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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

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US – Softwood Lumber IV (Article 21.5 – Canada)	Panel 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/RW, adopted 20 December 2005, upheld by Appellate Body Report WT/DS257/AB/RW, DSR 2005:XXIII, p. 11401
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, p. 1875
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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, p. 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, p. 323
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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
AUV	Average unit values
CIF	Cost, insurance, freight
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
JT&N	Jincheng Tongda & Neal
Keystone	Keystone Foods, LLC
MOFCOM	Ministry of Commerce of the People's Republic of China
Pilgrim's Pride	Pilgrim's Pride Corporation
POI	Period of investigation
Redetermination	Ministry of Commerce, Notice No. 44 of 8 July 2014 of the Redetermination of the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the US
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Steptoe	Steptoe & Johnson LLP
RMB	Chinese Renminbi
Tyson	Tyson Foods, Inc.
Vienna Convention	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 Complaint by the United States

1.1. This compliance dispute concerns the challenge by the United States to measures taken by China to comply with the rulings and recommendations of the Dispute Settlement Body (DSB) in the original proceeding *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*.

1.2. Paragraph 1 of the Agreed Procedures under Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) reached between the United States and China states that "[s]hould the United States consider that the situation described in Article 21.5 of the DSU exists, the United States will request that China enter into consultations with the United States." The United States considered that China's measures taken to comply with the recommendations and rulings of the DSB in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* are not consistent with the covered agreements and therefore requested, on 17 May 2016, that China enter into consultations.

1.3. Consultations were held on 24 May 2016, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 27 May 2016, the United States requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU with standard terms of reference.[1]

1.5. At its meeting on 22 June 2016, the DSB referred this dispute, if possible, to the original Panel, in accordance with Article 21.5 of the DSU.

1.6. 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 documents WT/DS427/11 and WT/DS427/11/Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[2]

1.7. In accordance with Article 21.5 of the DSU, the Panel was composed on 18 July 2016 as follows:

Chairperson:	Mr Faizullah Khilji
Members:	Mr Serge Fréchette
	Ms Claudia Orozco

1.8. Brazil, Ecuador, the European Union, and Japan reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.9. After consulting the parties, the Panel:

a. adopted its Working Procedures[3] and timetable on 9 November 2016;

b. revised the timetable on 1 December 2016, and again on 4 July 2017; and

[1] Request for the establishment of a panel by the United States, WT/DS427/11 and WT/DS427/11/Corr.1 (United States' panel request).
[2] Constitution note of the Panel, WT/DS427/12.
[3] See the Panel's Working Procedures in Annex A-1.

c. adopted, on 22 November 2016, additional procedures for the protection of Business Confidential Information (BCI).[4]

1.10. The Panel held its substantive meeting with the parties on 25 and 26 April 2017. A session with the third parties took place on 26 April 2017. The Panel issued its Interim Report to the parties on 22 September 2017. The Panel issued its Final Report to the parties on 17 November 2017.

1.11. In these panel proceedings, each party raised concerns regarding the late submission of exhibits by the other party, outside of the deadlines prescribed by the Working Procedures adopted by the Panel.[5] As necessary and appropriate, we address the substance of these concerns in our findings below. We do, however, stress the importance of adherence by all parties and third parties to the time-limits for filing submissions provided for in the timetable, including exhibits, in the interests of fairness and the orderly conduct of panel proceedings.

1.3.2 Preliminary ruling

1.12. In its first and second written submissions, China requested the Panel to rule that certain claims addressed by the United States are not within the scope of its request for the establishment of a panel in this dispute and are therefore not within the jurisdiction of this Panel. The United States responded to China's request in its second written submission.

1.13. By communication dated 22 March 2017, the Panel issued a preliminary ruling, set out in Annex E-1.

2 THE MEASURES AT ISSUE

2.1. This dispute concerns measures taken by China to implement the DSB recommendations and rulings in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*. These measures comprise the Ministry of Commerce of the People's Republic of China (MOFCOM)'s redetermination[6] issued on 8 July 2014 and the continued imposition of anti-dumping and countervailing duties on imports of broiler products from the United States.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that the measures at issue are inconsistent with the following provisions[7]:

a. Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Articles 15.1 and 15.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because MOFCOM's analysis of the alleged price effects of imports under investigation did not involve an objective examination of the record and was not based on positive evidence. For example, MOFCOM:

   i. failed to account for differences in the product mix between the average unit value (AUV) of subject imports and the AUV of domestic sales;

   ii. failed to explain how it collected product-specific pricing data in the reinvestigation, why data was solicited from only four domestic producers, and what proportion of total domestic industry sales were covered by the data;

[4] See Additional Working Procedures of the Panel concerning Business Confidential Information, Annex A-2.

[5] United States' general comments on China's response to Panel questions, paras. 2-4; China's letter dated 12 June 2017 to the Chairperson of the Panel.

[6] Ministry of Commerce, Notice No. 44 of 8 July 2014 of the Redetermination of the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the US (Redetermination), (Exhibit CHN-1 (translated version), also submitted as Exhibit USA-9 (translated version)).

[7] As set out in the United States' panel request.

iii. failed to explain how the alleged price underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects at other points during the period of investigation (POI); and

iv. failed to address evidence that prices for domestically produced products that competed with subject imports declined far less than prices for other domestic products in the first half of 2009.

b. 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 did not involve an objective evaluation of all relevant economic factors and indices having a bearing on the state of the industry. For example, MOFCOM did not address economic evidence and factors that contradicted its finding that the industry was suffering material injury on account of US imports.

c. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

d. Articles 6.4 and 6.5 of the Anti-Dumping Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to disclose the questionnaires it submitted to Chinese domestic producers during the reinvestigation.

e. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the reinvestigation.

f. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform interested Members and parties of the essential facts under consideration which form the basis for its decision to apply definitive measures. For example, MOFCOM did not disclose the calculations utilized to determine the dumping and subsidy margins for US producers.

g. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material, all relevant information on matters of fact and law and the reasons which led to the imposition of final measures, and the reasons for the acceptance or rejection of relevant arguments or claims. For example, MOFCOM's explanations with respect to its findings for its material injury determination fail to address key arguments made by interested parties.

h. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because MOFCOM improperly calculated the cost of production for US producers, failed to calculate costs on the basis of the records kept by the US producers under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.

i. Article 9.4 of the Anti-Dumping Agreement because MOFCOM applied to imports from producers and exporters not included in the examination − and to which the application

of facts available was not warranted – an anti-dumping duty that exceeded the weighted average margin of dumping established with respect to the selected exporters or producers. For example, MOFCOM failed to correctly calculate dumping margins for US interested parties, and then applied a rate to imports from producers and exporters not included in the examination that exceeded the selected exporters or producers' weighted average margin of dumping.

j. Article 6.8 and Annex II of the Anti-Dumping Agreement (including, *inter alia*, paragraphs 1, 3, 5, and 6) because MOFCOM made determinations for US producers on the basis of the facts available even though it:

   i. failed to specify in detail the information required from interested parties and the manner in which it should be structured;

   ii. did not take into account verifiable and appropriately submitted information; and

   iii. failed to provide supplying parties of the reasons evidence or information was rejected and an opportunity to provide further explanations.

k. Article 1 of the Anti-Dumping Agreement as a consequence of the breaches of the Anti-Dumping Agreement described above.

l. Article 10 of the SCM Agreement as a consequence of the breaches of the SCM Agreement described above.

m. Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 as a consequence of the breaches of the Anti-Dumping Agreement and the SCM Agreement described above.

