains that MOFCOM did not misunderstand the US respondent's argument and reject it by saying that paws fell within the scope of the investigation. Rather, MOFCOM found that all the different types of products inside the scope, including paws, could be analysed together.[875] Finally China notes that the United States itself did

[865] United States' first written submission, paras. 352, 363-364; second written submission, paras. 245-46.
[866] United States' second written submission, para. 247.
[867] United States' second written submission, para. 248.
[868] United States' second written submission, paras. 248-249 (citing USAPEEC's Comments on the Preliminary Anti-Dumping Determination, Exhibit USA-46, p. 22).
[869] United States' first written submission, para. 366; second written submission, paras. 250-252.
[870] China's second written submission, para. 263.
[871] China's first written submission, para. 427; second written submission, para. 258; opening statement at the second meeting of the Panel, para. 128.
[872] China's first written submission, para. 428-430.
[873] China's first written submission, paras. 431-432.
[874] China's first written submission, paras. 433-435; second written submission, paras. 261-262.
[875] China's second written submission, para. 260 (citing Preliminary Anti-Dumping Determination, Exhibit USA-2, p. 31).

not rely on this argument in its substantive claim on causation, which, in China's view, proves that the argument was immaterial.[876]

7.4.5.2.5 Evaluation by the Panel

7.601. In examining the United States' claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement, we recall that we must address the following two questions:

i. Whether the arguments at issue addressed "issues of fact and law considered material" by MOFCOM from the perspective of the determinations at issue; and if so,

ii. Whether MOFCOM's public notices of the Final Determinations set forth the reasons for its rejection of each argument in sufficient detail to allow USAPEEC to understand why its arguments were treated as they were, and to assess whether or not MOFCOM's treatment of the relevant issue was consistent with domestic law and/or the covered agreements.[877]

7.4.5.2.5.1 Argument concerning market shares

7.602. Considering the first question, we are satisfied that the argument concerning the fact that the market shares gained by the subject imports were not to the detriment of the domestic industry is relevant to material issues of fact and law. Market share gains by the subject imports were a significant consideration in MOFCOM's ultimate finding of causation. Moreover, USAPEEC's argument seeks to sever the link between any gain in subject import market share and the injury if any, suffered by the domestic industry. The argument therefore goes to the heart of the causal relationship between subject imports and the injury, if any, suffered by the domestic industry. For this reason MOFCOM necessarily had to address it if it were to ultimately establish a causal link between subject imports and material injury.

7.603. Turning to whether MOFCOM's Final Determinations set forth, or made available the reasons for accepting or rejecting the respondents' argument on this issue, as noted above, MOFCOM acknowledged the argument in its Final Determination. As noted above, MOFCOM rejected the argument on the basis that subject imports had increased in absolute terms and that even though domestic producers had increased their market share, they were nonetheless injured, particularly given the existence of price undercutting and price suppression as well as other negative effects on the domestic industry.[878] In our view, in doing so, MOFCOM provided, in its Final Determinations, the reasons why it rejected the argument raised by USAPEEC in a manner that was sufficient for USAPEEC to assess the consistency of MOFCOM's treatment of the issue with domestic law and WTO law.

7.4.5.2.5.2 Argument with respect to chicken paws

7.604. We consider that USAPEEC's argument that imports of chicken paws could not injure the Chinese domestic industry given that the Chinese domestic industry could not supply more paws pertains to material issues. Similar to the argument on market shares, USAPEEC's argument on chicken paws goes to the causal link between subject imports and the injury, if any, suffered by the domestic industry.

7.605. Turning to whether MOFCOM sufficiently explained its reasons for rejecting this argument in its Final Determinations, we recall that MOFCOM acknowledged the argument in its Preliminary Determinations and indicated that it considered that all chicken parts competed and were substitutable with one another. MOFCOM neither acknowledged nor addressed the argument in its Final Determinations. Since we have concluded that the argument is a relevant one under Articles 12.2.2 and 22.5, MOFCOM was required to address it in its Final Determinations or through a separate report. Considering that in its Comments on the Preliminary Determinations, USAPEEC limited itself to repeating the argument without adding to it – other than to state that MOFCOM

[876] China's second written submission, para. 262.
[877] See above, para. 7.530.
[878] See above, para. 7.591.

had misunderstood it – MOFCOM could in our view have satisfied its obligations under Articles 12.2 and 12.2.2, and Articles 22.3 and 22.5 through a simple reference to its treatment of the issue in the Preliminary Determination. MOFCOM could not, however, altogether abstain from even mentioning the argument.

7.4.5.2.5.3 Conclusion

7.606. On the basis of the foregoing, we reject the United States' claims with respect to the argument that any market share gained by subject imports was not to the detriment of the domestic industry and uphold the United States' claims with respect to the argument that subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.

7.607. On the basis of the foregoing, we find that the United States has not established that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement with respect to the explanations provided by MOFCOM in the public notice of its Final Anti-Dumping and Countervailing Duty Determinations for its rejection of USAPEEC's argument that any market share gained by subject imports was not to the detriment of the domestic industry. We also find that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and with Articles 22.3 and 22.5 of the SCM Agreement due to MOFCOM's failure, in the Final Anti-Dumping and Countervailing Duty Determinations, to provide the reasons for its rejection of USAPEEC's argument concerning the inability of Chinese domestic producers to supply chicken paws in sufficient quantities.

7.5 Consequential violations

7.608. The United States claims that China's actions are inconsistent with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement. The United States submits that because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the Anti-Dumping Agreement[879] and that because MOFCOM's conduct in the subsidy investigation was inconsistent with the provisions of the SCM Agreement cited in its other claims, China also breached Article 10 of the SCM Agreement.[880]

7.609. China argues that it has acted consistently with its obligations under both Agreements and, therefore, the United States' consequential claims under Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement lack merit.[881]

7.610. Article 1 of the Anti-Dumping Agreement reads in relevant part:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. (footnote omitted)

7.611. Similarly, Article 10 of the SCM Agreement provides that:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted)

7.612. To succeed in a claim under Article 1 of the Anti-Dumping Agreement or Article 10 of the SCM Agreement, a complaining Member need only establish that anti-dumping or countervailing

[879] United States' first written submission, para. 174.
[880] United States' first written submission, para. 243.
[881] China's first written submission, paras. 186 and 226.

duties were imposed and the imposing Member acted inconsistently with one of its obligations under the relevant Agreement.[882]

7.613. Therefore, to the extent we have upheld the United States' claims under the Anti-Dumping Agreement and the SCM Agreement, we find that China has also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

i. China acted inconsistently with the requirements of Article 6.2 of the Anti-Dumping Agreement due to MOFCOM's failure to provide opportunities for interested parties with adverse interests to meet and present opposing views and offer rebuttal arguments, there being no evidence on record that other interested parties with interests adverse to those of the United States Government declined to attend the meeting.

ii. China acted inconsistently with Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement due to MOFCOM's failure to require the Petitioner to provide adequate non-confidential summaries of information that it submitted in confidence.

iii. China acted inconsistently with Article 6.9 of the Anti-dumping Agreement as MOFCOM did not disclose all of the essential facts, in particular those pertaining to its determination of the existence and margins of dumping to the three relevant interested parties: Pilgrim's Pride, Tyson, and Keystone.

iv. China acted inconsistently with the first sentence of Article 2.2.1.1 of the Anti-dumping Agreement when MOFCOM declined to use Tyson and Keystone's books and records in calculating the cost of production for determining normal value. With respect to Pilgrim's Pride, the United States has not established that China acted inconsistently with the first sentence of Article 2.2.1.1.

v. China acted inconsistently with the second sentence of Article 2.2.1.1 because: (i) there was insufficient evidence of its consideration of the alternative allocation methodologies presented by the respondents; (ii) MOFCOM improperly allocated all processing costs to all products; and (iii) MOFCOM allocated Tyson's costs to produce non-exported products to the normal value of the products for which MOFCOM was calculating a dumping margin.

vi. The United States' claim under Article 2.4 of the Anti-Dumping Agreement is outside the Panel's terms of reference.

vii. China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement due to MOFCOM's application of an "all others" rate determined on the basis of facts available to US producers/exporters who failed to register in the anti-dumping duty investigation.

viii. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement due to MOFCOM's failure to disclose certain "essential facts" forming the basis of its determination of the "all others" anti-dumping rate.

ix. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because MOFCOM failed to disclose "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" or "all relevant information on matters of fact" with respect to its calculation of the "all others" anti-dumping rate in the Final Anti-Dumping Determination. The Panel does not rule

[882] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; *US – Softwood Lumber IV,* para. 143.

on the corresponding claims of the United States with respect to the Preliminary Determination.

x. China acted inconsistently with Article 12.7 of the SCM Agreement due to MOFCOM's application of an "all others" rate determined on the basis of facts available to US producers/exporters who failed to register in the countervailing duty investigation.

xi. China acted inconsistently with Article 12.8 of the SCM Agreement due to MOFCOM's failure to disclose certain "essential facts" underlying its decision to apply an "all others" countervailing duty rate.

xii. China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to disclose "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" or "all relevant information on matters of fact" with respect to its calculation of the "all others" countervailing duty rate in the Final Countervailing Duty Determination. The Panel does not rule on the corresponding claims of the United States with respect to the Preliminary Determination.

xiii. China acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because MOFCOM did not ensure that the countervailing duty levied did not exceed the amount of the subsidization per unit of the subsidized and exported product.

xiv. The United States has not established that China acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement given that MOFCOM was not obligated to attempt to seek out and identify all domestic producers in the process of defining the domestic industry. Furthermore, the United States has not established that China effectively excluded domestic producers from consideration as part of the domestic industry creating a self-selection bias which gave rise to a material risk of distortion of the injury analysis.

xv. China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and with Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values that included a different product mix, without taking any steps to control for differences in physical characteristics affecting price comparability or make necessary adjustments; and because MOFCOM's findings of price suppression in each investigation relied on its findings of price undercutting. The United States has not established that China acted inconsistently with the same provisions because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values at different levels of trade.

xvi. The United States' claims under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement concerning the United States Government's level of trade argument fall within our terms of reference; and China acted inconsistently with these provisions due to MOFCOM's failure to disclose, in the public notice of its Final Determinations, its reasons for the rejection of this argument.

xvii. The Panel does not rule on the United States' claims that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement because MOFCOM's findings that subject imports had an adverse impact on the domestic industry were not based on an objective examination of all relevant economic factors and indices having a bearing on the state of the industry.

xviii. The Panel does not rule on the United States' claims that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

xix. The United States has not established that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement with respect to the explanations provided by MOFCOM in the public notice of its Final Anti-Dumping and Countervailing Duty Determinations for its rejection of US interested parties' arguments that any market share gained by subject imports was not to the detriment of the domestic industry.

xx. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and 22.3 and 22.5 of the SCM Agreement due to MOFCOM's failure to provide, in the public notice of its Final Anti-Dumping and Countervailing Duty Determinations, the reasons for its rejection of US interested parties' argument that subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken paws, which Chinese domestic producers were incapable of supplying in adequate quantities.

xxi. China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement as a consequence of the foregoing violations of these Agreements.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement and the SCM Agreement, they have nullified or impaired benefits accruing to the United States under these agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that China bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the SCM Agreement.

_____

WORLD TRADE ORGANIZATION

WT/DS427/R/Add.1

2 August 2013

(13-3966)

Original: English

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS427/R.

_____

LIST OF ANNEXES
ANNEX A

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS AT THE SUBSTANTIVE MEETINGS OF THE PANEL

	Contents	Page
Annex A-1	Integrated Executive Summary Submitted by the United States	A-2
Annex A-2	Integrated Executive Summary Submitted by China (BCI redacted)	A-49

ANNEX B

WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

	Contents	Page
Annex B-1	Third-Party Statement of Chile	B-2
Annex B-2	Integrated Executive Summary Submitted by the European Union	B-4
Annex B-3	Integrated Executive Summary Submitted by Japan	B-9
Annex B-4	Integrated Executive Summary Submitted by Mexico	B-12
Annex B-5	Integrated Executive Summary Submitted by Norway	B-18
Annex B-6	Integrated Executive Summary Submitted by the Kingdom of Saudi Arabia	B-21
Annex B-7	Thailand's Responses to Panel Questions	B-24

ANNEX C

WORKING PROCEDURES FOR THE PANEL

	Contents	Page
Annex C-1	Working Procedures for the Panel	C-2
Annex C-2	Additional Working Procedures of the Panel Concerning Business Confidential Information	C-7

ANNEX A

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS AT THE SUBSTANTIVE MEETINGS OF THE PANEL

Contents		Page
Annex A-1	Integrated Executive Summary Submitted by the United States	A-2
Annex A-2	Integrated Executive Summary Submitted by China (BCI redacted)	A-49

ANNEX A-1

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE UNITED STATES

First Integrated Executive Summary by the United States

I. OVERVIEW

1. China's anti-dumping and countervailing duty measures on broiler products from the United States are the result of a flawed process yielding flawed results. This is confirmed by the *post-hoc* rationalizations offered by China during the course of these proceedings; they demonstrate that China's investigating authority, the Ministry of Commerce for the People's Republic of China (MOFCOM), simply ignored and discounted evidence and arguments that it found problematic throughout the underlying investigations.

2. The United States is alleging that the flawed process and results are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These obligations include:

- AD Agreement Article 6.2: MOFCOM's failure to grant the United States' request for a hearing;
- AD Agreement Article 6.9: MOFCOM's failure to allow U.S. respondents to see the calculations for their respective dumping margins;
- AD Agreement Article 6.5.1 and SCM Agreement Article 12.4.1: MOFCOM allowing the Petitioner to include confidential information in the Petition without providing non-confidential summaries;
- AD Agreement Article 2.2.1.1: MOFCOM's rejection – made without any explanation – of the costs kept in the books and records of U.S. producers to calculate the normal values for U.S. respondents, even though those costs were in accordance with generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with the production and sale of the products subject to the investigation and replacement of those costs with an unreasonable allocation methodology;
- AD Agreement Article 2.4: MOFCOM's failure to conduct a fair comparison of normal value and export price for Keystone, a U.S. respondent, by applying certain freezer storage fees in a manner that inflated Keystone's dumping margin;
- AD Agreement Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II and SCM Agreement Articles 12.7, 12.8, 22.3, 22.4, and 22.5: MOFCOM's imposition of an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact or why it rejected facts and law raised by the United States and U.S. respondents in the Preliminary and Final Determinations;
- SCM Agreement Article 19.4 and Article VI:3 of the GATT 1994: MOFCOM's failure to properly allocate the alleged subsidy in relation to subject merchandise;

- AD Agreement Articles 3.1 and 4.1 and SCM Agreement Articles 15.1 and 16.1: MOFCOM wrongly defined the domestic industry to include only those firms that supported the AD and CVD investigations;

- AD Agreement Articles 3.1, 3.2, 6.4 and 12.2 and SCM Agreement Articles 15.1, 15.2, 12.3, and 22.3: MOFCOM's price effects analysis was based upon flawed price comparisons, failed to address conflicting evidence that the domestic industry was gaining market-share, and did not disclose MOFCOM's methodology for adjusting subject import price data with respect to different levels of trade.

- AD Agreement Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Agreement Articles: 15.1, 15.5, 22.3, and 22.5: MOFCOM's causation analysis relied exclusively on findings relating to volume and price but ignored data that contradicted those findings such as data indicating that any increase in subject import volume came wholly at the expense of other exporters and not domestic producers. Moreover, MOFCOM failed to explain in its final determination why it rejected the arguments put forward by U.S. respondents; and

- AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4: MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry" as it cannot be reconciled with all the evidence attesting to the overall health of the domestic industry.

II. PROCEDURAL AND FACTUAL BACKGROUND

3. China's measures imposing anti-dumping and countervailing duties on broiler products from the United States are set forth in MOFCOM Notice No. 8 [2010], Notice No. 26 [2010], Notice No. 51 [2010], and Notice No. 52 [2010], including any and all annexes.

4. Under these measures, China has levied the following antidumping and countervailing duty rates on imports of broiler products from U.S. producers and exporters.

Firm	Antidumping Duty Rates	Countervailing Duty Rates
Pilgrim's	53.4%	5.1%
Tyson	50.3%	12.5%
Keystone	50.3%	4.0%
Firms that registered for the investigation but were not selected as mandatory respondents	51.8%	7.4%
"All others"	105.4%	30.3%

5. On September 20, 2011, the United States requested consultations with China with respect to these measures. The United States and China held consultations on October 28, 2011. As these consultations did not resolve the dispute, the United States requested, on December 8, 2011, the establishment of a panel. The Dispute Settlement Body ("DSB") considered this request at its meeting on December 19, 2011, at which time China objected to the establishment of a panel. The United States renewed its request for the establishment of a panel at the January 20, 2011 meeting of the DSB, at which time a panel was established.

III. STANDARD OF REVIEW

6. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. The standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

7. A WTO panel, per its standard of review, assesses whether a Member has abided by its obligations by looking at the contemporaneous explanations provided by the investigating authority. In short, because it is the task of a panel to assess the reasoning of an investigating authority, there is a concomitant duty on the investigating authority to set forth its reasoning in light of the obligation at issue because a defect in the reasoning, such as a failure to properly justify a position or address arguments means that the authority will be held to have acted inconsistently with the relevant provision. Therefore, *post-hoc* arguments offered by a defending Member cannot be taken into account.

IV. MOFCOM'S PROCEDURAL FAILINGS

A. China Breached Article 6.2 of the AD Agreement by Denying the U.S. Request for a Hearing

8. The United States requested, in writing, that MOFCOM's Bureau of Industry Injury Investigation ("BIII") conduct a "public hearing" to address various procedural and substantive concerns relating to the conduct of the AD and CVD investigations. MOFCOM summarily rejected the U.S. request for a public hearing. Instead, MOFCOM, without any further inquiry, decided that the U.S. request was of no concern to any other interested party, and offered only a closed forum where the United States could present its views to MOFCOM and MOFCOM alone. In so doing, MOFCOM acted inconsistently with Article 6.2 of the AD Agreement.

9. Article 6.2 of the AD Agreement sets forth four requirements on investigating authorities. First, it must allow any interested party to request a hearing. The United States made a request for a hearing through its July 12 letter. Once a request is made, the authorities "shall" provide the opportunities provided for in the provision. The qualification on the obligation is expressed in the following sentence of Article 6.2, which notes that "provision of such opportunities must take account of the need to preserve confidentiality" or "convenience to the parties." Here, MOFCOM did not claim the request was denied because prior opportunities had been provided or the United States had missed a reasonable deadline to request a hearing. MOFCOM denied the request on grounds that have no basis in Article 6.2: that the issues were not relevant to other interested parties (even though MOFCOM did not attempt to inquire further about what precisely the issues entailed) and that it has already decided that its investigations were being carried out "in a public, just and transparent manner."

10. Second, the provision states that the opportunity extends to "all interested parties." In its letter denying the U.S. request, MOFCOM appears to make a distinction between the United States and interested parties by suggesting the latter have no interest in the concerns identified by the United States. That is incorrect as Article 6.11(ii) of the AD Agreement provides that "interested parties" under the agreement includes "the government of the exporting Member," which in this case is the United States.

11. Third, Article 6.2 provides that the opportunity is to "meet those parties with adverse interests. Accordingly, the United States was entitled upon request to a meeting where it could be concurrently present with other parties that had adverse interests. In assessing this right, it is critical to remember that the point is not whether those with adverse positions would have ultimately chosen to meet with the United States, but that MOFCOM decided *ab initio* that no such gathering would occur.

12. Finally, Article 6.2 provides that the meeting should allow for opposing views and rebuttals to be offered. The opinion presentation meeting that MOFCOM offered as a substitute makes no such provision. MOFCOM's option needs to be considered in the context of Article 6.3 of the AD Agreement, which provides that the oral information provided in a hearing shall only be taken into account if it is reproduced in writing and made available to other interested parties. For a party such as the Petitioner, who would be adverse to the issues raised in the proposed hearing, MOFCOM's procedure of substituting a closed meeting as soon as a petitioner declines to meet, allows a petitioner an easy way to avoid a hearing and limit the record of arguments it finds objectionable.

13. In respect to how the obligations in Article 6.2 may be satisfied, the United States considers that an investigating authority could satisfy its obligations in multiple ways. One simple method

would be for an investigating authority to adopt a practice of routinely holding hearings in all its investigations. Alternatively, it could follow procedures similar to those MOFCOM provides in its own rules for hearings – and which were denied to the United States. These procedures include (1) a procedure whereby an interested party can initiate a hearing; (2) a procedure by which the investigating authority can announce the logistics for the hearing and allow all interested parties the opportunity to participate, perhaps through a registration process; and (3) procedures whereby the hearing is conducted so the parties can have a full opportunity to make their own presentations and then have an opportunity to comment on the presentations made by other interested parties. Here, MOFCOM by allowing only the United States to present its opinions to MOFCOM, without presentations of views of the Petitioner, any opportunity for comment, and rebuttal by other interested parties, acted inconsistently with Article 6.2 of the AD Agreement by summarily denying the U.S. request for a hearing.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

14. China breached Article 6.9 of the AD Agreement by failing to disclose to the interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. In particular, MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

1. *Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins*

15. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties. The obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of "facts", which is defined to mean "[a] thing known for certain to have occurred or to be true." The use of the adjective "essential" to modify "facts" indicates that this obligation does not encompass "any and all" facts, but rather is concerned only with those facts that are "absolutely indispensible or necessary." For purposes of the investigating authority's dumping determination, the essential facts under Article 6.9 are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. China presents a classic straw man argument by purporting to paraphrase the U.S. argument in an extreme manner, and then argues against it. The United States, however, relies fully and appropriately on the text of Article 6.9 of the AD Agreement.

16. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. They are "facts" because they are things "known for certain to have occurred", and they are "essential" because they are absolutely indispensible to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed. Moreover, unless the interested parties are provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

2. *MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.*

17. MOFCOM failed to make available the calculations and data it used to determine the existence and margin of dumping and thereby prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. The essential facts MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with

respect to the determination of costs of production. For normal value, export price and costs of production, MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM's elimination or rejection of data provided by each respondent.

18. China asserts that it met its disclosure obligation because the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping. Disclosure of summary figures does not meet China's obligations under Article 6.9 of the AD Agreement because these summary figures represent merely the final stage of a margin calculation and at no point does MOFCOM disclose the data or calculations used to derive them. At most, these disclosures merely allowed the exporters to guess at or approximate the calculations. China provides exhibits that purportedly could direct the respondents to the information relied on by MOFCOM and allow them to reconstruct the calculations performed by MOFCOM. These tables were not provided to the interested parties during the investigation. However, even if they had been provided, they merely refer the respondents to the scattered and vague statements in the Final AD Determination and disclosure documents concerning adjustments purportedly made by MOFCOM. They do not provide the data and calculations used by MOFCOM to determine the existence and magnitude of dumping.

19. Without knowing the facts of the actual data used by MOFCOM, the respondents were not in a position to defend their interests in the investigation. In order to defend their interests, the respondents needed to be able to review and comment on the calculation performed by MOFCOM. Without access to the actual calculations performed, the respondents could not re-construct the exact calculations, contrary to China's suggestion, and certainly could not review the data and calculations used by MOFCOM to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.

20. The United States is challenging MOFCOM's failure to require the Petitioner to prepare non-confidential summaries in six instances in the Petition as breaches of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement. There are five facets to these provisions that are critical to their interpretation. First, the provisions apply to information submitted by any interested party participating in the investigation. The Petitioner was an interested party. Second, the obligation upon an investigating authority for the production of non-confidential summaries is not simply permissive, but obligatory in that the investigating authority must ensure that summaries are furnished. Third, the use of the term "exceptional" in the provisions qualifies the possibilities for deviation. The *only* instance when the investigating authority is excused from requiring an interested party to provide a non-confidential summary is when preparation is infeasible such as when the information cannot be summarized without revealing confidential information. Fourth, the obligation to either provide a non-confidential summary or an explanation of why summarization is not possible falls on the interested Member or interested party – not the investigating authority. Fifth, the obligations in these provisions are not contingent upon another interested party making a request for a non-confidential summary or a showing that an interested party was injured by the lack of a non-confidential summary.

21. China attempts to sidestep its failure to require the Petitioner to provide non-confidential summaries by noting the United States is not challenging the underlying claims of confidentiality. That argument, however, fails to sequence the issues properly because the provisions require the investigating authority to assess the confidentiality claim. As the Appellate Body recognized in *EC – Fasteners*, the summary is critical because interested parties cannot defend their interests – including challenging the confidentiality claim – without an understanding of the information in question.

22. China's post-hoc attempt to cobble non-confidential summaries additionally fails because there is no indicia that would let an interested party know that the information China cites now as serving as a non-confidential summary was intended to serve as such and because they entail conclusions that an interested party must summarily accept rather than any summarization of the actual information. The panel in *China – GOES* was clear that the provisions "require the interested

party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information" and that a mere conclusion "does not provide an interested party with a basis to challenge whether the confidential information provides a basis for the conclusion drawn."

23. In short, the Petitioner did not provide any statement regarding why summarization was not possible, and MOFCOM saw no need for it to do so. Accordingly, China breached Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATIONS

A. China Breached Article 2.2.1.1 of the AD Agreement by Summarily Rejecting U.S. Producers' Costs of Production

24. During the investigation, U.S. producers presented to MOFCOM the costs of production they kept in their books and records for the various subject products. The producers explained that their records allocated higher production costs for more valuable chicken products, such as breast meat. U.S. producers put evidence on the record explaining why their costs were GAAP consistent and reasonably reflected the costs associated with the production and sale of the products. This evidence includes U.S. and Chinese accounting treatises, letters from auditors, precedents from other investigating authorities, Chinese GAAP, and International Accounting Standards. MOFCOM asserted in its Preliminary and Final AD Determinations, without providing any reasoning or analysis, that it did not believe that the reported costs reasonably reflected the actual costs of production. Instead, MOFCOM stated that U.S. producers had an affirmative responsibility to convince it otherwise.

25. Article 2.2.1.1 of the AD Agreement imposes positive obligations on an investigating authority. First, *the investigating authority must accept* the costs kept by the exporter or producer in its books and records if those costs of production are GAAP consistent and reasonably reflect the costs associated with the production and sale of subject products. The use of the term "normally" in the provision confirms that the obligation in the first sentence of Article 2.2.1.1 is for the investigating authority, as a rule, to calculate costs on the basis of a producer or exporter's records. The dependent clause of the provision indicates two circumstances [provisos] under which it would be possible to derogate from this rule: such records are not in accordance with [1] the generally accepted accounting principles of the exporting country and [2] do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the obligation is on the investigating authority to rely upon a producer's figures unless it demonstrates why one or both of the conditions do not apply.

26. In respect to these two provisos, Article 2.2.1.1. states the provision is "[f]or the purposes of paragraph 2," i.e. Article 2.2. Article 2.2 in turn states that when sales in the ordinary course of trade in the domestic market cannot be used, two other methods can, including cost of production method: the method specified in 2.2.1.1. Article 2.2 states the margin of dumping shall be determined by comparison "with the cost of production in the country of origin." Accordingly, the two provisos must be considered with respect to their objective of calculating the cost of production in the country of origin.

27. MOFCOM in rejecting these costs as unreasonable has an obligation to explain why they were so. The obligation stems from (1) the general requirement that an investigating authority's actions are subject to review by WTO panels; (2) because Article 2.2.1.1 is a "positive" obligation upon the investigating authority; and (3) because the second sentence of the provision requires an investigating authority to "consider" available evidence, which here was substantial. Critically, MOFCOM put nothing forward on the record as to why U.S. producers' costs were unreasonable. MOFCOM's *post-hoc* explanation that the costs were unreasonable because of conditions in the Chinese market cannot be accepted by virtue of the fact that they are post-hoc. In any event, that basis to declare costs as unreasonable runs afoul of the AD Agreement.

28. If the investigating authority establishes that the costs are not reasonable or not consistent with GAAP, then *the investigating authority* bears the additional burden of demonstrating that it considered all available evidence, including historically utilized allocations made available by the exporter or producer to ensure that its alternative allocation is proper. A "proper" allocation is an

allocation that captures the costs of production in the country of origin and one that can be accurately used to ensure that the anti-dumping duty is not greater than dumping as to the particular product. MOFCOM did not assert or accept that it was required to evaluate the evidence submitted by U.S. producers or the merits of its own methodology, or that it might need to make adjustments with respect to product scope. Not surprisingly, MOFCOM's application of a weight-based allocation here is not proper.

29. When there are joint products that are non-homogenous, the use of a unit based allocation such as weight eliminates any relationship with the cost of production in the country of origin. It results in the same amount of costs being assigned to low and high value products. The resulting antidumping duty margin would accordingly be distorted. MOFCOM's decision to adopt such a methodology seems to suggest the deliberative process ignored key concerns:

- Why is it reasonable to take costs that are in fact already associated with sale and remove that characteristic from them by averaging them according to weight?

- Why is it reasonable to take the specific processing costs incurred post-split and average them across all products, even though it is clear that some of those products did not incur those costs?

- Why is this methodology reasonable when producers cannot adopt it in the course of their normal records thus vitiating the principle that costs should reflects the costs of production in the country of origin? If they did, they would be allocating costs to low value products far in excess of the fair market value of such products. As a result, the producer's inventory, based on MOFCOM's methodology, would be in violation of the lower of cost or market [LCM] rules of accounting standards.

30. In short, MOFCOM's methodology is anything but "proper," particularly when compared to using the costs kept in the producers' books and records.

B. China Breached Article 2.4 of the AD Agreement By Failing To Conduct a Fair Comparison Between Keystone's Constructed Normal Value And Export Price.

31. China breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. Specifically, MOFCOM improperly adjusted Keystone's export price to account for certain freezer storage expenses.

1. *Keystone's Reported Freezer Storage Expenses to MOFCOM*

41. Keystone incurred freezer storage expenses on all home market sales that would be comparable to the sales of product in China – all frozen product incurred the same freezer storage expenses, regardless of whether they were sold in the United States or exported to China. Those freezer storage expenses were reported to MOFCOM in response to MOFCOM's AD Questionnaire. In the Preliminary AD Determination, MOFCOM constructed a normal value for Keystone by summing Keystone's reported costs of production, expenses, and an amount for reasonable profits. Given that freezer fees were included both in the cost-of-production-based normal value, and were incurred on export sales, MOFCOM properly made no adjustment to the export price regarding freezer fees. In the Final AD Determination, however, MOFCOM deducted Keystone's freezer storage fees from its export price.

2. *Article 2.4 of the AD Agreement Requires Allowances for Differences in Normal Value and Export Price Affecting Price Comparability*

42. For purposes of conducting a fair comparison between the export price and normal value, Article 2.4 of the AD Agreement requires due allowances to be made for differences affecting price comparability. The Appellate Body has stated that the *a contrario* application of this directive prohibits allowances or adjustments for differences that do not affect price comparability. Moreover, if the allowances to be made pursuant to Article 2.4 are limited to differences affecting price comparability, it is clear that no allowance could be made where no difference exists at all (let alone a difference affecting price comparability).

3. *MOFCOM's Treatment of Keystone's Freezer Storage Fees Precluded MOFCOM from Conducting a Fair Comparison*

43. MOFCOM made an undue adjustment to exclude freezer storage expenses from Keystone's export price and therefore compared a normal value that included at least some portion of those expenses, as China admits, to an export price that did not. The adjustment to the dumping margin calculated by MOFCOM for Keystone did not reflect merely the presence or absence of dumping. Rather, the margin of dumping derived from comparing Keystone's normal value to its export price reflected the fact that the same freezer storage expenses were added to the cost of production, while subtracted from the export price. By conducting such a comparison, which overstates the difference between the normal value and export price attributable to this expense, MOFCOM acted inconsistently with Article 2.4 by failing to conduct a fair comparison.

44. China asserts that the adjustment was warranted because all of Keystone's exports to China were of frozen product, and therefore incurred freezer storage expenses, but only a fraction of Keystone's domestic sales incurred freezer storage expenses because not all of those products were frozen. However, China admits that its adjustment resulted in a mismatch. China relies on the *post-hoc* characterization of Keystone as failing to provide accurate or timely responses to MOFCOM's request to justify this result. However, China's assertion is contrary to the record which indicates that MOFCOM verified that all of the costs of Keystone's financial reports, which included freezer storage expenses, had been properly reported to MOFCOM.

4. *The U.S. Claim Regarding Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference*

45. The United States' claim under Article 2.4 of the AD Agreement concerning MOFCOM's failure to conduct a fair comparison between Keystone's constructed normal value and its export price is properly within the panel's terms of reference. Contrary to China's assertion, the legal basis for the United States' claim clearly evolved from the legal basis that formed the subject of consultations and is therefore properly within the scope of the panel's terms of reference. Moreover, Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request.

46. The United States is pursuing several claims regarding MOFCOM's treatment of the respondents' reported costs and MOFCOM's failures to disclose certain essential facts, information and reasoning associated with calculating the respondents' normal values and export prices. At the time of the United States' request for consultations, it was apparent that there was some discrepancy in MOFCOM's treatment of Keystone's reported costs in constructing Keystone's normal value, including MOFCOM's treatment of Keystone's reported costs for freezer storage expenses. Given MOFCOM's flawed disclosures, it was unclear precisely how MOFCOM had treated those costs. It was not until consultations that it became apparent that MOFCOM had made an undue adjustment to Keystone's export price. This is not unlike the situation discussed in the Appellate Body report for *Mexico—Beef and Rice*, where a complaining party learns of additional information during consultations that warrants revising the list of treaty provisions with which the measure is alleged to be inconsistent.

C. China Breached Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2 and Annex II of the AD Agreement by Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin, and Failing to Explain its Determination in the Anti-Dumping Investigation.

47. When MOFCOM initiated the AD and CVD investigations, it notified the six U.S. producers identified in the Petition of the investigation and requested the U.S. Embassy to notify any other exporters or producers. MOFCOM required any U.S. exporter that wished to participate in the investigation to register with MOFCOM. Three companies were investigated and MOFCOM assigned those companies individual margins of dumping in the Preliminary and Final AD Determinations. MOFCOM applied a weighted-average margin to other companies that registered with MOFCOM, but were not investigated. However, with regard to companies that MOFCOM did not notify, or

even identify, MOFCOM assigned an "all others" dumping margin substantially higher than the highest margin assigned to any investigated company.

48. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the AD questionnaires, and were not otherwise provided the notice required by the AD Agreement, MOFCOM breached Article 6.8 and Annex II of the AD Agreement. MOFCOM also breached Article 6.9 of the AD Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" dumping margin and Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" Rate in the Final Antidumping Duty Determination is Inconsistent with Article 6.8 and Annex II of the AD Agreement.*

49. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied facts available apparently adverse to the interests of producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation.

50. Article 6.8 of the AD Agreement limits the circumstances in which investigating authorities may resort to the use of facts available to where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation. Together with Annex II, paragraph 1 of the AD Agreement, Article 6.8 ensures that an exporter or producer has an opportunity to provide information required by an investigating authority before the investigating authority resorts to the use of facts available. An investigating authority that calculates dumping margins adverse to the interests of a party on the basis of facts available for exporters or producers that the authority did not give notice, will be in breach of Article 6.8.

51. MOFCOM did not notify "all other" U.S. producers or exporters. In the absence of being notified of the necessary information required by MOFCOM, those unregistered exporters or producers cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation. By applying facts available adverse to the interests of the companies that were not notified of the information required of them, were never sent copies of the antidumping questionnaire or otherwise provided the notice the AD Agreement requires, MOFCOM breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin*.

52. MOFCOM's failure to inform interested parties "of the essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin in time for the interested parties to defend their interests is inconsistent with Article 6.9 of the AD Agreement. At no time in the dumping investigation did MOFCOM identify the essential facts that formed the basis for its imposition of the 105.4 percent "all others" dumping margin. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate. Likewise, without disclosure of the factual information MOFCOM used to calculate the 105.4 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. In short, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by Failing to Explain its Determination.*

53. China acted inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" dumping margin. MOFCOM breached Article 12.2 of the AD Agreement because it failed to provide in sufficient detail the

findings and conclusions that led to the application of facts available. MOFCOM breached Article 12.2.1 of the AD Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 12.2.2 of the AD Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" dumping margin. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the dumping margin for "all other" respondents and, thus, fails to satisfy China's obligations.

D. China Breached Article 1 of the AD Agreement.

54. Because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the AD Agreement.

V. MOFCOM'S FLAWED CVD DETERMINATIONS

A. China Breached Articles 12.7, 12.8, 22.3, 22.4 and 22.5 Of The SCM Agreement By Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate, and Failing to Explain its Determination in the Countervailing Duty Investigation.

55. As it did in the antidumping investigation, MOFCOM assigned an "all others" subsidy rate to companies that MOFCOM did not notify, or even identify, that was substantially higher than the highest subsidy rate assigned to any investigated company. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the CVD questionnaires, and were not otherwise provided the notice required by the SCM Agreement, MOFCOM breached Article 12.7 of the SCM Agreement. MOFCOM also breached Article 12.8 of the SCM Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" subsidy rate and Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Article 12.7 of the SCM Agreement.*

56. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFOCM did not notify of the information required of them. Without notice of the information required of interested parties subject to the investigation, no other, unidentified U.S. producers or exporters can be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period. Neither can other, unidentified U.S. producers or exporters be said to have significantly impeded an investigation for which they received no information requests. MOFCOM acted inconsistently with its obligations under Article 12.7 by using facts available adverse to a company's interests to calculate subsidy rates for producers or exporters that the authorities did not investigate. Moreover, to the extent that such non-countervailable programs are factored into MOFCOM's calculation of the all others rate, MOFCOM ignored substantiated facts already on the record of the investigation.

2. *MOFCOM Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate.*

57. MOFCOM's failure to inform the United States and other interested parties "of the essential facts under consideration" that formed the basis for the "all others" subsidy rate calculation is inconsistent with Article 12.8 of the SCM Agreement. At no time in the CVD investigation did MOFCOM identify the essential facts that formed the basis for its imposition of a 30.3 percent all others subsidy rate. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis

for MOFCOM's determination and therefore could not adequately defend their interests. Without disclosure of the factual information MOFCOM used to calculate the 30.3 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. With these essential facts, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Article 22.3, 22.4 and 22.5 of the SCM Agreement by Failing to Explain its Determination of the "All Others" Subsidy Rate.*

58. China acted inconsistently with Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" subsidy rate. MOFCOM breached Article 22.3 of the SCM Agreement because it failed to provide in sufficient detail the findings and conclusions that led to the application of facts available. MOFCOM breached Article 22.4 of the SCM Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 22.5 of the SCM Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" subsidy rate. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the subsidy rate for "all other" respondents and, thus, fails to satisfy China's obligations.

B. China Breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by Failing Properly to Allocate the Alleged Subsidy in Relation to Subject Products.

59. Investigating authorities, when calculating CVD rates, must ensure that the amount of subsidy received by a producer or exporter is properly allocated to the producer's or exporter's products under investigation. The result of this calculation is a per-unit, countervailing duty rate that can be applied to the producer's or exporters' sales of subject merchandise. Thus, an investigating authority, at a minimum, must ensure that any countervailing duty reflects only the subsidies provided to the subject products and not to any other products.

60. Here, MOFCOM found that the respondents purchased the corn and soybean meal used to feed and raise chickens on preferential terms. MOFCOM attempted to quantify the amount of the subsidy and factored it into the aggregate numerators when calculating the CVD rates for U.S. producers. Putting aside whether MOFCOM's subsidy theory is correct, MOFCOM's approach ignores a critical point: "all chickens" are not the products subject to the investigation; certain "broiler products" are.

32. Although one U.S. respondent, Keystone, used chickens to produce only subject products, the other two respondents, Tyson and Pilgrim's, used chickens to produce a significant quantity of non-subject merchandise. MOFCOM, however, made no adjustments for these two producers and instead incorrectly allocated the entire amount of the purported subsidy solely to the production of subject merchandise.

33. Tyson, Pilgrim's, and the United States proffered solutions to MOFCOM regarding this error. For example, the United States explained that MOFCOM could redress this error by applying either of two possible adjustments:

> [1] Because the numerator reflects the companies' total purchases of corn and soybean during the period of investigation, the denominator should be revised to reflect the companies' total sales of all chicken products (both subject and non-subject poultry products).
>
> [2] Alternatively, BOFT could reduce the numerator to reflect the amount of corn and soybean meal used to produce chicken feed for those chickens used to produce the subject merchandise, while maintaining the denominator reflecting the companies' sales of subject merchandise only.

61. Either adjustment was technically feasible. With respect to the first option, the questionnaire responses included data regarding the volume of non-subject merchandise that was produced from chickens. In regard to the alternative option, Tyson and Pilgrim's quantified for MOFCOM the percentage of poultry sales that could be attributed to subject merchandise. Accordingly, MOFCOM could have proceeded to use that data to properly proportion the numerator. MOFCOM did not do so.

62. In respect to the arguments proffered by China regarding questionnaire and data responses, the United States has two preliminary points. First, it seems China's logic is that respondents somehow both knew what the data requested of them was to be used for and that they still knowingly obstructed the questions in a manner that would increase their margins. Not surprisingly, the record does not lend credence to that supposition. Second, what is the bearing of these questions on the ultimate inquiry: was MOFCOM apprised of the fault – that the numerator and denominator did not line up – and did it have a method by which to correct it? To that point, China's answer says nothing.

63. In short, MOFCOM mismatched the respective numerators and denominators for Tyson's and Pilgrim's subsidy calculations. MOFCOM was made aware of this error as well as acceptable options for correcting it. Nonetheless, MOFCOM refused to correct its mistake and proceeded to levy countervailing duties that are clearly in excess of any subsidy that may exist with respect to the subject merchandise. Accordingly, MOFCOM's CVD calculations for Pilgrim's and Tyson are inconsistent with Articles 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

C. China Breached Article 10 of the SCM Agreement

64. Because MOFCOM's conduct in the subsidy investigation was inconsistent with the provisions of the SCM Agreement noted above, China also breached Article 10.

VI. MOFCOM'S FLAWED INJURY DETERMINATIONS

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

65. MOFCOM limited its definition of the domestic industry to domestic producers that voluntarily returned domestic producers' questionnaire responses. China should have, but did not, independently identify the universe of domestic producers in order to provide questionnaires to either each producer or, alternatively, a representative sample of domestic producers. Instead, MOFCOM only provided blank questionnaires to the 20 producers listed in the petition, which were all members of CAAA and therefore petitioners. MOFCOM did so, even though respondents had identified other large domestic producers not included in the definition of the domestic industry and notified MOFCOM as to their existence.

66. MOFCOM also failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the domestic industry. According to MOFCOM, such producers could have received blank questionnaire to complete and return either by registering for participation in the investigations or by downloading a blank questionnaire off of MOFCOM's website. MOFCOM's notices mentioned none of this. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by completing a questionnaire response, MOFCOM also imposed a self-selection process among the domestic producers that introduced a material risk of distortion. Only producers posting the weakest performance would have had any incentive to come forward.

67. By so proceeding, MOFCOM increased the likelihood that petitioners and domestic producers hand- picked by them would return questionnaire responses and thus be included in the data set used by China to perform the analysis leading to its final determinations. By contrast, MOFCOM's approach to identifying domestic producers other than "known domestic producers" listed in the petition was calculated to elicit no response.

68. An investigating authority must independently collect information relevant to its definition of the domestic industry. An investigating authority cannot define the domestic industry consistently

with Articles 3.1 and 4.1 of the ADA or Articles 15.1 and 16.1 of the SCM Agreement without making active, independent efforts to identify the universe of domestic producers of the like product. 121. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain{} passive in the face of possible shortcomings in the evidence submitted."

69. Accordingly, a process for defining the domestic industry that inevitably results in an examination of only producers selected or identified by the Petitioner cannot comport with the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is the same type of biased analysis the Appellate Body found inconsistent in *EC – Fasteners*. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to participate in the injury investigation by either joining the petition, responding to the notice, or downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack any incentive to respond to MOFCOM's notice or to otherwise participate in the investigation. Indeed, domestic producers posting the strongest performance would have every incentive <u>not</u> to make themselves known. That is because withholding their performance data from the investigating authority could only increase the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

70. Thus, MOFCOM's approach of limiting the domestic industry data to that from the Petitioner and select other producers named by Petitioner favored the interests of the Petitioner and petition supporters and prejudiced respondents. Further, because MOFCOM's biased and flawed definition of the domestic industry would have tainted its analysis of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5 of the ADA and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, respectively, China acted inconsistently with those articles as well by not conducting its analysis in relation to an appropriately defined "domestic industry."

71. MOFCOM's definition of the domestic industry was also inconsistent with Article 4.1 of the ADA because it did not include "the domestic producers as a whole of the like products or to those of them whose collective output of the {like} products constitutes a major proportion of the total domestic production of those products." In light of its knowledge of the existence of domestic producers based on the data source it relied on to establish total domestic production, as discussed above, MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by defining the domestic industry so as to effectively exclude domestic producers accounting for approximately half of Chinese broiler production.

B. China's Price Effects Analysis Final Determination Breached Articles 3.1, 3.2, 6.4 and 12.2 of the AD Agreement and Articles 15.1, 15.2, 12.3, and 22.3 of the SCM Agreement.

72. MOFCOM's price effects analysis is inconsistent with China's WTO obligations in three key respects: first, MOFCOM's finding that subject imports undersold the domestic like product to a significant degree was based on fundamentally flawed price comparisons; second, MOFCOM's only basis for finding that subject imports suppressed domestic like product prices is its flawed finding that subject imports undersold the domestic like product to a significant degree; and third, MOFCOM failed to disclose the methodology it purportedly used to adjust the pricing data to reflect their different level of trade.

1. *MOFCOM's Failure to Control for Differences in Level of Trade and Product Mix is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.*

73. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require the investigating authority to base its injury determination on "positive evidence" and conduct an

"objective examination." To conduct a price effects analysis consistent with the objectivity and positive evidence requirements, an investigating authority must utilize domestic and subject import pricing data that permit reasonably accurate price comparisons. By failing to control for obvious differences in level of trade and product mix and, therefore, MOFCOM's analysis of price effects violated Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

a. *MOFCOM's Comparison of Subject Import Prices and Domestic Like Product Prices at Different Levels of Trade is Not an Objective Examination.*

74. MOFCOM compared the value of subject imports with the value of the domestic like product at different levels of trade. Specifically, MOFCOM used the pricing data in the Petition to compare subject import prices based on official import statistics – on a CIF basis – to the domestic producers' sales prices to their first arm's-length customers. Because the average unit value of subject imports on a CIF basis does not include transportation costs from the border to an importer's warehouse and the importer's markup, such unit values would naturally be lower than the average unit value of subject imports sold by importers to first arms-length customers.

75. China confirmed in its first written submission that MOFCOM failed to adjust the CIF prices to account for the fact that they were at a different level of trade than the domestic producers' sales. By making the comparison of prices at different levels of trade, MOFCOM made a finding of price undercutting by the subject imports nearly inevitable. China also asserts that it was proper to compare these pricing data, notwithstanding the different levels of trade, because both were "ready to enter further sales channels". This assertion does not address the inherent problem that by comparing this data, without adjustment, MOFCOM ignored the series of additional costs normally incurred before the imported goods can reach the point of actually competing on the market with domestic like products. In short, the prices were at different levels of trade and not comparable. Thus, MOFCOM's price analysis cannot constitute an objective examination of price effects, and is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

b. *MOFCOM Compared Subject Import Prices and Domestic Industry Sale Prices Influenced by Obvious Differences in Product Mix.*

76. MOFCOM's price analysis also failed to control for obvious and significant differences in the mix of products among subject import shipments and domestic industry shipments reflected by the record evidence. Where subject imports and the domestic like product differ significantly in terms of product mix and value, as here, a comparison of the average unit value of subject imports to the average unit value of the domestic like product would reflect differences in product mix rather than meaningful price comparisons. Such price comparisons therefore could not properly allow an investigating authority to "consider whether there has been significant price undercutting," as required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, or to conduct an "objective examination" of "positive evidence" pertaining to subject import price effects, as required under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. China fails to refute the fact that by comparing the average unit value of subject imports to the average unit value of the domestic like products, despite record evidence that significant differences existed between the relative mix of products, MOFCOM failed to conduct a pricing analysis based on positive evidence and an objective examination.

2. *MOFCOM's Adverse Price Effects Findings Were Predicated Entirely on Its Defective Underselling Analysis, and Therefore Inconsistent with WTO Requirements.*

77. MOFCOM's finding that subject imports suppressed domestic like product prices is predicated entirely on its flawed underselling analysis and, therefore, that finding is not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

78. China's suggestion that MOFCOM's underselling analysis was only one component of that finding is not reflected by the determinations, which focus exclusively on MOFCOM's price undercutting analysis. With no evidence of subject import underselling, MOFCOM lacked the necessary positive evidence to support its finding that subject import prices had the effect of suppressing domestic like product prices. The United States does not disagree that an authority can make a finding of significant price effects without finding that there has been "significant" price undercutting during the period of investigation. In this case, however, MOFCOM based its price suppression analysis entirely on its flawed undercutting analysis. MOFCOM made no finding that subject import volume and market share alone could have suppressed domestic like product prices to a significant degree, and the record would not have supported such a finding. Notwithstanding the theoretical possibility of an investigating authority finding price suppression in the absence of underselling, the United States emphasizes that here, MOFCOM explicitly predicated its finding that subject imports suppressed domestic like product prices on its finding that subject imports undersold the domestic like product to a significant degree.

79. MOFCOM's finding of price suppression is also inconsistent with the requirement to "consider whether there has been a significant price undercutting" by the dumped or subsidized imports as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. The absence of any valid price comparisons or positive record evidence that subject imports influenced domestic like product prices made it impossible for MOFCOM to consider properly whether subject imports had the effect of depressing or suppressing domestic like product prices, as required by those articles.

3. *MOFCOM Failed to Disclose Its Alleged Methodology for Adjusting Subject Import Pricing Data to Reflect Its Different Level of Trade Relative to Domestic Like Product Pricing Data.*

80. MOFCOM failed to disclose the methodology that it allegedly used to adjust subject import prices to account for their different level of trade as compared to domestic industry sale prices. Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement require the investigating authority to provide interested parties with "all non-confidential information relevant to the presentation of their cases and used by the investigating authority." The methodology MOFCOM purported to use to adjust the pricing data is clearly information relevant to the presentation of the interested parties' cases and used by the investigating authority, and therefore MOFCOM's failure to disclose that information is inconsistent with those requirements.

81. MOFCOM's purported methodology for adjusting import prices also constituted relevant information on the matters of fact and law, and reasons which have led to the imposition of final measures, within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. That methodology was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. MOFCOM's failure to disclose this methodology is also inconsistent with those articles as well. Additionally, MOFCOM's alleged methodology for adjusting subject import prices to account for their different levels of trade also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement, and MOFCOM's failure to disclose this information is inconsistent with those provisions as well.

82. China has now apparently conceded that MOFCOM made no adjustment to subject import prices to account for their different level of trade relative to domestic like product prices. If that is the case, then the United States recognizes that MOFCOM would have had no methodology for making such an adjustment to disclose to the parties in accordance with Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement. But if MOFCOM did actually reject the U.S. argument concerning the need for proper price comparisons, MOFCOM would be in breach of ADA Article 12.2.2 and SCM Article 22.5 for failure to provide in its determinations the reasons for rejection of this very relevant argument that goes to the heart of the pricing analysis relied on by MOFCOM.

C. China's Impact Analysis in its Final Determination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

83. MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in violation of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

1. *MOFCOM's Consideration of the Domestic Industry's Capacity Utilization was not an "Objective Examination" of "Positive Evidence."*

84. MOFCOM's finding that the domestic industry's low level of capacity utilization resulted from subject import competition does not reflect an "objective examination" because it was contradicted by record evidence that the decline in capacity utilization was driven by the domestic industry's expansion of its capacity far in excess of demand growth. An objective examination would have considered the minor increase in capacity utilization in context with the domestic industry's expansion of its capacity and the increase in apparent consumption. Subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports increased their share of apparent consumption entirely at the expense of non-subject imports. Rather, the record showed that the domestic industry's capacity utilization trend resulted entirely from the industry's capacity expansion. Given this record evidence, MOFCOM's finding that subject imports had an adverse impact on the domestic industry's rate of capacity utilization was not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

2. *MOFCOM's Consideration of End-of-Period Inventories was not an "Objective Examination" of "Positive Evidence."*

85. MOFCOM's finding that the increase in the domestic industry's end-of-period inventories was caused by subject imports cannot be the result of an "objective examination" because the record established that neither the level of end-of-period inventories nor the increase in end-of-period inventories were significant relative to domestic industry output and shipments. MOFCOM's finding that the increase in domestic industry inventories was significant was therefore not based on an "objective examination" of "positive evidence" and inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. MOFCOM relied on this factor, together with its flawed consideration of capacity utilization, to find that the domestic industry was adversely impacted, despite the record evidence that its performance otherwise improved.

3. *MOFCOM's Adverse Impact Finding was Predicated on its Flawed Examination of Capacity Utilization and End-of-Period Inventories, and Therefore Inconsistent with WTO Requirements.*

86. MOFCOM's finding that subject imports had an adverse impact on the domestic industry over the entire period of investigation rested entirely on its flawed findings regarding capacity utilization and end-of-period inventories. MOFCOM failed to reconcile its impact analysis with evidence that the domestic industry's performance strengthened substantially during the bulk of the increase in subject import volume between 2006 and 2008. Given MOFCOM's dependence on those flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted was not based on an "objective examination" of "positive evidence" and, therefore, inconsistent with Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

D. China's Causal Link Analysis in its Final Determination Breached Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.

87. MOFCOM's causation analysis is flawed because (1) MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) it relies on the flawed price undercutting analysis described above; and (3) MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance improved during the bulk of the increase in subject import volume between 2006 and 2008. These flaws confirm that MOFCOM's

analysis is not based on an objective examination of positive evidence, in breach of China's obligations under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also means that MOFCOM failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury", in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

1. *MOFCOM's Causation Analysis is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.*

a. *MOFCOM Ignored Evidence that Subject Import Volume Did Not Increase at the Expense of the Domestic Industry.*

88. MOFCOM's determination of a causal link between subject imports and the domestic industry's purported material injury rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. However, the record evidence clearly contradicts this finding and it indicates that subject import volume and market share did not increase at the expense of the domestic industry. The increase in subject import volume and market share did not negatively impact the domestic industry because the record indicated that the domestic industry gained even more market share than subject imports during the same period.

89. China asserts that subject imports gained market share at the expense of Chinese producers that did not complete questionnaire responses and were therefore not included within MOFCOM's definition of the domestic industry. China's new market share data was not considered by MOFCOM and does not provide an answer to the question of how subject imports could have caused injury to the domestic industry defined by MOFCOM, if subject imports did not gain market share at the expense of that industry.. MOFCOM could not have examined the impact of subject imports on domestic producers not included within the domestic industry definition because it lacked data on the performance of such producers -- – and China offers no other argument to rebut the U.S. argument.

90. MOFCOM failed to base its finding of a causal link between subject imports and the domestic industry's performance on an objective examination of positive evidence, in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, because it neglected to factor this evidence into its causal link analysis. MOFCOM's analysis is also inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement because MOFCOM failed to examine all relevant evidence.

b. *MOFCOM's Causation Analysis Relies on its Flawed Price Effects Findings.*

91. MOFCOM's finding of causation is also inconsistent with the AD and SCM agreements because it was premised on MOFCOM's price underselling analysis. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, this finding, too, is inconsistent with WTO requirements. Furthermore, in light of MOFCOM's flawed price undercutting analysis, MOFCOM failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Finally, by relying on its defective pricing analysis, MOFCOM failed to base its causal link analysis on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

c. *MOFCOM Failed to Reconcile Its Causation Analysis with Evidence that the Domestic Industry's Performance Improved as Subject Import Volume and Market Share Increased.*

92. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the bulk of the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance between 2006 and 2008. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to

predicate its causation analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

2. *MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents is Inconsistent with Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.*

93. MOFCOM also failed to address key causation arguments raised by the respondents during the investigation. The obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their determinations that include "all relevant information on the matters of fact and law" material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

94. The U.S. respondents raised two principal arguments concerning the absence of any causal link between subject imports and material injury that went unanswered by MOFCOM. First, they argued that there could be no causal link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports. MOFCOM responded that it was under no obligation under Chinese domestic law to consider market share data. Second, USAPEEC argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which the Chinese domestic industry was incapable of supplying in adequate quantities. MOFCOM purported to address this argument in its preliminary determination, but was clearly under the misapprehension that the respondents' argument concerned whether chicken paws were within the scope of the investigation.

95. MOFCOM's failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' arguments is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. As these issues were material to MOFCOM's causal link analysis, MOFCOM's failure to address them was also inconsistent with Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement.

VII. CONCLUSION

96. China in these proceedings has chosen to defend its interests by discussing arguments and data that were nowhere on the record. That raises, however, a corresponding thought: if China cannot defend its investigations without having to resort to information and arguments not on the record, what hope was there that the respondents, who never saw that information or those arguments during the investigation, could have defended their interests?

97. The United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and AD Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and AD Agreement.

Second Integrated Executive Summary by the United States

I. OVERVIEW

1. Lacking evidentiary support for the findings and conclusions made by the Ministry of Commerce for the People's Republic of China (MOFCOM) with respect to the anti-dumping and countervailing duties at issue in this dispute, China instead offers *post hoc* rationalizations to defend MOFCOM's actions. But such rationalizations are not permissible in WTO dispute settlement proceedings. Moreover, they serve only to prove the United States' point: that MOFCOM's process and findings were flawed and there is nothing from the investigations that justifies anti-dumping and countervailing duty measures on U.S. broiler products.

II. MOFCOM'S PROCEDURAL FAILINGS

A. China Cannot Defend MOFCOM's Denial of the U.S. Hearing Request.

2. It is undisputed that the United States made a request for a hearing. It is also undisputed that MOFCOM did not grant a hearing, since China does not claim that its opinion presentation meeting is the type of meeting envisioned under Article 6.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Thus, the only question is whether MOFCOM presented a justification to refuse the U.S. hearing request that is permissible under ADA Article 6.2.

3. China's argument that MOFCOM contacted the Petitioner (and later all the various parties referenced in a Panel question), and that the Petitioner (and these other parties) did not believe a hearing was necessary, is not documented in the record. Indeed, it strains credulity for China to imply that MOFCOM somehow contacted 47 parties within one business day by telephone and that all of these parties had an immediate answer regarding the hearing request.

4. The evidence that is on the record in fact contradicts China's claim. The MOFCOM letter to the United States makes no mention of such contact and proffers very different reasons for denying the request: that MOFCOM had conducted the investigations in a "public, just, and transparent manner in accordance with Chinese laws" and that the issues "are not relevant to the interested parties directly." MOFCOM's own rules regarding injury hearings, which were notified to the WTO, further undermine China's claim, as they make no mention of the informal type of contact that China now claims MOFCOM undertook.

5. With respect to China's assertions regarding the U.S. demand for a public hearing, such assertions are simply misdirection. The United States has noted it requested a *public* hearing to confirm it sought the procedure outlined in MOFCOM's rules, which are labeled as Rules for a *Public* Hearing as opposed to an opinion presentation meeting. MOFCOM's determinations gave the impression that the U.S. request was granted when in fact it was not.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

6. The United States demonstrated that MOFCOM acted inconsistently with Article 6.9 by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties, including by failing to make available the data and calculations it performed to determine the existence and margins of dumping. China claims that MOFCOM was under no obligation to provide the actual data and calculations that formed the basis of its dumping determination because the U.S. respondents, based on the limited information disclosed by MOFCOM, could have replicated MOFCOM's calculations. However, the limited data disclosed by MOFCOM was too scant to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

1. *The Disclosure Obligation Under Article 6.9 Includes the Data and Calculations Performed by an Investigating Authority to Determine the Existence and Margin of Dumping*

7. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. Without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed.

2. *China's Interpretation of Article 6.9 of the AD Agreement is Incorrect and Does Not Excuse MOFCOM's Failure to Disclose the Essential Facts Forming the Basis of Its Decision to Apply Definitive Measures*

8. China asserts that an investigating authority can satisfy the obligation of Article 6.9 through the disclosure of information the investigating authority considers sufficient to assist the interested parties in surmising or deriving what the essential facts may have been. However, without access to the actual calculations performed, and the actual data used, the interested parties could not, for example, check MOFCOM's methodology and math for errors or confirm that MOFCOM did what it purported to do. Similarly, the interested parties could not "comment on the completeness and correctness of the facts being considered… provide information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts," consistent with the disclosure described by the panel report in *EC – Salmon*.

9. To enable interested parties to defend their interests, the actual data and calculations must be disclosed because a clerical or mathematical mistake, or a mistake in a conversion of units, could result in a serious distortion of the dumping margin. In this case, any number of inadvertent errors, such as (1) an error in currency conversions; (ii) the omission of a sale from the calculations; (iii) the failure to deduct certain expenses; or (iv) the misplacement of a decimal point would not be apparent from the information MOFCOM provided to the interested parties.

10. In any event, MOFCOM did not disclose sufficient information to allow the U.S. exporters to replicate the authority's calculations. China created three tables for this dispute that purportedly would allow the respondents to replicate MOFCOM's calculations, but those tables merely combine into one document various vague references to adjustments that were scattered throughout the record. At most, those references would have allowed the interested parties to guess at or approximate the calculations.

11. China also relies on an erroneous interpretation of Article 6.9 to assert that an investigating authority's disclosure obligation is limited to information the investigating authority considers necessary for the interested parties to defend their interests. China conflates the second sentence of Article 6.9 with the scope of disclosure required by the first. Although the second sentence informs the meaning of the first sentence by indicating that one value of disclosure is to permit "parties to defend their interests," it is not a limitation on the first sentence.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries.

12. China is mistaken when it asserts that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation was satisfied through purported summaries in its own determinations or can be inferred from excerpts in the Petition, because these purported summaries provide some understanding of the confidential information submitted by the interested party. Specifically, China's position is inconsistent with the text of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Per these provisions, interested parties must have a "reasonable understanding of the substance of the information submitted in confidence," and thus be able to defend their interests.

13. In *China-GOES*, the panel recognized that in order to adequately defend their interests, interested parties must have access to adequate non-confidential summaries *during* the course of the investigation prepared by the interested parties, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once a determination is made, the parties' ability to defend their interests has been compromised.

14. In several instances, China appears to argue that the purported non-confidential summaries contained in the Petition provide a reasonable understanding of the substance of the confidential information, in light of the various factors cited in Article 3.4 of the AD Agreement. In doing so, China appears to be arguing that its obligation to provide adequate non-confidential summaries should be assessed in the context of ADA Article 3.4. The text of the Agreement does not support China's argument. For example, ADA Article 3.4 provides no cross-reference to ADA Article 6.5.1 or vice-versa. The obligation to provide adequate non-confidential summaries is an independent obligation, separate from any consideration that may be relevant to other provisions of the AD Agreement.

15. China's reliance on the panel's report in *Mexico – Pipe and Tubes* is similarly misplaced. China argues that panel report found that there is no explicit method by which an investigating authority must decide whether to accept information as confidential. China further asserts, erroneously, that in that investigation Mexico's authority accepted "a general claim similar to that accepted by China." China neglects to mention that when the *Pipe and Tubes* panel found that there is no mandatory method by which Members must evaluate such a claim, it did not mean that evaluation could be foregone altogether. To the contrary, the panel specifically cited the fact that the interested party in that case "explained why, in its opinion, it was impossible to summarize certain information," something that is missing in the record here.

16. Assuming *arguendo* that China's *post hoc* summaries should be considered, the purported summaries remain inadequate. For each category of confidential information, the application contained no summary at all, or contained unlabeled graphs or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. As a result, China breached SCM Article 12.4.1 and AD Article 6.5.1.

III. CHINA CANNOT DEFEND ITS ANTI-DUMPING AND CVD DETERMINATIONS

A. China Did Not – And Still Cannot – Justify MOFCOM's Cost Allocation Determinations

17. China has not cited anything in MOFCOM's determinations to show analysis beyond what the United States has already referenced, and what has been referenced does not show that MOFCOM gave any consideration to the proper allocation of respondents' costs. In other words, China's arguments in these proceedings are simply *post hoc* rationalizations and accordingly impermissible *ab initio*. Even if these arguments had been made in the investigations, they would still reflect a misunderstanding of the relevant law and facts, and thus remain untenable.

1. *China's* Post Hoc *Arguments Cannot Be Considered*

18. The fundamental problem with every argument proffered by China is that they are *post hoc* rationalizations. Through the course of its own submission, the panel meeting, and in its responses to the Panel's questions, China has not been able to draw upon any additional language in any of MOFCOM's determinations that suggests anything but the summary rejection of U.S. respondents' reported costs. The arguments presented by China in this dispute stand in stark contrast to the MOFCOM determinations themselves.

China's *Post Hoc* Arguments

- The very distinct markets for broiler products in the United States and China and how the respondents' cost methodologies were reported – over allocating costs to breasts popular in the United States and under allocating costs to paws and other parts popular in China – became important considerations for MOFCOM in evaluating whether respondents' reported product-specific costs reasonably reflected the cost of production of the subject merchandise for purposes of the antidumping investigation.

  - *China's arguments do not address that MOFCOM's determinations contain no explanations or analysis regarding purported Chinese or U.S. markets.*

- In the antidumping context, recorded costs based on such a methodology cannot reasonably reflect the actual costs of production for a given product. Moreover, the extreme bias resulting from this methodology given product preferences in China could not be justified.

  - *The determinations though do not even reference any bias given product preferences in China or note what preferences Chinese consumers have.*

- This distortion is even more severe when using costs based on U.S. market values to determine the reasonableness of prices being charged in China.

  - *The determinations do not reference a distortion, severe or otherwise. There is nothing on the record to suggest that MOFCOM's issue was interested in determining what market values the respondents' utilized. Indeed, MOFCOM did not even solicit such information from the respondents.*

- The respondents' real and/or practical treatment of the status of paws and other products under their cost allocation methodology was a point of initial concern for MOFCOM, given the relatively high sales value of such products.

  - *The determinations do not reflect any concerns about the treatment of paws. Indeed, it is notable that the determinations for Keystone and Tyson are nearly identical, yet in these proceedings, China focuses primarily on how Keystone purportedly treated paws.*

- Tyson claimed to treat all products as joint products, but its treatment of products like paws in the allocation process did not really resemble standard joint product treatment. Rather, its allocation reflected a by-product approach.

  - *There is nothing in the determinations about joint products or by products or why one is acceptable and the other not. In fact, the determinations do not even call into question how Tyson characterized its accounting treatment of the products.*

- China's point is that in a value-based allocation one must take into account the circumstances of all sales to properly allocate costs to all production.

  - *There is nothing in the determinations even touching upon value-based allocations, let alone anything regarding what MOFCOM thought a value-based allocation must include.*

19. As noted, *post hoc* arguments do not suffice as justifications in WTO dispute settlement. Accordingly, China's failure to tie its arguments to findings made by MOFCOM compels the rejection of these arguments from consideration and in turn mandates – as China has no other arguments – a finding that China acted inconsistently with ADA Article 2.2.1.1.

20. China has attempted to sidestep the prohibition against *post hoc* arguments by presenting two claims. First, China asserts its reasoning for rejecting respondents' kept costs is "self-evident"

and thus did not need to be elucidated in its determinations. Second, China appears to assert that rather than look to whether the determination objectively sets forth the reasoning – which is what the Appellate Body and every panel that has considered this issue has concluded – the panel must instead try to consider what the respondents should have understood at the time to be MOFCOM's unwritten concerns and conclusions.

21. The same compelling testament refutes both claims: the complete absence of any discussion by MOFCOM or the interested parties regarding whether the costs were appropriate for the Chinese market. Respondents and the Petitioner had every incentive to address positions adopted by MOFCOM that could have impacted their interests. Yet when one looks to the record, one sees that while the respondents submitted voluminous evidence on why their costs were reasonable, there is conspicuous silence regarding the notion that prices of paws in China would be used as a basis to make a dramatic upward adjustment in normal value by replacing the cost allocations used in respondents books with a methodology chosen by MOFCOM. The reason for the silence is unmistakable: no one knew that MOFCOM considered the demands of the Chinese market to be relevant to calculating normal value.

22. The reason no one was aware that MOFCOM thought Chinese prices were relevant to determining normal value is two-fold. First, because MOFCOM never made any indication on the record that this point was relevant. MOFCOM's arguments are therefore, at best, unsubstantiated, and at worst, developed solely for purposes of this dispute. Second, China's position creates an artificial increase in normal value because the products receive relatively high value in China. Usually, a low price in the import market compared to the home market constitutes dumping. Here, China is arguing that because the product has a high price in China, the normal value derived from the costs of production (which is a surrogate for home market prices) must be inflated, and dumping must be found. If one accepts China's position, then it means MOFCOM essentially flipped the definition of dumping around. Ultimately though, the end result was that respondents had no opportunity to respond to this claim and to defend their interests.

23. To the extent China maintains that it was not obligated by the AD Agreement to provide its reasoning because it is "self-evident" that the costs were unreasonable in light of prices in China, then the United States notes that no WTO Member that has opined on this issue in the course of this dispute has found it to be, in fact, "self-evident." To the contrary, every Member to proffer a view on this issue has disagreed with China that whether costs are reasonably associated with production or sale entails any consideration, whatsoever, of the importing market. Accordingly, if it is not readily apparent to WTO members, it is implausible to claim that it was nevertheless "self-evident" to the respondents. In short, even if the standard was whether the parties had subjective knowledge of MOFCOM's concerns about the Chinese marketplace with respect to the use of a value-based allocation methodology – which it is not – the evidence does not substantiate China's position.

2. *China's* Post Hoc *Arguments Misinterpret Article 2.2.1.1*

24. China's present formula for interpreting Article 2.2.1.1 is to add words that are not there, *i.e.,* "in the anti-dumping context," and subtract words that clearly are there, such as "sale" and "associated with," as in "*associated with* the production and *sale,*" and the word "proper" as in "*proper* allocation of costs," with the end result being a misconstruction of China's obligations. Specifically, China argues three untenable propositions. First, China asserts that a producer's kept costs can be rejected on the basis that they are unreasonable from the perspective of the importing market. Second, China asserts that it is the obligation of a respondent to keep its costs in a manner that is reasonable in the "anti-dumping context." Third, China does not acknowledge that the investigating authority's obligation to consider all available evidence with the object of arriving at a proper allocation.

a. *The Prices in the Importing Market or China's So-called "Anti-dumping Context" is Irrelevant to Calculating Normal Value*

25. China argues that a company's costs in its books and records are not reasonable if the end result is that a company's costs of production are based on its experience in its home market, and remain the same despite different price trends (arising perhaps, from market tastes and demands) in another, importing country. But that would mean that in any instance where the producers' kept

costs result in a normal value lower than the export price that the costs are *per se* unreasonable and a new methodology must be derived that finds a dumping margin. China appears to argue that the AD Agreement has some sort of gloss – the "anti-dumping context"– that permits costs to be calculated in a manner that permits a finding of dumping.

26. China's position – which is opposed by every third party that has commented on this issue – is inconsistent with the AD Agreement. Whether dumping exists and is actionable is contingent on what the AD Agreement provides. There is no notion of dumping that is actionable outside the bounds of the Agreement. The AD Agreement specifies how normal value is to be determined. If the cost of production method is used to determine normal value, then the AD Agreement prescribes how costs are to be calculated. Only after they are so calculated and normal value determined can it be decided whether dumping exists or not.

27. Moreover, the relevant text in fact disclaims the proposition China advocates. Article 2.2.1.1 begins by noting "for the purposes of paragraph 2." Paragraph 2 is Article 2.2, which in respect to the cost of production method states the comparison is to be done "with the cost of production in the *country of origin*." As can be confirmed by the plain text and drafting history, the objective when calculating normal value under the cost of production test is to develop a surrogate home market price. This is consistent with the general scheme of Article 2.2, which is to use sales of the like product in the "domestic market of the exporting country" if they can be used. China's position is therefore inconsistent with the text of the AD Agreement.

b. *Article 2.2.1.1 is a Positive Obligation on the Investigating Authority Regarding the Calculation of the Cost of Production*

28. China argues the respondent must calculate its costs on a basis that is reasonable for the investigating authority to use in the antidumping context – *i.e*. based on the prices in the Chinese market. As explained above, the Chinese market is irrelevant for purposes of Article 2.2.1.1. Further, the AD Agreement does not distinguish calculations specifically for the "antidumping context" from calculations used for any other purposes. China's arguments presume that foreign respondents have an obligation to take their calculations based on their books and records and modify them to satisfy investigating authorities under this provision, lest they be rejected for failure to make such modifications. There is no textual support for such a claim, and in fact, such an interpretation of the obligations of respondents is at odds with the requirement of the investigating authority under Article 2.2.1.1 to rely on the books and records "historically utilized by the exporter or producer."

29. China defends its interpretation by asserting that Article 2.2.1.1 does not provide for the identity of the party who calculate costs. In fact, the AD Agreement does so provide. Article 2.2.1.1 by referencing Article 2.2 makes clear it is referencing the investigating authority. Therefore, the appropriate interpretation of Article 2.2.1.1 is that it provides that costs are to be calculated *by the investigating authority* on the basis of records "kept by the exporter or producer." Indeed, one must ask under what circumstances would a firm keep in its books and records costs tailored for the purposes of the hypothetical possibility of a future antidumping investigation that has not yet occurred, and may never occur, and focused on whether prices are reasonable from the perspective of the importing market? The short answer is never. Thus, the relevant inquiry is not whether respondents have satisfied their obligations to the investigating authority to calculate costs that are reasonable to the authority, but whether the investigating authority has abided by its obligations to the AD Agreement to use the respondents' kept costs in light of the relevant circumstances.

30. U.S. respondents put evidence on the record that their costs were calculated in a manner that is consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards. Evidence on the record also showed that Chinese producers of broiler products use a value-based allocation methodology as well and that Chinese accounting literature substantiated that the use of a value based allocation methodology can be reasonable. Despite all of this evidence on the record as to the reasonableness of the use of a value based cost allocation methodology, China nonetheless claims that the U.S. producers did not adequately meet their so-called burden under Article 2.2.1.1 because they did not provide information that showed that their allocation methodologies reflected the prices of the Chinese market – and that MOFCOM could remain silent in the face of this evidence. China's position lacks any textual support.

c. *An Investigating Authority Must Consider All Available Evidence in Order to Arrive at a Proper Allocation*

31. China acknowledges that "consideration" under Article 2.2.1.1 entails "some degree of deliberation"; however, China neglects the object of that deliberation: "a proper allocation of costs." China's interpretation turns the obligation to "consider all available evidence" into what the Appellate Body has specifically held as insufficient under Article 2.2.1.1: simply receiving and noting evidence. Here, MOFCOM failed to engage in consideration with respect to both its decision to reject U.S. respondents' kept costs and in adopting its weight-based methodology.

32. With respect to its weight-based methodology, China asserts that once MOFCOM found U.S. respondents' costs unreasonable, it was free to turn to any methodology it deemed reasonable. But that is not so. The second sentence of Article 2.2.1.1 provides not only an obligation regarding the consideration of evidence in determining whether the kept costs are GAAP consistent and reasonable, but also mandates that those costs be considered in any event in determining the proper allocation of costs. In other words, as the Appellate Body has noted, compelling evidence requires reflection in order satisfy the requirement to "consider all available evidence." Nothing in MOFCOM's determinations suggests that MOFCOM undertook such an exercise in determining an alternative methodology in this case.

3. *MOFCOM Did Not Properly Evaluate U.S. Respondents' Reported Costs or its Weight-Based Methodology*

33. The United States addresses certain representations made by China regarding the respondents' costs and to emphasize that a proper evaluation would not hold the costs unreasonable simply because they are based upon value-based accounting.

a. *MOFCOM's Determinations Do Not Reflect "Consideration"*

34. With respect to U.S. producer's kept records, China asserts that MOFCOM's consideration is established through its (i) questionnaire requests asking for a description of the cost allocation systems maintained by respondents and (ii) its determinations for Tyson and Keystone. The definitions for "consider" include the following: "think carefully about; take into account when making a judgment, look attentively at." The most a questionnaire response could achieve though it simply accepting or noting evidence though. China fares no better when it cites MOFCOM's determinations, which summarily claim the respondents' costs are unreasonable without addressing the specifics of their costs or evidence. Comparing these determinations against the U.S. *prima facie* case demonstrates that MOFCOM failed to engage in consideration.

35. Tyson's evidence, for example, explained its cost system, why that cost system was reasonable, and that MOFCOM's methodology, besides being generally inappropriate, had a serious calculation error. The MOFCOM determinations referenced by China in these proceedings are completely silent with respect to those three points as well as what rationales supported MOFCOM's application of a weight-based methodology (a methodology that Tyson demonstrated suffered from a serious calculation error). Indeed, even if one scrutinized the record outside what China specifically referenced, one still finds nothing by MOFCOM addressing or examining these issues.

36. Similarly, Keystone presented evidence explaining its cost system and why that system was reasonable. Additionally, Keystone, after having its methodology rejected in the preliminary determination, also proffered alternative methodologies – methodologies still based on the initial data submitted. But neither the MOFCOM determinations referenced by China nor anything else from the investigation indicates that MOFCOM considered this evidence, including the alternative methodologies proffered by MOFCOM.

37. Likewise, Pilgrim's submitted evidence explaining its costs and why they were reasonable. China does not even bother to argue MOFCOM's determinations reflect consideration of Pilgrim's evidence. Instead, China asserts that MOFCOM applied "Facts Available." However, at no time did MOFCOM ever issue a warning to Pilgrim's that Facts Available would be applied if requested information was not provided – or what the missing information was. China's assertions that such notice is provided for in *AD Final Disclosure* is simply untenable. In short, China has not explained

why MOFCOM was entitled to afford Pilgrim's such treatment and why the records and evidence Pilgrim's submitted – months before the AD disclosure – had to be ignored. China's claim that MOFCOM applied Facts Available is simply an admission that MOFCOM failed to consider Pilgrim's evidence.

b. *China Misrepresents the Factual Record*

38. China has made various factual misrepresentations regarding the respondents' kept costs in these proceedings. These misrepresentations include that (i) respondents assigned zero costs to paws; (ii) that respondents treated subject merchandise as by-products as opposed to joint products; and (iii) that MOFCOM was concerned with Tyson's use of an offal market price in valuing paws.

39. A zero cost of production in a company's books might be indicative of scrap or waste, and such products might generate miscellaneous revenue. Accordingly, the mere existence of a zero cost of production does not indicate that the kept cost is necessarily unreasonable. However, as the United States has explained, none of the respondents' reported costs for subject merchandise were actually zero. China's contrary assertions are based on distortions of how costs are kept by one particular respondent, Keystone, and applying that distortion to the other respondents.

40. As demonstrated by U.S. data, including Exhibit USA-60, Keystone allocated costs to paws. In response, China can only muster that those U.S. submissions "do not really contradict" Keystone's statements. The fact that China cannot draw upon anything in MOFCOM's determinations, as well the fact that Keystone prepared alternative allocations – which also received no analysis in the determination – establishes that MOFCOM was simply not concerned with this issue during the investigation and that MOFCOM did not consider a proper allocation of respondents' costs. In other words, the so-called "zero" cost issue is simply *post hoc* rationalization.

41. In its second written submission, China now proffers that another reason to discount the respondents' records was that they did not treat paws as "true" joint products and actually treated them as by-products. As an initial matter, there is nothing in Article 2.2.1.1 that suggests kept costs for by-products are unacceptable while those for joint products may be. Factually though, there is nothing in the determinations regarding any finding by MOFCOM regarding joint products, co-products, or by-products. The silence is particularly striking in light of the evidentiary record. For example, Tyson, in its supplemental questionnaire and in its Further Comments on the Preliminary AD Determination explicitly noted that it did "not classify any products produced from the live birds as by-products [and it] … treats all products that are produced from the live birds as co-products. Tyson assigns production costs to all of these products and records the revenue generated from sales of these products as sales revenue."

42. China also takes offense – although it is not clear why – that Tyson valued paws per an offal market price. However, China cannot point to where in the record there is any indication that MOFCOM thought an offal price problematic or why offal cannot be a joint product and, in particular, a co-product. In fact, Tyson explained that the "offal price" was based on sales in the United States. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price. Accordingly, China has not adduced any record evidence in support of its finding.

c. *MOFCOM Did Not Weigh the Merits of Respondent's Kept Costs Against its Weight-Based Methodology*

43. MOFCOM's obligation was to accept GAAP consistent costs which were reasonably associated with the production and sale of the product under consideration. The United States has not argued that costs, in order to be reasonably associated with the production and *sale* of a product, must be its market value. However, it defies common sense to claim that a cost allocation methodology that relies on market values, is the industry standard, and is consistent with the recommendations of authoritative accounting treatises is either "undeniably distortive" or "arbitrary" as China claims. Under these circumstances, MOFCOM had a duty to set forth its reasoning. China cannot even support those assertions here, and MOFCOM most certainly did not do so in the administrative proceeding.

44. As the United States has explained, a principal question presented is how could MOFCOM remain silent about the methodology it chose over the books and records historically utilized by the respondents, particularly when the respondents placed significant evidence explaining why their respective costs were reasonable? MOFCOM's failure must also be considered in light of a key point: the present case concerns *non-homogeneous joint products*. Breasts, wingtips, leg quarters, and paws are different products. A value-based allocation is not inherently unreasonable; different products can reasonably be expected to have different costs allocated to them. Indeed, the use of a value-based allocation is often reasonable because it can account for differences in physical characteristics (*e.g.,* breast meat compared to paws) based on how the market values those differences. A value-based allocation also reasonably permits the seller to try to maximize their profitability on all products based on their relative ability to generate revenue. U.S. producers put evidence on the record to that effect, such as the accounting treatises cited by both China and the United States during this dispute. A cursory review raises serious questions as to the propriety of MOFCOM's decision and refutes any assertion that it was self-evident to resort to MOFCOM's methodology.

45. First, respondents explained that the industry standard in both the United States and China is to use value-based allocations. The fact that in the normal course of business, both United States and Chinese producers of chicken use a value-based allocation methodology is probative that such a methodology is reasonable.

46. Second, respondents put forward evidence, including text books and accounting authorities, that confirmed in the case of non-homogenous joint products, the use of a relative value based allocation is a reasonable method of allocating costs and the use of a weight-based value allocation is not a reasonable method of allocating costs. China cites a treatise by Professor Horngren to note that that unit based accounting is preferred in rate setting situations and then China alleges that anti-dumping is essentially rate-setting. The United States rejects China's characterization of anti-dumping proceedings as exercises in rate regulation and has noted that China has not even bothered to try and define what a rate regulation proceeding is or what text in the AD Agreement supports such a supposition. Fundamentally though, China misapplies the context. A firm that is subject to rate regulation, such as a provider of electricity, may not be able to identify what the actual value of its commodity is, and must thus resort to a unit based accounting system. The accounting methodology is not to be applied by the rate-setter but the participant subject to it. When it came to other industries, including specifically the poultry industry, Professor Horngren's text explains the propriety of relative value based costing.

47. Third, there is no explanation why a weight-based methodology is purportedly neutral. Non-homogenous joint products usually have significantly different market values, are often physically non-homogeneous, and may not be quantifiable using the same unit of measure (e.g., gasses vs. solids). MOFCOM's logic does not precludes an investigating authority from choosing a unit measure that yields the highest dumping margins. For example, between volume and weight, MOFCOM has not explained why one would be more acceptable than the other. In this case in particular, the methodology used by MOFCOM skewed the companies' costs away from their actual costs and the value realized by individual chicken parts. Instead, it treated all chicken products as if they had precisely the same physical characteristics, which China itself recognizes is not the case. Such a methodology is no way "neutral."

48. Fourth, China's own *post hoc* position on what constitutes reasonableness is, itself, unreasonable. China asserts that reasonableness must be focused on the cost of production and not on sales, and it quotes *EC – Salmon* for the proposition that there is no explicit description of "cost of production" in the AD Agreement. What China neglects is that Article 2.2.1.1 provides that the "reasonably reflect" requirement in that Article is for "costs associated with the production and *sale of the product under consideration.*" Not surprisingly, the panel in *EC – Salmon* later stated "that the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product.'" Even setting aside China's selective quotation, it remains unclear how a weight-based allocation better addresses the cost of production that allegedly concern MOFCOM. China's methodology ensures that certain products will always be valued at below cost because the cost of production is completely divorced from market forces. Specifically, high and low value products are simply averaged together as if they were the same. An allocation methodology that could result in certain products always being sold at a loss is not reasonable. Furthermore, products with different values frequently have different processing costs, which was the case for many of the joint products in this case, yet

MOFCOM's approach largely ignored or minimized those costs, despite the actual costs employed in the respondents' records.

49. Finally, rather than reject all of the companies' allocation of costs, MOFCOM could have – at a minimum – simply worked with the respondents by outlining its concerns. Instead, MOFCOM's response was to go far beyond such any reasoned approach and to throw out the respondents' reported methodologies. Such a response is unreasonable and inconsistent with the requirements of Article 2.2.1.1.

B. China Breached Article 2.4 of the AD Agreement by Failing to Conduct a Fair Comparison between Keystone's Constructed Normal Value and Export Price

50. MOFCOM breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. MOFCOM made an undue adjustment to Keystone's export price to account for certain freezer storage expenses that were already included in Keystone's constructed normal value.

1. *The United States' Claim that China Breached Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference*

51. China's argument that the United States claim under Article 2.4 is not within the Panel's terms of reference rests on three assertions: (i) the U.S. request does not reference Article 2.4; (ii) it does not mention "freezer storage expenses"; and (iii) none of the provisions referenced in the request are "reasonably related" to the issue of fair comparison. With regard to (i) and (ii), nothing in the DSU required the U.S. consultation request to include a specific mention of Article 2.4 or freezer storage fees. With respect to (iii), the issues raised in the consultation request were in fact reasonably related to Article 2.4 of the AD Agreement.

52. The fact that the United States' request for consultations does not include a specific reference to Article 2.4 or freezer storage expenses does not render the U.S. claim, as spelled out in the U.S. panel request, outside of the Panel's terms of reference. The Panel Report in *Mexico – Beef & Rice* found that there was no need for "complete identity between the scope of the request for consultations and the request for the establishment [of a panel]." The Appellate Body agreed. The implication of China's assertion that the U.S. claim is outside the Panel's terms of reference merely because the U.S. request for consultations did not reference Article 2.4 or freezer storage expenses would be the imposition of a requirement of "complete identify" that was rejected by the panel and Appellate Body reports in *Mexico – Beef & Rice*.