3.2. China requests that the Panel reject the US claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures.[8]

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union and Japan are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures.[9] Brazil and Ecuador did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. We issued the Interim Report to the parties on 22 September 2017. On 28 September 2017 China requested a one week extension of the deadline for submitting written requests for the Panel to review aspects of the interim report.[10] On 29 September 2017 we sought comments from the United States. On 2 October 2017 the United States submitted a response in which it agreed to China's request for an extension on condition that there be no change in the date for the release of the Final Report.[11] On 3 October 2017, the Chair of the Panel transmitted the following communication to the parties:

> I refer to China's letter of 28 September 2017 and the response of the United States in its letter of 2 October 2017. China requests that the Panel extend the time-period for comments on the Interim Report from 6 October to 13 October 2017, to accommodate a Chinese national holiday. In the event China's request is acceded to,

[8] See the parties' executive summaries in Annexes B-1 to B-3 and C-1 to C-3.
[9] See the European Union's and Japan's executive summaries in Annexes D-1 and D-2.
[10] Letter dated 28 September 2017 from China to the Panel.
[11] Letter dated 2 October 2017 from the United States to the Panel.

the United States requests a commensurate extension of the deadline for comments without further delay in the issuance of the final report.

My colleagues and I are sensitive to the importance of accommodating national holidays in timetables where possible. It may be recalled, for instance, that following their comments at the organizational meeting, the parties' requests to avoid domestic holiday periods (Thanksgiving, Christmas and Chinese New Year) were accommodated in setting the dates for the first and second written submissions.

It may also be kindly recalled that both parties were provided with the final revised timetable on 4 July 2017. China did not raise any concerns about the timetable at that time or, indeed, at any point before its letter of 28 September 2017. In its letter, China merely requests a one-week delay in the deadline for submission of requests for interim review. It neither explains why it failed to alert the Panel earlier of the possible impact of the Chinese National Day holiday on its ability to comment on the Interim Report, nor explains why it failed to do so at this point until nearly a week after it received the Interim Report.

It needs emphasizing that the Panel is mindful of the importance of national holidays, and recalls that it took such holidays into account in establishing the original timetable in this dispute. However, the Panel is also concerned with preserving the integrity of dispute settlement procedures and protecting the rights of both parties. In this regard, the Panel considers that it is necessary, as a rule, for a party to a dispute to:

1. raise procedural objections at the earliest point at which it becomes or ought to become aware of the facts underlying those objections; and

2. if it is unable to do so, set out clearly in its request for a remedy the reason why it could not have made its objections earlier.

China's letter of 28 September 2017 came very late in the proceedings − well after China knew, or should have known, of the potential conflict with its holiday. China's letter contains no explanation or justification for raising its objection so late in the proceedings, more than two months after the final revised timetable was issued to the parties. Please note that the United States requests a commensurate extension of the deadline for comments, in the event that China's request is acceded to, but further asks that the issuance of the final report not be delayed. It is not possible for the Panel to accommodate both parties in this matter. In these circumstances, and having considered the interests of both parties and of orderly proceedings and the needs of the Panel, the Panel has decided on balance to deny China's request for an extension of time to request review of precise aspects of the interim report.

The dates for the remainder of this dispute, as set forth in the Timetable circulated to the parties on 4 July 2017 are therefore confirmed:

- Deadline for parties to request review of part(s) of the report and to request interim review meeting: 6 October 2017, 5 p.m.

- Interim review meeting, if requested − If no meeting requested, deadline for comments on requests for review: 20 October 2017, 5 p.m.

- Issuance of final report to the parties: 17 November 2017, 5 p.m.[12]

6.2. The parties submitted their written requests for the Panel to review aspects of the interim report and subsequent comments on those requests in accordance with the established deadlines.

[12] Emphasis original.

7 FINDINGS

7.1 General principles

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". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[13] Articles 31 and 32 of the Vienna Convention on the Law of Treaties codify in part these customary rules.[14] Finally, WTO Ministers have recognized with respect to the Anti-Dumping Agreement and Part V of the SCM Agreement, "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".[15]

7.1.2 Standard of review

7.2. Article 11 of the DSU provides 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.

In addition, Article 17.6 of the Anti-Dumping Agreement sets out the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) 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;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review that a panel is required to apply with respect to both the factual and the legal aspects of the present dispute. This means that in reviewing the investigating authority's determination in this dispute, we must:

a. examine whether the authority has provided a reasoned[16] and adequate[17] explanation as to:

[13] Article 17.6(ii) 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.

[14] Appellate Body Report, *US – Gasoline*, p. 17.

[15] 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.

[16] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent."

[17] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant."

i. how the evidence on the record supported its factual findings[18], and

ii. how those factual findings support the overall determination[19];

b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;

c. limit our examination to the evidence that was before the investigating authority during the course of the investigation[20];

d. take into account all such evidence submitted by the parties to the dispute[21]; and

e. not simply defer to the conclusions of the investigating authority: our examination of those conclusions must be "in-depth" and "critical and searching".[22]

7.1.3 Burden of proof

7.3. In WTO dispute settlement, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[23] Where a party "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[24] A complaining party establishes a *prima facie* case where, in the absence of effective refutation by the defending party, a panel is required as a matter of law to rule in favour of the complaining party.[25]

7.1.4 Article 21.5 proceedings

7.4. A panel in an Article 21.5 proceeding related to anti-dumping and countervailing investigations has three key and closely related responsibilities. It is charged with making findings as to whether:

a. the measures found inconsistent with the WTO Agreement have been brought into conformity;

b. the "measures taken to comply"[26] are otherwise substantively consistent with the WTO Agreement[27]; and

c. in seeking to bring itself into compliance, the investigating authority observed the procedural protections of the relevant WTO agreements in the compliance investigation/determination/proceedings.

[18] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it."

[19] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must examine 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."

[20] Anti-Dumping Agreement, Article 17.5(ii); Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

[21] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

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

[23] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[24] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[25] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

[26] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; and Panel Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.41; *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, paras. 7.160 and 7.165.

[27] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41.

7.5. In a compliance reinvestigation and redetermination it is not enough for an investigating authority to only address specific items of concerns identified by a panel in its original report finding inconsistency/ies. Although resolving problems identified by a panel in an original proceeding may well be the *sine qua non* in bringing the measure at issue into conformity, an adopted panel report requires a Member to bring its measure into conformity with the WTO Agreement/s at issue, and not just the specific findings.

7.2 Article 2.2.1.1 of the Anti-Dumping Agreement: the proper allocation of costs

7.2.1 Introduction

7.2.1.1 Our findings in the original report

7.6. In the original report, we made certain findings under the first and the second sentences of Article 2.2.1.1 of the Anti-Dumping Agreement, which provide:

> For the purpose of paragraph 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.

The issue before us in this proceeding is whether, in its redetermination, MOFCOM complied with the second sentence of Article 2.2.1.1. Given the structure of the provision and the arguments of the parties in these proceedings, it is useful to briefly revisit our findings under both sentences of Article 2.2.1.1:

First sentence

a. The two conditions of the first sentence of Article 2.2.1.1 are cumulative[28]: for the requirement to use the respondents' books and records to apply, those books and records must be both consistent with Generally Acceptable Accounting Principles and reasonably reflect costs associated with production and sale.[29]

b. An investigating authority is required to explain why it has declined to use a respondent's books and records.[30]

c. MOFCOM did not explain its decision not to use the books and records of Keystone Foods, LLC (Keystone) and Tyson Foods, Inc. (Tyson), but in respect of Pilgrim's Pride Corporation (Pilgrim's Pride) it specifically found "the data as originally submitted was irreconcilable and that the information to correct the errors was untimely".[31]

d. China acted inconsistently with the first sentence of Article 2.2.1.1 when MOFCOM declined to use Keystone's and Tyson's books and records in calculating the cost of production for determining normal value.

e. With respect to Pilgrim's Pride, MOFCOM explained its reasons for departing from the norm and declining to use Pilgrim's Pride books and records. Therefore, with respect to

[28] Panel Report, *EC – Salmon (Norway)*, para. 7.483.
[29] Panel Report, *China – Broiler Products*, para. 7.166.
[30] Panel Report, *China – Broiler Products*, para. 7.161.
[31] Panel Report, *China – Broiler Products*, para. 7.173.

Pilgrim's Pride, the United States did not establish that China acted inconsistently with the first sentence of Article 2.2.1.1.[32]

Second sentence

a. The requirement to "consider" evidence goes beyond merely taking note of evidence; it entails examining, and weighing the merits of, relevant evidence.[33]

b. An investigating authority is required to engage in "some degree of deliberation" in considering "all available evidence … so as to ensure that there is a proper allocation of costs".[34]

c. Although an investigating authority will not always have to examine and weigh the merits of evidence relating to alternative allocation methodologies, the circumstances of a particular case may require such consideration in order to act consistently with Article 2.2.1.1[35] and this must be reflected in the record of its decision.[36]

d. "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".[37]

e. MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 because there was "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".[38]

f. MOFCOM's straight allocation of total processing costs to all products necessarily means that it included costs solely associated with processing certain subject broiler products in its calculation of costs to all subject broiler products.[39]

g. Evidence relied upon by China did not support its position 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".[40]

h. MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 also because it "improperly allocated costs from certain products derived from a chicken to other products derived from a chicken".[41]

7.2.1.2 MOFCOM's redetermination

7.2.1.2.1 Tyson

7.7. For certain product models, the volume of like products sold in the domestic market accounted for less than 5% of Tyson's total volume of "the product concerned"[42] exported to China. Accordingly, MOFCOM proceeded to construct the normal value "by using weighted average production cost, plus reasonable expenses and profit".[43]

[32] Panel Report, *China – Broiler Products*, para. 7.175.
[33] Panel Report, *China – Broiler Products*, para. 7.187.
[34] Panel Report, *China – Broiler Products*, para. 7.188.
[35] Panel Report, *China – Broiler Products*, para. 7.190.
[36] Panel Report, *China – Broiler Products*, para. 7.192.
[37] Panel Report, *China – Broiler Products*, para. 7.193. (emphasis added)
[38] Panel Report, *China – Broiler Products*, para. 7.195. (emphasis added)
[39] Panel Report, *China – Broiler Products*, para. 7.196.
[40] Panel Report, *China – Broiler Products*, para. 7.197.
[41] Panel Report, *China – Broiler Products*, para. 7.197. (emphasis added)
[42] We understand that by "product concerned", the determination is referring to chicken feet and not the subject products as a whole.
[43] Redetermination, (Exhibit CHN-1 (translated version)), p. 28. (emphasis added)

7.2.1.2.1.1 Tyson's initial value-based cost allocation

7.8. At the time of the original investigation, Tyson was transitioning from one accounting system to another. Under the new system[44], it allocated costs to various broiler product models on the basis of their value in the US domestic market. Wing-tips, feet, and gizzards − some of the broiler product models exported to China − were classified as "offal", which has a low value in the US market[45]; costs were allocated accordingly, with additional adjustments for freight and processing. MOFCOM found that "excessive meat cost were [*sic*] allocated to certain products disproportionately, while other products were allocated almost no meat cost".[46]

7.9. In the reinvestigation, MOFCOM "conducted further investigation on the allocation method of meat cost and on the processing cost of each product model" for Tyson.[47] MOFCOM found that:

a. In respect of certain broiler product models (such as chicken feet) valued and costed as offal, "export sales prices were much higher than the prices of other offal products sold in the domestic market".[48]

b. Tyson did not allocate costs on the basis of "overall sales price" to those broiler product models, but rather costs on the basis of their domestic price.[49]

c. Tyson did not allocate various other common costs (such as feed and common processing) to these broiler product models.