53. The United States explained that its Article 2.4 claim evolved from the legal basis that formed the subject of consultations through a process not unlike that described by the Appellate Body in *Mexico – Beef & Rice*: as a result of consultations, the United States had a better understanding of China's treatment of Keystone's freezer storage fees, such that Article 2.4 became relevant. China's assertion that a claim under Article 2.4 could not evolve from a claim under Article 2.2 or Article 2.2.1.1 because these articles are "completely unrelated" is incorrect. The constructed normal value that is determined under Article 2.2 and Article 2.2.1.1 is one of the two variables subject to the fair comparison conducted under Article 2.4. China also asserts that the Article 2.4 claim is unrelated to the respondents' cost records or how allocation of costs was effected. China's assertion is belied by the evidence China relies on for its substantive arguments, namely Keystone's reported costs, and China's discussion of how those costs were reported and allocated.

2. *China's* Post Hoc *Assertions Do Not Justify MOFCOM's Undue Adjustment to Keystone's Export Price*

54. MOFCOM's adjustment to Keystone's export price was inconsistent with Article 2.4 of the AD Agreement. The United States demonstrated the following basic facts, with which China does not appear to disagree: Keystone reported certain freezer storage expenses in response to MOFCOM's AD Questionnaire; MOFCOM included those costs when it constructed Keystone's normal value, and MOFCOM made an adjustment to Keystone's export price that resulted in freezer storage expenses being included both as a cost of production in Keystone's normal value and as an expense adjustment to Keystone's export price.

55. China responds with two *post hoc* assertions in an attempt to justify why the adjustment was nevertheless proper, despite the unfair result. First, China asserts that MOFCOM found that Keystone had reported freezer storage fees in a manner requiring an adjustment, due to Keystone's failure to provide adequate responses to MOCFCOM's requests for information. This assertion is incorrect because MOFCOM verified that Keystone's reported costs had been properly reported. MOFCOM did not purport to make an adjustment to Keystone's export price based on how it allocated costs. China's assertion to the contrary misrepresents the record, as no such finding or justification is reflected anywhere in the record. Even if the problem concerned, as China now suggests, was how Keystone allocated freezer storage costs, the solution to the problem asserted by China would not have been the adjustment to the export price made by MOFCOM.

56. China's second *post hoc* assertion is that MOFCOM properly declined to calculate a normal value adjustment given the late stage of the investigation at which the issue was discovered and in light of Keystone's incomplete responses. This assertion is also not supported by the record. MOFCOM first indicated that it was adjusting Keystone's export price in regard to freezer fees in the Final AD Disclosure in mid-July 2010. Just ten days later, in its Comments on the Final AD Disclosure, Keystone explained in detail what it considered to be the problem with MOFCOM's adjustment and proposed solutions to fix the problem. These comments were provided two months before MOFCOM issued its Final AD Determination, providing MOFCOM with sufficient time to correct the error that China suggests MOFCOM was aware of.

C. China Cannot Dispute That Its Countervailing Duty is in Excess of the Alleged Subsidy

57. China blames the respondents for any mistakes that were made because the respondents purportedly mislead MOFCOM through the provision of inaccurate questionnaire responses. In short, MOFCOM is asserting some form of procedural default: respondents provided incorrect answers and now they must suffer the consequences. Even if China's position excused its obligation – which it does not – China's position is simply *reductio ad absurdum*. Per China's logic, respondents, who had every interest in ensuring that their CVD rates were as low as possible, mislead MOFCOM in a manner that *increased* their CVD rates. More importantly, the respondents unquestionably provided all of the data needed to calculate a proper countervailing duty prior to the preliminary determination and expressly pointed out MOFCOM's error long before the final determination.

1. *Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Not Subject to Procedural Default*

58. SCM Article 19.4 and Article VI:3 of the GATT 1994 are mandatory in nature and contain no exceptions. The language in these provisions creates a fixed ceiling regarding the imposition of a countervailing duty. Accordingly, an authority may not satisfy its obligation by merely asserting its CVD is a reasonable approximation of the subsidy; it must calculate the CVD rate based on the record evidence particular to the amount of the subsidy.

59. Adding context to this obligation are SCM Articles 10 and 21.1, which reinforce the obligations of the SCM Agreement, including Article 19.4. Article 10, by specifying that that Members are to do what is "necessary," compels Members to take affirmative action if necessary in order to comply with their SCM Agreement obligations. Article 21.1, by providing that CVD measures can be in force "only as long as and to the extent necessary counteract subsidization which is causing injury" means that obligations such as those in Article 19.4 are continuous. They do not expire while a CVD measure is in place.

60. Here, even if one gave every favorable inference to MOFCOM, China's argument is essentially that a miscalculation by an investigating authority should be excused because MOFCOM did what it could with the questionnaire responses. But that argument does not answer why the obligation is any less applicable today or any less susceptible to remediation. In order to do what is "necessary" to abide by Article 19.4, MOFCOM must fix the CVD rate.

2. *The Additional Questionnaire Requests Referenced by MOFCOM do not Change the Relevant Data*

61. China points to a series of questionnaire queries in its first written submission to argue that MOFCOM engaged in a holistic inquiry to obtain the relevant data to ensure the subsidy was properly calculated. Notably, China never referenced these questions, nor the respondents' responses, when explaining its CVD calculations during the investigation. As the United States noted previously, to the extent MOFCOM referenced any questionnaire data, it was the data in the second questionnaire. Accordingly, the claim of a holistic inquiry appears to be simply more *post hoc* rationalization. Assuming *arguendo* that it is not, two critical points remain unchanged.

62. First, the existence of these questions does not change the fact that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. China may claim MOFCOM did not get the answers it wanted to the questions it now points to but China cannot claim that MOFCOM lacked the data to recognize a problem existed and to perform a correct calculation.

63. The data provided in response to the Second Supplemental Questionnaire is for total purchases of corn and soybean, not just those purchases for subject merchandise. The respondents' exhibits, on their face, indicate they are intended to provide the ingredients in the feed consumed by chickens and the quantity and value thereof. The fact that the respondents viewed the data as total feed can be confirmed as follows. For Tyson, its response, as reflected in Exhibit CS2-I-3, reported the total "production quantity of live broiler chicken" in tons. Tyson reported the total quantity (tons) and value (USD) of each ingredient used to produce the feed that was consumed by those live chickens. With respect to Pilgrim's, it reported total purchases of corn and soybeans, as reflected in Exhibit S-II-I-2 of the Second Supplemental CVD Questionnaire Response. It can be confirmed that the figures reflect total purchases of corn and soybeans for all production by comparing the data in this response to the response to Question 9 of the First Supplemental CVD Questionnaire, which asked for the "purchases of raw materials (including soybean, corn, feed for broilers and live chickens) during the POI." The response to that question is found in Exhibit S-I-9(b) of the First Supplemental CVD Questionnaire Response (which is a restatement of the table responding to question III-3 of the original anti-subsidy questionnaire, asking for the same). Exhibit CHN-38, which was part of Pilgrim's submission, explicitly notes that some of the feed is going to pullets and breeders. Thus, while it is conceivable that U.S. respondents were confused as to the question posed by MOFCOM, MOFCOM was in a position to see what U.S. respondents interpreted.

64. The methods for correction were also provided to MOFCOM. Pilgrim's Table 1-5, attached as Exhibit USA-77, would allow MOFCOM to revise the numerator by utilizing a ratio of subject merchandise to total merchandise. Tyson addressed how relevant data could be utilized to adjust the denominator. MOFCOM did not address why either method was inappropriate or even attempt to further ascertain in light of this information what the proper subsidy would be.

65. In short, nothing China has argued overcomes MOFCOM's obligation to ensure the CVD rate applied is no greater than the subsidy. Because the CVD rates applied to the respondents are in excess of the amount of the subsidies found to exist, MOFCOM should correct its erroneous determination.

D. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

66. The United States demonstrated the following with respect to China's determination of the "all others" dumping margin and subsidy rates: (1) China breached ADA Articles 6.8 and Annex II and SCM Article 12.7 because MOFCOM applied "facts available" to exporters or producers it did not notify; (2) China breached ADA Article 6.9 and SCM Article 12.7 because MOFCOM failed to disclose the essential facts under consideration in calculating the "all others" rates; and (3) China breached ADA Articles 12.2, 12.2.1 and 12.2.2 and SCM Articles 22.3, 22.4 and 22.5 because MOFCOM failed to explain its "all others" determinations in the antidumping and countervailing duty investigations. China has not rebutted these arguments.

1. *China Breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement Because MOFCOM Applied "Facts Available" Apparently Adverse to the Interests of "All Other" Exporters or Producers It Did Not Notify*

a. *MOFCOM Did Not Notify "All Other" Exporters or Producers*

67. MOFCOM applied facts available to calculate an adverse dumping margin and subsidy rate for unknown, unidentified producers or exporters that were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying available facts to such producers or exporters, MOFCOM acted inconsistent with China's obligations under ADA Article 6.8 and Annex II and SCM Article 12.7.

68. An investigating authority's recourse to facts available under ADA Article 6.8 and SCM Article 12.7 is limited to situations where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. The *Mexico – Beef & Rice* panel explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information. The Appellate Body report further explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. Given MOFCOM's failure to notify "all other" exporters or producers, those exporters and producers cannot be said to have failed to provide necessary or requested information, or otherwise to have impeded the AD and CVD investigations. Therefore, MOFCOM's resort to facts available adverse to the interests of those exporters or producers was inconsistent with ADA Article 6.8 and SCM Article 12.7.

69. China argues that MOFCOM attempted to notify all producers or exporters by: (1) posting a public notice on MOFCOM's website; (2) placing a copy of the initiation notices in a reading room in Beijing; and (3) providing a copy of the initiation notices to the U.S. Embassy and requesting it to notify any other producers or exporters. These actions were the only efforts made by MOFCOM to notify "all other" producers and exporters of broiler products. Whether considered on their own or collectively, it is not reasonable to resort to the use of available facts on the basis of these efforts. First, posting a public notice on MOFCOM's website is not likely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Second, placing a copy of the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. Third, the obligation to notify interested parties is on the investigating authority – not the Member where those exporters or producers might be located.

70. The panel in *GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with ADA Article 6.8. The panel reached a similar conclusion with regard to SCM Article 12.7. Given the similarity of the underlying facts and legal arguments in *GOES* and this dispute, the panel's reasoning there should be considered highly persuasive here.

71. China's position appears to be that an investigating authority may apply, in a punitive manner, whatever facts are necessary to compel compliance. However, an incentive only works if that incentive is communicated to the other party. The flaw in China's reasoning is that it assumes companies were aware of the investigation and declined to participate. Given MOFCOM's failure to notify all other exporters and producers of the initiation of the investigations, those producers therefore had no knowledge of the investigations or of the fact that MOFCOM would apply a punitive all others rate if they did not register.

72. The United States also notes that China's "all other" rate applies, not only to companies that exported to China during the period of investigation, but did not register or were otherwise unknown to MOFCOM, but also to exporters and producers that began shipping after the MOFCOM initiated the investigations, or even after the conclusion of the investigation. Those exporters or producers could not be said to have failed to provide information or impeded MOFCOM's investigation – they might not have even existed during the investigation. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

b. *MOFCOM Applied "Facts Available" in a Manner Adverse to the Interests of "All Other" Producers/Exporters*

73. The WTO-inconsistency of China's approach is underscored by the manner in which it applied "facts available." The *Mexico – Beef and Rice* Appellate Body report explained the limitations on the use of facts available under SCM Article 12.7 (which is nearly identical to the text of ADA Article 6.8) and indicated that recourse to facts available "does not permit an investigating authority to use any information in whatever way it chooses." Even if China could justify applying facts available to unknown exporters or producers it did not notify, it cannot justify the manner in which it applied those facts, which is also inconsistent with ADA Article 6.8 and SCM Article 12.7.

i. MOFCOM's application of facts available in the antidumping investigation.

74. In the Final AD Determination, MOFCOM applied a dumping margin of 105.4 percent to "all other" producers or exporters of U.S. broiler products – a margin more than twice the size of any margin assigned to an investigated company or the weighted-average dumping margin assigned to companies that registered with MOFCOM, but that were not investigated. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all-others dumping margin was calculated. However, China explained that MOFCOM apparently looked at the "facts available" to determine what normal value and what export price could be paired together to calculate the largest possible dumping margin. Based on China's explanation, it is apparent that MOFCOM did not attempt to take into account the substantiated facts provided by interested parties or to use those facts for the limited purpose of replacing the information that had not been provided. Rather, MOFCOM applied facts it specifically selected, purportedly from the record, to determine the value that was most adverse to all other producers or exporters, inconsistent with ADA Article 6.8.

ii. MOFCOM's application of facts available in the countervailing duty investigation.

75. In the Final CVD Determination, MOFCOM applied a subsidy rate of 30.3 percent to "all other" producers or exporters of U.S. broiler products – a margin nearly four times greater than the weighted average of the subsidy rates applied to the investigated companies. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all others subsidy rate was calculated. China now offers a *post hoc* explanation of the calculation of this rate, referring to two methods of calculating the alleged subsidy: the "competitive-benefit" analysis and the "pass-through" analysis. With respect to the investigated companies, in the Final CVD Determination, MOFCOM treated the pass-through benefit as the maximum amount of the subsidy. However, China reveals in its statement above that for "all other" producers, it did not treat the pass-through amount as a limit. In other words, in calculating the subsidy rate for those producers, it treated them as if they could receive a benefit that was actually greater than the amount that they could possibly receive in reality. This is not an application of "facts available." Rather it is a departure not only from facts that were substantiated on the record and relied on by MOFCOM to calculate the subsidy rate for the investigated companies, but from facts altogether. Such an approach is a departure from the limited use of facts available, as described by the Appellate Body, and inconsistent with SCM Article 12.7.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculation the "All Others" Dumping Margin and Subsidy Rate*

76. The United States demonstrated that China breached ADA Article 6.9 and SCM Article 12.8 because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. In response, China does not appear to deny that MOFCOM failed to disclose the data and calculations underlying MOFCOM's "all others" calculations. China's response that "[t]he only 'essential fact' regarding the 'all others rate' is the rate itself" is inconsistent with the text of ADA Article 6.9 and SCM Article 12.8, which require the disclosure of essential facts "which *form the basis* for the decision to apply definitive measures." China's argument conflates the essential facts forming the basis of the decision with the decision itself. Moreover, the disclosure obligation in Article 6.9 and Article 12.8 is clear and does not permit the investigating authority to determine that something less than disclosure of the essential facts is warranted based on its subjective assessment that certain parties do not need the information.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement, and Articles 22.3, 22.4 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations*

77. China breached ADA Articles 12.2, 12.2.1 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as SCM Articles 22.3, 22.4 and 22.5 by failing to explain the "all others" subsidy rate in the CVD determinations. China cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

78. With regard to the "all others" dumping margin, the purported disclosure fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, a full explanation of the methodology used to establish the export price and normal value used for "all other" respondents, or all relevant information underlying its determination, as required by ADA Articles 12.2, 12.2.1 and 12.2.2. In fact, the first explanation of MOFCOM's calculation of the "all others" dumping margin was provided by China during its statement at the first panel meeting, when it indicated that the margin consisted of the "highest calculated normal value and the lowest recorded export price." However, China acknowledged in response to the Panel's questions that "[t]he final disclosure did not expressly state that the specific data relied upon from these companies was the highest calculation normal value and the lower recorded export price." The fact that the first explanation of this margin was not provided until China's statement, and is found nowhere in the record, evidences MOFCOM's failure to provide any such explanation during the investigation.

79. With regard to the "all others" subsidy rate, China attempted to provide an additional "explanation" of MOFCOM's calculation of the "all others" subsidy rate in its response to the panel's questions. To the extent China's proffered explanation is meant to supplement the conclusory statement included in MOFCOM's Final CVD Disclosure, it cannot excuse MOFCOM's failure to provide such an explanation during the investigation, which breached Articles 22.3, 22.4 and 22.5 of the SCM Agreement.

IV. MOFCOM'S FLAWED INJURY DETERMINATIONS

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

80. China attempts to defend MOFCOM's approach to defining the domestic industry by arguing that defining the domestic industry in an unbiased fashion was simply not possible under the circumstances. According to China, MOFCOM reasonably provided questionnaires only to producers listed in the petition, which all belonged to petitioner CAAA, because the Chinese broiler industry was hopelessly fragmented, allegedly consisting of 27,638,046 producers. And, China argues MOFCOM's definition of the domestic industry to include only the 15 questionnaire responses

completed by producers listed in the petition and two producers clearly handpicked by petitioner, all of which unsurprisingly supported the petition, should be excused, because these producers represented over 50 percent of Chinese broiler production.

81. Such *post hoc* arguments fail to rebut that MOFCOM's actual approach to defining the domestic industry necessarily resulted in a domestic industry definition biased in favor of petitioners. The undisputed facts establish that MOFCOM's definition of the domestic industry was inconsistent with China's WTO obligations. Nor has China altered this bottom line by its unpersuasive efforts to recast MOFCOM's process for defining the domestic industry.

1. *The Undisputed Facts Demonstrate that MOFCOM's Domestic Industry Definition Was Inconsistent with China's WTO Obligations*

82. China does not deny that MOFCOM limited its definition of the domestic industry to those domestic producers that completed domestic producers' questionnaire responses, and that MOFCOM provided domestic producers' questionnaires only to the 20 producers belonging to petitioner CAAA listed in Exhibit 2 of the petition. As members of the CAAA, these 20 producers were by definition petitioners. Nor does China deny that the only affirmative actions taken by MOFCOM to identify other domestic producers was its publication, on September 27, 2009, of a "Notification on Registration of Participating in Industry Injury Investigation" with respect to both the antidumping and countervailing duty investigations, and the posting of a blank domestic producers' questionnaire on its website.

83. MOFCOM's approach to defining the domestic industry is thus inherently biased in favor of petitioners, and hence inconsistent with the objectivity requirement under ADA Article 3.1 and SCM Article 15.1, in several respects. As an initial matter, MOFCOM failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the investigation. By making it a prerequisite that, to be included in the industry definition, a domestic producer needed to participate in the investigation, MOFCOM at the outset set up an unreasonable barrier for domestic producers to provide information relevant to the injury investigation. Domestic producers that might have been willing to complete a questionnaire response but did not necessarily wish to participate as parties would have been dissuaded from providing information under these circumstances.

84. By setting up obstacles that made it infeasible for domestic producers other than producers listed in the petition to complete and return questionnaire responses, MOFCOM increased the likelihood that the only domestic producers would respond. Indeed, these producers – self-selected by Petitioner by dint of their membership or affiliation with CAAA – were the only producers to whom MOFCOM provided questionnaires.

85. By superficially inviting other domestic producers to volunteer for inclusion in the domestic industry by either responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in violation of ADA Article 3.1 and SCM Article 15.1. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of a measure, and would therefore have a financial incentive to participate in the injury investigation either by joining the petition, by responding to the notice, or by downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack the incentive to respond to the MOFCOM's notice or to otherwise participate in the investigation, thereby increasing the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

86. MOFCOM's failure to make active, independent efforts to collect representative information breaches China's obligations under the AD and SCM Agreement. ADA Article 5.1 and SCM Article 11.1 contemplate that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged" dumping and subsidies. Similarly, ADA Article 1 and SCM Article 10 provide that antidumping and countervailing measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the respective Agreements. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain[] passive in the face of possible

shortcomings in the evidence submitted." Given the centrality of the domestic industry definition to the volume, price, impact, and causation analyses required under ADA Articles 3.2, 3.4, and 3.5 and SCM Articles 15.2, 15.4, and 15.5, it is particularly important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a thorough and objective manner.

87. Further, by limiting the domestic industry to those domestic producers who were either members of CAAA or otherwise selected by petitioner, to the exclusion of nearly half of the industry, MOFCOM defined the domestic industry in a manner inconsistent with ADA Article 4.1 and SCM Article 16.1, which express a clear preference for investigating authorities to define the domestic industry as "the domestic producers as a whole of the like product" by listing that definition of domestic industry first. Only after active efforts to include (or in the case of sampling, represent) all producers may the authority resort to the alternative, secondary definition of the domestic industry as domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products." If investigating authorities were free to define the domestic industry to include no more than producers accounting for "a major proportion of the total domestic production" at their option, the Agreements would not have included the more stringent definition of domestic industry, and would not have listed the more stringent definition first.

88. Moreover, investigating authorities that do not make active efforts to collect the information necessary to define the domestic industry as producers as a whole of the like product effectively exclude domestic producers from the definition for reasons other than those authorized under ADA Article 4.1 and SCM Article 16.1. These articles provide only two specific exceptions to defining the domestic industry as producers as a whole of the like product – one for related producers and one for regional industries. The articles do not permit investigating authorities to exclude domestic producers from the domestic industry definition by failing to make active, independent efforts to identify the universe of domestic producers of the like product. An investigating authority whose inaction excludes domestic producers otherwise willing to cooperate with the investigation from its definition of the domestic industry would therefore be in violation of ADA Article 4.1 and SCM Article 16.1.

89. In response to the United States' argument, China argues that the two exceptions under ADA Article 4.1 and SCM Article 16.1 do not preclude an investigating authority from defining a domestic industry to include producers accounting for a major proportion of total domestic production. China misunderstands the United States' argument. The United States is not arguing that investigating authorities must always define the domestic industry to include 100 percent of production unless one of the two exceptions is met, but that an investigating authority breaches Articles 4.1 and 16.1 when the authority's process for defining the domestic industry tends to result in the systematic exclusion of domestic producers for reasons other than the two listed exceptions. As MOFCOM failed to make active, independent efforts to identify the universe of domestic producers. MOFCOM's definition of the domestic industry was inconsistent with ADA Articles 3.1 and 4.1 and SCM Articles 15.1 and 16.1.

2. *China's* Post Hoc *Rationalizations Cannot Remedy MOFCOM's Deficient Approach to Defining the Domestic Industry.*

90. In defending MOFCOM's approach to defining the domestic industry, China provides a revisionist framework in an apparent effort to make MOFCOM's approach appear reasonable. The Panel's review, however, centers around those findings the authority actually made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact. Thus, China's *post hoc* rationalizations are of no relevance to the Panel's examination of "whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."

a. *Purported Press Coverage and Allegedly Reasonable Deadlines Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations.*

91. Despite the manifest deficiencies that plagued MOFCOM's notices of September 27, 2009, China argues that the Panel should find MOFCOM's investigations WTO-consistent because the broilers investigations were covered by independent news organizations. Notwithstanding that these notices failed to inform domestic producers of how to participate to be considered part of the domestic industry, China claims that all domestic producers should have known of their ability to provide information in light of this press coverage. Contrary to China's argument, general reporting on the broilers investigations in the Chinese press cannot substitute for MOFCOM's obligation to investigate actively the universe of domestic producers. Even assuming that the investigations were widely publicized, such publicity would not have provided domestic producers other than those listed in the petition with the essential information missing from MOFCOM's own notices on how to be considered part of the domestic industry.

92. Similarly unavailing is China's argument that MOFCOM gave parties a reasonable period of time to register for participation in the injury investigation and complete domestic producers' questionnaire responses. The United States is not challenging the deadlines provided in MOFCOM's notices for registering for participation in the injury investigations or for completing and returning questionnaire responses. Rather, the United States maintains that MOFCOM did not provide domestic producers other than producers listed in the petition with information on the steps needed to be taken to be considered part of the domestic industry. No amount of time to respond to the notices or the questionnaires could compensate for the selection bias deficiencies, which resulted in a domestic industry definition biased in favor of petitioner.

b. *The Alleged Inclusion of Two Producers Other Than Petitioners and Producers Listed in the Petition Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations*

93. China argues that MOFCOM's definition of the domestic industry was not biased because two of the 17 producers included in the definition were not producers listed in the petition, but rather producers that managed to complete domestic producers' questionnaire responses under unexplained circumstances. The most plausible way in which these two producers could have received blank domestic producers' questionnaire is if they received them from the *producers listed in the petition*, which would have been the only source of questionnaires other than MOFCOM. Thus, these two producers were no less handpicked by petitioners than were the producers listed in the petition. Moreover, MOFCOM's inclusion of these two producers within its domestic industry definition would not have reduced the bias that resulted from MOFCOM's approach to defining the domestic industry.

c. *The Alleged Fragmentation of the Chinese Broiler Industry Did Not Excuse MOFCOM's Failure to Define the Domestic Industry in Accordance with China's WTO Obligations.*

94. In yet another *post hoc* argument, China argues that it was reasonable for MOFCOM to provide questionnaires only to the 20 members of petitioner CAAA listed in the petition because the extreme fragmentation of the domestic industry, allegedly consisting of 27,638,046 producers, made it impractical to do otherwise. It defies logic that 17 domestic producers with 84,179 employees in 2008 could have accounted for 50.82 percent total domestic production that year, as MOFCOM found, while the other 27,638,029 producers with at least 27,638,029 employees accounted for 49.18 percent of total domestic production.

95. In response to a Panel question, China concedes that these data on Chinese broiler farms include producers of yellow feather chickens, which are outside the domestic industry boundaries that MOFCOM itself set. It bears noting that during the investigations, MOFCOM made a deliberate decision to limit the domestic industry to the producers of white feather chicken products coextensive with the scope of imported products, rather than to define the industry more broadly to cover yellow feather chicken production as well. Having affirmatively made this decision to proceed with the narrower domestic industry definition, China cannot now have it both ways by

arguing that its investigatory task was overly burdensome because of the large number of producers and employees producing yellow feather chicken products. The data now relied on by China – which include yellow feather chicken production – are therefore of no use in ascertaining the degree of fragmentation of the white feather chicken industry in China.

96. What these data do indicate is that the white feather chicken industry is far smaller than the yellow feather chicken industry in China. According to China, MOFCOM's data on total domestic production was calculated by a consultant based in part on these tracking data. China does not explain why MOFCOM did not use the same data, presumably available from the consultant, to identify and contact additional domestic producers, which would all possess the offspring of the original breeder pairs.

97. In any event, the complexity or fragmentation of a domestic industry does not excuse an investigating authority from making active, independent efforts to identify a representative subset of domestic producers for purposes of defining the domestic industry. Even if the domestic industry producing white feather poultry was as fragmented as China argues, China should have made an effort to collect information that was representative of the industry as a whole. China could have accomplished this and met its WTO obligations by any of several means, including actively seeking data from the 147 major producers, or by sampling. As the Appellate Body explained in *EC – Fasteners*, "an injury determination regarding a fragmented industry must . . . cover a large enough proportion of total domestic production to ensure that a proper injury determination can be made pursuant to Article 3.1." As the *EC – Salmon* panel explained, such a sample must also be representative of domestic producers as a whole, because "{a} sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for . . . an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of [ADA] Article 3.1."

d. *MOFCOM's Approach to Defining the Domestic Industry Was Similar to the EC's Approach in* EC – Fasteners *and Hence No Less Inconsistent with WTO Requirements*

98. MOFCOM's approach to defining the domestic industry shared fundamental similarities with the EC's approach in *EC – Fasteners*. In *Fasteners*, the EC published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample. The Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in violation of ADA Article 4.1.

99. China cannot meaningfully distinguish the legal implications of *EC – Fasteners* from those that apply here. According to China, the Appellate Body held the EC's definition of the domestic industry was inconsistent with the "major proportion" requirement only because it accounted for a "low" 27 percent of total domestic production, whereas MOFCOM's definition of the domestic industry accounted for over 50 percent of total domestic production. While the Appellate Body criticized the EC for relying on information from only 45 of the 318 producers for which it had contact information, China claims, MOFCOM "did not collect data that it then ignored" but rather relied on data reported by all "known" Chinese producers.

100. The Appellate Body did not, however, find the EC's approach to defining the domestic industry inconsistent with ADA Article 4.1 because it covered too low a proportion of total domestic production, as China claims. To the contrary, the Appellate Body found that "{t}he fragmented nature of the fasteners industry . . . might have permitted such a low proportion . . . provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion." The Appellate Body found the EC's process for defining the domestic industry inconsistent with Article 4.1 because "by limiting the domestic industry definition to those producers willing to be part of the sample . . . the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination." Just as the EC had limited its definition of the domestic industry to those producers that "'expressed a wish to be included in the sample,'" MOFCOM effectively limited its definition of the domestic producers to producers listed in the petition and producers willing to register for participation in the injury investigations or download a questionnaire. MOFCOM's

process for defining the domestic industry introduced the same limitation on data coverage and material risk of distortion as the EC's approach.

101. China's argument that "MOFCOM did not intentionally exclude any domestic producers from its investigation" is unpersuasive. MOFCOM's approach to defining the domestic industry ensured that only petitioners and petition supporters – the domestic producers likely to post the weakest performance – would complete questionnaire responses and thus be included in the domestic industry definition. MOFCOM's consideration of all data collected from such a biased subset of producers would not have mitigated the material risk of distortion created by MOFCOM's process for defining the domestic industry.

102. As the Appellate Body held in *EC – Fasteners*, an investigating authority that defines the domestic industry to include only domestic producers willing to be part of the domestic industry definition introduces "a material risk of distortion" and reduces the data coverage of the domestic industry in breach of ADA Article 4.1. Because that is precisely the approach that MOFCOM took here in defining the domestic industry to include only petitioners and self-selected petition supporters, MOFCOM's definition is inconsistent with ADA Article 4.1 and SCM Article 16.1.

B. China Cannot Defend MOFCOM's Price Effects Analysis

100. The United States demonstrated that China breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2 because MOFCOM's price effects analysis was based on fundamentally flawed price comparisons that failed to account for differences in level of trade or product mix.

1. *MOFCOM Was Obligated to Ensure the Comparability of the Subject Import and Domestic Like Product Average Unit Value Data Used in Its Price Comparisons*

101. China acknowledged at the first Panel meeting that the price effects issues in this dispute echo price issues that were then pending before the Appellate Body in *China – GOES*. Since that meeting, the Appellate Body in *China – GOES* has considered and rejected China's position that "adjustments to ensure price comparability . . . are not required by Articles 3.2 and 15.2." The Appellate Body explained that: "[a]lthough there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products." The Panel here should find similarly that MOFCOM's failure to ensure comparability in this case is a breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

2. *MOFCOM's Failure to Account for Level of Trade Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations*

102. By comparing domestic and subject import prices at different levels of trade, MOFCOM made a finding of underselling almost inevitable, breaching ADA Article 3.1 and SCM Article 15.1's objectivity requirement. MOFCOM's faulty comparison also rendered MOFCOM's underselling analysis inconsistent with the underselling analysis contemplated by ADA Article 3.2 and SCM Article 15.2. Contrary to China's assertions, domestic prices to first arms-length customers at the factory gate are not at the same level of trade as import prices at the port just because the prices are for merchandise physically situated, or "landed," in China. China ignores that import prices at the port would not reflect the prices that the first arms-length customers of domestic producers, including distributors and retailers, would pay for subject imports.

103. China also argues that the Panel should excuse MOFCOM's failure to compare domestic prices and import prices at the same level of trade because collecting import prices at the same level of trade as domestic prices would have been a "truly daunting" task. Yet, MOFCOM made no effort to collect information from importers that would have made a proper comparison possible. China's defense that it had no way of identifying importers is all the more untenable given that MOFCOM asked for this information from the U.S. exporters, who went to great lengths to provide it. Having collected this information, MOFCOM was in a position to, at the very least, mail blank

importers' questionnaires to the most significant importers of subject merchandise from the United States. MOFCOM made no such effort.

104. In any event, as the United States explained in response to Panel Question 70, investigating authorities remain obligated to conduct an "objective examination" of "positive evidence," pursuant to ADA Article 3.1 and SCM Article 15.1, even in the absence of importer questionnaire responses. MOFCOM stated that "the Investigating authority has taken the difference in sales levels into consideration, adjusting the import prices based on Customs data accordingly." China now claims that the adjustment to which MOFCOM was referring was the addition of estimated customs duties to CIF import prices. But such an adjustment has nothing to do with level of trade and would have done nothing to remedy the distortion caused by comparing domestic prices and import prices at different levels of trade.

105. China's contention that adjusting import prices to account for their different levels of trade would not have been feasible is beside the point and does not excuse China of its obligations. MOFCOM was obligated to insure that its price comparisons were based on domestic prices and import prices at the same level of trade. How it did so was up to MOFCOM. In this case, however, MOFCOM did nothing to account for the fact that subject import prices were at a different level of trade than domestic prices. Instead, MOFCOM predicated its underselling analysis on a comparison of domestic prices and subject import prices at different levels of trade, in breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

3. *MOFCOM's Failure to Account for Product Mix Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations*

106. The United States also demonstrated that China's failure to account for differences in product mix was inconsistent with China's WTO obligations. China does not deny that MOFCOM's average unit value comparisons failed to account for differences in product mix and, instead, asserts that MOFCOM's comparison was reasonable because the product mix of subject imports was, in China's view, weighted in favor of higher value products, allegedly including chicken paws. China's argument is nothing more than a *post hoc* rationalization of the deficiencies in MOFCOM's analysis, found nowhere in the final determinations.

107. In the actual determinations, MOFCOM asserted that it was under no obligation to consider product mix and did not contest USAPEEC's showing that 97 percent of subject imports consisted of low value products. Even China's own data show that the product mix of subject imports and domestic industry sales differed dramatically, as did the unit value of different types of broiler products. None of the evidence China relies on to justify MOFCOM's failure to account for differences in product mix was cited, analyzed, or relied upon by MOFCOM in its final determinations, much less disclosed to the parties during the investigations.

108. China claims that confidential invoices that domestic producers allegedly provided to MOFCOM during the verification process, show that the unit value of domestic industry sales of chicken breasts was lower than the unit value of domestic industry sales of chicken paws. But MOFCOM's actual findings in the final determinations make clear that it considered none of the evidence cited by China or the extent to which differences in product mix may have distorted its average unit value comparisons. Contrary to China's assertion, MOFCOM quite explicitly found was that it was under no obligation to take product mix into account and therefore did not do so.

109. Even if the Panel were to accept China's request to engage in an exercise of *post hoc* rationalization, the excuses that China has developed for the purpose of this proceeding are meritless. First, China cites Customs data indicating that the average unit value of subject imported "offal, chicken paws" and "offal, mid-joint wing" were higher than the average unit value of subject imported "cut, with bones," "offal, others," and "cold frozen gizzard" to argue that chicken paws were a high value product. However, evidence that the average unit value of subject imported chicken paws was greater than the average unit value of certain other low-value chicken parts imported from the United States does not establish that chicken paws were a high value chicken part.

110. Similarly misplaced is China's *post hoc* explanation that MOFCOM's average unit value comparisons were reasonable because the average unit value of chicken paws was higher than the average unit value of breast meat. China's assertion relies on 63 invoices from three domestic producers and, at most, could show merely that these producers received higher prices on sales of chicken paws than on sales of chicken breasts. MOFCOM did not make these assertions during the investigation, and China's citations to these hand-picked invoices in no way show or support China's claim that importers received higher prices on sales of chicken paws imported from the United States than domestic producers received on sales of chicken breast. Moreover, China's argument only underscores that the average unit value of chicken parts varies widely depending on the part and that the product mix of subject imports differed markedly from that of the domestic industry. This variability indicates that the average unit value of subject imports and domestic industry shipments, respectively, would be influenced significantly by changes and differences in product mix.

111. China's new data also underscore the fact that subject imports consisted of a product mix that differed dramatically from the product mix for domestic industry shipments. Regardless of the relative unit values of chicken breasts and chicken paws sold by domestic producers, the fact remains that MOFCOM compared subject import and domestic like product average unit values without accounting for obvious and stark differences in product mix, thereby failing "to ensure price comparability." China has failed to rebut the United States' demonstration that MOFCOM's failure in this regard breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

4. *MOFCOM's Price Suppression Finding Was Predicated Entirely on Its Defective Underselling Analysis*

112. China has failed to rebut the U.S. demonstration that MOFCOM's flawed price suppression finding was predicated entirely on its defective underselling analysis. China argues that even if MOFCOM's underselling analysis were found inconsistent with China's WTO obligations, the Panel should still uphold MOFCOM's price suppression finding because, according to China, MOFCOM demonstrated the existence of price suppression and was under no obligation to establish that the suppression was caused by subject imports. China also argues that MOFCOM demonstrated that subject imports suppressed domestic like product prices through volume effects alone. Neither argument has any merit. First, to the extent MOFCOM relied on its price suppression finding, it was obligated to establish that such price suppression was the effect of subject imports. ADA Article 3.2 and SCM Article 15.2 require investigating authorities to consider whether any significant suppression (or depression) of domestic prices is "the effect" of subject imports. In turn, an investigating authority can rely on price suppression or price depression to support a finding of injury only if the authority establishes that price suppression or price depression was linked to subject imports. As the panel and Appellate Body found in *China – GOES*, "*merely showing* the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2." Consistent with this reasoning, MOFCOM was obligated in this investigation to demonstrate that any significant suppression of domestic prices was caused by subject imports. Because the only evidence cited by MOFCOM linking subject imports to price suppression was its deficient underselling analysis, MOFCOM failed to establish that the price suppression was the effect of subject imports, in violation of ADA Article 3.2 and SCM Article 15.2.

113. Second, equally unpersuasive is China's argument that MOFCOM's price suppression was not dependent on its underselling analysis because, according to China, MOFCOM also found that subject import "volume effects" and "market share effects" suppressed domestic prices. Contrary to China's argument, MOFCOM made no such finding and, in any event, the record would not support such a finding. Nor did MOFCOM make any finding, as China now asserts, that subject import volume and market share alone, in the absence of significant underselling, could have suppressed domestic like product prices to a significant degree. Indeed, such a finding would conflict with MOFCOM's preceding price analysis, which concluded that domestic like product prices were suppressed by subject import underselling. It would also conflict with evidence that the increase in subject import volume and market share during the period examined did not come at the expense of the domestic industry, which gained more market share than subject imports.

114. Even if the Panel were to find that MOFCOM predicated its price suppression finding on a combination of subject import price and volume effects, MOFCOM made no finding and provided no explanation as to how subject import volume effects alone were sufficient to suppress domestic like product prices to a significant degree. In *GOES*, as in this dispute, China argued that MOFCOM's price depression and suppression findings were based on subject import price and volume effects, and could be upheld on the basis of volume effects alone. The Appellate Body rejected this argument and agreed with the Panel that "it was 'not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.'" The Panel should reach the same conclusion here because MOFCOM's final determinations are similarly bereft of any explanation as to how significant price suppression could have been the effect of the increase in subject import volume alone.

C. MOFCOM's Analysis of the Domestic Industry Factors Was Inconsistent with China's WTO Obligations

115. The United States demonstrated that MOFCOM's impact analysis was inconsistent with China's obligations under ADA Articles 3.1 and 3.4 and SCM Articles 15.1 and 15.4. MOFCOM attached decisive significance to two factors – the domestic industry's capacity utilization and end-of-period inventories – in finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period, while failing to conduct an objective examination of the other factors. China fails to explain how MOFCOM could have found that subject imports had an adverse impact on the domestic industry during the period of investigation when the record showed that the domestic industry's performance improved markedly according to almost every measure during the 2006-2008 period, which coincided with the bulk of the increase in subject import volume

1. *MOFCOM Relied on Its Defective Analysis of Capacity Utilization and End-of-Period Inventories to Find that Subject Imports Adversely Impacted the Domestic Industry During the 2006-2008 Period*

116. China mischaracterizes the U.S. position, claiming that the United States would give "decisive" weight to capacity utilization and end-of-period inventory trends. To the contrary, it was MOFCOM that made these factors central to its analysis of impact. MOFCOM's only support for its finding that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period, was its defective analysis of domestic industry capacity utilization and end-of-period inventories during the 2006-2008 period. MOFCOM could not rely on its finding that "the domestic like products sector could not gain a reasonable profit margin" to support its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period because the industry's pre-tax loss narrowed between 2006 and 2008.

2. *MOFCOM Failed to Establish that Subject Imports Adversely Impacted Domestic Industry Capacity Utilization or End-of-Period Inventories During the 2006-2008 Period*

117. Domestic industry capacity utilization and end-of-period inventory trends did not constitute "positive evidence" that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period. The domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period. Thus, the domestic industry's capacity utilization trend was entirely explained by the industry's own capacity expansion and was not affected by subject imports. MOFCOM's reliance on domestic industry capacity utilization to support its finding that subject imports had an adverse impact on the domestic industry "during the entire POI" was therefore not supported by an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1. Nor does its reliance on this factor reflect an examination of all relevant economic factors and indices, in breach of ADA Article 3.4 and SCM Article 15.4.

118. The United States has also shown that the increase in domestic industry end-of-period inventories as a share of domestic industry shipments and production was too small to be materially adverse. In response, China argues that MOFCOM was under no obligation to find

end-of-period inventories "significant" because, in its view, ADA Article 3.4 and SCM Article 15.4 only require investigating authorities to evaluate the enumerated injury factors. However, MOFCOM did in fact find the increase in end-of-period inventories significant when it relied on this increase, in combination with the domestic industry's capacity utilization trends, to find that subject imports adversely impacted the domestic industry "during the entire POI," including the 2006-2008 period.

3. *MOFCOM Was Obligated to Base Its Impact Analysis on an Examination of Trends over the Entire Period of Investigation*

119. MOFCOM was obligated to explain how subject imports could have adversely impacted the domestic industry in the first half of 2009 when most of the increase in subject import volume coincided with a dramatic improvement in the domestic industry's performance during the 2006-2008 period. By failing to do so, MOFCOM failed to conduct an objective evaluation of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, and failed to consider "all relevant economic factors and indices having a bearing on the state of the industry," in breach of ADA Article 3.4 and SCM Article 15.4.

4. *MOFCOM's Future Projections Were Irrelevant to Its Analysis of the Impact of Subject Imports During the Period of Investigation*

120. The possibility that subject imports may increase in the future so as to adversely impact the domestic industry in the future is irrelevant to the impact analysis required under ADA Article 3.4 and SCM Article 15.4 for present material injury purposes. Investigating authorities must examine the impact of dumped imports that have already entered the domestic market, and not the possible impact of dumped imports that may later enter the market.

121. China cites to the panel's finding in *EC – Fasteners*, but, contrary to China's argument, the panel did not hold that investigating authorities may consider the future impact of "potential" subject imports, and nothing in ADA Article 3.4 or SCM Article 15.4 would support such an interpretation. Rather, those Articles require investigating authorities to examine "the impact of dumped [and subsidized] imports" that entered the domestic market during the period under consideration.

D. MOFCOM's Causal Link Analysis Was Inconsistent with China's WTO Obligations

122. MOFCOM's causal link analysis did not meet China's obligations under the WTO Agreements because MOFCOM failed to establish that subject import competition had adverse volume or price effects on the domestic industry, the performance of which improved markedly during the 2006-2008 period in which the bulk of the increase in subject import volume occurred.

1. *MOFCOM Failed to Address Market Share Trends that Contradicted Its Causal Link Analysis*

123. China does not and cannot deny that MOFCOM failed to explain how the increase in subject import volume and market share could have had an adverse impact on the domestic industry when the domestic industry gained more market share than subject imports during the period examined. In failing to address this evidence, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, or an examination of "all relevant evidence," in breach of AD Article 3.5 and SCM Article 15.5.

124. China attempts to proffer new evidence – not mentioned by MOFCOM in its determinations or otherwise disclosed to the parties – that, in its view, shows that the increase in subject import market share did come at the expense of the domestic industry. Even if the Panel were to examine China's new data, these data would not serve to support MOFCOM's causation findings. China acknowledges that its new market share data include data reflective of all domestic producers, including those "for which MOFCOM did not have questionnaire responses." MOFCOM could not have factored the market share trends of domestic producers as a whole into its causal link analysis because the evidentiary record on the domestic industry's performance was limited to data from the 17 domestic producers included in its domestic industry definition. A market share

loss suffered entirely by domestic producers outside the domestic industry definition would not have been reflected in the performance data collected from producers included within the domestic industry definition. MOFCOM could not find that market share lost by producers outside the definition contributed to any adverse trends reported by producers within the definition in accordance with the positive evidence and objectivity requirements under ADA Article 3.1 and SCM Article 15.1. Thus, China's new market share data is irrelevant to the Panel's assessment of whether MOFCOM's causal link analysis was consistent with China's WTO obligations.

125. China's new market share data also indicate that the increase in subject import market share between 2008 and the first half of 2009 came almost entirely at the expense of non-subject imports, while domestic industry market share remained stable. Citing its new market share data, China claims that "the overall domestic industry lost almost 2 percentage points of market share" to subject imports during the period examined, but most all of the loss occurred during the 2006-2008 period when domestic industry performance strengthened. A market share shift from domestic producers to subject imports that coincides with a strengthening of domestic industry performance does not support the finding of a causal link between subject imports and injury. In any event, MOFCOM collected no performance data from the domestic producers that lost market share to subject imports between 2006 and the first half of 2009 and therefore possessed no positive evidence with which to examine the causal relationship between subject imports and the performance of those producers.

126. MOFCOM's actual market share analysis showed that the 3.92 percent increase in subject import market share during the period of investigation did not prevent the domestic industry, as defined by MOFCOM, from increasing its market share by 4.38 percent. Thus, it is incontrovertible that the increase in subject import volume and market share during the period of investigation did not come at the expense of the domestic industry for which MOFCOM collected performance data. By failing to reconcile its causal link analysis with this evidence, MOFCOM failed to conduct an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to base its causal link analysis on an examination of "all relevant evidence," in violation of ADA Article 3.5 and SCM Article 15.5.

2. *MOFCOM's Causal Link Analysis Relied on Its Defective Price Effects Analysis*

127. MOFCOM was obligated to ensure the comparability of its subject import and domestic like product pricing data pursuant to ADA Article 3.1 and SCM Article 15.1. By failing to account for obvious differences in level of trade and product mix, thereby making a finding of subject import underselling more likely, MOFCOM not only violated Articles 3.1 and 15.1, but also failed to conduct the underselling analysis required under ADA Article 3.2 and SCM Article 15.2. China's assertion that MOFCOM's price suppression finding was not predicated entirely on its underselling analysis is contradicted by MOFCOM's explicit findings in the final determinations that subject import underselling, not subject import volume, suppressed domestic like product prices. With no evidence that subject imports either undersold or suppressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to demonstrate a causal link between subject import price effects and material injury, in violation of ADA Article 3.5 and SCM Article 15.5.

128. MOFCOM also failed to reconcile its causal link analysis with evidence that subject import volume did not increase at the expense of the domestic industry, which gained more market share than subject imports during the period examined. The United States has also established that MOFCOM failed to reconcile its causal link analysis with evidence that the domestic industry's performance improved according to almost every measure during the bulk of the increase in subject import volume between 2006 and 2008. MOFCOM's failure to address this evidence rendered its causal link analysis inconsistent with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

129. In response, China proffers *post hoc* rationalizations found nowhere in the final determinations to argue that MOFCOM found subject import volume to have had both "direct" and "indirect" effects on the domestic industry. Contrary to China's "direct effects" argument, MOFCOM did not find that "but for the subject import presence in the market . . . the domestic industry could have sold more broiler products." China does not provide a citation to support this assertion

because it appears nowhere in the final determinations. Moreover, if an investigating authority relies on the increase in subject import volume to make an affirmative material injury determination, it must establish a causal link between that volume increase and material injury. If China is claiming that MOFCOM's causation finding was based on the increase in subject import volume, its failure to show that MOFCOM established a link between the increase and the domestic industry's performance is fatal under ADA Article 3.5 and SCM Article 15.5. MOFCOM also failed to base its causal link analysis on "an examination of all relevant evidence," in breach of these same articles, or to conduct an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1.

130. China also argues that subject import volume had an "indirect" effect on domestic like product prices, but neglects to mention that the analysis from which it selectively quotes was expressly limited to the 2006-2008 period, over which time the domestic industry gained 4.61 percentage points of market share. Subject imports could have had no "indirect volume effect" on domestic like product prices between 2006 and 2008 when the 1.83 percentage point increase in subject import market share during the period was accompanied by an increase in domestic industry market share over twice as large.

131. The analysis highlighted by China was deficient in other respects as well. For example, it conflicted with evidence that the domestic industry did not "maintain" its market share but rather increased it, and did not sell at prices below cost to an increasing extent but rather narrowed its loss as a share of sales income from 7.9 percent in 2006 to 4.7 percent in 2008. This passage also relies on MOFCOM's defective analysis of domestic industry capacity utilization and end-of-period inventories, as the only two factors that did not show dramatic improvement during the 2006-2008 period. Far from demonstrating that subject import volume had an impact -- indirect or otherwise -- on domestic like product prices, the analysis highlighted by China only underscores MOFCOM's failure to reconcile its causal link analysis with evidence that the bulk of the increase in subject import volume coincided with a marked improvement in the domestic industry's performance during the 2006-2008 period. Here too, China's breach of ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5 is apparent.

132. Finally, China argues that the Panel could uphold MOFCOM's finding that subject imports adversely affected domestic like product prices based solely on MOFCOM's observation that subject import prices and domestic like product prices moved in "parallel" during the period examined and declined together in the first half of 2009. As the Appellate Body explained in *GOES*, MOFCOM's reference to parallel price trends alone, without "any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings," does not support a finding that subject imports adversely affected domestic like product prices. In other words, such parallel price movements alone do not establish that changes in subject import prices caused changes in domestic like product prices.

3. *MOFCOM Failed to Address Domestic Industry Performance Trends that Contradicted Its Causal Link Analysis*

133. China concedes that MOFCOM predicated its causal link analysis almost entirely on trends in the first half of 2009 and asserts that such a reliance was consistent with China's WTO obligations. China fails to recognize that MOFCOM was obligated to examine the causal relationship between subject imports and domestic industry performance during the entire period of investigation, not just during a selective period. An investigating authority cannot predicate its causal link analysis on "all relevant evidence," much less an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1, without examining the relationship between subject imports and domestic industry performance over the entire investigative period for which data has been collected. An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of ADA Article 3.1 and SCM Article 15.1.

134. An investigating authority cannot selectively pick data points that appear to support its causal link analysis, while ignoring conflicting trends over the period of investigation as a whole, without breaching ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5. Doing precisely that, MOFCOM predicated its causal link analysis entirely on subject import and domestic industry performance trends in the first half of 2009, while ignoring subject import and domestic industry

performance trends over the entire period of investigation that conflicted with its analysis. Moreover, the absence of a coincidence between an increase in imports and a decline in the relevant injury factors over the entire period examined by MOFCOM contradicted MOFCOM's finding that subject imports adversely impacted the domestic industry during the period of investigation. Because MOFCOM's impact analysis relied exclusively on trends in the first half of 2009 without reconciling trends over the 2006-2008 period, the analysis was inconsistent with both the impact analysis envisioned by ADA Article 3.4 and SCM Article 15.4 and the objectivity requirement under ADA Article 3.1 and SCM Article 15.1.

135. China's only other defense of MOFCOM's failure to factor trends over the entire period of investigation into its causal link analysis is to claim that MOFCOM did, in fact, consider domestic industry financial trends over the entire period. To the contrary, MOFCOM's finding that the domestic industry experienced financial losses throughout the period of investigation sheds no light on the causal relationship between subject imports and the industry's financial performance. Such a finding says nothing about the relationship between movements in import volume and market share and the movements in injury factors over time, which are essential to the causal link analysis required under the AD and SCM Agreements. The record showed that the 47.2 percent increase in subject import volume between 2006 and 2008 was accompanied by an improvement in the domestic industry's pre-tax loss from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008. These trends indicate that the bulk of the increase in subject import volume, 90.9 percent of the total increase, had no adverse impact on the domestic industry's financial performance. By failing to reconcile these data with its causal link analysis, MOFCOM failed to demonstrate a causal link between subject imports and material injury in accordance with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

E. MOFCOM's Failure to Address U.S. Respondents' Arguments that Raised Material Issues Concerning Causation Was Inconsistent with China's WTO Obligations

136. China fails to rebut the U.S. demonstration that MOFCOM's failure to address two key causation arguments violated ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

1. *MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Market Share Trends*

137. China claims that MOFCOM addressed U.S. respondents' argument that subject imports increased at the expense of non-subject imports and not the domestic industry in two respects. However, by simply providing a conclusory rejection of a respondent's argument that raises a material issue, an investigating authority has not fulfilled its obligations under ADA Article 12.2 and SCM Article 22.3. Those articles require investigating authorities to issue public determinations setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." ADA Article 12.2.2 and SCM Article 22.5 elaborate that investigating authorities must include in their final determinations "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" including "the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers." To the extent that a respondent raises an issue "which must be resolved in the course of the investigation in order for the investigating authority to reach its determination," an investigating authority is required to provide "in sufficient detail the findings and conclusions reached" in accepting or rejecting the argument in resolution of the issue. An authority's response to such an argument would also be subject to the requirement that the authority conduct an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1. In light of these obligations, investigating authorities must address a party's argument that raises a material issue by resolving the issue "in sufficient detail" based on an "objective examination" of "positive evidence" in the final determination.

138. MOFCOM's response to the U.S. respondents' argument concerning non-subject imports in the final determination did not comport with these obligations. The U.S. respondents' argument to that effect therefore raised a material issue that MOFCOM was required to resolve "in sufficient detail" based on an "objective examination" of "positive evidence."

139. Instead of resolving the issue, MOFCOM evaded it. MOFCOM's finding that it was entitled to consider the absolute volume of subject imports did not address the issue because U.S. respondents were not arguing that subject import volume did not increase, but rather that the increase was not at the domestic industry's expense. MOFCOM's finding that the domestic industry's market share gains "did not imply that the domestic industry did not suffer from injury" is a conclusory statement devoid of any "objective examination" of "positive evidence." It is also contrary to logic, given that an increase in subject import market share that is accompanied by a greater increase in domestic industry market share would not ordinarily support the existence of a causal link between subject imports and material injury. Far from resolving the material issue raised by U.S. respondents in "sufficient detail," MOFCOM provided no reasoning or evidentiary support whatsoever for rejecting the argument, in breach of ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

2. *MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Chicken Paws*

140. With respect to the U.S. respondents' argument concerning chicken paws, China concedes that "MOFCOM did not explicitly address this specific issue in its Final Determination." China argues that the Panel should excuse this omission because MOFCOM addressed the argument in the preliminary determination and "did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of this issue." China's argument is factually incorrect.

141. In its Injury Brief, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Rejecting this argument in its preliminary determination, MOFCOM explained that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import of all the investigated products including Paw as a whole . . . ." Far from failing to provide any new information on the issue subsequent to the preliminary determinations, as China wrongly claims, USAPEEC responded to MOFCOM's clear misapprehension of the issue with a clarification in its Comments on the Preliminary Determination. In light of the USAPEEC's clarification, China cannot credibly argue that "MOFCOM did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of the issue." MOFCOM did not repeat its earlier discussion of the issue because, as USAPEEC made clear in its comments on the preliminary determination, that discussion was based on a fundamental misunderstanding of USAPEEC's argument and therefore irrelevant. Rather, MOFCOM simply ignored USAPEEC's effort to clarify its chicken paws argument and omitted any mention of the issue in the final determinations.

142. China's argument that MOFCOM was under no obligation to address USAPEEC's argument concerning chicken paws because MOFCOM did not consider the argument "material" is also unpersuasive. USAPEEC's argument that nearly half of subject imports could have had no adverse impact on the domestic industry, thereby substantially attenuating subject import competition, was clearly an issue that needed to be resolved in order for MOFCOM to reach a final determination. Consequently, MOFCOM's failure to address the issue in its final determinations breached ADA Articles 12.2 and 12.2.2 and SCM Articles 22.3 and 22.5.

143. China's *post hoc* explanation for why MOFCOM might have found USAPEEC's argument concerning chicken paws is irrelevant because China's new theories cannot remedy MOFCOM's failure to comply with its obligation to address USAPEEC's argument concerning chicken paws in the final determinations. MOFCOM did not explain why it found USAPEEC's chicken paws argument immaterial, but simply ignored the argument.

144. China's *post hoc* explanation is also unpersuasive because it is based on a mis-characterization of USAPEEC's argument. In China's view, USAPEEC's argument concerning chicken paws was irrelevant to MOFCOM's analytic framework, and hence not "material," because MOFCOM analyzed injury on an overall basis rather than on the basis of market segments. Yet, USAPEEC was not asking MOFCOM to conduct its injury analysis based on market segments. Rather, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Discussing this argument would

have entailed addressing the point that subject imports could not have been injurious given the disproportionate presence of parts that could not be supplied by domestic producers. China has failed to rebut the United States' demonstration that USAPEEC's argument concerning chicken paws raised a material issue that MOFCOM failed to address in the final determinations, much less resolve "in sufficient detail," in breach of ADA Articles 12.2 and 12.2.1 and SCM Articles 22.3 and 22.5.

ANNEX A-2

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY CHINA

BCI deleted, as indicated [***]

First Integrated Executive Summary by China

I. PROCEDURAL ISSUES

A. MOFCOM Did Not Breach Article 6.2 With Respect To The U.S. Request For A Public Hearing

1. The United States claims that MOFCOM breached Article 6.2 of the AD Agreement by not holding a public hearing in response to a U.S. Government request. Although MOFCOM's regulations provide that it may hold such a hearing upon request, consistent with Article 6.2 of the AD Agreement nothing within MOFCOM's regulations mandates that a public hearing be held under any circumstance.

2. As part of a general obligation on investigating authorities to provide a full opportunity for parties to defend their interests, Article 6.2 of the AD Agreement establishes that investigating authorities provide the "opportunity" for "parties with adverse interests" to meet. It does not mandate a public hearing and does not require an adverse party to join any meeting requested by the opposing party, public or otherwise. In other words, there is no obligation that such a meeting *must* occur, and such a meeting would definitively not occur if opposing interests choose not to engage.

3. China views an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests as one of facilitator. In other words, the authority's purpose is to promote the conditions under which such a meeting could occur. This is consistent with the plain meaning of "provide opportunities" as used in Article 6.2. Among the definitions of the word "provide" is "take appropriate measures in view of a possible event; make adequate preparation." The word "opportunity" is defined as "a time or condition favourable for a particular action or aim." By these terms, MOFCOM meets its obligations under Article 6.2 through procedures made available to interested parties that may lead to a meeting of parties with adverse interests organized by the authority in the event those parties mutually desire such a meeting.

4. China does not view the authority's discretion under Article 6.2 as encompassing the right to "refuse" to organize and hold such a meeting of parties with adverse interests. This wrongly implies that it is the authority's decision, in the first instance, as to whether such a meeting should or must take place. Article 6.2 merely states that "authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests . . . ." Thus, where it is clear that parties with adverse interests will not meet, the question of an authority's obligation to organize a meeting of such parties under Article 6.2 becomes moot.

5. Keeping in mind the fact that the interested parties themselves determine whether a meeting of parties with adverse interests actually takes place, China wishes to clarify that in the underlying investigation MOFCOM did not reject a request by the U.S. Government to meet with the petitioner. It accepted that request, but the question of whether a meeting of interested parties with adverse interests could or should take place is a entirely separate matter.

6. In the underlying proceeding, those parties with adverse interests to the United States declined to meet, and therefore the need for the meeting envisioned under Article 6.2 of the AD Agreement was rendered moot. Nonetheless, MOFCOM afforded the U.S. Government a full opportunity to defend its interests, consistent with Article 6.2, by meeting with U.S. Government officials so that they could present their views orally, and by receiving documents from the U.S. Government after the meeting setting forth the U.S. Government position.

B. MOFCOM Was Not Obligated To Disclose All Aspects Of Its Dumping Calculation

7. The United States claims Article 6.9 of the AD Agreement requires expansive disclosure, reading the "essential facts" to be disclosed under that provision as reaching any and all aspects of an investigating authority's dumping calculation. Indeed, the U.S. argument would seemingly require disclosure of every detail that comprised part of the authority's consideration of the matter, whether it be individual transaction data, the basic calculation methodology, any calculation worksheets, and the calculation program itself. This interpretation of Article 6.9 and a purported obligation of disclosure in a particular form is without merit.

8. The text of Article 6.9 clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests. It does not call for the expansive disclosure called for by the United States or a particular form of disclosure. This reading of the text is consistent with the findings of prior dispute settlement panels that have found Article 6.9 limited to those essential facts that form the basis of the authorities' decision whether to apply definitive measures. Whether a disclosure is comprised of "essential facts" within the meaning of Article 6.9 is fact-specific and depends on the form of disclosure by the administering authority. What is important is that the form of disclosure provides the interested party the basis to defend its interests, consistent with the last sentence of Article 6.9.

9. The criteria for distinguishing essential facts from regular facts must be derived from the context of Article 6.9, which clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests with respect to an authority's decision whether to apply definitive measures. As outlined by the panel in *EC – Salmon* "essential facts" may be distinguished from "regular facts" based on whether they are "necessary" to enable comments on the determination to apply definitive measures, including comments on the completeness and correctness of the facts being considered, corrections of perceived errors, and interpretative points. China's position is that the calculation program or worksheets, for example, are not necessary to enable comments on the authority's decision whether to apply definitive measures where the authority has made available other disclosures to the interested parties to enable such comments. Again, Article 6.9 does not specify format, only that essential facts are conveyed that allow interested parties to defend their interests.

10. With respect to the distinction between facts and reasoning in the context of Article 6.9, China believes that facts are invariable. For example, if the authority states that the price for a product is X, or that it has declined to make a requested adjustment, those are facts. They are constant and present a specific reference point. In contrast, reasoning consists of the intermediate details of consideration – the variable thought process that leads to an authority finding that the price of a product is X or concluding that a requested adjustment is unwarranted. These details are not the subject of disclosure under Article 6.9, as the panel in *U.S. -- OCTG Sunset Reviews* made clear.

11. Ultimately, whether we are dealing with "reasoning" or "facts" or whether the two might merge for purposes of identifying "essential facts," MOFCOM disclosed all the information necessary for the respondents to defend their interests, consistent with Article 6.9. The respondents were in control of their own facts, and were provided MOFCOM's basis or description of the various aspects of its dumping calculation.

C. The AD and CVD Petitions Contained Adequate Non-Confidential Summaries, Consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

12. The U.S. claim about non-confidential summaries is actually quite narrow. The United States does <u>not</u> challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential. Rather, the United States challenges only the sufficiency under Article 6.5.1 and Article 12.4.1 of the non-confidential summaries provided. Finally, the U.S. arguments regarding inadequate summaries focus only on the petition. Specifically, the U.S. challenge focuses on the adequacy of the non-confidential summaries for six items contained in the petition and namely the petitioners' production data and five distinct data sets related to "economic position," including

production capacity, domestic inventory levels, cash flow, wages and employment, and labor productivity.

13. The U.S. arguments regarding these specific pieces of information are fundamentally flawed. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. One must therefore consider the detail provided, and whether that detail is enough to understand the information being submitted, given the purpose for which the information is being submitted. The non-confidential summaries in the public version of the petition more than met this standard.

14. For its part, the United States seeks to impute a specific labelling requirement to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement from the facts and findings involved in *China – GOES*. In that case, the panel found certain of the non-confidential summaries provided in the petition to be inadequate. But the U.S. attempt to draw parallels with the instant case fails. The facts in *China – GOES* are very different from the facts in this dispute. More specifically, unlike *China – GOES*, in this dispute there is no case of "duelling" non-confidential summaries or supplemental summaries found elsewhere in the petition to cause any confusion as to where the non-confidential summaries are provided. Nonetheless, the United States seems to claim that it is impossible to find non-confidential summaries without specific labelling, implying some self-evident requirement to label. It alternatively and erroneously claims that "China argues that the Petitioner did in fact prepare the summaries, at other sections of the Petition, even though they were not labelled as such . . . ." These claims and the purported need in this case to "cobble together" non-confidential summaries from the petition are simply another failed *China – GOES* analogy that has no bearing on whether there exists any specific labelling requirement under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

15. In sum, China would reiterate that neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary that it can readily relate to specific confidential information that has been redacted, but no more than that.

16. China was unable to respond to any specific arguments made by the United States in its first written submission as it declined to address any of the information found in the petition. At the first substantive meeting, the United States did provide two examples out of the six claims made, to which China would like to provide an immediate response. The first example addressed by the United States is production and standing. Once again, the United States has misapplied the facts from *China – GOES* in an effort to make arguments here. As distinguished from *China – GOES*, in the instant case the petitioners reported that they accounted for more than 50 percent of total domestic production and included with that assertion the data on total domestic production. This information provided more than an understanding of the simple nature of the confidential information; it provided an understanding of the substance of that confidential information, consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

17. The second example offered by the United States in its opening statement at the first substantive meeting concerns production capacity. The United States complains that the lack of published scales on graphs presented in the petition denied parties any ability "to discern whether any specific trends, and the magnitudes thereof, are actually taking place." This statement is incorrect. First, the initial scale line in the graph is labelled zero. Second, the graph presents two data bars for each period, including a bar representing production (yield) and a bar representing production capacity. Given the points of reference provided by the zero scale and simultaneous representation of both production and capacity, both trends and the magnitude of those trends are easily seen. The U.S. claim that the graph does not provide a reasonable understanding of what the underlying information constitutes cannot be sustained.

II. MOFCOM'S ANTIDUMPING DETERMINATIONS

A. MOFCOM'S AD Determination Was Consistent With Article 2.2.1.1 Of The AD Agreement

18. The United States argues that MOFCOM, when determining normal values, unreasonably rejected the respondents' recorded GAAP-consistent production costs in favor of an average cost methodology based on weight. In making this argument, the United States misreads the obligation under Article 2.2.1.1 of the AD Agreement. Contrary to the U.S. argument, Article 2.2.1.1 does not reflect a blind mandate that recorded costs always be used whenever the records are in accordance with GAAP. Article 2.2.1.1 has two independent conditions, including (1) that the records be GAAP-consistent; and (2) that the reasonably reflect the costs associated with production and sale of the product under consideration. Both of these conditions must be met. Whether or not records are GAAP-consistent, an authority must still look to the particular purposes of the AD Agreement in determining whether the costs to be used in an anti-dumping investigation reasonably reflect the costs associated with the production and sale of the specific product under consideration *in an antidumping context*.

19. China's view of the term "normally" as used in Article 2.2.1.1 also differs from that advanced by the United States. The United States reads the two exceptions to using a respondents' recorded costs expressly indentified in Article 2.2.1.1 as serving to exclusively define the affirmative obligation where the circumstances described in those two exceptions do not exist. China believes that is "normally" the case, but the U.S. interpretation would seemingly reduce the term "normally" to mere surplusage. To achieve the same effect, Article 2.2.1.1 might have been drafted without resort to the term "normally" at all. It seems to China that, in order to give the term "normally" meaning consistent with fundamental rules of treaty interpretation, it must evidence the possibility of some other derogation from the "normal" rule.

20. At its core, the AD Agreement is about establishing a fair price or, more specifically, it is about measuring the degree of any unfairness in price based on differences between normal value and export price. Any cost allocations, therefore, must generate costs of production that allow an authority to use the costs in ways that make sense given the purpose AD Agreement, and that make sense given the specific circumstances of each case. This need to focus on specific circumstances is explicit in the structure of Article 2.2.1.1, which establishes (1) GAAP-consistency and (2) whether records "reasonably reflect" the cost of production as separate and distinct conditions governing the use of a producer's cost records.

21. The key issue is what meaning should be ascribed the terms "reasonably reflect" and "cost associated with the production" as used in Article 2.2.1.1 of the AD Agreement. With respect to the term "cost associated with the production," the meaning must concern what the producer had to pay to be able to produce the items at issue as opposed to revenue gained. This distinction can be critical depending on the circumstance of a particular case. For example, in a value-based cost allocation methodology, how the revenue potential for different products is taken into account, if it is taken into account at all, will dictate whether recorded costs "reasonably reflect" the costs associated with the production and sale of the product under consideration.

22. This issue of value-based methodologies would prove critical in this AD investigation. Though the respondents in the AD investigation produced many forms of broiler products, the respondents in general measured their own performance in terms of the broiler products most popular in the U.S. market, particularly chicken breasts. This approach led to respondents treating certain broiler products subject to the investigation and shipped in substantial volumes to China at high prices as holding little or no value. Thus, important revenue-generating products such as paws absorbed much less of the total cost that had been incurred to produce the whole bird. For example, Tyson treated paws as offal, or effectively waste, and allocated costs to that product based on an offal price. This treatment was inconsistent with the true value of paws in the market and thereby over-allocated costs to other products such as breasts. Keystone adopted an even more extreme approach that grossly undervalued paws for allocation purposes. These approaches did not result in costs that reasonably reflected the cost of production.

23. China believes that respondents bear the burden in the first place of convincing the authority that its costs "reasonably reflect" the cost associated with the production and sale of the product

at issue. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must "consider" it, and that the burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

24. During the course of the investigation, the respondents failed to meet their burden. Tyson offered a series of arguments as to why its cost allocation methodology was "reasonable." However, Tyson never addressed its *actual* recorded costs or explained, for example, why its *actual* recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products. Rather, Tyson emphasized that its methodology was reasonable because it was GAAP-consistent, and then essentially assumed that GAAP consistent automatically meant "reasonably reflects" the cost of production. In reality, however, the general arguments Tyson made about valued-based approaches did not reflect its actual allocation methodologies. Like Tyson, Keystone also made considerable efforts to demonstrate why its methodology was "reasonable." Once again, the main emphasis was on the assertion that it was GAAP-consistent, not on its actual records.

25. Pilgrim's also sought to defend its cost methodology on the basis of reasonableness with respect to GAAP. Pilgrim never addressed its actual costs, in part because it struggled to even assemble costs that it could reconcile. Although the United States leaves the impression that Pilgrim's submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The basis for MOFCOM's rejection of Pilgrim's cost data had very little to do with the allocation methodology reflected in the Pilgrim's Pride cost records. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data provided by Pilgrim's Pride after the preliminary disclosure were ruled out of time.

26. Nonetheless, MOFCOM accepted the respondents' total costs for broiler products, although it did not accept the respondents' reported product-specific costs. It provided a simple, clear, and concise explanation for why it did so with respect to each of the respondents under investigation, noting that the reported costs did not "reasonably reflect" the cost of production. However, China further notes that, contrary to U.S. arguments, Article 2.2.1.1 does not contain any requirement for an authority to "explain" its decision to decline to use a respondent's recorded allocated costs. Rather, it merely provides that an authority must "consider all available evidence on the proper allocation of costs . . . ." This is a very different standard, requiring only evidence of "consideration" rather than an explanation. China submits that the record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue, consistent with Article 2.2.1.1.

27. Having rejected respondents' reported costs that did not "reasonably reflect" the cost of producing the broiler parts at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents' distorting cost methodologies. To this end, Article 2.2.1.1. imposes only two requirements on the authority. First the authority must "consider all available evidence on the proper allocation of costs." Second, the authority must adjust costs "appropriately" if they do not properly take into account non-recurring costs or start-up expenses. In cases such as the current dispute, that do not involve non-recurring costs or start up costs, there is only one affirmative obligation: " to consider all available evidence on the proper allocation of costs." MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to the very different consumer perceptions in either the U.S. or Chinese markets. Thus, it was on this neutral basis that MOFCOM allocated respondents' raw material costs.

28. MOFCOM considered this allocation based on weight to be reasonable for several reasons. First, a weight-based allocation avoided the distortions that had made the respondents' value-based cost allocations unreasonable, including in particular the arbitrary values the respondents' assigned to products like paws to allocate costs which reflected neither actual market conditions or even an actual price for the specific product. Even the United States own investigating authority, the Department of Commerce, has identified the "circularity" problems inherent in value-based allocation methodologies – all of which came into play here -- when a price is used to set a price. Having rejected respondents' costs as not reasonably reflecting costs, and in the absence of any other compelling argument from respondents, MOFCOM had to find some

alternative that avoided these problems. Second, a weight-based allocation also reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts. Finally, the weight-based allocation was specifically listed as one of the reasonable alternatives in the materials cited by respondents.

29. The United States contends that MOFCOM had an obligation to explain why its approach was proper in relation to other approaches and in light of criticisms advanced by the respondents. But this obligation is not reflected in Article 2.2.1.1. Again, Article 2.2.1.1 imposes an obligation on investigating authorities to "consider" all evidence for the "proper" allocation of costs. Moreover, Article 2.2.1.1 does not specify any particular method for "consideration," and what constitutes adequate "consideration" will vary from case to case. As China demonstrates above, careful consideration of the very sources presented to MOFCOM by the respondents in this case fully justified MOFCOM's use of a weight base measure in this investigation.

30. The circumstances and evidence surrounding the respondents' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the markets concerned. MOFCOM considered all the evidence during the investigation concerning the allocation of costs to reach a reasonable allocation methodology, and this is reflected in the record. Specifically, the record reflects a sustained line of inquiry by MOFCOM regarding the respondents costs from the first questionnaire, to the supplemental questionnaire, and to the second supplemental questionnaire. In addition, the MOFCOM disclosure documents reflect more than mere receipt of evidence on the part of MOFCOM, but an active investigation of that evidence that it expressly sought from the respondents. MOFCOM "investigated" the evidence in reaching its conclusion, rather than merely taking note of the respondents' submissions. Finally, in the final AD Determination, MOFCOM again stated that neither Tyson nor Keystone provided sufficient reasons to justify their reported costs. Indeed, as discussed in the final AD determination, MOFCOM gave several opportunities for the parties to present their arguments on all issues involved in the investigation prior to the final determination, and discussed these issues orally with the parties. Ultimately, MOFCOM relied on a weight-based allocation as a compromise and a recognized approach to price regulation proceedings.

B. U.S. Claims Regarding The Treatment Of Freezer Storage Fees And Fair Comparison Under Article 2.4 Of The AD Agreement Should Be Set Aside

31. It is well-established that Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request. Nonetheless, there are limits to this fundamental rule. In the context of legal claims, a Member may not raise a new legal basis in a panel request that reflects a disconnect from the legal bases set forth in its request for consultations.

32. The U.S. claim under Article 2.4 of the AD Agreement with respect to freezer storage expenses is not referenced in any manner within the U.S. request for consultations in this dispute. On its face, the U.S. consultation request does not specify Article 2.4 of the AD Agreement within any of the thirteen specific items identified by the United States as areas in which China's measures are allegedly inconsistent with GATT 1994 or the AD Agreement. Moreover, none of the specific GATT 1994 or AD Agreement provisions referenced by the United States in its consultation request are reasonably related to the issue of fair comparison, which is the subject matter of Article 2.4 of the AD Agreement. Finally, the U.S. consultation request otherwise makes no mention of freezer storage expenses, which is the factual issue the United States seeks to address in its Article 2.4 claim. Under the circumstances, China believes that the U.S. Article 2.4 claim impermissibly expands the scope of this dispute and is therefore outside the terms of reference of this proceeding. The Panel should therefore set aside the Article 2.4 claim, consistent with Articles 4 and 6 of the Dispute Settlement Understanding (DSU).

33. But even if the panel agrees to consider the U.S. Article 2.4 claim, it is without merit. Contrary to U.S. arguments, freezer fees clearly reflected a difference between export price and normal value affecting price comparability. Throughout the course of the underlying investigation MOFCOM indicated to Keystone what information was necessary to ensure a fair comparison between normal value and export price, meeting its obligation under Article 2.4 to indicate to Keystone what information was necessary to ensure a fair comparison. Keystone, however, provided ambiguous if not misleading responses to MOFCOM regarding such fees.

34. Article 2.4 requires allowances for differences in normal value and export price affecting price comparability. The authority has the obligation to make necessary adjustments so as to effect a fair comparison in ascertaining any margin of dumping. The nature of the obligation to make allowances is a case-specific issue. The Appellate Body has recognized that, "{t}he issue of which specific 'allowances' should be made in any case depends very much on the facts surrounding the calculation of export price and normal value." Thus, while an allowance may not be necessary in one investigation, it may be appropriate in another investigation depending on the information provided by the respondent parties and the facts surrounding the calculation of normal value and export price. The authority's allowances must therefore be guided by the factual record and methodologies being applied. Moreover, the authority has discretion in how it chooses to effect a "due allowance." As explained by the panel in *EU – Footwear (China),* the only requirement is that it must be "fair."

35. China believes that the provisions of the AD Agreement implicated by the facts of this case fall under Article 2.4. Keystone's failure to properly identify or characterize its freezer storage costs led to the allocation of a majority of those costs to fresh product, thereby reducing constructed normal vale for frozen product. This caused an imbalance in the dumping comparison between constructed normal value and export price given the fact that export price sales were all frozen and therefore incorporated freezer costs. This necessarily affected price comparability. Although these costs might have been accounted for differently in constructed normal value, China sees no basis in either Article 2.2.1.1 or 2.4 for a hierarchy in terms of where such costs should be accounted or adjusted. The discretion must be left to the authority. Having performed its cost allocation, MOFCOM was well within its discretion to make due allowance under Article 2.4 with respect to these costs.

36. In addition, while the obligation to ensure a "fair comparison" lies on the investigating authority, including the responsibility to "indicate to the parties in question what information is necessary to ensure a fair comparison," respondents also have an obligation to be forthright and clear in providing such information. The role of respondents cannot be passive. For example, the panel hearing *EU – Footwear (China)* concluded that interested parties must "make substantiated requests for 'due allowance', whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability." It follows that respondents are equally obligated to substantiate when allowances are not required. Thus, they have an obligation to report expenses correctly and to characterize them correctly where asked. MOFCOM asked precise and detailed questions in both the normal value section and the export prices section of its questionnaire requiring the respondent to report the expenses (including freezer fees) in a way to adjust the differences that affect price comparability. Keystone unreasonably and perhaps intentionally shaded the facts.

37. As far as how MOFCOM allocated freezer storage costs upon rejecting Keystone's reported costs and resorting to constructed NV, China reiterates that before any re-allocation by MOFCOM Keystone had previously allocated freezer fees to products without classifying or distinguishing between frozen products and non-frozen products. Thus, MOFCOM had no basis to understand the nature of those specific costs. MOFCOM allocated Keystone's reported total costs, including the reported "other expenses," on a weight-averaged basis across all production. Thus, constructed NV included a weight-averaged proportion of those costs. The practical effect of this allocation, unknown to MOFCOM at the time given how Keystone reported and characterized costs, was that constructed NV for frozen product models was artificially low given that a much larger proportion of domestic sales were of fresh, not frozen product, but freezer costs were allocated over all production on a weight-averaged basis.

38. MOFCOM made an EP adjustment to account for this imbalance rather than any modification to constructed NV in light of Keystone's failure to properly report these costs with respect to export price. Although other adjustments might have been made in pursuit of the same fair comparison under Article 2.4, the text of Article 2.4 leaves the form of the adjustment to the discretion of the investigating authority. Article 2.4 only states that in conducting the comparison between NV and EP "due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Given the distortion with respect to how freezer costs were allocated, there was a clear issue of price comparability for which due allowance was necessary.

C. MOFCOM's Determination Of The AD "All Others" Rate

39. The petition in the underlying investigation identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. In addition, MOFCOM received an entry of appearance from the U.S. association representing poultry exporters, that itself is comprised of about 200 member companies and organizations. Given the large number of interested parties, MOFCOM exercised the discretion afforded under Article 6.10 of the AD Agreement to limit its examination of producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

40. In its public notification of the initiation of an investigation, MOFCOM made it clear that all exporters/producers should register with the Ministry, were subject to individual investigation, and were subject to an antidumping rate based on facts available if they did not register and or fully participate in the investigation. The United States acknowledges that the initiation notice was provided to the United States and the six known producers/exporters of broiler products, as well as the fact that a request was made to the U.S Embassy to notify any other producers or exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 6.1 of the AD Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. The notice also clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

41. In its preliminary and final determinations, MOFCOM followed the rule in Article 9.4 with respect to known exporters or producers not included in the examination and assigned to those interested parties the weighted average margin of dumping established with respect to the selected exporters or producers. With respect to unknown exporters or producers, MOFCOM applied a facts available rate as provided under Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Specifically, in assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation.

42. In its preliminary and final results, MOFCOM stated that it would apply facts available. The basis for applying facts available was the lack of cooperation reflected in the failure of unknown parties to make an entry of appearance or provide a questionnaire response. MOFCOM noted that it relied on facts available, including the best information available, to determine normal value and export price. This information was not disclosed because if came from confidential sources, but consisted of the highest calculated normal value and the lowest recorded export price.

43. China believes its disclosure complied with the requirements of Articles 6.9 of the AD Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary AD and CVD determinations. This disclosure, well in advance of the final determination, was in "sufficient time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Articles 6.9 and 12.8 do not require this degree of disclosure.

44. The context provided by Article 6.5.1 of the Anti-Dumping Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 6.5.1applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the

authority, and thus have limited contextual relevance for what the authority must do under Article 6.9 of the AD Agreement.

D. MOFCOM's Obligations Under Article 1 Of The AD Agreement

45. The United States has also raised a claim under Article 1 of the AD Agreement, which provides that "{a}n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

III. MOFCOM'S CVD DETERMINATIONS

A. MOFCOM's Determination of the CVD "All Others" Rate

46. The facts surrounding the "all others" rate issued in the preliminary and final determinations of the CVD proceeding are virtually the same as those presented with respect to the AD "all others" rate. The petition identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. MOFCOM also received the entry of the U.S. trade association, USAPEEC. As in the AD case, MOFCOM exercised its discretion and limited its examination of interested parties or producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

47. As acknowledged by the United States, the initiation notice was provided to the United States and the six known producers/exporters of broiler products, and a request was made of the U.S. Embassy to notify all other known producers and exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 22.2 of the SCM Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. Again, the notice clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

48. With respect to unknown exporters or producers, MOFCOM applied a rate consistent with Article 12.7 of the SCM Agreement and in line with the considerations reflected under Annex II of the AD Agreement. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation and applied an "all others" rate based on "facts available" as provided under Article 12.7 of the SCM Agreement and paragraph 7 of Annex II of the AD Agreement.

49. The "all others" rate included one subsidy program – the upstream subsidy (feed) program. MOFCOM calculated the *ad valorem* rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount.

50. China believes its disclosure complied with the requirements of Article 12.8 of the SCM Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary CVD determination. This disclosure, well in advance of the final determination, was in "sufficient

time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Article 12.8 does not require this degree of disclosure.

51. The context provided by Article 12.4.1 of the SCM Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 12.4.1 applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the authority, and thus have limited contextual relevance for what the authority must do under Article 12.8 of the SCM Agreement.

B. MOFCOM's Subsidy Allocation With Respect To Feed Subsidies Was Proper

52. In its first written submission, the United States claims that MOFCOM breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by misallocating the subsidy found to exist. At the outset, China does not dispute that an investigating authority has an obligation under GATT 1994 and the SCM Agreement to align the numerator and denominator in calculating the appropriate subsidy margin. China agrees that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 set forth a fundamental rule to this effect, as elaborated by the Appellate Body and various dispute settlement panels.

53. At the same time, China does dispute the United States' simplistic rendition of the facts in the underlying proceeding. In this case, MOFCOM needed to calculate the indirect benefit to the respondents from upstream subsides conferred on corn and soybeans purchased and consumed by the respondents in the production of subject merchandise. Over a series of questions posed in the original and a series of supplemental questionnaires issued to Tyson and Pilgrim's, MOFCOM sought to collect the information necessary to engage in an appropriate calculation. Based on the responses, MOFCOM was able to make a determination on the quantity of purchased corn and soybean meal consumed in the production of the subject merchandise.

54. The United States, for its part, erroneously suggests that the entire matter may be reduced to a single question posed in MOCFOM's second supplemental questionnaire focused on total purchases of corn, soybeans, and soybean meal. In so doing, the United States ignores MOFCOM's more direct efforts to receive information from Tyson and Pilgrim's focused on purchased feed consumption related to the production of subject merchandise, and the responses received in turn. Based on the totality of the responses received, as well as the deficiencies therein, MOFCOM applied the information that respondents themselves attributed to the production of subject merchandise.

55. Specifically, the subsidy per unit of the subject products was calculated on the basis of feed purchased and consumed in the production of subject merchandise during the POI. Given likely inventory effects, MOFCOM understood that there could be differences in terms of the amount purchased and the amount consumed over the same period. Thus, as between reported purchases and consumption, it would use the lesser of the two figures. This was the basic data upon which MOFCOM would rely in its calculation. To confirm all data, MOFCOM sought detailed information on the production cost of feed, live broilers, and subject merchandise, as well as consumption of feed in the production of subject merchandise. Through this detailed information, MOFCOM could more confidently trace feed purchased and consumed in the production of subject merchandise during the POI to confirm that data was reported correctly.

56. MOFCOM ultimately received the basic information necessary to calculate the subsidy benefit in response to questions posed in the second supplemental questionnaire on purchases of feed consumed in the production of subject merchandise during the POI. In terms of other data MOFCOM requested and might have used to track and scrutinize the consumption data to ensure it had captured all actual consumption, that data was never fully provided, but did not prevent the

ability to calculate a margin. MOFCOM did not require or obtain information from elsewhere to perform the respondents' subsidy calculation. It used the information held out by the respondents as their total consumption of feed in the production of the subject merchandise during the period of investigation.

57. Based on an examination of reported purchases and consumption, MOFCOM used the feed consumption data reported in response to question I.4 of the second supplemental questionnaire for Tyson and question I.6 of the second supplemental questionnaire with respect to Pilgrim's, both of which also matched the reported purchase data. The denominator used was the sales quantity of subject merchandise. MOFCOM did consider the alternative provided by the respondents. Neither Tyson or Pilgrim provided any information to correct or clarify its submission of data on feed consumption in the production of subject merchandise, therefore, after considering the alternative provided by U.S. respondents, MOFCOM had to rely on the data used in its calculation.

58. After its preliminary results, MOFCOM received arguments by both respondents. In both instances Tyson and Pilgrim's argued that MOFCOM had over-allocated feed subsidies to subject merchandise and sought to clarify that the feed information provided encompassed more than subject merchandise. In none of these arguments, however, did either respondent actually provide a basis for MOFCOM to discard the feed information used in the calculation.

59. In terms of MOFCOM's disclosure, the disclosure documents identify both the unsubsidized benchmark price for feed materials and the subsidized purchase prices reported by the respondents for the same materials. The difference in the unsubsidized and subsidized prices was then multiplied against a total quantity of corn and a total quantity of soybean meal. These data on corn and soybean meal would reveal where in the questionnaire responses that MOFCOM derived the information, and namely from the reported purchases and consumption data of the respondents from the second supplemental questionnaire. In terms of the denominator – total sales quantity of subject merchandise – this figure was also disclosed and could also be traced by the respondents to data reported to MOFCOM in their questionnaire responses.

C. China's Obligations Under Article 10 of the SCM Agreement

60. The United States has raised several claims under the SCM Agreement that China has addressed in succession. To the extent China has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

IV. MOFCOM'S INJURY DETERMINATION

61. The starting point for the Panel's analysis in this dispute is a situation where: (1) increasing volumes of subject imports that gained market share and had adverse volume effects on the domestic industry, (2) a domestic industry that suffered consistent operating losses that built up over the period and worsened at the end of period, and (3) no other explanations for these operating losses and severe declines in 2009 have been presented. These circumstances are unchallenged by the United States, which casts doubt on whether it has established a *prima facie* case.

A. MOFCOM Properly Defined the Domestic Industry As Required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement

62. The description by the United States of the process whereby MOFCOM determined the domestic industry seriously distorts what actually happened. MOFCOM fully complied with China's obligations under the WTO. MOFCOM's investigations were not biased, and simply reflected the realities of a highly fragmented industry for which there was no complete list of producers. MOFCOM did not exclude any cooperating producers from its investigations. To the contrary, MOFCOM's investigations included enough of the larger domestic producers to qualify as a "major proportion," and thus objectively examined the domestic industry in full compliance with the obligations under the WTO.