MOFCOM determined that Tyson's records did not "reasonably reflect the production cost associated with the product concerned".[50]

7.2.1.2.1.2 MOFCOM's weight-based cost allocation

7.10. In the original investigation, MOFCOM found that:

a. "it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned";

b. "weight-based method could be more objective and more reasonable than the value-based method … [to] reflect the production cost associated with the product concerned"[51]; and

c. "[t]he weight-based methodology … would not allocate too much meat costs to a part of products, while allocate almost none of meat cost to other part of the products".[52]

In its comments in the original investigation and then again in the questionnaire response to the reinvestigation, Tyson argued that:

> [I]f the Ministry of Commerce insists to use the weight-based cost allocation method in the final determination, it shall consider all products generated from live chickens, and use the cost data re-submitted by Tyson company.[53]

MOFCOM considered Tyson's approach "not reasonable"[54] because:

[44] Tyson "transitioned from a fully-absorbed cost system to a standard cost system" during the POI. (United States' first written submission, para. 123). "Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation." (United States' first written submission, para. 124).
[45] Redetermination, (Exhibit CHN-1 (translated version)), p. 28.
[46] Redetermination, (Exhibit CHN-1 (translated version)), p. 29.
[47] Redetermination, (Exhibit CHN-1 (translated version)), p. 30.
[48] Redetermination, (Exhibit CHN-1 (translated version)), p. 30.
[49] We will refer to this as a domestic-value-only cost allocation.
[50] Redetermination, (Exhibit CHN-1 (translated version)), p. 31.
[51] Redetermination, (Exhibit CHN-1 (translated version)), p. 33.
[52] Redetermination, (Exhibit CHN-1 (translated version)), p. 35.
[53] Redetermination, (Exhibit CHN-1 (translated version)), p. 36.
[54] Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

a. Tyson's methodology did not account for weight loss due to dead birds or birds "inappropriate for processing"[55];

b. "during the original investigation and re-investigation, the Investigating Authority calculated the production costs of each model of the products concerned … this production cost didn't include that of the non-concerned products, such as feather, blood, etc. … [t]he cost allocation method for other products generated from the live chicken products (e.g. feather, blood, deep processed product, cooked product) is not the target of this investigation"[56];

c. "costs of live chickens were monthly different during the period of the investigation. The Company did not explain in details [*sic*] which parts of live chickens were used for the production of the product concerned, and which parts were used for the production of other products"[57]; and

d. "by using the method claimed by the Company to calculate the cost, the total cost of the product concerned would be lower than the total cost of the product concerned in the Company's accounting book, but the Company did not explain in details what cost was reduced therefrom".[58]

7.11. MOFCOM then issued detailed supplemental questionnaires in the reinvestigation to ascertain processing costs per product model. It found that, "the production cost data submitted by the Company in the responses to the original investigation and the re-investigation could not fully and truly reflect the actual production cost of all models of the product concerned".[59] Accordingly, it determined that:

a. "the meat cost for all models of the product concerned should be calculated by using the weight based methodology";

b. "processing cost of common process should be allocated to all products by using the weight-based methodology";

c. "processing cost incurred for the particular product should be allocated to the particular product"; and

d. "production costs for all models of the product concerned should be determined on the basis of facts available and best information available".[60]

7.2.1.2.2 Pilgrim's Pride

7.12. MOFCOM determined that:

> Since the Dispute Settlement Report does not address the determination of the investigating authority on the Company's normal value, export price, price adjusted items and [cost, insurance, freight (CIF)] price, the investigating authority decides in the re-investigation to maintain the determination of the original investigation with respect to the Company's normal value, export price, price adjusted items and CIF price.[61]

7.13. In the reinvestigation, MOFCOM sought to comply with the Panel's findings regarding disclosure in its original report. In doing so, MOFCOM "found a calculation mistake" and proceeded to correct the error.[62] In its redetermination, MOFCOM stressed that it did not "change the

[55] Redetermination, (Exhibit CHN-1 (translated version)), p. 36.
[56] Redetermination, (Exhibit CHN-1 (translated version)), fn 30. (emphasis added)
[57] Redetermination, (Exhibit CHN-1 (translated version)), p. 37.
[58] Redetermination, (Exhibit CHN-1 (translated version)), p. 37.
[59] Redetermination, (Exhibit CHN-1 (translated version)), p. 42.
[60] Redetermination, (Exhibit CHN-1 (translated version)), p. 43 (emphasis added). This indicates that blood, feathers, and viscera were excluded from the calculation.
[61] Redetermination, (Exhibit CHN-1 (translated version)), p. 54.
[62] Redetermination, (Exhibit CHN-1 (translated version)), p. 54.

determination method and source of data with respect to the normal value and the export price in the original investigation", but rather corrected faulty calculations.[63]

7.2.2 Main arguments of the parties

7.2.2.1 United States

7.14. MOFCOM failed to ensure a proper cost allocation in respect of Tyson and Pilgrim's Pride and therefore acted inconsistently with the second sentence of Article 2.2.1.1.[64]

7.2.2.1.1 Tyson

7.15. In the redetermination, MOFCOM purported to apply a weight-based cost allocation methodology to determine the cost of production of the products at issue. It calculated the per-pound cost of production by dividing the total cost of producing a chicken by the weight of the chicken less the weight of certain by-products; specifically, it excluded the weight of blood, feathers, and organs, on the basis that they were not "used for human consumption".

7.16. MOFCOM's approach is inconsistent with the second sentence of Article 2.2.1.1, which requires a "proper allocation of costs". A "proper" cost allocation must be internally coherent. If MOFCOM applies a weight-based cost allocation methodology, it must fully account for all products that are produced from the live birds, including by-products. To do so, MOFCOM would have had to divide the total cost of the live birds by their total weight.[65] Tyson did report this total cost in the event that MOFCOM rejected Tyson's value-based allocation approach and decided instead to adopt a weight-based allocation.[66] MOFCOM's exclusion of by-products not "used for human consumption" is not relevant in this context "since the joint costs of the chicken are used to produce non-subject merchandise – and they are being distributed to only certain products".[67]

7.2.2.1.2 Pilgrim's Pride

7.17. MOFCOM failed to consider any alternative allocation methodologies for Pilgrim's Pride.[68] The Panel in its original report found that "there was insufficient evidence of consideration [by MOFCOM] of alternative allocation methodologies presented by the respondents".[69] "The respondents" included Pilgrim's Pride.[70] MOFCOM was required "to address that deficiency in its redetermination, and its failure to do so is inconsistent with China's WTO obligations".[71] To ensure "a neutral, fact-driven consideration of the 'proper' allocation of costs", MOFCOM was required to "consider[] data submitted by Pilgrim's Pride – whether flawed or not".[72] Regardless of whether the Panel in its original report had made this finding specifically in respect of Pilgrim's Pride, because the measure is within its terms of reference, the Panel is required to address the claim.

7.2.2.2 China

7.2.2.2.1 Tyson

7.18. In its original report, the Panel did not "engage in any specific interpretation of what the word 'proper' in Article 2.2.1.1 meant, or what specific obligation that word created".[73] While "some of the Panel's language in the original report could be read to suggest a substantive

[63] Redetermination, (Exhibit CHN-1 (translated version)), p. 55; see also Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), p. 1.
[64] In its panel request, the United States also cited Article 2.2 of the Anti-Dumping Agreement. The United States does not develop any arguments in any of its submissions in respect of an alleged violation of Article 2.2. We therefore do not further address the claim in respect of Article 2.2.
[65] United States' first written submission, para. 93.
[66] United States' response to Panel question No. 24(c), para. 60.
[67] United States' response to Panel question No. 24(a), para. 57.
[68] United States' first written submission, para. 102.
[69] United States' first written submission, para. 101 (referring to Panel Report, *China – Broiler Products*, paras. 7.193 and 7.198).
[70] United States' second written submission, para. 118.
[71] United States' second written submission, para. 116.
[72] United States' second written submission, para. 119.
[73] China's response to Panel question No. 31, para. 118.

obligation"[74], the Panel in the original report "did not present any interpretation that focused specifically on the legal issue of whether the second sentence of Article 2.2.1.1 imposes a substantive obligation or the nature of that obligation". For this reason, this "is the legal issue that the Panel should address anew in this proceeding".[75]

7.19. First, the only obligation in the second sentence of Article 2.2.1.1 is to consider all available evidence; there is no substantive obligation to allocate costs properly.[76] MOFCOM did consider all available evidence on the proper allocation of costs, including Tyson's proposed cost allocation methodology. The redetermination discusses Tyson's proposed cost allocation methodology, satisfying the three-part test set out by the Panel in its original report for "consideration" within the meaning of second sentence of Article 2.2.1.1.[77]

7.20. Second, the information at issue is not "evidence" because it was not "historically utilized"[78]; therefore, there was no obligation to consider it.[79]

7.21. Third, even if the second sentence of Article 2.2.1.1 contains substantive obligations, the Panel in its original report did not define the term "proper".[80]

7.22. Fourth, the Panel's "finding in [paragraph] 7.198 [of its original report] was based on the Panel's understanding of the facts at that time. These facts have been significantly clarified during the re-investigation and this Article 21.5 proceeding".[81]

7.23. MOFCOM met the requirements of Article 2.2.1.1 because it:

a. asked Tyson "for the breakdown of sales into subject and non-subject merchandise", adding a clarification with respect to "non-subject merchandise" that "products not for human consumption, such as chicken feather, chicken blood, internal organs" are not subject products[82];

b. sought Tyson's own allocation method for dividing subject and non-subject products[83] and accepted Tyson's division[84];

c. found that Tyson "reasonably drew distinctions between higher revenue and lower revenue products"[85] and accepted "Tyson's normal accounting approach for this initial distinction into subject and non-subject merchandise"[86];

d. considered "the evidence about the proper way to allocate costs among the specific products within the subset of edible subject products"[87] and "realized that the Tyson's [*sic*] value-based method in fact introduced a distortion by using a very low value of

[74] China's response to Panel question No. 31, para. 119.
[75] China's response to Panel question No. 31, para. 119.
[76] China's first written submission, para. 147.
[77] China's first written submission, paras. 164-165.
[78] China's response to Panel question No. 31, para. 128.
[79] China's first written submission, para. 166; response to Panel question No. 31, para. 128.
[80] China's response to Panel question No. 31, para. 125.
[81] China's response to Panel question No. 31, para. 127. Specifically, according to China, the United States incorrectly alleges that "MOFCOM did not allocate any costs to blood and feather":
> China believes the Panel now has a sufficient factual basis to dismiss that U.S. fiction. As discussed extensively in response to Question 24(g) above, MOFCOM simply left in place the assignment of costs to blood and feathers that Tyson itself has used in the ordinary course of business.

[82] China's response to Panel question No. 24(a), para. 63.
[83] China's response to Panel question No. 24(a), para. 64.
[84] China specifically argues that MOFCOM accepted "as the initial step the division of products into subject and non-subject, and the Tyson assignment of total costs into those two buckets." (China's second written submission, para. 175 (emphasis added)). China acknowledges that Tyson's breakdown was based on MOFCOM's own product definition: "According to MOFCOM's request in the re-investigation, Tyson confirmed that the reported cost of the subject products in the original investigation did not cover the cost of the non-subject products, such as feathers and blood." (China's response to Panel question No. 24(b), para. 65).
[85] China's second written submission, para. 175.
[86] China's second written submission, para. 175.
[87] China's second written submission, para. 176.

offal (or price of waste products) to establish costs for the certain products (like chicken paws)"[88]; and

e. rejected Tyson's proposed cost allocation methodology as not correctly reflecting costs.[89]

Article 2.2.1.1 focuses on the "product under consideration". Therefore, including products not under consideration, such as the by-products at issue here, would not "reasonably reflect" the cost of the products at issue.[90] The US approach would require that "even though Tyson had itself assigned few costs to inedible waste products, MOFCOM had to go back and take costs that Tyson had itself allocated to edible broiler parts, and reallocate them back to the inedible waste products based on weight."[91] MOFCOM accepted the total meat costs of the subject products reported by Tyson, and then allocated that total meat cost to individual models of the subject broiler products based on weight.[92]

7.2.2.2.2 Pilgrim's Pride

7.24. The claim is not within the Panel's terms of reference. Even if it were:

a. the Panel in its original report "never found any inconsistency with the second sentence of Article 2.2.1.1 with regard to MOFCOM's determination for Pilgrim's Pride"[93];

b. the reference to "respondents" in the original report is only to Tyson and Keystone[94] because:

i. the Panel's summary of the arguments does not refer to Pilgrim's Pride[95],

ii. the Panel's analysis does not mention Pilgrim's Pride[96],

iii. the only finding specific to Pilgrim's Pride was in respect of the first sentence of Article 2.2.1.1[97], and

iv. the Panel in its original report could not have found that MOFCOM should have considered Pilgrim's Pride's alternative methodologies, because "[t]he errors in the [*sic*] Pilgrim's Pride data rendered any alternative allocations largely irrelevant, since they would have been based on fundamentally flawed information that had not been corrected on a timely basis"[98];

c. because the Panel did not find any inconsistencies in an original panel report, China cannot be found not to have implemented a finding in a subsequent Article 21.5 dispute[99]; and

d. if there are any ambiguities in the original report, they should be resolved in favour of China because "it would be unfair to penalize China for not specifically addressing an issue not raised in the Panel Report".[100]

[88] China's second written submission, para. 176. We will refer to the product concerned, variously described as chicken "feet" or "paws", as "chicken feet".
[89] China's first written submission, para. 166: "In particular, in both the original determination and the redetermination, MOFCOM expressly considered and rejected the alternative cost allocation method which Tyson proposed."
[90] China's first written submission, para. 171.
[91] China's second written submission, para. 177.
[92] China's response to Panel question No. 24(h), para. 98.
[93] China's first written submission, para. 136.
[94] China's first written submission, para. 137.
[95] China's first written submission, para. 138.
[96] China's first written submission, para. 138.
[97] China's first written submission, para. 138.
[98] China's first written submission, para. 139.
[99] China's first written submission, para. 136.
[100] China's first written submission, para. 142.