63. First, MOFCOM published its notice of investigation on 27 September 2009, inviting all interested parties to participate in the investigation and register with the authorities. That notice referenced "interested parties," but also made clear that the data being collected would include production – a clear reference to "domestic producers." Thus, all parties were on notice about the conduct of this case.

64. Second, MOFCOM distributed domestic producer questionnaires to every known Chinese producer of broiler chicken products. This case did not involve a few domestic producers that collectively represented only a small portion of the total domestic production of broiler products. Rather, the petition on its face identified those larger producers that collectively produced more than 50 percent of the estimated total production in China. By sending questionnaires to the "known producers," MOFCOM was thus sending questionnaires to those Chinese producers that alone represented the major proportion of the domestic industry.

65. Third, even though MOFCOM already had identified a group of domestic producers that represented more than 50 percent of total production, MOFCOM took the additional step of placing the domestic producer questionnaire on the MOFCOM web site, again inviting any interested parties who produced broiler chicken during the period of investigation to complete the questionnaire. By doing so, MOFCOM was reasonably trying to improve an already substantial coverage of the domestic producers.

66. This process resulted in MOFCOM receiving questionnaire responses from 17 domestic producers. The total domestic producer responses thus included both members of the petitioning association and non-members of that association.

67. Under the circumstances of this investigation, MOFCOM took reasonable steps to conduct its investigation. MOFCOM started with a group of domestic producers that produced enough subject merchandise to qualify as a major proportion of the total industry. And MOFCOM then took additional steps that sought to improve the coverage. Although the efforts to expand the coverage were not as successful as MOFCOM might have hoped, MOFCOM made reasonable good faith efforts to obtain the additional data.

68. MOFCOM also had a basis in positive evidence for finding the 17 responses from domestic producers represented a major proportion of the domestic industry. Neutral and reliable estimates of total domestic production were included in the petition, as were official customs statistics on both imports into China and exports from China. MOFCOM thus had positive evidence to determine reliable estimates of both the total production in China, total apparent consumption in China, and the shares of those represented by the 17 responses.

69. Although the estimates of total domestic production were themselves neutral and reliable, MOFCOM was able to further assess and confirm the reliability of these estimates in two ways. First, MOFCOM officials reviewed worksheets during the verification, confirmed the reasonableness of the estimation and confirmed the reasonableness of the assumptions under in those worksheets. Second, this same estimation methodology has been used in other contexts for other purposes.

70. Thus, the United States is incorrect when it says MOFCOM defined the industry as only those companies supporting the petitions. That is not what MOFCOM did. MOFCOM made reasonable efforts to obtain as many questionnaire responses as it could, both contacting all known producers and using public postings on its website in an attempt to reach others. MOFCOM eventually obtained 17 timely and usable responses over the course of the entire proceeding. It so happens that all 17 of those responding domestic producers supported the petitions. But this situation is very different than limiting the investigation to only those companies that supported the petitions. MOFCOM in no way limited the companies participating in its investigation.

71. MOFCOM also contacted the Ministry of Agriculture, which collects statistical data on the number of farms, but does not have any information on specific producers. In addition, the Ministry of Agriculture collects data on all chickens, both white feather broiler chickens (subject merchandise) and yellow feather chickens (non-subject merchandise).

72. The United States identifies two separate legal theories to argue that MOFCOM acted inconsistently with its WTO obligations. But in both instances, the United States has mischaracterized the underlying facts at issue, misstated the relevant legal obligations as they applied in this case, and misread the guidance provided by the Appellate Body in *EC-Fasteners*.

73. The first U.S. argument focuses on one key phrase in Article 3.1 and 15.1 – the need for authorities to conduct an "objective examination." The United States has not presented any arguments about the lack of "positive evidence." The United States argues that because the process of determining the domestic industry was biased, the determination itself was not an "objective examination" of this key issue. This U.S. argument is incorrect in several respects.

74. First, the United States is factually mistaken in that the MOFCOM process was not biased. MOFCOM undertook a reasonable and unbiased process to identify and collect information from enough domestic producers to represent a "major proportion" of the domestic industry as a whole. Second, the United States is also factually mistaken in saying the Chinese industry is not fragmented. The Chinese industry includes millions of domestic producers. Third, the United States has misread the guidance in *EC – Fasteners (AB)*. That guidance in fact demonstrates why MOFCOM's determination in this case complied with the "objective examination" requirement of Articles 3.1 and 15.1.

75. "Objective examination" under Articles 3.1 and 15.1 do not require an impractical quest for perfection. Rather, "objective examination" – particularly in an area such as deciding how much investigation is enough in the context of defining a highly fragmented domestic industry – allows flexibility. MOFCOM properly defined the domestic industry as including those producers who represented more than 50 percent of the total industry and thus satisfied the "major proportion" test.

76. This interpretation reflects the guidance about the meaning of Article 4.1 provided by the Appellate Body in *EC – Fasteners*. The Appellate Body offered what is essentially a sliding scale test: the more substantial the percentage of the total domestic industry covered, the less concerned the investigating authorities need to be about obtaining further responses. Under this sliding scale logic, the converse is equally true. The higher the proportion covered, the less sensitive the authority needs to be to obtaining further responses. When the authority already has responses representing a high proportion of the total domestic industry, that response already, in the words of the Appellate Body, appropriately "reflects the total production of the producers as a whole."

77. Beyond the high proportion in this case, there are other facts that also limit any possible obligation on MOFCOM to have done anything more. First, this industry is highly fragmented, and the Appellate Body has specifically recognized that in such highly fragmented industries, the "major proportion" test in Article 4.1 "provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible."

78. Second, respondents provided MOFCOM with only limited information on additional domestic producers that should be contacted that were not already known. The names of the four allegedly unknown Chinese producers provided in the U.S. FWS were in fact the names of companies that either were already known and contacted, or knew about the case and decided not to cooperate by providing responses.

79. Third, MOFCOM in fact had no other names of domestic producers to contact or questionnaire responses to use in the analysis, other than companies that had already responded or decided not to respond. This fact is critical. This case does not involve the "active exclusion of certain domestic producers" that makes an Article 4.1 determination "more susceptible" to a WTO inconsistency, and that the Appellate Body criticized in *EC - Fasteners*.

80. Fourth, since MOFCOM had questionnaire responses from all the larger producers, additional questionnaire responses from smaller producers would not materially affect the analysis. Estimates based on record evidence demonstrate that additional producers would likely have represented much less than 1 percent of total domestic production.

81. The second U.S. argument presents a more limited, but equally erroneous argument under Articles 4.1 and 16.1. The U.S. argument fundamentally misreads the obligation of these provisions. First, the United States ignores the fact that Articles 4.1 and 16.1 set forth two distinct tests that the United States tried to blurs into one test. Under Articles 4.1 and 16.1, the authorities may choose to define the domestic industry as "the domestic producers as a whole." Alternatively, the authorities can define the domestic industry as including only those domestic producers whose "collective output constitutes a major proportion of the total domestic production."

82. Second, the United States conveniently overlooks the extent to which the phrase "major proportion" leaves the authorities with considerable discretion. This provision does not specify any numerical threshold, unlike the provisions on standing that set forth specific rules based on 25 percent and 50 percent of total domestic production. When addressing this issue, the Appellate Body noted only that this phrase should be understood as "a relatively high proportion of the total domestic production." Nothing in the Appellate Body decision in *EC – Fasteners (AB)* imposes any different obligations.

83. Contrary to the U.S. argument, MOFCOM did not intentionally exclude any domestic producers from its investigation. The United States apparently misses the importance of a key phrase that it cites from *EC – Fasteners (AB)*, that the authorities in that case had "excluded producers that provided relevant information." It is true that authorities have only limited discretion actually to collect information, but then to ignore it. In the anti-dumping investigation at issue in *EC Fasteners*, the investigating authorities actually had contact information for 318 known producers, but ultimately based their determination on only 45 of those 318 known producers. That situation is totally different from the present case, where MOFCOM used the available data for all known Chinese producers.

84. The U.S. argument is essentially that if MOFCOM could have theoretically done more, it had an obligation to do more. The proper application of the "major proportion" test under Articles 4.1 and 16.1 does not require the authorities to include data from unknown domestic producers, particularly not when the authority has collected and analyzed data from known producers accounting for more than 50 percent of total domestic production.

B. MOFCOM Properly Found Adverse Price Effects As Required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

85. Although the United States challenges the MOFCOM findings of adverse price effects on both substantive and procedural grounds, both lines of attack fail. MOFCOM reasonably exercised its discretion as the administering authority to gather facts, consider those facts, and analyze them in its discussion of adverse price effects. The WTO Agreements do not require countries to follow any single approach or use any specific methodology. Rather, the relevant international obligations reflect very specific rules that respect the discretion of national authorities to conduct investigations in ways that are appropriate to each country, and in ways that are appropriate to each specific case.

1. MOFCOM reasonably found multiple adverse price effects in these cases

86. MOFCOM collected positive evidence to serve as the basis for its consideration of adverse price effects within the meaning of Articles 3.2 and 15.2. MOFCOM collected data on the average prices earned by domestic producers for their sales of all broiler chicken products. The questionnaires to the domestic producers asked for the overall sales quantity and sales value, from which MOFCOM could determine an overall average unit value ("AUV") for each relevant period of time. MOFCOM also collected similar data on the average prices earned by U.S. exporters for their overall sales of broiler products in China, as reflected in official Chinese customs statistics. Here as well, MOFCOM was able to use sales quantities and sales values to determine overall AUVs for the relevant periods. MOFCOM then used these data to assess trends and to compare the relative price levels of domestically produced broiler products as a whole and imports of broiler products from the United States as whole.

87. MOFCOM objectively examined that positive evidence. MOFCOM's Final Determinations confirm that MOFOM considered and discussed each of the three specific types of adverse price

effects set forth in Articles 3.2 and 15.2. Ultimately, MOFCOM focused on the price undercutting and price suppression in its discussion of adverse price effects. Although Articles 3.2 and 15.2 make clear that authorities may consider as many or as few of these enumerated price effects as may be appropriate in a particular case, MOFCOM considered all three categories before focusing its discussion on the two adverse price effects that were the most pronounced in these cases. Doing so was completely consistent with the discretion afforded authorities under Articles 3.2 and 15.2.

88. MOFCOM objectively evaluated the evidence using a methodology that focused on broader trends for the subject merchandise overall. Although there may be other methodologies that authorities could use, MOFCOM's methodology was consistent with the discretion afforded to authorities by the texts of Articles 3.2 and 15.2.

2. MOFCOM properly found price undercutting within the meaning of Articles 3.2 and 15.2 specifically and Articles 3.1 and 15.1 more generally

89. At the outset, China notes that Articles 3.2 and 15.2 do not specify any particular methodology for analyzing price undercutting. Authorities thus have broad discretion in choosing a methodology, provided that methodology represents an "objective examination" of the "positive evidence" before the authorities.

90. That is precisely what MOFCOM did in these injury investigations. The United States attacks MOFCOM's alleged failure to take into account different levels of trade. But MOFCOM did consider this issue. This issue was raised by the U.S. respondents, and addressed by the respondents, by the domestic producers, and by MOFCOM in its determinations. MOFCOM both summarized the comments by the parties and then addressed those comments.

91. The U.S. argument presupposes an automatic obligation to consider resale prices charged by importers rather than purchase prices paid by importers, as reflected in the official import statistics. Such an obligation simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. MOFCOM's use of landed prices in China allowed the authority to compare domestic prices and import prices on a comparable basis, without the more difficult – and in these particular investigations, impossible -- administrative burden of determining comparable prices at a later stage in the distribution chain. China notes that even the U.S. exporters reported uncertainty about who actually served as importers of their product into China. The existence of other theoretically possible reasonable methods does not render MOFCOM's practically realistic method to be unreasonable or otherwise not "objective."

92. The core legal issue is whether there is any obligation on MOFCOM (or any authority) to use only an average resale price from an importer, rather than an average sale price to an importer. The resale price from the importer could be higher, lower, or the same. Costs could be passed along in the resale price, or they could be absorbed by the importer to make the sale. The importer might earn of a profit or a loss on the resale. Thus in the abstract, the resale price could be higher or lower. Nor has the United States pointed to any record evidence suggesting a material difference in the levels of trade. MOFCOM's method is neutral – and an "objective examination" – to consider either the average price to the importer or the average price from the importer. Absent some evidence before the authority suggesting a distortion of some sort, either approach would be permissible under Articles 3 and 15.

93. Indeed, this dispute shows that resale prices can be lower. As discussed during the first meeting with the Panel, a survey conducted by the U.S. Department of Agriculture suggests that during 2008 the vast majority of importers in China were reselling imported broiler chicken at 20-30 percent losses. The United States argument assumes that importer resale prices must always be higher. This assumption is just wrong. It is not necessarily true. Moreover, during the investigation, the U.S. respondents provided no evidence suggesting it was true. Indeed, in light of the U.S. Department of Agriculture report, it now seems likely that no such evidence was provided to MOFCOM because in fact importers were selling at significant losses during the critical period 2008. There is no record evidence contradicting this public statement that importers were reselling at a loss. No importers responded to the importer questionnaires.

94. The United States also attacks MOFCOM's alleged failure to take into account differences in product mix. But MOFCOM also considered this issue. The U.S. argument presupposes an obligation to consider specific product segments, rather than the product as a whole, another obligation that simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. Authorities have discretion on such issues. Both overall averages and more specific averages are both reasonable alternatives, absent some evidence in a particular investigation indicating a material distortion. In these investigations, the U.S. respondents presented only general arguments, not specific evidence of material distortions. Indeed, the data presented by the United States before this Panel – when viewed in its entirely – demonstrates the error of the U.S. argument. By using broader averages rather than more narrow product categories, MOFCOM in fact understated the degree of price undercutting in these investigations.

95. The U.S. respondent argument was inherently flawed. This argument proceeds from a false premise that chicken breast prices were higher. The record evidence before MOFCOM – in the form of numerous domestic producer invoices, including 21 individual invoices with both chicken breast and chicken paw transactions – demonstrates that chicken breast prices were lower, not higher, than chicken paw prices. So the U.S. respondent premise of the methodology overstating the magnitude of underselling is backwards; the methodology actually understates the magnitude of underselling. Such an approach does not violate any obligation of "objective examination," since the MOFCOM methodology based on the facts of this case was in fact conservative.

96. Beyond mischaracterizing the issues of level of trade and product mix, the United States also ignored the issue of "likeness" among the various types of subject merchandise. It would not be an "objective examination" to compare the prices of different like products, but it would be "objective" to compare products that are part of the same like product. In cases where the administering authority has defined a single like product, and that finding of a single like product has not been challenged before the Panel, there is nothing in the "objective examination" requirement that forces authorities to conduct a price comparison based on product segments within the single like product. Comparisons in a particular case may or may not be objective, depending on the facts of each case.

97. Perhaps recognizing the limited scope of the obligations under Articles 3.2 and 15.2, the United States also presents a more sweeping argument under Articles 3.1 and 15.1. The United States accuses MOFCOM of "failure to control for such obvious differences." Yet, this argument rests on two fundamental errors.

98. First, this argument assumes these differences are "obvious" when they are not at all obvious, and were not demonstrated to the satisfaction of the authorities during the proceedings below. The respondents before MOFCOM and the United States before this Panel assume that the price paid by the importer is necessarily and always at a different level of trade than the price offered by domestic producers. But that is not necessarily the case at all. These investigations illustrate just how murky that issue can be in a particular case. The respondents before MOFCOM and the United States before this Panel also assume that the higher portion of chicken paws in U.S. exports to China distorted the average import price downward. But that is not only not necessarily true, but in fact is false in these investigations. In the Chinese market, chicken paws are a premium item with a higher price, and thus the higher proportion of chicken paws actually distorted the average import price upward, not downward. The more basic point is that the differences alleged by the United States are hardly obvious; they depend on specific facts in specific cases.

99. Second, this argument also incorrectly assumes that more detail always trumps less detail, and that such less detail is thus inherently not "objective." The United States is trying to use Articles 3.1 and 15.1 to impose its own vision of investigative methodologies on MOFCOM. The United States may prefer to conduct pricing analysis based on resale prices by importers, but that does not mean that all countries must use this method. The landed price in a country – as reflected in official import statistics – is another reasonable method that MOFCOM could reasonably and "objectively" decide to use in a specific case. Similarly, the United States may prefer to conduct pricing analysis on specific products, but that does not mean all countries must use this method, and that using an overall average is inherently wrong. The use of average prices is another reasonable method – and one that in this case conservatively understated the margins of underselling.

100. On both of these issues, the United States has failed to meet it burden of establishing a *prima facie* case that MOFCOM's methodologies as applied in these specific investigations were inconsistent with China's WTO obligations. The specific facts of these cases – as discussed in more detail below – fully support the WTO consistency of the choices MOFCOM made in these investigations.

3. MOFCOM's finding of price suppression would alone be sufficient to comply with the obligations under Article 3.2 and 15.2

101. The United States argues that MOFCOM's finding of price suppression "is predicated entirely on its defective finding of significant underselling," and therefore must fail. But this argument is incorrect both legally and factually in several respects.

102. As a legal matter, the United States is trying to read into Articles 3.2 and 15.2 obligations that do not exist in those provisions. The U.S. argument makes two key legal errors. First, the U.S. argument ignores the textual elements of Articles 3.2 and 15.2 that make explicit that price suppression is an alternative to price undercutting. In particular the term "otherwise" separates price undercutting on the one hand and price depression and price suppression on the other hand. Similarly, the disjunctive term "or" separates price depression and price suppression. The text thus makes explicit that these three analytic techniques are each distinct ways for the authority to find adverse price effects. Any one of them alone can be sufficient. In particular, the text expressly sets out price suppression as an adverse price effect that may exist even if price undercutting has not been found.

103. Second, Articles 3.2 and 15.2 require only a showing of the existence of adverse price effects. The United States is simply wrong to argue that these provisions also require a showing that subject imports caused or affected the price suppression. Rather, price suppression is the effect that an authority observes in the domestic industry. Any obligation to find such a causal nexus is found elsewhere in Articles 3 and 15, not in Articles 3.2 and 15.2.

104. As a factual matter, MOFCOM's finding of price suppression was not dependent on the existence of underselling. Price suppression is a distinct finding that has nothing to do with the relative prices of subject imports and domestic prices. Rather, price suppression – as found by MOFCOM in these investigations – generally reflects a comparison of domestic prices and domestic costs over time. There may well be other ways for authorities to discern price suppression, but this comparison of changing prices to changing costs is the most commonly used analytic technique. Domestic prices in this case were able to increase over the period, but were not able to increase enough to cover rising costs. Thus, domestic price increases to cover rising costs that would otherwise have been expected did not occur, the profit margins eroded, and the consequence was price suppression. None of this depends on any findings of price undercutting.

105. Thus, regardless of the relative price levels of domestic and imported broiler parts, the domestic prices were suppressed by the volume and market share effects of the subject imports. Subject imports were increasing their volume and market share, which triggered the domestic firm response to avoid further loss of volume. The price suppression can rest exclusively on the adverse volume effects of the subject imports, and MOFCOM expressly set price suppression as an independent and additional adverse price effect.

4. MOFCOM properly disclosed sufficient factual information about its findings of adverse price effects as required by Articles 6 and 12 of the AD Agreement and Articles 12 and 22 of the SCM Agreement

106. The United States incorrectly asserts that MOFCOM acknowledged the need for some adjustment to account for different levels of trade. This claim is not true. MOFCOM's Final Determinations discussed the need to adjust for the customs duties imposed on different types of broiler chicken products imported from the United States, to create a comparable landed, duty-paid basis for price comparisons, not any other adjustment.

107. This U.S. procedural argument thus rests on a cascading set of false assumptions. The United States assumes that MOFCOM made an adjustment for level of trade that MOFCOM did not make. The United States then assumes that the MOFCOM price effects discussion rests on the

finding or price undercutting, when in fact MOFCOM had two legally independent bases for its price effects discussion. MOFCOM in fact complied with all its procedural obligations.

C. China Properly Analyzed Impact As Required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

108. The United States has seriously mischaracterized the MOFCOM determinations about material injury. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. Yet it is the United States that ignores the totality of the evidence before MOFCOM, and selectivity picks time periods to create the illusion of a domestic industry doing acceptably, when the domestic industry in fact was suffering material injury.

109. Regarding the overall argument about adverse impact, the United States makes three analytic errors. First, the United States comments only about the period 2006-2008 and says nothing at all about the sharp declines in virtually every indicator during the first half of 2009. MOFCOM discussed sixteen different economic indicators, and for each of those indicators discussed the same consistent periods of time: full years 2006, 2007, and 2008, and the change in the first half of 2009 relative to the same period during 2008.

110. Second, the United States also says nothing about the MOFCOM discussion of likely continuing U.S. exports to China. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. The United States has completely ignored this factor.

111. Third, the United States focuses on volume indicators, and ignored the weak financial indicators over the entire period. A domestic industry with net operating losses every year of the investigative period is an industry suffering material injury. The United States cannot make these financial losses go away by ignoring them. When discussing both gross profits and net profits, MOFCOM added additional discussion of 2007, putting in context the modest improvement in 2007 that contrasted with the overall performance over the period and underscored the decline in financial performance in 2008.

112. The U.S. argument about two specific injury indicators fares no better. Although Articles 3.4 and 15.4 list numerous factors to be considered, the United States raises claims about only two. MOFCOM's Final Determinations included "an evaluation of" these two factors, and thus complied with the relevant obligation. That the United States disagrees with how MOFCOM evaluated these two specific factors does not mean the MOFCOM evaluation of all the various factors was not an "objective examination." To the contrary, MOFCOM reasonably evaluated both factors and addressed U.S. arguments about these factors, and all the other factors in its Final Determinations.

D. MOFCOM Properly Demonstrated The Causal Link Required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

113. At the outset, it is important to note the specific parameters of the challenge being raised by the United States relating to causation. The United States – in its request for consultations, its request for a panel, and in its first written submission -- has focused its challenge solely on the issue of causal link as specified in the first and second sentences. In other words, the United States has not included any claims about other causes, or about MOFCOM's approach to considering other causes and thus ensuring non-attribution as required by the third sentence of Articles 3.5 and 15.5.

114. Thus, the issue before this Panel is simply whether MOFCOM properly established the "causal relationship" between subject imports and the injury to the Chinese domestic industry required by the first and second sentences of Articles 3.5 and 15.5. The Appellate Body has repeatedly made clear that a causation requirement in the context of a trade remedy proceeding requires only that the imports under investigation have contributed in some meaningful way to the injury being suffered by the domestic industry. The Appellate Body in *US – Wheat Gluten* interpreted the word "cause" and the term "causal link" to reflect a relationship in which increased imports "contribute to 'bringing about', 'producing' or 'inducing' the serious injury." The Appellate Body was careful to

clarify that the authority need not show that the subject imports were the only cause, or the major cause, of the injury. Rather, the authority need only show that the imports contribute in some manner, *"even though other factors are also contributing, 'at the same time', to the situation of the domestic industry."* Although the Appellate Body has not directly addressed the degree of "contribution" necessary, in *U.S. – Tyres (China)* it equated "significant cause" to "important contribution." The Appellate Body explained that "significant cause" amounted to more than a mere contribution, implying that the use of "cause" alone equals little more than the imports merely contributing to the serious injury.

115. Indeed, the United States has agreed with this interpretation of the scope of Articles 3.5 and 15.5. In its talking points presented to MOFCOM during this proceeding, the United States argued that MOFCOM did not show a "meaningful contribution" by subject imports. In making this argument, the United States acknowledges that subject imports need not be the only cause, the most important cause, or even an important or significant cause. Rather, subject imports need only be making some meaningful contribution to the material injury being suffered.

116. Thus, the burden on the United States in making a *prima facie* claim under Articles 3.5 and 15.5 is to demonstrate that MOFCOM failed to show that subject imports were making a meaningful contribution to the material injury. On the other hand, China can defeat the U.S. claim simply by showing that MOFCOM reasonably found that subject imports were contributing in some way to the material injury. Subject imports need not be a "significant cause, " a phrase used in other WTO contexts. Rather, subject imports need only be a "cause," and may be one of many causes and still be sufficient to satisfy Articles 3.5 and 15.5.

117. The United States tries to meet this *prima facie* burden with three arguments, but they all fail. First, MOFCOM did not ignore evidence about market share. Rather, it is the United States that tries to ignore market share gain by U.S. subject imports at the expense of the Chinese industry as a whole. The United States ignores the fact that subject imports from the United States gained much more market share than non-subject imports from other countries lost.

118. Second, MOFCOM did not rely on price undercutting analysis as the sole basis for its discussion of adverse price effects. Rather, MOFCOM reasonably relied on both proper price undercutting analysis and proper price suppression analysis as legally independent bases for adverse price effects. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

119. Third, MOFCOM did not fail to reconcile its causation analysis with trends over the period. Rather, it is the U.S. argument that tries to ignore and downplay the sharp declines in the first half of 2009 and the dismal financial performance over the entire period of investigation. The existence of some positive trends does not negative the conclusions MOFCOM drew from weak and deteriorating financial performance over the period.

120. MOFCOM thus properly established the "causal relationship" required by Articles 3.5 and 15.5. Since the United States does not otherwise make any distinct arguments under Articles 3.1 and 15.1, the failure of the U.S. arguments under Articles 3.5 and 15.5 means that MOFCOM has fully complied with its WTO obligations regarding causal link.

Second Integrated Executive Summary by China

I. PROCEDURAL ISSUES

A. MOFCOM's Decision To Not Hold A Public Hearing Did Not Violate Article 6.2 Of The AD Agreement

1. The United States has not articulated any legitimate basis for finding MOFCOM's decision to not hold a hearing, public or closed, inconsistent with Article 6.2 of the AD Agreement. The language of Article 6.2 is straightforward and the facts as presented are equally straightforward. Article 6.2 does not include the term "public hearing," and otherwise imposes no obligation on authorities to provide a public hearing or compel parties with adverse interests to meet. Rather, Article 6.2 simply obligates authorities, on request, to "provide opportunities for all interested parties *to meet* those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered" (emphasis added). The text makes clear that an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests is one of facilitator -- to promote the conditions under which such a meeting could occur. This interpretation is consistent with the plain meaning of the phrase "provide opportunities" as used in Article 6.2.

2. In the underlying investigation MOFCOM did not reject a U.S. request to meet with the petitioner. It accepted that request. MOFCOM notified all interested parties it understood to have interests adverse to the U.S. Government and determined that they had no intention to meet the United States at such a hearing. MOFCOM's action constituted efforts to organize the requested meeting and "provide opportunities" for such a meeting, consistent with Article 6.2. Thus, MOFCOM fulfilled its obligation under Article 6.2, and the question of a hearing where parties with adverse interests meet was rendered moot. The U.S. argument is reduced to a nonsensical claim that because a hearing was not held, the United States was somehow constrained in the arguments it could present to MOFCOM. The United States has yet to articulate how its arguments were constrained in the opinion meeting MOFCOM organized for the United States in the absence of a hearing where parties with adverse interests declared they would not be present. It cannot.

B. MOFCOM's Disclosure Of Essential Facts Related To The Dumping Calculation Was Consistent With Article 6.9

3. MOFCOM's dumping margin disclosures fully complied with the obligations of Article 6.9. MOFCOM disclosed all the "essential facts" that "form the basis for the decision" to apply the AD measures, and all the facts that were necessary for respondents to "defend their interests." Specifically, in the underlying proceeding, MOFCOM gave each respondent a particularized disclosure document that explained the MOFCOM calculation and provided the key benchmarks – normal value, CIF price, and net export price – necessary for each respondent to see which products created what dumping margins, and sufficient for each respondent to cross check MOFCOM's calculations with the data that respondent had provided. China understands that there might be certain specific situations where the investigating authority applies data not submitted by the respondents themselves. In such cases, China recognizes that additional disclosure might be necessary to allow respondents to defend their interests. But that is precisely what MOFCOM did in this case, such as with respect to the adjustment of Keystone's freezer fees.

4. The United States argues this is insufficient, insisting that authorities must provide all calculations, data, and computer programs with respect to normal value, export price, and cost of production. The United States fundamentally misreads the text. The disclosure required under Article 6.9 covers only facts, not reasoning, and only "essential facts." Moreover, the facts of this particular dispute show that disclosure of methodologies can meet the obligation to disclose "essential facts" and to allow all the parties "to defend their interests." The U.S. reading of "essential facts" that need to be disclosed effectively defeats the meaning of the word "essential".

5. As a final interpretive point, the United States contends that China has misinterpreted Article 6.9 by conflating the second sentence of that provision with the scope of disclosure required by the first sentence. China disagrees. In terms of the first sentence, the issue is whether an authority has informed interested parties of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States asserts that

such essential facts must include the full panoply of data, analyses, worksheets, and computer programs used by the authority. But if the basis for the decision whether to apply definitive measures may be understood from something less than this extensive disclosure, then it is plainly evident that the more extensive disclosure consists of more than "essential facts." It is otherwise axiomatic that if a more limited disclosure may impart the same understanding, then it is sufficient for the party to defend its interests.

6. Indeed, it is the United States that tries to confuse the issue by essentially arguing that the "essential facts" referred to in Article 6.9 include all facts "under consideration which form the basis for the decision whether to apply definitive measures." This reading is incorrect. Article 6.9 concerns only those "essential facts under consideration." And these facts, of course, are those indispensible to an understanding of the final determination, and therefore indispensible to the defense of a party's interests. MOFCOM's final disclosure met this standard by providing the respondents the means to understand the authority's consideration of whether dumping has occurred and, if so, the magnitude of such dumping, thereby allowing the parties to defend their interests.

7. Nowhere does the United States explain or provide any example of why the specific disclosures made by MOFCOM in this particular case were insufficient. In its questions to the parties, the Panel asked the parties to consider the issue of sales disregarded as not being in the ordinary course. China explained how MOFCOM addressed this issue for each of the three respondents. The United States complained about the lack of a list of specific transactions that had been disregarded, asserting that these below cost sales are "absolutely indispensable" to the calculation of dumping margins. But the key issue is whether the authority provided enough information and explanation for the respondent to have understood was the authority had done with the respondents' information, and how that information was being used to determine the dumping margin. If the respondents felt the need to know the specific sales excluded, the MOFCOM disclosure allowed the respondents to derive that information. The United States has not explained why it could not be done, or how the specific list of excluded sales were either "essential" or necessary to "defend their interests." It may be that the U.S. demand for "data" and "calculations" is probably a WTO consistent approach, but it is not the only WTO consistent approach; it is merely the U.S. approach that the United States now demands that every other Member follow. But the text of Article 6.9 does not mandate one approach over the other, and it would be inappropriate for the Panel to impose one particular method.

C. The United States Has Failed To Demonstrate That The Non-Confidential Summaries Contained In The AD/CVD Petitions Were Inadequate Under Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

8. The United States has advanced two arguments with respect to non-confidential summaries. First, it claims that while Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement have no labelling requirements, the facts of the underlying investigation mandated labelling of the non-confidential summaries contained in the petition. According to the United States, there were no indicia contained in the petition that would allow a party to know that what it was reading was intended as a non-confidential summary. Second, the United States claims that summaries made available (that it was evidently able to identify without the labelling it now demands) represent mere conclusions that "an interested party must summarily accept rather than any summarization of the actual information." Both arguments are without merit.

9. With respect to the question of specific labelling, China agrees, consistent with the findings of the Appellate Body, that Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement are intended to serve due process interests. But the sole standard by which the sufficiency of non-confidential summaries is to be assessed is by reference to whether the summaries "permit a reasonable understanding of the substance of the information submitted in confidence." As far as the purported lack of any indicia that would allow parties to know that they were reading a non-confidential summary, the United States neglects to mention that the document to which it refers is in fact the "non-confidential version" of the confidential petition. The remainder of the U.S. argument is tantamount to encouraging parties to not read the non-confidential version of a petition out of concern they would realize that what they were reading was a non-confidential summary that would permit a reasonable understanding of the substance of the information submitted in confidence.

10. Neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary and that it can readily relate to specific confidential information that has been redacted, but no more than that. More importantly, those due process concerns are not raised here, where there is no question that parties would understand the non-confidential version of the petition as presenting non-confidential summaries in a logical and identifiable format.

11. Regarding the U.S. claim that the non-confidential summaries contained in the petition contained mere conclusions and therefore did not permit a reasonable understanding of the information submitted in confidence, the facts simply do not support this assertion. When one considers the summaries in their totality, it leads to the unavoidable conclusion that the summaries provided did permit a reasonable understanding of the information submitted in confidence, consistent with Article 6.5 of the AD Agreement and Article 12.5.1 of the SCM Agreement. The United States is simply complaining about the form in which they were conveyed. The question of whether non-confidential summaries are adequate is a fact specific inquiry. The inquiry does not begin with the presumption that respondents are universally incapable of discerning the existence of non-confidential summaries absent labelling or summarization in a particular manner. The United States is over reaching, and its arguments are belied by the very cases it cites for support. In particular, China is surprised that the United States would raise *Mexico – Olive Oil*, since it supports China's position.

II. MOFCOM'S ANTIDUMPING DETERMINATION

A. The U.S. Claim About Freezer Costs under Article 2.4

12. The United States incorrectly argues that it is inconsequential that its consultations request made no mention of fair comparison, Article 2.4, or freezer storage costs. Yet, these subjects touch upon both the factual and legal bases of the U.S. claim in its panel request. Raising these matters in the panel request where no such mention was made in a consultations request necessarily expands the dispute. To suggest otherwise would diminish the due process standard governing notice of the scope of a dispute.

13. The Article 2.4 claim is not a derivation of the U.S. consultation inquiry under Article 2.2 and Article 2.2.1.1. Specifically, the United States raised two contentions in its consultations request: First, that MOFCOM acted inconsistently with Articles 2.2 and 2.2.1.1 by *failing to calculate costs on the basis of the records kept by the U.S. producers under investigation*; Second, that MOFCOM acted inconsistently with Articles 2.2.1.1 because it *failed to properly allocate production costs*. There is no legal link to Article 2.4 and no factual link to freezer costs in these claims.

14. The U.S. excuse about discovering the real nature of the freezer cost issue at consultations fails for two important reasons. First, whether a panel request has impermissibly expanded the scope of a dispute is made by exclusive reference to the written request for consultations, not from what is discussed at consultations. Second, the notion that the United States "had a better understanding" of freezer costs as a result of consultations is belied by the record. The United States cannot plead ignorance or confusion about the facts. It is clear from MOFCOM's final AD disclosure that it addressed the freezer cost issue in the context of export price to effect a fair comparison, which is the subject of Article 2.4. U.S. claims that the disclosure was somehow "vague" are without any support and require the U.S. to quote passages from MOFCOM's final disclosure without proper context. There is no basis to relate the facts of MOFCOM's final disclosure on freezer costs to a consultation request concerning Article 2.2.1.1.

15. But should the Panel consider the merits, it should reject the U.S. Article 2.4 claim. The United States ignores the obscured manner in which Keystone reported its freezer costs, a failure that cannot be attributed to MOFCOM, but to Keystone's decision to avoid its obligation to be forthright and accurate in responding to MOFCOM's questions. For example, beyond ambiguous or misleading statements in its questionnaire, Keystone did not specify in Form 6-7 that what it was reporting were freezer storage costs. The item in question only referred to "storage." In Form 6-5, which concerned production costs and expenses, Keystone reported these freezer storage

expenses as "other expenses," and placed nearly all of those "other expenses" under domestic sales. The United States then faults MOFCOM for verifying the Keystone data, a fact that does not bear on whether the freezer cost data were fairly reported. The United States also claims that MOFCOM's further consideration of the record after verification and discovery of the freezer costs issue is nowhere to be found on the record. That is not accurate. In fact, the issue is discussed in detail in Keystone's final disclosure.

16. The freezer cost issue constituted a difference between export price and normal value affecting price comparability for which due allowance was warranted. The United States all but admits as much in its Second Written Submission. The U.S. complaint really centers on how the adjustment was to be effected in light of the circumstances. China submits that the outcome and resulting adjustment to export price must be examined in light of how MOFCOM met its obligation to request specific information on freezer costs and the nature of such costs in relation to export price, how Keystone did not meet its obligations by misleading MOFCOM in the way it reported such costs in it questionnaire responses, and the need for MOFCOM to resolve the issue with the information on the record.

B. MOFCOM's Determination With Respect To Cost Allocation Was Consistent With Article 2.2.1.1

1. U.S. characterizations of the respondents' cost allocation methodologies are erroneous

17. The United States contends that both respondents treated products like paws as joint products in the production process, on the same tier as products like chicken breasts. This approach would make sense given the substantial value the respondents derived from products like paws. But for practical purposes both respondents treated paws as by-products. The United States asserts that China has argued that the distinction between joint products and by-products becomes a dispositive consideration of whether costs are reasonable for purposes of Article 2.2.1.1. China has never made that argument. Rather, China agrees that the issue is whether the respondents' recorded costs are (1) GAAP consistent and (2) reasonably reflect costs associated with the product and sale of the product concerned. Both conditions must be met. But when contradictions exist between how a respondent characterizes its allocation methodology and the methodology actually employed, such as in the case of Tyson, these contradictions contribute to serious doubts about the reasonableness of recorded costs.

18. As illustrated by the United States, Tyson repeatedly claimed to treat paws as joint products, an infinitely reasonable characterization under the circumstances. Any cost accounting text will indicate that joint products are two or more products from a joint production process with relatively significant sales values. The prices commanded for Tyson's paws would imply such a characterization. But having identified paws as a joint product, Tyson's reported *actual* accounting practice went in the opposite direction. Tyson valued paws as waste, assigning the price for offal as the cost of paws (the "offal credit"), offsetting meat costs for boneless product with that value, which is more consistent with how standard accounting texts address by-products.

19. Contrary to suggestions by the United States, the fact that a company labels a product a "joint product" does not mean it actually treats that product like a joint product, as is evident in the case of Tyson. The inconsistencies in Tyson's statements, the reality that paws were higher value products, and Tyson's methodology that ignored paw values were legitimate red flags. They raised serious issues and justified MOFCOM's immediate suspicion and scrutiny, not in terms of whether paws were joint products or by-products, but in terms of whether Tyson's allocated costs reasonably reflected the costs associated with the production and sale of the product concerned.

20. The respondents' approach to accounting for paws and similar products informs the second mischaracterization of the United States concerning the type of allocation methodology applied by the respondents. According to the United States, the respondents applied a "relative value-based allocation." In China's view there was little that was relational or even rational about the allocation. [***] and Tyson assigned paws a waste value disconnected with the market value or its actual realized sales for that product. In summary, the relevant respondents – Tyson and Keystone -- were treating for allocation purposes products like paws contrary to their overall sales experience with these products. These facts provide extremely important context in addressing the remainder of the U.S. arguments, particularly in relation to U.S. claims that China has argued for

market-specific costs when in fact it was the U.S. respondents that pursued this approach and did so in an arbitrary manner.

21. Finally, although the United States wants to leave the impression that Pilgrim's Pride submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data later provided by Pilgrim's Pride after the disclosure on the preliminary determination were rejected as out of time, forcing MOFCOM to apply facts available under Article 6.8.

2. The United States wrongly asserts that China is arguing in favor of market-specific costs of production

22. The United States claims that China is advocating market-specific costs of production in order to facilitate a fair comparison under Article 2.4. The EU offered a similar contention at the first meeting with the Panel. These assertions turn China's argument and the facts of the underlying investigation on their head. China is not advocating export market-specific costs of production. China is arguing that value-based cost allocations cannot be driven by any specific market. In particular, value-based allocations must take into account the circumstances of all sales to properly allocate costs to all production. But that is not how the respondents allocated their costs. They allocated costs based on how they *perceived* the value of certain products in the U.S. market, ignoring the actual value of their total production sold in all markets. They viewed paws as waste, not based on their total U.S. production of paws, but based on how they *perceived* that product's value (not production) if sold in the U.S. market. This approach is not consistent with Article 2.2. The relevant "cost" under Article 2.2 and its subsections relates to "production" in the country of origin. It does not relate to perceptions or values (real or arbitrary) assigned to a "product" sold in the country of origin.

23. The United States also embraces an EU argument that the "cost of production" referred to in Article 2.2 refers to the cost of production in the country of origin. China agrees to the extent that production can only take place in the country of investigation. An authority cannot superimpose costs from production situated elsewhere. But this does not obviate the need to determine the "price to be paid for the act of producing" consistent with the meaning of "cost of production" as elaborated on by the panel in *EC – Salmon*.

24. Finally, China is not arguing that value-based cost methodologies are inherently unreasonable, as the United States contends. Rather, China's argument, as validated by the facts of this case, is that value-based allocations are vulnerable to distortion if driven by the subjective or arbitrary choices of the companies in question when choosing what values to use as the basis for their cost allocations. There is no question that these distortions were at work in the instant case and therefore the respondents' costs did not reasonably reflect the costs associated with the production and sale of the product under consideration.

3. The respondents' reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and were therefore properly rejected

25. The respondents reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and MOFCOM's concern over the respondent's value-based allocations was not novel, but in fact reflected concerns that have been cited by even U.S. authorities when considering allocation issues. To summarize some of the more unusual and problematic aspects of the Tyson and Keystone allocation methodologies and the distortions that flowed from those methodologies:

- As a practical matter, [***] despite the relatively high sales value of these products, contrary to conventional cost accounting practices regarding joint production.

- Although Tyson claimed to apply a "relative sales value" approach to allocating meat costs, at best it applied a relative price approach, disconnected from its actual sales.

- In using prices to assign meat costs, Tyson did not use prices for the product concerned. For example, and as discussed above, with respect to high value products such as paws Tyson relied on an offal price, or effectively a waste price.

- In using prices as meat costs, [***].

- Keystone stated that it [***].

- Under circumstances in which [***] the respondents' profit margins for domestically-sold breasts were [***] while paws, the principal product to China showed profit margins [***].

- Under circumstances in which [***] they proved incapable of [***]. At the same time, respondents showed [***] for exports to China. Overall profitability [***].

The United States still has no response to these facts. Instead, the United States clings to an argument that Article 2.2.1.1 will not sustain – that the presence of a GAAP-consistent methodology creates some form of presumption that reported allocated costs are reasonable.

26. The United States also declined to engage the Panel with a response to a fundamental question: is it appropriate to use a non-profitable price directly as a cost or as a basis for cost allocation? In the first instance, the concerns of circularity are immediate as the direct use of a non-profitable price for a product as the cost for that product would render the below-cost test virtually meaningless. But even in the second instance, the use of an arbitrarily low price as a basis for allocating cost for one product when using more accurate prices for other products as part of the same allocation gives rise to the same circularity problems. In the underlying investigation this is precisely what happened. The respondents resorted to irrational values that could not generate reasonable costs. Thus, their actual recorded cost allocations were unreasonable and could not be used. In the case of Tyson, China notes that Tyson employed low prices – the so-called "offal credit" -- directly as costs for products like paws, giving rise to circularity and undermining the below cost test. Where such a cost allocation ensures that the export prices of main export products are always higher than production cost, [***], antidumping rules would be circumvented and rendered ineffective.

27. China also rejects the U.S. contention that it has "muddied" the waters of this issue by "ignoring the evidence proffered by respondents" regarding their cost allocation methodologies. For example, the United States touts that the offal market price relied upon by Tyson was published by Urner Barry. But the source of the price was not necessarily material. It was the price used that really mattered. Consider Exhibit 6-I-5-2 of Tyson's original questionnaire, highlighted by the United States for purposes of its argument. In this exhibit Tyson provided an example of a production cost summary report for one plant for one week. Tyson itemized separate per unit meat costs for a variety of products under a "Meat" column. For many of the products listed, including paws, Tyson assigned [***] – the "offal credit" that Tyson and the United States state was a market price. Exhibit 6-I-5-2 underscores the following: First, Tyson valued paws on the same basis as, for example, [***]. Second, this was not a relative sales value approach to cost allocation for paws since no relative sales value for paws was used to allocate cost, contrary to arguments by the United States. In sum, whether or not "market prices" were used is not the core of the issue. U.S. arguments that this is the crux of China's argument are simply misplaced.

4. The respondents failed to meet their burden to show that their reported cost allocations reasonably reflected the cost of production and sale of the product under consideration

28. The United States contends that MOFCOM had the burden to demonstrate that the respondents' cost allocations did not reasonably reflect the cost associated with the production and sale of the product under consideration. The U.S. argument appears to be that there is a rebuttable presumption that such costs are reasonable if they are GAAP-consistent. China disagrees with this interpretation of Article 2.2.1.1. The respondent has some obligation to demonstrate that its cost allocations reasonably reflect the cost of production, and this cannot be presumed even where their records are GAAP-consistent. The language of Article 2.2.1.1 supports China's position. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must "consider" that information, and that the

burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

29. Respondents did not present MOFCOM with a rationale for accepting their allocated costs. The respondents' instead emphasized the assertion that their records were GAAP-consistent, and those explanations at times did not even reflect the respondent's own actual accounting methodologies which as discussed produced self-evident distortions in the respondents' cost data. Such a defense does not survive scrutiny under Article 2.2.1.1. Although the United States effectively wants to advance respondents' argument here, even the United States has to concede that an authority need not accept a respondent's records where they do not meet both express conditions under Article 2.2.1.1., and namely: (1) that records are GAAP-consistent; and (2) that they reasonably reflect the cost associated with product and sale of the product under consideration. Under the circumstances, the respondents did not meet their burden to establish that their reported allocated costs reasonably reflected the cost associated with production and sale of the product concerned.

5. MOFCOM's own weight-based allocation was proper within the meaning of Article 2.2.1.1 of the AD Agreement

30. The United States argues that MOFCOM's weight-based allocation was inconsistent with Article 2.2.1.1 because it did not reflect a "proper" allocation of costs. Specifically, the United States contends that a "proper" allocation captures "the costs of production in the country of origin and that can be accurately used to ensure that anti-dumping duty is not greater than dumping as to a particular product." But the general U.S. concern about ensuring that the anti-dumping duty is not greater than the dumping as to a particular product merely validates China's point about the proper allocation of costs and the purpose of the AD Agreement. The United States appears to agree with all the contextual elements that inform Article 2.2.1.1 and the proper allocation of costs that China has raised. To summarize that context, the issue is not cost of production generally or conceptually within the confines of a GAAP-consistent methodology; the issue is cost of production of a specifically defined product and the specific normal value to be derived from that cost. More specifically, the "cost of production" as enumerated in Article VI:1(b)(ii) of GATT 1994, and the AD Agreement more generally, is about ensuring reasonable comparisons, and using the cost of producing the good as the anchor to prevent distorted comparisons.

31. The United States claims that MOFCOM's weight-based methodology results in the same amount of costs being assigned to low and high value products, and that the allocation of costs to low value products would be in excess of the fair market value of such products. This observation ignores the facts of the underlying case, especially that the respondents' own distorted, market-specific allocations resulted in certain high value products (the products shipped to China) being assigned costs far below fair market value while other high value products (the products not shipped to China) were assigned costs that approached or exceeded fair market value. Although the United States acknowledges that weight-based methodologies are not always inappropriate and are not specifically tailored to find dumping, it seems to argue that weight-based methodologies are always inappropriate in joint-product scenarios involving non-homogeneous products, and claims that in this case MOFCOM applied a weight-based methodology for the specific purpose of finding dumping. China disagrees with this characterization, which ignores all of the context of the case.

32. First, the U.S. argument rests in part on the existence of joint products. But the United States provides no support for the proposition that weight-based methodologies are always inappropriate when joint products are non-homogeneous. Indeed, the very accounting texts cited by the respondents in the underlying proceeding indicated that weight-based approaches are appropriate in joint production scenarios, and this was particularly the case in the context of rate regulation proceedings such as antidumping proceedings. Second, the record does not reflect that the respondents were treating all products as joint products, which undercuts the United States proposed *per se* rule against weight-based methodologies. Third, for all the U.S. protests regarding inflated profits when a weight-based approach is applied, the reality is that it was the U.S. respondents that were generating this result with their arbitrary approaches to cost allocation. The respondents' approaches to cost allocation in fact functioned as if they were tailored to avoid a finding of dumping. Tyson's "relative sales value" approach is inconsistent with every fundamental

rule proposed for such a methodology as presented in the accounting text presented at Exhibit USA-72.

33. MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions for the respondents' total production in the market rather than respondents' distorting cost methodologies. MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to either the U.S. or Chinese markets. In other words, MOFCOM applied a market-neutral approach to costs. The weight-based approach was reasonable because: (1) it avoided the distortions that had made the respondents' value-based cost allocations unreasonable as discussed above; (2) it reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts; and (3) it was specifically listed as one of the reasonable alternatives in the materials cited by respondents, particularly in the context of a price regulation proceeding; and (4) it was also proposed by the respondents in their alternatives.

34. MOFCOM's methodology was to take total reported costs for the production of subject merchandise and allocate those costs over total reported weight of subject merchandise production. This methodology was implemented using the data reported in Table 6-3 provided by the various respondents, where such data was reported. Thus, contrary to U.S. arguments, there could be no over-allocation of costs to subject merchandise.

35. Finally, the United States argues that including product-specific processing costs within the weight-averaged allocation of costs was improper. But the circumstances of the instant case warranted that approach. But both Keystone and Tyson's responses and data suffered from contradictions or discrepancies that could not be reconciled or relied upon. Thus, any processing costs had to be weight-averaged with other costs.

6. MOFCOM met its obligation under Article 2.2.1.1 to consider all available evidence on the proper allocation of costs

36. The obligation imposed on authorities under Article 2.2.1.1 includes a requirement to "consider all available evidence on the proper allocation of costs . . . ." The Appellate Body in *U.S. – Softwood Lumber* has elaborated on the term "consider" as used in Article 2.2.1.1, explaining that "consideration" would not be satisfied by simply "receiving evidence" or merely "taking notice of evidence." Rather, evidence of "consideration" must demonstrate "some degree of deliberation on the part of the investigating authority." At the same time, the Appellate Body found that "the nature of this deliberative process will depend on the facts of a particular case before the investigating authority."

37. The record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue beyond simply receiving or taking notice of evidence. The fact that this evidence is found across multiple documents produced as part of the investigation does not diminish the overall probative value of the documents as a whole. As the panel in *Egypt – Steel Rebar* stated, the evidence needed to rebut a *prima facie* case can be found "in the disclosure documents, in the published determination, or in other internal documents." As such, China's evidence adequately rebuts the U.S. claim.

38. Moreover, the Appellate Body in *US – Lumber V* indicated that the nature of an authority's "deliberative process will depend on the facts of a particular case before the investigating authority." In this case there were very substantial distortions associated with the respondents' allocation methodologies as further revealed in the costs themselves. To the extent such methodologies led to the costing of a product in a manner disconnected from market reality, as was plainly evident in the case here, the need for a particular form of consideration must give way to the fundamental and obvious nature of the problem. Under such circumstances, if there is basic evidence of consideration, that should be sufficient. This approach is consistent with how panels have viewed an authority's obligation under Article 2.2 when dealing with extensive cost data, such as reflected by the panel report in in *EC – Salmon*. Based on the multiple instances of consideration reflected on the record, MOFCOM met its obligation to "consider all available evidence on the proper allocation of costs" as required by Article 2.2.1.1.

39. Concerning U.S. claims that MOFCOM did not consider all evidence on alternative methodologies, MOFCOM in fact addressed arguments raised by both Keystone and Tyson

concerning MOFCOM's weight-based allocation methodology. As MOFCOM noted, these arguments did not sufficiently justify the reason why different parts of the subject products had different costs. Indeed, what these arguments focused on were the "reasonableness" of value-based allocations in the context of GAAP-consistency. To the extent the respondents addressed weight-based allocations, both respondents actually provided a weight-based alternative. With the respondents also suggesting such an approach, and with their own accounting literature indicating that weight-based methodologies were proper in certain contexts, MOFCOM can not be faulted for actually applying a weight-based methodology. If the authority is actually applying a methodology also proposed by the respondents, it is difficult to contend that the authority did not consider this evidence. The circumstances of the case warranted a weight-based allocation of these costs.

40. Finally, the United States continues to misstate the obligation under Article 2.2.1.1, insisting MOFCOM was required to "explain" its decision to reject respondents' reported allocated costs and apply an alternative allocation in its determination. Contrary to the U.S. argument, there is no positive obligation under Article 2.2.1.1 to "explain." Rather, as noted, MOFCOM was required to "consider" all available evidence on the proper allocation of costs. China has demonstrated that the record reflects such consideration and the United States has not established a *prima facie* case where it focuses on "explanation." China also notes that in its panel request the United States raised a claim under Article 12.2 in relation to the cost allocation issue. Throughout this entire proceeding, the United Stated has not prosecuted this claim in any manner. There is not a single articulation of a *prima facie* case under Article 12.2 with respect to the cost allocation issue found in any submission made by the United States, or during meetings with the panel. Indeed, the United States has never even mentioned Article 12.2 in relation to the cost allocation issue. Thus, China believes that this U.S. claim must be set aside, and the Panel should carefully consider the U.S. arguments concerning "explanation" and how they relate, if at all, to the claims actually prosecuted by the United States in this proceeding, and the distinctions that exist with the substantive obligation under Article 2.2.1.1 and the panel's standard of review under Article 17.6.

7. U.S. *Post Hoc* Rationale Arguments

41. Looking further at the issue of "explanation" and "consideration," the United States also claims that China is now engaging in *post hoc* rationales to support MOFCOM's decision on the question of cost allocation that should be ignored by the Panel, consistent with Article 17.6 of the AD Agreement. The United States has in fact not fairly articulated the parameters of a *post hoc* claim. China submits that its arguments presented to the Panel are not *post hoc*, but are merely elaborations of the record evidence embodied in MOFCOM's rationale for declining to use respondents' reported allocated costs, and namely that respondents' reported allocated costs did not reasonably reflect the cost of production.

42. First, this is not an issue where MOFCOM failed to consider the question of cost allocation altogether and is only now trying to offer rationales for MOFCOM's decision. Thus, it is very different from cases, such as *Korea – Dairy Safeguards*, where the record did not reflect any examination of specific injury factors. Second, the Panel must distinguish among the decision at issue, the rationale, and the supporting record. The United States has inappropriately conflated the decision with the rationale in this case and therefore approaches the issue of post hoc argument at the wrong level. The decision under Article 2.2.1.1 concerns whether or not to utilize respondents' reported allocated costs or some alternative cost allocation for purposes of constructed normal value. The relevant rationales relate to whether respondents' cost allocations were GAAP-consistent, whether they reasonably reflect the cost of production and sale, and whether the applied allocation was proper. The supporting record for the rationales is drawn from the investigation record as a whole. This is consistent with how panels have considered the question of *post hoc* arguments in prior cases, including cases cited by the United States in advancing its *post hoc* arguments, including in *Guatemala – Cement II* , *Argentina – Ceramic Tiles*, and *Mexico – Pipes and Tubes*. Importantly, once a panel has identified the stated decision and rationale in the record, the next step is to engage in "a detailed examination of the record evidence" to see if the authority's rationale was objective and unbiased.

43. This is precisely how the Panel must examine the U.S. *post hoc* argument claims in this proceeding. First, the Panel must identify the decision at issue. To that end, the United States does not dispute that MOFCOM plainly set forth its decision declining to use respondents' reported allocated costs and apply an alternative methodology. Second the Panel must examine the record to see if MOFCOM set forth a rationale for this decision. Likewise, there is no dispute that MOFCOM

set forth in both its preliminary and final disclosures that the rationale for not using respondents' reported allocated costs was that the reported allocated costs did not reasonably reflect the cost of production of the product concerned. Finally, the Panel must examine the record facts as established by MOFCOM to determine if MOFCOM's rationale was unbiased and objective. As already discussed, the record facts objectively reveal that respondents' reported costs did not reasonably reflect the cost of production, and the alternative selected by MOFCOM was proper. Under the circumstances, there is no basis for the U.S. *post hoc* claims.

44. Finally, China notes that the U.S. argument would require the Panel to go well beyond its authority under Article 17.6(i) of the AD Agreement. That provision makes clear that as long as the facts have been properly established, and evaluated in an unbiased and objective manner, that evaluation by the authority "shall not be overturned." Article 17.6(i) does not otherwise specify what is "proper", "unbiased" and "objective", neither does Article 2.2.1.1 require the specific extent of disclosure and explanation of the facts in the final determination, only that the authority shall consider all evidence. Concerning whether the facts established by MOFCOM were proper and whether the evaluation was unbiased and objective, China submits that despite the record evidence and elaborations thereof submitted by China during the course of the dispute, the United States has offered nothing in response to justify respondents' reported product specific costs, particularly the costs reported for paws, a failure that China believes underscores the appropriateness of MOFCOM's finding that the respondents' reported costs were not reasonable.

C. Antidumping "All Others" Rate

45. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation. MOFCOM also gave adequate disclosure of the margin. With respect to unknown and non-participating parties China believes the announcement of the margin provides the "essential facts" to such parties and puts them on notice to begin evaluating other options under Chinese law if they wish to export to China at some time in the future.

46. The United States contends that it is not necessary for the Panel to reach any conclusions regarding what information MOFCOM should have included in the notice of initiation or what would be a sufficient manner of notice such that the investigating authority can assume that producers have received notice. According to the United States, because MOFCOM did not identify other exporters and producers, or provide them with necessary requests for information, it could not find that they refused to cooperate with the investigation. China disagrees. These inquiries are germane and necessary for determining whether China complied with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

47. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement also apply to unknown producers. These provisions apply whenever a party "otherwise does not provide." This more general language "otherwise does not provide" extends to both known and unknown parties. Given this more open-ended language, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement govern those situations involving unknown exporters. The question of whether MOFCOM specifically identified these unknown exporters and producers is not relevant to the issue of whether such unknown exporters received sufficient notice and whether they complied with requests for information.

48. In terms of sufficient notice of necessary information and the consequences of not appearing, MOFCOM's notice of initiation stated MOFCOM would apply facts available to companies that failed to register within the specific time period. The notice of initiation also made clear that the "Registration Form for Countervailing Investigation" could be downloaded from the MOFCOM website and provided the specific web address. China believes this provided sufficient notice of the information requested and of the consequences of not appearing in the investigation.

49. In terms of what constitutes a sufficient manner of notice such that an authority can assume that unknown producers have received notice and can apply Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement, China's approach has been to take three specific actions, including placing the notice in the public reading room at MOFCOM, publishing the notice on the internet, and providing a copy of the notice to the government authorities of the unknown producers. China believes that this constitutes a sufficient manner of notice to apply facts available

in both the AD and CVD cases was consistent with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

50. As far as MOFCOM's disclosure obligations under Article 12.2, 12.2.1, and 12.2.2 of the AD Agreement, the preliminary determination noted that MOFCOM had relied on the facts available. The final determination specified that the "all others" rate was based on the normal value and export price of a model from the sampled companies to determine their dumping margins. This referred to the data of the three companies, including Keystone, Tyson, and Pilgrim's.

III. COUNTERVAILING DUTY ISSUES

A. Subsidy Allocation

51. On the subsidy allocation issue, MOFCOM's approach and calculation was consistent with Article 19.4 and Article VI:3 of the GATT 1994. The United States continues to engage in distraction by attacking MOFCOM's holistic inquiry to obtain the relevant data on feed subsidies to ensure the subsidy was properly calculated. Indeed, MOFCOM presented several questions on purchases, production cost, and unit consumption in the initial questionnaire. Had complete and accurate responses been provided, MOFCOM would have been able to properly allocate the benefit received from the upstream subsidy programs to the subject products. There would have been no need for supplemental questionnaires. Thus, China does not agree with the United States that MOFCOM's initial questionnaire was "irrelevant." The United States is merely trying to obscure the fact that there were serious deficiencies in the responses provided. The respondents in many cases provided no response to the questions presented, and where they did respond, it was not responsive to the question. The respondents offered no evidence that they would adequately respond, if at all, to the questions presented. Rather than holding the respondents to complete and accurate responses to those questions, and the prospect of a facts available finding, MOFCOM elected to offer the respondents an alternative, simplified approach.

52. In the second supplemental questionnaire, MOFCOM focused on a few basic questions, the responses to which would form the basis of its calculation. But China must again emphasize that the issuance of the second supplemental questionnaire was the result of the serious deficiencies found in the responses to the initial questionnaire, and the fact that the data used in the final subsidy rate calculation came from responses to the second supplemental questionnaire did not render the initial questionnaire irrelevant.

53. In terms of the simplicity of the second supplemental questionnaire. For question I.4 of the Tyson second supplemental questionnaire and question I.6 of the Pilgrim's second supplemental questionnaire, the information sought concerned total consumption of feed in the production of broiler products, i.e., subject products, during the period of investigation: "Please provide the specific names, main contents, quantity and value of the various feeds grains (such as corns, soybeans etc) consumed in the production of the broiler products during the POI by your company." Despite the clarity of these questions, the United States attempts to argue that the meaning of "broiler products" was unclear and became the origin of the alleged misallocation, but it is obvious that the reference was to subject merchandise. This is plainly stated in the initiation notice. The respondents provided responses to these questions, which formed the basis for MOFCOM's calculation. There is no room for ambiguity in the question presented, and by all accounts the respondents understood its meaning.

54. The U.S. claim that the data provided in response to this question related to the total purchase of corn and soybeans ignores all of the facts cited by China. In response to this question, Tyson did not state it was providing data on total purchases of corn and soybeans. Nor would Tyson be expected to, given the unambiguous nature of the question. Tyson responded as follows:

> *The feeds grains consumed by Tyson during the POI in the production of the broiler products* were only corns and soybeans. *Please see* the relevant data provided in Annex CS2-I-3 for the quantity and value of these two raw materials.

55. Thus, Tyson indicated in response to the question that it was reporting feed consumed in the production of broiler products and directed MOFCOM to data – "the relevant data" -- in Annex CS2-I-3, provided as Exhibit CHN-37. The United States points to data contained in CS2-I-3

reporting quantity of "live broiler chicken," but there is nothing in the exhibit that indicates that what was being reported was all live broiler chicken and not live broiler chicken intended for the production of subject merchandise. Moreover, the respondents' failure to respond to the full set of MOFCOM's questions regarding production cost in the initial questionnaire prevented MOFCOM from cross-checking the information. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise. The United States has still not addressed why Tyson never sought to correct Annex CS2-I-3 if it was ever in error. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise.

56. With respect to Pilgrim's, the company's response to same unambiguous question on consumption in the production of subject merchandise was simply as follows: "Please refer to Annex II-SI-2: Feed Formulation" The U.S. response does not address the fact that Annex II-SI-2 expressly states that "over time, such as the POI, the purchases are reflective of the consumption," and purchase records are therefore "reflective of the actual consumption." Thus, Pilgrim's made clear that it understood it was responding to a question on consumption and that it was affirmatively stating that purchases and consumption during the POI were equal. Pilgrim's expressed no confusion, contrary to the U.S. argument, but instead clarified why its purchase data and consumption data were the same. The United States fails to address other issues associated with Annex II-SI-2, including those related to feed consumed for pullets and breeders and external feed sales identified by China.

57. In summary, China's position is that MOFCOM's subsidy margin calculation properly relied upon data provided by the respondents concerning the volume of feed purchased and consumed in the production of subject merchandise and the total weight of subject merchandise sales. First, there is no question that this calculation aligns the proper numerator and denominator for purposes of deriving a subsidy margin specific to subject merchandise. Thus, MOFCOM's choice of methodology is correct, and its choice of a *per unit* methodology reflects the text of Article 19.4, which addresses the proper level of countervailing duties relative to the "subsidization per unit of the subsidized and exported product" found to exist.

58. Second, the respondents provided MOFCOM with the information necessary to perform the calculation, and in particular data on consumption in the production of subject merchandise. Although the United States contends that MOFCOM never requested information specific to subject merchandise, as previously noted, that is not an accurate statement. There is no question that the second supplemental questionnaire specifically asked for consumption of feed in the production of "broiler products" – that is, subject merchandise. To any party reading the notice of initiation and the questionnaire, the meaning of "broiler products" would be unmistakable. U.S. claims of confusion over this term simply do not work. And it was on the basis of the response to this question that MOFCOM calculated its subsidy margin, as MOFCOM made clear in the final disclosure.

59. Third, although MOFCOM was well aware of respondents' arguments on over-allocation, the arguments made by the respondents focused on the wrong issue or were otherwise supported by erroneous information. In one fashion or another, the basis of each argument was that MOFCOM affirmatively used feed purchases in excess of that applicable to subject merchandise in the subsidy calculation. This was not the case and did not reflect MOFCOM's methodology, which focused on the volume of feed purchased and consumed in the production of subject merchandise. Tyson claimed that MOFCOM used total purchases, and therefore sought an increased in the denominator, but it ignored the fact that it reported the same figure for consumption in the production of broiler products and did not otherwise substantiate its claim in light of its response on subject merchandise feed consumption. Pilgrim's claimed that certain deductions to its reported purchases used in the production of broiler products were warranted, but failed to substantiate these deductions. It sought deductions for breeders and pullets without establishing why feed for such animals was not part of the production process. It sought deductions for feed sales when it previously told MOFCOM in its initial questionnaire that it had no feed sales. Finally it sought to reduce the calculated benefit by applying a ratio of [***] which it said reflected output of subject product, but offered no substantiated evidence for such a reduction, only the estimate for output, which consistently pegged output at an unwavering [***] in each year between 2006 and 2008 and into the period of investigation. The estimate itself was not even derived from evidence on the record of the CVD proceeding.

60. Fourth, having determined an appropriate calculation methodology, and after giving ample opportunity for the respondents to provide requested data, MOFCOM was entitled to apply that methodology to the data reported by the respondents as feed consumed in the production of subject merchandise during the period of investigation. The United States, however, contends that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. But what the United States is really arguing is that MOFCOM was required to alter its calculation methodology – either by increasing the denominator or reducing the numerator on a basis that did not reflect MOFCOM's methodology and/or the data MOFCOM had expressly requested from the respondents.

61. What the United States never addresses is that if the respondents understood that there was a mistake in their reported data, they should have provided corrected data, not alternative approaches to the claimed problem. Yet, the record of the investigation reflects no attempt by either Tyson or Pilgrim's to provide corrected data, if such corrections were ever necessary. Instead, both respondents advanced either different methodologies without a sufficient basis, or conflicting and unsubstantiated data. Moreover, they made no claim that they could not provide the data in the form requested by MOFCOM. Instead, they requested that MOFCOM change its calculation methodology in a variety of ways. It was not MOFCOM's obligation under the facts presented to yield to every demand of the respondents as to how it should perform its calculation.

62. China adds that one of the purposes of the verification was to verify the elements reported that were essential in calculating the respondents' subsidy rate. In this regard, the consumption of corn and soybean for the production of the subject product was one of the essential elements. Tyson claimed that it did not maintain the requisite consumption records, and that purchases could be used as basis to consider consumption. Pilgrim's claimed in the exhibit provided in response to question I.6 of the second supplemental that purchases equalled consumption. For these reasons, MOFCOM had to verify the consumption data through the basis of purchases. The verification disclosures contained a section titled "*Verification of the Completeness of the Company's Sales and the Data on Purchase of Corn and Soybean Meal*". But this does not discount the representations of the respondents in terms of consumption for the production of subject merchandise.

63. China believes the data provided by the respondents in the questionnaires were correct in terms of reporting feed purchased and consumed in the production of subject merchandise. If not, the record presents other serious issues related to the accuracy of the respondents' submissions. For example, at verification Tyson reported a consumption value that was roughly 10 percent in excess of what it reported as the value of consumption in its questionnaire responses. This may have in fact reflected total consumption, reinforcing the idea that what Tyson reported in its response was limited to subject merchandise consumption, consistent with what the question requested. Either MOFCOM was correct in this understanding, or the data revealed that Tyson's responses suffered from serious inaccuracies and could not be trusted – including its statement that it did not keep consumption records (proven wrong at verification) and the data provided in response to Question I.4 could not be matched to the records found at verification. MOFCOM chose to accept Tyson's responses at face value. These and other data discrepancies and shortcomings with respect to Pilgrim's may shed some light, for example, on why the respondents declined to provide corrected responses that were responsive to the questions posed. They also reflect that MOFCOM was conservative and reasonable in its approach.

B. CVD "All Others" Rate

64. With respect to the CVD "All Others" rate, China reiterates the points it previously made with respect to the AD "All Others" rate. China has explained the steps taken by MOFCOM at initiation to notify producers and exporters of initiation and the consequences of failing to respond to MOFCOM's notice, which it believes was adequate under the circumstances. It has also described how it approached the examination of producers and the treatment of known and unknown parties, as well as the nature and adequacy of its disclosure.

65. In terms of whether the "all others" rate included any upstream feed program found not found countervailable by MOFCOM in the investigation, the Final Disclosure to the U.S. Government does indicate that the subsidy programme used for determining the "all others" rate was a countervailable feed programme. The reference to "upstream subsidy" in the Final Disclosure is an explicit reference to the feed subsidy. Indeed, their was no single "countervailable feed program," but multiple "upstream subsidy programs" for feed ingredients, the benefits from

which were found to pass through to the sampled respondents. The full analysis of these programs and how benefit passed through to the respondents is contained in a section entitled "Upstream Subsidy Programs," a term used consistently throughout the investigation in the multiple disclosures to refer to the feed subsidy programs.

66. MOFCOM calculated the *ad valorem* "all others" rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This approach resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). Because the rate was derived from the benefits received by these companies, it could only include countervailable feed programs.

67. The United States claims that MOFCOM, in calculating the subsidy rate for the "all others" producers, treated them as if they could receive a benefit that was actually greater than the amount that they could receive. This assertion is incorrect. If the competitive benefit exceeded the calculated pass-through amount from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). The record reflects, that there are circumstances under which the calculated competitive benefit amount could be lower than the pass through amount, as in the case of Pilgrim's. Thus, applying facts available, MOFCOM could rely on an actual calculated competitive benefit amount from the investigation.

IV. INJURY ISSUES

68. China makes three overarching points about the U.S. injury claims. First, the United States has not provided sufficient factual support for its claims to make a *prima facie* case. Sometimes there is no evidence at all. Sometimes there is only misinterpreted evidence. China has shown how the U.S. assumptions are inconsistent with both the evidence on the record before MOFCOM at the time, and with other available evidence. Thus, even assuming the United States may have met its initial *prima facie* burden as the complaining party, China has fully rebutted that *prima facie* case during these proceedings.

69. Second, the United States repeatedly tries to use Articles 3.1 and 15.1 to create specific obligations with regard to the various issues addressed by the other provisions of Articles 3 and 15 in a general way but without any specific obligations. These arguments, however, fail as going well beyond the text. If the substantive provision cited by the United States does not impose a specific requirement or specific methodology on authorities that must be met in every case, then Articles 3.1 and 15.1 cannot be interpreted to impose such specific methodologies that apply in every case. These absolutist positions must be rejected, because the texts of Articles 3 and 15 do not support them. If the Panel finds that the United States has not met its burden of providing sufficient facts to support its claims in this specific case, then those claims must fail.

70. Third, contrary to repeated U.S. claims China is not advancing new rationales. The rationales are present in determinations and the record. China is just elaborating on those rationales on the basis of facts on the record that support those rationales. This is not *post hoc* argument. Moreover, it is not *post hoc* for China to provide a factual rebuttal to the premises or assumptions behind the U.S. claims before the Panel. If those claims lack any factual basis in the record, then the United States has failed to meet its *prima facie* case.

A. Defining the Domestic Industry

71. China has shown that MOFCOM reasonably defined the domestic industry, alerting all known domestic producers, and successfully obtaining information from seventeen domestic producers that represented a "major proportion" of the domestic industry. No questionnaire responses received were excluded from the analysis. The only known producers left out were those that knew about the pending case, but declined to respond to the domestic producer questionnaire.

72. At the outset of its investigation, MOFCOM considered the domestic industry as all domestic producers. MOFCOM stressed that "all interested parties" included all domestic producers, and that "every domestic producing company" had the right to submit questionnaire responses. At the outset, MOFCOM was open to receiving responses from any and all domestic producers. As MOFCOM stressed in the Determination, the authority "did not limit the scope of the domestic industry."

73. But eventually MOFCOM realized that it had received only 17 responses, and was unlikely to receive any more, and so MOFCOM then considered the domestic industry as those responding producers that represented more than half and thus the "major proportion" of the domestic industry as a whole. MOFCOM expressly noted the 17 responding domestic "accounted for a major part of the total production quantity of the domestic like product."

74. The United States has not identified any known producers who were not given a full and equal opportunity to participate, and whose responses were not considered. This is not a case where the authority knew of other domestic producers that were ignored. The known producers were those larger white feather broiler producers that had organized themselves into an association group. They all knew about the investigation and most of them responded. Thus, this case is fundamentally different from other situations, where the authority knew of other producers and even had responses from other producers, but excluded those responses from the investigation.

75. MOFCOM did not erect any obstacles, and rather took extra steps to publish the specifics of the investigation on its website. The United States confuses the important distinction between what MOFCOM did and the resulting responses by the domestic producers. If MOFCOM had an open process and uses all the responses received, MOFCOM cannot be faulted, particularly when MOFCOM in fact obtained responses representing more than half of estimated total domestic production. The MOFCOM notice applied to all "interested parties" not just to "respondents." Chinese domestic producers knew that they were "interested parties." The U.S. argument boils down to the claim MOFCOM should have done more. But in the absence of other known producers who could be notified about the investigation, it is not at all clear what the United States expects MOFCOM to have done.

76. Since there were no obstacles, the United States tries to create a theory of distorting self-selection that has no factual basis. The U.S. theory that those domestic producers with stronger financial performance would not respond is just wrong. Of the five CAAA members that did not respond, three of them were Tyson affiliated joint ventures. If their participation in the investigation would have helped the respondents because they were more profitable, the more logical inference is that they would have participated to benefit their joint venture partners. Of the fifteen responding CAAA members, several of them were in fact profitable in various years of the period of investigation. Of the seventeen responding domestic producers, eight companies were profitable in 2007, one company was profitable in 2008 and a different company was profitable in the first half of 2009. Under the U.S. theory of self-selection, these profitable companies should not have responded; but they did respond.

77. The United States also continues to claim MOFCOM set up "obstacles to make it infeasible" to respond, even though two companies not members of CAAA were able to respond. The U.S. speculation that these companies received questionnaires from petitioners has no factual basis. The information was all available on the MOFCOM website, and it is more plausible that these companies obtained the questionnaire from the website. The point is not the size of these two companies, but rather what their participation confirms about the process. The process was not limited to petitioners and companies that were not petitioners did in fact participate. Their responses were used, and were not excluded.

78. The United States also ignores the highly fragmented nature of the Chinese white feather broiler industry, and misstates the nature of the information available. The United States attacks the Ministry of Agriculture statistical information, but presents an unpersuasive argument that ignores the reality that much of the chicken production in China occurs on small family farms. It does not "defy logic" that there are a lot of small family farmers in China who are not specialized producers of poultry. Much of the national production has been consolidated into a few very large domestic producers. In addition, the fragmentation applies to both segments of the Chinese chicken industry. The CAAA members were the largest producers of white feather broiler chickens, and accounted for about half of total domestic production of that product. But it would still take tens of thousands – perhaps millions -- of other producers to account for the other half of the white feather production.

17. Although MOFCOM did not explicitly discuss the fragmentation of the domestic industry in its Final Determination, MOFCOM's consideration of the fragmented nature of the industry can be found in record evidence. The Ministry of Agriculture was part of the investigation team, which means that Ministry of Agriculture statistics and the knowledge of those statistics was part of the overall deliberations by the team. Moreover, in the Exhibit 6 of the Petition, the consultant who estimated the overall size of the domestic industry specifically noted the evolution from 12 enterprises at the great-grandparent stage leading to thousands of individual enterprises at the parent generation. Going an additional generation (from parents to the current generation of producers) would turn thousands into millions. Even if one simply took note of the specific statement that there were "thousands of parent production enterprises" that fact alone establishes the highly fragmented nature of the domestic white feather broiler industry in China. The fragmentation of the domestic industry was thus part of the known factual background against which MOFCOM considered the domestic industry and framed the investigation.

79. Contrary to the U.S. argument, there was no data or contact information for specific domestic producers. Rather, the tracking being done by the consultant and by the Ministry of Agriculture was done based on statistical models, not based on individual company responses or tracking. The United States tries to imply that ten years ago a few breeder pairs arrived and those specific companies have been tracked ever since, but this argument misstates reality. The white feather chicken industry in China started about thirty years ago, and the tracking has been by statistical models of growth in the aggregate, not the individual domestic producers. Moreover, the forms received by the Ministry of Agriculture do not have any company specific data. Contrary to the U.S. argument, there was no list of even the 147 largest domestic producers. White feather broiler chicken production by these other companies not part of the CAAA group was in fact very small relative to the total industry production. The United States has not provided any evidence of known companies who did not know about the case or whose response was excluded from consideration. Bald speculation that MOFCOM could have done more does not sufficient.

27. At most, the United States has identified a single additional company – Fujian Summer -- that could have been contacted. Fujian Summer was not a member of CAAA either before or at the time of filing of the petition. Yet even though Fujian Summer was not explicitly contacted by MOFCOM, China has provided to the Panel definitive evidence that Fujian Summer was aware of the case, but nevertheless did not register and did not submit a questionnaire response. Under these facts, MOFCOM not providing a questionnaire to a company that had actual notice of the pending investigation and declined to participate does not violate any WTO obligations. The United States concedes there is no WTO obligation to compel unwilling producers to respond. Fujian Summer was such an unwilling producer.

1. Articles 3.1 and 15.1

80. The United States fundamentally misinterprets Articles 3.1 and 15.1 and the Appellate Body decision in *EC-Fasteners*. MOFCOM did not "define" the industry as those willing to participate in a sample. Rather, MOFCOM initially considered the industry as all producers, and then proceeded with a reasonable and neutral effort to collect responses from as many as possible. The U.S. claim that MOFCOM "effectively limited its definition" glosses over a key factual distinction, because MOFCOM did not limit its definition in any way. The United States confuses what MOFCOM did with what responses naturally occurred. MOFCOM also did not exclude any responses. In *EC-Fasteners*, the Appellate Body was particularly troubled that the EC had contact information for 318 producers, and partial responses from them, but then ignored most of those known

companies. These facts could not be more different from the current case, where the United States keeps insisting MOFCOM should done more to contact unknown producers.

81. The United States concedes the Agreements provide no specific steps that MOFCOM had to take, and essentially argues that MOFCOM had some obligation to somehow contact unknown producers, even though MOFCOM already had received information constituting a "major proportion" of the industry. Nothing in the text imposes such an obligation. MOFCOM had no obligation to do the impossible or impractical, and needed only to conduct an "objective examination," which MOFCOM did in this case.

82. MOFCOM in fact took actions largely consistent with each of the actions suggested by Mexico, to the extent they were relevant in this particular case. MOFCOM in fact worked with the Ministry of Agriculture to ensure there was no other available information on the identity of other domestic producers. MOFCOM was working with the national level officers at the Ministry of Agriculture. MOFCOM checked with the Ministry of Agriculture and confirmed that there are no lists of white feather broiler producers at either the national level or the provincial level; that is not the way the Ministry of Agriculture tracks its statistical information. MOFCOM also worked with the CAAA, the producers association responsible for white feather broiler chicken producers in China. MOFCOM knew that this association would include all or at least most of the major producers in China, and would thus allow MOFCOM to reach a broad and representative group of domestic producers. CAAA is the only such association, and there are no other producer associations of the subject merchandise. MOFCOM is not aware of any programmes that provide such subsidy benefits to Chinese domestic producers of broiler chickens, as opposed to general support for all agriculture generally.

2. Articles 4.1 and 16.1

83. MOFCOM also fully complied with the obligations of Articles 4.1 and 16.1 by defining the domestic industry as those producers representing the "major proportion" of the Chinese domestic industry.

84. The United States argues for a preference first to consider the industry as a "whole," but neither the text nor the context reflects such preference over defining the industry as the "major proportion." Rather the text presents two alternatives separated by "or" without any preferences. Particularly when contrasted with other provisions that set forth a very explicitly preference for one approach over another, the texts of Articles 4.1 and 16.1 do not provide any preferences. The exceptions set forth in Articles 4.1 and 16.1 apply to either method for defining the domestic industry and do not indicate any preference.

85. The United States also argues Articles 4.1 and 16.1 impose a positive obligation to make "active efforts" that does not exist. The text creates no such obligation. Rather, the text explicitly references only certain other obligations in Articles 3 and 15, strongly suggesting that the other obligations not referenced should not be read into Articles 4.1 and 16.1. The United States draws a false analogy to *U.S. - Wheat Gluten* that addressed a specific issue relating to safeguards. The United States ignores the more relevant guidance of *Mexico – Beef and Rice* that rejected U.S. efforts to read the word "investigation" to create obligations regarding things an authority should have known, but did not actually know.

86. Any such violation would have to depend on the facts of a particular situation. There is no *per se* rule that if a complaining party identifies some possible action that could have been taken, the defending party has violated its WTO obligations because something that could have been done was not done. In China's view, one must consider both the nature of the proposed action, and the likelihood it would have generated some material information.

87. An authority need not take every possible action, since authorities have discretion as to how they shape their investigations. In this investigation, MOFCOM faced a highly fragmented industry. There was no "master list" of domestic producers. China repeated confirmed that no such list existed and the United States provided no evidence of such a list. Under such circumstances, once MOFCOM had worked with the industry association to reach out to known producers, and once MOFCOM had collected questionnaire response representing a "major proportion" of the domestic industry, the lack of action to attempt to find additional domestic producers is not WTO inconsistent.

88. In addition, since some actions are unlikely to yield any material information, authorities must have discretion to determine how best to allocate the finite resources available for each investigation. In this particular case, with MOFCOM having received responses from all the largest producers and having received responses from enough domestic producers to constitute a major proportion of the domestic industry, additional responses are likely to have been from smaller producers and are therefore unlikely to have materially affected the analysis. These circumstances provide yet another reason that the lack of action attempting to find other producers – assuming they could have been found at all – is not inconsistent with WTO obligations.

89. Moreover, even if there were some textual preference, it is not clear what that preference would establish for purposes of this particular case. MOFCOM did not choose a "major proportion" over the industry as whole, nor did MOFCOM ignore any available data. MOFCOM used all the data it had, and those responses collectively constituted a "major proportion." Once it properly found the responding producers represented a "major proportion," MOFCOM complied with the obligations of Articles 4.1 and 16.1.

B. Price Effects

90. China has also shown that MOFCOM reasonably determined the existence of adverse price effects in this case, based on both price undercutting and price suppression. The United States and China have fundamental disagreements over both the facts of this particular case, and the nature of the WTO obligations regarding price effects. The United States hopes its aggressive legal interpretation that imposes specific methodologies will somehow trump the factual deficiencies of its claim, for otherwise the U.S. claim fails.

1. Price Undercutting

91. MOFCOM properly found price undercutting, comparing average prices for the broiler products as a whole and comparing those prices at the same level of trade – landed, duty-paid prices in China. MOFCOM considered the products as a whole because all broiler chicken parts were part of the same like product, and all types of broiler chicken parts competed with each other. U.S. exports of chicken paws competed directly with Chinese produced chicken paws, but they also competed with other Chinese produced broiler chicken parts. MOFCOM specifically found that prices of imported and domestically sold chicken parts were "comparable." MOFCOM compared domestic ex factory prices with imported CIF prices because that comparison was at the same level of trade.

(a) Product Mix

92. The U.S. claim about price effects rests in part on flawed assumptions about product mix, assuming that chicken breast prices were higher than other chicken part prices and that chicken paws were low value products. The United States assumes without any evidence that the prices of certain parts -- particularly chicken breasts not exported to China by the United States, but prevalent in the Chinese domestic market -- were higher and distorted the comparison with the allegedly "low value" parts exported by the United States. But these U.S. assumptions are totally at odds with all of the available information and evidence to the contrary.

93. China presented to the Panel extensive record evidence on this point. (1) questionnaire data submitted by the USAPEEC that contradicted U.S. arguments about the relative prices of different types of broiler chicken parts; (2) officials Chinese import statistics showing the relative prices of different products; and (3) numerous invoices for actual transactions by various domestic producers. All of this record evidence confirmed and provided mutually reinforcing evidence for a proposition that would be common sense for anyone in China – that chicken paws are more expensive than chicken breast. Thus contrary to the unsupported U.S. assertion in this Panel proceeding, the record evidence on the relative prices of different chicken parts is that chicken breast prices in China were lower than other products, so including these prices in the average domestic price significantly understated the actual margins of price undercutting.

94. The United States tries to dismiss China's rebuttal, by calling the rebuttal *post hoc*, but these arguments misunderstand China's point. MOFCOM specifically rejected the respondents' argument that import prices were low by finding that the import prices were comparable. Moreover, MOFCOM's methodology was neutral on its face; there is nothing inherently wrong in

using overall average prices. The United States has the burden of showing not just that there was price variation, but that there were some adverse distortions from that price variation. The United States does not win its claim simply by showing that the prices of different products varied. The prices must vary by enough and must be adverse to the respondents' interests here. The United States recognizes this burden, and that is why the United States presented its "chicken breast prices are higher" argument in its First Written Submission. China's arguments have been to rebut the U.S. argument that there was any adverse distortion here. There is nothing *post hoc* about rebutting the factual basis presented by the United States as the basis of its claim.

95. The United States asserts the products exported to China were "the lowest value chicken parts," even though the record evidence does not support that assertion at all. China has shown that the actual data submitted by respondents during the investigation did not support these sweeping claims that exports to China were of "low value products." Moreover, China has also shown that the record evidence about prices in the Chinese market completely refutes the U.S. argument that including chicken breasts in the overall average created any adverse distortion. In fact, China has shown that comparing the prices of specific products – wings, claws, and legs – that represent about 80 percent of U.S. exports to China would show consistently higher margins of underselling than MOFCOM found. In particular, we note that the margins of underselling for imported chicken paws compared to domestic chicken paws were consistently higher – more than three times higher -- than the underselling margins MOFCOM found.. The premise that U.S. exports to China were low value and that low value creating underselling margins is just wrong. The MOFCOM approach was not adverse to respondents; it was a conservative methodology that actually favored respondents.

96. The United States misreads the Panel and Appellate Body guidance in *China-GOES*. Those decisions were made based on the specific factual evidence in that dispute, and the belief that China had not sufficiently addressed and rebutted before the Panel the factual basis of the U.S. claim in that dispute. Here, China has fully rebutted the U.S. factual claim that there were any differences in product mix that were adverse to U.S. respondents. The very weak factual basis presented by the respondents' data has been fully rebutted. China does not see how a conservative methodology that understated the margins of underselling provides any factual basis for the U.S. claim that MOFCOM was not "objective" in its analysis.