7.2.2.3 Main arguments of the third parties

7.25. The European Union argues that in respect of the first claim, the second sentence of Article 2.2.1.1 contains a substantive obligation of proper cost allocation. A cost allocation methodology must be applied in a coherent manner. In case of a weight-based cost allocation methodology, costs which occur with regard to the whole chicken must, in principle, be spread over all broiler products according to their weight.[101]

7.26. In respect of the second claim, the findings made by the Panel in the original report in relation to the second sentence of Article 2.2.1.1 also relate to Pilgrim's Pride. But even if this should not be the case, the redetermination would nevertheless be subject to scrutiny in these compliance proceedings regarding the issue in dispute.[102]

7.2.3 Evaluation

7.2.3.1 The law

7.27. Article 2.2.1.1 of the Anti-Dumping Agreement provides (for ease of reference, we set out the three sentences separately):

> For the purpose of paragraph 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.

7.28. "Paragraph 2", referred to in the first sentence is Article 2.2 of the Anti-Dumping Agreement, which provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined 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.[103]

Thus, by its own terms Article 2.2.1.1 sets out parameters for a methodology for arriving at a proper allocation of costs necessary to arrive at a "cost of production" that may be used in constructing a normal value for purposes of the comparison required under Article 2.2. This requires, in the context of the second sentence of Article 2.2.1.1, the investigating authority to "consider … all available evidence on the proper allocation of costs".

[101] European Union's third-party submission, paras. 29-30.
[102] European Union's third-party submission, paras. 33-34.
[103] Emphasis added; fn omitted.

7.2.3.1.1 Consider

7.29. The first sentence of Article 2.2.1.1 requires that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The use of the term "normally" in a legal obligation indicates a rule from which derogations are permitted subject to the conditions set out in the legal provision.[104] In respect of Article 2.2.1.1, this means that to calculate cost of production for the purposes of Article 2.2, the rule for the information to be used is that the investigating authority relies on the records kept by the exporter or producer under investigation, except where the conditions for the application of the rule, set out in the provision[105], are not met.

7.30. The second sentence relates to the methodology for allocating costs: an investigating authority must "consider" all evidence on proper cost allocation. This consideration is not to be undertaken in the abstract. In context, its purpose is clear: to ensure that cost elements for the subject product are properly determined for, we recall, purposes of constructing a normal value for that product. The consideration of evidence as to cost allocation methodology goes to the heart of what Article 2.2.1.1 is about: coming up with a properly allocated cost of production for the product under investigation for use by an investigating authority in constructing a normal value for that product. This is further confirmed by the third sentence: "[u]nless already reflected in the cost allocations under this sub-paragraph". Fundamentally, a normal value for a product cannot be properly constructed unless costs of production are properly allocated to that product, and a proper allocation of costs cannot happen without consideration of all available evidence on the proper allocation of costs.

7.31. Accordingly, Article 2.2.1.1 sets out an integrated obligation to calculate a cost of production for purposes of the comparison required under Article 2.2, with two elements:

a. in the first sentence, the rule as to the information to be used, including allocated costs; and

b. in the second sentence, the method for resolving issues of allocation when those records cannot be used in this respect:

   i. consideration of all evidence as to proper allocation; and

   ii. choosing an appropriate methodology to ensure a proper allocation of costs of production to the subject product in constructing normal value.

7.2.3.1.2 All available evidence

7.32. Where an investigating authority constructs normal value on the basis of cost of production, and determines that the records of an exporter or a producer are not appropriate for purposes of properly allocating costs to the subject product, the second sentence sets out the evidentiary basis for the investigating authority's choice of a cost allocation methodology. The investigating authority is required to "consider":

a. all;

b. available;

c. evidence;

d. on the proper allocation of costs:

[104] Panel Report, *China – Broiler Products*, para. 7.161. See also Appellate Body Report, *US – Clove Cigarettes*, para. 273.

[105] Those conditions are that those 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".

i. including that which is made available by the exporter or producer in the course of the investigation; and

ii. 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.

7.33. The term "evidence" is not defined in the Anti-Dumping Agreement. It is not necessary for us to do so in this case; at a minimum, it encompasses information provided to an investigating authority by an interested party, whether or not positive, accurate or adequate. Nothing in the Anti-Dumping Agreement, or the WTO Agreement as a whole, suggests that information loses its character as "evidence" by virtue of failing to meet certain criteria. Whether the evidence meets these criteria is a separate matter for the investigating authority to consider.

7.34. First, given the requirements of Article 2.2.1.1, the evidence must be "on the proper allocation of costs". The qualifier "proper" has a range of meanings, not all of which are relevant for the purposes of the Anti-Dumping Agreement; it is in the context in which the term is found and with a view to giving effect to Article 2.2.1.1 that the relevant "ordinary meaning" is revealed:

a. The first sentence of Article 2.2.1.1 refers to "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration".[106]

b. The last sentence of the same subparagraph provides that "costs shall be adjusted appropriately" for certain items or in respect of certain circumstances.[107]

c. Article 2.2.2 refers to costs that are "based on actual data pertaining to production and sales in the ordinary course of trade" of the product at issue.

7.35. Thus, for example, evidence that a particular allocation methodology reasonably reflects the cost of production of the product at issue, evidence of "appropriate" adjustments to costs, or evidence that certain costs relate to production of the product in question, is evidence "on the proper allocation of costs". We do not mean to suggest that in every instance, there is a single "correct" allocation to be determined upon considering the evidence on cost allocation methodologies. Indeed, the use of the term "proper" suggests due deference to the circumstances of a product's life-cycle or a producer's or an exporter's production line and business model, as well as the availability of data and different accounting systems used.[108]

7.36. Second, the reference to "all available" evidence requires, in our view, consideration of all evidence that is available to the investigating authority. The phrase beginning "including" makes clear that certain types of evidence must be considered if available, but does not limit the scope of "all available evidence" that must be considered in any event. Rather, it establishes, for instance, that an investigating authority must consider evidence on the proper allocation of costs made available by the exporter or producer where such allocations have been historically utilized, even if that exporter or producer's records were rejected as the basis for calculating costs under the first sentence of Article 2.2.1.1. Merely because an investigating authority determines that the records kept by an exporter or producer are not in accordance with the generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration does not necessarily mean that the cost allocation methodologies reflected in those records may not be appropriate if properly applied using appropriate information. An investigating authority may not summarily dismiss evidence of cost allocation provided by the exporter or producer that it had historically used.