97. The United States dismisses China's use of record evidence about the relative prices of different chicken parts. These invoices were not "hand-picked" or in any way collected to address this specific U.S. argument – which had not yet been made. Rather, this evidence on MOFCOM's record provides a broad sampling of chicken prices in the Chinese market that allows one to test the factual premise of the U.S. claim. The evidence confirms that the factual premise of the U.S. claim is wrong, but also that MOFCOM's methodology was not in any way adverse. MOFCOM's methodology understated the margins of underselling.

98. In addition, we note the following about these invoices. First, the invoices were collected randomly during the verifications of the three domestic producers before the preliminary determination. In other words, the invoices were not "hand picked", but rather were collected in the ordinary course of the verification. Second, the 63 invoices were broadly representative, since they cover the different years of the period of investigation and were issued to 28 different customers. Third, the individual invoice prices are internally consistent, confirming that these samples are representative rather than outliers. Finally, the prices on these invoices can be crossed checked with prices reported in the import data. Though there were no imports of chicken breasts, the prices of imports of wings, paws, leg quarters, and offal show a relative ranking of prices that is consistent with the invoices for domestic prices of the same products. For all of these reasons, this record evidence is reliable and representative.

(b) Level of Trade

99. MOFCOM reasonably compared prices at comparable levels of trade. Domestic prices were ex factory prices – the prices paid by customers in China, without any expenses included. Import prices were CIF duty-paid prices – again, the prices paid by customers in China, without any expenses included. On both sides, the customers were mostly distributors – companies that were buying chicken parts, either from domestic suppliers or from U.S. exporters, and then reselling them. The U.S. producers never argued to the contrary. They never argued to IBII that the level of trade needed to be taken into account.

100. The U.S. claim rests on flawed assumptions about the underlying facts about the customers in China. The United States asserts without any evidence that "as a general commercial matter "CIF import prices are at a different level of trade than domestic producer sales to first arms-length customers." This argument, however, assumes that most U.S. exports go to importers that are not themselves distributors of chicken parts, and that those importers always resell at higher prices that earn them a profit. Neither of these assumptions has any factual basis. Rather, the U.S. argument rests entirely on unsupported factual assertions that the prices being compared were at different levels of trade.

101. The United States assumes without any evidence that U.S. exports were first imported by companies that were not themselves distributors and that had to be resold to another company that was the distributor. In fact, the record showed both domestic shipments and U.S. imports were going to a similar mix of customers, with roughly 80 percent of the volume going to customers who were distributors – someone reselling the merchandise. This argument is not a *post hoc* rationalization. Rather, it is showing how the factual assertion by the United States not only is a bald factual assertion without any supporting evidence, but also is actually contradicted by the record evidence before MOFCOM.

102. Moreover, the U.S. assumption of a positive importer mark-up is directly contradicted by a U.S. Government report showing that importers of U.S. chicken parts were reselling at a loss. The United States tries to ignore this inconvenient fact, arguing MOFCOM still had to compare prices at the same level of trade. Yet the U.S. argument is that the price paid by importers cannot be used because of the importers' mark-up, an assertion without any factual basis that is contradicted by evidence China has presented the Panel. The U.S. claim depends critically on this assumption about mark-up, but there is no factual basis for this assumption.

103. China notes that this issue arose very late in the investigation. This issue had not been raised by any of the U.S. respondents during the investigation. From the initition in September 2009, through the questionnaire responses and verification, through the arguments before and the Preliminary Determination itself in February 2010, no U.S. responding party raised this issue. The issue of the level of trade arose for the first time on 20 July 2010, when the U.S. Government raised this issue in a meeting with MOFCOM, and then summarized its comment in written notes filed after the meeting.

104. Even though the U.S. argument about level of trade was raised very late, MOFCOM had in fact addressed this issue of sales channels early as part of its determination of "like product." MOFCOM explained regarding "sales channels and customer groups" that: "The white-feather broiler products produced domestically and the product concerned were identical or overlapped in terms of sales channels, areas of sales, and that certain of the customer groups of the two products were also overlapping." Virtually the same discussion was included in the Preliminary Determination, long before the U.S. Government raised its concern about level of trade.

105. This qualitative statement about overlap can be confirmed with the record evidence. China arrived at an estimate by comparing the largest customers reported for the period of investigation by domestic producers and exporters. The total volume by those domestic producer customer that appeared to be resellers was 1.04 million MT. The total volume for all reported customers was 1.29 million MT. The ratio is 80.2 percent. The same proportion occurred with U.S. exporters. This calculation of the 80% thus quantifies a more general qualitative finding that MOFCOM had already made, back at the time of preliminary determination.

106. Having already found as a factual matter that sales channels "were identical or overlapped" and that the Chinese customers were considering domestic and imported product at "the same time," and thus "were competing with each other" in these sales channels, MOFCOM then summarized and addressed the specific U.S. comment about levels of trade in its Final Determination. MOFCOM presented its response that: (1) MOFCOM had "taken into consideration" the possible difference between the "sales levels" of the domestic and import prices being compared, (2) MOFCOM had already adjusted the import price to the level reflected in the landed (duty-paid) price reported in the Chinese Customs statistics, and (3) none of the interested parties had raised any issues about the adjusted import price and underselling margins that had been calculated and announced in the preliminary determination back on 5 February 2010. Under these circumstances, MOFCOM made no further adjustments.

107. Beyond the discussion as part of the like product determination, the issue is not otherwise discussed on the record, because of the extreme late date on which the specific issue was first raised. Although MOFCOM's factual findings about the "identical" or "overlapping" sales channels and MOFCOM methodology for comparing domestic and import prices was disclosed as early as 5 February 2010 in the preliminary determination, the specific U.S. complaint about levels of trade was not raised for more than six months on 20 July 2010. This comment was raised about a month before the CVD Final Determination on 29 August 2010, which presented the injury analysis that was then repeated a month later on 26 September 2010 in the AD Final Determination. A comment raised for the first time a month before an authority issues its Final Determination cannot be expected to trigger much in the way of additional consideration before what MOFCOM had done here – acknowledge the issue, and explain its position with regard to the issue.

(c) Implications of U.S. Arguments

108. The factual errors of the U.S. claim can be seen most clearly by considering the alternative methodologies the United States has proposed, which show higher margins of underselling than MOFCOM found in its Final Determination. The available evidence suggests that taking into account resale prices by importers would have increased the underselling margins in 2008 by 20 percentage points or more. The available evidence suggests that taking into product mix into account – and focusing on the competition for wings, claws and legs in the Chinese market -- would have increased the underselling margins by 20 to 30 percentage points or more in virtually every period of comparison. Conservative methodologies that understate the margins of underselling fully meet the obligation of "objective examination," and otherwise comply with Articles 3.2 and 15.2.

109. The U.S. argument reveals the extent to which the United States is seeking to impose a specific methodology regardless of the facts. The United States goes so far as to argue that even if some importers were in fact themselves distributors in China, if any of the importers were not distributors the prices to those importers could not be used. The U.S. argument is basically that MOFCOM had to use resale prices charged by the importers, and could never use the prices paid by those importers. This desire to impose a specific methodology can also be seen in the U.S. insistence that MOFCOM had to collect questionnaire responses from importers, and complaining that MOFCOM did not do enough to collect such responses. But this U.S. argument assumes MOFCOM was under some obligation to collect importer questionnaires responses, and did not have the discretion to make decisions about how to collect data for the investigation. Nothing in the Agreements requires this specific methodology, and the United States has not provided the factual basis to justify requiring that methodology in this case.

110. Given the absence of any specific rules in Articles 3.2 and 15.2, it is not surprising that different WTO members use different methodologies. China understands that Canada uses an approach similar to the United States, looking at resale prices charged by importers. But China also understands that Pakistan and Colombia use approaches similar to China, looking at CIF prices from import statistics. Authorities may ask about importer resale prices in importer questionnaire responses, but in many countries such responses are not routinely submitted in sufficient quantities to be a reliable basis for determinations. Neither approach is inherently right or wrong. Either approach is facially neutral, unless shown to be problem in a specific case based on specific facts.

111. In China's view, these facts and the diversity of WTO member practices confirm that MOFCOM's use of its facially neutral methodologies in this particular case was "objective examination" based on "positive evidence." The United States has not established a *prima facie* case that these neutral methodologies made an affirmative determination more likely, and so the U.S. claim must fail.

112. Beyond these misunderstandings of the facts, the United States also incorrectly reads Articles 3 and 15 as <u>always</u> requiring the authority to consider price comparability, and in particular the issues of (1) levels of trade and (2) product mix. China agrees that such an obligation <u>may</u> arise, but it only arises based on the facts and circumstances of a particular case. In other words, when an authority has existing policies that are neutral on their face, as MOFCOM does here, the obligation to go beyond those existing policies arises only from the facts and circumstances of each individual case. The U.S. effort to use "objective examination" to impose specific methodologies on authorities in every case goes well beyond the text of the Agreements.

In this case, the United States has not met its factual burden of demonstrating a need to take into account either level of trade or product mix.

2. Price Suppression

113. The United States argues that MOFCOM's finding of price suppression rested entirely on its findings of price undercutting. Since MOFCOM's findings of price undercutting were completely proper, there is no error in noting the connection between the price undercutting and the price suppression in this case. But even if the Panel were to take issue with MOFCOM's findings of price undercutting, China notes that price suppression can exist independently of any price undercutting. The United States has conceded this point, and the Appellate Body recently confirmed this point.

114. Besides discussing price undercutting, MOFCOM also relied on volume effects and market share effects, and specifically described the price suppression finding as an alternative finding. In other words, MOFCOM's Final Determination in fact explained how subject imports had "explanatory force" with regard to the suppression of domestic prices through the adverse volume effects. At the end of the its discussion of subject import volume (section V(I)) and subject import prices and domestic prices (section V(II)), MOFCOM inserted a summary paragraph that addressed both subject import volume and subject import price. This concluding paragraph discussed both volume and price, and so integrated both of these issues. In this summing up its conclusions about the effects of subject imports, MOFCOM noted that the "continuous expansion of the market share" and the "large quantity" of dumped/subsidized subject imports in the Chinese market had two effects: (1) they undercut domestic prices, but they also (2) led to a "decrease of profit level," and thus were suppressing prices. The price undercutting was necessarily a price effect, since undercutting involves comparing two sets of prices. But the price suppression finding simply observed that in the face of the larger volume and market share of subject imports, domestic prices were suppressed and thus the domestic industry suffered lower profit levels. In this concluding paragraph, MOFCOM was thus drawing a direct connection between the volume of subjects imports and price suppression as one of the consequences of that "large quantity" of subject imports.

115. The U.S. argument to the contrary misstates the MOFCOM final determination. The title may refer to subject import prices, but the discussion in the last paragraph of this section discussed the "large quantity" of subject imports and their "continuous expansion of the market share." The fact that MOFCOM also noted the effect of price undercutting on price suppression does not mean that subject import volume and market share were not also causing price suppression. That is why MOFCOM used the phrasing "not only … but also."

116. The United States tries to support its argument about the exclusive link between undercutting and price suppression by citing other passages in MOFCOM's determination, but these U.S. citations simply highlight two very misleading translation mistake.

117. The first translation mistake is subtle, but important. The U.S. translation reads: the "lower price of the Subject Products has also suppressed sales prices of the domestic like products." China's translation reads instead: the "low-priced sales of the product concerned also suppressed the selling price of the like product." The U.S. translation's use of the phrase "lower price" implies price undercutting. In fact, the Chinese original refers to "low-price sales of the product concerned," which is a stock Chinese language phrase to refer to dumped/subsidized imports.

118. The second mistake relates to a MOFCOM discussion of pricing trends in early 2009. The U.S. translation reads: "… the price cutting of the Subject Products caused substantial suppression on the sale price of the domestic like products…." China's translation reads instead: "… the activity of price reduction of the product concerned caused apparent undercut and suppression to the price of the domestic like product…." In other words, the United States mistranslated "price reduction" as "price cutting." More seriously, while the original lists "price reduction" as the cause of both price undercutting and price suppression, the U.S. translation turns price undercutting into the cause of price suppression. This mistake may be quite convenient for the U.S. argument in this dispute, but it ignores the correct reading of the MOFCOM determination on this point.

119. Thus, contrary to the U.S. argument, MOFCOM did not point to price undercutting as the sole cause of price suppression. Rather, MOFCOM noted price undercutting and price suppression

as parallel adverse consequences caused by the increasing volume and market share of subject imports at the prices for which they were being sold in China. A proper interpretation of the MOFCOM Final Determination must take into account several points. First, the Final Determination is responding to a specific argument by the U.S. respondents about the magnitude of price decreases in the first half of 2009. The context is thus a specific price decrease and explaining the magnitude of that price decrease. Second, the phrase "affected by this" also refers to the degree to which domestic broilers and subject import competed with each other and were substitutable, and also refers to subject import market share. Third, MOFCOM stressed that the domestic industry needed to cut its own price to preserve market share. Finally, MOFCOM concluded its discussion by explaining with regard to the first half of 2009 that "the activity of price reduction" by subject imports had two effects: (1) price undercutting, and (2) price suppression. Thus, the connection is not price undercutting causing price suppression, but rather price reduction causing both undercutting and suppression.

C. Adverse Impact

120. MOFCOM also properly found material injury. MOFCOM objectively examined the entire period of investigation, not ignoring the critical first half of 2009 as does the United States. MOFCOM also objectively examined all the injury factors, not ignoring the domestic industry financial performance as does the United States.

121. The United States mistakenly argues that MOFCOM's finding of injury rested on only two factors. Yet the United States continues to ignore the persistent operating losses throughout the period. The United State quotes part of the MOFCOM determination, where MOFCOM explains how notwithstanding some positive trends, the continued growth and low prices of subject imports prevented the domestic industry from effectively utilizing its new capacity, and thus contributed to the continuing operating losses. The United States highlights part of the quote, but should have stressed the key last phrase: "so profit before tax for the domestic like products remained negative during the POI."

122. MOFCOM properly relied on the evidence of low capacity utilization. One cannot reasonably compare percentages when applied to different base amounts. Moreover, the United States makes a more fundamental error, claiming that domestic industry capacity expansion "entirely explained" the trend and capacity utilization was "not affected by subject imports." These absolute statements are just wrong. Subject imports grew over the period, gaining about four percentage points of market share. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers, and domestic capacity utilization would have been higher. Thus, subject imports had a necessary and unavoidable effect, through their increased volume and market share. MOFCOM was fully entitled to rely upon this effect.

123. MOFCOM also properly relied on the evidence of growing end-of-period inventories. China has not conceded the inventories were not significant. Rather, China simply noted it was under no obligation to find inventories in themselves to be significant. MOFCOM properly noted that inventories were increasing. And as with capacity utilization, subject imports made the situation worse. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers and their inventory levels would have been lower.

124. MOFCOM in fact considered all the economic factors over the entire period, not just 2009. That MOFCOM focused on the end of the period does not mean MOFCOM ignored the earlier part of the period. The United States believes it can focus on the improving volume trends over the 2006 to 2008 period, and ignore the persistent operating losses over the entire period. A modest improvement in 2007 that still left the domestic industry with operating losses does not make up for cumulative operating losses over the full three year period of 2.651 billion yuan – the period of time when the subject imports increased the most.

125. MOFCOM most certainly did not ignore these huge operating losses over this period, or their pattern over time. MOFCOM focused on the impact of the subject imports on the financial performance of the domestic industry, and thus properly respected the obligations of Articles 3.4 and 15.4. MOFCOM drew this connection as part of its discussion of causal link, and then reiterated this connection between subject import volume and the financial results, and between subject imports generally and the financial results.

126. The United States improperly tries to dismiss the MOFCOM finding of future declines in the economic indicators. China agrees that the examination in Articles 3.4 and 15.4 refer to the same past imports as Articles 3.2 and 15.2. The point, however, is that even past imports can have future adverse effects. That is why Articles 3.4 and 15.4 refer to the "potential negative effects" for several of the injury indicia. A past history of increasing imports – particularly when viewed in the context of possible future increases in imports – can create the types of "potential negative effects" Articles 3.4 and 15.4 mention. An authority may properly put past imports into the context of possible future imports when assessing these past imports. For example, continued U.S. exports to China would continue to depress capacity utilization, and would continue to leave excess inventories languishing at the companies or force liquidation sales to clear inventory. These are precisely the type of future declines that the phrase "actual and potential declines" in Articles 3.4 and 15.4 contemplates.

127. MOFCOM properly relied on data for the responding domestic producers, in the context of the overall domestic industry. China disagrees with the brief and overbroad statements of the panel in *EC – Bed Linen* that would appear to limit the authority to do so. This summary statement, not reviewed by the Appellate Body, does not adequately address the text of the Agreements or the factual information being considered.

128. Regarding the text, we note three points. First, nothing in the text of Articles 4.1 or 16.1 requires a single definition of the domestic industry. Nothing in the text precludes an authority from defining the domestic industry as all producers in some respects but as a "major proportion" in other respects, depending on the issue and the available evidence. Second, the text actually contemplates using two different sets of data, since the "major proportion" in Articles 4.1 and 16.1 is determined by reference to "the total domestic production." It is not possible to determine a "major proportion" without reference to some data beyond the subset that constitute the "major proportion." Third, the text of Articles 3.4 and 15.4 expressly allows an authority to consider "all relevant economic factors and indices have a bearing on the state of the industry." In other words, the analysis is not just the facts for the industry, but also the facts that might have a "bearing on the state" of that industry, however defined. This broad language can include more than just the facts narrowly defined by the responding domestic producers in a case.

129. This case provides good examples of how other information can be factually relevant. Consider apparent consumption. This economic factor is a common way to assess broad demand trends. If the authority has data on total domestic production, an authority has discretion to measure apparent domestic consumption based on either the industry as a whole, or based on the subset of total domestic production represented by the 17 responding producers. Or consider market share. If an authority exercises its discretion to define total apparent domestic consumption based on all domestic production, an authority also has discretion to report market share based on that total apparent domestic consumption. It is more accurate to say the 17 responding domestic producers have about 40% of the total market and to say that subject imports have about 10% of the total market, rather than to inflate both numbers by ignoring the domestic production of non-responding producers.

130. MOFCOM thus used the different kinds of information appropriately. The analysis of the factors under Articles 3.4 and 15.4 generally relied on the information reported by the 17 responding domestic producers. But for apparent consumption and market share, MOFCOM reasonably and properly viewed the production and shipment data for the 17 responding domestic producers in the context of the available information on the total domestic production by all domestic producers, and the total apparent consumption based on that total domestic production.

D. Causation

131. Finally, MOFCOM properly drew the causal link between the increasing subject imports and both the adverse volume and adverse price effects those subject imports had on the domestic industry. The U.S. claim concerning causation is actually quite narrow. It involves only the requirement in the second sentence of Articles 3.5 and 15.5 to find a "causal relationship," and does not address the requirement in the third sentence to "examine any known factors other than" subject imports. The United States still has not offered any other causes as alternative explanations for why the Chinese domestic industry had operating losses in every year, and suffered declines in 2008 and even more severe declines in 2009.

1. Basis for Finding Causal Link

132. The United States tries to dismiss China's arguments as *post hoc*, but the United States misses the point of these arguments. China's arguments seek to rebut the arguments the United States has made in support of its claim. The United States has both mischaracterized MOFCOM's final determination, but also ignored other aspects of the factual record before MOFCOM. China can properly explain how the factual record before MOFCOM rebuts the specific factual claims the United States has now made.

133. The U.S. claim involves only three specific arguments. If those three arguments are wrong, then the United States has not established a *prima facie* case and the U.S. claim relating to causation must fail.

134. Regarding the argument about market share, the U.S. claim focused on a few facts in isolation, and simply ignored other facts. China has not presented new evidence. Rather, the United States ignored all the facts in MOFCOM's determination, in particular that subject imports gained more market share than non-subject imports. In its First Written Submission, the United States misrepresented the record, because it simply ignored the distinction between the half of the domestic industry for which MOFCOM had questionnaire responses and the other half of the domestic industry for which MOFCOM did not have questionnaire responses. That is why China pointed out the U.S. factual assertion "the entire increase in subject import market share … came at the expense of non-subject imports" was just wrong.

135. MOFCOM's determination focused on analyzing the market share of the 17 responding domestic producers. That is the absolute level of market share MOFCOM reported in its Final Determination, and that is the basis of the market share trends that MOFCOM relied upon in its analysis. But since MOFCOM reported all market share figures relative to total apparent consumption for the entire market, those market share figures implicitly considered the non-responding domestic producers as well. When reporting the market share of the 17 responding domestic producers (averaging around 41%), the market share of subject imports (averaging around 9%), and the market share of non-subject imports (averaging around 3%), MOFCOM determined each of these segments relative the total apparent domestic consumption, not just the consumption defined based on the reported production by the 17 responding domestic producers. That is why these market shares add up only to 53% (on average), and leaves about 47% (on average) unaccounted for. By reporting market shares of 41%, 9% and 3%, MOFCOM was also implicitly considering the remaining 47% need to reach 100% of the market.

136. The U.S. claim that MOFCOM "ignored" the evidence of the market share increases by the reporting domestic producers is also just wrong. To the contrary, MOFCOM specifically acknowledged this argument and addressed the argument, noting the domestic industry efforts to stabilize its market share when discussing volume effects, and acknowledging the increasing market share when discussing causation. MOFCOM specifically explained that even though the "market share of the like product presented an increase to certain extent in general, but this did not mean that the domestic industry did not suffer from injury." MOFCOM noted its assessment depended on all the economic factors, and stressed that even the gain in market share could not "change the worsening financial situation of the domestic industry."

137. Thus, this aspect of the U.S. claim must fail, because the U.S. assertions are flatly contradicted by the record evidence and MOFCOM's determination. Subject imports gained market share beyond that lost by non-subject imports and MOFCOM acknowledged and addressed the gain in market share by the reporting domestic producers. China's efforts to present the complete picture based on record evidence simply complements these other reasons to reject this aspect of the U.S. claim.

138. Regarding the argument about price effects, the United States repeats its claim that MOFCOM's methodology made a "finding of subject import underselling more likely." Yet China has demonstrated the opposite is true – that MOFCOM's methodology actually understated the margins of underselling. Thus, China has rebutted the essential factual premise of the U.S. claim, and thus the U.S. claim itself.

139. MOFCOM properly relied on both price effects and volume effects. These arguments are not *post hoc*, but rather reflect points made in the Final Determination. The United States argues that

MOFCOM's determination rested entirely on price undercutting, even though the Final Determination explicitly relied on a combination of factors, not just price undercutting. In particular, when discussing the volume effects, MOFCOM expressly found the increasing subject import volume at relatively low prices forced the domestic industry to cut its prices below cost to maintain market share. The fact that the domestic producers may have gained some market share over this 2006-2008 period does not mean the increasing subject import volume was causing the price suppression that MOFCOM found. Moreover, when discussing the effect of subject imports on the condition of the domestic industry, MOFCOM again found the link between the quantity and prices of subject imports to the deteriorating financial condition of the domestic industry, regardless of the market share.

140. The U.S. argument assumes that absent a loss of market share, an authority cannot find any adverse volume effects. But this argument is just wrong. Articles 3.2 and 15.2 explicitly allow the authority to find adverse volume effects based on either an increase in absolute volume or an increase in market share. An increase in subject import market share is not an indispensible requirement. Moreover, MOFCOM expressly acknowledged the increase in market share by the reporting domestic producers, but nevertheless found adverse effects from the increasing absolute volume of subject imports that forced the domestic firms to adjust prices that could not keep up with costs, and thus increased the financial losses.

141. The United States tries to obscure this essential point by arguing deceptively about changes relative to 2006 and arguing vaguely about "most other measures." Yet the operating losses in 2008 were larger than 2006, and were even worse in the first half of 2009. The United States cannot make these financial losses disappear by ignoring them. Nor are these financial losses any less injurious because the domestic industry may have had some improving indicators. Even as the domestic industry increased its production and sales, it continued to have severe financial losses, and the increasing volume of subject imports contributed meaningfully to those losses. In a growing overall market, instead of seeing their operating losses disappear, the domestic industry operating losses persisted at a high level.

142. Finally, regarding the argument about correlation over time, the United States makes several mistakes. First, the United States assumes that subject imports were not causing material injury in 2006, and that any improvement from 2006 therefore means imports were not causing injury. There is no factual basis for this assumption, and the operating losses even in 2006 support MOFCOM finding material injury for the entire period.

143. Second, the United States misconstrues MOFCOM's finding as limited to injury caused by subject imports in the first half of 2009. China addressed this period of time in its First Written Submission because the United States had completely ignored this most recent period of time. The MOFCOM Final Determination, however, makes clear that it was considering the entire period of investigation, putting all of these trends into proper context. That MOFCOM was fully considering the entire period can be seen throughout the Final Determination. First, MOFCOM systematically discussed all industry trends over the entire period, including each full year as well as the first half of 2009. Second, when summarizing these trends, MOFCOM expressly acknowledged the positive trends in some factors over the 2006 to 2008 period, and the improvement in 2007, while also noting the inability of the domestic industry to earn operating profits in any year during this period. Third, when discussing the causal link, MOFCOM also discussed the full 2006 to 2008 period. Finally, when addressing the arguments of the various parties concerning causation, MOFCOM expressly addressed this U.S. argument about the trends over the 2006 to 2008 period, and specifically addressed the 2006 to 2008 period and then the first half of 2009. It is simply disingenuous for the United States to argue that MOFCOM did not consider the full period of time.

144. Nothing in the WTO cases cited by the United States requires a different result. MOFCOM did not focus exclusively on the first six months of each year, and instead considered full year data. That situation is very different from recognizing that material injury occurring over the entire period had become worse at the end of the period. Moreover, MOFCOM did not ignore the trends earlier in the period, and expressly acknowledged them as part of showing why there was injury over the entire period that became worse at the end of the period.

145. Third, the United States also improperly dismisses the adverse financial trends, apparently considering a 4.7 percent operating loss in 2008 as somehow being a good result and the absence of any material injury caused by subject imports. The MOFCOM Final Determination, however,

makes clear that these operating losses throughout the period were in fact injurious, and the record supports that finding.

146. Fourth, the United States makes much of the import volume over the 2006 to 2008 period, but ignores the other aspects of market conditions in 2007. It is true that a large portion of the total increase in subject imports occurred in 2007. But this was a year when apparent domestic consumption improved strongly, and the margin of subject import underselling was smaller than other years. The modest improvement in financial performance in 2007 does not prove that subject imports were not causing any material injury. The domestic industry still had operating losses. Those losses were somewhat mitigated by the strong market and less severe price undercutting in 2007. The pattern over 2006, 2007, and 2008 in fact confirms that subject imports were contributing significantly to the material injury – particularly the financial losses – being suffered by the Chinese industry.

147. In sum, subject imports need not be the only cause; they need only contribute meaningfully to the adverse condition of the domestic industry. In this case, broiler products from the United States made such a contribution to the material injury, and thus met the standards of Articles 3.5 and 15.5.

2. Addressing Respondents' Injury Arguments

148. Regarding the argument about non-subject imports, the MOFCOM Final Determination reasonably and repeatedly addressed this argument. MOFCOM first addressed this argument about subject imports simply substituting for non-subject imports in the general discussion of the impact of subject import volume, noting that the Agreements allow an authority to consider either absolute volume or market share. And the record evidence before MOFCOM showed that subject imports were increasing by much more than non-subject imports. Indeed, over the 2006 to 2008 period, subject imports increased by almost 200,000 MT while non-subject imports did not decrease but rather increased by about 35,000 MT. It is hard to see how increasing subject imports were replacing increasing non-subject imports. MOFCOM addressed this argument a second time, when it noted that subject imports were a growing portion of total imports, and that non-subject imports were thus not an alternative explanation of the domestic industry problems. The fact that subject imports were increasing so much more than non-subject imports does not mean subject imports were only replacing the non-subject imports.

149. Regarding the argument about chicken paws, the United States mischaracterizes the MOFCOM treatment of this issue. The United States claims MOFCOM's preliminary determination discussion of this issue was only a decision about scope that did not address respondents' argument. In fact, MOFCOM was noting that since the investigation included all chicken parts, MOFCOM was conducting its analysis based on all the products under investigation as a whole, and not separate market segments. MOFCOM specifically noted that all chicken parts were part of the same "like" product and competed with each other, even if the different parts did not have a one-to-one relationship of competition. MOFCOM did not misunderstand the respondents' argument, and MOFCOM's comment was not just about scope. MOFCOM was explaining why it rejected the proposed analysis based on different product segments. The United States also claims respondents were not asking for a market segments analysis. But by insisting that MOFCOM consider competition among different types of broiler chicken parts, respondents were in fact asking for a market segments analysis even if they did not label it as such. The United States has not made such a causation argument before the Panel – and has not established a *prima facie* case that an authority must conduct its causation analysis based on market segments, or that there was anything not objective about MOFCOM analyzing causation for broiler chicken as whole.

_____

ANNEX B

WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

Contents		Page
Annex B-1	Third-Party Statement of Chile	B-2
Annex B-2	Integrated Executive Summary Submitted by the European Union	B-4
Annex B-3	Integrated Executive Summary Submitted by Japan	B-9
Annex B-4	Integrated Executive Summary Submitted by Mexico	B-12
Annex B-5	Integrated Executive Summary Submitted by Norway	B-18
Annex B-6	Thailand's Responses to Panel Questions	B-21
Annex B-7	Integrated Executive Summary Submitted by the Kingdom of Saudi Arabia	B-25

ANNEX B-1

THIRD-PARTY STATEMENT OF CHILE

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party in this dispute, welcomes the opportunity to present its views on certain systemic aspects of this case.

2. Chile feels that this dispute covers issues of great importance for the proper application and interpretation of the Anti-Dumping and SCM Agreements, in particular as regards compliance with rules that enable the parties to be provided with the information and opportunities needed to defend their interests, a prerequisite for due process and one that is considered essential for ensuring the legitimacy of any investigation.

3. First of all, Chile considers compliance with the obligations set forth in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement, which require the authorities to inform interested parties of the essential facts forming the basis of their determinations, to be of vital importance.

4. The above-mentioned provisions are fundamental rules of due process, and compliance therewith is vital to ensuring that the parties receive the information needed to defend their interests in a focused manner. These obligations not only guarantee the parties' right to defend themselves in the proceedings, but also ensure the legitimacy of the authority's investigation and its decision.

5. In order to determine effective compliance with the rules in question, the Panel must examine the content of the information provided by the authority, so as to ensure that it is sufficient and adequate for guaranteeing the parties' right of defence. In this respect, the Panel in *EC-Salmon (Norway)* stated that the essential facts are "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority… the essential facts to be disclosed are those 'under consideration which form the basis of the decision'".[1] Chile also believes that the Panel should verify when exactly this essential information was provided, making sure that the parties have had sufficient time to formulate their defence. The rule will no longer be effective if these conditions are not verified.

6. Chile also wishes to emphasize the importance of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement, which state that the authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, where such parties indicate that such information is not susceptible of summary, a statement of the reasons why summarization is not possible must also be provided.

7. We agree with the assertions made by the United States in its first written submission to the effect that the above-mentioned rules apply to any interested party in the investigation, and therefore MOFCOM should have required the petitioners to provide non-confidential summaries in accordance with the requirements set forth in those rules. The inability to provide such a summary due to the existence of exceptional circumstances should have been explained and justified by the petitioners, and the authority should have evaluated the relevance of those justifications. In this regard, the Appellate Body in *EC-Fasteners (China)* stated that "[f]or its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible. As the Panel found, 'in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the

[1] Panel, *EC-Salmon (Norway)*, paragraph 7.796.

potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel'".[2]

8. The importance of compliance with the above lies in allowing the interested parties to access the information contained in non-confidential summaries, thus securing them the right to properly defend their interests and ensuring the legitimacy of the investigation process by verifying one of the basic principles of due process: the right of all parties to be heard.

9. Lastly, and without wishing to refer to whether the investigating authority properly defined the domestic industry as established in Article 4.1 of the Anti-Dumping Agreement and Article 16 of the SCM Agreement, Chile would like to suggest to the Panel that in the analysis of the companies covered by the concept of domestic industry in the present case, it take these provisions into consideration, given that this concept not only covers the Chinese companies supporting the anti-dumping and countervailing duty investigations, but also the domestic producers as a whole of the like products or those whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Once again, many thanks for this opportunity.

[2] *EC – Fasteners (AB)*, paragraph 544.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE EUROPEAN UNION

I. PROCEDURAL CLAIMS

A. Obligations under Article 6.2 ADA

1. The United States complains that, pursuant to Article 6.2 *ADA*, it requested the investigating authority to provide an opportunity, in this case, for the United States to meet with those parties having adverse interests, so that opposing views might be presented and rebuttal arguments offered. The key point in China's response is the factual assertion that the investigating authority contacted the petitioners and the petitioners indicated that they would not participate in any such meeting. The European Union has not located evidence of such a contact in the documents submitted to the Panel. In the eventuality that the contact and response is not recorded in the file, or otherwise evidenced, then the key point in China's response would not appear to be supported by the evidence.

B. Disclosure of Data and Calculations Used to Establish Dumping Margins

2. The European Union agrees with the United States that the calculation method employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9 *ADA*. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken. By failing to disclose the data and calculations used to establish dumping margins, China has acted inconsistently with Article 6.9 *ADA*.

C. Disclosure of Essential Facts under Consideration in Calculating the "All Others" Dumping Margin

3. China has also breached Article 6.9 *ADA* It appears that China has also failed to disclose the methodology or identify the essential facts under consideration regarding its calculation of the “all others” dumping margin and the imposition of a residual duty at 105.4 %. A single sentence to the effect that it used the facts available and the best information available to make such determinations was insufficient to satisfy the disclosure obligations under Article 6.9 *ADA*.

D. Explanation of the Decision to Apply Facts Available in Calculating the "All Others" Dumping Margin

4. The European Union agrees with the United States that a single sentence in the Final Determination, stating that MOFCOM is resorting to facts available, is not sufficient to meet the requirement of Article 12.2.2 *ADA* to give public notice of “all relevant information on matters of fact and law” and state the “reasons which have led to the imposition of final measures”, and that the failure to provide more detailed explanations constitutes a breach of Article 12.2.2 *ADA*.

E. Non-Confidential Summaries

5. If the non-confidential version of the petition contains data that can be regarded as a summary of the redacted confidential information, the parties under investigation should be made aware of that, so they can be reassured that they have the full picture in front of them and there is no missing information that could be useful for them to build a defensive strategy. Such awareness is necessary "to permit a reasonable understanding of the substance of the information submitted" as required by Articles 6.5.1 of the *Anti-Dumping Agreement* and 12.4.1 of the *SCM Agreement*. The investigating authorities are therefore bound to require the interested parties submitting confidential information to indicate in a clear and understandable manner where in the text of their submission the non-confidential summaries of the redacted information are to be found.

II. ANTI-DUMPING DUTIES

A. Article 2.2.1.1 ADA: the allocation of production costs among different broiler products: by value or by weight

6. Article 2.1 of the *Anti-Dumping Agreement* directs the investigating authority to enquire into "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The exporting country is the United States, not China. Thus, these provisions did not direct the investigating authority to enquire into the costs of production of a chicken paw wherever in the world it might be destined for consumption. Rather, they directed the investigating authority to enquire into the costs of production of a chicken paw destined for consumption in the *United States*.

7. Article 2.4 of the *Anti-Dumping Agreement* addresses the obligation to make a fair comparison. It requires that due allowance be made (by adjusting normal value or export price) for differences affecting price comparability, and includes an open list. All of the items in the list refer to the objective characteristics of the product or the transaction. Although the list is open, the examples expressly included in the list give guidance as to the types of things that might justify an adjustment, even if they are not expressly included in the list. Since all the expressly included items are objective, that suggests that other types of adjustment, not expressly listed, would also be objective in nature. The notion of consumer preference is not objective. It refers to the gratification of the consumer. This cannot be objectively assessed. It is not therefore a suitable basis on which to make an adjustment that would tend to increase or create a margin of dumping, any more than it would be to decrease or eliminate a margin of dumping. If, for reasons of consumer preference, a particular item is characterised in the home market as a "by-product" having a relatively lower value, but in the export market as a product having a relatively higher value, this fact does not in itself lead to the conclusion that the data do not permit a proper comparison, or that an adjustment should be made.

8. This conclusion does not change in circumstances where the product (such as a chicken paw) is initially joined with some other product (such as a chicken breast) as part of a whole, such that the only possible approach with respect to production costs prior to separation is allocation. If the facts indicate that the value in the home market is not distorted, for example by government regulation or subsidies, then value may be a reasonable basis on which to allocate such pre-separation costs. If the value in the home market is very low, or zero, then it may be reasonable to allocate very low, or zero, production costs to the chicken paw.

9. The may not be a burden of proof issue, because the facts appear to be reasonably well known and not controversial. Rather, the question is whether the accounts reasonably reflect the costs of production. This is more a matter of explanation, that is, the interpretation and application of the *Anti-Dumping Agreement*. The European Union would expect such explanation to be forthcoming, in the first place, from the exporter providing access to the accounting records. One would thus expect it to be in the file. If the investigating authority would decide to reject such explanation, in favour of a different explanation, then one would expect such different explanation to be set out in the measure at issue, or in the underlying documents, or at least to be otherwise apparent from the file. The task of the complaining Member in DSU litigation would then be to explain why the original explanation is reasonable, and the different explanation advanced by the investigating authority is not reasonable. The task of the defending Member would be to explain why the explanation advanced by the complaining Member is not reasonable, and why the different explanation preferred by the investigating authority is reasonable. The Panel then has to decide. Normally, the two explanations will not be equally reasonable, because as the parties are pressed, it will become apparent that one explanation can be sustained on the basis of rational considerations, whilst the other cannot. If, however, the two explanations (that is, interpretations and applications) remain in equipoise, then, in accordance with Article 17.6(ii) of the *Anti-Dumping Agreement* and the case law interpreting that provision, the Panel should find the measure to be in conformity with the *Anti-Dumping Agreement*. No DSB report has ever found this to be the case and it is possible that such a conclusion may never be sustained. In light of the above explanations, the European Union would be surprised if this would be such a case, because the different explanation elaborated by China is obviously irrational.

B. "All Others" dumping margin: all interested parties … shall be given notice (Articles 6.1 and 6.8 and Annex II ADA)

10. The European Union notes that in this case it is possible that the US claim does not raise the general question of how investigating authorities can give notice to producers that exist but are not known and do not make themselves known. Rather, it is possible that in this case the US claim is limited to the narrower proposition that the steps taken by the investigating authority in this case, and particularly the period of 20 days, whilst constituting "notice", nevertheless did not constitute "sufficient" notice. The European Union would therefore suggest that the Panel focus on this question, which appears to be the point that is in dispute between the Parties. The question of whether "sufficient" notice has been given would appear to be one that is largely dependent on all the facts and circumstances surrounding the particular case, and therefore one on which the European Union does not further comment in this Third Party Written Submission.

III. COUNTERVAILING DUTIES

A. "All Others" subsidy rate: all interested parties … shall be given notice (Articles 12.1 and 12.7 of the SCM Agreement), be informed of the essential facts (Article 12.8 of the SCM Agreement) and there shall be an explanation of the determination (Articles 22.3, 22.4 and 22.5 of the SCM Agreement)

11. With respect to the requirement to give notice the European Union notes the differences in the wording of Article 6.1 *ADA* and Article 12.1 of the *SCM Agreement*, as well as in the substance of the two agreements. Thus, although under the *Anti-Dumping Agreement*, a Member might not necessarily know the names and addresses of firms producing on its territory and exporting to the investigating Member, and that may, or may not, be engaged in dumping, the situation is not necessarily identical under the *SCM Agreement*. On the contrary, in the case of subsidies taking the shape of direct transfer of public funds or, as in this case, of preferential terms of sale offered by the central government, one might have thought that, in order for a subsidy to be granted, and eventually paid, it might generally be necessary, if only from a practical point of view, for the granting Member to have the name and address of the recipient. In these circumstances, the Panel may wish to consider, on the basis of the particular facts of the case before it, whether or not notice to the interested Member at least under the *SCM Agreement* might serve as adequate notice to interested parties that exist, but that are not known to the investigating authority, and that do not make themselves known. Therefore the European Union would suggest that the Panel should approach with caution the proposition that the Appellate Body's findings on this point in *Mexico – Beef and Rice*, which relate to the *ADA*, can be automatically transposed to the context of the *SCM Agreement*, without taking into account the particularities of the *SCM Agreement*.

12. The United States further claims that the measure at issue is inconsistent with (1) Article 12.8 of the *SCM Agreement* because the investigating authority failed to inform all interested parties, including the government of the United States, of the essential facts under consideration which form the basis for the decision, particularly with respect to the "all others" subsidy rate; and (b) Articles 22.3, 22.4 and 22.5 of the *SCM Agreement* because the investigating authority failed to explain its determination, also particularly with respect to the "all others" subsidy rate. Given the apparent absence of any meaningful disclosure, the European Union agrees with the both of these claims and arguments of the United States.

B. Allocation of Subsidies in Relation to Subject Products

13. The European Union agrees with the US that in calculating the subsidisation per unit ratio funder Article 19.4 of the *SCM Agreement,* there should be a parallelism between the numerator and the denominator, in the sense that they should either reflect the full amount of the subsidy in the numerator and the total sales of all products benefiting from it, in the denominator (Option 1) or, alternatively, be confined to the part of the subsidy benefiting the subject merchandise, in the numerator, and to the sales of the subject merchandise only, in the denominator (Option 2). These alternative methods are the most appropriate and it appears from the file that the data available allowed for each of them to be applied in this case. Other methods, even if they are less precise, would also be legitimate to the extent that they can ensure that the resulting figures do not exceed the ceiling fixed in Article 19.4 of the *SCM Agreement*. However, the method chosen by China, which is based on the unreasonable assumption that the full amount of the subsidy was

allocated to benefit the subject merchandise, has inflated the subsidisation per unit ratio and led to the imposition of countervailing duties that were certain to exceed the actual level of subsidisation.

IV. CONCERNING MOFCOM'S INJURY DETERMINATIONS

A. Price Effects Analysis

14. In order to ensure compliance with Article 3.1 *ADA* and Article 15.1 of the *SCM Agreement*, whenever a price effects analysis resorts to a direct price comparison between domestic and imported goods, such comparison must necessarily take into account the possible discrepancies between the prices compared in terms of product mix and level of trade. Based on the specific facts of the case before it, the investigating authority has to determine if such discrepancies have an actual impact on the comparability of prices, and if so, it must satisfy itself that the prices compared correspond to a comparable product mix and to the same level of trade, or alternatively, that appropriate adjustments are made to take into account the differences in product mix or level of trade.

15. Product mix may have an impact on price comparability where, due to varying production costs or consumer preferences, one product mix is objectively valued higher than another so that a direct comparison between the two turns out to be inappropriate.

16. The level of trade has such an impact to the extent that the transition of the product concerned from one level of trade to the other adds new costs, which are reflected in the prices charged for that product further down the distribution chain.

B. Impact Analysis

17. Article 3.4 *ADA* contains a mandatory – rather than illustrative – list of fifteen factors which must always be evaluated by the investigating authorities in every investigation. At the same time, "all relevant factors" may include, in a given case, factors in addition to those listed in Article 3.4 *ADA*. An overall evaluation (rather than a simple data gathering) of all factors in the appropriate context is particularly necessary in cases where several factors show positive trends. Such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured.

18. Therefore, if as it appears, MOFCOM's finding of adverse impact of the dumped imports was based predominantly on the assessment of two of the injury factors and made without engaging into an in-depth analysis of the particular relevance and relative weight of all relevant factors, and without an overall assessment of the existing trends, the European Union is of the opinion that the impact analysis is flawed and Articles 3.1 and 3.4 *ADA* and 15.1 and 15.4 of the *SCM Agreement* are breached.

C. Causation Analysis

19. Causation is a necessary element not only of the not only of the overall injury analysis under Articles 3.5 *ADA* and 15.5 of the *SCM Agreement* but also of the price effects analysis under Articles 3.2 *ADA* and 15.2 of the *SCM Agreement* and of the impact analysis under Articles 3.4 *ADA* and 15.4 of the *SCM Agreement*, with the only nuance that the latter two do not require a non-attribution analysis.

20. So far as the non-attribution analysis in this case is concerned, this is a rather fact-intensive discussion, in which the European Union prefers not to take a definitive position. It deems, however, appropriate to point out that, although the evolution of sales volumes and market shares, as presented by the US, seems sufficient to make a *prima facie* case that the US imports did not increase at the expense of the domestic industry (whose sales and market share also grew during the same period) but rather at the expense of third country imports (whose volume and market share declined), it is not sufficient in itself to justify a definitive conclusion to that effect. It could be, for example, that apart from eroding the volume and share of third-country imports, US imports have also had the effect of preventing domestic product sales from increasing at an even higher scale. Whether or not this was the case indeed, is a point of fact that the investigating

authority has the burden of verifying. In appears however, that MOFCOM has failed to discharge this burden and link the increase in US imports to any material injury suffered by the domestic industry.

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY JAPAN

A. Disclosure of the Essential Facts Before the Final Determination Under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*

1. As the preceding panels clarified[1], Articles 6.9 of the *AD Agreement* and 12.8 of the *SCM Agreement* oblige the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis and the final findings and conclusion on the existence of dumping or subsidization, injury, and causation. And such disclosure must be sufficient enough for interested parties to defend their interests.

2. The fact-finding processes for the normal value, the export price, and adjustments are all indispensable for the final fact-findings of dumping. Accordingly, the authorities must disclose at a minimum the actual process of fact-findings of the normal value and export price and adjustments thereto to the exporter which submitted the relevant raw data.

3. When the authorities decide to apply the facts available in the calculation of the dumping margin for "all others", they are required to disclose such facts available in accordance with Article 6.9 of the *AD Agreement*. Furthermore, Article 6.9 of the *AD Agreement* requires the authorities to disclose to interested parties the body of facts, on which the authorities found that the interested party *did not* provide necessary information.

4. The United States alleges that MOFCOM failed to disclose the facts necessary to calculate a 30.3 percent subsidy rate applicable to un-examined producers. The authorities must disclose the body of facts, on which they found the financial contribution, benefit, and specificity, including the "facts available" used, and the calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

5. Furthermore, the process of the application of the below-cost test including the actual sales prices and their actual costs are also facts necessary for the authority to find the normal value and indispensable elements of the determination of dumping and the calculation of the dumping margin. As such, they "form the basis for the decision whether to apply definitive measures." Thus, in accordance with Article 6.9, the authority is required to inform interested parties of these facts.

B. Preparation of Non-Confidential Summaries under Article 6.5.1 of the *AD Agreement* and Article 12.4.1 of the *SCM Agreement*

6. Pursuant to Article 6.5.1 of the *AD Agreement* and Article 12.4.1 of the *SCM Agreement,* when an application does not contain a non-confidential summary of confidential information, the authorities are obliged to scrutinize whether the applicant's statement established the exceptional circumstances specific to the particular information. If the authorities accept an application containing neither a non-confidential summary nor statements establishing exceptional circumstances, the authorities would act inconsistently with these provisions.

7. The Panel should review carefully whether the application adequately provided a non-confidential summary in accordance with the disciplines in the *AD Agreement* and the *SCM Agreement*. If not, the Panel should review whether or not the MOFCOM accepted the application upon confirming that the applicant's statement appropriately explained the reasons why particular pieces of confidential information are not susceptible of summary in light of particular circumstances of the information.

[1] Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179 para. 7.110 and Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States,* WT/DS414/R, circulated 15 June 2012 para. 7.407.

C. The Determination of the All Others Rates

8. As the panel in *China – GOES* stated, Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* clarify that the authorities must notify the exporter or foreign producer of the specific information which the authorities require from the exporter or foreign producer. Only when such party does not provide the specifically requested information may the authorities apply the facts available instead of the original information the party would have submitted. Inaction by exporters/producers, who were unknown to the authorities, to make themselves known to the authorities would not be a valid reason for the importing Member to apply facts available. A dumping determination based on facts available with respect to such exporters/producers would be inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*. Japan is of the view that the same interpretation also applies to Article 12.7 of the *SCM Agreement.*

D. The Sufficiency of the Description in the Notice of Preliminary and Final Determinations

9. With respect to the alleged failure to explain the basis to determine an "all others" anti-dumping rate based on facts available, Japan agrees with the United States that investigating authorities must explain in sufficient detail the factual basis to determine to apply facts available and the factual basis to determine the normal value and the export price to calculate the dumping margin.

10. In the countervailing duty investigation in question, MOFCOM was obliged to explain in sufficient detail the background and reasons, both legally and factually, that led MOFCOM to find a 31.4 percent margin in the preliminary determination and 30.3 percent margin in the final determination for those exporters which failed to make an entry for appearance or failed to submit a questionnaire response.

11. The United States alleges that MOFCOM "failed to disclose the methodology that it claimed to have used to adjust subject import prices to account for their different level of trade" in its analysis of price undercutting.[2] Pursuant to Article 12.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*, the authorities must provide sufficient background and reasons for its conclusion of issues of law and fact relevant to, and material in the authorities' final determination in the public notice or a separate report of the final determination. Articles 3.2 of the *AD Agreement* and 15.2 of the *SCM Agreement* set forth that "the investigating authorities shall consider whether there has been a significant price undercutting". As this text clarifies, the authorities are obliged to consider the issue of price undercutting to reach the determination of injury. Accordingly, this issue is relevant and material to the final determination. MOFCOM thus was obliged to provide sufficient background and reasons in the public notice or a separate report of the final determination of the issue of fact that MOFCOM considered in making price-undercutting analysis.

E. The Authorities' Consideration of Price Suppression

12. In its First Written Submission, China takes the position that Article 3.2 of the *AD Agreement* and Article 15.2 of the *SCM Agreement* "require only a showing of the existence of adverse price effects" but do not "require a showing that subject imports caused or affected the price suppression."[3] China's interpretation does not account for the full text of these provisions, which make explicit that the effect on prices is that of the dumped or subsidized imports: "the effect <u>of</u> the … imports <u>on</u> prices."

[2] First Written Submission of the United States of America, submitted on 27 June 2012, para. 312.
[3] First Written Submission of the People's Republic of China, para. 336.

13. Article 3.2 of the *AD Agreement* and Article 15.2 of the *SCM Agreement* do not require an investigating authority to use any particular type of price suppression analysis.[4] The text of these Articles, however, imposes certain disciplines on the flexibility afforded to investigating authorities in determining price suppression. As explained above, price suppression must be considered in relation to the imports. A price suppression analysis that is limited to a comparison of domestic prices and costs without consideration of the imports does not satisfy the requirement to assess the "effect of the . . . imports on prices."

14. As a general matter, an examination of the relative price levels of the domestically produced and imported products is an effective way to analyze price effects. China's position that a finding of price suppression has nothing to do with the relative price levels of both products is extreme and untenable.

15. In respect of the authorities' obligation to consider price suppression, Japan concurs with the Appellate Body that "with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices"[5]. Furthermore, the Appellate Body has upheld the finding of the panel in that case that, "because Articles 3.2 and 15.2 require an investigating authority to consider *whether the effect of* subject imports is to depress prices of like domestic products to a significant degree, "*merely showing* the existence of significant price [suppression] does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement"[6].

[4] *See, e.g.,* Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3, para. 7.638 ("It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price undercutting."). *See also* Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, para. 7.328 ("Article 15.2 confers wide latitude on the investigating authority.")

[5] Appellate Body Report, *China-Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States,* WT/DS414/AB/R, circulated to WTO Members 18 October 2012 (*"China-GOES"),* para. 154.

[6] Appellate Body report, *China-GOES*, para. 159 (a footnote omitted).

ANNEX B-4

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY MEXICO

I. Choice of the basis for calculating costs

A. The obligation to calculate costs on the basis of the records kept by the exporter or producer under investigation is not absolute

1. Mexico agrees with China that the obligation under Article 2.2.1.1 of the *Anti-Dumping Agreement* (AD Agreement) to calculate costs on the basis of the records kept by the exporter or producer is not absolute. We note that the text of this article establishes two basic premises:

(a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;

(b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:

(i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

(ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In *US – Clove Cigarettes*[1], the WTO's Appellate Body interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule", and stated that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation. Thus, in the context of Article 2.2.1.1 of the AD Agreement, the expression "normally" implies that there is a presumption in favour of the accounting records of the producer or exporter being considered for the calculation of the costs when they comply with the conditions identified in indents (i) and (ii) above, but that this presumption can always be rebutted. In other words, if the records satisfy these conditions and the authority decides not to use them, then the authority bears the burden of explaining why they were not considered.

3. As for the second premise in Article 2.2.1.1 of the AD Agreement, the Panel in *US – Softwood Lumber V* found that Article 2.2.1.1 required that the costs be calculated on the basis of the exporter or producer's records, insofar as those records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration.[2] Mexico considers that Article 2.2.1.1 of the AD Agreement establishes a *juris tantum* presumption: unless proven otherwise, the exporters' records will be considered to be in accordance with GAAP and to reasonably reflect the costs associated with the production and sale of the product under consideration. Consequently, the initial burden of rebutting the said presumption would lie with the investigating authority.[3]

4. In short, Mexico considers that the obligation to use the records of the exporter or producer under investigation is not absolute for two reasons: (1) because the records must be compatible with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration; and (2) because, according to the text of Article 2.2.1.1. of the AD Agreement and the Appellate Body's interpretation of the term "normally" in *US – Clove Cigarettes*, even if the records satisfied these two conditions, the investigating authority would not necessarily have to use them if faced with a case in which such action was justified.

[1] Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, paragraph 273.

[2] Appellate Body Report, *US – Softwood Lumber V*, paragraph 7.237.

[3] Reply by Mexico to question 10 of the Panel.

B. A methodology for allocating costs by price might not reasonably reflect the costs of production and sale of a product under investigation

5. In Mexico's view, a methodology for allocating costs by price, such as that used by the United States exporters, might not reasonably reflect the costs of production and sale of the product under consideration. In this connection, we consider it important to define the meaning of the expressions "cost of production" and "cost of sale", given that one of the requirements for using the accounting records of the exporter or producer is that they reasonably reflect those costs.

6. As indicated in China's first written submission, in *EC – Salmon (Norway)* the Panel established that the ordinary meaning of the expression "cost of production" is "the price to be paid for the act of producing".[4] Thus, assuming that the cost of production is the price to be paid for the act of producing, it is permissible to suppose that the meaning of the expression "cost of sale" is the price to be paid for the storage of the product to be sold. Mexico considers that even a zero cost of production can reasonably reflect the costs associated with the production (but not necessarily the sale) of a product provided the price paid for the act of producing the product was really zero.[5] What is essential here is that the cost of production should actually be equal to zero.

7. Thus, for an investigating authority to be able to take into account the accounting records of the exporter, those records must reflect both the price paid for the act of producing and the price paid for the storage of the product to be sold. Consequently, if the costing methodology of United States exporters did not satisfy the above requirement, then it could not be used by the Chinese investigating authority.

8. The methodology of costing by price basically consists in allocating costs on the basis of the price at which a product is sold to the end consumer. If this methodology is applied to the case of joint products, then the cost of the product as a whole is pro-rated and allocated to each joint product in relation to its market price. Thus, a greater cost is allocated to those joint products that have a higher market price, and a lower cost to those that have a lower price.

9. This costing method involves artificially transferring part of the profit obtained from the sale of the joint products for which there is a high demand to the joint products with a lower demand. The effect is that all the joint products always have the same profit margin, no matter which joint product is concerned and no matter the price at which it is sold. Thus, the method of costing by price involves circularity: if the cost depends on the price, than that cost will normally be below the price.

10. This does not necessarily pose a problem for the calculation of a dumping margin because if the joint products have more or less similar prices on the market of the exporting country, the difference between the profits yielded by the price-based method and the real profits, per joint product, would be minimal or zero. Consequently, the distortion could be insignificant or non-existent.

11. However, in cases such as this one, the distortion could be severe, since there are joint products with a very high selling price on the US market (e.g. chicken breast), and others with a very low value on the same market (e.g. legs). While Mexico considers the existence of a very distinct difference in prices between the joint products investigated on their market of origin to be relevant, it would like to point out in relation to one of the questions of the Panel that it does not believe that the value of a product on the export market is relevant for the purposes of Article 2.2.1.1 of the AD Agreement.[6] Given the enormous difference in prices on the US market, the methodology of costing by price would distort costs, allocating a higher cost to chicken breasts and a lower cost to legs. As a result, the prices that should be below the costs might artificially end up exceeding them.

12. In the face of this problem, one of the viable alternatives is to use a method based on weight, as did the Chinese authority. When this method is used, the distortion created by the

[4] Panel Report, *EC – Salmon (Norway)*, paragraph 7.481.
[5] Reply by Mexico to question 8(b) of the Panel.
[6] Reply by Mexico to question 8(a) of the Panel.

combination of such different prices for joint products on the United States market and the method of costing by price does not arise.

13. Thus, in the present case, taking into account the serious distortions that ensue and given the enormous difference in price between the joint products included in the product under consideration, we must conclude that, in this case, the method of costing by price does not reasonably reflect the costs associated with the production and sale of the product under consideration, since it could not reflect "the price to be paid for the act of producing", as interpreted by the Panel in *EC – Salmon (Norway)*, or the "price to be paid for the storage of the product to be sold", proposed by Mexico in its first oral statement (inferred by analogy from the determinations of the panel in question). For this reason, Mexico agrees with China that "[i]f a company has to spend $100 to produce an item, the fact that the item may only sell for $10 does not change the fact that the 'price to be paid for the act of producing' that item was $100".

II. Definition of the domestic industry

A. China should explain the basis on which its authority concluded that the 17 companies investigated represented more than 50% of the domestic industry for the purposes of the determination of injury

14. Mexico notes that the Chinese authority found that the 17 domestic producers that supported the investigation accounted for 45.53%, 50.72%, 50.82% and 52.59% of the total volume of domestic production in China in the years 2006, 2007, 2008 and 2009, respectively. However, China did not provide any detailed explanation of the basis on which its investigating authority reached these conclusions. In its first written submission, China makes several statements[7] which raise doubts as to whether the investigating authority really knew the total production of the like product on its domestic market. China also states that its authority did not take a sample because it had no knowledge of the universe of producers that constituted the industry under investigation. It is therefore indispensable that China provide a detailed description in this respect.

B. The United States' appraisal of the facts may not be correct and therefore its claim regarding Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well founded

15. Assuming that China was justified in finding that the 17 companies that supported the investigation represented more than 50% of the total volume of domestic production, Mexico agrees that the United States' exposition of the facts in its first written submission could be incorrect. In fact, it is not clear to Mexico that China defined the domestic industry with the bias alleged by the United States. Therefore, the United States' claim concerning Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well-founded.

16. The United States claims that, inconsistently with Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement, China excluded from the domestic industry all producers of white-feather broiler products that did not support the investigation and that its authority did not make any significant effort to identify other producers different from those already known. Proof at this was the fact that no producer other than these 17 appeared in the investigation. This, according to the United States, increased the possibility of an affirmative determination of injury, and it claims that this is inconsistent with the requirement to conduct an objective examination, as provided for in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Likewise, the United States points out that the Chinese authority should have identified the universe of domestic producers rather than limiting its definition of the domestic industry to the 17 producers aforementioned.

17. China asserts that mechanisms additional to publication on the website were used and involved the reporting of the investigation by China's larger television channels and major newspapers. Moreover, it states that the assertion made by the United States is incorrect, since of these 17 producers, only 15 participated in the initial petition while the other two replied to the questionnaire without having had previous contact with the Chinese authority.

[7] First written submission of China, paragraphs 235, 243, 250 and 257.

18. With regard to the actions taken by the Chinese authority, assuming that it had not used any mechanism apart from publication on the website, Mexico would agree with the United States that the actions of an investigating authority cannot be limited to such publication, especially in China's case as it acknowledges the existence of a very large number of producers. Mexico recalls in this connection what was established by the Appellate Body in *US – Wheat Gluten*, namely that the authorities "must *actively* seek out pertinent information" in the case before them.[8] Consequently, in Mexico's view the Chinese authority could have taken some additional action to seek to identify as many producers as possible so as, on that basis, to define the domestic industry and, subsequently, to conduct its injury analysis. For example, the Chinese authority could have enquired among local government agencies and producers' associations and checked lists of beneficiaries of subsidy programmes, consulted the authorities in charge of animal health matters, etc.[9]

19. With regard to the domestic industry, Mexico notes that China found that the companies that supported the investigation represented the domestic white-feather broiler products industry inasmuch as they were the only ones to appear in the proceedings because they constituted more than 50% of China's total production during the examination period. Assuming that two other producers actually did appear, and that they replied to the questionnaire, that would suggest that the approach of the Chinese authority was to define the industry as a "major proportion" of the total domestic production. In this connection, Mexico notes that Article 4.1 of the AD Agreement clearly indicates that a domestic industry can be defined in two different ways: (a) as the domestic producers as a whole; or (b) as producers whose production constitutes a major proportion of total domestic production.

20. The United States maintains that China was obliged to identify all of the domestic producers and send them a questionnaire, and to include all of the domestic producers in the injury analysis.

21. In Mexico's opinion this is not necessarily so. Article 4.1 of the AD Agreement allows the domestic industry to be defined as including only producers that produce a major proportion of the total domestic production. Insofar as the Chinese authority based its analysis on this approach and complied with the standard applicable, it would not have unjustifiably excluded any producer from the definition of the domestic industry.

22. Nevertheless, it is clear that to be in a position to decide whether the actions of the authority were sufficient, it is necessary to know how it determined the total domestic production. As there are no data in the final determination to indicate the basis on which the total production was determined, Mexico considers that there could have been a violation of Article 12.2.2 of the AD Agreement. However, if the record contains elements that justify the determinations concerning the composition of the domestic industry, it would be incorrect to conclude that there was also a violation of Article 3 of the AD Agreement. For these reasons, we respectfully request this Panel to examine the contents of the administrative record of the investigation.

III. Comparison of the prices of the imports with the domestic prices on the market of the importing country

A. The comparison of the price of the imports with the price of the domestic product should be based on positive evidence and involve an objective examination

23. Mexico notes that, in accordance with the reasoning of the Panels in *Egypt – Rebar*[10] and *EC – Tube or Pipe Fittings*[11], there is no single valid method of conducting the undercutting analysis under Article 3.2 of the AD Agreement. However, even if there is no mandatory method, Mexico considers that the conditions established in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement are applicable to the undercutting analysis, since these articles govern all aspects relating to the determination of injury.

24. Consequently, the undercutting analysis should be consistent with Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement, i.e. it should be based on positive evidence and

[8] Appellate Body Report, *US – Wheat Gluten*, paragraph 53.
[9] Reply by Mexico to question 11 of the Panel.
[10] Panel Report, *Egypt – Rebar*, paragraph 7.73.
[11] Panel Report, *EC – Tube or Pipe Fittings,* paragraph 7.292.

involve an objective examination.[12] In other words, the undercutting analysis should be carried out in an unbiased manner, without favouring the interests of any party, since the determination will always be influenced by the objectivity of the investigation process, or the lack thereof.

B. *The price comparison must be conducted at the same level of trade*

25. As already mentioned, in the AD Agreement there is no indication of the details that should be taken into account in analysing the level of undercutting in the context of a determination of injury. Nevertheless, Mexico considers that, in addition to the general rules laid down in Article 3.1 of the AD Agreement, certain obligations laid down in Article 2.4 of the AD Agreement are applicable to the undercutting analysis.

26. In this respect, in *EC – Tube or Pipe Fittings*, the Panel determined as follows:

> 7.292 [I]n view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the *Anti-Dumping Agreement* relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, **we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis**.
>
> 7.293 In a dumping determination, one focus of **adjustments** may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; **by contrast, the focus in a price undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to customers**. (Emphasis added.)

27. Thus, the Panel recognized that although all of the obligations of Article 2 cannot be transposed into the analysis envisaged in Article 3, it is possible to transpose some of them and, moreover, accepted that making adjustments is one of the obligations capable of being transposed.

28. In this connection, Mexico considers that the price comparison for the purposes of injury analysis must be conducted at the same level of trade and that, if need be, the necessary adjustments should be made to ensure that the comparison between the like product and the product under investigation is objective and fair. This is necessary to prevent distortions or bias in the analysis of the effects of the imports on domestic prices in the importing country. In Mexico's opinion, this is something that needs to be addressed in order to be able to fulfil the obligation of carrying out an objective examination in accordance with Article 3.1 of the AD Agreement.

C. *A significant difference in the values of the baskets of products compared could produce erroneous results in the price analysis*

29. Mexico agrees with the United States that a significant difference between the values of the domestic products and the like national products could lead to a biased conclusion regarding the levels of undercutting, if it is decided to compare average prices.

30. Although the Chinese authority has explained its reasons for not conducting the price analysis on a disaggregated basis, Mexico is not convinced that this explanation is adequate. In Mexico's opinion, where the analysis of the effects of the imports on internal prices in the importing country is concerned, the Chinese authority should have compared products "of the same species" and not products "of the same genus". In Mexico's view, a disaggregated comparison between products "of the same species" would make possible a more appropriate and reasonable comparison.

31. This is based on Articles 3.1 and 3.2 of the AD Agreement, which require that the investigated product and the domestic product be like. Indeed, Article 3.1 states that the determination of injury must include an objective examination "of the effect of the dumped

[12] Regarding the meaning of the expression "objective examination", see the Appellate Body Report in *US – Hot-Rolled Steel*, paragraph 193.

imports on prices in the domestic market for *like* products". Likewise, the second sentence of Article 3.2 states that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting … as compared with the price of a like product of the importing Member […]".[13]

32. Finally, as Mexico stated in its replies to the questions raised by this Panel, Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement set out three types of price effects which are alternatives and do not depend on each other. Mexico has three reasons for considering this to be so: (1) Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement mention three price effects with different characteristics; (2) each price effect is separated by the word "or", which suggests that the investigating authority can take into account one or more of them; and (3) the last sentence of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement[14] suggest that the authority can analyse the undercutting in isolation and independently of the price depression or suppression.[15]

[13] Reply by Mexico to question 15 of the Panel.
[14] "No one or several of these factors can necessarily give decisive guidance".
[15] Reply by Mexico to question 13 of the Panel.

ANNEX B-5

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY NORWAY

I. The authorities' duty to provide opportunities for a meeting between interested parties and parties with adverse interests

1. The US claims that China acted inconsistently with Article 6.2 of the *AD Agreement*, by refusing the request for a public hearing.[1] The wording of the second sentence of Article 6.2, "the authorities *shall*" (emphasis added), makes it clear that the authorities have no flexibility as regards providing opportunities for a meeting between interested parties and parties with adverse interests (provided the authorities have been asked by an interested party to hold a meeting). It is an obligation they have to fulfill. The terminology chosen, "provide opportunities", entails contacting the parties with adverse interests and asking them to take part in such a meeting.

2. After being contacted and asked to attend (with sufficient attention being paid to the convenience of the parties, cf. the third sentence of Article 6.2), the parties with adverse interests may however decide that they cannot or do not want to attend the meeting, in line with the fourth sentence of Article 6.2. In such a case, if *all* parties with adverse interests inform the authorities that they will not be attending the meeting, the authorities would not be obliged to hold the meeting. Norway would like to underline that this is the *only* viable reason not to hold a meeting in line with Article 6.2. Under such circumstances, the authorities' obligation of "providing opportunities" for the relevant parties to meet has been met.

II. Disclosure of essential facts under consideration which form the basis for the decision of whether to apply definitive measures

3. The US claims that China is in breach of Article 6. 9 of the *AD Agreement*, as the investigating authority did not disclose the data and calculations performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.[2] The core of the duty of disclosure under Article 6.9 relates to "essential facts". The term "fact" has been interpreted to mean "a thing that is known to have occurred, to exist or to be true".[3] On the basis of that definition, the panel in *Argentina – Poultry* found that while the authority's *reasons* should explain *inter alia* how it weighed the facts and how the facts in the record supported its determination, the duty of disclosure relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed.[4]

4. Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. Absent disclosure of the essential facts, interested parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

5. Accordingly, if the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. This is important for the legitimacy of the process as well as a safeguard mechanism for the correctness of the actual numbers and data relied on. These facts are essential to the final determination, as it could not otherwise be made and no duties could then be imposed. Such disclosure is important to ensure interested parties have the opportunity to defend their interest, in accordance with Article 6.2 of the *AD Agreement*.

[1] The US' First Written Submission, paras. 39 and 40.
[2] The US' First Written Submission, para. 53.
[3] Panel report, *Argentina – Poultry*, para. 7.225.
[4] Panel report, *EC - Salmon*, para. 7.807.

III. The determination of the «all others» rate

6. The US claims that China applied facts available to producers that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, thereby acting inconsistently with Article 6.8 and Annex II of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.[5] Paragraph 1 of Annex II of the *AD Agreement* insists that the authority "specify in detail the information required from any interested party" and ensure that the interested party be "aware that if the information is not supplied within a reasonable time", the authority may use facts available. Accordingly, in *Mexico – Rice,* the Appellate Body ruled that the authority could not apply facts available to the exporters that were not investigated and not notified of the required information.[6] Inaction is thus not sufficient grounds for resorting to facts available.[7] In the case before the Panel, China submits that a higher level of notice was effected compared to *Mexico – Rice*, as the notice was posted on the website of MOFCOM.[8] The Panel in *China – GOES*, on this very issue, noted the following:

> "Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party."[9]

7. This conclusion follows directly from the wording of paragraph 1 of Annex II of the *AD Agreement*. "Aware" is defined as "conscious", "not ignorant", "having knowledge" or "well-informed".[10] The fact that the notice is available on the internet, together with millions of other documents, does not ensure that the individual producer actually knows about the notice. Furthermore, if this lower threshold was to be applied, inconsistent with the wording of paragraph 1 of Annex II, it would imply that the producers would have to ensure they were up to date with all potential notices from all investigating authorities in all WTO Members to whom they export goods at all times. According to paragraph 1 of Annex II, the responsibility is clearly put on the investigating authority. The only viable interpretation of paragraph 1 of Annex II is thus that putting a notice on the internet is not sufficient to fulfill the requirement of awareness as stipulated. In such cases, the interested parties cannot be seen to have been notified of the required information in the terms of Article 6.8 of the *AD Agreement*.

8. Although the *SCM Agreement* has no equivalent to Annex II of the *AD Agreement*, the Appellate Body in *Mexico – Rice* found that the same limitations on the authorities' discretion when resorting to the use of facts available apply to Article 12.7 of the *SCM Agreement*.[11] It is thus Norway's view that Article 12.7 of the *SCM Agreement* should be interpreted to the same effect, in line with the object and purpose of the said Article.

IV. Explanation of determinations

9. The US claims that China violated Articles 12.2, 12.2.1 and 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement* because the investigating authority failed to provide an adequate explanation for some of its determinations, including the determinations of the "all others" rates and the determinations of injury.[12] Under the cited provisions, the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive anti-dumping and countervailing duties. The Appellate Body and panels have consistently ruled that these provisions require investigating authorities to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.[13] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[14] The "evidentiary path that led to the inferences and overall conclusions of

[5] The US' First Written Submission, paras. 146 and 184.
[6] Appellate Body Report, *Mexico – Rice*, para. 259.
[7] Appellate Body Report, *Mexico – Rice*, para. 259.
[8] China's First Written Submission, paras. 182-184 and 190-193.
[9] Panel Report, *China – GOES*, para 7.386.
[10] The Concise Oxford Dictionary of current English, R. E. Allen, 8th edition, Oxford University Press, Oxford.
[11] Appellate Body Report, *Mexico – Rice*, para. 295.
[12] The US' First Written Submission, paras. 166-169, 213-218 and 312.
[13] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 99.
[14] Appellate Body Report, *US – Line Pipe*, para 217.

the investigating authority must be clearly discernible in the reasoning and explanations found in its report".[15]

10. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *AD Agreement* and the *SCM Agreement* governing those determinations. These provisions thus represent an important safeguard mechanism for due process rights.

V. Definition of the domestic industry

11. The US claims that China violated Articles 3.1 and 4.1 of the *AD Agreement* and Articles 15.1 and 16.1 of the *SCM Agreement*, by including only domestic producers that voluntarily requested and returned domestic producers' questionnaire responses in the definition of the domestic industry.[16] Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the investigating authority to conduct an "objective examination" of the economic state of the "domestic industry" on the basis of "positive evidence". In *EC – Bed Linen (India - 21.5)*, the Appellate Body ruled that an "objective examination" requires authorities to reach a result that is "*unbiased, even-handed*, and *fair*."[17] In *US – Hot-Rolled Steel (AB)*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

> "to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured."[18]

12. Furthermore, the Appellate Body found that the "*selective*" examination of just "one part" of an industry is not "objective" because the authority could choose the worst performing part of the industry for examination, thereby making an injury determination "more likely". It held that "[t]he investigation and examination must focus on the *totality* of the 'domestic industry'."[19] Thus, an investigating authority cannot single out particular parts or groups of the domestic industry for investigation. This ruling thus also demonstrates that the requirements of objectivity impose contextual constraints on how the investigating authority defines the "domestic industry" under Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*.

13. As to the precise definition of "domestic industry", this, according to said Articles, comprises producers "as a whole" of the like products. In the alternative, the industry may be limited to a "major proportion" of the industry. However, the *only* category of producers that may be entirely excluded from the industry is "related" producers. The definition of "domestic industry" therefore ensures the inclusion of domestic producers from all segments and sectors of the industry on an equal footing. Any determinations made with respect to the "domestic industry" will accordingly be representative of that industry as a whole. The said Articles do not authorise an authority to limit an industry solely to a certain group of producers, for example supporters of the investigation.

14. Accordingly, it is Norway's view that an investigating authority cannot limit the definition of the domestic industry to certain categories of producers, such as supporters of the investigation. This would be inconsistent with Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*. Furthermore, such a limitation of the definition of the domestic industry would not fulfil the objectivity requirement of Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*.

[15] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 97.
[16] The US' First Written Submission, para. 257.
[17] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.
[18] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.
[19] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.

ANNEX B-6

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE KINGDOM OF SAUDI ARABIA

1. The Kingdom of Saudi Arabia participates as a third party in this dispute *China – Antidumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427) to express its views on a number of important systemic issues raised in this dispute.

I. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT: FOREIGN PRODUCERS' AND EXPORTERS' COST DATA SHALL BE USED ABSENT EXCEPTIONAL CIRCUMSTANCES

2. Saudi Arabia is of the view that Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to use the costs as actually borne by the producer as reflected in the records of the producer in question as the basis for the determination whether sales are made in the ordinary course of trade or are, in contrast, below costs. The same costs as reflected in the records of the exporter or producer under investigation should also be used in the event that the normal value is to be constructed in accordance with Article 2.2 of the Anti-Dumping Agreement.

3. Article 2.2.1.1, first sentence imposes a general obligation of principle in respect of the basis for the cost determination. It provides that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation." The second part of the first sentence sets out the exceptional circumstances under which the rule would not apply and thus clarifies that this obligation is subject to two limited conditions only: (a) that "such records are in accordance with the generally accepted accounting principles of the exporting country"; and (b) that the records "reasonably reflect the costs associated with the production and sale of the product under consideration." These two basic conditions underline the exceptional nature of the circumstances that would allow an authority to reject the records of the producer or exporter as the basis for the cost determination.

4. The second sentence expands on one of these conditions by clarifying the final part of the first sentence relating to the condition that the costs reasonably reflect the costs "associated with" the production and sale of the product under consideration, which is affected by the cost allocation methodology that is used. Article 2.2.1.1 does not permit the rejection of costs data and their replacement with other data simply because the authorities consider that the costs as reflected in the records are below an external benchmark or because a different allocation method could have been used.

5. The condition that the costs have to "reasonably reflect" the costs "associated with" the production and sale of the product under consideration does *not* allow an authority to question the accuracy or "reasonableness" of the costs as such, but concerns merely their *association with* the product under consideration as compared with other products to which the costs may also be associated. In *US – Softwood Lumber V*, the panel noted that that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".[1] According to the panel in *EC – Salmon (Norway)*, "the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product".[2] That is the only relevant test to apply in the context of this second condition.

6. Furthermore, Saudi Arabia considers that Article 2.2.1.1 does not impose a particular cost allocation methodology but does impose a clear and meaningful obligation to consider all available evidence, including in particular the evidence provided by the foreign producer or exporter. As long as the method historically utilized by the foreign producer or exporter as reflected in the records is

[1] Panel Report, *US – Softwood Lumber V*, para. 7.321.
[2] Panel Reports, *EC – Salmon (Norway)*, para. 7.483; *Egypt – Steel Rebar*, paras. 7.393 and 7.422.

reasonable, it must be accepted. A method is not "unreasonable" simply because the allocation of costs leads to less costs being allocated to a by-product or a waste product, even if that by-product or that waste product is of great value in the country of importation. Nor would it be correct to suggest that the cost allocation method has to be appropriate "for purposes of the anti-dumping investigation". The requirement in the second sentence that the allocation method has to be one that has been "historically utilized" points in the opposite direction. It confirms that the cost allocation method as reflected in the records must be the method that the producer or exporter is used to employ, and is precisely not tailor-made for purposes of the investigation.

II. INVESTIGATING AUTHORITIES CAN RESORT TO THE USE OF FACTS AVAILABLE ONLY IN VERY LIMITED CIRCUMSTANCES AND NEVER IN A PUNITIVE MANNER AND MUST DISCLOSE THE BASIS FOR THE USE OF FACTS AVAILABLE

7. Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement permit the use of facts available only in limited circumstances. These limited circumstances are: (a) when an interested party or Member has not provided "necessary" information in a timely manner (specifically "within a reasonable period"), or (b) when an interested party or Member has otherwise significantly impeded the investigation. In addition, Annex II of the Anti-Dumping Agreement makes clear that the use of facts available is permissible only when the parties have been given proper notice of the information required by the investigating authority, and have been informed of the possibility that facts available will be applied in the event of non-cooperation with the authority. This effectively means that an active approach on the side of the investigating authority is required in order to ensure that interested parties have been contacted and adequately informed before it is entitled to resort to the use of facts available. Therefore, if the investigating authority has failed to identify and notify an exporter or foreign producer, no facts available may be used in respect of this exporter. Thus, "facts available" should only be used to fill in gaps in the necessary information and cannot be used in a punitive manner. The investigating authority must employ the *best*, most appropriate and proper facts available, and the determination must not be based on speculative inferences.

8. Saudi Arabia recalls that Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require investigating authorities to disclose those facts underlying the final findings and conclusions in respect of the essential elements that must exist for the application of definitive anti-dumping or countervailing duties. Saudi Arabia considers that when facts available are used, the authorities must disclose the "facts" relied upon to reach the conclusion that facts available were warranted, as part of the facts necessary to the process of analysis and decision-making by the investigating authority.[3] In addition, in the view of Saudi Arabia, it must be disclosed why these facts were considered to be the "best" information available for the particular producer. This "factual basis" for making the dumping or subsidies determination is clearly part of the "essential facts under consideration" that interested parties must be informed of before the final determination such that they can provide their comments and defend their interest, as required by Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. Similarly, Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement also impose an obligation to include in the public notice of the determination "sufficient detail" on the important issues of facts and law considered "material" to the investigating authorities such as, undoubtedly, the factual basis for the dumping or subsidies margin calculation.

III. PROPER ALLOCATION OF SUBSIDIES UNDER ARTICLE 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994 REQUIRES ALLOCATION TO ALL PRODUCTS BENEFITING FROM THE SUBSIDY

9. Saudi Arabia considers that Article 19.4 of the SCM Agreement and Article VI of the GATT 1994 impose a minimum requirement on the investigating authority to ensure a proper and correct allocation of the total subsidy amount to the specific subject product. Whatever the allocation methodology to be adopted, Saudi Arabia considers that if a subsidy benefits several products including but not limited to the product under consideration, it is improper to allocate the total subsidy amount to the subject product only. An investigating authority that does not properly allocate the subsidies over all of the products benefiting from the subsidy but instead allocates all

[3] Panel Report, *China – GOES*, para. 7.408.

of the subsidy amount to the product under consideration only will likely impose countervailing duties that are in excess of the amount of subsidies benefiting the product.

IV. AN INJURY EXAMINATION MUST BE OBJECTIVE AND BASED ON POSITIVE EVIDENCE

10. Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement set forth an obligation to conduct an objective injury examination based on positive evidence which permeates all aspects of the injury and causation investigation, including the definition of the domestic industry to be examined. First, an injury examination can only be objective if the process that led to the definition of the domestic industry was equally objective. Second, an objective examination of price effects in the context of an injury determination under Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement needs to recognize important differences between the subject product and the like product, such as the product mix and must compare prices at the same level of trade. Third, an investigating authority conducting an injury examination under Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement must provide an accurate and adequate explanation of how the facts support the findings. Fourth, an objective causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement requires investigating authorities to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. The non-attribution requirement requires the authorities to separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors, such as decisions on capacity expansion and other business decisions that are unrelated to the dumped or subsidized imports.

V. DUE PROCESS REQUIRES THAT A PROPER BALANCE BE STRUCK BETWEEN TRANSPARENCY AND THE PROTECTION OF CONFIDENTIAL INFORMATION

11. Saudi Arabia notes the balance struck in Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement between confidentiality and transparency. Due process requires that interested parties have a right to see the evidence submitted or gathered in an investigation, and have an adequate opportunity for the defense of their interests. But it is important to recall that there could be “exceptional circumstances” in which summarization of confidential information will not be possible. In this respect it must be emphasized that transparency does not trump legitimate confidentiality concerns.

ANNEX B-7

THAILAND'S RESPONSES TO PANEL QUESTIONS

I. PROCEDURAL CLAIMS

A. OBLIGATIONS UNDER ARTICLE 6.2 OF THE ANTI-DUMPING AGREEMENT

1. (to all third parties) Please clarify your views as to how an authority may satisfy the obligation to "provide opportunities" under Article 6.2, second sentence, of the Anti-Dumping Agreement, including the conditions, if any, under which an investigating authority may refuse to organise and hold a hearing.

Response to Question 1: *The Government of Thailand (GOT) considers that Article 6.2 provides opportunities for interested parties with adverse interests to meet all interested parties so that opposing views may be presented and rebuttal arguments may be offered. Where an interested party requests a hearing under Article 6.2, the GOT considers that an authority should accept the request, provided that the interested party with adverse interests is also provided an opportunity to attend and that the request is raised within the reasonable period of time as not to be a disruption to the proceedings.*

B. DISCLOSURE OF ESSENTIAL FACTS

2. (to all third parties) What, in your view, are the relevant "essential facts" concerning an AD calculation which an investigating authority must disclose pursuant to Article 6.9 of the Anti-Dumping Agreement? In particular, do you think the authority is obliged to disclose as "essential facts": (1) its actual dumping margin calculations; (2) exclusion of certain transactions or results of its application of the below-costs test?

Response to Question 2: *The GOT considers that Article 6.9 intends to provide interested parties with opportunities to defend their interests. In this respect, an authority should issue a detailed calculation of the dumping margin, including the results of any below cost tests and an explanation of why any transactions were being excluded, so that interested parties have an opportunity to comment and such comments may be taken into account prior to the issuance of the final determination.*

3. (to all third parties) What are the criteria for distinguishing essential facts from regular facts, and facts from reasoning? For instance, the application of the test to determine whether sales were in the ordinary course of trade may require an investigation authority to apply a number of assumptions to the data, which arguably may involve an element of reasoning. Does that mean that they are not "facts"? Please discuss.

Response to Question 3: *The essential facts are those considered relevant by an authority in determining whether there has been dumping, injury, and a causal link. These facts may include facts that explain, for example, why the authority decided sales were in the ordinary course of trade or facts that explain why sales were not considered to be in the ordinary course of trade. These facts are to be based on data submitted during the proceedings, which is considered to be reliable and verifiable.*

C. REQUIREMENT TO PROVIDE NON-CONFIDENTIAL SUMMARIES

4. (to all third parties) Should the investigating authority require the interested party submitting the confidential information to indicate or label the non-confidential summary of the redacted information in the non-confidential version? Why? Please refer to relevant text of the Agreements and/or any prior decisions which may inform your views on the matter.

Response to Question 4: *The GOT considers that it is not necessary for an authority to require the interested party to label the non-confidential summary. Our Government is of the view that the*

means to comply with Article 6.5.1. is at the discretion of an investigating authority, provided that the non-confidential summary permits a reasonable understanding of the substance of information submitted in confidence.

II. USE OF ADVERSE FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATE

5. (to the European Union) In its third party written submission, paragraphs 49-52, the European Union has raised a textual difference between Articles 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement, as well as between the Anti-Dumping and the SCM Agreements in general. The European Union argues that whereas the government of a WTO Member may not be aware of all firms producing the product under investigation in its territory for purposes of an AD investigation, it is likely to know the firms that it is subsidising. Please elaborate, and address the following points:

(a) Given that the definition of "interested party" in the Anti-Dumping Agreement includes the government of the exporting Member, is there any significant difference between the two Agreements with respect to the party from whom information may be requested?

(b) Can non-cooperation on the part of an "interested Member" be the basis for applying a facts available "all others" rate to producers/exporters who were not given direct notice by the investigating authority of the information required?

(c) Does requesting that a Member notify its allegedly subsidised producers fall within the scope of a request for information under Article 12.7 of the SCM Agreement?

6. (to other third parties) Do you agree with the European Union's reading of the textual differences between the two Agreements?

7. (to all third parties) The Panel notes that in the AD and CVD investigations MOFCOM essentially divided exporters/producers into three categories: (1) exporters/producers selected for individual examination; (2) registered companies who were not selected for individual examination (including an alternate respondent); and (3) interested parties who were unknown to MOFCOM and who did not appear before MOFCOM.

(a) Given the meaning of the term "interested party" in Article 6.11 of the Anti-Dumping Agreement/Article 12.9 of the SCM Agreement, please clarify whether in your view Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement are applicable to the unknown producers. If so what information should be included in the notice of initiation for it to be sufficient to notify unknown producers of the information requested and of the consequences of not appearing? What would be a sufficient manner of notice such that the investigating authority can assume that unknown producers have received notice and can apply Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement?

Response to Question 7(a): *The GOT considers that Article 6.11 of the Anti-dumping Agreement and Article 12.9 of the SCM Agreements apply to unknown producers. The notice of initiation of the investigation should clearly mention that the proceeding concerns all producers and not just those listed in the complaint, notified directly by the authority, or contacted by the exporting Member. If the unknown producers do not make themselves known to the investigating authority within the prescribed time limits, the best available information may be applied which could result in a determination of dumping margins on the basis of facts available for the producers concerned.*

(b) Please explain how the scope of the obligation in Article 6.8 relates to the disciplines of Article 9.4 of the Anti-Dumping Agreement. Does Article 9.4 apply to unknown interested parties who were not part of the universe of interested parties considered for the sample/selection or should they be captured by Article 6.8? If neither of these provisions is applicable, what provision applies to the calculation of their rate?

Response to Question 7(b): *The GOT considers that the application of Article 9.4 is a decision taken by the authority based on the number of exporting producers known to exist. As the GOT considers that unknown producers should make themselves known to the investigation within the prescribed time limits following the notice of initiation of the investigation, Article 6.8 would apply to unknown producers, which would result in a determination of dumping margins on the basis of facts available for the producers concerned.*

III. CALCULATION OF THE ANTI-DUMPING DUTY

8. (to all third parties) With respect to an investigating authority' use or non-use of costs as reported in a producer's records pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement:

(a) How should by-products and joint-products be treated for purposes of costs allocation, in particular where these by-products or joint products have very little value on the domestic market, but can attract a high price on the export market?

Response to Question 8(a): *The GOT considers that the manufacturing costs of joint or by products should be based on the overall production process from which these products are derived. This would mean that the product with very little value on the domestic market would be sold at a loss and the comparison to be made, in the example cited, would be between the constructed value and the export price.*

(b) Do you think that a zero cost of production can ever reasonably reflect the "costs associated with the production and sale" of a product?

Response to Question 8(b): *Please refer to (a)*

9. (to all third parties) What are the cost components that should be included in constructing normal value of chicken paws?

10. (to all third parties) Please, provide your view as to who (i.e. a respondent or an investigating authority) bears the initial burden of proving that the records do not reasonably reflect the costs and at which point this burden shifts from one party to the other.

Response to Question 10: *The GOT considers that the burden of proof in demonstrating that the record does not reasonably reflects the costs is initially with the investigating authority (IA) and the burden shifts to the interested party at the time when this issue is raised by the IA within the context of the proceedings. This may occur following the questionnaire response as highlighted in the deficiency letter, during the on-site-verification or in response to the preliminary determination or essential facts.*

IV. INJURY

A. DEFINITION OF THE DOMESTIC INDUSTRY

11. (to all third parties) Please explain the relationship between the ability of an investigating authority to define the domestic industry under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement as a "major proportion" of the total domestic production on one hand, and the obligation to conduct the injury analysis based on positive evidence and an objective examination under Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement on the other hand. In circumstances, such as in this case, where petitioners represent a "major proportion" of the domestic industry, how far does an investigating authority need to go to identify and invite other producers to provide data to be taken into account in the injury analysis?

Response to Question 11: *Under the Thai Anti-dumping law, while 25% of the domestic industry is able to initiate a complaint following the initiation, it is required that at least 50% of domestic production should participate in the investigation for the domestic industry to have standing. This is undertaken to ensure that the injury assessment is as representative as possible.*

12. PRICE EFFECTS

13. (to all third parties) China argues that Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement set out the three types of price effects they mention as alternatives. Consequently, China also argues that, under these two provisions, findings of price suppression or price depression may (in principle) be made independently from a finding of price undercutting. Do you agree? Please explain your position in this respect.

Response to Question 13: *The GOT agrees with China that there are three distinct price effects. Price undercutting may occur without price depression and suppression. Vice-versa, price depression may occur without price undercutting and the same is true for price suppression. To say otherwise would be to deny the impact of other factors listed under Article 3.2.*

14. (to all third parties) In your view, is there any obligation on an investigating authority to ensure for purposes of the price effects analysis that the two sets of pricing data being compared (subjects imports, domestic like products) correspond to: (i) a comparable product mix; and (ii) the same level of trade? If so, in what provision(s) do you find the obligation?

15. (to all third parties) Is likeness to be taken into account in making the comparison between imports and domestic products for the price effects analysis? In this regard please elaborate on the relationship between the "likeness" and the "objective examination" requirements and explain the overlap between the two, if any.

Response to Question 15: *In doing the price effects analysis, the authorities should try to compare prices of particular models or varieties within the investigated product.*

B. CAUSATION

16. (to all third parties) Please discuss whether, in your view, the issue of causation arises only under Article 3.5 of the Anti-Dumping Agreement/Article 15.5 of the SCM Agreement, or whether it also arises under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4.

Response to Question 16: *The GOT is of the view that Article 3.5 requires causation to be confirmed in terms of the factors listed under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4*

_____

ANNEX C

WORKING PROCEDURES FOR THE PANEL

Contents		Page
Annex C-1	Working Procedures for the Panel	C-2
Annex C-2	Additional Working Procedures of the Panel Concerning Business Confidential Information	C-7

ANNEX C-1

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES
ON BROILER PRODUCTS FROM THE UNITED STATES
(DS427)

WORKING PROCEDURES FOR THE PANEL

Adopted on 15 June 2012

1. In its proceedings, 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 shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where 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.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any 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. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, 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. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers

to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant reasonable extensions of the time to make an objection upon a showing of good cause. In any event no objection shall be received after the deadline for the comments on the responses to the questions following the second substantive meeting. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. 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. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6. China's exhibits could be numbered CHN-1, CHN-2, etc.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

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 to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) 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.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If the respondent chooses not to avail itself of that right, the Panel shall invite the United States to present its opening 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 statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

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

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party

shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. Each party shall submit an integrated executive summary of its arguments as presented in its written submissions, statements and responses to questions, in two parts. The parties shall submit the first part of the integrated executive summary 10 calendar days after the responses to the questions following the first substantive meeting. The parties shall submit the second part of the integrated executive summary 10 calendar days after the comments on the responses to questions following the second substantive meeting.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement at the latest 7 calendar days after the date of the third party session, or in the event that the Panel addresses questions to the third parties, 7 calendar days after the deadline for submission of responses to these questions. The integrated summary to be provided by each third party shall not exceed 5 pages.

21. The executive summaries referred to above 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. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

Interim review

22. 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.

23. 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.

24. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

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

(b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to

DSRegistry@wto.org, and cc'd to XXXXX, XXXXX, and XXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX C-2

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES
ON BROILER PRODUCTS FROM THE UNITED STATES
(DS427)

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING
BUSINESS CONFIDENTIAL INFORMATION

Adopted on 19 June 2012

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

4. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

6. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

8. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

_____

WORLD TRADE ORGANIZATION

WT/DS427/R/Add.1

2 August 2013

(13-3966)

Original: English

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS427/R.

_____

LIST OF ANNEXES
ANNEX A

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS AT THE SUBSTANTIVE MEETINGS OF THE PANEL

	Contents	Page
Annex A-1	Integrated Executive Summary Submitted by the United States	A-2
Annex A-2	Integrated Executive Summary Submitted by China (BCI redacted)	A-49

ANNEX B

WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

	Contents	Page
Annex B-1	Third-Party Statement of Chile	B-2
Annex B-2	Integrated Executive Summary Submitted by the European Union	B-4
Annex B-3	Integrated Executive Summary Submitted by Japan	B-9
Annex B-4	Integrated Executive Summary Submitted by Mexico	B-12
Annex B-5	Integrated Executive Summary Submitted by Norway	B-18
Annex B-6	Integrated Executive Summary Submitted by the Kingdom of Saudi Arabia	B-21
Annex B-7	Thailand's Responses to Panel Questions	B-24

ANNEX C

WORKING PROCEDURES FOR THE PANEL

	Contents	Page
Annex C-1	Working Procedures for the Panel	C-2
Annex C-2	Additional Working Procedures of the Panel Concerning Business Confidential Information	C-7

ANNEX A

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS AT THE SUBSTANTIVE MEETINGS OF THE PANEL

Contents		Page
Annex A-1	Integrated Executive Summary Submitted by the United States	A-2
Annex A-2	Integrated Executive Summary Submitted by China (BCI redacted)	A-49

ANNEX A-1

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE UNITED STATES

First Integrated Executive Summary by the United States

I. OVERVIEW

1. China's anti-dumping and countervailing duty measures on broiler products from the United States are the result of a flawed process yielding flawed results. This is confirmed by the *post-hoc* rationalizations offered by China during the course of these proceedings; they demonstrate that China's investigating authority, the Ministry of Commerce for the People's Republic of China (MOFCOM), simply ignored and discounted evidence and arguments that it found problematic throughout the underlying investigations.

2. The United States is alleging that the flawed process and results are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These obligations include:

- AD Agreement Article 6.2: MOFCOM's failure to grant the United States' request for a hearing;
- AD Agreement Article 6.9: MOFCOM's failure to allow U.S. respondents to see the calculations for their respective dumping margins;
- AD Agreement Article 6.5.1 and SCM Agreement Article 12.4.1: MOFCOM allowing the Petitioner to include confidential information in the Petition without providing non-confidential summaries;
- AD Agreement Article 2.2.1.1: MOFCOM's rejection – made without any explanation – of the costs kept in the books and records of U.S. producers to calculate the normal values for U.S. respondents, even though those costs were in accordance with generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with the production and sale of the products subject to the investigation and replacement of those costs with an unreasonable allocation methodology;
- AD Agreement Article 2.4: MOFCOM's failure to conduct a fair comparison of normal value and export price for Keystone, a U.S. respondent, by applying certain freezer storage fees in a manner that inflated Keystone's dumping margin;
- AD Agreement Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II and SCM Agreement Articles 12.7, 12.8, 22.3, 22.4, and 22.5: MOFCOM's imposition of an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact or why it rejected facts and law raised by the United States and U.S. respondents in the Preliminary and Final Determinations;
- SCM Agreement Article 19.4 and Article VI:3 of the GATT 1994: MOFCOM's failure to properly allocate the alleged subsidy in relation to subject merchandise;

- AD Agreement Articles 3.1 and 4.1 and SCM Agreement Articles 15.1 and 16.1: MOFCOM wrongly defined the domestic industry to include only those firms that supported the AD and CVD investigations;

- AD Agreement Articles 3.1, 3.2, 6.4 and 12.2 and SCM Agreement Articles 15.1, 15.2, 12.3, and 22.3: MOFCOM's price effects analysis was based upon flawed price comparisons, failed to address conflicting evidence that the domestic industry was gaining market-share, and did not disclose MOFCOM's methodology for adjusting subject import price data with respect to different levels of trade.

- AD Agreement Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Agreement Articles: 15.1, 15.5, 22.3, and 22.5: MOFCOM's causation analysis relied exclusively on findings relating to volume and price but ignored data that contradicted those findings such as data indicating that any increase in subject import volume came wholly at the expense of other exporters and not domestic producers. Moreover, MOFCOM failed to explain in its final determination why it rejected the arguments put forward by U.S. respondents; and

- AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4: MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry" as it cannot be reconciled with all the evidence attesting to the overall health of the domestic industry.

II. PROCEDURAL AND FACTUAL BACKGROUND

3. China's measures imposing anti-dumping and countervailing duties on broiler products from the United States are set forth in MOFCOM Notice No. 8 [2010], Notice No. 26 [2010], Notice No. 51 [2010], and Notice No. 52 [2010], including any and all annexes.

4. Under these measures, China has levied the following antidumping and countervailing duty rates on imports of broiler products from U.S. producers and exporters.

Firm	Antidumping Duty Rates	Countervailing Duty Rates
Pilgrim's	53.4%	5.1%
Tyson	50.3%	12.5%
Keystone	50.3%	4.0%
Firms that registered for the investigation but were not selected as mandatory respondents	51.8%	7.4%
"All others"	105.4%	30.3%

5. On September 20, 2011, the United States requested consultations with China with respect to these measures. The United States and China held consultations on October 28, 2011. As these consultations did not resolve the dispute, the United States requested, on December 8, 2011, the establishment of a panel. The Dispute Settlement Body ("DSB") considered this request at its meeting on December 19, 2011, at which time China objected to the establishment of a panel. The United States renewed its request for the establishment of a panel at the January 20, 2011 meeting of the DSB, at which time a panel was established.

III. STANDARD OF REVIEW

6. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. The standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

7. A WTO panel, per its standard of review, assesses whether a Member has abided by its obligations by looking at the contemporaneous explanations provided by the investigating authority. In short, because it is the task of a panel to assess the reasoning of an investigating authority, there is a concomitant duty on the investigating authority to set forth its reasoning in light of the obligation at issue because a defect in the reasoning, such as a failure to properly justify a position or address arguments means that the authority will be held to have acted inconsistently with the relevant provision. Therefore, *post-hoc* arguments offered by a defending Member cannot be taken into account.

IV. MOFCOM'S PROCEDURAL FAILINGS

A. China Breached Article 6.2 of the AD Agreement by Denying the U.S. Request for a Hearing

8. The United States requested, in writing, that MOFCOM's Bureau of Industry Injury Investigation ("BIII") conduct a "public hearing" to address various procedural and substantive concerns relating to the conduct of the AD and CVD investigations. MOFCOM summarily rejected the U.S. request for a public hearing. Instead, MOFCOM, without any further inquiry, decided that the U.S. request was of no concern to any other interested party, and offered only a closed forum where the United States could present its views to MOFCOM and MOFCOM alone. In so doing, MOFCOM acted inconsistently with Article 6.2 of the AD Agreement.

9. Article 6.2 of the AD Agreement sets forth four requirements on investigating authorities. First, it must allow any interested party to request a hearing. The United States made a request for a hearing through its July 12 letter. Once a request is made, the authorities "shall" provide the opportunities provided for in the provision. The qualification on the obligation is expressed in the following sentence of Article 6.2, which notes that "provision of such opportunities must take account of the need to preserve confidentiality" or "convenience to the parties." Here, MOFCOM did not claim the request was denied because prior opportunities had been provided or the United States had missed a reasonable deadline to request a hearing. MOFCOM denied the request on grounds that have no basis in Article 6.2: that the issues were not relevant to other interested parties (even though MOFCOM did not attempt to inquire further about what precisely the issues entailed) and that it has already decided that its investigations were being carried out "in a public, just and transparent manner."

10. Second, the provision states that the opportunity extends to "all interested parties." In its letter denying the U.S. request, MOFCOM appears to make a distinction between the United States and interested parties by suggesting the latter have no interest in the concerns identified by the United States. That is incorrect as Article 6.11(ii) of the AD Agreement provides that "interested parties" under the agreement includes "the government of the exporting Member," which in this case is the United States.

11. Third, Article 6.2 provides that the opportunity is to "meet those parties with adverse interests. Accordingly, the United States was entitled upon request to a meeting where it could be concurrently present with other parties that had adverse interests. In assessing this right, it is critical to remember that the point is not whether those with adverse positions would have ultimately chosen to meet with the United States, but that MOFCOM decided *ab initio* that no such gathering would occur.

12. Finally, Article 6.2 provides that the meeting should allow for opposing views and rebuttals to be offered. The opinion presentation meeting that MOFCOM offered as a substitute makes no such provision. MOFCOM's option needs to be considered in the context of Article 6.3 of the AD Agreement, which provides that the oral information provided in a hearing shall only be taken into account if it is reproduced in writing and made available to other interested parties. For a party such as the Petitioner, who would be adverse to the issues raised in the proposed hearing, MOFCOM's procedure of substituting a closed meeting as soon as a petitioner declines to meet, allows a petitioner an easy way to avoid a hearing and limit the record of arguments it finds objectionable.

13. In respect to how the obligations in Article 6.2 may be satisfied, the United States considers that an investigating authority could satisfy its obligations in multiple ways. One simple method

would be for an investigating authority to adopt a practice of routinely holding hearings in all its investigations. Alternatively, it could follow procedures similar to those MOFCOM provides in its own rules for hearings – and which were denied to the United States. These procedures include (1) a procedure whereby an interested party can initiate a hearing; (2) a procedure by which the investigating authority can announce the logistics for the hearing and allow all interested parties the opportunity to participate, perhaps through a registration process; and (3) procedures whereby the hearing is conducted so the parties can have a full opportunity to make their own presentations and then have an opportunity to comment on the presentations made by other interested parties. Here, MOFCOM by allowing only the United States to present its opinions to MOFCOM, without presentations of views of the Petitioner, any opportunity for comment, and rebuttal by other interested parties, acted inconsistently with Article 6.2 of the AD Agreement by summarily denying the U.S. request for a hearing.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

14. China breached Article 6.9 of the AD Agreement by failing to disclose to the interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. In particular, MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

1. *Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins*

15. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties. The obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of "facts", which is defined to mean "[a] thing known for certain to have occurred or to be true." The use of the adjective "essential" to modify "facts" indicates that this obligation does not encompass "any and all" facts, but rather is concerned only with those facts that are "absolutely indispensible or necessary." For purposes of the investigating authority's dumping determination, the essential facts under Article 6.9 are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. China presents a classic straw man argument by purporting to paraphrase the U.S. argument in an extreme manner, and then argues against it. The United States, however, relies fully and appropriately on the text of Article 6.9 of the AD Agreement.

16. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. They are "facts" because they are things "known for certain to have occurred", and they are "essential" because they are absolutely indispensible to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed. Moreover, unless the interested parties are provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

2. *MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.*

17. MOFCOM failed to make available the calculations and data it used to determine the existence and margin of dumping and thereby prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. The essential facts MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with

respect to the determination of costs of production. For normal value, export price and costs of production, MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM's elimination or rejection of data provided by each respondent.

18. China asserts that it met its disclosure obligation because the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping. Disclosure of summary figures does not meet China's obligations under Article 6.9 of the AD Agreement because these summary figures represent merely the final stage of a margin calculation and at no point does MOFCOM disclose the data or calculations used to derive them. At most, these disclosures merely allowed the exporters to guess at or approximate the calculations. China provides exhibits that purportedly could direct the respondents to the information relied on by MOFCOM and allow them to reconstruct the calculations performed by MOFCOM. These tables were not provided to the interested parties during the investigation. However, even if they had been provided, they merely refer the respondents to the scattered and vague statements in the Final AD Determination and disclosure documents concerning adjustments purportedly made by MOFCOM. They do not provide the data and calculations used by MOFCOM to determine the existence and magnitude of dumping.

19. Without knowing the facts of the actual data used by MOFCOM, the respondents were not in a position to defend their interests in the investigation. In order to defend their interests, the respondents needed to be able to review and comment on the calculation performed by MOFCOM. Without access to the actual calculations performed, the respondents could not re-construct the exact calculations, contrary to China's suggestion, and certainly could not review the data and calculations used by MOFCOM to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.

20. The United States is challenging MOFCOM's failure to require the Petitioner to prepare non-confidential summaries in six instances in the Petition as breaches of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement. There are five facets to these provisions that are critical to their interpretation. First, the provisions apply to information submitted by any interested party participating in the investigation. The Petitioner was an interested party. Second, the obligation upon an investigating authority for the production of non-confidential summaries is not simply permissive, but obligatory in that the investigating authority must ensure that summaries are furnished. Third, the use of the term "exceptional" in the provisions qualifies the possibilities for deviation. The *only* instance when the investigating authority is excused from requiring an interested party to provide a non-confidential summary is when preparation is infeasible such as when the information cannot be summarized without revealing confidential information. Fourth, the obligation to either provide a non-confidential summary or an explanation of why summarization is not possible falls on the interested Member or interested party – not the investigating authority. Fifth, the obligations in these provisions are not contingent upon another interested party making a request for a non-confidential summary or a showing that an interested party was injured by the lack of a non-confidential summary.

21. China attempts to sidestep its failure to require the Petitioner to provide non-confidential summaries by noting the United States is not challenging the underlying claims of confidentiality. That argument, however, fails to sequence the issues properly because the provisions require the investigating authority to assess the confidentiality claim. As the Appellate Body recognized in *EC – Fasteners*, the summary is critical because interested parties cannot defend their interests – including challenging the confidentiality claim – without an understanding of the information in question.

22. China's post-hoc attempt to cobble non-confidential summaries additionally fails because there is no indicia that would let an interested party know that the information China cites now as serving as a non-confidential summary was intended to serve as such and because they entail conclusions that an interested party must summarily accept rather than any summarization of the actual information. The panel in *China – GOES* was clear that the provisions "require the interested

party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information" and that a mere conclusion "does not provide an interested party with a basis to challenge whether the confidential information provides a basis for the conclusion drawn."

23. In short, the Petitioner did not provide any statement regarding why summarization was not possible, and MOFCOM saw no need for it to do so. Accordingly, China breached Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATIONS

A. China Breached Article 2.2.1.1 of the AD Agreement by Summarily Rejecting U.S. Producers' Costs of Production

24. During the investigation, U.S. producers presented to MOFCOM the costs of production they kept in their books and records for the various subject products. The producers explained that their records allocated higher production costs for more valuable chicken products, such as breast meat. U.S. producers put evidence on the record explaining why their costs were GAAP consistent and reasonably reflected the costs associated with the production and sale of the products. This evidence includes U.S. and Chinese accounting treatises, letters from auditors, precedents from other investigating authorities, Chinese GAAP, and International Accounting Standards. MOFCOM asserted in its Preliminary and Final AD Determinations, without providing any reasoning or analysis, that it did not believe that the reported costs reasonably reflected the actual costs of production. Instead, MOFCOM stated that U.S. producers had an affirmative responsibility to convince it otherwise.

25. Article 2.2.1.1 of the AD Agreement imposes positive obligations on an investigating authority. First, *the investigating authority must accept* the costs kept by the exporter or producer in its books and records if those costs of production are GAAP consistent and reasonably reflect the costs associated with the production and sale of subject products. The use of the term "normally" in the provision confirms that the obligation in the first sentence of Article 2.2.1.1 is for the investigating authority, as a rule, to calculate costs on the basis of a producer or exporter's records. The dependent clause of the provision indicates two circumstances [provisos] under which it would be possible to derogate from this rule: such records are not in accordance with [1] the generally accepted accounting principles of the exporting country and [2] do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the obligation is on the investigating authority to rely upon a producer's figures unless it demonstrates why one or both of the conditions do not apply.

26. In respect to these two provisos, Article 2.2.1.1. states the provision is "[f]or the purposes of paragraph 2," i.e. Article 2.2. Article 2.2 in turn states that when sales in the ordinary course of trade in the domestic market cannot be used, two other methods can, including cost of production method: the method specified in 2.2.1.1. Article 2.2 states the margin of dumping shall be determined by comparison "with the cost of production in the country of origin." Accordingly, the two provisos must be considered with respect to their objective of calculating the cost of production in the country of origin.

27. MOFCOM in rejecting these costs as unreasonable has an obligation to explain why they were so. The obligation stems from (1) the general requirement that an investigating authority's actions are subject to review by WTO panels; (2) because Article 2.2.1.1 is a "positive" obligation upon the investigating authority; and (3) because the second sentence of the provision requires an investigating authority to "consider" available evidence, which here was substantial. Critically, MOFCOM put nothing forward on the record as to why U.S. producers' costs were unreasonable. MOFCOM's *post-hoc* explanation that the costs were unreasonable because of conditions in the Chinese market cannot be accepted by virtue of the fact that they are post-hoc. In any event, that basis to declare costs as unreasonable runs afoul of the AD Agreement.

28. If the investigating authority establishes that the costs are not reasonable or not consistent with GAAP, then *the investigating authority* bears the additional burden of demonstrating that it considered all available evidence, including historically utilized allocations made available by the exporter or producer to ensure that its alternative allocation is proper. A "proper" allocation is an

allocation that captures the costs of production in the country of origin and one that can be accurately used to ensure that the anti-dumping duty is not greater than dumping as to the particular product. MOFCOM did not assert or accept that it was required to evaluate the evidence submitted by U.S. producers or the merits of its own methodology, or that it might need to make adjustments with respect to product scope. Not surprisingly, MOFCOM's application of a weight-based allocation here is not proper.

29. When there are joint products that are non-homogenous, the use of a unit based allocation such as weight eliminates any relationship with the cost of production in the country of origin. It results in the same amount of costs being assigned to low and high value products. The resulting antidumping duty margin would accordingly be distorted. MOFCOM's decision to adopt such a methodology seems to suggest the deliberative process ignored key concerns:

- Why is it reasonable to take costs that are in fact already associated with sale and remove that characteristic from them by averaging them according to weight?

- Why is it reasonable to take the specific processing costs incurred post-split and average them across all products, even though it is clear that some of those products did not incur those costs?

- Why is this methodology reasonable when producers cannot adopt it in the course of their normal records thus vitiating the principle that costs should reflects the costs of production in the country of origin? If they did, they would be allocating costs to low value products far in excess of the fair market value of such products. As a result, the producer's inventory, based on MOFCOM's methodology, would be in violation of the lower of cost or market [LCM] rules of accounting standards.

30. In short, MOFCOM's methodology is anything but "proper," particularly when compared to using the costs kept in the producers' books and records.

B. China Breached Article 2.4 of the AD Agreement By Failing To Conduct a Fair Comparison Between Keystone's Constructed Normal Value And Export Price.

31. China breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. Specifically, MOFCOM improperly adjusted Keystone's export price to account for certain freezer storage expenses.

1. *Keystone's Reported Freezer Storage Expenses to MOFCOM*

41. Keystone incurred freezer storage expenses on all home market sales that would be comparable to the sales of product in China – all frozen product incurred the same freezer storage expenses, regardless of whether they were sold in the United States or exported to China. Those freezer storage expenses were reported to MOFCOM in response to MOFCOM's AD Questionnaire. In the Preliminary AD Determination, MOFCOM constructed a normal value for Keystone by summing Keystone's reported costs of production, expenses, and an amount for reasonable profits. Given that freezer fees were included both in the cost-of-production-based normal value, and were incurred on export sales, MOFCOM properly made no adjustment to the export price regarding freezer fees. In the Final AD Determination, however, MOFCOM deducted Keystone's freezer storage fees from its export price.

2. *Article 2.4 of the AD Agreement Requires Allowances for Differences in Normal Value and Export Price Affecting Price Comparability*

42. For purposes of conducting a fair comparison between the export price and normal value, Article 2.4 of the AD Agreement requires due allowances to be made for differences affecting price comparability. The Appellate Body has stated that the *a contrario* application of this directive prohibits allowances or adjustments for differences that do not affect price comparability. Moreover, if the allowances to be made pursuant to Article 2.4 are limited to differences affecting price comparability, it is clear that no allowance could be made where no difference exists at all (let alone a difference affecting price comparability).

3. *MOFCOM's Treatment of Keystone's Freezer Storage Fees Precluded MOFCOM from Conducting a Fair Comparison*

43. MOFCOM made an undue adjustment to exclude freezer storage expenses from Keystone's export price and therefore compared a normal value that included at least some portion of those expenses, as China admits, to an export price that did not. The adjustment to the dumping margin calculated by MOFCOM for Keystone did not reflect merely the presence or absence of dumping. Rather, the margin of dumping derived from comparing Keystone's normal value to its export price reflected the fact that the same freezer storage expenses were added to the cost of production, while subtracted from the export price. By conducting such a comparison, which overstates the difference between the normal value and export price attributable to this expense, MOFCOM acted inconsistently with Article 2.4 by failing to conduct a fair comparison.

44. China asserts that the adjustment was warranted because all of Keystone's exports to China were of frozen product, and therefore incurred freezer storage expenses, but only a fraction of Keystone's domestic sales incurred freezer storage expenses because not all of those products were frozen. However, China admits that its adjustment resulted in a mismatch. China relies on the *post-hoc* characterization of Keystone as failing to provide accurate or timely responses to MOFCOM's request to justify this result. However, China's assertion is contrary to the record which indicates that MOFCOM verified that all of the costs of Keystone's financial reports, which included freezer storage expenses, had been properly reported to MOFCOM.

4. *The U.S. Claim Regarding Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference*

45. The United States' claim under Article 2.4 of the AD Agreement concerning MOFCOM's failure to conduct a fair comparison between Keystone's constructed normal value and its export price is properly within the panel's terms of reference. Contrary to China's assertion, the legal basis for the United States' claim clearly evolved from the legal basis that formed the subject of consultations and is therefore properly within the scope of the panel's terms of reference. Moreover, Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request.

46. The United States is pursuing several claims regarding MOFCOM's treatment of the respondents' reported costs and MOFCOM's failures to disclose certain essential facts, information and reasoning associated with calculating the respondents' normal values and export prices. At the time of the United States' request for consultations, it was apparent that there was some discrepancy in MOFCOM's treatment of Keystone's reported costs in constructing Keystone's normal value, including MOFCOM's treatment of Keystone's reported costs for freezer storage expenses. Given MOFCOM's flawed disclosures, it was unclear precisely how MOFCOM had treated those costs. It was not until consultations that it became apparent that MOFCOM had made an undue adjustment to Keystone's export price. This is not unlike the situation discussed in the Appellate Body report for *Mexico—Beef and Rice*, where a complaining party learns of additional information during consultations that warrants revising the list of treaty provisions with which the measure is alleged to be inconsistent.

C. China Breached Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2 and Annex II of the AD Agreement by Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin, and Failing to Explain its Determination in the Anti-Dumping Investigation.

47. When MOFCOM initiated the AD and CVD investigations, it notified the six U.S. producers identified in the Petition of the investigation and requested the U.S. Embassy to notify any other exporters or producers. MOFCOM required any U.S. exporter that wished to participate in the investigation to register with MOFCOM. Three companies were investigated and MOFCOM assigned those companies individual margins of dumping in the Preliminary and Final AD Determinations. MOFCOM applied a weighted-average margin to other companies that registered with MOFCOM, but were not investigated. However, with regard to companies that MOFCOM did not notify, or

even identify, MOFCOM assigned an "all others" dumping margin substantially higher than the highest margin assigned to any investigated company.

48. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the AD questionnaires, and were not otherwise provided the notice required by the AD Agreement, MOFCOM breached Article 6.8 and Annex II of the AD Agreement. MOFCOM also breached Article 6.9 of the AD Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" dumping margin and Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" Rate in the Final Antidumping Duty Determination is Inconsistent with Article 6.8 and Annex II of the AD Agreement.*

49. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied facts available apparently adverse to the interests of producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation.

50. Article 6.8 of the AD Agreement limits the circumstances in which investigating authorities may resort to the use of facts available to where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation. Together with Annex II, paragraph 1 of the AD Agreement, Article 6.8 ensures that an exporter or producer has an opportunity to provide information required by an investigating authority before the investigating authority resorts to the use of facts available. An investigating authority that calculates dumping margins adverse to the interests of a party on the basis of facts available for exporters or producers that the authority did not give notice, will be in breach of Article 6.8.

51. MOFCOM did not notify "all other" U.S. producers or exporters. In the absence of being notified of the necessary information required by MOFCOM, those unregistered exporters or producers cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation. By applying facts available adverse to the interests of the companies that were not notified of the information required of them, were never sent copies of the antidumping questionnaire or otherwise provided the notice the AD Agreement requires, MOFCOM breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin*.

52. MOFCOM's failure to inform interested parties "of the essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin in time for the interested parties to defend their interests is inconsistent with Article 6.9 of the AD Agreement. At no time in the dumping investigation did MOFCOM identify the essential facts that formed the basis for its imposition of the 105.4 percent "all others" dumping margin. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate. Likewise, without disclosure of the factual information MOFCOM used to calculate the 105.4 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. In short, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by Failing to Explain its Determination.*

53. China acted inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" dumping margin. MOFCOM breached Article 12.2 of the AD Agreement because it failed to provide in sufficient detail the

findings and conclusions that led to the application of facts available. MOFCOM breached Article 12.2.1 of the AD Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 12.2.2 of the AD Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" dumping margin. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the dumping margin for "all other" respondents and, thus, fails to satisfy China's obligations.

D. China Breached Article 1 of the AD Agreement.

54. Because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the AD Agreement.

V. MOFCOM'S FLAWED CVD DETERMINATIONS

A. China Breached Articles 12.7, 12.8, 22.3, 22.4 and 22.5 Of The SCM Agreement By Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate, and Failing to Explain its Determination in the Countervailing Duty Investigation.

55. As it did in the antidumping investigation, MOFCOM assigned an "all others" subsidy rate to companies that MOFCOM did not notify, or even identify, that was substantially higher than the highest subsidy rate assigned to any investigated company. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the CVD questionnaires, and were not otherwise provided the notice required by the SCM Agreement, MOFCOM breached Article 12.7 of the SCM Agreement. MOFCOM also breached Article 12.8 of the SCM Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" subsidy rate and Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Article 12.7 of the SCM Agreement.*

56. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFOCM did not notify of the information required of them. Without notice of the information required of interested parties subject to the investigation, no other, unidentified U.S. producers or exporters can be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period. Neither can other, unidentified U.S. producers or exporters be said to have significantly impeded an investigation for which they received no information requests. MOFCOM acted inconsistently with its obligations under Article 12.7 by using facts available adverse to a company's interests to calculate subsidy rates for producers or exporters that the authorities did not investigate. Moreover, to the extent that such non-countervailable programs are factored into MOFCOM's calculation of the all others rate, MOFCOM ignored substantiated facts already on the record of the investigation.

2. *MOFCOM Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate.*

57. MOFCOM's failure to inform the United States and other interested parties "of the essential facts under consideration" that formed the basis for the "all others" subsidy rate calculation is inconsistent with Article 12.8 of the SCM Agreement. At no time in the CVD investigation did MOFCOM identify the essential facts that formed the basis for its imposition of a 30.3 percent all others subsidy rate. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis

for MOFCOM's determination and therefore could not adequately defend their interests. Without disclosure of the factual information MOFCOM used to calculate the 30.3 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. With these essential facts, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Article 22.3, 22.4 and 22.5 of the SCM Agreement by Failing to Explain its Determination of the "All Others" Subsidy Rate.*

58. China acted inconsistently with Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" subsidy rate. MOFCOM breached Article 22.3 of the SCM Agreement because it failed to provide in sufficient detail the findings and conclusions that led to the application of facts available. MOFCOM breached Article 22.4 of the SCM Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 22.5 of the SCM Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" subsidy rate. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the subsidy rate for "all other" respondents and, thus, fails to satisfy China's obligations.

B. China Breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by Failing Properly to Allocate the Alleged Subsidy in Relation to Subject Products.

59. Investigating authorities, when calculating CVD rates, must ensure that the amount of subsidy received by a producer or exporter is properly allocated to the producer's or exporter's products under investigation. The result of this calculation is a per-unit, countervailing duty rate that can be applied to the producer's or exporters' sales of subject merchandise. Thus, an investigating authority, at a minimum, must ensure that any countervailing duty reflects only the subsidies provided to the subject products and not to any other products.

60. Here, MOFCOM found that the respondents purchased the corn and soybean meal used to feed and raise chickens on preferential terms. MOFCOM attempted to quantify the amount of the subsidy and factored it into the aggregate numerators when calculating the CVD rates for U.S. producers. Putting aside whether MOFCOM's subsidy theory is correct, MOFCOM's approach ignores a critical point: "all chickens" are not the products subject to the investigation; certain "broiler products" are.

32. Although one U.S. respondent, Keystone, used chickens to produce only subject products, the other two respondents, Tyson and Pilgrim's, used chickens to produce a significant quantity of non-subject merchandise. MOFCOM, however, made no adjustments for these two producers and instead incorrectly allocated the entire amount of the purported subsidy solely to the production of subject merchandise.

33. Tyson, Pilgrim's, and the United States proffered solutions to MOFCOM regarding this error. For example, the United States explained that MOFCOM could redress this error by applying either of two possible adjustments:

> [1] Because the numerator reflects the companies' total purchases of corn and soybean during the period of investigation, the denominator should be revised to reflect the companies' total sales of all chicken products (both subject and non-subject poultry products).
>
> [2] Alternatively, BOFT could reduce the numerator to reflect the amount of corn and soybean meal used to produce chicken feed for those chickens used to produce the subject merchandise, while maintaining the denominator reflecting the companies' sales of subject merchandise only.

61. Either adjustment was technically feasible. With respect to the first option, the questionnaire responses included data regarding the volume of non-subject merchandise that was produced from chickens. In regard to the alternative option, Tyson and Pilgrim's quantified for MOFCOM the percentage of poultry sales that could be attributed to subject merchandise. Accordingly, MOFCOM could have proceeded to use that data to properly proportion the numerator. MOFCOM did not do so.

62. In respect to the arguments proffered by China regarding questionnaire and data responses, the United States has two preliminary points. First, it seems China's logic is that respondents somehow both knew what the data requested of them was to be used for and that they still knowingly obstructed the questions in a manner that would increase their margins. Not surprisingly, the record does not lend credence to that supposition. Second, what is the bearing of these questions on the ultimate inquiry: was MOFCOM apprised of the fault – that the numerator and denominator did not line up – and did it have a method by which to correct it? To that point, China's answer says nothing.

63. In short, MOFCOM mismatched the respective numerators and denominators for Tyson's and Pilgrim's subsidy calculations. MOFCOM was made aware of this error as well as acceptable options for correcting it. Nonetheless, MOFCOM refused to correct its mistake and proceeded to levy countervailing duties that are clearly in excess of any subsidy that may exist with respect to the subject merchandise. Accordingly, MOFCOM's CVD calculations for Pilgrim's and Tyson are inconsistent with Articles 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

C. China Breached Article 10 of the SCM Agreement

64. Because MOFCOM's conduct in the subsidy investigation was inconsistent with the provisions of the SCM Agreement noted above, China also breached Article 10.

VI. MOFCOM'S FLAWED INJURY DETERMINATIONS

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

65. MOFCOM limited its definition of the domestic industry to domestic producers that voluntarily returned domestic producers' questionnaire responses. China should have, but did not, independently identify the universe of domestic producers in order to provide questionnaires to either each producer or, alternatively, a representative sample of domestic producers. Instead, MOFCOM only provided blank questionnaires to the 20 producers listed in the petition, which were all members of CAAA and therefore petitioners. MOFCOM did so, even though respondents had identified other large domestic producers not included in the definition of the domestic industry and notified MOFCOM as to their existence.

66. MOFCOM also failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the domestic industry. According to MOFCOM, such producers could have received blank questionnaire to complete and return either by registering for participation in the investigations or by downloading a blank questionnaire off of MOFCOM's website. MOFCOM's notices mentioned none of this. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by completing a questionnaire response, MOFCOM also imposed a self-selection process among the domestic producers that introduced a material risk of distortion. Only producers posting the weakest performance would have had any incentive to come forward.

67. By so proceeding, MOFCOM increased the likelihood that petitioners and domestic producers hand- picked by them would return questionnaire responses and thus be included in the data set used by China to perform the analysis leading to its final determinations. By contrast, MOFCOM's approach to identifying domestic producers other than "known domestic producers" listed in the petition was calculated to elicit no response.

68. An investigating authority must independently collect information relevant to its definition of the domestic industry. An investigating authority cannot define the domestic industry consistently

with Articles 3.1 and 4.1 of the ADA or Articles 15.1 and 16.1 of the SCM Agreement without making active, independent efforts to identify the universe of domestic producers of the like product. 121. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain{} passive in the face of possible shortcomings in the evidence submitted."

69. Accordingly, a process for defining the domestic industry that inevitably results in an examination of only producers selected or identified by the Petitioner cannot comport with the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is the same type of biased analysis the Appellate Body found inconsistent in *EC – Fasteners*. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to participate in the injury investigation by either joining the petition, responding to the notice, or downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack any incentive to respond to MOFCOM's notice or to otherwise participate in the investigation. Indeed, domestic producers posting the strongest performance would have every incentive <u>not</u> to make themselves known. That is because withholding their performance data from the investigating authority could only increase the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

70. Thus, MOFCOM's approach of limiting the domestic industry data to that from the Petitioner and select other producers named by Petitioner favored the interests of the Petitioner and petition supporters and prejudiced respondents. Further, because MOFCOM's biased and flawed definition of the domestic industry would have tainted its analysis of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5 of the ADA and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, respectively, China acted inconsistently with those articles as well by not conducting its analysis in relation to an appropriately defined "domestic industry."

71. MOFCOM's definition of the domestic industry was also inconsistent with Article 4.1 of the ADA because it did not include "the domestic producers as a whole of the like products or to those of them whose collective output of the {like} products constitutes a major proportion of the total domestic production of those products." In light of its knowledge of the existence of domestic producers based on the data source it relied on to establish total domestic production, as discussed above, MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by defining the domestic industry so as to effectively exclude domestic producers accounting for approximately half of Chinese broiler production.

B. China's Price Effects Analysis Final Determination Breached Articles 3.1, 3.2, 6.4 and 12.2 of the AD Agreement and Articles 15.1, 15.2, 12.3, and 22.3 of the SCM Agreement.

72. MOFCOM's price effects analysis is inconsistent with China's WTO obligations in three key respects: first, MOFCOM's finding that subject imports undersold the domestic like product to a significant degree was based on fundamentally flawed price comparisons; second, MOFCOM's only basis for finding that subject imports suppressed domestic like product prices is its flawed finding that subject imports undersold the domestic like product to a significant degree; and third, MOFCOM failed to disclose the methodology it purportedly used to adjust the pricing data to reflect their different level of trade.

1. *MOFCOM's Failure to Control for Differences in Level of Trade and Product Mix is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.*

73. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require the investigating authority to base its injury determination on "positive evidence" and conduct an

"objective examination." To conduct a price effects analysis consistent with the objectivity and positive evidence requirements, an investigating authority must utilize domestic and subject import pricing data that permit reasonably accurate price comparisons. By failing to control for obvious differences in level of trade and product mix and, therefore, MOFCOM's analysis of price effects violated Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

a. *MOFCOM's Comparison of Subject Import Prices and Domestic Like Product Prices at Different Levels of Trade is Not an Objective Examination.*

74. MOFCOM compared the value of subject imports with the value of the domestic like product at different levels of trade. Specifically, MOFCOM used the pricing data in the Petition to compare subject import prices based on official import statistics – on a CIF basis – to the domestic producers' sales prices to their first arm's-length customers. Because the average unit value of subject imports on a CIF basis does not include transportation costs from the border to an importer's warehouse and the importer's markup, such unit values would naturally be lower than the average unit value of subject imports sold by importers to first arms-length customers.

75. China confirmed in its first written submission that MOFCOM failed to adjust the CIF prices to account for the fact that they were at a different level of trade than the domestic producers' sales. By making the comparison of prices at different levels of trade, MOFCOM made a finding of price undercutting by the subject imports nearly inevitable. China also asserts that it was proper to compare these pricing data, notwithstanding the different levels of trade, because both were "ready to enter further sales channels". This assertion does not address the inherent problem that by comparing this data, without adjustment, MOFCOM ignored the series of additional costs normally incurred before the imported goods can reach the point of actually competing on the market with domestic like products. In short, the prices were at different levels of trade and not comparable. Thus, MOFCOM's price analysis cannot constitute an objective examination of price effects, and is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

b. *MOFCOM Compared Subject Import Prices and Domestic Industry Sale Prices Influenced by Obvious Differences in Product Mix.*

76. MOFCOM's price analysis also failed to control for obvious and significant differences in the mix of products among subject import shipments and domestic industry shipments reflected by the record evidence. Where subject imports and the domestic like product differ significantly in terms of product mix and value, as here, a comparison of the average unit value of subject imports to the average unit value of the domestic like product would reflect differences in product mix rather than meaningful price comparisons. Such price comparisons therefore could not properly allow an investigating authority to "consider whether there has been significant price undercutting," as required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, or to conduct an "objective examination" of "positive evidence" pertaining to subject import price effects, as required under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. China fails to refute the fact that by comparing the average unit value of subject imports to the average unit value of the domestic like products, despite record evidence that significant differences existed between the relative mix of products, MOFCOM failed to conduct a pricing analysis based on positive evidence and an objective examination.

2. *MOFCOM's Adverse Price Effects Findings Were Predicated Entirely on Its Defective Underselling Analysis, and Therefore Inconsistent with WTO Requirements.*

77. MOFCOM's finding that subject imports suppressed domestic like product prices is predicated entirely on its flawed underselling analysis and, therefore, that finding is not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

78. China's suggestion that MOFCOM's underselling analysis was only one component of that finding is not reflected by the determinations, which focus exclusively on MOFCOM's price undercutting analysis. With no evidence of subject import underselling, MOFCOM lacked the necessary positive evidence to support its finding that subject import prices had the effect of suppressing domestic like product prices. The United States does not disagree that an authority can make a finding of significant price effects without finding that there has been "significant" price undercutting during the period of investigation. In this case, however, MOFCOM based its price suppression analysis entirely on its flawed undercutting analysis. MOFCOM made no finding that subject import volume and market share alone could have suppressed domestic like product prices to a significant degree, and the record would not have supported such a finding. Notwithstanding the theoretical possibility of an investigating authority finding price suppression in the absence of underselling, the United States emphasizes that here, MOFCOM explicitly predicated its finding that subject imports suppressed domestic like product prices on its finding that subject imports undersold the domestic like product to a significant degree.

79. MOFCOM's finding of price suppression is also inconsistent with the requirement to "consider whether there has been a significant price undercutting" by the dumped or subsidized imports as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. The absence of any valid price comparisons or positive record evidence that subject imports influenced domestic like product prices made it impossible for MOFCOM to consider properly whether subject imports had the effect of depressing or suppressing domestic like product prices, as required by those articles.

3. *MOFCOM Failed to Disclose Its Alleged Methodology for Adjusting Subject Import Pricing Data to Reflect Its Different Level of Trade Relative to Domestic Like Product Pricing Data.*

80. MOFCOM failed to disclose the methodology that it allegedly used to adjust subject import prices to account for their different level of trade as compared to domestic industry sale prices. Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement require the investigating authority to provide interested parties with "all non-confidential information relevant to the presentation of their cases and used by the investigating authority." The methodology MOFCOM purported to use to adjust the pricing data is clearly information relevant to the presentation of the interested parties' cases and used by the investigating authority, and therefore MOFCOM's failure to disclose that information is inconsistent with those requirements.

81. MOFCOM's purported methodology for adjusting import prices also constituted relevant information on the matters of fact and law, and reasons which have led to the imposition of final measures, within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. That methodology was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. MOFCOM's failure to disclose this methodology is also inconsistent with those articles as well. Additionally, MOFCOM's alleged methodology for adjusting subject import prices to account for their different levels of trade also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement, and MOFCOM's failure to disclose this information is inconsistent with those provisions as well.

82. China has now apparently conceded that MOFCOM made no adjustment to subject import prices to account for their different level of trade relative to domestic like product prices. If that is the case, then the United States recognizes that MOFCOM would have had no methodology for making such an adjustment to disclose to the parties in accordance with Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement. But if MOFCOM did actually reject the U.S. argument concerning the need for proper price comparisons, MOFCOM would be in breach of ADA Article 12.2.2 and SCM Article 22.5 for failure to provide in its determinations the reasons for rejection of this very relevant argument that goes to the heart of the pricing analysis relied on by MOFCOM.

C. China's Impact Analysis in its Final Determination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

83. MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in violation of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

1. *MOFCOM's Consideration of the Domestic Industry's Capacity Utilization was not an "Objective Examination" of "Positive Evidence."*

84. MOFCOM's finding that the domestic industry's low level of capacity utilization resulted from subject import competition does not reflect an "objective examination" because it was contradicted by record evidence that the decline in capacity utilization was driven by the domestic industry's expansion of its capacity far in excess of demand growth. An objective examination would have considered the minor increase in capacity utilization in context with the domestic industry's expansion of its capacity and the increase in apparent consumption. Subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports increased their share of apparent consumption entirely at the expense of non-subject imports. Rather, the record showed that the domestic industry's capacity utilization trend resulted entirely from the industry's capacity expansion. Given this record evidence, MOFCOM's finding that subject imports had an adverse impact on the domestic industry's rate of capacity utilization was not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

2. *MOFCOM's Consideration of End-of-Period Inventories was not an "Objective Examination" of "Positive Evidence."*

85. MOFCOM's finding that the increase in the domestic industry's end-of-period inventories was caused by subject imports cannot be the result of an "objective examination" because the record established that neither the level of end-of-period inventories nor the increase in end-of-period inventories were significant relative to domestic industry output and shipments. MOFCOM's finding that the increase in domestic industry inventories was significant was therefore not based on an "objective examination" of "positive evidence" and inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. MOFCOM relied on this factor, together with its flawed consideration of capacity utilization, to find that the domestic industry was adversely impacted, despite the record evidence that its performance otherwise improved.

3. *MOFCOM's Adverse Impact Finding was Predicated on its Flawed Examination of Capacity Utilization and End-of-Period Inventories, and Therefore Inconsistent with WTO Requirements.*

86. MOFCOM's finding that subject imports had an adverse impact on the domestic industry over the entire period of investigation rested entirely on its flawed findings regarding capacity utilization and end-of-period inventories. MOFCOM failed to reconcile its impact analysis with evidence that the domestic industry's performance strengthened substantially during the bulk of the increase in subject import volume between 2006 and 2008. Given MOFCOM's dependence on those flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted was not based on an "objective examination" of "positive evidence" and, therefore, inconsistent with Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

D. China's Causal Link Analysis in its Final Determination Breached Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.

87. MOFCOM's causation analysis is flawed because (1) MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) it relies on the flawed price undercutting analysis described above; and (3) MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance improved during the bulk of the increase in subject import volume between 2006 and 2008. These flaws confirm that MOFCOM's

analysis is not based on an objective examination of positive evidence, in breach of China's obligations under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also means that MOFCOM failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury", in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

1. *MOFCOM's Causation Analysis is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.*

a. *MOFCOM Ignored Evidence that Subject Import Volume Did Not Increase at the Expense of the Domestic Industry.*

88. MOFCOM's determination of a causal link between subject imports and the domestic industry's purported material injury rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. However, the record evidence clearly contradicts this finding and it indicates that subject import volume and market share did not increase at the expense of the domestic industry. The increase in subject import volume and market share did not negatively impact the domestic industry because the record indicated that the domestic industry gained even more market share than subject imports during the same period.

89. China asserts that subject imports gained market share at the expense of Chinese producers that did not complete questionnaire responses and were therefore not included within MOFCOM's definition of the domestic industry. China's new market share data was not considered by MOFCOM and does not provide an answer to the question of how subject imports could have caused injury to the domestic industry defined by MOFCOM, if subject imports did not gain market share at the expense of that industry.. MOFCOM could not have examined the impact of subject imports on domestic producers not included within the domestic industry definition because it lacked data on the performance of such producers -- – and China offers no other argument to rebut the U.S. argument.

90. MOFCOM failed to base its finding of a causal link between subject imports and the domestic industry's performance on an objective examination of positive evidence, in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, because it neglected to factor this evidence into its causal link analysis. MOFCOM's analysis is also inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement because MOFCOM failed to examine all relevant evidence.

b. *MOFCOM's Causation Analysis Relies on its Flawed Price Effects Findings.*

91. MOFCOM's finding of causation is also inconsistent with the AD and SCM agreements because it was premised on MOFCOM's price underselling analysis. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, this finding, too, is inconsistent with WTO requirements. Furthermore, in light of MOFCOM's flawed price undercutting analysis, MOFCOM failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Finally, by relying on its defective pricing analysis, MOFCOM failed to base its causal link analysis on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

c. *MOFCOM Failed to Reconcile Its Causation Analysis with Evidence that the Domestic Industry's Performance Improved as Subject Import Volume and Market Share Increased.*

92. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the bulk of the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance between 2006 and 2008. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to

predicate its causation analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

2. *MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents is Inconsistent with Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.*

93. MOFCOM also failed to address key causation arguments raised by the respondents during the investigation. The obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their determinations that include "all relevant information on the matters of fact and law" material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

94. The U.S. respondents raised two principal arguments concerning the absence of any causal link between subject imports and material injury that went unanswered by MOFCOM. First, they argued that there could be no causal link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports. MOFCOM responded that it was under no obligation under Chinese domestic law to consider market share data. Second, USAPEEC argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which the Chinese domestic industry was incapable of supplying in adequate quantities. MOFCOM purported to address this argument in its preliminary determination, but was clearly under the misapprehension that the respondents' argument concerned whether chicken paws were within the scope of the investigation.

95. MOFCOM's failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' arguments is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. As these issues were material to MOFCOM's causal link analysis, MOFCOM's failure to address them was also inconsistent with Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement.

VII. CONCLUSION

96. China in these proceedings has chosen to defend its interests by discussing arguments and data that were nowhere on the record. That raises, however, a corresponding thought: if China cannot defend its investigations without having to resort to information and arguments not on the record, what hope was there that the respondents, who never saw that information or those arguments during the investigation, could have defended their interests?

97. The United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and AD Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and AD Agreement.

Second Integrated Executive Summary by the United States

I. OVERVIEW

1. Lacking evidentiary support for the findings and conclusions made by the Ministry of Commerce for the People's Republic of China (MOFCOM) with respect to the anti-dumping and countervailing duties at issue in this dispute, China instead offers *post hoc* rationalizations to defend MOFCOM's actions. But such rationalizations are not permissible in WTO dispute settlement proceedings. Moreover, they serve only to prove the United States' point: that MOFCOM's process and findings were flawed and there is nothing from the investigations that justifies anti-dumping and countervailing duty measures on U.S. broiler products.

II. MOFCOM'S PROCEDURAL FAILINGS

A. China Cannot Defend MOFCOM's Denial of the U.S. Hearing Request.

2. It is undisputed that the United States made a request for a hearing. It is also undisputed that MOFCOM did not grant a hearing, since China does not claim that its opinion presentation meeting is the type of meeting envisioned under Article 6.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Thus, the only question is whether MOFCOM presented a justification to refuse the U.S. hearing request that is permissible under ADA Article 6.2.

3. China's argument that MOFCOM contacted the Petitioner (and later all the various parties referenced in a Panel question), and that the Petitioner (and these other parties) did not believe a hearing was necessary, is not documented in the record. Indeed, it strains credulity for China to imply that MOFCOM somehow contacted 47 parties within one business day by telephone and that all of these parties had an immediate answer regarding the hearing request.

4. The evidence that is on the record in fact contradicts China's claim. The MOFCOM letter to the United States makes no mention of such contact and proffers very different reasons for denying the request: that MOFCOM had conducted the investigations in a "public, just, and transparent manner in accordance with Chinese laws" and that the issues "are not relevant to the interested parties directly." MOFCOM's own rules regarding injury hearings, which were notified to the WTO, further undermine China's claim, as they make no mention of the informal type of contact that China now claims MOFCOM undertook.

5. With respect to China's assertions regarding the U.S. demand for a public hearing, such assertions are simply misdirection. The United States has noted it requested a *public* hearing to confirm it sought the procedure outlined in MOFCOM's rules, which are labeled as Rules for a *Public* Hearing as opposed to an opinion presentation meeting. MOFCOM's determinations gave the impression that the U.S. request was granted when in fact it was not.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

6. The United States demonstrated that MOFCOM acted inconsistently with Article 6.9 by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties, including by failing to make available the data and calculations it performed to determine the existence and margins of dumping. China claims that MOFCOM was under no obligation to provide the actual data and calculations that formed the basis of its dumping determination because the U.S. respondents, based on the limited information disclosed by MOFCOM, could have replicated MOFCOM's calculations. However, the limited data disclosed by MOFCOM was too scant to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

1. *The Disclosure Obligation Under Article 6.9 Includes the Data and Calculations Performed by an Investigating Authority to Determine the Existence and Margin of Dumping*

7. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. Without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed.

2. *China's Interpretation of Article 6.9 of the AD Agreement is Incorrect and Does Not Excuse MOFCOM's Failure to Disclose the Essential Facts Forming the Basis of Its Decision to Apply Definitive Measures*

8. China asserts that an investigating authority can satisfy the obligation of Article 6.9 through the disclosure of information the investigating authority considers sufficient to assist the interested parties in surmising or deriving what the essential facts may have been. However, without access to the actual calculations performed, and the actual data used, the interested parties could not, for example, check MOFCOM's methodology and math for errors or confirm that MOFCOM did what it purported to do. Similarly, the interested parties could not "comment on the completeness and correctness of the facts being considered… provide information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts," consistent with the disclosure described by the panel report in *EC – Salmon*.

9. To enable interested parties to defend their interests, the actual data and calculations must be disclosed because a clerical or mathematical mistake, or a mistake in a conversion of units, could result in a serious distortion of the dumping margin. In this case, any number of inadvertent errors, such as (1) an error in currency conversions; (ii) the omission of a sale from the calculations; (iii) the failure to deduct certain expenses; or (iv) the misplacement of a decimal point would not be apparent from the information MOFCOM provided to the interested parties.

10. In any event, MOFCOM did not disclose sufficient information to allow the U.S. exporters to replicate the authority's calculations. China created three tables for this dispute that purportedly would allow the respondents to replicate MOFCOM's calculations, but those tables merely combine into one document various vague references to adjustments that were scattered throughout the record. At most, those references would have allowed the interested parties to guess at or approximate the calculations.

11. China also relies on an erroneous interpretation of Article 6.9 to assert that an investigating authority's disclosure obligation is limited to information the investigating authority considers necessary for the interested parties to defend their interests. China conflates the second sentence of Article 6.9 with the scope of disclosure required by the first. Although the second sentence informs the meaning of the first sentence by indicating that one value of disclosure is to permit "parties to defend their interests," it is not a limitation on the first sentence.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries.

12. China is mistaken when it asserts that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation was satisfied through purported summaries in its own determinations or can be inferred from excerpts in the Petition, because these purported summaries provide some understanding of the confidential information submitted by the interested party. Specifically, China's position is inconsistent with the text of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Per these provisions, interested parties must have a "reasonable understanding of the substance of the information submitted in confidence," and thus be able to defend their interests.

13. In *China-GOES*, the panel recognized that in order to adequately defend their interests, interested parties must have access to adequate non-confidential summaries *during* the course of the investigation prepared by the interested parties, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once a determination is made, the parties' ability to defend their interests has been compromised.

14. In several instances, China appears to argue that the purported non-confidential summaries contained in the Petition provide a reasonable understanding of the substance of the confidential information, in light of the various factors cited in Article 3.4 of the AD Agreement. In doing so, China appears to be arguing that its obligation to provide adequate non-confidential summaries should be assessed in the context of ADA Article 3.4. The text of the Agreement does not support China's argument. For example, ADA Article 3.4 provides no cross-reference to ADA Article 6.5.1 or vice-versa. The obligation to provide adequate non-confidential summaries is an independent obligation, separate from any consideration that may be relevant to other provisions of the AD Agreement.

15. China's reliance on the panel's report in *Mexico – Pipe and Tubes* is similarly misplaced. China argues that panel report found that there is no explicit method by which an investigating authority must decide whether to accept information as confidential. China further asserts, erroneously, that in that investigation Mexico's authority accepted "a general claim similar to that accepted by China." China neglects to mention that when the *Pipe and Tubes* panel found that there is no mandatory method by which Members must evaluate such a claim, it did not mean that evaluation could be foregone altogether. To the contrary, the panel specifically cited the fact that the interested party in that case "explained why, in its opinion, it was impossible to summarize certain information," something that is missing in the record here.

16. Assuming *arguendo* that China's *post hoc* summaries should be considered, the purported summaries remain inadequate. For each category of confidential information, the application contained no summary at all, or contained unlabeled graphs or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. As a result, China breached SCM Article 12.4.1 and AD Article 6.5.1.

III. CHINA CANNOT DEFEND ITS ANTI-DUMPING AND CVD DETERMINATIONS

A. China Did Not – And Still Cannot – Justify MOFCOM's Cost Allocation Determinations

17. China has not cited anything in MOFCOM's determinations to show analysis beyond what the United States has already referenced, and what has been referenced does not show that MOFCOM gave any consideration to the proper allocation of respondents' costs. In other words, China's arguments in these proceedings are simply *post hoc* rationalizations and accordingly impermissible *ab initio*. Even if these arguments had been made in the investigations, they would still reflect a misunderstanding of the relevant law and facts, and thus remain untenable.

1. *China's* Post Hoc *Arguments Cannot Be Considered*

18. The fundamental problem with every argument proffered by China is that they are *post hoc* rationalizations. Through the course of its own submission, the panel meeting, and in its responses to the Panel's questions, China has not been able to draw upon any additional language in any of MOFCOM's determinations that suggests anything but the summary rejection of U.S. respondents' reported costs. The arguments presented by China in this dispute stand in stark contrast to the MOFCOM determinations themselves.

China's *Post Hoc* Arguments

- The very distinct markets for broiler products in the United States and China and how the respondents' cost methodologies were reported – over allocating costs to breasts popular in the United States and under allocating costs to paws and other parts popular in China – became important considerations for MOFCOM in evaluating whether respondents' reported product-specific costs reasonably reflected the cost of production of the subject merchandise for purposes of the antidumping investigation.

  - *China's arguments do not address that MOFCOM's determinations contain no explanations or analysis regarding purported Chinese or U.S. markets.*

- In the antidumping context, recorded costs based on such a methodology cannot reasonably reflect the actual costs of production for a given product. Moreover, the extreme bias resulting from this methodology given product preferences in China could not be justified.

  - *The determinations though do not even reference any bias given product preferences in China or note what preferences Chinese consumers have.*

- This distortion is even more severe when using costs based on U.S. market values to determine the reasonableness of prices being charged in China.

  - *The determinations do not reference a distortion, severe or otherwise. There is nothing on the record to suggest that MOFCOM's issue was interested in determining what market values the respondents' utilized. Indeed, MOFCOM did not even solicit such information from the respondents.*

- The respondents' real and/or practical treatment of the status of paws and other products under their cost allocation methodology was a point of initial concern for MOFCOM, given the relatively high sales value of such products.

  - *The determinations do not reflect any concerns about the treatment of paws. Indeed, it is notable that the determinations for Keystone and Tyson are nearly identical, yet in these proceedings, China focuses primarily on how Keystone purportedly treated paws.*

- Tyson claimed to treat all products as joint products, but its treatment of products like paws in the allocation process did not really resemble standard joint product treatment. Rather, its allocation reflected a by-product approach.

  - *There is nothing in the determinations about joint products or by products or why one is acceptable and the other not. In fact, the determinations do not even call into question how Tyson characterized its accounting treatment of the products.*

- China's point is that in a value-based allocation one must take into account the circumstances of all sales to properly allocate costs to all production.

  - *There is nothing in the determinations even touching upon value-based allocations, let alone anything regarding what MOFCOM thought a value-based allocation must include.*

19. As noted, *post hoc* arguments do not suffice as justifications in WTO dispute settlement. Accordingly, China's failure to tie its arguments to findings made by MOFCOM compels the rejection of these arguments from consideration and in turn mandates – as China has no other arguments – a finding that China acted inconsistently with ADA Article 2.2.1.1.

20. China has attempted to sidestep the prohibition against *post hoc* arguments by presenting two claims. First, China asserts its reasoning for rejecting respondents' kept costs is "self-evident"

and thus did not need to be elucidated in its determinations. Second, China appears to assert that rather than look to whether the determination objectively sets forth the reasoning – which is what the Appellate Body and every panel that has considered this issue has concluded – the panel must instead try to consider what the respondents should have understood at the time to be MOFCOM's unwritten concerns and conclusions.

21. The same compelling testament refutes both claims: the complete absence of any discussion by MOFCOM or the interested parties regarding whether the costs were appropriate for the Chinese market. Respondents and the Petitioner had every incentive to address positions adopted by MOFCOM that could have impacted their interests. Yet when one looks to the record, one sees that while the respondents submitted voluminous evidence on why their costs were reasonable, there is conspicuous silence regarding the notion that prices of paws in China would be used as a basis to make a dramatic upward adjustment in normal value by replacing the cost allocations used in respondents books with a methodology chosen by MOFCOM. The reason for the silence is unmistakable: no one knew that MOFCOM considered the demands of the Chinese market to be relevant to calculating normal value.

22. The reason no one was aware that MOFCOM thought Chinese prices were relevant to determining normal value is two-fold. First, because MOFCOM never made any indication on the record that this point was relevant. MOFCOM's arguments are therefore, at best, unsubstantiated, and at worst, developed solely for purposes of this dispute. Second, China's position creates an artificial increase in normal value because the products receive relatively high value in China. Usually, a low price in the import market compared to the home market constitutes dumping. Here, China is arguing that because the product has a high price in China, the normal value derived from the costs of production (which is a surrogate for home market prices) must be inflated, and dumping must be found. If one accepts China's position, then it means MOFCOM essentially flipped the definition of dumping around. Ultimately though, the end result was that respondents had no opportunity to respond to this claim and to defend their interests.

23. To the extent China maintains that it was not obligated by the AD Agreement to provide its reasoning because it is "self-evident" that the costs were unreasonable in light of prices in China, then the United States notes that no WTO Member that has opined on this issue in the course of this dispute has found it to be, in fact, "self-evident." To the contrary, every Member to proffer a view on this issue has disagreed with China that whether costs are reasonably associated with production or sale entails any consideration, whatsoever, of the importing market. Accordingly, if it is not readily apparent to WTO members, it is implausible to claim that it was nevertheless "self-evident" to the respondents. In short, even if the standard was whether the parties had subjective knowledge of MOFCOM's concerns about the Chinese marketplace with respect to the use of a value-based allocation methodology – which it is not – the evidence does not substantiate China's position.

2. *China's* Post Hoc *Arguments Misinterpret Article 2.2.1.1*

24. China's present formula for interpreting Article 2.2.1.1 is to add words that are not there, *i.e.,* "in the anti-dumping context," and subtract words that clearly are there, such as "sale" and "associated with," as in "*associated with* the production and *sale,*" and the word "proper" as in "*proper* allocation of costs," with the end result being a misconstruction of China's obligations. Specifically, China argues three untenable propositions. First, China asserts that a producer's kept costs can be rejected on the basis that they are unreasonable from the perspective of the importing market. Second, China asserts that it is the obligation of a respondent to keep its costs in a manner that is reasonable in the "anti-dumping context." Third, China does not acknowledge that the investigating authority's obligation to consider all available evidence with the object of arriving at a proper allocation.

a. *The Prices in the Importing Market or China's So-called "Anti-dumping Context" is Irrelevant to Calculating Normal Value*

25. China argues that a company's costs in its books and records are not reasonable if the end result is that a company's costs of production are based on its experience in its home market, and remain the same despite different price trends (arising perhaps, from market tastes and demands) in another, importing country. But that would mean that in any instance where the producers' kept

costs result in a normal value lower than the export price that the costs are *per se* unreasonable and a new methodology must be derived that finds a dumping margin. China appears to argue that the AD Agreement has some sort of gloss – the "anti-dumping context"– that permits costs to be calculated in a manner that permits a finding of dumping.

26. China's position – which is opposed by every third party that has commented on this issue – is inconsistent with the AD Agreement. Whether dumping exists and is actionable is contingent on what the AD Agreement provides. There is no notion of dumping that is actionable outside the bounds of the Agreement. The AD Agreement specifies how normal value is to be determined. If the cost of production method is used to determine normal value, then the AD Agreement prescribes how costs are to be calculated. Only after they are so calculated and normal value determined can it be decided whether dumping exists or not.

27. Moreover, the relevant text in fact disclaims the proposition China advocates. Article 2.2.1.1 begins by noting "for the purposes of paragraph 2." Paragraph 2 is Article 2.2, which in respect to the cost of production method states the comparison is to be done "with the cost of production in the *country of origin*." As can be confirmed by the plain text and drafting history, the objective when calculating normal value under the cost of production test is to develop a surrogate home market price. This is consistent with the general scheme of Article 2.2, which is to use sales of the like product in the "domestic market of the exporting country" if they can be used. China's position is therefore inconsistent with the text of the AD Agreement.

b. *Article 2.2.1.1 is a Positive Obligation on the Investigating Authority Regarding the Calculation of the Cost of Production*

28. China argues the respondent must calculate its costs on a basis that is reasonable for the investigating authority to use in the antidumping context – *i.e*. based on the prices in the Chinese market. As explained above, the Chinese market is irrelevant for purposes of Article 2.2.1.1. Further, the AD Agreement does not distinguish calculations specifically for the "antidumping context" from calculations used for any other purposes. China's arguments presume that foreign respondents have an obligation to take their calculations based on their books and records and modify them to satisfy investigating authorities under this provision, lest they be rejected for failure to make such modifications. There is no textual support for such a claim, and in fact, such an interpretation of the obligations of respondents is at odds with the requirement of the investigating authority under Article 2.2.1.1 to rely on the books and records "historically utilized by the exporter or producer."

29. China defends its interpretation by asserting that Article 2.2.1.1 does not provide for the identity of the party who calculate costs. In fact, the AD Agreement does so provide. Article 2.2.1.1 by referencing Article 2.2 makes clear it is referencing the investigating authority. Therefore, the appropriate interpretation of Article 2.2.1.1 is that it provides that costs are to be calculated *by the investigating authority* on the basis of records "kept by the exporter or producer." Indeed, one must ask under what circumstances would a firm keep in its books and records costs tailored for the purposes of the hypothetical possibility of a future antidumping investigation that has not yet occurred, and may never occur, and focused on whether prices are reasonable from the perspective of the importing market? The short answer is never. Thus, the relevant inquiry is not whether respondents have satisfied their obligations to the investigating authority to calculate costs that are reasonable to the authority, but whether the investigating authority has abided by its obligations to the AD Agreement to use the respondents' kept costs in light of the relevant circumstances.

30. U.S. respondents put evidence on the record that their costs were calculated in a manner that is consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards. Evidence on the record also showed that Chinese producers of broiler products use a value-based allocation methodology as well and that Chinese accounting literature substantiated that the use of a value based allocation methodology can be reasonable. Despite all of this evidence on the record as to the reasonableness of the use of a value based cost allocation methodology, China nonetheless claims that the U.S. producers did not adequately meet their so-called burden under Article 2.2.1.1 because they did not provide information that showed that their allocation methodologies reflected the prices of the Chinese market – and that MOFCOM could remain silent in the face of this evidence. China's position lacks any textual support.

c. *An Investigating Authority Must Consider All Available Evidence in Order to Arrive at a Proper Allocation*

31. China acknowledges that "consideration" under Article 2.2.1.1 entails "some degree of deliberation"; however, China neglects the object of that deliberation: "a proper allocation of costs." China's interpretation turns the obligation to "consider all available evidence" into what the Appellate Body has specifically held as insufficient under Article 2.2.1.1: simply receiving and noting evidence. Here, MOFCOM failed to engage in consideration with respect to both its decision to reject U.S. respondents' kept costs and in adopting its weight-based methodology.

32. With respect to its weight-based methodology, China asserts that once MOFCOM found U.S. respondents' costs unreasonable, it was free to turn to any methodology it deemed reasonable. But that is not so. The second sentence of Article 2.2.1.1 provides not only an obligation regarding the consideration of evidence in determining whether the kept costs are GAAP consistent and reasonable, but also mandates that those costs be considered in any event in determining the proper allocation of costs. In other words, as the Appellate Body has noted, compelling evidence requires reflection in order satisfy the requirement to "consider all available evidence." Nothing in MOFCOM's determinations suggests that MOFCOM undertook such an exercise in determining an alternative methodology in this case.

3. *MOFCOM Did Not Properly Evaluate U.S. Respondents' Reported Costs or its Weight-Based Methodology*

33. The United States addresses certain representations made by China regarding the respondents' costs and to emphasize that a proper evaluation would not hold the costs unreasonable simply because they are based upon value-based accounting.

a. *MOFCOM's Determinations Do Not Reflect "Consideration"*

34. With respect to U.S. producer's kept records, China asserts that MOFCOM's consideration is established through its (i) questionnaire requests asking for a description of the cost allocation systems maintained by respondents and (ii) its determinations for Tyson and Keystone. The definitions for "consider" include the following: "think carefully about; take into account when making a judgment, look attentively at." The most a questionnaire response could achieve though it simply accepting or noting evidence though. China fares no better when it cites MOFCOM's determinations, which summarily claim the respondents' costs are unreasonable without addressing the specifics of their costs or evidence. Comparing these determinations against the U.S. *prima facie* case demonstrates that MOFCOM failed to engage in consideration.

35. Tyson's evidence, for example, explained its cost system, why that cost system was reasonable, and that MOFCOM's methodology, besides being generally inappropriate, had a serious calculation error. The MOFCOM determinations referenced by China in these proceedings are completely silent with respect to those three points as well as what rationales supported MOFCOM's application of a weight-based methodology (a methodology that Tyson demonstrated suffered from a serious calculation error). Indeed, even if one scrutinized the record outside what China specifically referenced, one still finds nothing by MOFCOM addressing or examining these issues.

36. Similarly, Keystone presented evidence explaining its cost system and why that system was reasonable. Additionally, Keystone, after having its methodology rejected in the preliminary determination, also proffered alternative methodologies – methodologies still based on the initial data submitted. But neither the MOFCOM determinations referenced by China nor anything else from the investigation indicates that MOFCOM considered this evidence, including the alternative methodologies proffered by MOFCOM.

37. Likewise, Pilgrim's submitted evidence explaining its costs and why they were reasonable. China does not even bother to argue MOFCOM's determinations reflect consideration of Pilgrim's evidence. Instead, China asserts that MOFCOM applied "Facts Available." However, at no time did MOFCOM ever issue a warning to Pilgrim's that Facts Available would be applied if requested information was not provided – or what the missing information was. China's assertions that such notice is provided for in *AD Final Disclosure* is simply untenable. In short, China has not explained

why MOFCOM was entitled to afford Pilgrim's such treatment and why the records and evidence Pilgrim's submitted – months before the AD disclosure – had to be ignored. China's claim that MOFCOM applied Facts Available is simply an admission that MOFCOM failed to consider Pilgrim's evidence.

b. *China Misrepresents the Factual Record*

38. China has made various factual misrepresentations regarding the respondents' kept costs in these proceedings. These misrepresentations include that (i) respondents assigned zero costs to paws; (ii) that respondents treated subject merchandise as by-products as opposed to joint products; and (iii) that MOFCOM was concerned with Tyson's use of an offal market price in valuing paws.

39. A zero cost of production in a company's books might be indicative of scrap or waste, and such products might generate miscellaneous revenue. Accordingly, the mere existence of a zero cost of production does not indicate that the kept cost is necessarily unreasonable. However, as the United States has explained, none of the respondents' reported costs for subject merchandise were actually zero. China's contrary assertions are based on distortions of how costs are kept by one particular respondent, Keystone, and applying that distortion to the other respondents.

40. As demonstrated by U.S. data, including Exhibit USA-60, Keystone allocated costs to paws. In response, China can only muster that those U.S. submissions "do not really contradict" Keystone's statements. The fact that China cannot draw upon anything in MOFCOM's determinations, as well the fact that Keystone prepared alternative allocations – which also received no analysis in the determination – establishes that MOFCOM was simply not concerned with this issue during the investigation and that MOFCOM did not consider a proper allocation of respondents' costs. In other words, the so-called "zero" cost issue is simply *post hoc* rationalization.

41. In its second written submission, China now proffers that another reason to discount the respondents' records was that they did not treat paws as "true" joint products and actually treated them as by-products. As an initial matter, there is nothing in Article 2.2.1.1 that suggests kept costs for by-products are unacceptable while those for joint products may be. Factually though, there is nothing in the determinations regarding any finding by MOFCOM regarding joint products, co-products, or by-products. The silence is particularly striking in light of the evidentiary record. For example, Tyson, in its supplemental questionnaire and in its Further Comments on the Preliminary AD Determination explicitly noted that it did "not classify any products produced from the live birds as by-products [and it] … treats all products that are produced from the live birds as co-products. Tyson assigns production costs to all of these products and records the revenue generated from sales of these products as sales revenue."

42. China also takes offense – although it is not clear why – that Tyson valued paws per an offal market price. However, China cannot point to where in the record there is any indication that MOFCOM thought an offal price problematic or why offal cannot be a joint product and, in particular, a co-product. In fact, Tyson explained that the "offal price" was based on sales in the United States. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price. Accordingly, China has not adduced any record evidence in support of its finding.

c. *MOFCOM Did Not Weigh the Merits of Respondent's Kept Costs Against its Weight-Based Methodology*

43. MOFCOM's obligation was to accept GAAP consistent costs which were reasonably associated with the production and sale of the product under consideration. The United States has not argued that costs, in order to be reasonably associated with the production and *sale* of a product, must be its market value. However, it defies common sense to claim that a cost allocation methodology that relies on market values, is the industry standard, and is consistent with the recommendations of authoritative accounting treatises is either "undeniably distortive" or "arbitrary" as China claims. Under these circumstances, MOFCOM had a duty to set forth its reasoning. China cannot even support those assertions here, and MOFCOM most certainly did not do so in the administrative proceeding.

44. As the United States has explained, a principal question presented is how could MOFCOM remain silent about the methodology it chose over the books and records historically utilized by the respondents, particularly when the respondents placed significant evidence explaining why their respective costs were reasonable? MOFCOM's failure must also be considered in light of a key point: the present case concerns *non-homogeneous joint products*. Breasts, wingtips, leg quarters, and paws are different products. A value-based allocation is not inherently unreasonable; different products can reasonably be expected to have different costs allocated to them. Indeed, the use of a value-based allocation is often reasonable because it can account for differences in physical characteristics (*e.g.,* breast meat compared to paws) based on how the market values those differences. A value-based allocation also reasonably permits the seller to try to maximize their profitability on all products based on their relative ability to generate revenue. U.S. producers put evidence on the record to that effect, such as the accounting treatises cited by both China and the United States during this dispute. A cursory review raises serious questions as to the propriety of MOFCOM's decision and refutes any assertion that it was self-evident to resort to MOFCOM's methodology.

45. First, respondents explained that the industry standard in both the United States and China is to use value-based allocations. The fact that in the normal course of business, both United States and Chinese producers of chicken use a value-based allocation methodology is probative that such a methodology is reasonable.

46. Second, respondents put forward evidence, including text books and accounting authorities, that confirmed in the case of non-homogenous joint products, the use of a relative value based allocation is a reasonable method of allocating costs and the use of a weight-based value allocation is not a reasonable method of allocating costs. China cites a treatise by Professor Horngren to note that that unit based accounting is preferred in rate setting situations and then China alleges that anti-dumping is essentially rate-setting. The United States rejects China's characterization of anti-dumping proceedings as exercises in rate regulation and has noted that China has not even bothered to try and define what a rate regulation proceeding is or what text in the AD Agreement supports such a supposition. Fundamentally though, China misapplies the context. A firm that is subject to rate regulation, such as a provider of electricity, may not be able to identify what the actual value of its commodity is, and must thus resort to a unit based accounting system. The accounting methodology is not to be applied by the rate-setter but the participant subject to it. When it came to other industries, including specifically the poultry industry, Professor Horngren's text explains the propriety of relative value based costing.

47. Third, there is no explanation why a weight-based methodology is purportedly neutral. Non-homogenous joint products usually have significantly different market values, are often physically non-homogeneous, and may not be quantifiable using the same unit of measure (e.g., gasses vs. solids). MOFCOM's logic does not precludes an investigating authority from choosing a unit measure that yields the highest dumping margins. For example, between volume and weight, MOFCOM has not explained why one would be more acceptable than the other. In this case in particular, the methodology used by MOFCOM skewed the companies' costs away from their actual costs and the value realized by individual chicken parts. Instead, it treated all chicken products as if they had precisely the same physical characteristics, which China itself recognizes is not the case. Such a methodology is no way "neutral."

48. Fourth, China's own *post hoc* position on what constitutes reasonableness is, itself, unreasonable. China asserts that reasonableness must be focused on the cost of production and not on sales, and it quotes *EC – Salmon* for the proposition that there is no explicit description of "cost of production" in the AD Agreement. What China neglects is that Article 2.2.1.1 provides that the "reasonably reflect" requirement in that Article is for "costs associated with the production and *sale of the product under consideration.*" Not surprisingly, the panel in *EC – Salmon* later stated "that the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product.'" Even setting aside China's selective quotation, it remains unclear how a weight-based allocation better addresses the cost of production that allegedly concern MOFCOM. China's methodology ensures that certain products will always be valued at below cost because the cost of production is completely divorced from market forces. Specifically, high and low value products are simply averaged together as if they were the same. An allocation methodology that could result in certain products always being sold at a loss is not reasonable. Furthermore, products with different values frequently have different processing costs, which was the case for many of the joint products in this case, yet

MOFCOM's approach largely ignored or minimized those costs, despite the actual costs employed in the respondents' records.

49. Finally, rather than reject all of the companies' allocation of costs, MOFCOM could have – at a minimum – simply worked with the respondents by outlining its concerns. Instead, MOFCOM's response was to go far beyond such any reasoned approach and to throw out the respondents' reported methodologies. Such a response is unreasonable and inconsistent with the requirements of Article 2.2.1.1.

B. China Breached Article 2.4 of the AD Agreement by Failing to Conduct a Fair Comparison between Keystone's Constructed Normal Value and Export Price

50. MOFCOM breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. MOFCOM made an undue adjustment to Keystone's export price to account for certain freezer storage expenses that were already included in Keystone's constructed normal value.

1. *The United States' Claim that China Breached Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference*

51. China's argument that the United States claim under Article 2.4 is not within the Panel's terms of reference rests on three assertions: (i) the U.S. request does not reference Article 2.4; (ii) it does not mention "freezer storage expenses"; and (iii) none of the provisions referenced in the request are "reasonably related" to the issue of fair comparison. With regard to (i) and (ii), nothing in the DSU required the U.S. consultation request to include a specific mention of Article 2.4 or freezer storage fees. With respect to (iii), the issues raised in the consultation request were in fact reasonably related to Article 2.4 of the AD Agreement.

52. The fact that the United States' request for consultations does not include a specific reference to Article 2.4 or freezer storage expenses does not render the U.S. claim, as spelled out in the U.S. panel request, outside of the Panel's terms of reference. The Panel Report in *Mexico – Beef & Rice* found that there was no need for "complete identity between the scope of the request for consultations and the request for the establishment [of a panel]." The Appellate Body agreed. The implication of China's assertion that the U.S. claim is outside the Panel's terms of reference merely because the U.S. request for consultations did not reference Article 2.4 or freezer storage expenses would be the imposition of a requirement of "complete identify" that was rejected by the panel and Appellate Body reports in *Mexico – Beef & Rice*.

53. The United States explained that its Article 2.4 claim evolved from the legal basis that formed the subject of consultations through a process not unlike that described by the Appellate Body in *Mexico – Beef & Rice*: as a result of consultations, the United States had a better understanding of China's treatment of Keystone's freezer storage fees, such that Article 2.4 became relevant. China's assertion that a claim under Article 2.4 could not evolve from a claim under Article 2.2 or Article 2.2.1.1 because these articles are "completely unrelated" is incorrect. The constructed normal value that is determined under Article 2.2 and Article 2.2.1.1 is one of the two variables subject to the fair comparison conducted under Article 2.4. China also asserts that the Article 2.4 claim is unrelated to the respondents' cost records or how allocation of costs was effected. China's assertion is belied by the evidence China relies on for its substantive arguments, namely Keystone's reported costs, and China's discussion of how those costs were reported and allocated.

2. *China's* Post Hoc *Assertions Do Not Justify MOFCOM's Undue Adjustment to Keystone's Export Price*

54. MOFCOM's adjustment to Keystone's export price was inconsistent with Article 2.4 of the AD Agreement. The United States demonstrated the following basic facts, with which China does not appear to disagree: Keystone reported certain freezer storage expenses in response to MOFCOM's AD Questionnaire; MOFCOM included those costs when it constructed Keystone's normal value, and MOFCOM made an adjustment to Keystone's export price that resulted in freezer storage expenses being included both as a cost of production in Keystone's normal value and as an expense adjustment to Keystone's export price.

55. China responds with two *post hoc* assertions in an attempt to justify why the adjustment was nevertheless proper, despite the unfair result. First, China asserts that MOFCOM found that Keystone had reported freezer storage fees in a manner requiring an adjustment, due to Keystone's failure to provide adequate responses to MOCFCOM's requests for information. This assertion is incorrect because MOFCOM verified that Keystone's reported costs had been properly reported. MOFCOM did not purport to make an adjustment to Keystone's export price based on how it allocated costs. China's assertion to the contrary misrepresents the record, as no such finding or justification is reflected anywhere in the record. Even if the problem concerned, as China now suggests, was how Keystone allocated freezer storage costs, the solution to the problem asserted by China would not have been the adjustment to the export price made by MOFCOM.

56. China's second *post hoc* assertion is that MOFCOM properly declined to calculate a normal value adjustment given the late stage of the investigation at which the issue was discovered and in light of Keystone's incomplete responses. This assertion is also not supported by the record. MOFCOM first indicated that it was adjusting Keystone's export price in regard to freezer fees in the Final AD Disclosure in mid-July 2010. Just ten days later, in its Comments on the Final AD Disclosure, Keystone explained in detail what it considered to be the problem with MOFCOM's adjustment and proposed solutions to fix the problem. These comments were provided two months before MOFCOM issued its Final AD Determination, providing MOFCOM with sufficient time to correct the error that China suggests MOFCOM was aware of.

C. China Cannot Dispute That Its Countervailing Duty is in Excess of the Alleged Subsidy

57. China blames the respondents for any mistakes that were made because the respondents purportedly mislead MOFCOM through the provision of inaccurate questionnaire responses. In short, MOFCOM is asserting some form of procedural default: respondents provided incorrect answers and now they must suffer the consequences. Even if China's position excused its obligation – which it does not – China's position is simply *reductio ad absurdum*. Per China's logic, respondents, who had every interest in ensuring that their CVD rates were as low as possible, mislead MOFCOM in a manner that *increased* their CVD rates. More importantly, the respondents unquestionably provided all of the data needed to calculate a proper countervailing duty prior to the preliminary determination and expressly pointed out MOFCOM's error long before the final determination.

1. *Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Not Subject to Procedural Default*

58. SCM Article 19.4 and Article VI:3 of the GATT 1994 are mandatory in nature and contain no exceptions. The language in these provisions creates a fixed ceiling regarding the imposition of a countervailing duty. Accordingly, an authority may not satisfy its obligation by merely asserting its CVD is a reasonable approximation of the subsidy; it must calculate the CVD rate based on the record evidence particular to the amount of the subsidy.

59. Adding context to this obligation are SCM Articles 10 and 21.1, which reinforce the obligations of the SCM Agreement, including Article 19.4. Article 10, by specifying that that Members are to do what is "necessary," compels Members to take affirmative action if necessary in order to comply with their SCM Agreement obligations. Article 21.1, by providing that CVD measures can be in force "only as long as and to the extent necessary counteract subsidization which is causing injury" means that obligations such as those in Article 19.4 are continuous. They do not expire while a CVD measure is in place.

60. Here, even if one gave every favorable inference to MOFCOM, China's argument is essentially that a miscalculation by an investigating authority should be excused because MOFCOM did what it could with the questionnaire responses. But that argument does not answer why the obligation is any less applicable today or any less susceptible to remediation. In order to do what is "necessary" to abide by Article 19.4, MOFCOM must fix the CVD rate.

2. *The Additional Questionnaire Requests Referenced by MOFCOM do not Change the Relevant Data*

61. China points to a series of questionnaire queries in its first written submission to argue that MOFCOM engaged in a holistic inquiry to obtain the relevant data to ensure the subsidy was properly calculated. Notably, China never referenced these questions, nor the respondents' responses, when explaining its CVD calculations during the investigation. As the United States noted previously, to the extent MOFCOM referenced any questionnaire data, it was the data in the second questionnaire. Accordingly, the claim of a holistic inquiry appears to be simply more *post hoc* rationalization. Assuming *arguendo* that it is not, two critical points remain unchanged.

62. First, the existence of these questions does not change the fact that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. China may claim MOFCOM did not get the answers it wanted to the questions it now points to but China cannot claim that MOFCOM lacked the data to recognize a problem existed and to perform a correct calculation.