7.37. This recognizes a commercial reality: the cost allocations in a company's records may be used for multiple reasons in internal accounting systems, but not, one would expect, generally in

[106] Emphasis added.
[107] Emphasis added.
[108] We recall also China's arguments, based on dictionary definitions, that "proper" means "suitable" and "appropriate". (China's second written submission, para. 131). This is also consistent with China's reliance on the equally authentic French and Spanish version: *juste* and *adecuada*, which China translates as "just, fair, appropriate" and "suitable, appropriate". (China's second written submission, para. 132).

anticipation of an anti-dumping investigation. Where an exporter has historically utilized a cost allocation methodology, this suggests that the methodology was, in fact, not put in place for the sole purpose of the investigation. Thus, as noted above, even if the actual data on costs as reported in the records are rejected under the first sentence, the allocation methodology reflected in those records may nonetheless result in a proper allocation of costs if applied to a different set of data.

7.38. In the light of the above, evidence of allocation in the records of an exporter, where such allocation is historically utilized, must be "considered" − alongside all other evidence − to arrive at an allocation methodology that can generate a "proper allocation of costs" in calculating "cost of production" for the "purposes of paragraph 2".

7.2.3.1.3 Conclusion

7.39. To appreciate the import of the second sentence of Article 2.2.1.1, the entirety of the provision should be considered as a single obligation with multiple parts:

a. When an investigating authority constructs a normal value for purposes of the comparison under Article 2.2, Article 2.2.1.1 sets out two requirements for the calculation of costs of production.

b. Where the conditions of the first sentence are met, an investigating authority must use the information reported in the records kept by the exporter or producer in question to calculate cost of production for the product and the producer in question. This is the "normal" method, and an investigating authority may not reject the records without having first established, and explained, why the records are either not in accordance with the generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration.

c. When questions of cost allocation arise in calculating cost of production for the purposes of constructing a normal value for purposes of the comparison under Article 2.2, whether or not on the basis of:

    i. the information in the producer's records, or

    ii. an alternative set of data because the producer's records are rejected under the first sentence of Article 2.2.1.1.

d. The investigating authority must consider all available evidence related to the proper allocation of costs.

e. This evidence includes:

    i. evidence made available by exporters and producers, where the cost allocation was historically utilized: this includes evidence of cost allocation methodologies in records rejected under the first sentence, where the allocation is historically utilized;

    ii. calculations, data, and allocation methodologies generated by an exporter at the behest or request of the investigating authority; and

    iii. alternative allocation methodologies put forward by an exporter or producer during the investigative process (including a reinvestigation), either on its own, or to address concerns or questions raised by the investigating authority, in, for example questionnaires or follow-up questions, verification, etc.

f. Article 2.2.1.1 requires an investigating authority not just to "consider" certain evidence but to do so with a view to a proper allocation of costs for the purposes of Article 2.2.

g. There may be no single "proper" allocation of costs. An investigating authority's cost allocation is proper when it is appropriate to the facts and circumstances of the producer

and product in question, and is arrived at following the investigating authority's consideration of all available relevant evidence.

h. An investigating authority must adequately explain its consideration of the evidence and its choice of allocation methodology based on that consideration as one that, if applied properly, will result in a proper allocation of costs.

7.2.3.2 Tyson

7.40. We recall the product description set out in the redetermination:

> Detailed description of the product concerned: broiler products after slaughter and processing of living broiler chickens, including whole chickens, parts of whole chicken after cutting, by-products of broiler chickens, regardless whether it is fresh, chilled or frozen. Living chickens, broiler products packed in cans and other similar ways, broiler sausages and similar products, cooked broiler products are all not included in the scope of the investigation.
>
> Main application: the main application of the broiler products in domestic market is for human consumption, which normally reach the consumers directly or indirectly through whole-sales or retail-sales channels such as agricultural products markets or supermarkets, and through the catering industry.[109]

7.41. The product description, the exclusions, and the "usage" or "application" have not changed substantially from the original investigation.[110]

7.2.3.2.1 Preliminary observations

7.42. At the outset, we address two arguments that appear to have formed the core of each party's case.

7.43. The United States argues that MOFCOM's allocation methodology was not "internally coherent" and therefore did not constitute "proper allocation" because MOFCOM used two different cost allocation methodologies for different parts of a chicken: for feathers, blood, and inedible viscera, MOFCOM relied on Tyson's cost allocation based on domestic market values; for all other models it used a weight-based allocation. Even granting that MOFCOM used two different cost allocation methodologies, this alone does not demonstrate that China acted inconsistently with Article 2.2.1.1, for at least two reasons.

7.44. First, nothing in the text or context of Article 2.2.1.1 suggests that a "proper" allocation of costs is necessarily one that is "consistent", "internally coherent", or follows the same "logic" throughout. We see nothing in the text of the provision or in the concept of a "proper" allocation of cost that would require an investigating authority to use the same cost allocation methodology in every instance a cost allocation is necessary in an investigation. For instance, different stages of a subject product's production cycle, or the production of different models of a subject product, or the production of by-products in the process of producing a subject product, may all raise questions of the proper allocation of costs. We see no inherent reason that all such questions must be resolved by applying the same cost allocation methodology in a given investigation. An interpretation that would so narrow the meaning of "proper cost allocation" would be inconsistent with our understanding of the provision as requiring consideration of evidence of cost allocation that is appropriate to the circumstances.

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[109] Redetermination, (Exhibit CHN-1 (translated version)), p. 2.

[110] Panel Report, *China – Broiler Products*, fn 8:

> Specific description of the subject merchandise: chicken products into which alive [*sic*] 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.

7.45. Second, nothing in the facts of this case as presented and argued to us demonstrates why, in the particular circumstances of this case, the use of the same cost allocation methodology throughout was necessary. The US argument that MOFCOM was required to use a "consistent" or "internally coherent" cost allocation methodology is not based on the circumstances of either Tyson or the broiler products at issue. For one thing, nothing in the record suggests that any evidence on whether such consistency would be necessary from an accounting or a commercial perspective was provided to MOFCOM. For another, we can envision a variety of situations in which strict consistency in the application of cost allocation methodologies might not be necessary or appropriate. For example, large manufacturing conglomerates with multiple subsidiaries, factories and business lines may well employ different cost accounting methodologies internally across their operations, vertically and horizontally. It would be neither practicable nor reasonable for such a company, in responding to an anti-dumping investigation involving one of its products, to be required to provide cost data for that product based on a "consistent methodology" of cost allocation. As we have stated, we see nothing in Article 2.2.1.1 or its context that would require an investigating authority to use the same cost allocation methodology in respect of a product throughout. Of course, to the extent that an investigating authority uses more than one cost allocation methodology in calculating costs of production for purposes of determining normal value, the basis for this approach would have to be reasonable and adequately explained in its determination.