63. The data provided in response to the Second Supplemental Questionnaire is for total purchases of corn and soybean, not just those purchases for subject merchandise. The respondents' exhibits, on their face, indicate they are intended to provide the ingredients in the feed consumed by chickens and the quantity and value thereof. The fact that the respondents viewed the data as total feed can be confirmed as follows. For Tyson, its response, as reflected in Exhibit CS2-I-3, reported the total "production quantity of live broiler chicken" in tons. Tyson reported the total quantity (tons) and value (USD) of each ingredient used to produce the feed that was consumed by those live chickens. With respect to Pilgrim's, it reported total purchases of corn and soybeans, as reflected in Exhibit S-II-I-2 of the Second Supplemental CVD Questionnaire Response. It can be confirmed that the figures reflect total purchases of corn and soybeans for all production by comparing the data in this response to the response to Question 9 of the First Supplemental CVD Questionnaire, which asked for the "purchases of raw materials (including soybean, corn, feed for broilers and live chickens) during the POI." The response to that question is found in Exhibit S-I-9(b) of the First Supplemental CVD Questionnaire Response (which is a restatement of the table responding to question III-3 of the original anti-subsidy questionnaire, asking for the same). Exhibit CHN-38, which was part of Pilgrim's submission, explicitly notes that some of the feed is going to pullets and breeders. Thus, while it is conceivable that U.S. respondents were confused as to the question posed by MOFCOM, MOFCOM was in a position to see what U.S. respondents interpreted.

64. The methods for correction were also provided to MOFCOM. Pilgrim's Table 1-5, attached as Exhibit USA-77, would allow MOFCOM to revise the numerator by utilizing a ratio of subject merchandise to total merchandise. Tyson addressed how relevant data could be utilized to adjust the denominator. MOFCOM did not address why either method was inappropriate or even attempt to further ascertain in light of this information what the proper subsidy would be.

65. In short, nothing China has argued overcomes MOFCOM's obligation to ensure the CVD rate applied is no greater than the subsidy. Because the CVD rates applied to the respondents are in excess of the amount of the subsidies found to exist, MOFCOM should correct its erroneous determination.

D. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

66. The United States demonstrated the following with respect to China's determination of the "all others" dumping margin and subsidy rates: (1) China breached ADA Articles 6.8 and Annex II and SCM Article 12.7 because MOFCOM applied "facts available" to exporters or producers it did not notify; (2) China breached ADA Article 6.9 and SCM Article 12.7 because MOFCOM failed to disclose the essential facts under consideration in calculating the "all others" rates; and (3) China breached ADA Articles 12.2, 12.2.1 and 12.2.2 and SCM Articles 22.3, 22.4 and 22.5 because MOFCOM failed to explain its "all others" determinations in the antidumping and countervailing duty investigations. China has not rebutted these arguments.

1. *China Breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement Because MOFCOM Applied "Facts Available" Apparently Adverse to the Interests of "All Other" Exporters or Producers It Did Not Notify*

a. *MOFCOM Did Not Notify "All Other" Exporters or Producers*

67. MOFCOM applied facts available to calculate an adverse dumping margin and subsidy rate for unknown, unidentified producers or exporters that were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying available facts to such producers or exporters, MOFCOM acted inconsistent with China's obligations under ADA Article 6.8 and Annex II and SCM Article 12.7.

68. An investigating authority's recourse to facts available under ADA Article 6.8 and SCM Article 12.7 is limited to situations where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. The *Mexico – Beef & Rice* panel explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information. The Appellate Body report further explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. Given MOFCOM's failure to notify "all other" exporters or producers, those exporters and producers cannot be said to have failed to provide necessary or requested information, or otherwise to have impeded the AD and CVD investigations. Therefore, MOFCOM's resort to facts available adverse to the interests of those exporters or producers was inconsistent with ADA Article 6.8 and SCM Article 12.7.

69. China argues that MOFCOM attempted to notify all producers or exporters by: (1) posting a public notice on MOFCOM's website; (2) placing a copy of the initiation notices in a reading room in Beijing; and (3) providing a copy of the initiation notices to the U.S. Embassy and requesting it to notify any other producers or exporters. These actions were the only efforts made by MOFCOM to notify "all other" producers and exporters of broiler products. Whether considered on their own or collectively, it is not reasonable to resort to the use of available facts on the basis of these efforts. First, posting a public notice on MOFCOM's website is not likely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Second, placing a copy of the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. Third, the obligation to notify interested parties is on the investigating authority – not the Member where those exporters or producers might be located.

70. The panel in *GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with ADA Article 6.8. The panel reached a similar conclusion with regard to SCM Article 12.7. Given the similarity of the underlying facts and legal arguments in *GOES* and this dispute, the panel's reasoning there should be considered highly persuasive here.

71. China's position appears to be that an investigating authority may apply, in a punitive manner, whatever facts are necessary to compel compliance. However, an incentive only works if that incentive is communicated to the other party. The flaw in China's reasoning is that it assumes companies were aware of the investigation and declined to participate. Given MOFCOM's failure to notify all other exporters and producers of the initiation of the investigations, those producers therefore had no knowledge of the investigations or of the fact that MOFCOM would apply a punitive all others rate if they did not register.

72. The United States also notes that China's "all other" rate applies, not only to companies that exported to China during the period of investigation, but did not register or were otherwise unknown to MOFCOM, but also to exporters and producers that began shipping after the MOFCOM initiated the investigations, or even after the conclusion of the investigation. Those exporters or producers could not be said to have failed to provide information or impeded MOFCOM's investigation – they might not have even existed during the investigation. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

b. *MOFCOM Applied "Facts Available" in a Manner Adverse to the Interests of "All Other" Producers/Exporters*

73. The WTO-inconsistency of China's approach is underscored by the manner in which it applied "facts available." The *Mexico – Beef and Rice* Appellate Body report explained the limitations on the use of facts available under SCM Article 12.7 (which is nearly identical to the text of ADA Article 6.8) and indicated that recourse to facts available "does not permit an investigating authority to use any information in whatever way it chooses." Even if China could justify applying facts available to unknown exporters or producers it did not notify, it cannot justify the manner in which it applied those facts, which is also inconsistent with ADA Article 6.8 and SCM Article 12.7.

i. MOFCOM's application of facts available in the antidumping investigation.

74. In the Final AD Determination, MOFCOM applied a dumping margin of 105.4 percent to "all other" producers or exporters of U.S. broiler products – a margin more than twice the size of any margin assigned to an investigated company or the weighted-average dumping margin assigned to companies that registered with MOFCOM, but that were not investigated. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all-others dumping margin was calculated. However, China explained that MOFCOM apparently looked at the "facts available" to determine what normal value and what export price could be paired together to calculate the largest possible dumping margin. Based on China's explanation, it is apparent that MOFCOM did not attempt to take into account the substantiated facts provided by interested parties or to use those facts for the limited purpose of replacing the information that had not been provided. Rather, MOFCOM applied facts it specifically selected, purportedly from the record, to determine the value that was most adverse to all other producers or exporters, inconsistent with ADA Article 6.8.

ii. MOFCOM's application of facts available in the countervailing duty investigation.

75. In the Final CVD Determination, MOFCOM applied a subsidy rate of 30.3 percent to "all other" producers or exporters of U.S. broiler products – a margin nearly four times greater than the weighted average of the subsidy rates applied to the investigated companies. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all others subsidy rate was calculated. China now offers a *post hoc* explanation of the calculation of this rate, referring to two methods of calculating the alleged subsidy: the "competitive-benefit" analysis and the "pass-through" analysis. With respect to the investigated companies, in the Final CVD Determination, MOFCOM treated the pass-through benefit as the maximum amount of the subsidy. However, China reveals in its statement above that for "all other" producers, it did not treat the pass-through amount as a limit. In other words, in calculating the subsidy rate for those producers, it treated them as if they could receive a benefit that was actually greater than the amount that they could possibly receive in reality. This is not an application of "facts available." Rather it is a departure not only from facts that were substantiated on the record and relied on by MOFCOM to calculate the subsidy rate for the investigated companies, but from facts altogether. Such an approach is a departure from the limited use of facts available, as described by the Appellate Body, and inconsistent with SCM Article 12.7.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculation the "All Others" Dumping Margin and Subsidy Rate*

76. The United States demonstrated that China breached ADA Article 6.9 and SCM Article 12.8 because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. In response, China does not appear to deny that MOFCOM failed to disclose the data and calculations underlying MOFCOM's "all others" calculations. China's response that "[t]he only 'essential fact' regarding the 'all others rate' is the rate itself" is inconsistent with the text of ADA Article 6.9 and SCM Article 12.8, which require the disclosure of essential facts "which *form the basis* for the decision to apply definitive measures." China's argument conflates the essential facts forming the basis of the decision with the decision itself. Moreover, the disclosure obligation in Article 6.9 and Article 12.8 is clear and does not permit the investigating authority to determine that something less than disclosure of the essential facts is warranted based on its subjective assessment that certain parties do not need the information.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement, and Articles 22.3, 22.4 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations*

77. China breached ADA Articles 12.2, 12.2.1 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as SCM Articles 22.3, 22.4 and 22.5 by failing to explain the "all others" subsidy rate in the CVD determinations. China cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

78. With regard to the "all others" dumping margin, the purported disclosure fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, a full explanation of the methodology used to establish the export price and normal value used for "all other" respondents, or all relevant information underlying its determination, as required by ADA Articles 12.2, 12.2.1 and 12.2.2. In fact, the first explanation of MOFCOM's calculation of the "all others" dumping margin was provided by China during its statement at the first panel meeting, when it indicated that the margin consisted of the "highest calculated normal value and the lowest recorded export price." However, China acknowledged in response to the Panel's questions that "[t]he final disclosure did not expressly state that the specific data relied upon from these companies was the highest calculation normal value and the lower recorded export price." The fact that the first explanation of this margin was not provided until China's statement, and is found nowhere in the record, evidences MOFCOM's failure to provide any such explanation during the investigation.

79. With regard to the "all others" subsidy rate, China attempted to provide an additional "explanation" of MOFCOM's calculation of the "all others" subsidy rate in its response to the panel's questions. To the extent China's proffered explanation is meant to supplement the conclusory statement included in MOFCOM's Final CVD Disclosure, it cannot excuse MOFCOM's failure to provide such an explanation during the investigation, which breached Articles 22.3, 22.4 and 22.5 of the SCM Agreement.

IV. MOFCOM'S FLAWED INJURY DETERMINATIONS

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

80. China attempts to defend MOFCOM's approach to defining the domestic industry by arguing that defining the domestic industry in an unbiased fashion was simply not possible under the circumstances. According to China, MOFCOM reasonably provided questionnaires only to producers listed in the petition, which all belonged to petitioner CAAA, because the Chinese broiler industry was hopelessly fragmented, allegedly consisting of 27,638,046 producers. And, China argues MOFCOM's definition of the domestic industry to include only the 15 questionnaire responses

completed by producers listed in the petition and two producers clearly handpicked by petitioner, all of which unsurprisingly supported the petition, should be excused, because these producers represented over 50 percent of Chinese broiler production.

81. Such *post hoc* arguments fail to rebut that MOFCOM's actual approach to defining the domestic industry necessarily resulted in a domestic industry definition biased in favor of petitioners. The undisputed facts establish that MOFCOM's definition of the domestic industry was inconsistent with China's WTO obligations. Nor has China altered this bottom line by its unpersuasive efforts to recast MOFCOM's process for defining the domestic industry.

1. *The Undisputed Facts Demonstrate that MOFCOM's Domestic Industry Definition Was Inconsistent with China's WTO Obligations*

82. China does not deny that MOFCOM limited its definition of the domestic industry to those domestic producers that completed domestic producers' questionnaire responses, and that MOFCOM provided domestic producers' questionnaires only to the 20 producers belonging to petitioner CAAA listed in Exhibit 2 of the petition. As members of the CAAA, these 20 producers were by definition petitioners. Nor does China deny that the only affirmative actions taken by MOFCOM to identify other domestic producers was its publication, on September 27, 2009, of a "Notification on Registration of Participating in Industry Injury Investigation" with respect to both the antidumping and countervailing duty investigations, and the posting of a blank domestic producers' questionnaire on its website.

83. MOFCOM's approach to defining the domestic industry is thus inherently biased in favor of petitioners, and hence inconsistent with the objectivity requirement under ADA Article 3.1 and SCM Article 15.1, in several respects. As an initial matter, MOFCOM failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the investigation. By making it a prerequisite that, to be included in the industry definition, a domestic producer needed to participate in the investigation, MOFCOM at the outset set up an unreasonable barrier for domestic producers to provide information relevant to the injury investigation. Domestic producers that might have been willing to complete a questionnaire response but did not necessarily wish to participate as parties would have been dissuaded from providing information under these circumstances.

84. By setting up obstacles that made it infeasible for domestic producers other than producers listed in the petition to complete and return questionnaire responses, MOFCOM increased the likelihood that the only domestic producers would respond. Indeed, these producers – self-selected by Petitioner by dint of their membership or affiliation with CAAA – were the only producers to whom MOFCOM provided questionnaires.

85. By superficially inviting other domestic producers to volunteer for inclusion in the domestic industry by either responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in violation of ADA Article 3.1 and SCM Article 15.1. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of a measure, and would therefore have a financial incentive to participate in the injury investigation either by joining the petition, by responding to the notice, or by downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack the incentive to respond to the MOFCOM's notice or to otherwise participate in the investigation, thereby increasing the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

86. MOFCOM's failure to make active, independent efforts to collect representative information breaches China's obligations under the AD and SCM Agreement. ADA Article 5.1 and SCM Article 11.1 contemplate that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged" dumping and subsidies. Similarly, ADA Article 1 and SCM Article 10 provide that antidumping and countervailing measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the respective Agreements. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain[] passive in the face of possible

shortcomings in the evidence submitted." Given the centrality of the domestic industry definition to the volume, price, impact, and causation analyses required under ADA Articles 3.2, 3.4, and 3.5 and SCM Articles 15.2, 15.4, and 15.5, it is particularly important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a thorough and objective manner.

87. Further, by limiting the domestic industry to those domestic producers who were either members of CAAA or otherwise selected by petitioner, to the exclusion of nearly half of the industry, MOFCOM defined the domestic industry in a manner inconsistent with ADA Article 4.1 and SCM Article 16.1, which express a clear preference for investigating authorities to define the domestic industry as "the domestic producers as a whole of the like product" by listing that definition of domestic industry first. Only after active efforts to include (or in the case of sampling, represent) all producers may the authority resort to the alternative, secondary definition of the domestic industry as domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products." If investigating authorities were free to define the domestic industry to include no more than producers accounting for "a major proportion of the total domestic production" at their option, the Agreements would not have included the more stringent definition of domestic industry, and would not have listed the more stringent definition first.

88. Moreover, investigating authorities that do not make active efforts to collect the information necessary to define the domestic industry as producers as a whole of the like product effectively exclude domestic producers from the definition for reasons other than those authorized under ADA Article 4.1 and SCM Article 16.1. These articles provide only two specific exceptions to defining the domestic industry as producers as a whole of the like product – one for related producers and one for regional industries. The articles do not permit investigating authorities to exclude domestic producers from the domestic industry definition by failing to make active, independent efforts to identify the universe of domestic producers of the like product. An investigating authority whose inaction excludes domestic producers otherwise willing to cooperate with the investigation from its definition of the domestic industry would therefore be in violation of ADA Article 4.1 and SCM Article 16.1.

89. In response to the United States' argument, China argues that the two exceptions under ADA Article 4.1 and SCM Article 16.1 do not preclude an investigating authority from defining a domestic industry to include producers accounting for a major proportion of total domestic production. China misunderstands the United States' argument. The United States is not arguing that investigating authorities must always define the domestic industry to include 100 percent of production unless one of the two exceptions is met, but that an investigating authority breaches Articles 4.1 and 16.1 when the authority's process for defining the domestic industry tends to result in the systematic exclusion of domestic producers for reasons other than the two listed exceptions. As MOFCOM failed to make active, independent efforts to identify the universe of domestic producers. MOFCOM's definition of the domestic industry was inconsistent with ADA Articles 3.1 and 4.1 and SCM Articles 15.1 and 16.1.

2. *China's* Post Hoc *Rationalizations Cannot Remedy MOFCOM's Deficient Approach to Defining the Domestic Industry.*

90. In defending MOFCOM's approach to defining the domestic industry, China provides a revisionist framework in an apparent effort to make MOFCOM's approach appear reasonable. The Panel's review, however, centers around those findings the authority actually made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact. Thus, China's *post hoc* rationalizations are of no relevance to the Panel's examination of "whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."

a. *Purported Press Coverage and Allegedly Reasonable Deadlines Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations.*

91. Despite the manifest deficiencies that plagued MOFCOM's notices of September 27, 2009, China argues that the Panel should find MOFCOM's investigations WTO-consistent because the broilers investigations were covered by independent news organizations. Notwithstanding that these notices failed to inform domestic producers of how to participate to be considered part of the domestic industry, China claims that all domestic producers should have known of their ability to provide information in light of this press coverage. Contrary to China's argument, general reporting on the broilers investigations in the Chinese press cannot substitute for MOFCOM's obligation to investigate actively the universe of domestic producers. Even assuming that the investigations were widely publicized, such publicity would not have provided domestic producers other than those listed in the petition with the essential information missing from MOFCOM's own notices on how to be considered part of the domestic industry.

92. Similarly unavailing is China's argument that MOFCOM gave parties a reasonable period of time to register for participation in the injury investigation and complete domestic producers' questionnaire responses. The United States is not challenging the deadlines provided in MOFCOM's notices for registering for participation in the injury investigations or for completing and returning questionnaire responses. Rather, the United States maintains that MOFCOM did not provide domestic producers other than producers listed in the petition with information on the steps needed to be taken to be considered part of the domestic industry. No amount of time to respond to the notices or the questionnaires could compensate for the selection bias deficiencies, which resulted in a domestic industry definition biased in favor of petitioner.

b. *The Alleged Inclusion of Two Producers Other Than Petitioners and Producers Listed in the Petition Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations*

93. China argues that MOFCOM's definition of the domestic industry was not biased because two of the 17 producers included in the definition were not producers listed in the petition, but rather producers that managed to complete domestic producers' questionnaire responses under unexplained circumstances. The most plausible way in which these two producers could have received blank domestic producers' questionnaire is if they received them from the *producers listed in the petition*, which would have been the only source of questionnaires other than MOFCOM. Thus, these two producers were no less handpicked by petitioners than were the producers listed in the petition. Moreover, MOFCOM's inclusion of these two producers within its domestic industry definition would not have reduced the bias that resulted from MOFCOM's approach to defining the domestic industry.

c. *The Alleged Fragmentation of the Chinese Broiler Industry Did Not Excuse MOFCOM's Failure to Define the Domestic Industry in Accordance with China's WTO Obligations.*

94. In yet another *post hoc* argument, China argues that it was reasonable for MOFCOM to provide questionnaires only to the 20 members of petitioner CAAA listed in the petition because the extreme fragmentation of the domestic industry, allegedly consisting of 27,638,046 producers, made it impractical to do otherwise. It defies logic that 17 domestic producers with 84,179 employees in 2008 could have accounted for 50.82 percent total domestic production that year, as MOFCOM found, while the other 27,638,029 producers with at least 27,638,029 employees accounted for 49.18 percent of total domestic production.

95. In response to a Panel question, China concedes that these data on Chinese broiler farms include producers of yellow feather chickens, which are outside the domestic industry boundaries that MOFCOM itself set. It bears noting that during the investigations, MOFCOM made a deliberate decision to limit the domestic industry to the producers of white feather chicken products coextensive with the scope of imported products, rather than to define the industry more broadly to cover yellow feather chicken production as well. Having affirmatively made this decision to proceed with the narrower domestic industry definition, China cannot now have it both ways by

arguing that its investigatory task was overly burdensome because of the large number of producers and employees producing yellow feather chicken products. The data now relied on by China – which include yellow feather chicken production – are therefore of no use in ascertaining the degree of fragmentation of the white feather chicken industry in China.

96. What these data do indicate is that the white feather chicken industry is far smaller than the yellow feather chicken industry in China. According to China, MOFCOM's data on total domestic production was calculated by a consultant based in part on these tracking data. China does not explain why MOFCOM did not use the same data, presumably available from the consultant, to identify and contact additional domestic producers, which would all possess the offspring of the original breeder pairs.

97. In any event, the complexity or fragmentation of a domestic industry does not excuse an investigating authority from making active, independent efforts to identify a representative subset of domestic producers for purposes of defining the domestic industry. Even if the domestic industry producing white feather poultry was as fragmented as China argues, China should have made an effort to collect information that was representative of the industry as a whole. China could have accomplished this and met its WTO obligations by any of several means, including actively seeking data from the 147 major producers, or by sampling. As the Appellate Body explained in *EC – Fasteners*, "an injury determination regarding a fragmented industry must . . . cover a large enough proportion of total domestic production to ensure that a proper injury determination can be made pursuant to Article 3.1." As the *EC – Salmon* panel explained, such a sample must also be representative of domestic producers as a whole, because "{a} sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for . . . an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of [ADA] Article 3.1."

d. *MOFCOM's Approach to Defining the Domestic Industry Was Similar to the EC's Approach in* EC – Fasteners *and Hence No Less Inconsistent with WTO Requirements*

98. MOFCOM's approach to defining the domestic industry shared fundamental similarities with the EC's approach in *EC – Fasteners*. In *Fasteners*, the EC published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample. The Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in violation of ADA Article 4.1.

99. China cannot meaningfully distinguish the legal implications of *EC – Fasteners* from those that apply here. According to China, the Appellate Body held the EC's definition of the domestic industry was inconsistent with the "major proportion" requirement only because it accounted for a "low" 27 percent of total domestic production, whereas MOFCOM's definition of the domestic industry accounted for over 50 percent of total domestic production. While the Appellate Body criticized the EC for relying on information from only 45 of the 318 producers for which it had contact information, China claims, MOFCOM "did not collect data that it then ignored" but rather relied on data reported by all "known" Chinese producers.

100. The Appellate Body did not, however, find the EC's approach to defining the domestic industry inconsistent with ADA Article 4.1 because it covered too low a proportion of total domestic production, as China claims. To the contrary, the Appellate Body found that "{t}he fragmented nature of the fasteners industry . . . might have permitted such a low proportion . . . provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion." The Appellate Body found the EC's process for defining the domestic industry inconsistent with Article 4.1 because "by limiting the domestic industry definition to those producers willing to be part of the sample . . . the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination." Just as the EC had limited its definition of the domestic industry to those producers that "'expressed a wish to be included in the sample,'" MOFCOM effectively limited its definition of the domestic producers to producers listed in the petition and producers willing to register for participation in the injury investigations or download a questionnaire. MOFCOM's

process for defining the domestic industry introduced the same limitation on data coverage and material risk of distortion as the EC's approach.

101. China's argument that "MOFCOM did not intentionally exclude any domestic producers from its investigation" is unpersuasive. MOFCOM's approach to defining the domestic industry ensured that only petitioners and petition supporters – the domestic producers likely to post the weakest performance – would complete questionnaire responses and thus be included in the domestic industry definition. MOFCOM's consideration of all data collected from such a biased subset of producers would not have mitigated the material risk of distortion created by MOFCOM's process for defining the domestic industry.

102. As the Appellate Body held in *EC – Fasteners*, an investigating authority that defines the domestic industry to include only domestic producers willing to be part of the domestic industry definition introduces "a material risk of distortion" and reduces the data coverage of the domestic industry in breach of ADA Article 4.1. Because that is precisely the approach that MOFCOM took here in defining the domestic industry to include only petitioners and self-selected petition supporters, MOFCOM's definition is inconsistent with ADA Article 4.1 and SCM Article 16.1.

B. China Cannot Defend MOFCOM's Price Effects Analysis

100. The United States demonstrated that China breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2 because MOFCOM's price effects analysis was based on fundamentally flawed price comparisons that failed to account for differences in level of trade or product mix.

1. *MOFCOM Was Obligated to Ensure the Comparability of the Subject Import and Domestic Like Product Average Unit Value Data Used in Its Price Comparisons*

101. China acknowledged at the first Panel meeting that the price effects issues in this dispute echo price issues that were then pending before the Appellate Body in *China – GOES*. Since that meeting, the Appellate Body in *China – GOES* has considered and rejected China's position that "adjustments to ensure price comparability . . . are not required by Articles 3.2 and 15.2." The Appellate Body explained that: "[a]lthough there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products." The Panel here should find similarly that MOFCOM's failure to ensure comparability in this case is a breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

2. *MOFCOM's Failure to Account for Level of Trade Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations*

102. By comparing domestic and subject import prices at different levels of trade, MOFCOM made a finding of underselling almost inevitable, breaching ADA Article 3.1 and SCM Article 15.1's objectivity requirement. MOFCOM's faulty comparison also rendered MOFCOM's underselling analysis inconsistent with the underselling analysis contemplated by ADA Article 3.2 and SCM Article 15.2. Contrary to China's assertions, domestic prices to first arms-length customers at the factory gate are not at the same level of trade as import prices at the port just because the prices are for merchandise physically situated, or "landed," in China. China ignores that import prices at the port would not reflect the prices that the first arms-length customers of domestic producers, including distributors and retailers, would pay for subject imports.

103. China also argues that the Panel should excuse MOFCOM's failure to compare domestic prices and import prices at the same level of trade because collecting import prices at the same level of trade as domestic prices would have been a "truly daunting" task. Yet, MOFCOM made no effort to collect information from importers that would have made a proper comparison possible. China's defense that it had no way of identifying importers is all the more untenable given that MOFCOM asked for this information from the U.S. exporters, who went to great lengths to provide it. Having collected this information, MOFCOM was in a position to, at the very least, mail blank

importers' questionnaires to the most significant importers of subject merchandise from the United States. MOFCOM made no such effort.

104. In any event, as the United States explained in response to Panel Question 70, investigating authorities remain obligated to conduct an "objective examination" of "positive evidence," pursuant to ADA Article 3.1 and SCM Article 15.1, even in the absence of importer questionnaire responses. MOFCOM stated that "the Investigating authority has taken the difference in sales levels into consideration, adjusting the import prices based on Customs data accordingly." China now claims that the adjustment to which MOFCOM was referring was the addition of estimated customs duties to CIF import prices. But such an adjustment has nothing to do with level of trade and would have done nothing to remedy the distortion caused by comparing domestic prices and import prices at different levels of trade.

105. China's contention that adjusting import prices to account for their different levels of trade would not have been feasible is beside the point and does not excuse China of its obligations. MOFCOM was obligated to insure that its price comparisons were based on domestic prices and import prices at the same level of trade. How it did so was up to MOFCOM. In this case, however, MOFCOM did nothing to account for the fact that subject import prices were at a different level of trade than domestic prices. Instead, MOFCOM predicated its underselling analysis on a comparison of domestic prices and subject import prices at different levels of trade, in breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

3. *MOFCOM's Failure to Account for Product Mix Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations*

106. The United States also demonstrated that China's failure to account for differences in product mix was inconsistent with China's WTO obligations. China does not deny that MOFCOM's average unit value comparisons failed to account for differences in product mix and, instead, asserts that MOFCOM's comparison was reasonable because the product mix of subject imports was, in China's view, weighted in favor of higher value products, allegedly including chicken paws. China's argument is nothing more than a *post hoc* rationalization of the deficiencies in MOFCOM's analysis, found nowhere in the final determinations.

107. In the actual determinations, MOFCOM asserted that it was under no obligation to consider product mix and did not contest USAPEEC's showing that 97 percent of subject imports consisted of low value products. Even China's own data show that the product mix of subject imports and domestic industry sales differed dramatically, as did the unit value of different types of broiler products. None of the evidence China relies on to justify MOFCOM's failure to account for differences in product mix was cited, analyzed, or relied upon by MOFCOM in its final determinations, much less disclosed to the parties during the investigations.

108. China claims that confidential invoices that domestic producers allegedly provided to MOFCOM during the verification process, show that the unit value of domestic industry sales of chicken breasts was lower than the unit value of domestic industry sales of chicken paws. But MOFCOM's actual findings in the final determinations make clear that it considered none of the evidence cited by China or the extent to which differences in product mix may have distorted its average unit value comparisons. Contrary to China's assertion, MOFCOM quite explicitly found was that it was under no obligation to take product mix into account and therefore did not do so.

109. Even if the Panel were to accept China's request to engage in an exercise of *post hoc* rationalization, the excuses that China has developed for the purpose of this proceeding are meritless. First, China cites Customs data indicating that the average unit value of subject imported "offal, chicken paws" and "offal, mid-joint wing" were higher than the average unit value of subject imported "cut, with bones," "offal, others," and "cold frozen gizzard" to argue that chicken paws were a high value product. However, evidence that the average unit value of subject imported chicken paws was greater than the average unit value of certain other low-value chicken parts imported from the United States does not establish that chicken paws were a high value chicken part.

110. Similarly misplaced is China's *post hoc* explanation that MOFCOM's average unit value comparisons were reasonable because the average unit value of chicken paws was higher than the average unit value of breast meat. China's assertion relies on 63 invoices from three domestic producers and, at most, could show merely that these producers received higher prices on sales of chicken paws than on sales of chicken breasts. MOFCOM did not make these assertions during the investigation, and China's citations to these hand-picked invoices in no way show or support China's claim that importers received higher prices on sales of chicken paws imported from the United States than domestic producers received on sales of chicken breast. Moreover, China's argument only underscores that the average unit value of chicken parts varies widely depending on the part and that the product mix of subject imports differed markedly from that of the domestic industry. This variability indicates that the average unit value of subject imports and domestic industry shipments, respectively, would be influenced significantly by changes and differences in product mix.

111. China's new data also underscore the fact that subject imports consisted of a product mix that differed dramatically from the product mix for domestic industry shipments. Regardless of the relative unit values of chicken breasts and chicken paws sold by domestic producers, the fact remains that MOFCOM compared subject import and domestic like product average unit values without accounting for obvious and stark differences in product mix, thereby failing "to ensure price comparability." China has failed to rebut the United States' demonstration that MOFCOM's failure in this regard breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

4. *MOFCOM's Price Suppression Finding Was Predicated Entirely on Its Defective Underselling Analysis*

112. China has failed to rebut the U.S. demonstration that MOFCOM's flawed price suppression finding was predicated entirely on its defective underselling analysis. China argues that even if MOFCOM's underselling analysis were found inconsistent with China's WTO obligations, the Panel should still uphold MOFCOM's price suppression finding because, according to China, MOFCOM demonstrated the existence of price suppression and was under no obligation to establish that the suppression was caused by subject imports. China also argues that MOFCOM demonstrated that subject imports suppressed domestic like product prices through volume effects alone. Neither argument has any merit. First, to the extent MOFCOM relied on its price suppression finding, it was obligated to establish that such price suppression was the effect of subject imports. ADA Article 3.2 and SCM Article 15.2 require investigating authorities to consider whether any significant suppression (or depression) of domestic prices is "the effect" of subject imports. In turn, an investigating authority can rely on price suppression or price depression to support a finding of injury only if the authority establishes that price suppression or price depression was linked to subject imports. As the panel and Appellate Body found in *China – GOES*, "*merely showing* the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2." Consistent with this reasoning, MOFCOM was obligated in this investigation to demonstrate that any significant suppression of domestic prices was caused by subject imports. Because the only evidence cited by MOFCOM linking subject imports to price suppression was its deficient underselling analysis, MOFCOM failed to establish that the price suppression was the effect of subject imports, in violation of ADA Article 3.2 and SCM Article 15.2.

113. Second, equally unpersuasive is China's argument that MOFCOM's price suppression was not dependent on its underselling analysis because, according to China, MOFCOM also found that subject import "volume effects" and "market share effects" suppressed domestic prices. Contrary to China's argument, MOFCOM made no such finding and, in any event, the record would not support such a finding. Nor did MOFCOM make any finding, as China now asserts, that subject import volume and market share alone, in the absence of significant underselling, could have suppressed domestic like product prices to a significant degree. Indeed, such a finding would conflict with MOFCOM's preceding price analysis, which concluded that domestic like product prices were suppressed by subject import underselling. It would also conflict with evidence that the increase in subject import volume and market share during the period examined did not come at the expense of the domestic industry, which gained more market share than subject imports.

114. Even if the Panel were to find that MOFCOM predicated its price suppression finding on a combination of subject import price and volume effects, MOFCOM made no finding and provided no explanation as to how subject import volume effects alone were sufficient to suppress domestic like product prices to a significant degree. In *GOES*, as in this dispute, China argued that MOFCOM's price depression and suppression findings were based on subject import price and volume effects, and could be upheld on the basis of volume effects alone. The Appellate Body rejected this argument and agreed with the Panel that "it was 'not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.'" The Panel should reach the same conclusion here because MOFCOM's final determinations are similarly bereft of any explanation as to how significant price suppression could have been the effect of the increase in subject import volume alone.

C. MOFCOM's Analysis of the Domestic Industry Factors Was Inconsistent with China's WTO Obligations

115. The United States demonstrated that MOFCOM's impact analysis was inconsistent with China's obligations under ADA Articles 3.1 and 3.4 and SCM Articles 15.1 and 15.4. MOFCOM attached decisive significance to two factors – the domestic industry's capacity utilization and end-of-period inventories – in finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period, while failing to conduct an objective examination of the other factors. China fails to explain how MOFCOM could have found that subject imports had an adverse impact on the domestic industry during the period of investigation when the record showed that the domestic industry's performance improved markedly according to almost every measure during the 2006-2008 period, which coincided with the bulk of the increase in subject import volume

1. *MOFCOM Relied on Its Defective Analysis of Capacity Utilization and End-of-Period Inventories to Find that Subject Imports Adversely Impacted the Domestic Industry During the 2006-2008 Period*

116. China mischaracterizes the U.S. position, claiming that the United States would give "decisive" weight to capacity utilization and end-of-period inventory trends. To the contrary, it was MOFCOM that made these factors central to its analysis of impact. MOFCOM's only support for its finding that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period, was its defective analysis of domestic industry capacity utilization and end-of-period inventories during the 2006-2008 period. MOFCOM could not rely on its finding that "the domestic like products sector could not gain a reasonable profit margin" to support its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period because the industry's pre-tax loss narrowed between 2006 and 2008.

2. *MOFCOM Failed to Establish that Subject Imports Adversely Impacted Domestic Industry Capacity Utilization or End-of-Period Inventories During the 2006-2008 Period*

117. Domestic industry capacity utilization and end-of-period inventory trends did not constitute "positive evidence" that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period. The domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period. Thus, the domestic industry's capacity utilization trend was entirely explained by the industry's own capacity expansion and was not affected by subject imports. MOFCOM's reliance on domestic industry capacity utilization to support its finding that subject imports had an adverse impact on the domestic industry "during the entire POI" was therefore not supported by an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1. Nor does its reliance on this factor reflect an examination of all relevant economic factors and indices, in breach of ADA Article 3.4 and SCM Article 15.4.

118. The United States has also shown that the increase in domestic industry end-of-period inventories as a share of domestic industry shipments and production was too small to be materially adverse. In response, China argues that MOFCOM was under no obligation to find

end-of-period inventories "significant" because, in its view, ADA Article 3.4 and SCM Article 15.4 only require investigating authorities to evaluate the enumerated injury factors. However, MOFCOM did in fact find the increase in end-of-period inventories significant when it relied on this increase, in combination with the domestic industry's capacity utilization trends, to find that subject imports adversely impacted the domestic industry "during the entire POI," including the 2006-2008 period.

3. *MOFCOM Was Obligated to Base Its Impact Analysis on an Examination of Trends over the Entire Period of Investigation*

119. MOFCOM was obligated to explain how subject imports could have adversely impacted the domestic industry in the first half of 2009 when most of the increase in subject import volume coincided with a dramatic improvement in the domestic industry's performance during the 2006-2008 period. By failing to do so, MOFCOM failed to conduct an objective evaluation of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, and failed to consider "all relevant economic factors and indices having a bearing on the state of the industry," in breach of ADA Article 3.4 and SCM Article 15.4.

4. *MOFCOM's Future Projections Were Irrelevant to Its Analysis of the Impact of Subject Imports During the Period of Investigation*

120. The possibility that subject imports may increase in the future so as to adversely impact the domestic industry in the future is irrelevant to the impact analysis required under ADA Article 3.4 and SCM Article 15.4 for present material injury purposes. Investigating authorities must examine the impact of dumped imports that have already entered the domestic market, and not the possible impact of dumped imports that may later enter the market.

121. China cites to the panel's finding in *EC – Fasteners*, but, contrary to China's argument, the panel did not hold that investigating authorities may consider the future impact of "potential" subject imports, and nothing in ADA Article 3.4 or SCM Article 15.4 would support such an interpretation. Rather, those Articles require investigating authorities to examine "the impact of dumped [and subsidized] imports" that entered the domestic market during the period under consideration.

D. MOFCOM's Causal Link Analysis Was Inconsistent with China's WTO Obligations

122. MOFCOM's causal link analysis did not meet China's obligations under the WTO Agreements because MOFCOM failed to establish that subject import competition had adverse volume or price effects on the domestic industry, the performance of which improved markedly during the 2006-2008 period in which the bulk of the increase in subject import volume occurred.

1. *MOFCOM Failed to Address Market Share Trends that Contradicted Its Causal Link Analysis*

123. China does not and cannot deny that MOFCOM failed to explain how the increase in subject import volume and market share could have had an adverse impact on the domestic industry when the domestic industry gained more market share than subject imports during the period examined. In failing to address this evidence, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, or an examination of "all relevant evidence," in breach of AD Article 3.5 and SCM Article 15.5.

124. China attempts to proffer new evidence – not mentioned by MOFCOM in its determinations or otherwise disclosed to the parties – that, in its view, shows that the increase in subject import market share did come at the expense of the domestic industry. Even if the Panel were to examine China's new data, these data would not serve to support MOFCOM's causation findings. China acknowledges that its new market share data include data reflective of all domestic producers, including those "for which MOFCOM did not have questionnaire responses." MOFCOM could not have factored the market share trends of domestic producers as a whole into its causal link analysis because the evidentiary record on the domestic industry's performance was limited to data from the 17 domestic producers included in its domestic industry definition. A market share

loss suffered entirely by domestic producers outside the domestic industry definition would not have been reflected in the performance data collected from producers included within the domestic industry definition. MOFCOM could not find that market share lost by producers outside the definition contributed to any adverse trends reported by producers within the definition in accordance with the positive evidence and objectivity requirements under ADA Article 3.1 and SCM Article 15.1. Thus, China's new market share data is irrelevant to the Panel's assessment of whether MOFCOM's causal link analysis was consistent with China's WTO obligations.

125. China's new market share data also indicate that the increase in subject import market share between 2008 and the first half of 2009 came almost entirely at the expense of non-subject imports, while domestic industry market share remained stable. Citing its new market share data, China claims that "the overall domestic industry lost almost 2 percentage points of market share" to subject imports during the period examined, but most all of the loss occurred during the 2006-2008 period when domestic industry performance strengthened. A market share shift from domestic producers to subject imports that coincides with a strengthening of domestic industry performance does not support the finding of a causal link between subject imports and injury. In any event, MOFCOM collected no performance data from the domestic producers that lost market share to subject imports between 2006 and the first half of 2009 and therefore possessed no positive evidence with which to examine the causal relationship between subject imports and the performance of those producers.

126. MOFCOM's actual market share analysis showed that the 3.92 percent increase in subject import market share during the period of investigation did not prevent the domestic industry, as defined by MOFCOM, from increasing its market share by 4.38 percent. Thus, it is incontrovertible that the increase in subject import volume and market share during the period of investigation did not come at the expense of the domestic industry for which MOFCOM collected performance data. By failing to reconcile its causal link analysis with this evidence, MOFCOM failed to conduct an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to base its causal link analysis on an examination of "all relevant evidence," in violation of ADA Article 3.5 and SCM Article 15.5.

2. *MOFCOM's Causal Link Analysis Relied on Its Defective Price Effects Analysis*

127. MOFCOM was obligated to ensure the comparability of its subject import and domestic like product pricing data pursuant to ADA Article 3.1 and SCM Article 15.1. By failing to account for obvious differences in level of trade and product mix, thereby making a finding of subject import underselling more likely, MOFCOM not only violated Articles 3.1 and 15.1, but also failed to conduct the underselling analysis required under ADA Article 3.2 and SCM Article 15.2. China's assertion that MOFCOM's price suppression finding was not predicated entirely on its underselling analysis is contradicted by MOFCOM's explicit findings in the final determinations that subject import underselling, not subject import volume, suppressed domestic like product prices. With no evidence that subject imports either undersold or suppressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to demonstrate a causal link between subject import price effects and material injury, in violation of ADA Article 3.5 and SCM Article 15.5.

128. MOFCOM also failed to reconcile its causal link analysis with evidence that subject import volume did not increase at the expense of the domestic industry, which gained more market share than subject imports during the period examined. The United States has also established that MOFCOM failed to reconcile its causal link analysis with evidence that the domestic industry's performance improved according to almost every measure during the bulk of the increase in subject import volume between 2006 and 2008. MOFCOM's failure to address this evidence rendered its causal link analysis inconsistent with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

129. In response, China proffers *post hoc* rationalizations found nowhere in the final determinations to argue that MOFCOM found subject import volume to have had both "direct" and "indirect" effects on the domestic industry. Contrary to China's "direct effects" argument, MOFCOM did not find that "but for the subject import presence in the market . . . the domestic industry could have sold more broiler products." China does not provide a citation to support this assertion

because it appears nowhere in the final determinations. Moreover, if an investigating authority relies on the increase in subject import volume to make an affirmative material injury determination, it must establish a causal link between that volume increase and material injury. If China is claiming that MOFCOM's causation finding was based on the increase in subject import volume, its failure to show that MOFCOM established a link between the increase and the domestic industry's performance is fatal under ADA Article 3.5 and SCM Article 15.5. MOFCOM also failed to base its causal link analysis on "an examination of all relevant evidence," in breach of these same articles, or to conduct an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1.

130. China also argues that subject import volume had an "indirect" effect on domestic like product prices, but neglects to mention that the analysis from which it selectively quotes was expressly limited to the 2006-2008 period, over which time the domestic industry gained 4.61 percentage points of market share. Subject imports could have had no "indirect volume effect" on domestic like product prices between 2006 and 2008 when the 1.83 percentage point increase in subject import market share during the period was accompanied by an increase in domestic industry market share over twice as large.

131. The analysis highlighted by China was deficient in other respects as well. For example, it conflicted with evidence that the domestic industry did not "maintain" its market share but rather increased it, and did not sell at prices below cost to an increasing extent but rather narrowed its loss as a share of sales income from 7.9 percent in 2006 to 4.7 percent in 2008. This passage also relies on MOFCOM's defective analysis of domestic industry capacity utilization and end-of-period inventories, as the only two factors that did not show dramatic improvement during the 2006-2008 period. Far from demonstrating that subject import volume had an impact -- indirect or otherwise -- on domestic like product prices, the analysis highlighted by China only underscores MOFCOM's failure to reconcile its causal link analysis with evidence that the bulk of the increase in subject import volume coincided with a marked improvement in the domestic industry's performance during the 2006-2008 period. Here too, China's breach of ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5 is apparent.

132. Finally, China argues that the Panel could uphold MOFCOM's finding that subject imports adversely affected domestic like product prices based solely on MOFCOM's observation that subject import prices and domestic like product prices moved in "parallel" during the period examined and declined together in the first half of 2009. As the Appellate Body explained in *GOES*, MOFCOM's reference to parallel price trends alone, without "any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings," does not support a finding that subject imports adversely affected domestic like product prices. In other words, such parallel price movements alone do not establish that changes in subject import prices caused changes in domestic like product prices.

3. *MOFCOM Failed to Address Domestic Industry Performance Trends that Contradicted Its Causal Link Analysis*

133. China concedes that MOFCOM predicated its causal link analysis almost entirely on trends in the first half of 2009 and asserts that such a reliance was consistent with China's WTO obligations. China fails to recognize that MOFCOM was obligated to examine the causal relationship between subject imports and domestic industry performance during the entire period of investigation, not just during a selective period. An investigating authority cannot predicate its causal link analysis on "all relevant evidence," much less an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1, without examining the relationship between subject imports and domestic industry performance over the entire investigative period for which data has been collected. An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of ADA Article 3.1 and SCM Article 15.1.

134. An investigating authority cannot selectively pick data points that appear to support its causal link analysis, while ignoring conflicting trends over the period of investigation as a whole, without breaching ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5. Doing precisely that, MOFCOM predicated its causal link analysis entirely on subject import and domestic industry performance trends in the first half of 2009, while ignoring subject import and domestic industry

performance trends over the entire period of investigation that conflicted with its analysis. Moreover, the absence of a coincidence between an increase in imports and a decline in the relevant injury factors over the entire period examined by MOFCOM contradicted MOFCOM's finding that subject imports adversely impacted the domestic industry during the period of investigation. Because MOFCOM's impact analysis relied exclusively on trends in the first half of 2009 without reconciling trends over the 2006-2008 period, the analysis was inconsistent with both the impact analysis envisioned by ADA Article 3.4 and SCM Article 15.4 and the objectivity requirement under ADA Article 3.1 and SCM Article 15.1.

135. China's only other defense of MOFCOM's failure to factor trends over the entire period of investigation into its causal link analysis is to claim that MOFCOM did, in fact, consider domestic industry financial trends over the entire period. To the contrary, MOFCOM's finding that the domestic industry experienced financial losses throughout the period of investigation sheds no light on the causal relationship between subject imports and the industry's financial performance. Such a finding says nothing about the relationship between movements in import volume and market share and the movements in injury factors over time, which are essential to the causal link analysis required under the AD and SCM Agreements. The record showed that the 47.2 percent increase in subject import volume between 2006 and 2008 was accompanied by an improvement in the domestic industry's pre-tax loss from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008. These trends indicate that the bulk of the increase in subject import volume, 90.9 percent of the total increase, had no adverse impact on the domestic industry's financial performance. By failing to reconcile these data with its causal link analysis, MOFCOM failed to demonstrate a causal link between subject imports and material injury in accordance with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

E. MOFCOM's Failure to Address U.S. Respondents' Arguments that Raised Material Issues Concerning Causation Was Inconsistent with China's WTO Obligations

136. China fails to rebut the U.S. demonstration that MOFCOM's failure to address two key causation arguments violated ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

1. *MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Market Share Trends*

137. China claims that MOFCOM addressed U.S. respondents' argument that subject imports increased at the expense of non-subject imports and not the domestic industry in two respects. However, by simply providing a conclusory rejection of a respondent's argument that raises a material issue, an investigating authority has not fulfilled its obligations under ADA Article 12.2 and SCM Article 22.3. Those articles require investigating authorities to issue public determinations setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." ADA Article 12.2.2 and SCM Article 22.5 elaborate that investigating authorities must include in their final determinations "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" including "the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers." To the extent that a respondent raises an issue "which must be resolved in the course of the investigation in order for the investigating authority to reach its determination," an investigating authority is required to provide "in sufficient detail the findings and conclusions reached" in accepting or rejecting the argument in resolution of the issue. An authority's response to such an argument would also be subject to the requirement that the authority conduct an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1. In light of these obligations, investigating authorities must address a party's argument that raises a material issue by resolving the issue "in sufficient detail" based on an "objective examination" of "positive evidence" in the final determination.

138. MOFCOM's response to the U.S. respondents' argument concerning non-subject imports in the final determination did not comport with these obligations. The U.S. respondents' argument to that effect therefore raised a material issue that MOFCOM was required to resolve "in sufficient detail" based on an "objective examination" of "positive evidence."

139. Instead of resolving the issue, MOFCOM evaded it. MOFCOM's finding that it was entitled to consider the absolute volume of subject imports did not address the issue because U.S. respondents were not arguing that subject import volume did not increase, but rather that the increase was not at the domestic industry's expense. MOFCOM's finding that the domestic industry's market share gains "did not imply that the domestic industry did not suffer from injury" is a conclusory statement devoid of any "objective examination" of "positive evidence." It is also contrary to logic, given that an increase in subject import market share that is accompanied by a greater increase in domestic industry market share would not ordinarily support the existence of a causal link between subject imports and material injury. Far from resolving the material issue raised by U.S. respondents in "sufficient detail," MOFCOM provided no reasoning or evidentiary support whatsoever for rejecting the argument, in breach of ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

2. *MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Chicken Paws*

140. With respect to the U.S. respondents' argument concerning chicken paws, China concedes that "MOFCOM did not explicitly address this specific issue in its Final Determination." China argues that the Panel should excuse this omission because MOFCOM addressed the argument in the preliminary determination and "did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of this issue." China's argument is factually incorrect.

141. In its Injury Brief, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Rejecting this argument in its preliminary determination, MOFCOM explained that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import of all the investigated products including Paw as a whole . . . ." Far from failing to provide any new information on the issue subsequent to the preliminary determinations, as China wrongly claims, USAPEEC responded to MOFCOM's clear misapprehension of the issue with a clarification in its Comments on the Preliminary Determination. In light of the USAPEEC's clarification, China cannot credibly argue that "MOFCOM did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of the issue." MOFCOM did not repeat its earlier discussion of the issue because, as USAPEEC made clear in its comments on the preliminary determination, that discussion was based on a fundamental misunderstanding of USAPEEC's argument and therefore irrelevant. Rather, MOFCOM simply ignored USAPEEC's effort to clarify its chicken paws argument and omitted any mention of the issue in the final determinations.

142. China's argument that MOFCOM was under no obligation to address USAPEEC's argument concerning chicken paws because MOFCOM did not consider the argument "material" is also unpersuasive. USAPEEC's argument that nearly half of subject imports could have had no adverse impact on the domestic industry, thereby substantially attenuating subject import competition, was clearly an issue that needed to be resolved in order for MOFCOM to reach a final determination. Consequently, MOFCOM's failure to address the issue in its final determinations breached ADA Articles 12.2 and 12.2.2 and SCM Articles 22.3 and 22.5.

143. China's *post hoc* explanation for why MOFCOM might have found USAPEEC's argument concerning chicken paws is irrelevant because China's new theories cannot remedy MOFCOM's failure to comply with its obligation to address USAPEEC's argument concerning chicken paws in the final determinations. MOFCOM did not explain why it found USAPEEC's chicken paws argument immaterial, but simply ignored the argument.

144. China's *post hoc* explanation is also unpersuasive because it is based on a mis-characterization of USAPEEC's argument. In China's view, USAPEEC's argument concerning chicken paws was irrelevant to MOFCOM's analytic framework, and hence not "material," because MOFCOM analyzed injury on an overall basis rather than on the basis of market segments. Yet, USAPEEC was not asking MOFCOM to conduct its injury analysis based on market segments. Rather, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Discussing this argument would

have entailed addressing the point that subject imports could not have been injurious given the disproportionate presence of parts that could not be supplied by domestic producers. China has failed to rebut the United States' demonstration that USAPEEC's argument concerning chicken paws raised a material issue that MOFCOM failed to address in the final determinations, much less resolve "in sufficient detail," in breach of ADA Articles 12.2 and 12.2.1 and SCM Articles 22.3 and 22.5.

ANNEX A-2

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY CHINA

BCI deleted, as indicated [***]

First Integrated Executive Summary by China

I. PROCEDURAL ISSUES

A. MOFCOM Did Not Breach Article 6.2 With Respect To The U.S. Request For A Public Hearing

1. The United States claims that MOFCOM breached Article 6.2 of the AD Agreement by not holding a public hearing in response to a U.S. Government request. Although MOFCOM's regulations provide that it may hold such a hearing upon request, consistent with Article 6.2 of the AD Agreement nothing within MOFCOM's regulations mandates that a public hearing be held under any circumstance.

2. As part of a general obligation on investigating authorities to provide a full opportunity for parties to defend their interests, Article 6.2 of the AD Agreement establishes that investigating authorities provide the "opportunity" for "parties with adverse interests" to meet. It does not mandate a public hearing and does not require an adverse party to join any meeting requested by the opposing party, public or otherwise. In other words, there is no obligation that such a meeting *must* occur, and such a meeting would definitively not occur if opposing interests choose not to engage.

3. China views an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests as one of facilitator. In other words, the authority's purpose is to promote the conditions under which such a meeting could occur. This is consistent with the plain meaning of "provide opportunities" as used in Article 6.2. Among the definitions of the word "provide" is "take appropriate measures in view of a possible event; make adequate preparation." The word "opportunity" is defined as "a time or condition favourable for a particular action or aim." By these terms, MOFCOM meets its obligations under Article 6.2 through procedures made available to interested parties that may lead to a meeting of parties with adverse interests organized by the authority in the event those parties mutually desire such a meeting.

4. China does not view the authority's discretion under Article 6.2 as encompassing the right to "refuse" to organize and hold such a meeting of parties with adverse interests. This wrongly implies that it is the authority's decision, in the first instance, as to whether such a meeting should or must take place. Article 6.2 merely states that "authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests . . . ." Thus, where it is clear that parties with adverse interests will not meet, the question of an authority's obligation to organize a meeting of such parties under Article 6.2 becomes moot.

5. Keeping in mind the fact that the interested parties themselves determine whether a meeting of parties with adverse interests actually takes place, China wishes to clarify that in the underlying investigation MOFCOM did not reject a request by the U.S. Government to meet with the petitioner. It accepted that request, but the question of whether a meeting of interested parties with adverse interests could or should take place is a entirely separate matter.

6. In the underlying proceeding, those parties with adverse interests to the United States declined to meet, and therefore the need for the meeting envisioned under Article 6.2 of the AD Agreement was rendered moot. Nonetheless, MOFCOM afforded the U.S. Government a full opportunity to defend its interests, consistent with Article 6.2, by meeting with U.S. Government officials so that they could present their views orally, and by receiving documents from the U.S. Government after the meeting setting forth the U.S. Government position.

B. MOFCOM Was Not Obligated To Disclose All Aspects Of Its Dumping Calculation

7. The United States claims Article 6.9 of the AD Agreement requires expansive disclosure, reading the "essential facts" to be disclosed under that provision as reaching any and all aspects of an investigating authority's dumping calculation. Indeed, the U.S. argument would seemingly require disclosure of every detail that comprised part of the authority's consideration of the matter, whether it be individual transaction data, the basic calculation methodology, any calculation worksheets, and the calculation program itself. This interpretation of Article 6.9 and a purported obligation of disclosure in a particular form is without merit.

8. The text of Article 6.9 clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests. It does not call for the expansive disclosure called for by the United States or a particular form of disclosure. This reading of the text is consistent with the findings of prior dispute settlement panels that have found Article 6.9 limited to those essential facts that form the basis of the authorities' decision whether to apply definitive measures. Whether a disclosure is comprised of "essential facts" within the meaning of Article 6.9 is fact-specific and depends on the form of disclosure by the administering authority. What is important is that the form of disclosure provides the interested party the basis to defend its interests, consistent with the last sentence of Article 6.9.

9. The criteria for distinguishing essential facts from regular facts must be derived from the context of Article 6.9, which clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests with respect to an authority's decision whether to apply definitive measures. As outlined by the panel in *EC – Salmon* "essential facts" may be distinguished from "regular facts" based on whether they are "necessary" to enable comments on the determination to apply definitive measures, including comments on the completeness and correctness of the facts being considered, corrections of perceived errors, and interpretative points. China's position is that the calculation program or worksheets, for example, are not necessary to enable comments on the authority's decision whether to apply definitive measures where the authority has made available other disclosures to the interested parties to enable such comments. Again, Article 6.9 does not specify format, only that essential facts are conveyed that allow interested parties to defend their interests.

10. With respect to the distinction between facts and reasoning in the context of Article 6.9, China believes that facts are invariable. For example, if the authority states that the price for a product is X, or that it has declined to make a requested adjustment, those are facts. They are constant and present a specific reference point. In contrast, reasoning consists of the intermediate details of consideration – the variable thought process that leads to an authority finding that the price of a product is X or concluding that a requested adjustment is unwarranted. These details are not the subject of disclosure under Article 6.9, as the panel in *U.S. -- OCTG Sunset Reviews* made clear.

11. Ultimately, whether we are dealing with "reasoning" or "facts" or whether the two might merge for purposes of identifying "essential facts," MOFCOM disclosed all the information necessary for the respondents to defend their interests, consistent with Article 6.9. The respondents were in control of their own facts, and were provided MOFCOM's basis or description of the various aspects of its dumping calculation.

C. The AD and CVD Petitions Contained Adequate Non-Confidential Summaries, Consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

12. The U.S. claim about non-confidential summaries is actually quite narrow. The United States does <u>not</u> challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential. Rather, the United States challenges only the sufficiency under Article 6.5.1 and Article 12.4.1 of the non-confidential summaries provided. Finally, the U.S. arguments regarding inadequate summaries focus only on the petition. Specifically, the U.S. challenge focuses on the adequacy of the non-confidential summaries for six items contained in the petition and namely the petitioners' production data and five distinct data sets related to "economic position," including

production capacity, domestic inventory levels, cash flow, wages and employment, and labor productivity.

13. The U.S. arguments regarding these specific pieces of information are fundamentally flawed. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. One must therefore consider the detail provided, and whether that detail is enough to understand the information being submitted, given the purpose for which the information is being submitted. The non-confidential summaries in the public version of the petition more than met this standard.

14. For its part, the United States seeks to impute a specific labelling requirement to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement from the facts and findings involved in *China – GOES*. In that case, the panel found certain of the non-confidential summaries provided in the petition to be inadequate. But the U.S. attempt to draw parallels with the instant case fails. The facts in *China – GOES* are very different from the facts in this dispute. More specifically, unlike *China – GOES*, in this dispute there is no case of "duelling" non-confidential summaries or supplemental summaries found elsewhere in the petition to cause any confusion as to where the non-confidential summaries are provided. Nonetheless, the United States seems to claim that it is impossible to find non-confidential summaries without specific labelling, implying some self-evident requirement to label. It alternatively and erroneously claims that "China argues that the Petitioner did in fact prepare the summaries, at other sections of the Petition, even though they were not labelled as such . . . ." These claims and the purported need in this case to "cobble together" non-confidential summaries from the petition are simply another failed *China – GOES* analogy that has no bearing on whether there exists any specific labelling requirement under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

15. In sum, China would reiterate that neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary that it can readily relate to specific confidential information that has been redacted, but no more than that.

16. China was unable to respond to any specific arguments made by the United States in its first written submission as it declined to address any of the information found in the petition. At the first substantive meeting, the United States did provide two examples out of the six claims made, to which China would like to provide an immediate response. The first example addressed by the United States is production and standing. Once again, the United States has misapplied the facts from *China – GOES* in an effort to make arguments here. As distinguished from *China – GOES*, in the instant case the petitioners reported that they accounted for more than 50 percent of total domestic production and included with that assertion the data on total domestic production. This information provided more than an understanding of the simple nature of the confidential information; it provided an understanding of the substance of that confidential information, consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

17. The second example offered by the United States in its opening statement at the first substantive meeting concerns production capacity. The United States complains that the lack of published scales on graphs presented in the petition denied parties any ability "to discern whether any specific trends, and the magnitudes thereof, are actually taking place." This statement is incorrect. First, the initial scale line in the graph is labelled zero. Second, the graph presents two data bars for each period, including a bar representing production (yield) and a bar representing production capacity. Given the points of reference provided by the zero scale and simultaneous representation of both production and capacity, both trends and the magnitude of those trends are easily seen. The U.S. claim that the graph does not provide a reasonable understanding of what the underlying information constitutes cannot be sustained.

II. MOFCOM'S ANTIDUMPING DETERMINATIONS

A. MOFCOM'S AD Determination Was Consistent With Article 2.2.1.1 Of The AD Agreement

18. The United States argues that MOFCOM, when determining normal values, unreasonably rejected the respondents' recorded GAAP-consistent production costs in favor of an average cost methodology based on weight. In making this argument, the United States misreads the obligation under Article 2.2.1.1 of the AD Agreement. Contrary to the U.S. argument, Article 2.2.1.1 does not reflect a blind mandate that recorded costs always be used whenever the records are in accordance with GAAP. Article 2.2.1.1 has two independent conditions, including (1) that the records be GAAP-consistent; and (2) that the reasonably reflect the costs associated with production and sale of the product under consideration. Both of these conditions must be met. Whether or not records are GAAP-consistent, an authority must still look to the particular purposes of the AD Agreement in determining whether the costs to be used in an anti-dumping investigation reasonably reflect the costs associated with the production and sale of the specific product under consideration *in an antidumping context*.

19. China's view of the term "normally" as used in Article 2.2.1.1 also differs from that advanced by the United States. The United States reads the two exceptions to using a respondents' recorded costs expressly indentified in Article 2.2.1.1 as serving to exclusively define the affirmative obligation where the circumstances described in those two exceptions do not exist. China believes that is "normally" the case, but the U.S. interpretation would seemingly reduce the term "normally" to mere surplusage. To achieve the same effect, Article 2.2.1.1 might have been drafted without resort to the term "normally" at all. It seems to China that, in order to give the term "normally" meaning consistent with fundamental rules of treaty interpretation, it must evidence the possibility of some other derogation from the "normal" rule.

20. At its core, the AD Agreement is about establishing a fair price or, more specifically, it is about measuring the degree of any unfairness in price based on differences between normal value and export price. Any cost allocations, therefore, must generate costs of production that allow an authority to use the costs in ways that make sense given the purpose AD Agreement, and that make sense given the specific circumstances of each case. This need to focus on specific circumstances is explicit in the structure of Article 2.2.1.1, which establishes (1) GAAP-consistency and (2) whether records "reasonably reflect" the cost of production as separate and distinct conditions governing the use of a producer's cost records.

21. The key issue is what meaning should be ascribed the terms "reasonably reflect" and "cost associated with the production" as used in Article 2.2.1.1 of the AD Agreement. With respect to the term "cost associated with the production," the meaning must concern what the producer had to pay to be able to produce the items at issue as opposed to revenue gained. This distinction can be critical depending on the circumstance of a particular case. For example, in a value-based cost allocation methodology, how the revenue potential for different products is taken into account, if it is taken into account at all, will dictate whether recorded costs "reasonably reflect" the costs associated with the production and sale of the product under consideration.

22. This issue of value-based methodologies would prove critical in this AD investigation. Though the respondents in the AD investigation produced many forms of broiler products, the respondents in general measured their own performance in terms of the broiler products most popular in the U.S. market, particularly chicken breasts. This approach led to respondents treating certain broiler products subject to the investigation and shipped in substantial volumes to China at high prices as holding little or no value. Thus, important revenue-generating products such as paws absorbed much less of the total cost that had been incurred to produce the whole bird. For example, Tyson treated paws as offal, or effectively waste, and allocated costs to that product based on an offal price. This treatment was inconsistent with the true value of paws in the market and thereby over-allocated costs to other products such as breasts. Keystone adopted an even more extreme approach that grossly undervalued paws for allocation purposes. These approaches did not result in costs that reasonably reflected the cost of production.

23. China believes that respondents bear the burden in the first place of convincing the authority that its costs "reasonably reflect" the cost associated with the production and sale of the product

at issue. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must "consider" it, and that the burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

24. During the course of the investigation, the respondents failed to meet their burden. Tyson offered a series of arguments as to why its cost allocation methodology was "reasonable." However, Tyson never addressed its *actual* recorded costs or explained, for example, why its *actual* recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products. Rather, Tyson emphasized that its methodology was reasonable because it was GAAP-consistent, and then essentially assumed that GAAP consistent automatically meant "reasonably reflects" the cost of production. In reality, however, the general arguments Tyson made about valued-based approaches did not reflect its actual allocation methodologies. Like Tyson, Keystone also made considerable efforts to demonstrate why its methodology was "reasonable." Once again, the main emphasis was on the assertion that it was GAAP-consistent, not on its actual records.

25. Pilgrim's also sought to defend its cost methodology on the basis of reasonableness with respect to GAAP. Pilgrim never addressed its actual costs, in part because it struggled to even assemble costs that it could reconcile. Although the United States leaves the impression that Pilgrim's submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The basis for MOFCOM's rejection of Pilgrim's cost data had very little to do with the allocation methodology reflected in the Pilgrim's Pride cost records. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data provided by Pilgrim's Pride after the preliminary disclosure were ruled out of time.

26. Nonetheless, MOFCOM accepted the respondents' total costs for broiler products, although it did not accept the respondents' reported product-specific costs. It provided a simple, clear, and concise explanation for why it did so with respect to each of the respondents under investigation, noting that the reported costs did not "reasonably reflect" the cost of production. However, China further notes that, contrary to U.S. arguments, Article 2.2.1.1 does not contain any requirement for an authority to "explain" its decision to decline to use a respondent's recorded allocated costs. Rather, it merely provides that an authority must "consider all available evidence on the proper allocation of costs . . . ." This is a very different standard, requiring only evidence of "consideration" rather than an explanation. China submits that the record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue, consistent with Article 2.2.1.1.

27. Having rejected respondents' reported costs that did not "reasonably reflect" the cost of producing the broiler parts at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents' distorting cost methodologies. To this end, Article 2.2.1.1. imposes only two requirements on the authority. First the authority must "consider all available evidence on the proper allocation of costs." Second, the authority must adjust costs "appropriately" if they do not properly take into account non-recurring costs or start-up expenses. In cases such as the current dispute, that do not involve non-recurring costs or start up costs, there is only one affirmative obligation: " to consider all available evidence on the proper allocation of costs." MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to the very different consumer perceptions in either the U.S. or Chinese markets. Thus, it was on this neutral basis that MOFCOM allocated respondents' raw material costs.

28. MOFCOM considered this allocation based on weight to be reasonable for several reasons. First, a weight-based allocation avoided the distortions that had made the respondents' value-based cost allocations unreasonable, including in particular the arbitrary values the respondents' assigned to products like paws to allocate costs which reflected neither actual market conditions or even an actual price for the specific product. Even the United States own investigating authority, the Department of Commerce, has identified the "circularity" problems inherent in value-based allocation methodologies – all of which came into play here -- when a price is used to set a price. Having rejected respondents' costs as not reasonably reflecting costs, and in the absence of any other compelling argument from respondents, MOFCOM had to find some

alternative that avoided these problems. Second, a weight-based allocation also reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts. Finally, the weight-based allocation was specifically listed as one of the reasonable alternatives in the materials cited by respondents.

29. The United States contends that MOFCOM had an obligation to explain why its approach was proper in relation to other approaches and in light of criticisms advanced by the respondents. But this obligation is not reflected in Article 2.2.1.1. Again, Article 2.2.1.1 imposes an obligation on investigating authorities to "consider" all evidence for the "proper" allocation of costs. Moreover, Article 2.2.1.1 does not specify any particular method for "consideration," and what constitutes adequate "consideration" will vary from case to case. As China demonstrates above, careful consideration of the very sources presented to MOFCOM by the respondents in this case fully justified MOFCOM's use of a weight base measure in this investigation.

30. The circumstances and evidence surrounding the respondents' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the markets concerned. MOFCOM considered all the evidence during the investigation concerning the allocation of costs to reach a reasonable allocation methodology, and this is reflected in the record. Specifically, the record reflects a sustained line of inquiry by MOFCOM regarding the respondents costs from the first questionnaire, to the supplemental questionnaire, and to the second supplemental questionnaire. In addition, the MOFCOM disclosure documents reflect more than mere receipt of evidence on the part of MOFCOM, but an active investigation of that evidence that it expressly sought from the respondents. MOFCOM "investigated" the evidence in reaching its conclusion, rather than merely taking note of the respondents' submissions. Finally, in the final AD Determination, MOFCOM again stated that neither Tyson nor Keystone provided sufficient reasons to justify their reported costs. Indeed, as discussed in the final AD determination, MOFCOM gave several opportunities for the parties to present their arguments on all issues involved in the investigation prior to the final determination, and discussed these issues orally with the parties. Ultimately, MOFCOM relied on a weight-based allocation as a compromise and a recognized approach to price regulation proceedings.

B. U.S. Claims Regarding The Treatment Of Freezer Storage Fees And Fair Comparison Under Article 2.4 Of The AD Agreement Should Be Set Aside

31. It is well-established that Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request. Nonetheless, there are limits to this fundamental rule. In the context of legal claims, a Member may not raise a new legal basis in a panel request that reflects a disconnect from the legal bases set forth in its request for consultations.

32. The U.S. claim under Article 2.4 of the AD Agreement with respect to freezer storage expenses is not referenced in any manner within the U.S. request for consultations in this dispute. On its face, the U.S. consultation request does not specify Article 2.4 of the AD Agreement within any of the thirteen specific items identified by the United States as areas in which China's measures are allegedly inconsistent with GATT 1994 or the AD Agreement. Moreover, none of the specific GATT 1994 or AD Agreement provisions referenced by the United States in its consultation request are reasonably related to the issue of fair comparison, which is the subject matter of Article 2.4 of the AD Agreement. Finally, the U.S. consultation request otherwise makes no mention of freezer storage expenses, which is the factual issue the United States seeks to address in its Article 2.4 claim. Under the circumstances, China believes that the U.S. Article 2.4 claim impermissibly expands the scope of this dispute and is therefore outside the terms of reference of this proceeding. The Panel should therefore set aside the Article 2.4 claim, consistent with Articles 4 and 6 of the Dispute Settlement Understanding (DSU).

33. But even if the panel agrees to consider the U.S. Article 2.4 claim, it is without merit. Contrary to U.S. arguments, freezer fees clearly reflected a difference between export price and normal value affecting price comparability. Throughout the course of the underlying investigation MOFCOM indicated to Keystone what information was necessary to ensure a fair comparison between normal value and export price, meeting its obligation under Article 2.4 to indicate to Keystone what information was necessary to ensure a fair comparison. Keystone, however, provided ambiguous if not misleading responses to MOFCOM regarding such fees.

34. Article 2.4 requires allowances for differences in normal value and export price affecting price comparability. The authority has the obligation to make necessary adjustments so as to effect a fair comparison in ascertaining any margin of dumping. The nature of the obligation to make allowances is a case-specific issue. The Appellate Body has recognized that, "{t}he issue of which specific 'allowances' should be made in any case depends very much on the facts surrounding the calculation of export price and normal value." Thus, while an allowance may not be necessary in one investigation, it may be appropriate in another investigation depending on the information provided by the respondent parties and the facts surrounding the calculation of normal value and export price. The authority's allowances must therefore be guided by the factual record and methodologies being applied. Moreover, the authority has discretion in how it chooses to effect a "due allowance." As explained by the panel in *EU – Footwear (China),* the only requirement is that it must be "fair."

35. China believes that the provisions of the AD Agreement implicated by the facts of this case fall under Article 2.4. Keystone's failure to properly identify or characterize its freezer storage costs led to the allocation of a majority of those costs to fresh product, thereby reducing constructed normal vale for frozen product. This caused an imbalance in the dumping comparison between constructed normal value and export price given the fact that export price sales were all frozen and therefore incorporated freezer costs. This necessarily affected price comparability. Although these costs might have been accounted for differently in constructed normal value, China sees no basis in either Article 2.2.1.1 or 2.4 for a hierarchy in terms of where such costs should be accounted or adjusted. The discretion must be left to the authority. Having performed its cost allocation, MOFCOM was well within its discretion to make due allowance under Article 2.4 with respect to these costs.

36. In addition, while the obligation to ensure a "fair comparison" lies on the investigating authority, including the responsibility to "indicate to the parties in question what information is necessary to ensure a fair comparison," respondents also have an obligation to be forthright and clear in providing such information. The role of respondents cannot be passive. For example, the panel hearing *EU – Footwear (China)* concluded that interested parties must "make substantiated requests for 'due allowance', whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability." It follows that respondents are equally obligated to substantiate when allowances are not required. Thus, they have an obligation to report expenses correctly and to characterize them correctly where asked. MOFCOM asked precise and detailed questions in both the normal value section and the export prices section of its questionnaire requiring the respondent to report the expenses (including freezer fees) in a way to adjust the differences that affect price comparability. Keystone unreasonably and perhaps intentionally shaded the facts.

37. As far as how MOFCOM allocated freezer storage costs upon rejecting Keystone's reported costs and resorting to constructed NV, China reiterates that before any re-allocation by MOFCOM Keystone had previously allocated freezer fees to products without classifying or distinguishing between frozen products and non-frozen products. Thus, MOFCOM had no basis to understand the nature of those specific costs. MOFCOM allocated Keystone's reported total costs, including the reported "other expenses," on a weight-averaged basis across all production. Thus, constructed NV included a weight-averaged proportion of those costs. The practical effect of this allocation, unknown to MOFCOM at the time given how Keystone reported and characterized costs, was that constructed NV for frozen product models was artificially low given that a much larger proportion of domestic sales were of fresh, not frozen product, but freezer costs were allocated over all production on a weight-averaged basis.

38. MOFCOM made an EP adjustment to account for this imbalance rather than any modification to constructed NV in light of Keystone's failure to properly report these costs with respect to export price. Although other adjustments might have been made in pursuit of the same fair comparison under Article 2.4, the text of Article 2.4 leaves the form of the adjustment to the discretion of the investigating authority. Article 2.4 only states that in conducting the comparison between NV and EP "due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Given the distortion with respect to how freezer costs were allocated, there was a clear issue of price comparability for which due allowance was necessary.

C. MOFCOM's Determination Of The AD "All Others" Rate

39. The petition in the underlying investigation identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. In addition, MOFCOM received an entry of appearance from the U.S. association representing poultry exporters, that itself is comprised of about 200 member companies and organizations. Given the large number of interested parties, MOFCOM exercised the discretion afforded under Article 6.10 of the AD Agreement to limit its examination of producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

40. In its public notification of the initiation of an investigation, MOFCOM made it clear that all exporters/producers should register with the Ministry, were subject to individual investigation, and were subject to an antidumping rate based on facts available if they did not register and or fully participate in the investigation. The United States acknowledges that the initiation notice was provided to the United States and the six known producers/exporters of broiler products, as well as the fact that a request was made to the U.S Embassy to notify any other producers or exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 6.1 of the AD Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. The notice also clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

41. In its preliminary and final determinations, MOFCOM followed the rule in Article 9.4 with respect to known exporters or producers not included in the examination and assigned to those interested parties the weighted average margin of dumping established with respect to the selected exporters or producers. With respect to unknown exporters or producers, MOFCOM applied a facts available rate as provided under Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Specifically, in assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation.

42. In its preliminary and final results, MOFCOM stated that it would apply facts available. The basis for applying facts available was the lack of cooperation reflected in the failure of unknown parties to make an entry of appearance or provide a questionnaire response. MOFCOM noted that it relied on facts available, including the best information available, to determine normal value and export price. This information was not disclosed because if came from confidential sources, but consisted of the highest calculated normal value and the lowest recorded export price.

43. China believes its disclosure complied with the requirements of Articles 6.9 of the AD Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary AD and CVD determinations. This disclosure, well in advance of the final determination, was in "sufficient time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Articles 6.9 and 12.8 do not require this degree of disclosure.

44. The context provided by Article 6.5.1 of the Anti-Dumping Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 6.5.1applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the

authority, and thus have limited contextual relevance for what the authority must do under Article 6.9 of the AD Agreement.

D. MOFCOM's Obligations Under Article 1 Of The AD Agreement

45. The United States has also raised a claim under Article 1 of the AD Agreement, which provides that "{a}n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

III. MOFCOM'S CVD DETERMINATIONS

A. MOFCOM's Determination of the CVD "All Others" Rate

46. The facts surrounding the "all others" rate issued in the preliminary and final determinations of the CVD proceeding are virtually the same as those presented with respect to the AD "all others" rate. The petition identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. MOFCOM also received the entry of the U.S. trade association, USAPEEC. As in the AD case, MOFCOM exercised its discretion and limited its examination of interested parties or producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

47. As acknowledged by the United States, the initiation notice was provided to the United States and the six known producers/exporters of broiler products, and a request was made of the U.S. Embassy to notify all other known producers and exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 22.2 of the SCM Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. Again, the notice clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

48. With respect to unknown exporters or producers, MOFCOM applied a rate consistent with Article 12.7 of the SCM Agreement and in line with the considerations reflected under Annex II of the AD Agreement. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation and applied an "all others" rate based on "facts available" as provided under Article 12.7 of the SCM Agreement and paragraph 7 of Annex II of the AD Agreement.

49. The "all others" rate included one subsidy program – the upstream subsidy (feed) program. MOFCOM calculated the *ad valorem* rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount.

50. China believes its disclosure complied with the requirements of Article 12.8 of the SCM Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary CVD determination. This disclosure, well in advance of the final determination, was in "sufficient

time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Article 12.8 does not require this degree of disclosure.

51. The context provided by Article 12.4.1 of the SCM Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 12.4.1 applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the authority, and thus have limited contextual relevance for what the authority must do under Article 12.8 of the SCM Agreement.

B. MOFCOM's Subsidy Allocation With Respect To Feed Subsidies Was Proper

52. In its first written submission, the United States claims that MOFCOM breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by misallocating the subsidy found to exist. At the outset, China does not dispute that an investigating authority has an obligation under GATT 1994 and the SCM Agreement to align the numerator and denominator in calculating the appropriate subsidy margin. China agrees that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 set forth a fundamental rule to this effect, as elaborated by the Appellate Body and various dispute settlement panels.

53. At the same time, China does dispute the United States' simplistic rendition of the facts in the underlying proceeding. In this case, MOFCOM needed to calculate the indirect benefit to the respondents from upstream subsides conferred on corn and soybeans purchased and consumed by the respondents in the production of subject merchandise. Over a series of questions posed in the original and a series of supplemental questionnaires issued to Tyson and Pilgrim's, MOFCOM sought to collect the information necessary to engage in an appropriate calculation. Based on the responses, MOFCOM was able to make a determination on the quantity of purchased corn and soybean meal consumed in the production of the subject merchandise.

54. The United States, for its part, erroneously suggests that the entire matter may be reduced to a single question posed in MOCFOM's second supplemental questionnaire focused on total purchases of corn, soybeans, and soybean meal. In so doing, the United States ignores MOFCOM's more direct efforts to receive information from Tyson and Pilgrim's focused on purchased feed consumption related to the production of subject merchandise, and the responses received in turn. Based on the totality of the responses received, as well as the deficiencies therein, MOFCOM applied the information that respondents themselves attributed to the production of subject merchandise.

55. Specifically, the subsidy per unit of the subject products was calculated on the basis of feed purchased and consumed in the production of subject merchandise during the POI. Given likely inventory effects, MOFCOM understood that there could be differences in terms of the amount purchased and the amount consumed over the same period. Thus, as between reported purchases and consumption, it would use the lesser of the two figures. This was the basic data upon which MOFCOM would rely in its calculation. To confirm all data, MOFCOM sought detailed information on the production cost of feed, live broilers, and subject merchandise, as well as consumption of feed in the production of subject merchandise. Through this detailed information, MOFCOM could more confidently trace feed purchased and consumed in the production of subject merchandise during the POI to confirm that data was reported correctly.

56. MOFCOM ultimately received the basic information necessary to calculate the subsidy benefit in response to questions posed in the second supplemental questionnaire on purchases of feed consumed in the production of subject merchandise during the POI. In terms of other data MOFCOM requested and might have used to track and scrutinize the consumption data to ensure it had captured all actual consumption, that data was never fully provided, but did not prevent the

ability to calculate a margin. MOFCOM did not require or obtain information from elsewhere to perform the respondents' subsidy calculation. It used the information held out by the respondents as their total consumption of feed in the production of the subject merchandise during the period of investigation.

57. Based on an examination of reported purchases and consumption, MOFCOM used the feed consumption data reported in response to question I.4 of the second supplemental questionnaire for Tyson and question I.6 of the second supplemental questionnaire with respect to Pilgrim's, both of which also matched the reported purchase data. The denominator used was the sales quantity of subject merchandise. MOFCOM did consider the alternative provided by the respondents. Neither Tyson or Pilgrim provided any information to correct or clarify its submission of data on feed consumption in the production of subject merchandise, therefore, after considering the alternative provided by U.S. respondents, MOFCOM had to rely on the data used in its calculation.

58. After its preliminary results, MOFCOM received arguments by both respondents. In both instances Tyson and Pilgrim's argued that MOFCOM had over-allocated feed subsidies to subject merchandise and sought to clarify that the feed information provided encompassed more than subject merchandise. In none of these arguments, however, did either respondent actually provide a basis for MOFCOM to discard the feed information used in the calculation.

59. In terms of MOFCOM's disclosure, the disclosure documents identify both the unsubsidized benchmark price for feed materials and the subsidized purchase prices reported by the respondents for the same materials. The difference in the unsubsidized and subsidized prices was then multiplied against a total quantity of corn and a total quantity of soybean meal. These data on corn and soybean meal would reveal where in the questionnaire responses that MOFCOM derived the information, and namely from the reported purchases and consumption data of the respondents from the second supplemental questionnaire. In terms of the denominator – total sales quantity of subject merchandise – this figure was also disclosed and could also be traced by the respondents to data reported to MOFCOM in their questionnaire responses.

C. China's Obligations Under Article 10 of the SCM Agreement

60. The United States has raised several claims under the SCM Agreement that China has addressed in succession. To the extent China has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

IV. MOFCOM'S INJURY DETERMINATION

61. The starting point for the Panel's analysis in this dispute is a situation where: (1) increasing volumes of subject imports that gained market share and had adverse volume effects on the domestic industry, (2) a domestic industry that suffered consistent operating losses that built up over the period and worsened at the end of period, and (3) no other explanations for these operating losses and severe declines in 2009 have been presented. These circumstances are unchallenged by the United States, which casts doubt on whether it has established a *prima facie* case.

A. MOFCOM Properly Defined the Domestic Industry As Required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement

62. The description by the United States of the process whereby MOFCOM determined the domestic industry seriously distorts what actually happened. MOFCOM fully complied with China's obligations under the WTO. MOFCOM's investigations were not biased, and simply reflected the realities of a highly fragmented industry for which there was no complete list of producers. MOFCOM did not exclude any cooperating producers from its investigations. To the contrary, MOFCOM's investigations included enough of the larger domestic producers to qualify as a "major proportion," and thus objectively examined the domestic industry in full compliance with the obligations under the WTO.

63. First, MOFCOM published its notice of investigation on 27 September 2009, inviting all interested parties to participate in the investigation and register with the authorities. That notice referenced "interested parties," but also made clear that the data being collected would include production – a clear reference to "domestic producers." Thus, all parties were on notice about the conduct of this case.

64. Second, MOFCOM distributed domestic producer questionnaires to every known Chinese producer of broiler chicken products. This case did not involve a few domestic producers that collectively represented only a small portion of the total domestic production of broiler products. Rather, the petition on its face identified those larger producers that collectively produced more than 50 percent of the estimated total production in China. By sending questionnaires to the "known producers," MOFCOM was thus sending questionnaires to those Chinese producers that alone represented the major proportion of the domestic industry.

65. Third, even though MOFCOM already had identified a group of domestic producers that represented more than 50 percent of total production, MOFCOM took the additional step of placing the domestic producer questionnaire on the MOFCOM web site, again inviting any interested parties who produced broiler chicken during the period of investigation to complete the questionnaire. By doing so, MOFCOM was reasonably trying to improve an already substantial coverage of the domestic producers.

66. This process resulted in MOFCOM receiving questionnaire responses from 17 domestic producers. The total domestic producer responses thus included both members of the petitioning association and non-members of that association.

67. Under the circumstances of this investigation, MOFCOM took reasonable steps to conduct its investigation. MOFCOM started with a group of domestic producers that produced enough subject merchandise to qualify as a major proportion of the total industry. And MOFCOM then took additional steps that sought to improve the coverage. Although the efforts to expand the coverage were not as successful as MOFCOM might have hoped, MOFCOM made reasonable good faith efforts to obtain the additional data.

68. MOFCOM also had a basis in positive evidence for finding the 17 responses from domestic producers represented a major proportion of the domestic industry. Neutral and reliable estimates of total domestic production were included in the petition, as were official customs statistics on both imports into China and exports from China. MOFCOM thus had positive evidence to determine reliable estimates of both the total production in China, total apparent consumption in China, and the shares of those represented by the 17 responses.

69. Although the estimates of total domestic production were themselves neutral and reliable, MOFCOM was able to further assess and confirm the reliability of these estimates in two ways. First, MOFCOM officials reviewed worksheets during the verification, confirmed the reasonableness of the estimation and confirmed the reasonableness of the assumptions under in those worksheets. Second, this same estimation methodology has been used in other contexts for other purposes.

70. Thus, the United States is incorrect when it says MOFCOM defined the industry as only those companies supporting the petitions. That is not what MOFCOM did. MOFCOM made reasonable efforts to obtain as many questionnaire responses as it could, both contacting all known producers and using public postings on its website in an attempt to reach others. MOFCOM eventually obtained 17 timely and usable responses over the course of the entire proceeding. It so happens that all 17 of those responding domestic producers supported the petitions. But this situation is very different than limiting the investigation to only those companies that supported the petitions. MOFCOM in no way limited the companies participating in its investigation.

71. MOFCOM also contacted the Ministry of Agriculture, which collects statistical data on the number of farms, but does not have any information on specific producers. In addition, the Ministry of Agriculture collects data on all chickens, both white feather broiler chickens (subject merchandise) and yellow feather chickens (non-subject merchandise).

72. The United States identifies two separate legal theories to argue that MOFCOM acted inconsistently with its WTO obligations. But in both instances, the United States has mischaracterized the underlying facts at issue, misstated the relevant legal obligations as they applied in this case, and misread the guidance provided by the Appellate Body in *EC-Fasteners*.

73. The first U.S. argument focuses on one key phrase in Article 3.1 and 15.1 – the need for authorities to conduct an "objective examination." The United States has not presented any arguments about the lack of "positive evidence." The United States argues that because the process of determining the domestic industry was biased, the determination itself was not an "objective examination" of this key issue. This U.S. argument is incorrect in several respects.

74. First, the United States is factually mistaken in that the MOFCOM process was not biased. MOFCOM undertook a reasonable and unbiased process to identify and collect information from enough domestic producers to represent a "major proportion" of the domestic industry as a whole. Second, the United States is also factually mistaken in saying the Chinese industry is not fragmented. The Chinese industry includes millions of domestic producers. Third, the United States has misread the guidance in *EC – Fasteners (AB)*. That guidance in fact demonstrates why MOFCOM's determination in this case complied with the "objective examination" requirement of Articles 3.1 and 15.1.

75. "Objective examination" under Articles 3.1 and 15.1 do not require an impractical quest for perfection. Rather, "objective examination" – particularly in an area such as deciding how much investigation is enough in the context of defining a highly fragmented domestic industry – allows flexibility. MOFCOM properly defined the domestic industry as including those producers who represented more than 50 percent of the total industry and thus satisfied the "major proportion" test.

76. This interpretation reflects the guidance about the meaning of Article 4.1 provided by the Appellate Body in *EC – Fasteners*. The Appellate Body offered what is essentially a sliding scale test: the more substantial the percentage of the total domestic industry covered, the less concerned the investigating authorities need to be about obtaining further responses. Under this sliding scale logic, the converse is equally true. The higher the proportion covered, the less sensitive the authority needs to be to obtaining further responses. When the authority already has responses representing a high proportion of the total domestic industry, that response already, in the words of the Appellate Body, appropriately "reflects the total production of the producers as a whole."

77. Beyond the high proportion in this case, there are other facts that also limit any possible obligation on MOFCOM to have done anything more. First, this industry is highly fragmented, and the Appellate Body has specifically recognized that in such highly fragmented industries, the "major proportion" test in Article 4.1 "provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible."

78. Second, respondents provided MOFCOM with only limited information on additional domestic producers that should be contacted that were not already known. The names of the four allegedly unknown Chinese producers provided in the U.S. FWS were in fact the names of companies that either were already known and contacted, or knew about the case and decided not to cooperate by providing responses.

79. Third, MOFCOM in fact had no other names of domestic producers to contact or questionnaire responses to use in the analysis, other than companies that had already responded or decided not to respond. This fact is critical. This case does not involve the "active exclusion of certain domestic producers" that makes an Article 4.1 determination "more susceptible" to a WTO inconsistency, and that the Appellate Body criticized in *EC - Fasteners*.

80. Fourth, since MOFCOM had questionnaire responses from all the larger producers, additional questionnaire responses from smaller producers would not materially affect the analysis. Estimates based on record evidence demonstrate that additional producers would likely have represented much less than 1 percent of total domestic production.

81. The second U.S. argument presents a more limited, but equally erroneous argument under Articles 4.1 and 16.1. The U.S. argument fundamentally misreads the obligation of these provisions. First, the United States ignores the fact that Articles 4.1 and 16.1 set forth two distinct tests that the United States tried to blurs into one test. Under Articles 4.1 and 16.1, the authorities may choose to define the domestic industry as "the domestic producers as a whole." Alternatively, the authorities can define the domestic industry as including only those domestic producers whose "collective output constitutes a major proportion of the total domestic production."

82. Second, the United States conveniently overlooks the extent to which the phrase "major proportion" leaves the authorities with considerable discretion. This provision does not specify any numerical threshold, unlike the provisions on standing that set forth specific rules based on 25 percent and 50 percent of total domestic production. When addressing this issue, the Appellate Body noted only that this phrase should be understood as "a relatively high proportion of the total domestic production." Nothing in the Appellate Body decision in *EC – Fasteners (AB)* imposes any different obligations.

83. Contrary to the U.S. argument, MOFCOM did not intentionally exclude any domestic producers from its investigation. The United States apparently misses the importance of a key phrase that it cites from *EC – Fasteners (AB)*, that the authorities in that case had "excluded producers that provided relevant information." It is true that authorities have only limited discretion actually to collect information, but then to ignore it. In the anti-dumping investigation at issue in *EC Fasteners*, the investigating authorities actually had contact information for 318 known producers, but ultimately based their determination on only 45 of those 318 known producers. That situation is totally different from the present case, where MOFCOM used the available data for all known Chinese producers.

84. The U.S. argument is essentially that if MOFCOM could have theoretically done more, it had an obligation to do more. The proper application of the "major proportion" test under Articles 4.1 and 16.1 does not require the authorities to include data from unknown domestic producers, particularly not when the authority has collected and analyzed data from known producers accounting for more than 50 percent of total domestic production.

B. MOFCOM Properly Found Adverse Price Effects As Required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

85. Although the United States challenges the MOFCOM findings of adverse price effects on both substantive and procedural grounds, both lines of attack fail. MOFCOM reasonably exercised its discretion as the administering authority to gather facts, consider those facts, and analyze them in its discussion of adverse price effects. The WTO Agreements do not require countries to follow any single approach or use any specific methodology. Rather, the relevant international obligations reflect very specific rules that respect the discretion of national authorities to conduct investigations in ways that are appropriate to each country, and in ways that are appropriate to each specific case.

1. MOFCOM reasonably found multiple adverse price effects in these cases

86. MOFCOM collected positive evidence to serve as the basis for its consideration of adverse price effects within the meaning of Articles 3.2 and 15.2. MOFCOM collected data on the average prices earned by domestic producers for their sales of all broiler chicken products. The questionnaires to the domestic producers asked for the overall sales quantity and sales value, from which MOFCOM could determine an overall average unit value ("AUV") for each relevant period of time. MOFCOM also collected similar data on the average prices earned by U.S. exporters for their overall sales of broiler products in China, as reflected in official Chinese customs statistics. Here as well, MOFCOM was able to use sales quantities and sales values to determine overall AUVs for the relevant periods. MOFCOM then used these data to assess trends and to compare the relative price levels of domestically produced broiler products as a whole and imports of broiler products from the United States as whole.

87. MOFCOM objectively examined that positive evidence. MOFCOM's Final Determinations confirm that MOFOM considered and discussed each of the three specific types of adverse price

effects set forth in Articles 3.2 and 15.2. Ultimately, MOFCOM focused on the price undercutting and price suppression in its discussion of adverse price effects. Although Articles 3.2 and 15.2 make clear that authorities may consider as many or as few of these enumerated price effects as may be appropriate in a particular case, MOFCOM considered all three categories before focusing its discussion on the two adverse price effects that were the most pronounced in these cases. Doing so was completely consistent with the discretion afforded authorities under Articles 3.2 and 15.2.

88. MOFCOM objectively evaluated the evidence using a methodology that focused on broader trends for the subject merchandise overall. Although there may be other methodologies that authorities could use, MOFCOM's methodology was consistent with the discretion afforded to authorities by the texts of Articles 3.2 and 15.2.

2. MOFCOM properly found price undercutting within the meaning of Articles 3.2 and 15.2 specifically and Articles 3.1 and 15.1 more generally

89. At the outset, China notes that Articles 3.2 and 15.2 do not specify any particular methodology for analyzing price undercutting. Authorities thus have broad discretion in choosing a methodology, provided that methodology represents an "objective examination" of the "positive evidence" before the authorities.

90. That is precisely what MOFCOM did in these injury investigations. The United States attacks MOFCOM's alleged failure to take into account different levels of trade. But MOFCOM did consider this issue. This issue was raised by the U.S. respondents, and addressed by the respondents, by the domestic producers, and by MOFCOM in its determinations. MOFCOM both summarized the comments by the parties and then addressed those comments.

91. The U.S. argument presupposes an automatic obligation to consider resale prices charged by importers rather than purchase prices paid by importers, as reflected in the official import statistics. Such an obligation simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. MOFCOM's use of landed prices in China allowed the authority to compare domestic prices and import prices on a comparable basis, without the more difficult – and in these particular investigations, impossible -- administrative burden of determining comparable prices at a later stage in the distribution chain. China notes that even the U.S. exporters reported uncertainty about who actually served as importers of their product into China. The existence of other theoretically possible reasonable methods does not render MOFCOM's practically realistic method to be unreasonable or otherwise not "objective."

92. The core legal issue is whether there is any obligation on MOFCOM (or any authority) to use only an average resale price from an importer, rather than an average sale price to an importer. The resale price from the importer could be higher, lower, or the same. Costs could be passed along in the resale price, or they could be absorbed by the importer to make the sale. The importer might earn of a profit or a loss on the resale. Thus in the abstract, the resale price could be higher or lower. Nor has the United States pointed to any record evidence suggesting a material difference in the levels of trade. MOFCOM's method is neutral – and an "objective examination" – to consider either the average price to the importer or the average price from the importer. Absent some evidence before the authority suggesting a distortion of some sort, either approach would be permissible under Articles 3 and 15.

93. Indeed, this dispute shows that resale prices can be lower. As discussed during the first meeting with the Panel, a survey conducted by the U.S. Department of Agriculture suggests that during 2008 the vast majority of importers in China were reselling imported broiler chicken at 20-30 percent losses. The United States argument assumes that importer resale prices must always be higher. This assumption is just wrong. It is not necessarily true. Moreover, during the investigation, the U.S. respondents provided no evidence suggesting it was true. Indeed, in light of the U.S. Department of Agriculture report, it now seems likely that no such evidence was provided to MOFCOM because in fact importers were selling at significant losses during the critical period 2008. There is no record evidence contradicting this public statement that importers were reselling at a loss. No importers responded to the importer questionnaires.

94. The United States also attacks MOFCOM's alleged failure to take into account differences in product mix. But MOFCOM also considered this issue. The U.S. argument presupposes an obligation to consider specific product segments, rather than the product as a whole, another obligation that simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. Authorities have discretion on such issues. Both overall averages and more specific averages are both reasonable alternatives, absent some evidence in a particular investigation indicating a material distortion. In these investigations, the U.S. respondents presented only general arguments, not specific evidence of material distortions. Indeed, the data presented by the United States before this Panel – when viewed in its entirely – demonstrates the error of the U.S. argument. By using broader averages rather than more narrow product categories, MOFCOM in fact understated the degree of price undercutting in these investigations.

95. The U.S. respondent argument was inherently flawed. This argument proceeds from a false premise that chicken breast prices were higher. The record evidence before MOFCOM – in the form of numerous domestic producer invoices, including 21 individual invoices with both chicken breast and chicken paw transactions – demonstrates that chicken breast prices were lower, not higher, than chicken paw prices. So the U.S. respondent premise of the methodology overstating the magnitude of underselling is backwards; the methodology actually understates the magnitude of underselling. Such an approach does not violate any obligation of "objective examination," since the MOFCOM methodology based on the facts of this case was in fact conservative.

96. Beyond mischaracterizing the issues of level of trade and product mix, the United States also ignored the issue of "likeness" among the various types of subject merchandise. It would not be an "objective examination" to compare the prices of different like products, but it would be "objective" to compare products that are part of the same like product. In cases where the administering authority has defined a single like product, and that finding of a single like product has not been challenged before the Panel, there is nothing in the "objective examination" requirement that forces authorities to conduct a price comparison based on product segments within the single like product. Comparisons in a particular case may or may not be objective, depending on the facts of each case.

97. Perhaps recognizing the limited scope of the obligations under Articles 3.2 and 15.2, the United States also presents a more sweeping argument under Articles 3.1 and 15.1. The United States accuses MOFCOM of "failure to control for such obvious differences." Yet, this argument rests on two fundamental errors.

98. First, this argument assumes these differences are "obvious" when they are not at all obvious, and were not demonstrated to the satisfaction of the authorities during the proceedings below. The respondents before MOFCOM and the United States before this Panel assume that the price paid by the importer is necessarily and always at a different level of trade than the price offered by domestic producers. But that is not necessarily the case at all. These investigations illustrate just how murky that issue can be in a particular case. The respondents before MOFCOM and the United States before this Panel also assume that the higher portion of chicken paws in U.S. exports to China distorted the average import price downward. But that is not only not necessarily true, but in fact is false in these investigations. In the Chinese market, chicken paws are a premium item with a higher price, and thus the higher proportion of chicken paws actually distorted the average import price upward, not downward. The more basic point is that the differences alleged by the United States are hardly obvious; they depend on specific facts in specific cases.

99. Second, this argument also incorrectly assumes that more detail always trumps less detail, and that such less detail is thus inherently not "objective." The United States is trying to use Articles 3.1 and 15.1 to impose its own vision of investigative methodologies on MOFCOM. The United States may prefer to conduct pricing analysis based on resale prices by importers, but that does not mean that all countries must use this method. The landed price in a country – as reflected in official import statistics – is another reasonable method that MOFCOM could reasonably and "objectively" decide to use in a specific case. Similarly, the United States may prefer to conduct pricing analysis on specific products, but that does not mean all countries must use this method, and that using an overall average is inherently wrong. The use of average prices is another reasonable method – and one that in this case conservatively understated the margins of underselling.

100. On both of these issues, the United States has failed to meet it burden of establishing a *prima facie* case that MOFCOM's methodologies as applied in these specific investigations were inconsistent with China's WTO obligations. The specific facts of these cases – as discussed in more detail below – fully support the WTO consistency of the choices MOFCOM made in these investigations.

3. MOFCOM's finding of price suppression would alone be sufficient to comply with the obligations under Article 3.2 and 15.2

101. The United States argues that MOFCOM's finding of price suppression "is predicated entirely on its defective finding of significant underselling," and therefore must fail. But this argument is incorrect both legally and factually in several respects.

102. As a legal matter, the United States is trying to read into Articles 3.2 and 15.2 obligations that do not exist in those provisions. The U.S. argument makes two key legal errors. First, the U.S. argument ignores the textual elements of Articles 3.2 and 15.2 that make explicit that price suppression is an alternative to price undercutting. In particular the term "otherwise" separates price undercutting on the one hand and price depression and price suppression on the other hand. Similarly, the disjunctive term "or" separates price depression and price suppression. The text thus makes explicit that these three analytic techniques are each distinct ways for the authority to find adverse price effects. Any one of them alone can be sufficient. In particular, the text expressly sets out price suppression as an adverse price effect that may exist even if price undercutting has not been found.

103. Second, Articles 3.2 and 15.2 require only a showing of the existence of adverse price effects. The United States is simply wrong to argue that these provisions also require a showing that subject imports caused or affected the price suppression. Rather, price suppression is the effect that an authority observes in the domestic industry. Any obligation to find such a causal nexus is found elsewhere in Articles 3 and 15, not in Articles 3.2 and 15.2.

104. As a factual matter, MOFCOM's finding of price suppression was not dependent on the existence of underselling. Price suppression is a distinct finding that has nothing to do with the relative prices of subject imports and domestic prices. Rather, price suppression – as found by MOFCOM in these investigations – generally reflects a comparison of domestic prices and domestic costs over time. There may well be other ways for authorities to discern price suppression, but this comparison of changing prices to changing costs is the most commonly used analytic technique. Domestic prices in this case were able to increase over the period, but were not able to increase enough to cover rising costs. Thus, domestic price increases to cover rising costs that would otherwise have been expected did not occur, the profit margins eroded, and the consequence was price suppression. None of this depends on any findings of price undercutting.

105. Thus, regardless of the relative price levels of domestic and imported broiler parts, the domestic prices were suppressed by the volume and market share effects of the subject imports. Subject imports were increasing their volume and market share, which triggered the domestic firm response to avoid further loss of volume. The price suppression can rest exclusively on the adverse volume effects of the subject imports, and MOFCOM expressly set price suppression as an independent and additional adverse price effect.

4. MOFCOM properly disclosed sufficient factual information about its findings of adverse price effects as required by Articles 6 and 12 of the AD Agreement and Articles 12 and 22 of the SCM Agreement

106. The United States incorrectly asserts that MOFCOM acknowledged the need for some adjustment to account for different levels of trade. This claim is not true. MOFCOM's Final Determinations discussed the need to adjust for the customs duties imposed on different types of broiler chicken products imported from the United States, to create a comparable landed, duty-paid basis for price comparisons, not any other adjustment.

107. This U.S. procedural argument thus rests on a cascading set of false assumptions. The United States assumes that MOFCOM made an adjustment for level of trade that MOFCOM did not make. The United States then assumes that the MOFCOM price effects discussion rests on the

finding or price undercutting, when in fact MOFCOM had two legally independent bases for its price effects discussion. MOFCOM in fact complied with all its procedural obligations.

C. China Properly Analyzed Impact As Required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

108. The United States has seriously mischaracterized the MOFCOM determinations about material injury. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. Yet it is the United States that ignores the totality of the evidence before MOFCOM, and selectivity picks time periods to create the illusion of a domestic industry doing acceptably, when the domestic industry in fact was suffering material injury.

109. Regarding the overall argument about adverse impact, the United States makes three analytic errors. First, the United States comments only about the period 2006-2008 and says nothing at all about the sharp declines in virtually every indicator during the first half of 2009. MOFCOM discussed sixteen different economic indicators, and for each of those indicators discussed the same consistent periods of time: full years 2006, 2007, and 2008, and the change in the first half of 2009 relative to the same period during 2008.

110. Second, the United States also says nothing about the MOFCOM discussion of likely continuing U.S. exports to China. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. The United States has completely ignored this factor.

111. Third, the United States focuses on volume indicators, and ignored the weak financial indicators over the entire period. A domestic industry with net operating losses every year of the investigative period is an industry suffering material injury. The United States cannot make these financial losses go away by ignoring them. When discussing both gross profits and net profits, MOFCOM added additional discussion of 2007, putting in context the modest improvement in 2007 that contrasted with the overall performance over the period and underscored the decline in financial performance in 2008.

112. The U.S. argument about two specific injury indicators fares no better. Although Articles 3.4 and 15.4 list numerous factors to be considered, the United States raises claims about only two. MOFCOM's Final Determinations included "an evaluation of" these two factors, and thus complied with the relevant obligation. That the United States disagrees with how MOFCOM evaluated these two specific factors does not mean the MOFCOM evaluation of all the various factors was not an "objective examination." To the contrary, MOFCOM reasonably evaluated both factors and addressed U.S. arguments about these factors, and all the other factors in its Final Determinations.

D. MOFCOM Properly Demonstrated The Causal Link Required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

113. At the outset, it is important to note the specific parameters of the challenge being raised by the United States relating to causation. The United States – in its request for consultations, its request for a panel, and in its first written submission -- has focused its challenge solely on the issue of causal link as specified in the first and second sentences. In other words, the United States has not included any claims about other causes, or about MOFCOM's approach to considering other causes and thus ensuring non-attribution as required by the third sentence of Articles 3.5 and 15.5.

114. Thus, the issue before this Panel is simply whether MOFCOM properly established the "causal relationship" between subject imports and the injury to the Chinese domestic industry required by the first and second sentences of Articles 3.5 and 15.5. The Appellate Body has repeatedly made clear that a causation requirement in the context of a trade remedy proceeding requires only that the imports under investigation have contributed in some meaningful way to the injury being suffered by the domestic industry. The Appellate Body in *US – Wheat Gluten* interpreted the word "cause" and the term "causal link" to reflect a relationship in which increased imports "contribute to 'bringing about', 'producing' or 'inducing' the serious injury." The Appellate Body was careful to

clarify that the authority need not show that the subject imports were the only cause, or the major cause, of the injury. Rather, the authority need only show that the imports contribute in some manner, *"even though other factors are also contributing, 'at the same time', to the situation of the domestic industry."* Although the Appellate Body has not directly addressed the degree of "contribution" necessary, in *U.S. – Tyres (China)* it equated "significant cause" to "important contribution." The Appellate Body explained that "significant cause" amounted to more than a mere contribution, implying that the use of "cause" alone equals little more than the imports merely contributing to the serious injury.

115. Indeed, the United States has agreed with this interpretation of the scope of Articles 3.5 and 15.5. In its talking points presented to MOFCOM during this proceeding, the United States argued that MOFCOM did not show a "meaningful contribution" by subject imports. In making this argument, the United States acknowledges that subject imports need not be the only cause, the most important cause, or even an important or significant cause. Rather, subject imports need only be making some meaningful contribution to the material injury being suffered.

116. Thus, the burden on the United States in making a *prima facie* claim under Articles 3.5 and 15.5 is to demonstrate that MOFCOM failed to show that subject imports were making a meaningful contribution to the material injury. On the other hand, China can defeat the U.S. claim simply by showing that MOFCOM reasonably found that subject imports were contributing in some way to the material injury. Subject imports need not be a "significant cause, " a phrase used in other WTO contexts. Rather, subject imports need only be a "cause," and may be one of many causes and still be sufficient to satisfy Articles 3.5 and 15.5.

117. The United States tries to meet this *prima facie* burden with three arguments, but they all fail. First, MOFCOM did not ignore evidence about market share. Rather, it is the United States that tries to ignore market share gain by U.S. subject imports at the expense of the Chinese industry as a whole. The United States ignores the fact that subject imports from the United States gained much more market share than non-subject imports from other countries lost.

118. Second, MOFCOM did not rely on price undercutting analysis as the sole basis for its discussion of adverse price effects. Rather, MOFCOM reasonably relied on both proper price undercutting analysis and proper price suppression analysis as legally independent bases for adverse price effects. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

119. Third, MOFCOM did not fail to reconcile its causation analysis with trends over the period. Rather, it is the U.S. argument that tries to ignore and downplay the sharp declines in the first half of 2009 and the dismal financial performance over the entire period of investigation. The existence of some positive trends does not negative the conclusions MOFCOM drew from weak and deteriorating financial performance over the period.

120. MOFCOM thus properly established the "causal relationship" required by Articles 3.5 and 15.5. Since the United States does not otherwise make any distinct arguments under Articles 3.1 and 15.1, the failure of the U.S. arguments under Articles 3.5 and 15.5 means that MOFCOM has fully complied with its WTO obligations regarding causal link.

Second Integrated Executive Summary by China

I. PROCEDURAL ISSUES

A. MOFCOM's Decision To Not Hold A Public Hearing Did Not Violate Article 6.2 Of The AD Agreement

1. The United States has not articulated any legitimate basis for finding MOFCOM's decision to not hold a hearing, public or closed, inconsistent with Article 6.2 of the AD Agreement. The language of Article 6.2 is straightforward and the facts as presented are equally straightforward. Article 6.2 does not include the term "public hearing," and otherwise imposes no obligation on authorities to provide a public hearing or compel parties with adverse interests to meet. Rather, Article 6.2 simply obligates authorities, on request, to "provide opportunities for all interested parties *to meet* those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered" (emphasis added). The text makes clear that an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests is one of facilitator -- to promote the conditions under which such a meeting could occur. This interpretation is consistent with the plain meaning of the phrase "provide opportunities" as used in Article 6.2.

2. In the underlying investigation MOFCOM did not reject a U.S. request to meet with the petitioner. It accepted that request. MOFCOM notified all interested parties it understood to have interests adverse to the U.S. Government and determined that they had no intention to meet the United States at such a hearing. MOFCOM's action constituted efforts to organize the requested meeting and "provide opportunities" for such a meeting, consistent with Article 6.2. Thus, MOFCOM fulfilled its obligation under Article 6.2, and the question of a hearing where parties with adverse interests meet was rendered moot. The U.S. argument is reduced to a nonsensical claim that because a hearing was not held, the United States was somehow constrained in the arguments it could present to MOFCOM. The United States has yet to articulate how its arguments were constrained in the opinion meeting MOFCOM organized for the United States in the absence of a hearing where parties with adverse interests declared they would not be present. It cannot.

B. MOFCOM's Disclosure Of Essential Facts Related To The Dumping Calculation Was Consistent With Article 6.9

3. MOFCOM's dumping margin disclosures fully complied with the obligations of Article 6.9. MOFCOM disclosed all the "essential facts" that "form the basis for the decision" to apply the AD measures, and all the facts that were necessary for respondents to "defend their interests." Specifically, in the underlying proceeding, MOFCOM gave each respondent a particularized disclosure document that explained the MOFCOM calculation and provided the key benchmarks – normal value, CIF price, and net export price – necessary for each respondent to see which products created what dumping margins, and sufficient for each respondent to cross check MOFCOM's calculations with the data that respondent had provided. China understands that there might be certain specific situations where the investigating authority applies data not submitted by the respondents themselves. In such cases, China recognizes that additional disclosure might be necessary to allow respondents to defend their interests. But that is precisely what MOFCOM did in this case, such as with respect to the adjustment of Keystone's freezer fees.

4. The United States argues this is insufficient, insisting that authorities must provide all calculations, data, and computer programs with respect to normal value, export price, and cost of production. The United States fundamentally misreads the text. The disclosure required under Article 6.9 covers only facts, not reasoning, and only "essential facts." Moreover, the facts of this particular dispute show that disclosure of methodologies can meet the obligation to disclose "essential facts" and to allow all the parties "to defend their interests." The U.S. reading of "essential facts" that need to be disclosed effectively defeats the meaning of the word "essential".

5. As a final interpretive point, the United States contends that China has misinterpreted Article 6.9 by conflating the second sentence of that provision with the scope of disclosure required by the first sentence. China disagrees. In terms of the first sentence, the issue is whether an authority has informed interested parties of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States asserts that

such essential facts must include the full panoply of data, analyses, worksheets, and computer programs used by the authority. But if the basis for the decision whether to apply definitive measures may be understood from something less than this extensive disclosure, then it is plainly evident that the more extensive disclosure consists of more than "essential facts." It is otherwise axiomatic that if a more limited disclosure may impart the same understanding, then it is sufficient for the party to defend its interests.

6. Indeed, it is the United States that tries to confuse the issue by essentially arguing that the "essential facts" referred to in Article 6.9 include all facts "under consideration which form the basis for the decision whether to apply definitive measures." This reading is incorrect. Article 6.9 concerns only those "essential facts under consideration." And these facts, of course, are those indispensible to an understanding of the final determination, and therefore indispensible to the defense of a party's interests. MOFCOM's final disclosure met this standard by providing the respondents the means to understand the authority's consideration of whether dumping has occurred and, if so, the magnitude of such dumping, thereby allowing the parties to defend their interests.

7. Nowhere does the United States explain or provide any example of why the specific disclosures made by MOFCOM in this particular case were insufficient. In its questions to the parties, the Panel asked the parties to consider the issue of sales disregarded as not being in the ordinary course. China explained how MOFCOM addressed this issue for each of the three respondents. The United States complained about the lack of a list of specific transactions that had been disregarded, asserting that these below cost sales are "absolutely indispensable" to the calculation of dumping margins. But the key issue is whether the authority provided enough information and explanation for the respondent to have understood was the authority had done with the respondents' information, and how that information was being used to determine the dumping margin. If the respondents felt the need to know the specific sales excluded, the MOFCOM disclosure allowed the respondents to derive that information. The United States has not explained why it could not be done, or how the specific list of excluded sales were either "essential" or necessary to "defend their interests." It may be that the U.S. demand for "data" and "calculations" is probably a WTO consistent approach, but it is not the only WTO consistent approach; it is merely the U.S. approach that the United States now demands that every other Member follow. But the text of Article 6.9 does not mandate one approach over the other, and it would be inappropriate for the Panel to impose one particular method.

C. The United States Has Failed To Demonstrate That The Non-Confidential Summaries Contained In The AD/CVD Petitions Were Inadequate Under Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

8. The United States has advanced two arguments with respect to non-confidential summaries. First, it claims that while Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement have no labelling requirements, the facts of the underlying investigation mandated labelling of the non-confidential summaries contained in the petition. According to the United States, there were no indicia contained in the petition that would allow a party to know that what it was reading was intended as a non-confidential summary. Second, the United States claims that summaries made available (that it was evidently able to identify without the labelling it now demands) represent mere conclusions that "an interested party must summarily accept rather than any summarization of the actual information." Both arguments are without merit.

9. With respect to the question of specific labelling, China agrees, consistent with the findings of the Appellate Body, that Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement are intended to serve due process interests. But the sole standard by which the sufficiency of non-confidential summaries is to be assessed is by reference to whether the summaries "permit a reasonable understanding of the substance of the information submitted in confidence." As far as the purported lack of any indicia that would allow parties to know that they were reading a non-confidential summary, the United States neglects to mention that the document to which it refers is in fact the "non-confidential version" of the confidential petition. The remainder of the U.S. argument is tantamount to encouraging parties to not read the non-confidential version of a petition out of concern they would realize that what they were reading was a non-confidential summary that would permit a reasonable understanding of the substance of the information submitted in confidence.

10. Neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary and that it can readily relate to specific confidential information that has been redacted, but no more than that. More importantly, those due process concerns are not raised here, where there is no question that parties would understand the non-confidential version of the petition as presenting non-confidential summaries in a logical and identifiable format.

11. Regarding the U.S. claim that the non-confidential summaries contained in the petition contained mere conclusions and therefore did not permit a reasonable understanding of the information submitted in confidence, the facts simply do not support this assertion. When one considers the summaries in their totality, it leads to the unavoidable conclusion that the summaries provided did permit a reasonable understanding of the information submitted in confidence, consistent with Article 6.5 of the AD Agreement and Article 12.5.1 of the SCM Agreement. The United States is simply complaining about the form in which they were conveyed. The question of whether non-confidential summaries are adequate is a fact specific inquiry. The inquiry does not begin with the presumption that respondents are universally incapable of discerning the existence of non-confidential summaries absent labelling or summarization in a particular manner. The United States is over reaching, and its arguments are belied by the very cases it cites for support. In particular, China is surprised that the United States would raise *Mexico – Olive Oil*, since it supports China's position.

II. MOFCOM'S ANTIDUMPING DETERMINATION

A. The U.S. Claim About Freezer Costs under Article 2.4

12. The United States incorrectly argues that it is inconsequential that its consultations request made no mention of fair comparison, Article 2.4, or freezer storage costs. Yet, these subjects touch upon both the factual and legal bases of the U.S. claim in its panel request. Raising these matters in the panel request where no such mention was made in a consultations request necessarily expands the dispute. To suggest otherwise would diminish the due process standard governing notice of the scope of a dispute.

13. The Article 2.4 claim is not a derivation of the U.S. consultation inquiry under Article 2.2 and Article 2.2.1.1. Specifically, the United States raised two contentions in its consultations request: First, that MOFCOM acted inconsistently with Articles 2.2 and 2.2.1.1 by *failing to calculate costs on the basis of the records kept by the U.S. producers under investigation*; Second, that MOFCOM acted inconsistently with Articles 2.2.1.1 because it *failed to properly allocate production costs*. There is no legal link to Article 2.4 and no factual link to freezer costs in these claims.

14. The U.S. excuse about discovering the real nature of the freezer cost issue at consultations fails for two important reasons. First, whether a panel request has impermissibly expanded the scope of a dispute is made by exclusive reference to the written request for consultations, not from what is discussed at consultations. Second, the notion that the United States "had a better understanding" of freezer costs as a result of consultations is belied by the record. The United States cannot plead ignorance or confusion about the facts. It is clear from MOFCOM's final AD disclosure that it addressed the freezer cost issue in the context of export price to effect a fair comparison, which is the subject of Article 2.4. U.S. claims that the disclosure was somehow "vague" are without any support and require the U.S. to quote passages from MOFCOM's final disclosure without proper context. There is no basis to relate the facts of MOFCOM's final disclosure on freezer costs to a consultation request concerning Article 2.2.1.1.

15. But should the Panel consider the merits, it should reject the U.S. Article 2.4 claim. The United States ignores the obscured manner in which Keystone reported its freezer costs, a failure that cannot be attributed to MOFCOM, but to Keystone's decision to avoid its obligation to be forthright and accurate in responding to MOFCOM's questions. For example, beyond ambiguous or misleading statements in its questionnaire, Keystone did not specify in Form 6-7 that what it was reporting were freezer storage costs. The item in question only referred to "storage." In Form 6-5, which concerned production costs and expenses, Keystone reported these freezer storage

expenses as "other expenses," and placed nearly all of those "other expenses" under domestic sales. The United States then faults MOFCOM for verifying the Keystone data, a fact that does not bear on whether the freezer cost data were fairly reported. The United States also claims that MOFCOM's further consideration of the record after verification and discovery of the freezer costs issue is nowhere to be found on the record. That is not accurate. In fact, the issue is discussed in detail in Keystone's final disclosure.

16. The freezer cost issue constituted a difference between export price and normal value affecting price comparability for which due allowance was warranted. The United States all but admits as much in its Second Written Submission. The U.S. complaint really centers on how the adjustment was to be effected in light of the circumstances. China submits that the outcome and resulting adjustment to export price must be examined in light of how MOFCOM met its obligation to request specific information on freezer costs and the nature of such costs in relation to export price, how Keystone did not meet its obligations by misleading MOFCOM in the way it reported such costs in it questionnaire responses, and the need for MOFCOM to resolve the issue with the information on the record.

B. MOFCOM's Determination With Respect To Cost Allocation Was Consistent With Article 2.2.1.1

1. U.S. characterizations of the respondents' cost allocation methodologies are erroneous

17. The United States contends that both respondents treated products like paws as joint products in the production process, on the same tier as products like chicken breasts. This approach would make sense given the substantial value the respondents derived from products like paws. But for practical purposes both respondents treated paws as by-products. The United States asserts that China has argued that the distinction between joint products and by-products becomes a dispositive consideration of whether costs are reasonable for purposes of Article 2.2.1.1. China has never made that argument. Rather, China agrees that the issue is whether the respondents' recorded costs are (1) GAAP consistent and (2) reasonably reflect costs associated with the product and sale of the product concerned. Both conditions must be met. But when contradictions exist between how a respondent characterizes its allocation methodology and the methodology actually employed, such as in the case of Tyson, these contradictions contribute to serious doubts about the reasonableness of recorded costs.

18. As illustrated by the United States, Tyson repeatedly claimed to treat paws as joint products, an infinitely reasonable characterization under the circumstances. Any cost accounting text will indicate that joint products are two or more products from a joint production process with relatively significant sales values. The prices commanded for Tyson's paws would imply such a characterization. But having identified paws as a joint product, Tyson's reported *actual* accounting practice went in the opposite direction. Tyson valued paws as waste, assigning the price for offal as the cost of paws (the "offal credit"), offsetting meat costs for boneless product with that value, which is more consistent with how standard accounting texts address by-products.

19. Contrary to suggestions by the United States, the fact that a company labels a product a "joint product" does not mean it actually treats that product like a joint product, as is evident in the case of Tyson. The inconsistencies in Tyson's statements, the reality that paws were higher value products, and Tyson's methodology that ignored paw values were legitimate red flags. They raised serious issues and justified MOFCOM's immediate suspicion and scrutiny, not in terms of whether paws were joint products or by-products, but in terms of whether Tyson's allocated costs reasonably reflected the costs associated with the production and sale of the product concerned.

20. The respondents' approach to accounting for paws and similar products informs the second mischaracterization of the United States concerning the type of allocation methodology applied by the respondents. According to the United States, the respondents applied a "relative value-based allocation." In China's view there was little that was relational or even rational about the allocation. [***] and Tyson assigned paws a waste value disconnected with the market value or its actual realized sales for that product. In summary, the relevant respondents – Tyson and Keystone -- were treating for allocation purposes products like paws contrary to their overall sales experience with these products. These facts provide extremely important context in addressing the remainder of the U.S. arguments, particularly in relation to U.S. claims that China has argued for

market-specific costs when in fact it was the U.S. respondents that pursued this approach and did so in an arbitrary manner.

21. Finally, although the United States wants to leave the impression that Pilgrim's Pride submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data later provided by Pilgrim's Pride after the disclosure on the preliminary determination were rejected as out of time, forcing MOFCOM to apply facts available under Article 6.8.

2. The United States wrongly asserts that China is arguing in favor of market-specific costs of production

22. The United States claims that China is advocating market-specific costs of production in order to facilitate a fair comparison under Article 2.4. The EU offered a similar contention at the first meeting with the Panel. These assertions turn China's argument and the facts of the underlying investigation on their head. China is not advocating export market-specific costs of production. China is arguing that value-based cost allocations cannot be driven by any specific market. In particular, value-based allocations must take into account the circumstances of all sales to properly allocate costs to all production. But that is not how the respondents allocated their costs. They allocated costs based on how they *perceived* the value of certain products in the U.S. market, ignoring the actual value of their total production sold in all markets. They viewed paws as waste, not based on their total U.S. production of paws, but based on how they *perceived* that product's value (not production) if sold in the U.S. market. This approach is not consistent with Article 2.2. The relevant "cost" under Article 2.2 and its subsections relates to "production" in the country of origin. It does not relate to perceptions or values (real or arbitrary) assigned to a "product" sold in the country of origin.

23. The United States also embraces an EU argument that the "cost of production" referred to in Article 2.2 refers to the cost of production in the country of origin. China agrees to the extent that production can only take place in the country of investigation. An authority cannot superimpose costs from production situated elsewhere. But this does not obviate the need to determine the "price to be paid for the act of producing" consistent with the meaning of "cost of production" as elaborated on by the panel in *EC – Salmon*.

24. Finally, China is not arguing that value-based cost methodologies are inherently unreasonable, as the United States contends. Rather, China's argument, as validated by the facts of this case, is that value-based allocations are vulnerable to distortion if driven by the subjective or arbitrary choices of the companies in question when choosing what values to use as the basis for their cost allocations. There is no question that these distortions were at work in the instant case and therefore the respondents' costs did not reasonably reflect the costs associated with the production and sale of the product under consideration.

3. The respondents' reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and were therefore properly rejected

25. The respondents reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and MOFCOM's concern over the respondent's value-based allocations was not novel, but in fact reflected concerns that have been cited by even U.S. authorities when considering allocation issues. To summarize some of the more unusual and problematic aspects of the Tyson and Keystone allocation methodologies and the distortions that flowed from those methodologies:

- As a practical matter, [***] despite the relatively high sales value of these products, contrary to conventional cost accounting practices regarding joint production.

- Although Tyson claimed to apply a "relative sales value" approach to allocating meat costs, at best it applied a relative price approach, disconnected from its actual sales.

- In using prices to assign meat costs, Tyson did not use prices for the product concerned. For example, and as discussed above, with respect to high value products such as paws Tyson relied on an offal price, or effectively a waste price.

- In using prices as meat costs, [***].

- Keystone stated that it [***].

- Under circumstances in which [***] the respondents' profit margins for domestically-sold breasts were [***] while paws, the principal product to China showed profit margins [***].

- Under circumstances in which [***] they proved incapable of [***]. At the same time, respondents showed [***] for exports to China. Overall profitability [***].

The United States still has no response to these facts. Instead, the United States clings to an argument that Article 2.2.1.1 will not sustain – that the presence of a GAAP-consistent methodology creates some form of presumption that reported allocated costs are reasonable.

26. The United States also declined to engage the Panel with a response to a fundamental question: is it appropriate to use a non-profitable price directly as a cost or as a basis for cost allocation? In the first instance, the concerns of circularity are immediate as the direct use of a non-profitable price for a product as the cost for that product would render the below-cost test virtually meaningless. But even in the second instance, the use of an arbitrarily low price as a basis for allocating cost for one product when using more accurate prices for other products as part of the same allocation gives rise to the same circularity problems. In the underlying investigation this is precisely what happened. The respondents resorted to irrational values that could not generate reasonable costs. Thus, their actual recorded cost allocations were unreasonable and could not be used. In the case of Tyson, China notes that Tyson employed low prices – the so-called "offal credit" -- directly as costs for products like paws, giving rise to circularity and undermining the below cost test. Where such a cost allocation ensures that the export prices of main export products are always higher than production cost, [***], antidumping rules would be circumvented and rendered ineffective.

27. China also rejects the U.S. contention that it has "muddied" the waters of this issue by "ignoring the evidence proffered by respondents" regarding their cost allocation methodologies. For example, the United States touts that the offal market price relied upon by Tyson was published by Urner Barry. But the source of the price was not necessarily material. It was the price used that really mattered. Consider Exhibit 6-I-5-2 of Tyson's original questionnaire, highlighted by the United States for purposes of its argument. In this exhibit Tyson provided an example of a production cost summary report for one plant for one week. Tyson itemized separate per unit meat costs for a variety of products under a "Meat" column. For many of the products listed, including paws, Tyson assigned [***] – the "offal credit" that Tyson and the United States state was a market price. Exhibit 6-I-5-2 underscores the following: First, Tyson valued paws on the same basis as, for example, [***]. Second, this was not a relative sales value approach to cost allocation for paws since no relative sales value for paws was used to allocate cost, contrary to arguments by the United States. In sum, whether or not "market prices" were used is not the core of the issue. U.S. arguments that this is the crux of China's argument are simply misplaced.

4. The respondents failed to meet their burden to show that their reported cost allocations reasonably reflected the cost of production and sale of the product under consideration

28. The United States contends that MOFCOM had the burden to demonstrate that the respondents' cost allocations did not reasonably reflect the cost associated with the production and sale of the product under consideration. The U.S. argument appears to be that there is a rebuttable presumption that such costs are reasonable if they are GAAP-consistent. China disagrees with this interpretation of Article 2.2.1.1. The respondent has some obligation to demonstrate that its cost allocations reasonably reflect the cost of production, and this cannot be presumed even where their records are GAAP-consistent. The language of Article 2.2.1.1 supports China's position. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must "consider" that information, and that the

burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

29. Respondents did not present MOFCOM with a rationale for accepting their allocated costs. The respondents' instead emphasized the assertion that their records were GAAP-consistent, and those explanations at times did not even reflect the respondent's own actual accounting methodologies which as discussed produced self-evident distortions in the respondents' cost data. Such a defense does not survive scrutiny under Article 2.2.1.1. Although the United States effectively wants to advance respondents' argument here, even the United States has to concede that an authority need not accept a respondent's records where they do not meet both express conditions under Article 2.2.1.1., and namely: (1) that records are GAAP-consistent; and (2) that they reasonably reflect the cost associated with product and sale of the product under consideration. Under the circumstances, the respondents did not meet their burden to establish that their reported allocated costs reasonably reflected the cost associated with production and sale of the product concerned.

5. MOFCOM's own weight-based allocation was proper within the meaning of Article 2.2.1.1 of the AD Agreement

30. The United States argues that MOFCOM's weight-based allocation was inconsistent with Article 2.2.1.1 because it did not reflect a "proper" allocation of costs. Specifically, the United States contends that a "proper" allocation captures "the costs of production in the country of origin and that can be accurately used to ensure that anti-dumping duty is not greater than dumping as to a particular product." But the general U.S. concern about ensuring that the anti-dumping duty is not greater than the dumping as to a particular product merely validates China's point about the proper allocation of costs and the purpose of the AD Agreement. The United States appears to agree with all the contextual elements that inform Article 2.2.1.1 and the proper allocation of costs that China has raised. To summarize that context, the issue is not cost of production generally or conceptually within the confines of a GAAP-consistent methodology; the issue is cost of production of a specifically defined product and the specific normal value to be derived from that cost. More specifically, the "cost of production" as enumerated in Article VI:1(b)(ii) of GATT 1994, and the AD Agreement more generally, is about ensuring reasonable comparisons, and using the cost of producing the good as the anchor to prevent distorted comparisons.

31. The United States claims that MOFCOM's weight-based methodology results in the same amount of costs being assigned to low and high value products, and that the allocation of costs to low value products would be in excess of the fair market value of such products. This observation ignores the facts of the underlying case, especially that the respondents' own distorted, market-specific allocations resulted in certain high value products (the products shipped to China) being assigned costs far below fair market value while other high value products (the products not shipped to China) were assigned costs that approached or exceeded fair market value. Although the United States acknowledges that weight-based methodologies are not always inappropriate and are not specifically tailored to find dumping, it seems to argue that weight-based methodologies are always inappropriate in joint-product scenarios involving non-homogeneous products, and claims that in this case MOFCOM applied a weight-based methodology for the specific purpose of finding dumping. China disagrees with this characterization, which ignores all of the context of the case.

32. First, the U.S. argument rests in part on the existence of joint products. But the United States provides no support for the proposition that weight-based methodologies are always inappropriate when joint products are non-homogeneous. Indeed, the very accounting texts cited by the respondents in the underlying proceeding indicated that weight-based approaches are appropriate in joint production scenarios, and this was particularly the case in the context of rate regulation proceedings such as antidumping proceedings. Second, the record does not reflect that the respondents were treating all products as joint products, which undercuts the United States proposed *per se* rule against weight-based methodologies. Third, for all the U.S. protests regarding inflated profits when a weight-based approach is applied, the reality is that it was the U.S. respondents that were generating this result with their arbitrary approaches to cost allocation. The respondents' approaches to cost allocation in fact functioned as if they were tailored to avoid a finding of dumping. Tyson's "relative sales value" approach is inconsistent with every fundamental

rule proposed for such a methodology as presented in the accounting text presented at Exhibit USA-72.

33. MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions for the respondents' total production in the market rather than respondents' distorting cost methodologies. MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to either the U.S. or Chinese markets. In other words, MOFCOM applied a market-neutral approach to costs. The weight-based approach was reasonable because: (1) it avoided the distortions that had made the respondents' value-based cost allocations unreasonable as discussed above; (2) it reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts; and (3) it was specifically listed as one of the reasonable alternatives in the materials cited by respondents, particularly in the context of a price regulation proceeding; and (4) it was also proposed by the respondents in their alternatives.

34. MOFCOM's methodology was to take total reported costs for the production of subject merchandise and allocate those costs over total reported weight of subject merchandise production. This methodology was implemented using the data reported in Table 6-3 provided by the various respondents, where such data was reported. Thus, contrary to U.S. arguments, there could be no over-allocation of costs to subject merchandise.

35. Finally, the United States argues that including product-specific processing costs within the weight-averaged allocation of costs was improper. But the circumstances of the instant case warranted that approach. But both Keystone and Tyson's responses and data suffered from contradictions or discrepancies that could not be reconciled or relied upon. Thus, any processing costs had to be weight-averaged with other costs.

6. MOFCOM met its obligation under Article 2.2.1.1 to consider all available evidence on the proper allocation of costs

36. The obligation imposed on authorities under Article 2.2.1.1 includes a requirement to "consider all available evidence on the proper allocation of costs . . . ." The Appellate Body in *U.S. – Softwood Lumber* has elaborated on the term "consider" as used in Article 2.2.1.1, explaining that "consideration" would not be satisfied by simply "receiving evidence" or merely "taking notice of evidence." Rather, evidence of "consideration" must demonstrate "some degree of deliberation on the part of the investigating authority." At the same time, the Appellate Body found that "the nature of this deliberative process will depend on the facts of a particular case before the investigating authority."

37. The record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue beyond simply receiving or taking notice of evidence. The fact that this evidence is found across multiple documents produced as part of the investigation does not diminish the overall probative value of the documents as a whole. As the panel in *Egypt – Steel Rebar* stated, the evidence needed to rebut a *prima facie* case can be found "in the disclosure documents, in the published determination, or in other internal documents." As such, China's evidence adequately rebuts the U.S. claim.

38. Moreover, the Appellate Body in *US – Lumber V* indicated that the nature of an authority's "deliberative process will depend on the facts of a particular case before the investigating authority." In this case there were very substantial distortions associated with the respondents' allocation methodologies as further revealed in the costs themselves. To the extent such methodologies led to the costing of a product in a manner disconnected from market reality, as was plainly evident in the case here, the need for a particular form of consideration must give way to the fundamental and obvious nature of the problem. Under such circumstances, if there is basic evidence of consideration, that should be sufficient. This approach is consistent with how panels have viewed an authority's obligation under Article 2.2 when dealing with extensive cost data, such as reflected by the panel report in in *EC – Salmon*. Based on the multiple instances of consideration reflected on the record, MOFCOM met its obligation to "consider all available evidence on the proper allocation of costs" as required by Article 2.2.1.1.

39. Concerning U.S. claims that MOFCOM did not consider all evidence on alternative methodologies, MOFCOM in fact addressed arguments raised by both Keystone and Tyson

concerning MOFCOM's weight-based allocation methodology. As MOFCOM noted, these arguments did not sufficiently justify the reason why different parts of the subject products had different costs. Indeed, what these arguments focused on were the "reasonableness" of value-based allocations in the context of GAAP-consistency. To the extent the respondents addressed weight-based allocations, both respondents actually provided a weight-based alternative. With the respondents also suggesting such an approach, and with their own accounting literature indicating that weight-based methodologies were proper in certain contexts, MOFCOM can not be faulted for actually applying a weight-based methodology. If the authority is actually applying a methodology also proposed by the respondents, it is difficult to contend that the authority did not consider this evidence. The circumstances of the case warranted a weight-based allocation of these costs.

40. Finally, the United States continues to misstate the obligation under Article 2.2.1.1, insisting MOFCOM was required to "explain" its decision to reject respondents' reported allocated costs and apply an alternative allocation in its determination. Contrary to the U.S. argument, there is no positive obligation under Article 2.2.1.1 to "explain." Rather, as noted, MOFCOM was required to "consider" all available evidence on the proper allocation of costs. China has demonstrated that the record reflects such consideration and the United States has not established a *prima facie* case where it focuses on "explanation." China also notes that in its panel request the United States raised a claim under Article 12.2 in relation to the cost allocation issue. Throughout this entire proceeding, the United Stated has not prosecuted this claim in any manner. There is not a single articulation of a *prima facie* case under Article 12.2 with respect to the cost allocation issue found in any submission made by the United States, or during meetings with the panel. Indeed, the United States has never even mentioned Article 12.2 in relation to the cost allocation issue. Thus, China believes that this U.S. claim must be set aside, and the Panel should carefully consider the U.S. arguments concerning "explanation" and how they relate, if at all, to the claims actually prosecuted by the United States in this proceeding, and the distinctions that exist with the substantive obligation under Article 2.2.1.1 and the panel's standard of review under Article 17.6.

7. U.S. *Post Hoc* Rationale Arguments

41. Looking further at the issue of "explanation" and "consideration," the United States also claims that China is now engaging in *post hoc* rationales to support MOFCOM's decision on the question of cost allocation that should be ignored by the Panel, consistent with Article 17.6 of the AD Agreement. The United States has in fact not fairly articulated the parameters of a *post hoc* claim. China submits that its arguments presented to the Panel are not *post hoc*, but are merely elaborations of the record evidence embodied in MOFCOM's rationale for declining to use respondents' reported allocated costs, and namely that respondents' reported allocated costs did not reasonably reflect the cost of production.

42. First, this is not an issue where MOFCOM failed to consider the question of cost allocation altogether and is only now trying to offer rationales for MOFCOM's decision. Thus, it is very different from cases, such as *Korea – Dairy Safeguards*, where the record did not reflect any examination of specific injury factors. Second, the Panel must distinguish among the decision at issue, the rationale, and the supporting record. The United States has inappropriately conflated the decision with the rationale in this case and therefore approaches the issue of post hoc argument at the wrong level. The decision under Article 2.2.1.1 concerns whether or not to utilize respondents' reported allocated costs or some alternative cost allocation for purposes of constructed normal value. The relevant rationales relate to whether respondents' cost allocations were GAAP-consistent, whether they reasonably reflect the cost of production and sale, and whether the applied allocation was proper. The supporting record for the rationales is drawn from the investigation record as a whole. This is consistent with how panels have considered the question of *post hoc* arguments in prior cases, including cases cited by the United States in advancing its *post hoc* arguments, including in *Guatemala – Cement II* , *Argentina – Ceramic Tiles*, and *Mexico – Pipes and Tubes*. Importantly, once a panel has identified the stated decision and rationale in the record, the next step is to engage in "a detailed examination of the record evidence" to see if the authority's rationale was objective and unbiased.

43. This is precisely how the Panel must examine the U.S. *post hoc* argument claims in this proceeding. First, the Panel must identify the decision at issue. To that end, the United States does not dispute that MOFCOM plainly set forth its decision declining to use respondents' reported allocated costs and apply an alternative methodology. Second the Panel must examine the record to see if MOFCOM set forth a rationale for this decision. Likewise, there is no dispute that MOFCOM

set forth in both its preliminary and final disclosures that the rationale for not using respondents' reported allocated costs was that the reported allocated costs did not reasonably reflect the cost of production of the product concerned. Finally, the Panel must examine the record facts as established by MOFCOM to determine if MOFCOM's rationale was unbiased and objective. As already discussed, the record facts objectively reveal that respondents' reported costs did not reasonably reflect the cost of production, and the alternative selected by MOFCOM was proper. Under the circumstances, there is no basis for the U.S. *post hoc* claims.

44. Finally, China notes that the U.S. argument would require the Panel to go well beyond its authority under Article 17.6(i) of the AD Agreement. That provision makes clear that as long as the facts have been properly established, and evaluated in an unbiased and objective manner, that evaluation by the authority "shall not be overturned." Article 17.6(i) does not otherwise specify what is "proper", "unbiased" and "objective", neither does Article 2.2.1.1 require the specific extent of disclosure and explanation of the facts in the final determination, only that the authority shall consider all evidence. Concerning whether the facts established by MOFCOM were proper and whether the evaluation was unbiased and objective, China submits that despite the record evidence and elaborations thereof submitted by China during the course of the dispute, the United States has offered nothing in response to justify respondents' reported product specific costs, particularly the costs reported for paws, a failure that China believes underscores the appropriateness of MOFCOM's finding that the respondents' reported costs were not reasonable.

C. Antidumping "All Others" Rate

45. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation. MOFCOM also gave adequate disclosure of the margin. With respect to unknown and non-participating parties China believes the announcement of the margin provides the "essential facts" to such parties and puts them on notice to begin evaluating other options under Chinese law if they wish to export to China at some time in the future.

46. The United States contends that it is not necessary for the Panel to reach any conclusions regarding what information MOFCOM should have included in the notice of initiation or what would be a sufficient manner of notice such that the investigating authority can assume that producers have received notice. According to the United States, because MOFCOM did not identify other exporters and producers, or provide them with necessary requests for information, it could not find that they refused to cooperate with the investigation. China disagrees. These inquiries are germane and necessary for determining whether China complied with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

47. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement also apply to unknown producers. These provisions apply whenever a party "otherwise does not provide." This more general language "otherwise does not provide" extends to both known and unknown parties. Given this more open-ended language, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement govern those situations involving unknown exporters. The question of whether MOFCOM specifically identified these unknown exporters and producers is not relevant to the issue of whether such unknown exporters received sufficient notice and whether they complied with requests for information.

48. In terms of sufficient notice of necessary information and the consequences of not appearing, MOFCOM's notice of initiation stated MOFCOM would apply facts available to companies that failed to register within the specific time period. The notice of initiation also made clear that the "Registration Form for Countervailing Investigation" could be downloaded from the MOFCOM website and provided the specific web address. China believes this provided sufficient notice of the information requested and of the consequences of not appearing in the investigation.

49. In terms of what constitutes a sufficient manner of notice such that an authority can assume that unknown producers have received notice and can apply Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement, China's approach has been to take three specific actions, including placing the notice in the public reading room at MOFCOM, publishing the notice on the internet, and providing a copy of the notice to the government authorities of the unknown producers. China believes that this constitutes a sufficient manner of notice to apply facts available

in both the AD and CVD cases was consistent with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

50. As far as MOFCOM's disclosure obligations under Article 12.2, 12.2.1, and 12.2.2 of the AD Agreement, the preliminary determination noted that MOFCOM had relied on the facts available. The final determination specified that the "all others" rate was based on the normal value and export price of a model from the sampled companies to determine their dumping margins. This referred to the data of the three companies, including Keystone, Tyson, and Pilgrim's.

III. COUNTERVAILING DUTY ISSUES

A. Subsidy Allocation

51. On the subsidy allocation issue, MOFCOM's approach and calculation was consistent with Article 19.4 and Article VI:3 of the GATT 1994. The United States continues to engage in distraction by attacking MOFCOM's holistic inquiry to obtain the relevant data on feed subsidies to ensure the subsidy was properly calculated. Indeed, MOFCOM presented several questions on purchases, production cost, and unit consumption in the initial questionnaire. Had complete and accurate responses been provided, MOFCOM would have been able to properly allocate the benefit received from the upstream subsidy programs to the subject products. There would have been no need for supplemental questionnaires. Thus, China does not agree with the United States that MOFCOM's initial questionnaire was "irrelevant." The United States is merely trying to obscure the fact that there were serious deficiencies in the responses provided. The respondents in many cases provided no response to the questions presented, and where they did respond, it was not responsive to the question. The respondents offered no evidence that they would adequately respond, if at all, to the questions presented. Rather than holding the respondents to complete and accurate responses to those questions, and the prospect of a facts available finding, MOFCOM elected to offer the respondents an alternative, simplified approach.

52. In the second supplemental questionnaire, MOFCOM focused on a few basic questions, the responses to which would form the basis of its calculation. But China must again emphasize that the issuance of the second supplemental questionnaire was the result of the serious deficiencies found in the responses to the initial questionnaire, and the fact that the data used in the final subsidy rate calculation came from responses to the second supplemental questionnaire did not render the initial questionnaire irrelevant.

53. In terms of the simplicity of the second supplemental questionnaire. For question I.4 of the Tyson second supplemental questionnaire and question I.6 of the Pilgrim's second supplemental questionnaire, the information sought concerned total consumption of feed in the production of broiler products, i.e., subject products, during the period of investigation: "Please provide the specific names, main contents, quantity and value of the various feeds grains (such as corns, soybeans etc) consumed in the production of the broiler products during the POI by your company." Despite the clarity of these questions, the United States attempts to argue that the meaning of "broiler products" was unclear and became the origin of the alleged misallocation, but it is obvious that the reference was to subject merchandise. This is plainly stated in the initiation notice. The respondents provided responses to these questions, which formed the basis for MOFCOM's calculation. There is no room for ambiguity in the question presented, and by all accounts the respondents understood its meaning.

54. The U.S. claim that the data provided in response to this question related to the total purchase of corn and soybeans ignores all of the facts cited by China. In response to this question, Tyson did not state it was providing data on total purchases of corn and soybeans. Nor would Tyson be expected to, given the unambiguous nature of the question. Tyson responded as follows:

> *The feeds grains consumed by Tyson during the POI in the production of the broiler products* were only corns and soybeans. *Please see* the relevant data provided in Annex CS2-I-3 for the quantity and value of these two raw materials.

55. Thus, Tyson indicated in response to the question that it was reporting feed consumed in the production of broiler products and directed MOFCOM to data – "the relevant data" -- in Annex CS2-I-3, provided as Exhibit CHN-37. The United States points to data contained in CS2-I-3

reporting quantity of "live broiler chicken," but there is nothing in the exhibit that indicates that what was being reported was all live broiler chicken and not live broiler chicken intended for the production of subject merchandise. Moreover, the respondents' failure to respond to the full set of MOFCOM's questions regarding production cost in the initial questionnaire prevented MOFCOM from cross-checking the information. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise. The United States has still not addressed why Tyson never sought to correct Annex CS2-I-3 if it was ever in error. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise.

56. With respect to Pilgrim's, the company's response to same unambiguous question on consumption in the production of subject merchandise was simply as follows: "Please refer to Annex II-SI-2: Feed Formulation" The U.S. response does not address the fact that Annex II-SI-2 expressly states that "over time, such as the POI, the purchases are reflective of the consumption," and purchase records are therefore "reflective of the actual consumption." Thus, Pilgrim's made clear that it understood it was responding to a question on consumption and that it was affirmatively stating that purchases and consumption during the POI were equal. Pilgrim's expressed no confusion, contrary to the U.S. argument, but instead clarified why its purchase data and consumption data were the same. The United States fails to address other issues associated with Annex II-SI-2, including those related to feed consumed for pullets and breeders and external feed sales identified by China.

57. In summary, China's position is that MOFCOM's subsidy margin calculation properly relied upon data provided by the respondents concerning the volume of feed purchased and consumed in the production of subject merchandise and the total weight of subject merchandise sales. First, there is no question that this calculation aligns the proper numerator and denominator for purposes of deriving a subsidy margin specific to subject merchandise. Thus, MOFCOM's choice of methodology is correct, and its choice of a *per unit* methodology reflects the text of Article 19.4, which addresses the proper level of countervailing duties relative to the "subsidization per unit of the subsidized and exported product" found to exist.

58. Second, the respondents provided MOFCOM with the information necessary to perform the calculation, and in particular data on consumption in the production of subject merchandise. Although the United States contends that MOFCOM never requested information specific to subject merchandise, as previously noted, that is not an accurate statement. There is no question that the second supplemental questionnaire specifically asked for consumption of feed in the production of "broiler products" – that is, subject merchandise. To any party reading the notice of initiation and the questionnaire, the meaning of "broiler products" would be unmistakable. U.S. claims of confusion over this term simply do not work. And it was on the basis of the response to this question that MOFCOM calculated its subsidy margin, as MOFCOM made clear in the final disclosure.

59. Third, although MOFCOM was well aware of respondents' arguments on over-allocation, the arguments made by the respondents focused on the wrong issue or were otherwise supported by erroneous information. In one fashion or another, the basis of each argument was that MOFCOM affirmatively used feed purchases in excess of that applicable to subject merchandise in the subsidy calculation. This was not the case and did not reflect MOFCOM's methodology, which focused on the volume of feed purchased and consumed in the production of subject merchandise. Tyson claimed that MOFCOM used total purchases, and therefore sought an increased in the denominator, but it ignored the fact that it reported the same figure for consumption in the production of broiler products and did not otherwise substantiate its claim in light of its response on subject merchandise feed consumption. Pilgrim's claimed that certain deductions to its reported purchases used in the production of broiler products were warranted, but failed to substantiate these deductions. It sought deductions for breeders and pullets without establishing why feed for such animals was not part of the production process. It sought deductions for feed sales when it previously told MOFCOM in its initial questionnaire that it had no feed sales. Finally it sought to reduce the calculated benefit by applying a ratio of [***] which it said reflected output of subject product, but offered no substantiated evidence for such a reduction, only the estimate for output, which consistently pegged output at an unwavering [***] in each year between 2006 and 2008 and into the period of investigation. The estimate itself was not even derived from evidence on the record of the CVD proceeding.

60. Fourth, having determined an appropriate calculation methodology, and after giving ample opportunity for the respondents to provide requested data, MOFCOM was entitled to apply that methodology to the data reported by the respondents as feed consumed in the production of subject merchandise during the period of investigation. The United States, however, contends that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. But what the United States is really arguing is that MOFCOM was required to alter its calculation methodology – either by increasing the denominator or reducing the numerator on a basis that did not reflect MOFCOM's methodology and/or the data MOFCOM had expressly requested from the respondents.

61. What the United States never addresses is that if the respondents understood that there was a mistake in their reported data, they should have provided corrected data, not alternative approaches to the claimed problem. Yet, the record of the investigation reflects no attempt by either Tyson or Pilgrim's to provide corrected data, if such corrections were ever necessary. Instead, both respondents advanced either different methodologies without a sufficient basis, or conflicting and unsubstantiated data. Moreover, they made no claim that they could not provide the data in the form requested by MOFCOM. Instead, they requested that MOFCOM change its calculation methodology in a variety of ways. It was not MOFCOM's obligation under the facts presented to yield to every demand of the respondents as to how it should perform its calculation.

62. China adds that one of the purposes of the verification was to verify the elements reported that were essential in calculating the respondents' subsidy rate. In this regard, the consumption of corn and soybean for the production of the subject product was one of the essential elements. Tyson claimed that it did not maintain the requisite consumption records, and that purchases could be used as basis to consider consumption. Pilgrim's claimed in the exhibit provided in response to question I.6 of the second supplemental that purchases equalled consumption. For these reasons, MOFCOM had to verify the consumption data through the basis of purchases. The verification disclosures contained a section titled "*Verification of the Completeness of the Company's Sales and the Data on Purchase of Corn and Soybean Meal*". But this does not discount the representations of the respondents in terms of consumption for the production of subject merchandise.

63. China believes the data provided by the respondents in the questionnaires were correct in terms of reporting feed purchased and consumed in the production of subject merchandise. If not, the record presents other serious issues related to the accuracy of the respondents' submissions. For example, at verification Tyson reported a consumption value that was roughly 10 percent in excess of what it reported as the value of consumption in its questionnaire responses. This may have in fact reflected total consumption, reinforcing the idea that what Tyson reported in its response was limited to subject merchandise consumption, consistent with what the question requested. Either MOFCOM was correct in this understanding, or the data revealed that Tyson's responses suffered from serious inaccuracies and could not be trusted – including its statement that it did not keep consumption records (proven wrong at verification) and the data provided in response to Question I.4 could not be matched to the records found at verification. MOFCOM chose to accept Tyson's responses at face value. These and other data discrepancies and shortcomings with respect to Pilgrim's may shed some light, for example, on why the respondents declined to provide corrected responses that were responsive to the questions posed. They also reflect that MOFCOM was conservative and reasonable in its approach.

B. CVD "All Others" Rate

64. With respect to the CVD "All Others" rate, China reiterates the points it previously made with respect to the AD "All Others" rate. China has explained the steps taken by MOFCOM at initiation to notify producers and exporters of initiation and the consequences of failing to respond to MOFCOM's notice, which it believes was adequate under the circumstances. It has also described how it approached the examination of producers and the treatment of known and unknown parties, as well as the nature and adequacy of its disclosure.

65. In terms of whether the "all others" rate included any upstream feed program found not found countervailable by MOFCOM in the investigation, the Final Disclosure to the U.S. Government does indicate that the subsidy programme used for determining the "all others" rate was a countervailable feed programme. The reference to "upstream subsidy" in the Final Disclosure is an explicit reference to the feed subsidy. Indeed, their was no single "countervailable feed program," but multiple "upstream subsidy programs" for feed ingredients, the benefits from

which were found to pass through to the sampled respondents. The full analysis of these programs and how benefit passed through to the respondents is contained in a section entitled "Upstream Subsidy Programs," a term used consistently throughout the investigation in the multiple disclosures to refer to the feed subsidy programs.

66. MOFCOM calculated the *ad valorem* "all others" rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This approach resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). Because the rate was derived from the benefits received by these companies, it could only include countervailable feed programs.

67. The United States claims that MOFCOM, in calculating the subsidy rate for the "all others" producers, treated them as if they could receive a benefit that was actually greater than the amount that they could receive. This assertion is incorrect. If the competitive benefit exceeded the calculated pass-through amount from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). The record reflects, that there are circumstances under which the calculated competitive benefit amount could be lower than the pass through amount, as in the case of Pilgrim's. Thus, applying facts available, MOFCOM could rely on an actual calculated competitive benefit amount from the investigation.

IV. INJURY ISSUES

68. China makes three overarching points about the U.S. injury claims. First, the United States has not provided sufficient factual support for its claims to make a *prima facie* case. Sometimes there is no evidence at all. Sometimes there is only misinterpreted evidence. China has shown how the U.S. assumptions are inconsistent with both the evidence on the record before MOFCOM at the time, and with other available evidence. Thus, even assuming the United States may have met its initial *prima facie* burden as the complaining party, China has fully rebutted that *prima facie* case during these proceedings.

69. Second, the United States repeatedly tries to use Articles 3.1 and 15.1 to create specific obligations with regard to the various issues addressed by the other provisions of Articles 3 and 15 in a general way but without any specific obligations. These arguments, however, fail as going well beyond the text. If the substantive provision cited by the United States does not impose a specific requirement or specific methodology on authorities that must be met in every case, then Articles 3.1 and 15.1 cannot be interpreted to impose such specific methodologies that apply in every case. These absolutist positions must be rejected, because the texts of Articles 3 and 15 do not support them. If the Panel finds that the United States has not met its burden of providing sufficient facts to support its claims in this specific case, then those claims must fail.

70. Third, contrary to repeated U.S. claims China is not advancing new rationales. The rationales are present in determinations and the record. China is just elaborating on those rationales on the basis of facts on the record that support those rationales. This is not *post hoc* argument. Moreover, it is not *post hoc* for China to provide a factual rebuttal to the premises or assumptions behind the U.S. claims before the Panel. If those claims lack any factual basis in the record, then the United States has failed to meet its *prima facie* case.

A. Defining the Domestic Industry

71. China has shown that MOFCOM reasonably defined the domestic industry, alerting all known domestic producers, and successfully obtaining information from seventeen domestic producers that represented a "major proportion" of the domestic industry. No questionnaire responses received were excluded from the analysis. The only known producers left out were those that knew about the pending case, but declined to respond to the domestic producer questionnaire.

72. At the outset of its investigation, MOFCOM considered the domestic industry as all domestic producers. MOFCOM stressed that "all interested parties" included all domestic producers, and that "every domestic producing company" had the right to submit questionnaire responses. At the outset, MOFCOM was open to receiving responses from any and all domestic producers. As MOFCOM stressed in the Determination, the authority "did not limit the scope of the domestic industry."

73. But eventually MOFCOM realized that it had received only 17 responses, and was unlikely to receive any more, and so MOFCOM then considered the domestic industry as those responding producers that represented more than half and thus the "major proportion" of the domestic industry as a whole. MOFCOM expressly noted the 17 responding domestic "accounted for a major part of the total production quantity of the domestic like product."

74. The United States has not identified any known producers who were not given a full and equal opportunity to participate, and whose responses were not considered. This is not a case where the authority knew of other domestic producers that were ignored. The known producers were those larger white feather broiler producers that had organized themselves into an association group. They all knew about the investigation and most of them responded. Thus, this case is fundamentally different from other situations, where the authority knew of other producers and even had responses from other producers, but excluded those responses from the investigation.

75. MOFCOM did not erect any obstacles, and rather took extra steps to publish the specifics of the investigation on its website. The United States confuses the important distinction between what MOFCOM did and the resulting responses by the domestic producers. If MOFCOM had an open process and uses all the responses received, MOFCOM cannot be faulted, particularly when MOFCOM in fact obtained responses representing more than half of estimated total domestic production. The MOFCOM notice applied to all "interested parties" not just to "respondents." Chinese domestic producers knew that they were "interested parties." The U.S. argument boils down to the claim MOFCOM should have done more. But in the absence of other known producers who could be notified about the investigation, it is not at all clear what the United States expects MOFCOM to have done.

76. Since there were no obstacles, the United States tries to create a theory of distorting self-selection that has no factual basis. The U.S. theory that those domestic producers with stronger financial performance would not respond is just wrong. Of the five CAAA members that did not respond, three of them were Tyson affiliated joint ventures. If their participation in the investigation would have helped the respondents because they were more profitable, the more logical inference is that they would have participated to benefit their joint venture partners. Of the fifteen responding CAAA members, several of them were in fact profitable in various years of the period of investigation. Of the seventeen responding domestic producers, eight companies were profitable in 2007, one company was profitable in 2008 and a different company was profitable in the first half of 2009. Under the U.S. theory of self-selection, these profitable companies should not have responded; but they did respond.

77. The United States also continues to claim MOFCOM set up "obstacles to make it infeasible" to respond, even though two companies not members of CAAA were able to respond. The U.S. speculation that these companies received questionnaires from petitioners has no factual basis. The information was all available on the MOFCOM website, and it is more plausible that these companies obtained the questionnaire from the website. The point is not the size of these two companies, but rather what their participation confirms about the process. The process was not limited to petitioners and companies that were not petitioners did in fact participate. Their responses were used, and were not excluded.

78. The United States also ignores the highly fragmented nature of the Chinese white feather broiler industry, and misstates the nature of the information available. The United States attacks the Ministry of Agriculture statistical information, but presents an unpersuasive argument that ignores the reality that much of the chicken production in China occurs on small family farms. It does not "defy logic" that there are a lot of small family farmers in China who are not specialized producers of poultry. Much of the national production has been consolidated into a few very large domestic producers. In addition, the fragmentation applies to both segments of the Chinese chicken industry. The CAAA members were the largest producers of white feather broiler chickens, and accounted for about half of total domestic production of that product. But it would still take tens of thousands – perhaps millions -- of other producers to account for the other half of the white feather production.

17. Although MOFCOM did not explicitly discuss the fragmentation of the domestic industry in its Final Determination, MOFCOM's consideration of the fragmented nature of the industry can be found in record evidence. The Ministry of Agriculture was part of the investigation team, which means that Ministry of Agriculture statistics and the knowledge of those statistics was part of the overall deliberations by the team. Moreover, in the Exhibit 6 of the Petition, the consultant who estimated the overall size of the domestic industry specifically noted the evolution from 12 enterprises at the great-grandparent stage leading to thousands of individual enterprises at the parent generation. Going an additional generation (from parents to the current generation of producers) would turn thousands into millions. Even if one simply took note of the specific statement that there were "thousands of parent production enterprises" that fact alone establishes the highly fragmented nature of the domestic white feather broiler industry in China. The fragmentation of the domestic industry was thus part of the known factual background against which MOFCOM considered the domestic industry and framed the investigation.

79. Contrary to the U.S. argument, there was no data or contact information for specific domestic producers. Rather, the tracking being done by the consultant and by the Ministry of Agriculture was done based on statistical models, not based on individual company responses or tracking. The United States tries to imply that ten years ago a few breeder pairs arrived and those specific companies have been tracked ever since, but this argument misstates reality. The white feather chicken industry in China started about thirty years ago, and the tracking has been by statistical models of growth in the aggregate, not the individual domestic producers. Moreover, the forms received by the Ministry of Agriculture do not have any company specific data. Contrary to the U.S. argument, there was no list of even the 147 largest domestic producers. White feather broiler chicken production by these other companies not part of the CAAA group was in fact very small relative to the total industry production. The United States has not provided any evidence of known companies who did not know about the case or whose response was excluded from consideration. Bald speculation that MOFCOM could have done more does not sufficient.

27. At most, the United States has identified a single additional company – Fujian Summer -- that could have been contacted. Fujian Summer was not a member of CAAA either before or at the time of filing of the petition. Yet even though Fujian Summer was not explicitly contacted by MOFCOM, China has provided to the Panel definitive evidence that Fujian Summer was aware of the case, but nevertheless did not register and did not submit a questionnaire response. Under these facts, MOFCOM not providing a questionnaire to a company that had actual notice of the pending investigation and declined to participate does not violate any WTO obligations. The United States concedes there is no WTO obligation to compel unwilling producers to respond. Fujian Summer was such an unwilling producer.

1. Articles 3.1 and 15.1

80. The United States fundamentally misinterprets Articles 3.1 and 15.1 and the Appellate Body decision in *EC-Fasteners*. MOFCOM did not "define" the industry as those willing to participate in a sample. Rather, MOFCOM initially considered the industry as all producers, and then proceeded with a reasonable and neutral effort to collect responses from as many as possible. The U.S. claim that MOFCOM "effectively limited its definition" glosses over a key factual distinction, because MOFCOM did not limit its definition in any way. The United States confuses what MOFCOM did with what responses naturally occurred. MOFCOM also did not exclude any responses. In *EC-Fasteners*, the Appellate Body was particularly troubled that the EC had contact information for 318 producers, and partial responses from them, but then ignored most of those known

companies. These facts could not be more different from the current case, where the United States keeps insisting MOFCOM should done more to contact unknown producers.

81. The United States concedes the Agreements provide no specific steps that MOFCOM had to take, and essentially argues that MOFCOM had some obligation to somehow contact unknown producers, even though MOFCOM already had received information constituting a "major proportion" of the industry. Nothing in the text imposes such an obligation. MOFCOM had no obligation to do the impossible or impractical, and needed only to conduct an "objective examination," which MOFCOM did in this case.

82. MOFCOM in fact took actions largely consistent with each of the actions suggested by Mexico, to the extent they were relevant in this particular case. MOFCOM in fact worked with the Ministry of Agriculture to ensure there was no other available information on the identity of other domestic producers. MOFCOM was working with the national level officers at the Ministry of Agriculture. MOFCOM checked with the Ministry of Agriculture and confirmed that there are no lists of white feather broiler producers at either the national level or the provincial level; that is not the way the Ministry of Agriculture tracks its statistical information. MOFCOM also worked with the CAAA, the producers association responsible for white feather broiler chicken producers in China. MOFCOM knew that this association would include all or at least most of the major producers in China, and would thus allow MOFCOM to reach a broad and representative group of domestic producers. CAAA is the only such association, and there are no other producer associations of the subject merchandise. MOFCOM is not aware of any programmes that provide such subsidy benefits to Chinese domestic producers of broiler chickens, as opposed to general support for all agriculture generally.

2. Articles 4.1 and 16.1

83. MOFCOM also fully complied with the obligations of Articles 4.1 and 16.1 by defining the domestic industry as those producers representing the "major proportion" of the Chinese domestic industry.

84. The United States argues for a preference first to consider the industry as a "whole," but neither the text nor the context reflects such preference over defining the industry as the "major proportion." Rather the text presents two alternatives separated by "or" without any preferences. Particularly when contrasted with other provisions that set forth a very explicitly preference for one approach over another, the texts of Articles 4.1 and 16.1 do not provide any preferences. The exceptions set forth in Articles 4.1 and 16.1 apply to either method for defining the domestic industry and do not indicate any preference.

85. The United States also argues Articles 4.1 and 16.1 impose a positive obligation to make "active efforts" that does not exist. The text creates no such obligation. Rather, the text explicitly references only certain other obligations in Articles 3 and 15, strongly suggesting that the other obligations not referenced should not be read into Articles 4.1 and 16.1. The United States draws a false analogy to *U.S. - Wheat Gluten* that addressed a specific issue relating to safeguards. The United States ignores the more relevant guidance of *Mexico – Beef and Rice* that rejected U.S. efforts to read the word "investigation" to create obligations regarding things an authority should have known, but did not actually know.

86. Any such violation would have to depend on the facts of a particular situation. There is no *per se* rule that if a complaining party identifies some possible action that could have been taken, the defending party has violated its WTO obligations because something that could have been done was not done. In China's view, one must consider both the nature of the proposed action, and the likelihood it would have generated some material information.

87. An authority need not take every possible action, since authorities have discretion as to how they shape their investigations. In this investigation, MOFCOM faced a highly fragmented industry. There was no "master list" of domestic producers. China repeated confirmed that no such list existed and the United States provided no evidence of such a list. Under such circumstances, once MOFCOM had worked with the industry association to reach out to known producers, and once MOFCOM had collected questionnaire response representing a "major proportion" of the domestic industry, the lack of action to attempt to find additional domestic producers is not WTO inconsistent.

88. In addition, since some actions are unlikely to yield any material information, authorities must have discretion to determine how best to allocate the finite resources available for each investigation. In this particular case, with MOFCOM having received responses from all the largest producers and having received responses from enough domestic producers to constitute a major proportion of the domestic industry, additional responses are likely to have been from smaller producers and are therefore unlikely to have materially affected the analysis. These circumstances provide yet another reason that the lack of action attempting to find other producers – assuming they could have been found at all – is not inconsistent with WTO obligations.

89. Moreover, even if there were some textual preference, it is not clear what that preference would establish for purposes of this particular case. MOFCOM did not choose a "major proportion" over the industry as whole, nor did MOFCOM ignore any available data. MOFCOM used all the data it had, and those responses collectively constituted a "major proportion." Once it properly found the responding producers represented a "major proportion," MOFCOM complied with the obligations of Articles 4.1 and 16.1.

B. Price Effects

90. China has also shown that MOFCOM reasonably determined the existence of adverse price effects in this case, based on both price undercutting and price suppression. The United States and China have fundamental disagreements over both the facts of this particular case, and the nature of the WTO obligations regarding price effects. The United States hopes its aggressive legal interpretation that imposes specific methodologies will somehow trump the factual deficiencies of its claim, for otherwise the U.S. claim fails.

1. Price Undercutting

91. MOFCOM properly found price undercutting, comparing average prices for the broiler products as a whole and comparing those prices at the same level of trade – landed, duty-paid prices in China. MOFCOM considered the products as a whole because all broiler chicken parts were part of the same like product, and all types of broiler chicken parts competed with each other. U.S. exports of chicken paws competed directly with Chinese produced chicken paws, but they also competed with other Chinese produced broiler chicken parts. MOFCOM specifically found that prices of imported and domestically sold chicken parts were "comparable." MOFCOM compared domestic ex factory prices with imported CIF prices because that comparison was at the same level of trade.

(a) Product Mix

92. The U.S. claim about price effects rests in part on flawed assumptions about product mix, assuming that chicken breast prices were higher than other chicken part prices and that chicken paws were low value products. The United States assumes without any evidence that the prices of certain parts -- particularly chicken breasts not exported to China by the United States, but prevalent in the Chinese domestic market -- were higher and distorted the comparison with the allegedly "low value" parts exported by the United States. But these U.S. assumptions are totally at odds with all of the available information and evidence to the contrary.

93. China presented to the Panel extensive record evidence on this point. (1) questionnaire data submitted by the USAPEEC that contradicted U.S. arguments about the relative prices of different types of broiler chicken parts; (2) officials Chinese import statistics showing the relative prices of different products; and (3) numerous invoices for actual transactions by various domestic producers. All of this record evidence confirmed and provided mutually reinforcing evidence for a proposition that would be common sense for anyone in China – that chicken paws are more expensive than chicken breast. Thus contrary to the unsupported U.S. assertion in this Panel proceeding, the record evidence on the relative prices of different chicken parts is that chicken breast prices in China were lower than other products, so including these prices in the average domestic price significantly understated the actual margins of price undercutting.

94. The United States tries to dismiss China's rebuttal, by calling the rebuttal *post hoc*, but these arguments misunderstand China's point. MOFCOM specifically rejected the respondents' argument that import prices were low by finding that the import prices were comparable. Moreover, MOFCOM's methodology was neutral on its face; there is nothing inherently wrong in

using overall average prices. The United States has the burden of showing not just that there was price variation, but that there were some adverse distortions from that price variation. The United States does not win its claim simply by showing that the prices of different products varied. The prices must vary by enough and must be adverse to the respondents' interests here. The United States recognizes this burden, and that is why the United States presented its "chicken breast prices are higher" argument in its First Written Submission. China's arguments have been to rebut the U.S. argument that there was any adverse distortion here. There is nothing *post hoc* about rebutting the factual basis presented by the United States as the basis of its claim.

95. The United States asserts the products exported to China were "the lowest value chicken parts," even though the record evidence does not support that assertion at all. China has shown that the actual data submitted by respondents during the investigation did not support these sweeping claims that exports to China were of "low value products." Moreover, China has also shown that the record evidence about prices in the Chinese market completely refutes the U.S. argument that including chicken breasts in the overall average created any adverse distortion. In fact, China has shown that comparing the prices of specific products – wings, claws, and legs – that represent about 80 percent of U.S. exports to China would show consistently higher margins of underselling than MOFCOM found. In particular, we note that the margins of underselling for imported chicken paws compared to domestic chicken paws were consistently higher – more than three times higher -- than the underselling margins MOFCOM found.. The premise that U.S. exports to China were low value and that low value creating underselling margins is just wrong. The MOFCOM approach was not adverse to respondents; it was a conservative methodology that actually favored respondents.

96. The United States misreads the Panel and Appellate Body guidance in *China-GOES*. Those decisions were made based on the specific factual evidence in that dispute, and the belief that China had not sufficiently addressed and rebutted before the Panel the factual basis of the U.S. claim in that dispute. Here, China has fully rebutted the U.S. factual claim that there were any differences in product mix that were adverse to U.S. respondents. The very weak factual basis presented by the respondents' data has been fully rebutted. China does not see how a conservative methodology that understated the margins of underselling provides any factual basis for the U.S. claim that MOFCOM was not "objective" in its analysis.

97. The United States dismisses China's use of record evidence about the relative prices of different chicken parts. These invoices were not "hand-picked" or in any way collected to address this specific U.S. argument – which had not yet been made. Rather, this evidence on MOFCOM's record provides a broad sampling of chicken prices in the Chinese market that allows one to test the factual premise of the U.S. claim. The evidence confirms that the factual premise of the U.S. claim is wrong, but also that MOFCOM's methodology was not in any way adverse. MOFCOM's methodology understated the margins of underselling.

98. In addition, we note the following about these invoices. First, the invoices were collected randomly during the verifications of the three domestic producers before the preliminary determination. In other words, the invoices were not "hand picked", but rather were collected in the ordinary course of the verification. Second, the 63 invoices were broadly representative, since they cover the different years of the period of investigation and were issued to 28 different customers. Third, the individual invoice prices are internally consistent, confirming that these samples are representative rather than outliers. Finally, the prices on these invoices can be crossed checked with prices reported in the import data. Though there were no imports of chicken breasts, the prices of imports of wings, paws, leg quarters, and offal show a relative ranking of prices that is consistent with the invoices for domestic prices of the same products. For all of these reasons, this record evidence is reliable and representative.

(b) Level of Trade

99. MOFCOM reasonably compared prices at comparable levels of trade. Domestic prices were ex factory prices – the prices paid by customers in China, without any expenses included. Import prices were CIF duty-paid prices – again, the prices paid by customers in China, without any expenses included. On both sides, the customers were mostly distributors – companies that were buying chicken parts, either from domestic suppliers or from U.S. exporters, and then reselling them. The U.S. producers never argued to the contrary. They never argued to IBII that the level of trade needed to be taken into account.

100. The U.S. claim rests on flawed assumptions about the underlying facts about the customers in China. The United States asserts without any evidence that "as a general commercial matter "CIF import prices are at a different level of trade than domestic producer sales to first arms-length customers." This argument, however, assumes that most U.S. exports go to importers that are not themselves distributors of chicken parts, and that those importers always resell at higher prices that earn them a profit. Neither of these assumptions has any factual basis. Rather, the U.S. argument rests entirely on unsupported factual assertions that the prices being compared were at different levels of trade.

101. The United States assumes without any evidence that U.S. exports were first imported by companies that were not themselves distributors and that had to be resold to another company that was the distributor. In fact, the record showed both domestic shipments and U.S. imports were going to a similar mix of customers, with roughly 80 percent of the volume going to customers who were distributors – someone reselling the merchandise. This argument is not a *post hoc* rationalization. Rather, it is showing how the factual assertion by the United States not only is a bald factual assertion without any supporting evidence, but also is actually contradicted by the record evidence before MOFCOM.

102. Moreover, the U.S. assumption of a positive importer mark-up is directly contradicted by a U.S. Government report showing that importers of U.S. chicken parts were reselling at a loss. The United States tries to ignore this inconvenient fact, arguing MOFCOM still had to compare prices at the same level of trade. Yet the U.S. argument is that the price paid by importers cannot be used because of the importers' mark-up, an assertion without any factual basis that is contradicted by evidence China has presented the Panel. The U.S. claim depends critically on this assumption about mark-up, but there is no factual basis for this assumption.

103. China notes that this issue arose very late in the investigation. This issue had not been raised by any of the U.S. respondents during the investigation. From the initition in September 2009, through the questionnaire responses and verification, through the arguments before and the Preliminary Determination itself in February 2010, no U.S. responding party raised this issue. The issue of the level of trade arose for the first time on 20 July 2010, when the U.S. Government raised this issue in a meeting with MOFCOM, and then summarized its comment in written notes filed after the meeting.

104. Even though the U.S. argument about level of trade was raised very late, MOFCOM had in fact addressed this issue of sales channels early as part of its determination of "like product." MOFCOM explained regarding "sales channels and customer groups" that: "The white-feather broiler products produced domestically and the product concerned were identical or overlapped in terms of sales channels, areas of sales, and that certain of the customer groups of the two products were also overlapping." Virtually the same discussion was included in the Preliminary Determination, long before the U.S. Government raised its concern about level of trade.

105. This qualitative statement about overlap can be confirmed with the record evidence. China arrived at an estimate by comparing the largest customers reported for the period of investigation by domestic producers and exporters. The total volume by those domestic producer customer that appeared to be resellers was 1.04 million MT. The total volume for all reported customers was 1.29 million MT. The ratio is 80.2 percent. The same proportion occurred with U.S. exporters. This calculation of the 80% thus quantifies a more general qualitative finding that MOFCOM had already made, back at the time of preliminary determination.

106. Having already found as a factual matter that sales channels "were identical or overlapped" and that the Chinese customers were considering domestic and imported product at "the same time," and thus "were competing with each other" in these sales channels, MOFCOM then summarized and addressed the specific U.S. comment about levels of trade in its Final Determination. MOFCOM presented its response that: (1) MOFCOM had "taken into consideration" the possible difference between the "sales levels" of the domestic and import prices being compared, (2) MOFCOM had already adjusted the import price to the level reflected in the landed (duty-paid) price reported in the Chinese Customs statistics, and (3) none of the interested parties had raised any issues about the adjusted import price and underselling margins that had been calculated and announced in the preliminary determination back on 5 February 2010. Under these circumstances, MOFCOM made no further adjustments.

107. Beyond the discussion as part of the like product determination, the issue is not otherwise discussed on the record, because of the extreme late date on which the specific issue was first raised. Although MOFCOM's factual findings about the "identical" or "overlapping" sales channels and MOFCOM methodology for comparing domestic and import prices was disclosed as early as 5 February 2010 in the preliminary determination, the specific U.S. complaint about levels of trade was not raised for more than six months on 20 July 2010. This comment was raised about a month before the CVD Final Determination on 29 August 2010, which presented the injury analysis that was then repeated a month later on 26 September 2010 in the AD Final Determination. A comment raised for the first time a month before an authority issues its Final Determination cannot be expected to trigger much in the way of additional consideration before what MOFCOM had done here – acknowledge the issue, and explain its position with regard to the issue.

(c) Implications of U.S. Arguments

108. The factual errors of the U.S. claim can be seen most clearly by considering the alternative methodologies the United States has proposed, which show higher margins of underselling than MOFCOM found in its Final Determination. The available evidence suggests that taking into account resale prices by importers would have increased the underselling margins in 2008 by 20 percentage points or more. The available evidence suggests that taking into product mix into account – and focusing on the competition for wings, claws and legs in the Chinese market -- would have increased the underselling margins by 20 to 30 percentage points or more in virtually every period of comparison. Conservative methodologies that understate the margins of underselling fully meet the obligation of "objective examination," and otherwise comply with Articles 3.2 and 15.2.

109. The U.S. argument reveals the extent to which the United States is seeking to impose a specific methodology regardless of the facts. The United States goes so far as to argue that even if some importers were in fact themselves distributors in China, if any of the importers were not distributors the prices to those importers could not be used. The U.S. argument is basically that MOFCOM had to use resale prices charged by the importers, and could never use the prices paid by those importers. This desire to impose a specific methodology can also be seen in the U.S. insistence that MOFCOM had to collect questionnaire responses from importers, and complaining that MOFCOM did not do enough to collect such responses. But this U.S. argument assumes MOFCOM was under some obligation to collect importer questionnaires responses, and did not have the discretion to make decisions about how to collect data for the investigation. Nothing in the Agreements requires this specific methodology, and the United States has not provided the factual basis to justify requiring that methodology in this case.

110. Given the absence of any specific rules in Articles 3.2 and 15.2, it is not surprising that different WTO members use different methodologies. China understands that Canada uses an approach similar to the United States, looking at resale prices charged by importers. But China also understands that Pakistan and Colombia use approaches similar to China, looking at CIF prices from import statistics. Authorities may ask about importer resale prices in importer questionnaire responses, but in many countries such responses are not routinely submitted in sufficient quantities to be a reliable basis for determinations. Neither approach is inherently right or wrong. Either approach is facially neutral, unless shown to be problem in a specific case based on specific facts.

111. In China's view, these facts and the diversity of WTO member practices confirm that MOFCOM's use of its facially neutral methodologies in this particular case was "objective examination" based on "positive evidence." The United States has not established a *prima facie* case that these neutral methodologies made an affirmative determination more likely, and so the U.S. claim must fail.

112. Beyond these misunderstandings of the facts, the United States also incorrectly reads Articles 3 and 15 as <u>always</u> requiring the authority to consider price comparability, and in particular the issues of (1) levels of trade and (2) product mix. China agrees that such an obligation <u>may</u> arise, but it only arises based on the facts and circumstances of a particular case. In other words, when an authority has existing policies that are neutral on their face, as MOFCOM does here, the obligation to go beyond those existing policies arises only from the facts and circumstances of each individual case. The U.S. effort to use "objective examination" to impose specific methodologies on authorities in every case goes well beyond the text of the Agreements.

In this case, the United States has not met its factual burden of demonstrating a need to take into account either level of trade or product mix.

2. Price Suppression

113. The United States argues that MOFCOM's finding of price suppression rested entirely on its findings of price undercutting. Since MOFCOM's findings of price undercutting were completely proper, there is no error in noting the connection between the price undercutting and the price suppression in this case. But even if the Panel were to take issue with MOFCOM's findings of price undercutting, China notes that price suppression can exist independently of any price undercutting. The United States has conceded this point, and the Appellate Body recently confirmed this point.

114. Besides discussing price undercutting, MOFCOM also relied on volume effects and market share effects, and specifically described the price suppression finding as an alternative finding. In other words, MOFCOM's Final Determination in fact explained how subject imports had "explanatory force" with regard to the suppression of domestic prices through the adverse volume effects. At the end of the its discussion of subject import volume (section V(I)) and subject import prices and domestic prices (section V(II)), MOFCOM inserted a summary paragraph that addressed both subject import volume and subject import price. This concluding paragraph discussed both volume and price, and so integrated both of these issues. In this summing up its conclusions about the effects of subject imports, MOFCOM noted that the "continuous expansion of the market share" and the "large quantity" of dumped/subsidized subject imports in the Chinese market had two effects: (1) they undercut domestic prices, but they also (2) led to a "decrease of profit level," and thus were suppressing prices. The price undercutting was necessarily a price effect, since undercutting involves comparing two sets of prices. But the price suppression finding simply observed that in the face of the larger volume and market share of subject imports, domestic prices were suppressed and thus the domestic industry suffered lower profit levels. In this concluding paragraph, MOFCOM was thus drawing a direct connection between the volume of subjects imports and price suppression as one of the consequences of that "large quantity" of subject imports.

115. The U.S. argument to the contrary misstates the MOFCOM final determination. The title may refer to subject import prices, but the discussion in the last paragraph of this section discussed the "large quantity" of subject imports and their "continuous expansion of the market share." The fact that MOFCOM also noted the effect of price undercutting on price suppression does not mean that subject import volume and market share were not also causing price suppression. That is why MOFCOM used the phrasing "not only … but also."

116. The United States tries to support its argument about the exclusive link between undercutting and price suppression by citing other passages in MOFCOM's determination, but these U.S. citations simply highlight two very misleading translation mistake.

117. The first translation mistake is subtle, but important. The U.S. translation reads: the "lower price of the Subject Products has also suppressed sales prices of the domestic like products." China's translation reads instead: the "low-priced sales of the product concerned also suppressed the selling price of the like product." The U.S. translation's use of the phrase "lower price" implies price undercutting. In fact, the Chinese original refers to "low-price sales of the product concerned," which is a stock Chinese language phrase to refer to dumped/subsidized imports.

118. The second mistake relates to a MOFCOM discussion of pricing trends in early 2009. The U.S. translation reads: "… the price cutting of the Subject Products caused substantial suppression on the sale price of the domestic like products…." China's translation reads instead: "… the activity of price reduction of the product concerned caused apparent undercut and suppression to the price of the domestic like product…." In other words, the United States mistranslated "price reduction" as "price cutting." More seriously, while the original lists "price reduction" as the cause of both price undercutting and price suppression, the U.S. translation turns price undercutting into the cause of price suppression. This mistake may be quite convenient for the U.S. argument in this dispute, but it ignores the correct reading of the MOFCOM determination on this point.

119. Thus, contrary to the U.S. argument, MOFCOM did not point to price undercutting as the sole cause of price suppression. Rather, MOFCOM noted price undercutting and price suppression

as parallel adverse consequences caused by the increasing volume and market share of subject imports at the prices for which they were being sold in China. A proper interpretation of the MOFCOM Final Determination must take into account several points. First, the Final Determination is responding to a specific argument by the U.S. respondents about the magnitude of price decreases in the first half of 2009. The context is thus a specific price decrease and explaining the magnitude of that price decrease. Second, the phrase "affected by this" also refers to the degree to which domestic broilers and subject import competed with each other and were substitutable, and also refers to subject import market share. Third, MOFCOM stressed that the domestic industry needed to cut its own price to preserve market share. Finally, MOFCOM concluded its discussion by explaining with regard to the first half of 2009 that "the activity of price reduction" by subject imports had two effects: (1) price undercutting, and (2) price suppression. Thus, the connection is not price undercutting causing price suppression, but rather price reduction causing both undercutting and suppression.

C. Adverse Impact

120. MOFCOM also properly found material injury. MOFCOM objectively examined the entire period of investigation, not ignoring the critical first half of 2009 as does the United States. MOFCOM also objectively examined all the injury factors, not ignoring the domestic industry financial performance as does the United States.

121. The United States mistakenly argues that MOFCOM's finding of injury rested on only two factors. Yet the United States continues to ignore the persistent operating losses throughout the period. The United State quotes part of the MOFCOM determination, where MOFCOM explains how notwithstanding some positive trends, the continued growth and low prices of subject imports prevented the domestic industry from effectively utilizing its new capacity, and thus contributed to the continuing operating losses. The United States highlights part of the quote, but should have stressed the key last phrase: "so profit before tax for the domestic like products remained negative during the POI."

122. MOFCOM properly relied on the evidence of low capacity utilization. One cannot reasonably compare percentages when applied to different base amounts. Moreover, the United States makes a more fundamental error, claiming that domestic industry capacity expansion "entirely explained" the trend and capacity utilization was "not affected by subject imports." These absolute statements are just wrong. Subject imports grew over the period, gaining about four percentage points of market share. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers, and domestic capacity utilization would have been higher. Thus, subject imports had a necessary and unavoidable effect, through their increased volume and market share. MOFCOM was fully entitled to rely upon this effect.

123. MOFCOM also properly relied on the evidence of growing end-of-period inventories. China has not conceded the inventories were not significant. Rather, China simply noted it was under no obligation to find inventories in themselves to be significant. MOFCOM properly noted that inventories were increasing. And as with capacity utilization, subject imports made the situation worse. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers and their inventory levels would have been lower.

124. MOFCOM in fact considered all the economic factors over the entire period, not just 2009. That MOFCOM focused on the end of the period does not mean MOFCOM ignored the earlier part of the period. The United States believes it can focus on the improving volume trends over the 2006 to 2008 period, and ignore the persistent operating losses over the entire period. A modest improvement in 2007 that still left the domestic industry with operating losses does not make up for cumulative operating losses over the full three year period of 2.651 billion yuan – the period of time when the subject imports increased the most.

125. MOFCOM most certainly did not ignore these huge operating losses over this period, or their pattern over time. MOFCOM focused on the impact of the subject imports on the financial performance of the domestic industry, and thus properly respected the obligations of Articles 3.4 and 15.4. MOFCOM drew this connection as part of its discussion of causal link, and then reiterated this connection between subject import volume and the financial results, and between subject imports generally and the financial results.

126. The United States improperly tries to dismiss the MOFCOM finding of future declines in the economic indicators. China agrees that the examination in Articles 3.4 and 15.4 refer to the same past imports as Articles 3.2 and 15.2. The point, however, is that even past imports can have future adverse effects. That is why Articles 3.4 and 15.4 refer to the "potential negative effects" for several of the injury indicia. A past history of increasing imports – particularly when viewed in the context of possible future increases in imports – can create the types of "potential negative effects" Articles 3.4 and 15.4 mention. An authority may properly put past imports into the context of possible future imports when assessing these past imports. For example, continued U.S. exports to China would continue to depress capacity utilization, and would continue to leave excess inventories languishing at the companies or force liquidation sales to clear inventory. These are precisely the type of future declines that the phrase "actual and potential declines" in Articles 3.4 and 15.4 contemplates.

127. MOFCOM properly relied on data for the responding domestic producers, in the context of the overall domestic industry. China disagrees with the brief and overbroad statements of the panel in *EC – Bed Linen* that would appear to limit the authority to do so. This summary statement, not reviewed by the Appellate Body, does not adequately address the text of the Agreements or the factual information being considered.

128. Regarding the text, we note three points. First, nothing in the text of Articles 4.1 or 16.1 requires a single definition of the domestic industry. Nothing in the text precludes an authority from defining the domestic industry as all producers in some respects but as a "major proportion" in other respects, depending on the issue and the available evidence. Second, the text actually contemplates using two different sets of data, since the "major proportion" in Articles 4.1 and 16.1 is determined by reference to "the total domestic production." It is not possible to determine a "major proportion" without reference to some data beyond the subset that constitute the "major proportion." Third, the text of Articles 3.4 and 15.4 expressly allows an authority to consider "all relevant economic factors and indices have a bearing on the state of the industry." In other words, the analysis is not just the facts for the industry, but also the facts that might have a "bearing on the state" of that industry, however defined. This broad language can include more than just the facts narrowly defined by the responding domestic producers in a case.

129. This case provides good examples of how other information can be factually relevant. Consider apparent consumption. This economic factor is a common way to assess broad demand trends. If the authority has data on total domestic production, an authority has discretion to measure apparent domestic consumption based on either the industry as a whole, or based on the subset of total domestic production represented by the 17 responding producers. Or consider market share. If an authority exercises its discretion to define total apparent domestic consumption based on all domestic production, an authority also has discretion to report market share based on that total apparent domestic consumption. It is more accurate to say the 17 responding domestic producers have about 40% of the total market and to say that subject imports have about 10% of the total market, rather than to inflate both numbers by ignoring the domestic production of non-responding producers.

130. MOFCOM thus used the different kinds of information appropriately. The analysis of the factors under Articles 3.4 and 15.4 generally relied on the information reported by the 17 responding domestic producers. But for apparent consumption and market share, MOFCOM reasonably and properly viewed the production and shipment data for the 17 responding domestic producers in the context of the available information on the total domestic production by all domestic producers, and the total apparent consumption based on that total domestic production.

D. Causation

131. Finally, MOFCOM properly drew the causal link between the increasing subject imports and both the adverse volume and adverse price effects those subject imports had on the domestic industry. The U.S. claim concerning causation is actually quite narrow. It involves only the requirement in the second sentence of Articles 3.5 and 15.5 to find a "causal relationship," and does not address the requirement in the third sentence to "examine any known factors other than" subject imports. The United States still has not offered any other causes as alternative explanations for why the Chinese domestic industry had operating losses in every year, and suffered declines in 2008 and even more severe declines in 2009.

1. Basis for Finding Causal Link

132. The United States tries to dismiss China's arguments as *post hoc*, but the United States misses the point of these arguments. China's arguments seek to rebut the arguments the United States has made in support of its claim. The United States has both mischaracterized MOFCOM's final determination, but also ignored other aspects of the factual record before MOFCOM. China can properly explain how the factual record before MOFCOM rebuts the specific factual claims the United States has now made.

133. The U.S. claim involves only three specific arguments. If those three arguments are wrong, then the United States has not established a *prima facie* case and the U.S. claim relating to causation must fail.

134. Regarding the argument about market share, the U.S. claim focused on a few facts in isolation, and simply ignored other facts. China has not presented new evidence. Rather, the United States ignored all the facts in MOFCOM's determination, in particular that subject imports gained more market share than non-subject imports. In its First Written Submission, the United States misrepresented the record, because it simply ignored the distinction between the half of the domestic industry for which MOFCOM had questionnaire responses and the other half of the domestic industry for which MOFCOM did not have questionnaire responses. That is why China pointed out the U.S. factual assertion "the entire increase in subject import market share … came at the expense of non-subject imports" was just wrong.

135. MOFCOM's determination focused on analyzing the market share of the 17 responding domestic producers. That is the absolute level of market share MOFCOM reported in its Final Determination, and that is the basis of the market share trends that MOFCOM relied upon in its analysis. But since MOFCOM reported all market share figures relative to total apparent consumption for the entire market, those market share figures implicitly considered the non-responding domestic producers as well. When reporting the market share of the 17 responding domestic producers (averaging around 41%), the market share of subject imports (averaging around 9%), and the market share of non-subject imports (averaging around 3%), MOFCOM determined each of these segments relative the total apparent domestic consumption, not just the consumption defined based on the reported production by the 17 responding domestic producers. That is why these market shares add up only to 53% (on average), and leaves about 47% (on average) unaccounted for. By reporting market shares of 41%, 9% and 3%, MOFCOM was also implicitly considering the remaining 47% need to reach 100% of the market.

136. The U.S. claim that MOFCOM "ignored" the evidence of the market share increases by the reporting domestic producers is also just wrong. To the contrary, MOFCOM specifically acknowledged this argument and addressed the argument, noting the domestic industry efforts to stabilize its market share when discussing volume effects, and acknowledging the increasing market share when discussing causation. MOFCOM specifically explained that even though the "market share of the like product presented an increase to certain extent in general, but this did not mean that the domestic industry did not suffer from injury." MOFCOM noted its assessment depended on all the economic factors, and stressed that even the gain in market share could not "change the worsening financial situation of the domestic industry."

137. Thus, this aspect of the U.S. claim must fail, because the U.S. assertions are flatly contradicted by the record evidence and MOFCOM's determination. Subject imports gained market share beyond that lost by non-subject imports and MOFCOM acknowledged and addressed the gain in market share by the reporting domestic producers. China's efforts to present the complete picture based on record evidence simply complements these other reasons to reject this aspect of the U.S. claim.

138. Regarding the argument about price effects, the United States repeats its claim that MOFCOM's methodology made a "finding of subject import underselling more likely." Yet China has demonstrated the opposite is true – that MOFCOM's methodology actually understated the margins of underselling. Thus, China has rebutted the essential factual premise of the U.S. claim, and thus the U.S. claim itself.

139. MOFCOM properly relied on both price effects and volume effects. These arguments are not *post hoc*, but rather reflect points made in the Final Determination. The United States argues that

MOFCOM's determination rested entirely on price undercutting, even though the Final Determination explicitly relied on a combination of factors, not just price undercutting. In particular, when discussing the volume effects, MOFCOM expressly found the increasing subject import volume at relatively low prices forced the domestic industry to cut its prices below cost to maintain market share. The fact that the domestic producers may have gained some market share over this 2006-2008 period does not mean the increasing subject import volume was causing the price suppression that MOFCOM found. Moreover, when discussing the effect of subject imports on the condition of the domestic industry, MOFCOM again found the link between the quantity and prices of subject imports to the deteriorating financial condition of the domestic industry, regardless of the market share.

140. The U.S. argument assumes that absent a loss of market share, an authority cannot find any adverse volume effects. But this argument is just wrong. Articles 3.2 and 15.2 explicitly allow the authority to find adverse volume effects based on either an increase in absolute volume or an increase in market share. An increase in subject import market share is not an indispensible requirement. Moreover, MOFCOM expressly acknowledged the increase in market share by the reporting domestic producers, but nevertheless found adverse effects from the increasing absolute volume of subject imports that forced the domestic firms to adjust prices that could not keep up with costs, and thus increased the financial losses.

141. The United States tries to obscure this essential point by arguing deceptively about changes relative to 2006 and arguing vaguely about "most other measures." Yet the operating losses in 2008 were larger than 2006, and were even worse in the first half of 2009. The United States cannot make these financial losses disappear by ignoring them. Nor are these financial losses any less injurious because the domestic industry may have had some improving indicators. Even as the domestic industry increased its production and sales, it continued to have severe financial losses, and the increasing volume of subject imports contributed meaningfully to those losses. In a growing overall market, instead of seeing their operating losses disappear, the domestic industry operating losses persisted at a high level.

142. Finally, regarding the argument about correlation over time, the United States makes several mistakes. First, the United States assumes that subject imports were not causing material injury in 2006, and that any improvement from 2006 therefore means imports were not causing injury. There is no factual basis for this assumption, and the operating losses even in 2006 support MOFCOM finding material injury for the entire period.

143. Second, the United States misconstrues MOFCOM's finding as limited to injury caused by subject imports in the first half of 2009. China addressed this period of time in its First Written Submission because the United States had completely ignored this most recent period of time. The MOFCOM Final Determination, however, makes clear that it was considering the entire period of investigation, putting all of these trends into proper context. That MOFCOM was fully considering the entire period can be seen throughout the Final Determination. First, MOFCOM systematically discussed all industry trends over the entire period, including each full year as well as the first half of 2009. Second, when summarizing these trends, MOFCOM expressly acknowledged the positive trends in some factors over the 2006 to 2008 period, and the improvement in 2007, while also noting the inability of the domestic industry to earn operating profits in any year during this period. Third, when discussing the causal link, MOFCOM also discussed the full 2006 to 2008 period. Finally, when addressing the arguments of the various parties concerning causation, MOFCOM expressly addressed this U.S. argument about the trends over the 2006 to 2008 period, and specifically addressed the 2006 to 2008 period and then the first half of 2009. It is simply disingenuous for the United States to argue that MOFCOM did not consider the full period of time.

144. Nothing in the WTO cases cited by the United States requires a different result. MOFCOM did not focus exclusively on the first six months of each year, and instead considered full year data. That situation is very different from recognizing that material injury occurring over the entire period had become worse at the end of the period. Moreover, MOFCOM did not ignore the trends earlier in the period, and expressly acknowledged them as part of showing why there was injury over the entire period that became worse at the end of the period.

145. Third, the United States also improperly dismisses the adverse financial trends, apparently considering a 4.7 percent operating loss in 2008 as somehow being a good result and the absence of any material injury caused by subject imports. The MOFCOM Final Determination, however,

makes clear that these operating losses throughout the period were in fact injurious, and the record supports that finding.

146. Fourth, the United States makes much of the import volume over the 2006 to 2008 period, but ignores the other aspects of market conditions in 2007. It is true that a large portion of the total increase in subject imports occurred in 2007. But this was a year when apparent domestic consumption improved strongly, and the margin of subject import underselling was smaller than other years. The modest improvement in financial performance in 2007 does not prove that subject imports were not causing any material injury. The domestic industry still had operating losses. Those losses were somewhat mitigated by the strong market and less severe price undercutting in 2007. The pattern over 2006, 2007, and 2008 in fact confirms that subject imports were contributing significantly to the material injury – particularly the financial losses – being suffered by the Chinese industry.

147. In sum, subject imports need not be the only cause; they need only contribute meaningfully to the adverse condition of the domestic industry. In this case, broiler products from the United States made such a contribution to the material injury, and thus met the standards of Articles 3.5 and 15.5.

2. Addressing Respondents' Injury Arguments

148. Regarding the argument about non-subject imports, the MOFCOM Final Determination reasonably and repeatedly addressed this argument. MOFCOM first addressed this argument about subject imports simply substituting for non-subject imports in the general discussion of the impact of subject import volume, noting that the Agreements allow an authority to consider either absolute volume or market share. And the record evidence before MOFCOM showed that subject imports were increasing by much more than non-subject imports. Indeed, over the 2006 to 2008 period, subject imports increased by almost 200,000 MT while non-subject imports did not decrease but rather increased by about 35,000 MT. It is hard to see how increasing subject imports were replacing increasing non-subject imports. MOFCOM addressed this argument a second time, when it noted that subject imports were a growing portion of total imports, and that non-subject imports were thus not an alternative explanation of the domestic industry problems. The fact that subject imports were increasing so much more than non-subject imports does not mean subject imports were only replacing the non-subject imports.

149. Regarding the argument about chicken paws, the United States mischaracterizes the MOFCOM treatment of this issue. The United States claims MOFCOM's preliminary determination discussion of this issue was only a decision about scope that did not address respondents' argument. In fact, MOFCOM was noting that since the investigation included all chicken parts, MOFCOM was conducting its analysis based on all the products under investigation as a whole, and not separate market segments. MOFCOM specifically noted that all chicken parts were part of the same "like" product and competed with each other, even if the different parts did not have a one-to-one relationship of competition. MOFCOM did not misunderstand the respondents' argument, and MOFCOM's comment was not just about scope. MOFCOM was explaining why it rejected the proposed analysis based on different product segments. The United States also claims respondents were not asking for a market segments analysis. But by insisting that MOFCOM consider competition among different types of broiler chicken parts, respondents were in fact asking for a market segments analysis even if they did not label it as such. The United States has not made such a causation argument before the Panel – and has not established a *prima facie* case that an authority must conduct its causation analysis based on market segments, or that there was anything not objective about MOFCOM analyzing causation for broiler chicken as whole.

_____

ANNEX B

WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

Contents		Page
Annex B-1	Third-Party Statement of Chile	B-2
Annex B-2	Integrated Executive Summary Submitted by the European Union	B-4
Annex B-3	Integrated Executive Summary Submitted by Japan	B-9
Annex B-4	Integrated Executive Summary Submitted by Mexico	B-12
Annex B-5	Integrated Executive Summary Submitted by Norway	B-18
Annex B-6	Thailand's Responses to Panel Questions	B-21
Annex B-7	Integrated Executive Summary Submitted by the Kingdom of Saudi Arabia	B-25

ANNEX B-1

THIRD-PARTY STATEMENT OF CHILE

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party in this dispute, welcomes the opportunity to present its views on certain systemic aspects of this case.

2. Chile feels that this dispute covers issues of great importance for the proper application and interpretation of the Anti-Dumping and SCM Agreements, in particular as regards compliance with rules that enable the parties to be provided with the information and opportunities needed to defend their interests, a prerequisite for due process and one that is considered essential for ensuring the legitimacy of any investigation.

3. First of all, Chile considers compliance with the obligations set forth in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement, which require the authorities to inform interested parties of the essential facts forming the basis of their determinations, to be of vital importance.

4. The above-mentioned provisions are fundamental rules of due process, and compliance therewith is vital to ensuring that the parties receive the information needed to defend their interests in a focused manner. These obligations not only guarantee the parties' right to defend themselves in the proceedings, but also ensure the legitimacy of the authority's investigation and its decision.

5. In order to determine effective compliance with the rules in question, the Panel must examine the content of the information provided by the authority, so as to ensure that it is sufficient and adequate for guaranteeing the parties' right of defence. In this respect, the Panel in *EC-Salmon (Norway)* stated that the essential facts are "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority… the essential facts to be disclosed are those 'under consideration which form the basis of the decision'".[1] Chile also believes that the Panel should verify when exactly this essential information was provided, making sure that the parties have had sufficient time to formulate their defence. The rule will no longer be effective if these conditions are not verified.

6. Chile also wishes to emphasize the importance of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement, which state that the authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, where such parties indicate that such information is not susceptible of summary, a statement of the reasons why summarization is not possible must also be provided.

7. We agree with the assertions made by the United States in its first written submission to the effect that the above-mentioned rules apply to any interested party in the investigation, and therefore MOFCOM should have required the petitioners to provide non-confidential summaries in accordance with the requirements set forth in those rules. The inability to provide such a summary due to the existence of exceptional circumstances should have been explained and justified by the petitioners, and the authority should have evaluated the relevance of those justifications. In this regard, the Appellate Body in *EC-Fasteners (China)* stated that "[f]or its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible. As the Panel found, 'in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the

[1] Panel, *EC-Salmon (Norway)*, paragraph 7.796.

potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel'".[2]

8. The importance of compliance with the above lies in allowing the interested parties to access the information contained in non-confidential summaries, thus securing them the right to properly defend their interests and ensuring the legitimacy of the investigation process by verifying one of the basic principles of due process: the right of all parties to be heard.

9. Lastly, and without wishing to refer to whether the investigating authority properly defined the domestic industry as established in Article 4.1 of the Anti-Dumping Agreement and Article 16 of the SCM Agreement, Chile would like to suggest to the Panel that in the analysis of the companies covered by the concept of domestic industry in the present case, it take these provisions into consideration, given that this concept not only covers the Chinese companies supporting the anti-dumping and countervailing duty investigations, but also the domestic producers as a whole of the like products or those whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Once again, many thanks for this opportunity.

[2] *EC – Fasteners (AB)*, paragraph 544.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE EUROPEAN UNION

I. PROCEDURAL CLAIMS

A. Obligations under Article 6.2 ADA

1. The United States complains that, pursuant to Article 6.2 *ADA*, it requested the investigating authority to provide an opportunity, in this case, for the United States to meet with those parties having adverse interests, so that opposing views might be presented and rebuttal arguments offered. The key point in China's response is the factual assertion that the investigating authority contacted the petitioners and the petitioners indicated that they would not participate in any such meeting. The European Union has not located evidence of such a contact in the documents submitted to the Panel. In the eventuality that the contact and response is not recorded in the file, or otherwise evidenced, then the key point in China's response would not appear to be supported by the evidence.

B. Disclosure of Data and Calculations Used to Establish Dumping Margins

2. The European Union agrees with the United States that the calculation method employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9 *ADA*. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken. By failing to disclose the data and calculations used to establish dumping margins, China has acted inconsistently with Article 6.9 *ADA*.

C. Disclosure of Essential Facts under Consideration in Calculating the "All Others" Dumping Margin

3. China has also breached Article 6.9 *ADA* It appears that China has also failed to disclose the methodology or identify the essential facts under consideration regarding its calculation of the “all others” dumping margin and the imposition of a residual duty at 105.4 %. A single sentence to the effect that it used the facts available and the best information available to make such determinations was insufficient to satisfy the disclosure obligations under Article 6.9 *ADA*.

D. Explanation of the Decision to Apply Facts Available in Calculating the "All Others" Dumping Margin

4. The European Union agrees with the United States that a single sentence in the Final Determination, stating that MOFCOM is resorting to facts available, is not sufficient to meet the requirement of Article 12.2.2 *ADA* to give public notice of “all relevant information on matters of fact and law” and state the “reasons which have led to the imposition of final measures”, and that the failure to provide more detailed explanations constitutes a breach of Article 12.2.2 *ADA*.

E. Non-Confidential Summaries

5. If the non-confidential version of the petition contains data that can be regarded as a summary of the redacted confidential information, the parties under investigation should be made aware of that, so they can be reassured that they have the full picture in front of them and there is no missing information that could be useful for them to build a defensive strategy. Such awareness is necessary "to permit a reasonable understanding of the substance of the information submitted" as required by Articles 6.5.1 of the *Anti-Dumping Agreement* and 12.4.1 of the *SCM Agreement*. The investigating authorities are therefore bound to require the interested parties submitting confidential information to indicate in a clear and understandable manner where in the text of their submission the non-confidential summaries of the redacted information are to be found.

II. ANTI-DUMPING DUTIES

A. Article 2.2.1.1 ADA: the allocation of production costs among different broiler products: by value or by weight

6. Article 2.1 of the *Anti-Dumping Agreement* directs the investigating authority to enquire into "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The exporting country is the United States, not China. Thus, these provisions did not direct the investigating authority to enquire into the costs of production of a chicken paw wherever in the world it might be destined for consumption. Rather, they directed the investigating authority to enquire into the costs of production of a chicken paw destined for consumption in the *United States*.

7. Article 2.4 of the *Anti-Dumping Agreement* addresses the obligation to make a fair comparison. It requires that due allowance be made (by adjusting normal value or export price) for differences affecting price comparability, and includes an open list. All of the items in the list refer to the objective characteristics of the product or the transaction. Although the list is open, the examples expressly included in the list give guidance as to the types of things that might justify an adjustment, even if they are not expressly included in the list. Since all the expressly included items are objective, that suggests that other types of adjustment, not expressly listed, would also be objective in nature. The notion of consumer preference is not objective. It refers to the gratification of the consumer. This cannot be objectively assessed. It is not therefore a suitable basis on which to make an adjustment that would tend to increase or create a margin of dumping, any more than it would be to decrease or eliminate a margin of dumping. If, for reasons of consumer preference, a particular item is characterised in the home market as a "by-product" having a relatively lower value, but in the export market as a product having a relatively higher value, this fact does not in itself lead to the conclusion that the data do not permit a proper comparison, or that an adjustment should be made.

8. This conclusion does not change in circumstances where the product (such as a chicken paw) is initially joined with some other product (such as a chicken breast) as part of a whole, such that the only possible approach with respect to production costs prior to separation is allocation. If the facts indicate that the value in the home market is not distorted, for example by government regulation or subsidies, then value may be a reasonable basis on which to allocate such pre-separation costs. If the value in the home market is very low, or zero, then it may be reasonable to allocate very low, or zero, production costs to the chicken paw.

9. The may not be a burden of proof issue, because the facts appear to be reasonably well known and not controversial. Rather, the question is whether the accounts reasonably reflect the costs of production. This is more a matter of explanation, that is, the interpretation and application of the *Anti-Dumping Agreement*. The European Union would expect such explanation to be forthcoming, in the first place, from the exporter providing access to the accounting records. One would thus expect it to be in the file. If the investigating authority would decide to reject such explanation, in favour of a different explanation, then one would expect such different explanation to be set out in the measure at issue, or in the underlying documents, or at least to be otherwise apparent from the file. The task of the complaining Member in DSU litigation would then be to explain why the original explanation is reasonable, and the different explanation advanced by the investigating authority is not reasonable. The task of the defending Member would be to explain why the explanation advanced by the complaining Member is not reasonable, and why the different explanation preferred by the investigating authority is reasonable. The Panel then has to decide. Normally, the two explanations will not be equally reasonable, because as the parties are pressed, it will become apparent that one explanation can be sustained on the basis of rational considerations, whilst the other cannot. If, however, the two explanations (that is, interpretations and applications) remain in equipoise, then, in accordance with Article 17.6(ii) of the *Anti-Dumping Agreement* and the case law interpreting that provision, the Panel should find the measure to be in conformity with the *Anti-Dumping Agreement*. No DSB report has ever found this to be the case and it is possible that such a conclusion may never be sustained. In light of the above explanations, the European Union would be surprised if this would be such a case, because the different explanation elaborated by China is obviously irrational.

B. "All Others" dumping margin: all interested parties … shall be given notice (Articles 6.1 and 6.8 and Annex II ADA)

10. The European Union notes that in this case it is possible that the US claim does not raise the general question of how investigating authorities can give notice to producers that exist but are not known and do not make themselves known. Rather, it is possible that in this case the US claim is limited to the narrower proposition that the steps taken by the investigating authority in this case, and particularly the period of 20 days, whilst constituting "notice", nevertheless did not constitute "sufficient" notice. The European Union would therefore suggest that the Panel focus on this question, which appears to be the point that is in dispute between the Parties. The question of whether "sufficient" notice has been given would appear to be one that is largely dependent on all the facts and circumstances surrounding the particular case, and therefore one on which the European Union does not further comment in this Third Party Written Submission.

III. COUNTERVAILING DUTIES

A. "All Others" subsidy rate: all interested parties … shall be given notice (Articles 12.1 and 12.7 of the SCM Agreement), be informed of the essential facts (Article 12.8 of the SCM Agreement) and there shall be an explanation of the determination (Articles 22.3, 22.4 and 22.5 of the SCM Agreement)

11. With respect to the requirement to give notice the European Union notes the differences in the wording of Article 6.1 *ADA* and Article 12.1 of the *SCM Agreement*, as well as in the substance of the two agreements. Thus, although under the *Anti-Dumping Agreement*, a Member might not necessarily know the names and addresses of firms producing on its territory and exporting to the investigating Member, and that may, or may not, be engaged in dumping, the situation is not necessarily identical under the *SCM Agreement*. On the contrary, in the case of subsidies taking the shape of direct transfer of public funds or, as in this case, of preferential terms of sale offered by the central government, one might have thought that, in order for a subsidy to be granted, and eventually paid, it might generally be necessary, if only from a practical point of view, for the granting Member to have the name and address of the recipient. In these circumstances, the Panel may wish to consider, on the basis of the particular facts of the case before it, whether or not notice to the interested Member at least under the *SCM Agreement* might serve as adequate notice to interested parties that exist, but that are not known to the investigating authority, and that do not make themselves known. Therefore the European Union would suggest that the Panel should approach with caution the proposition that the Appellate Body's findings on this point in *Mexico – Beef and Rice*, which relate to the *ADA*, can be automatically transposed to the context of the *SCM Agreement*, without taking into account the particularities of the *SCM Agreement*.

12. The United States further claims that the measure at issue is inconsistent with (1) Article 12.8 of the *SCM Agreement* because the investigating authority failed to inform all interested parties, including the government of the United States, of the essential facts under consideration which form the basis for the decision, particularly with respect to the "all others" subsidy rate; and (b) Articles 22.3, 22.4 and 22.5 of the *SCM Agreement* because the investigating authority failed to explain its determination, also particularly with respect to the "all others" subsidy rate. Given the apparent absence of any meaningful disclosure, the European Union agrees with the both of these claims and arguments of the United States.

B. Allocation of Subsidies in Relation to Subject Products

13. The European Union agrees with the US that in calculating the subsidisation per unit ratio funder Article 19.4 of the *SCM Agreement,* there should be a parallelism between the numerator and the denominator, in the sense that they should either reflect the full amount of the subsidy in the numerator and the total sales of all products benefiting from it, in the denominator (Option 1) or, alternatively, be confined to the part of the subsidy benefiting the subject merchandise, in the numerator, and to the sales of the subject merchandise only, in the denominator (Option 2). These alternative methods are the most appropriate and it appears from the file that the data available allowed for each of them to be applied in this case. Other methods, even if they are less precise, would also be legitimate to the extent that they can ensure that the resulting figures do not exceed the ceiling fixed in Article 19.4 of the *SCM Agreement*. However, the method chosen by China, which is based on the unreasonable assumption that the full amount of the subsidy was

allocated to benefit the subject merchandise, has inflated the subsidisation per unit ratio and led to the imposition of countervailing duties that were certain to exceed the actual level of subsidisation.

IV. CONCERNING MOFCOM'S INJURY DETERMINATIONS

A. Price Effects Analysis

14. In order to ensure compliance with Article 3.1 *ADA* and Article 15.1 of the *SCM Agreement*, whenever a price effects analysis resorts to a direct price comparison between domestic and imported goods, such comparison must necessarily take into account the possible discrepancies between the prices compared in terms of product mix and level of trade. Based on the specific facts of the case before it, the investigating authority has to determine if such discrepancies have an actual impact on the comparability of prices, and if so, it must satisfy itself that the prices compared correspond to a comparable product mix and to the same level of trade, or alternatively, that appropriate adjustments are made to take into account the differences in product mix or level of trade.

15. Product mix may have an impact on price comparability where, due to varying production costs or consumer preferences, one product mix is objectively valued higher than another so that a direct comparison between the two turns out to be inappropriate.

16. The level of trade has such an impact to the extent that the transition of the product concerned from one level of trade to the other adds new costs, which are reflected in the prices charged for that product further down the distribution chain.

B. Impact Analysis

17. Article 3.4 *ADA* contains a mandatory – rather than illustrative – list of fifteen factors which must always be evaluated by the investigating authorities in every investigation. At the same time, "all relevant factors" may include, in a given case, factors in addition to those listed in Article 3.4 *ADA*. An overall evaluation (rather than a simple data gathering) of all factors in the appropriate context is particularly necessary in cases where several factors show positive trends. Such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured.

18. Therefore, if as it appears, MOFCOM's finding of adverse impact of the dumped imports was based predominantly on the assessment of two of the injury factors and made without engaging into an in-depth analysis of the particular relevance and relative weight of all relevant factors, and without an overall assessment of the existing trends, the European Union is of the opinion that the impact analysis is flawed and Articles 3.1 and 3.4 *ADA* and 15.1 and 15.4 of the *SCM Agreement* are breached.

C. Causation Analysis

19. Causation is a necessary element not only of the not only of the overall injury analysis under Articles 3.5 *ADA* and 15.5 of the *SCM Agreement* but also of the price effects analysis under Articles 3.2 *ADA* and 15.2 of the *SCM Agreement* and of the impact analysis under Articles 3.4 *ADA* and 15.4 of the *SCM Agreement*, with the only nuance that the latter two do not require a non-attribution analysis.

20. So far as the non-attribution analysis in this case is concerned, this is a rather fact-intensive discussion, in which the European Union prefers not to take a definitive position. It deems, however, appropriate to point out that, although the evolution of sales volumes and market shares, as presented by the US, seems sufficient to make a *prima facie* case that the US imports did not increase at the expense of the domestic industry (whose sales and market share also grew during the same period) but rather at the expense of third country imports (whose volume and market share declined), it is not sufficient in itself to justify a definitive conclusion to that effect. It could be, for example, that apart from eroding the volume and share of third-country imports, US imports have also had the effect of preventing domestic product sales from increasing at an even higher scale. Whether or not this was the case indeed, is a point of fact that the investigating

authority has the burden of verifying. In appears however, that MOFCOM has failed to discharge this burden and link the increase in US imports to any material injury suffered by the domestic industry.

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY JAPAN

A. Disclosure of the Essential Facts Before the Final Determination Under Article 6.9 of the *AD Agreement* and Article 12.8 of the *SCM Agreement*

1. As the preceding panels clarified[1], Articles 6.9 of the *AD Agreement* and 12.8 of the *SCM Agreement* oblige the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis and the final findings and conclusion on the existence of dumping or subsidization, injury, and causation. And such disclosure must be sufficient enough for interested parties to defend their interests.

2. The fact-finding processes for the normal value, the export price, and adjustments are all indispensable for the final fact-findings of dumping. Accordingly, the authorities must disclose at a minimum the actual process of fact-findings of the normal value and export price and adjustments thereto to the exporter which submitted the relevant raw data.

3. When the authorities decide to apply the facts available in the calculation of the dumping margin for "all others", they are required to disclose such facts available in accordance with Article 6.9 of the *AD Agreement*. Furthermore, Article 6.9 of the *AD Agreement* requires the authorities to disclose to interested parties the body of facts, on which the authorities found that the interested party *did not* provide necessary information.

4. The United States alleges that MOFCOM failed to disclose the facts necessary to calculate a 30.3 percent subsidy rate applicable to un-examined producers. The authorities must disclose the body of facts, on which they found the financial contribution, benefit, and specificity, including the "facts available" used, and the calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

5. Furthermore, the process of the application of the below-cost test including the actual sales prices and their actual costs are also facts necessary for the authority to find the normal value and indispensable elements of the determination of dumping and the calculation of the dumping margin. As such, they "form the basis for the decision whether to apply definitive measures." Thus, in accordance with Article 6.9, the authority is required to inform interested parties of these facts.

B. Preparation of Non-Confidential Summaries under Article 6.5.1 of the *AD Agreement* and Article 12.4.1 of the *SCM Agreement*

6. Pursuant to Article 6.5.1 of the *AD Agreement* and Article 12.4.1 of the *SCM Agreement,* when an application does not contain a non-confidential summary of confidential information, the authorities are obliged to scrutinize whether the applicant's statement established the exceptional circumstances specific to the particular information. If the authorities accept an application containing neither a non-confidential summary nor statements establishing exceptional circumstances, the authorities would act inconsistently with these provisions.

7. The Panel should review carefully whether the application adequately provided a non-confidential summary in accordance with the disciplines in the *AD Agreement* and the *SCM Agreement*. If not, the Panel should review whether or not the MOFCOM accepted the application upon confirming that the applicant's statement appropriately explained the reasons why particular pieces of confidential information are not susceptible of summary in light of particular circumstances of the information.

[1] Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179 para. 7.110 and Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States,* WT/DS414/R, circulated 15 June 2012 para. 7.407.

C. The Determination of the All Others Rates

8. As the panel in *China – GOES* stated, Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* clarify that the authorities must notify the exporter or foreign producer of the specific information which the authorities require from the exporter or foreign producer. Only when such party does not provide the specifically requested information may the authorities apply the facts available instead of the original information the party would have submitted. Inaction by exporters/producers, who were unknown to the authorities, to make themselves known to the authorities would not be a valid reason for the importing Member to apply facts available. A dumping determination based on facts available with respect to such exporters/producers would be inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*. Japan is of the view that the same interpretation also applies to Article 12.7 of the *SCM Agreement.*

D. The Sufficiency of the Description in the Notice of Preliminary and Final Determinations

9. With respect to the alleged failure to explain the basis to determine an "all others" anti-dumping rate based on facts available, Japan agrees with the United States that investigating authorities must explain in sufficient detail the factual basis to determine to apply facts available and the factual basis to determine the normal value and the export price to calculate the dumping margin.

10. In the countervailing duty investigation in question, MOFCOM was obliged to explain in sufficient detail the background and reasons, both legally and factually, that led MOFCOM to find a 31.4 percent margin in the preliminary determination and 30.3 percent margin in the final determination for those exporters which failed to make an entry for appearance or failed to submit a questionnaire response.

11. The United States alleges that MOFCOM "failed to disclose the methodology that it claimed to have used to adjust subject import prices to account for their different level of trade" in its analysis of price undercutting.[2] Pursuant to Article 12.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*, the authorities must provide sufficient background and reasons for its conclusion of issues of law and fact relevant to, and material in the authorities' final determination in the public notice or a separate report of the final determination. Articles 3.2 of the *AD Agreement* and 15.2 of the *SCM Agreement* set forth that "the investigating authorities shall consider whether there has been a significant price undercutting". As this text clarifies, the authorities are obliged to consider the issue of price undercutting to reach the determination of injury. Accordingly, this issue is relevant and material to the final determination. MOFCOM thus was obliged to provide sufficient background and reasons in the public notice or a separate report of the final determination of the issue of fact that MOFCOM considered in making price-undercutting analysis.

E. The Authorities' Consideration of Price Suppression

12. In its First Written Submission, China takes the position that Article 3.2 of the *AD Agreement* and Article 15.2 of the *SCM Agreement* "require only a showing of the existence of adverse price effects" but do not "require a showing that subject imports caused or affected the price suppression."[3] China's interpretation does not account for the full text of these provisions, which make explicit that the effect on prices is that of the dumped or subsidized imports: "the effect <u>of</u> the … imports <u>on</u> prices."

[2] First Written Submission of the United States of America, submitted on 27 June 2012, para. 312.
[3] First Written Submission of the People's Republic of China, para. 336.

13. Article 3.2 of the *AD Agreement* and Article 15.2 of the *SCM Agreement* do not require an investigating authority to use any particular type of price suppression analysis.[4] The text of these Articles, however, imposes certain disciplines on the flexibility afforded to investigating authorities in determining price suppression. As explained above, price suppression must be considered in relation to the imports. A price suppression analysis that is limited to a comparison of domestic prices and costs without consideration of the imports does not satisfy the requirement to assess the "effect of the . . . imports on prices."

14. As a general matter, an examination of the relative price levels of the domestically produced and imported products is an effective way to analyze price effects. China's position that a finding of price suppression has nothing to do with the relative price levels of both products is extreme and untenable.

15. In respect of the authorities' obligation to consider price suppression, Japan concurs with the Appellate Body that "with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices"[5]. Furthermore, the Appellate Body has upheld the finding of the panel in that case that, "because Articles 3.2 and 15.2 require an investigating authority to consider *whether the effect of* subject imports is to depress prices of like domestic products to a significant degree, "*merely showing* the existence of significant price [suppression] does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement"[6].

[4] *See, e.g.,* Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3, para. 7.638 ("It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price undercutting."). *See also* Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, para. 7.328 ("Article 15.2 confers wide latitude on the investigating authority.")

[5] Appellate Body Report, *China-Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States,* WT/DS414/AB/R, circulated to WTO Members 18 October 2012 (*"China-GOES"),* para. 154.

[6] Appellate Body report, *China-GOES*, para. 159 (a footnote omitted).

ANNEX B-4

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY MEXICO

I. Choice of the basis for calculating costs

A. The obligation to calculate costs on the basis of the records kept by the exporter or producer under investigation is not absolute

1. Mexico agrees with China that the obligation under Article 2.2.1.1 of the *Anti-Dumping Agreement* (AD Agreement) to calculate costs on the basis of the records kept by the exporter or producer is not absolute. We note that the text of this article establishes two basic premises:

(a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;

(b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:

(i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

(ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In *US – Clove Cigarettes*[1], the WTO's Appellate Body interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule", and stated that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation. Thus, in the context of Article 2.2.1.1 of the AD Agreement, the expression "normally" implies that there is a presumption in favour of the accounting records of the producer or exporter being considered for the calculation of the costs when they comply with the conditions identified in indents (i) and (ii) above, but that this presumption can always be rebutted. In other words, if the records satisfy these conditions and the authority decides not to use them, then the authority bears the burden of explaining why they were not considered.

3. As for the second premise in Article 2.2.1.1 of the AD Agreement, the Panel in *US – Softwood Lumber V* found that Article 2.2.1.1 required that the costs be calculated on the basis of the exporter or producer's records, insofar as those records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration.[2] Mexico considers that Article 2.2.1.1 of the AD Agreement establishes a *juris tantum* presumption: unless proven otherwise, the exporters' records will be considered to be in accordance with GAAP and to reasonably reflect the costs associated with the production and sale of the product under consideration. Consequently, the initial burden of rebutting the said presumption would lie with the investigating authority.[3]

4. In short, Mexico considers that the obligation to use the records of the exporter or producer under investigation is not absolute for two reasons: (1) because the records must be compatible with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration; and (2) because, according to the text of Article 2.2.1.1. of the AD Agreement and the Appellate Body's interpretation of the term "normally" in *US – Clove Cigarettes*, even if the records satisfied these two conditions, the investigating authority would not necessarily have to use them if faced with a case in which such action was justified.

[1] Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, paragraph 273.

[2] Appellate Body Report, *US – Softwood Lumber V*, paragraph 7.237.

[3] Reply by Mexico to question 10 of the Panel.

B. A methodology for allocating costs by price might not reasonably reflect the costs of production and sale of a product under investigation

5. In Mexico's view, a methodology for allocating costs by price, such as that used by the United States exporters, might not reasonably reflect the costs of production and sale of the product under consideration. In this connection, we consider it important to define the meaning of the expressions "cost of production" and "cost of sale", given that one of the requirements for using the accounting records of the exporter or producer is that they reasonably reflect those costs.

6. As indicated in China's first written submission, in *EC – Salmon (Norway)* the Panel established that the ordinary meaning of the expression "cost of production" is "the price to be paid for the act of producing".[4] Thus, assuming that the cost of production is the price to be paid for the act of producing, it is permissible to suppose that the meaning of the expression "cost of sale" is the price to be paid for the storage of the product to be sold. Mexico considers that even a zero cost of production can reasonably reflect the costs associated with the production (but not necessarily the sale) of a product provided the price paid for the act of producing the product was really zero.[5] What is essential here is that the cost of production should actually be equal to zero.

7. Thus, for an investigating authority to be able to take into account the accounting records of the exporter, those records must reflect both the price paid for the act of producing and the price paid for the storage of the product to be sold. Consequently, if the costing methodology of United States exporters did not satisfy the above requirement, then it could not be used by the Chinese investigating authority.

8. The methodology of costing by price basically consists in allocating costs on the basis of the price at which a product is sold to the end consumer. If this methodology is applied to the case of joint products, then the cost of the product as a whole is pro-rated and allocated to each joint product in relation to its market price. Thus, a greater cost is allocated to those joint products that have a higher market price, and a lower cost to those that have a lower price.

9. This costing method involves artificially transferring part of the profit obtained from the sale of the joint products for which there is a high demand to the joint products with a lower demand. The effect is that all the joint products always have the same profit margin, no matter which joint product is concerned and no matter the price at which it is sold. Thus, the method of costing by price involves circularity: if the cost depends on the price, than that cost will normally be below the price.

10. This does not necessarily pose a problem for the calculation of a dumping margin because if the joint products have more or less similar prices on the market of the exporting country, the difference between the profits yielded by the price-based method and the real profits, per joint product, would be minimal or zero. Consequently, the distortion could be insignificant or non-existent.

11. However, in cases such as this one, the distortion could be severe, since there are joint products with a very high selling price on the US market (e.g. chicken breast), and others with a very low value on the same market (e.g. legs). While Mexico considers the existence of a very distinct difference in prices between the joint products investigated on their market of origin to be relevant, it would like to point out in relation to one of the questions of the Panel that it does not believe that the value of a product on the export market is relevant for the purposes of Article 2.2.1.1 of the AD Agreement.[6] Given the enormous difference in prices on the US market, the methodology of costing by price would distort costs, allocating a higher cost to chicken breasts and a lower cost to legs. As a result, the prices that should be below the costs might artificially end up exceeding them.

12. In the face of this problem, one of the viable alternatives is to use a method based on weight, as did the Chinese authority. When this method is used, the distortion created by the

[4] Panel Report, *EC – Salmon (Norway)*, paragraph 7.481.
[5] Reply by Mexico to question 8(b) of the Panel.
[6] Reply by Mexico to question 8(a) of the Panel.

combination of such different prices for joint products on the United States market and the method of costing by price does not arise.

13. Thus, in the present case, taking into account the serious distortions that ensue and given the enormous difference in price between the joint products included in the product under consideration, we must conclude that, in this case, the method of costing by price does not reasonably reflect the costs associated with the production and sale of the product under consideration, since it could not reflect "the price to be paid for the act of producing", as interpreted by the Panel in *EC – Salmon (Norway)*, or the "price to be paid for the storage of the product to be sold", proposed by Mexico in its first oral statement (inferred by analogy from the determinations of the panel in question). For this reason, Mexico agrees with China that "[i]f a company has to spend $100 to produce an item, the fact that the item may only sell for $10 does not change the fact that the 'price to be paid for the act of producing' that item was $100".

II. Definition of the domestic industry

A. China should explain the basis on which its authority concluded that the 17 companies investigated represented more than 50% of the domestic industry for the purposes of the determination of injury

14. Mexico notes that the Chinese authority found that the 17 domestic producers that supported the investigation accounted for 45.53%, 50.72%, 50.82% and 52.59% of the total volume of domestic production in China in the years 2006, 2007, 2008 and 2009, respectively. However, China did not provide any detailed explanation of the basis on which its investigating authority reached these conclusions. In its first written submission, China makes several statements[7] which raise doubts as to whether the investigating authority really knew the total production of the like product on its domestic market. China also states that its authority did not take a sample because it had no knowledge of the universe of producers that constituted the industry under investigation. It is therefore indispensable that China provide a detailed description in this respect.

B. The United States' appraisal of the facts may not be correct and therefore its claim regarding Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well founded

15. Assuming that China was justified in finding that the 17 companies that supported the investigation represented more than 50% of the total volume of domestic production, Mexico agrees that the United States' exposition of the facts in its first written submission could be incorrect. In fact, it is not clear to Mexico that China defined the domestic industry with the bias alleged by the United States. Therefore, the United States' claim concerning Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well-founded.

16. The United States claims that, inconsistently with Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement, China excluded from the domestic industry all producers of white-feather broiler products that did not support the investigation and that its authority did not make any significant effort to identify other producers different from those already known. Proof at this was the fact that no producer other than these 17 appeared in the investigation. This, according to the United States, increased the possibility of an affirmative determination of injury, and it claims that this is inconsistent with the requirement to conduct an objective examination, as provided for in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Likewise, the United States points out that the Chinese authority should have identified the universe of domestic producers rather than limiting its definition of the domestic industry to the 17 producers aforementioned.

17. China asserts that mechanisms additional to publication on the website were used and involved the reporting of the investigation by China's larger television channels and major newspapers. Moreover, it states that the assertion made by the United States is incorrect, since of these 17 producers, only 15 participated in the initial petition while the other two replied to the questionnaire without having had previous contact with the Chinese authority.

[7] First written submission of China, paragraphs 235, 243, 250 and 257.

18. With regard to the actions taken by the Chinese authority, assuming that it had not used any mechanism apart from publication on the website, Mexico would agree with the United States that the actions of an investigating authority cannot be limited to such publication, especially in China's case as it acknowledges the existence of a very large number of producers. Mexico recalls in this connection what was established by the Appellate Body in *US – Wheat Gluten*, namely that the authorities "must *actively* seek out pertinent information" in the case before them.[8] Consequently, in Mexico's view the Chinese authority could have taken some additional action to seek to identify as many producers as possible so as, on that basis, to define the domestic industry and, subsequently, to conduct its injury analysis. For example, the Chinese authority could have enquired among local government agencies and producers' associations and checked lists of beneficiaries of subsidy programmes, consulted the authorities in charge of animal health matters, etc.[9]

19. With regard to the domestic industry, Mexico notes that China found that the companies that supported the investigation represented the domestic white-feather broiler products industry inasmuch as they were the only ones to appear in the proceedings because they constituted more than 50% of China's total production during the examination period. Assuming that two other producers actually did appear, and that they replied to the questionnaire, that would suggest that the approach of the Chinese authority was to define the industry as a "major proportion" of the total domestic production. In this connection, Mexico notes that Article 4.1 of the AD Agreement clearly indicates that a domestic industry can be defined in two different ways: (a) as the domestic producers as a whole; or (b) as producers whose production constitutes a major proportion of total domestic production.

20. The United States maintains that China was obliged to identify all of the domestic producers and send them a questionnaire, and to include all of the domestic producers in the injury analysis.

21. In Mexico's opinion this is not necessarily so. Article 4.1 of the AD Agreement allows the domestic industry to be defined as including only producers that produce a major proportion of the total domestic production. Insofar as the Chinese authority based its analysis on this approach and complied with the standard applicable, it would not have unjustifiably excluded any producer from the definition of the domestic industry.

22. Nevertheless, it is clear that to be in a position to decide whether the actions of the authority were sufficient, it is necessary to know how it determined the total domestic production. As there are no data in the final determination to indicate the basis on which the total production was determined, Mexico considers that there could have been a violation of Article 12.2.2 of the AD Agreement. However, if the record contains elements that justify the determinations concerning the composition of the domestic industry, it would be incorrect to conclude that there was also a violation of Article 3 of the AD Agreement. For these reasons, we respectfully request this Panel to examine the contents of the administrative record of the investigation.

III. Comparison of the prices of the imports with the domestic prices on the market of the importing country

A. The comparison of the price of the imports with the price of the domestic product should be based on positive evidence and involve an objective examination

23. Mexico notes that, in accordance with the reasoning of the Panels in *Egypt – Rebar*[10] and *EC – Tube or Pipe Fittings*[11], there is no single valid method of conducting the undercutting analysis under Article 3.2 of the AD Agreement. However, even if there is no mandatory method, Mexico considers that the conditions established in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement are applicable to the undercutting analysis, since these articles govern all aspects relating to the determination of injury.

24. Consequently, the undercutting analysis should be consistent with Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement, i.e. it should be based on positive evidence and

[8] Appellate Body Report, *US – Wheat Gluten*, paragraph 53.
[9] Reply by Mexico to question 11 of the Panel.
[10] Panel Report, *Egypt – Rebar*, paragraph 7.73.
[11] Panel Report, *EC – Tube or Pipe Fittings,* paragraph 7.292.

involve an objective examination.[12] In other words, the undercutting analysis should be carried out in an unbiased manner, without favouring the interests of any party, since the determination will always be influenced by the objectivity of the investigation process, or the lack thereof.

B. *The price comparison must be conducted at the same level of trade*

25. As already mentioned, in the AD Agreement there is no indication of the details that should be taken into account in analysing the level of undercutting in the context of a determination of injury. Nevertheless, Mexico considers that, in addition to the general rules laid down in Article 3.1 of the AD Agreement, certain obligations laid down in Article 2.4 of the AD Agreement are applicable to the undercutting analysis.

26. In this respect, in *EC – Tube or Pipe Fittings*, the Panel determined as follows:

> 7.292 [I]n view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the *Anti-Dumping Agreement* relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, **we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis**.
>
> 7.293 In a dumping determination, one focus of **adjustments** may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; **by contrast, the focus in a price undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to customers**. (Emphasis added.)

27. Thus, the Panel recognized that although all of the obligations of Article 2 cannot be transposed into the analysis envisaged in Article 3, it is possible to transpose some of them and, moreover, accepted that making adjustments is one of the obligations capable of being transposed.

28. In this connection, Mexico considers that the price comparison for the purposes of injury analysis must be conducted at the same level of trade and that, if need be, the necessary adjustments should be made to ensure that the comparison between the like product and the product under investigation is objective and fair. This is necessary to prevent distortions or bias in the analysis of the effects of the imports on domestic prices in the importing country. In Mexico's opinion, this is something that needs to be addressed in order to be able to fulfil the obligation of carrying out an objective examination in accordance with Article 3.1 of the AD Agreement.

C. *A significant difference in the values of the baskets of products compared could produce erroneous results in the price analysis*

29. Mexico agrees with the United States that a significant difference between the values of the domestic products and the like national products could lead to a biased conclusion regarding the levels of undercutting, if it is decided to compare average prices.

30. Although the Chinese authority has explained its reasons for not conducting the price analysis on a disaggregated basis, Mexico is not convinced that this explanation is adequate. In Mexico's opinion, where the analysis of the effects of the imports on internal prices in the importing country is concerned, the Chinese authority should have compared products "of the same species" and not products "of the same genus". In Mexico's view, a disaggregated comparison between products "of the same species" would make possible a more appropriate and reasonable comparison.

31. This is based on Articles 3.1 and 3.2 of the AD Agreement, which require that the investigated product and the domestic product be like. Indeed, Article 3.1 states that the determination of injury must include an objective examination "of the effect of the dumped

[12] Regarding the meaning of the expression "objective examination", see the Appellate Body Report in *US – Hot-Rolled Steel*, paragraph 193.

imports on prices in the domestic market for *like* products". Likewise, the second sentence of Article 3.2 states that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting … as compared with the price of a like product of the importing Member […]".[13]

32. Finally, as Mexico stated in its replies to the questions raised by this Panel, Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement set out three types of price effects which are alternatives and do not depend on each other. Mexico has three reasons for considering this to be so: (1) Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement mention three price effects with different characteristics; (2) each price effect is separated by the word "or", which suggests that the investigating authority can take into account one or more of them; and (3) the last sentence of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement[14] suggest that the authority can analyse the undercutting in isolation and independently of the price depression or suppression.[15]

[13] Reply by Mexico to question 15 of the Panel.
[14] "No one or several of these factors can necessarily give decisive guidance".
[15] Reply by Mexico to question 13 of the Panel.

ANNEX B-5

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY NORWAY

I. The authorities' duty to provide opportunities for a meeting between interested parties and parties with adverse interests

1. The US claims that China acted inconsistently with Article 6.2 of the *AD Agreement*, by refusing the request for a public hearing.[1] The wording of the second sentence of Article 6.2, "the authorities *shall*" (emphasis added), makes it clear that the authorities have no flexibility as regards providing opportunities for a meeting between interested parties and parties with adverse interests (provided the authorities have been asked by an interested party to hold a meeting). It is an obligation they have to fulfill. The terminology chosen, "provide opportunities", entails contacting the parties with adverse interests and asking them to take part in such a meeting.

2. After being contacted and asked to attend (with sufficient attention being paid to the convenience of the parties, cf. the third sentence of Article 6.2), the parties with adverse interests may however decide that they cannot or do not want to attend the meeting, in line with the fourth sentence of Article 6.2. In such a case, if *all* parties with adverse interests inform the authorities that they will not be attending the meeting, the authorities would not be obliged to hold the meeting. Norway would like to underline that this is the *only* viable reason not to hold a meeting in line with Article 6.2. Under such circumstances, the authorities' obligation of "providing opportunities" for the relevant parties to meet has been met.

II. Disclosure of essential facts under consideration which form the basis for the decision of whether to apply definitive measures

3. The US claims that China is in breach of Article 6. 9 of the *AD Agreement*, as the investigating authority did not disclose the data and calculations performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.[2] The core of the duty of disclosure under Article 6.9 relates to "essential facts". The term "fact" has been interpreted to mean "a thing that is known to have occurred, to exist or to be true".[3] On the basis of that definition, the panel in *Argentina – Poultry* found that while the authority's *reasons* should explain *inter alia* how it weighed the facts and how the facts in the record supported its determination, the duty of disclosure relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed.[4]

4. Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. Absent disclosure of the essential facts, interested parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

5. Accordingly, if the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. This is important for the legitimacy of the process as well as a safeguard mechanism for the correctness of the actual numbers and data relied on. These facts are essential to the final determination, as it could not otherwise be made and no duties could then be imposed. Such disclosure is important to ensure interested parties have the opportunity to defend their interest, in accordance with Article 6.2 of the *AD Agreement*.

[1] The US' First Written Submission, paras. 39 and 40.
[2] The US' First Written Submission, para. 53.
[3] Panel report, *Argentina – Poultry*, para. 7.225.
[4] Panel report, *EC - Salmon*, para. 7.807.

III. The determination of the «all others» rate

6. The US claims that China applied facts available to producers that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, thereby acting inconsistently with Article 6.8 and Annex II of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.[5] Paragraph 1 of Annex II of the *AD Agreement* insists that the authority "specify in detail the information required from any interested party" and ensure that the interested party be "aware that if the information is not supplied within a reasonable time", the authority may use facts available. Accordingly, in *Mexico – Rice,* the Appellate Body ruled that the authority could not apply facts available to the exporters that were not investigated and not notified of the required information.[6] Inaction is thus not sufficient grounds for resorting to facts available.[7] In the case before the Panel, China submits that a higher level of notice was effected compared to *Mexico – Rice*, as the notice was posted on the website of MOFCOM.[8] The Panel in *China – GOES*, on this very issue, noted the following:

> "Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party."[9]

7. This conclusion follows directly from the wording of paragraph 1 of Annex II of the *AD Agreement*. "Aware" is defined as "conscious", "not ignorant", "having knowledge" or "well-informed".[10] The fact that the notice is available on the internet, together with millions of other documents, does not ensure that the individual producer actually knows about the notice. Furthermore, if this lower threshold was to be applied, inconsistent with the wording of paragraph 1 of Annex II, it would imply that the producers would have to ensure they were up to date with all potential notices from all investigating authorities in all WTO Members to whom they export goods at all times. According to paragraph 1 of Annex II, the responsibility is clearly put on the investigating authority. The only viable interpretation of paragraph 1 of Annex II is thus that putting a notice on the internet is not sufficient to fulfill the requirement of awareness as stipulated. In such cases, the interested parties cannot be seen to have been notified of the required information in the terms of Article 6.8 of the *AD Agreement*.

8. Although the *SCM Agreement* has no equivalent to Annex II of the *AD Agreement*, the Appellate Body in *Mexico – Rice* found that the same limitations on the authorities' discretion when resorting to the use of facts available apply to Article 12.7 of the *SCM Agreement*.[11] It is thus Norway's view that Article 12.7 of the *SCM Agreement* should be interpreted to the same effect, in line with the object and purpose of the said Article.

IV. Explanation of determinations

9. The US claims that China violated Articles 12.2, 12.2.1 and 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement* because the investigating authority failed to provide an adequate explanation for some of its determinations, including the determinations of the "all others" rates and the determinations of injury.[12] Under the cited provisions, the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive anti-dumping and countervailing duties. The Appellate Body and panels have consistently ruled that these provisions require investigating authorities to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.[13] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[14] The "evidentiary path that led to the inferences and overall conclusions of

[5] The US' First Written Submission, paras. 146 and 184.
[6] Appellate Body Report, *Mexico – Rice*, para. 259.
[7] Appellate Body Report, *Mexico – Rice*, para. 259.
[8] China's First Written Submission, paras. 182-184 and 190-193.
[9] Panel Report, *China – GOES*, para 7.386.
[10] The Concise Oxford Dictionary of current English, R. E. Allen, 8th edition, Oxford University Press, Oxford.
[11] Appellate Body Report, *Mexico – Rice*, para. 295.
[12] The US' First Written Submission, paras. 166-169, 213-218 and 312.
[13] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 99.
[14] Appellate Body Report, *US – Line Pipe*, para 217.

the investigating authority must be clearly discernible in the reasoning and explanations found in its report".[15]

10. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *AD Agreement* and the *SCM Agreement* governing those determinations. These provisions thus represent an important safeguard mechanism for due process rights.

V. Definition of the domestic industry

11. The US claims that China violated Articles 3.1 and 4.1 of the *AD Agreement* and Articles 15.1 and 16.1 of the *SCM Agreement*, by including only domestic producers that voluntarily requested and returned domestic producers' questionnaire responses in the definition of the domestic industry.[16] Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the investigating authority to conduct an "objective examination" of the economic state of the "domestic industry" on the basis of "positive evidence". In *EC – Bed Linen (India - 21.5)*, the Appellate Body ruled that an "objective examination" requires authorities to reach a result that is "*unbiased, even-handed*, and *fair*."[17] In *US – Hot-Rolled Steel (AB)*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

> "to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured."[18]

12. Furthermore, the Appellate Body found that the "*selective*" examination of just "one part" of an industry is not "objective" because the authority could choose the worst performing part of the industry for examination, thereby making an injury determination "more likely". It held that "[t]he investigation and examination must focus on the *totality* of the 'domestic industry'."[19] Thus, an investigating authority cannot single out particular parts or groups of the domestic industry for investigation. This ruling thus also demonstrates that the requirements of objectivity impose contextual constraints on how the investigating authority defines the "domestic industry" under Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*.

13. As to the precise definition of "domestic industry", this, according to said Articles, comprises producers "as a whole" of the like products. In the alternative, the industry may be limited to a "major proportion" of the industry. However, the *only* category of producers that may be entirely excluded from the industry is "related" producers. The definition of "domestic industry" therefore ensures the inclusion of domestic producers from all segments and sectors of the industry on an equal footing. Any determinations made with respect to the "domestic industry" will accordingly be representative of that industry as a whole. The said Articles do not authorise an authority to limit an industry solely to a certain group of producers, for example supporters of the investigation.

14. Accordingly, it is Norway's view that an investigating authority cannot limit the definition of the domestic industry to certain categories of producers, such as supporters of the investigation. This would be inconsistent with Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*. Furthermore, such a limitation of the definition of the domestic industry would not fulfil the objectivity requirement of Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*.

[15] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 97.
[16] The US' First Written Submission, para. 257.
[17] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.
[18] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.
[19] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.

ANNEX B-6

INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE KINGDOM OF SAUDI ARABIA

1. The Kingdom of Saudi Arabia participates as a third party in this dispute *China – Antidumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427) to express its views on a number of important systemic issues raised in this dispute.

I. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT: FOREIGN PRODUCERS' AND EXPORTERS' COST DATA SHALL BE USED ABSENT EXCEPTIONAL CIRCUMSTANCES

2. Saudi Arabia is of the view that Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to use the costs as actually borne by the producer as reflected in the records of the producer in question as the basis for the determination whether sales are made in the ordinary course of trade or are, in contrast, below costs. The same costs as reflected in the records of the exporter or producer under investigation should also be used in the event that the normal value is to be constructed in accordance with Article 2.2 of the Anti-Dumping Agreement.

3. Article 2.2.1.1, first sentence imposes a general obligation of principle in respect of the basis for the cost determination. It provides that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation." The second part of the first sentence sets out the exceptional circumstances under which the rule would not apply and thus clarifies that this obligation is subject to two limited conditions only: (a) that "such records are in accordance with the generally accepted accounting principles of the exporting country"; and (b) that the records "reasonably reflect the costs associated with the production and sale of the product under consideration." These two basic conditions underline the exceptional nature of the circumstances that would allow an authority to reject the records of the producer or exporter as the basis for the cost determination.

4. The second sentence expands on one of these conditions by clarifying the final part of the first sentence relating to the condition that the costs reasonably reflect the costs "associated with" the production and sale of the product under consideration, which is affected by the cost allocation methodology that is used. Article 2.2.1.1 does not permit the rejection of costs data and their replacement with other data simply because the authorities consider that the costs as reflected in the records are below an external benchmark or because a different allocation method could have been used.

5. The condition that the costs have to "reasonably reflect" the costs "associated with" the production and sale of the product under consideration does *not* allow an authority to question the accuracy or "reasonableness" of the costs as such, but concerns merely their *association with* the product under consideration as compared with other products to which the costs may also be associated. In *US – Softwood Lumber V*, the panel noted that that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".[1] According to the panel in *EC – Salmon (Norway)*, "the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product".[2] That is the only relevant test to apply in the context of this second condition.

6. Furthermore, Saudi Arabia considers that Article 2.2.1.1 does not impose a particular cost allocation methodology but does impose a clear and meaningful obligation to consider all available evidence, including in particular the evidence provided by the foreign producer or exporter. As long as the method historically utilized by the foreign producer or exporter as reflected in the records is

[1] Panel Report, *US – Softwood Lumber V*, para. 7.321.
[2] Panel Reports, *EC – Salmon (Norway)*, para. 7.483; *Egypt – Steel Rebar*, paras. 7.393 and 7.422.

reasonable, it must be accepted. A method is not "unreasonable" simply because the allocation of costs leads to less costs being allocated to a by-product or a waste product, even if that by-product or that waste product is of great value in the country of importation. Nor would it be correct to suggest that the cost allocation method has to be appropriate "for purposes of the anti-dumping investigation". The requirement in the second sentence that the allocation method has to be one that has been "historically utilized" points in the opposite direction. It confirms that the cost allocation method as reflected in the records must be the method that the producer or exporter is used to employ, and is precisely not tailor-made for purposes of the investigation.

II. INVESTIGATING AUTHORITIES CAN RESORT TO THE USE OF FACTS AVAILABLE ONLY IN VERY LIMITED CIRCUMSTANCES AND NEVER IN A PUNITIVE MANNER AND MUST DISCLOSE THE BASIS FOR THE USE OF FACTS AVAILABLE

7. Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement permit the use of facts available only in limited circumstances. These limited circumstances are: (a) when an interested party or Member has not provided "necessary" information in a timely manner (specifically "within a reasonable period"), or (b) when an interested party or Member has otherwise significantly impeded the investigation. In addition, Annex II of the Anti-Dumping Agreement makes clear that the use of facts available is permissible only when the parties have been given proper notice of the information required by the investigating authority, and have been informed of the possibility that facts available will be applied in the event of non-cooperation with the authority. This effectively means that an active approach on the side of the investigating authority is required in order to ensure that interested parties have been contacted and adequately informed before it is entitled to resort to the use of facts available. Therefore, if the investigating authority has failed to identify and notify an exporter or foreign producer, no facts available may be used in respect of this exporter. Thus, "facts available" should only be used to fill in gaps in the necessary information and cannot be used in a punitive manner. The investigating authority must employ the *best*, most appropriate and proper facts available, and the determination must not be based on speculative inferences.

8. Saudi Arabia recalls that Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require investigating authorities to disclose those facts underlying the final findings and conclusions in respect of the essential elements that must exist for the application of definitive anti-dumping or countervailing duties. Saudi Arabia considers that when facts available are used, the authorities must disclose the "facts" relied upon to reach the conclusion that facts available were warranted, as part of the facts necessary to the process of analysis and decision-making by the investigating authority.[3] In addition, in the view of Saudi Arabia, it must be disclosed why these facts were considered to be the "best" information available for the particular producer. This "factual basis" for making the dumping or subsidies determination is clearly part of the "essential facts under consideration" that interested parties must be informed of before the final determination such that they can provide their comments and defend their interest, as required by Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. Similarly, Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement also impose an obligation to include in the public notice of the determination "sufficient detail" on the important issues of facts and law considered "material" to the investigating authorities such as, undoubtedly, the factual basis for the dumping or subsidies margin calculation.

III. PROPER ALLOCATION OF SUBSIDIES UNDER ARTICLE 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994 REQUIRES ALLOCATION TO ALL PRODUCTS BENEFITING FROM THE SUBSIDY

9. Saudi Arabia considers that Article 19.4 of the SCM Agreement and Article VI of the GATT 1994 impose a minimum requirement on the investigating authority to ensure a proper and correct allocation of the total subsidy amount to the specific subject product. Whatever the allocation methodology to be adopted, Saudi Arabia considers that if a subsidy benefits several products including but not limited to the product under consideration, it is improper to allocate the total subsidy amount to the subject product only. An investigating authority that does not properly allocate the subsidies over all of the products benefiting from the subsidy but instead allocates all

[3] Panel Report, *China – GOES*, para. 7.408.

of the subsidy amount to the product under consideration only will likely impose countervailing duties that are in excess of the amount of subsidies benefiting the product.

IV. AN INJURY EXAMINATION MUST BE OBJECTIVE AND BASED ON POSITIVE EVIDENCE

10. Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement set forth an obligation to conduct an objective injury examination based on positive evidence which permeates all aspects of the injury and causation investigation, including the definition of the domestic industry to be examined. First, an injury examination can only be objective if the process that led to the definition of the domestic industry was equally objective. Second, an objective examination of price effects in the context of an injury determination under Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement needs to recognize important differences between the subject product and the like product, such as the product mix and must compare prices at the same level of trade. Third, an investigating authority conducting an injury examination under Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement must provide an accurate and adequate explanation of how the facts support the findings. Fourth, an objective causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement requires investigating authorities to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. The non-attribution requirement requires the authorities to separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors, such as decisions on capacity expansion and other business decisions that are unrelated to the dumped or subsidized imports.

V. DUE PROCESS REQUIRES THAT A PROPER BALANCE BE STRUCK BETWEEN TRANSPARENCY AND THE PROTECTION OF CONFIDENTIAL INFORMATION

11. Saudi Arabia notes the balance struck in Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement between confidentiality and transparency. Due process requires that interested parties have a right to see the evidence submitted or gathered in an investigation, and have an adequate opportunity for the defense of their interests. But it is important to recall that there could be “exceptional circumstances” in which summarization of confidential information will not be possible. In this respect it must be emphasized that transparency does not trump legitimate confidentiality concerns.

ANNEX B-7

THAILAND'S RESPONSES TO PANEL QUESTIONS

I. PROCEDURAL CLAIMS

A. OBLIGATIONS UNDER ARTICLE 6.2 OF THE ANTI-DUMPING AGREEMENT

1. (to all third parties) Please clarify your views as to how an authority may satisfy the obligation to "provide opportunities" under Article 6.2, second sentence, of the Anti-Dumping Agreement, including the conditions, if any, under which an investigating authority may refuse to organise and hold a hearing.

Response to Question 1: *The Government of Thailand (GOT) considers that Article 6.2 provides opportunities for interested parties with adverse interests to meet all interested parties so that opposing views may be presented and rebuttal arguments may be offered. Where an interested party requests a hearing under Article 6.2, the GOT considers that an authority should accept the request, provided that the interested party with adverse interests is also provided an opportunity to attend and that the request is raised within the reasonable period of time as not to be a disruption to the proceedings.*

B. DISCLOSURE OF ESSENTIAL FACTS

2. (to all third parties) What, in your view, are the relevant "essential facts" concerning an AD calculation which an investigating authority must disclose pursuant to Article 6.9 of the Anti-Dumping Agreement? In particular, do you think the authority is obliged to disclose as "essential facts": (1) its actual dumping margin calculations; (2) exclusion of certain transactions or results of its application of the below-costs test?

Response to Question 2: *The GOT considers that Article 6.9 intends to provide interested parties with opportunities to defend their interests. In this respect, an authority should issue a detailed calculation of the dumping margin, including the results of any below cost tests and an explanation of why any transactions were being excluded, so that interested parties have an opportunity to comment and such comments may be taken into account prior to the issuance of the final determination.*

3. (to all third parties) What are the criteria for distinguishing essential facts from regular facts, and facts from reasoning? For instance, the application of the test to determine whether sales were in the ordinary course of trade may require an investigation authority to apply a number of assumptions to the data, which arguably may involve an element of reasoning. Does that mean that they are not "facts"? Please discuss.

Response to Question 3: *The essential facts are those considered relevant by an authority in determining whether there has been dumping, injury, and a causal link. These facts may include facts that explain, for example, why the authority decided sales were in the ordinary course of trade or facts that explain why sales were not considered to be in the ordinary course of trade. These facts are to be based on data submitted during the proceedings, which is considered to be reliable and verifiable.*

C. REQUIREMENT TO PROVIDE NON-CONFIDENTIAL SUMMARIES

4. (to all third parties) Should the investigating authority require the interested party submitting the confidential information to indicate or label the non-confidential summary of the redacted information in the non-confidential version? Why? Please refer to relevant text of the Agreements and/or any prior decisions which may inform your views on the matter.

Response to Question 4: *The GOT considers that it is not necessary for an authority to require the interested party to label the non-confidential summary. Our Government is of the view that the*

means to comply with Article 6.5.1. is at the discretion of an investigating authority, provided that the non-confidential summary permits a reasonable understanding of the substance of information submitted in confidence.

II. USE OF ADVERSE FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATE

5. (to the European Union) In its third party written submission, paragraphs 49-52, the European Union has raised a textual difference between Articles 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement, as well as between the Anti-Dumping and the SCM Agreements in general. The European Union argues that whereas the government of a WTO Member may not be aware of all firms producing the product under investigation in its territory for purposes of an AD investigation, it is likely to know the firms that it is subsidising. Please elaborate, and address the following points:

(a) Given that the definition of "interested party" in the Anti-Dumping Agreement includes the government of the exporting Member, is there any significant difference between the two Agreements with respect to the party from whom information may be requested?

(b) Can non-cooperation on the part of an "interested Member" be the basis for applying a facts available "all others" rate to producers/exporters who were not given direct notice by the investigating authority of the information required?

(c) Does requesting that a Member notify its allegedly subsidised producers fall within the scope of a request for information under Article 12.7 of the SCM Agreement?

6. (to other third parties) Do you agree with the European Union's reading of the textual differences between the two Agreements?

7. (to all third parties) The Panel notes that in the AD and CVD investigations MOFCOM essentially divided exporters/producers into three categories: (1) exporters/producers selected for individual examination; (2) registered companies who were not selected for individual examination (including an alternate respondent); and (3) interested parties who were unknown to MOFCOM and who did not appear before MOFCOM.

(a) Given the meaning of the term "interested party" in Article 6.11 of the Anti-Dumping Agreement/Article 12.9 of the SCM Agreement, please clarify whether in your view Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement are applicable to the unknown producers. If so what information should be included in the notice of initiation for it to be sufficient to notify unknown producers of the information requested and of the consequences of not appearing? What would be a sufficient manner of notice such that the investigating authority can assume that unknown producers have received notice and can apply Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement?

Response to Question 7(a): *The GOT considers that Article 6.11 of the Anti-dumping Agreement and Article 12.9 of the SCM Agreements apply to unknown producers. The notice of initiation of the investigation should clearly mention that the proceeding concerns all producers and not just those listed in the complaint, notified directly by the authority, or contacted by the exporting Member. If the unknown producers do not make themselves known to the investigating authority within the prescribed time limits, the best available information may be applied which could result in a determination of dumping margins on the basis of facts available for the producers concerned.*

(b) Please explain how the scope of the obligation in Article 6.8 relates to the disciplines of Article 9.4 of the Anti-Dumping Agreement. Does Article 9.4 apply to unknown interested parties who were not part of the universe of interested parties considered for the sample/selection or should they be captured by Article 6.8? If neither of these provisions is applicable, what provision applies to the calculation of their rate?

Response to Question 7(b): *The GOT considers that the application of Article 9.4 is a decision taken by the authority based on the number of exporting producers known to exist. As the GOT considers that unknown producers should make themselves known to the investigation within the prescribed time limits following the notice of initiation of the investigation, Article 6.8 would apply to unknown producers, which would result in a determination of dumping margins on the basis of facts available for the producers concerned.*

III. CALCULATION OF THE ANTI-DUMPING DUTY

8. (to all third parties) With respect to an investigating authority' use or non-use of costs as reported in a producer's records pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement:

(a) How should by-products and joint-products be treated for purposes of costs allocation, in particular where these by-products or joint products have very little value on the domestic market, but can attract a high price on the export market?

Response to Question 8(a): *The GOT considers that the manufacturing costs of joint or by products should be based on the overall production process from which these products are derived. This would mean that the product with very little value on the domestic market would be sold at a loss and the comparison to be made, in the example cited, would be between the constructed value and the export price.*

(b) Do you think that a zero cost of production can ever reasonably reflect the "costs associated with the production and sale" of a product?

Response to Question 8(b): *Please refer to (a)*

9. (to all third parties) What are the cost components that should be included in constructing normal value of chicken paws?

10. (to all third parties) Please, provide your view as to who (i.e. a respondent or an investigating authority) bears the initial burden of proving that the records do not reasonably reflect the costs and at which point this burden shifts from one party to the other.

Response to Question 10: *The GOT considers that the burden of proof in demonstrating that the record does not reasonably reflects the costs is initially with the investigating authority (IA) and the burden shifts to the interested party at the time when this issue is raised by the IA within the context of the proceedings. This may occur following the questionnaire response as highlighted in the deficiency letter, during the on-site-verification or in response to the preliminary determination or essential facts.*

IV. INJURY

A. DEFINITION OF THE DOMESTIC INDUSTRY

11. (to all third parties) Please explain the relationship between the ability of an investigating authority to define the domestic industry under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement as a "major proportion" of the total domestic production on one hand, and the obligation to conduct the injury analysis based on positive evidence and an objective examination under Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement on the other hand. In circumstances, such as in this case, where petitioners represent a "major proportion" of the domestic industry, how far does an investigating authority need to go to identify and invite other producers to provide data to be taken into account in the injury analysis?

Response to Question 11: *Under the Thai Anti-dumping law, while 25% of the domestic industry is able to initiate a complaint following the initiation, it is required that at least 50% of domestic production should participate in the investigation for the domestic industry to have standing. This is undertaken to ensure that the injury assessment is as representative as possible.*

12. PRICE EFFECTS

13. (to all third parties) China argues that Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement set out the three types of price effects they mention as alternatives. Consequently, China also argues that, under these two provisions, findings of price suppression or price depression may (in principle) be made independently from a finding of price undercutting. Do you agree? Please explain your position in this respect.

Response to Question 13: *The GOT agrees with China that there are three distinct price effects. Price undercutting may occur without price depression and suppression. Vice-versa, price depression may occur without price undercutting and the same is true for price suppression. To say otherwise would be to deny the impact of other factors listed under Article 3.2.*

14. (to all third parties) In your view, is there any obligation on an investigating authority to ensure for purposes of the price effects analysis that the two sets of pricing data being compared (subjects imports, domestic like products) correspond to: (i) a comparable product mix; and (ii) the same level of trade? If so, in what provision(s) do you find the obligation?

15. (to all third parties) Is likeness to be taken into account in making the comparison between imports and domestic products for the price effects analysis? In this regard please elaborate on the relationship between the "likeness" and the "objective examination" requirements and explain the overlap between the two, if any.

Response to Question 15: *In doing the price effects analysis, the authorities should try to compare prices of particular models or varieties within the investigated product.*

B. CAUSATION

16. (to all third parties) Please discuss whether, in your view, the issue of causation arises only under Article 3.5 of the Anti-Dumping Agreement/Article 15.5 of the SCM Agreement, or whether it also arises under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4.

Response to Question 16: *The GOT is of the view that Article 3.5 requires causation to be confirmed in terms of the factors listed under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4*

_____

ANNEX C

WORKING PROCEDURES FOR THE PANEL

Contents		Page
Annex C-1	Working Procedures for the Panel	C-2
Annex C-2	Additional Working Procedures of the Panel Concerning Business Confidential Information	C-7

ANNEX C-1

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES
ON BROILER PRODUCTS FROM THE UNITED STATES
(DS427)

WORKING PROCEDURES FOR THE PANEL

Adopted on 15 June 2012

1. In its proceedings, 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 shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where 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.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any 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. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, 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. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers

to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant reasonable extensions of the time to make an objection upon a showing of good cause. In any event no objection shall be received after the deadline for the comments on the responses to the questions following the second substantive meeting. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. 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. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6. China's exhibits could be numbered CHN-1, CHN-2, etc.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

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 to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) 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.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If the respondent chooses not to avail itself of that right, the Panel shall invite the United States to present its opening 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 statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

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

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party

shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. Each party shall submit an integrated executive summary of its arguments as presented in its written submissions, statements and responses to questions, in two parts. The parties shall submit the first part of the integrated executive summary 10 calendar days after the responses to the questions following the first substantive meeting. The parties shall submit the second part of the integrated executive summary 10 calendar days after the comments on the responses to questions following the second substantive meeting.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement at the latest 7 calendar days after the date of the third party session, or in the event that the Panel addresses questions to the third parties, 7 calendar days after the deadline for submission of responses to these questions. The integrated summary to be provided by each third party shall not exceed 5 pages.

21. The executive summaries referred to above 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. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

Interim review

22. 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.

23. 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.

24. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

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

(b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to

DSRegistry@wto.org, and cc'd to XXXXX, XXXXX, and XXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX C-2

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES
ON BROILER PRODUCTS FROM THE UNITED STATES
(DS427)

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING
BUSINESS CONFIDENTIAL INFORMATION

Adopted on 19 June 2012

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

4. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

6. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

7. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

8. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

_____