7.46. China asserts that it relied upon Tyson's value-based methodology for the first step of the cost allocation exercise (allocating costs between subject and non-subject goods) and argues that "[i]t is hard to fault MOFCOM for accepting Tyson's normal accounting approach for this initial distinction into subject and non-subject merchandise".[111] We recall that MOFCOM provided Tyson a "clarification" that, according to MOFCOM, defined the scope of subject and non-subject broiler products, i.e. those models that were and were not the subject of the investigation.[112] As we understand it, MOFCOM was well aware of Tyson's use of value-based cost allocation methodology – indeed, this was the very subject matter of the original case under Article 2.2.1.1, first sentence. Thus, when MOFCOM "clarified" the scope of the subject product definition, it in all likelihood was fully aware that Tyson would apply a value-based cost allocation to distinguish subject and non-subject broiler product models. However, the fact that MOFCOM "accepted" this initial cost allocation does not elucidate in any way the reasons for its shift to a different cost allocation methodology at a later stage. Accordingly, we do not consider it relevant to our analysis.

7.2.3.2.2 MOFCOM's rejection of Tyson's value-based cost allocation

7.47. MOFCOM accepted Tyson's initial cost allocation between "subject and non-subject merchandise" on the basis of a value-based cost allocation methodology. MOFCOM did so because it found that Tyson's value-based cost allocation between subject and non-subject products "reasonably drew distinctions between higher revenue and lower revenue products".[113] MOFCOM did not, therefore, apparently have any objections in principle to the use of a value-based cost allocation in general or Tyson's value-based methodology specifically.

7.48. MOFCOM next considered "the evidence about the proper way to allocate costs among the specific products within the subset of edible subject products".[114] According to China, in examining Tyson's cost allocation among subject product models:

> MOFCOM realized that the [*sic*] Tyson's value-based method in fact introduced a distortion by using a very low value of offal (or price of waste products) to establish costs for the certain products (like chicken paws).[115]

MOFCOM considered the use of the value of offal "a distortion" in Tyson's subject product allocation because, unlike certain other product models valued as offal in the United States, chicken feet had a consumer market outside the United States that valued those product models more highly. Accordingly:

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[111] China's second written submission, para. 175.

[112] This clarification related to the "main application" of the subject products. (See fn 110 and related text above; and Panel Report, *China – Broiler Products*, fn 340).

[113] China's second written submission, para. 175. (emphasis added)

[114] China's second written submission, para. 176.

[115] China's second written submission, para. 176.

> MOFCOM then reasonably and objectively concluded that for this anti-dumping investigation, a weight-based allocation was more reasonable method than the Tyson value-based method to allocate costs among those products that were physically subject products.[116]

7.49. The United States argues that, "[t]he essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology".[117] The "logic" the United States refers to concerns the application of MOFCOM's weight-based methodology. The United States argues, "under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them".[118] That is, for the United States, as a matter of logic, if a weight-based methodology is used to allocate costs among the subject product models, then the same methodology should have been used to allocate costs between subject and non-subject broiler product models, since both generated revenue.

7.50. We have found that nothing in Article 2.2.1.1 requires an investigation authority to apply the same methodology to allocate costs at different stages of its investigation. An investigating authority may use different cost allocation methodologies consistently with the second sentence of Article 2.2.1.1, so long as:

a. the reasons for doing so are unbiased and reasonable in the circumstances;

b. the methodology chosen results in a proper allocation of costs; and

c. the investigating authority explains its choice as between different methodologies.

7.51. The United States does not dispute that certain subject products have value in the Chinese consumer market that they do not have in the US market. MOFCOM's rejection of a value-based cost allocation that does not capture the value of a product model in its principal market does not, for the purposes of the second sentence of Article 2.2.1.1, strike us as inherently biased or unreasonable.

7.2.3.2.3 MOFCOM's use of weight-based cost allocation

7.52. We now turn to the question of whether MOFCOM considered all available evidence before it on the proper allocation of costs. MOFCOM decided to use a weight-based cost allocation for the subject broiler products. The costs allocated among different models of subject broiler products were those Tyson had allocated to all subject products on the basis of its domestic value-based methodology. MOFCOM rejected that methodology for allocating costs among the different models of subject broiler products. We found in the original report that:

> Of the two types of methodologies for doing so that were discussed in this case − one based on relative sales value ("value-based allocation") 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.[119]

Having identified a problem with an exporter's cost allocation methodology, an investigating authority that is required to consider all available evidence may not, however, disregard evidence related to that allocation, and use its own methodology, without an explanation of its decision that is reasoned and adequate.

7.53. MOFCOM accepted Tyson's domestic-value-only allocation of costs between subject and non-subject products on the basis that it drew a reasonable distinction "between higher revenue and lower revenue products". For the allocation of costs among subject broiler product models, however, MOFCOM in the redetermination concluded that a weight-based allocation methodology better reflected the costs of production of subject product models, than a methodology based on

[116] China's second written submission, para. 176.
[117] United States' first written submission, para. 91.
[118] United States' first written submission, para. 91. (emphasis added)
[119] Panel Report, *China – Broiler Products*, para. 7.167. (fns omitted)

their value on the domestic market of the exporting country. In this respect, MOFCOM made the following observations:

a. "[p]roduction cost means the necessary expenses invested by a producer to produce products, rather than the income that a producer can gain from sales of a product"[120]; and

b. MOFCOM "was not able to distinguish which feeds were specifically used to produce which parts of the product concerned".[121]

In respect of subject product models, MOFCOM decided to allocate "the necessary expenses invested by a producer to produce products" on the basis of the weight of the entire broiler less the weight of feathers, blood, and viscera − because, it stated, the latter were non-subject products.

7.54. There is no dispute between the parties that feathers, blood, and viscera are not "produced" for human consumption. At the same time, while there is no evidence directly on the record on this subject, it should be uncontroversial for us to take notice of the fact that feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models. MOFCOM does not explain why the cost of "producing" feathers, blood, and viscera is not part of "the necessary expenses invested by a producer to produce" the subject product models. Nowhere in the redetermination does MOFCOM explain why it was appropriate to exclude from its weight-based allocation of costs of producing subject product models "necessary expenses" of producing a live bird, merely because it had accepted an allocation of costs between subject and non-subject products based on domestic market value, i.e. "the income that a producer can gain from sales of a product".

7.55. In respect of MOFCOM's exclusion of feathers, blood, and viscera, China argues that these products were "waste".[122] We note in this regard MOFCOM's finding in the redetermination that "offal" (which includes viscera) can be turned into "feedstuff"[123], as well as the reference to "feather meal"[124], indicating that the products at issue were perhaps low-value by-products, but not "waste". Even if characterizing the product models at issue as "waste" were an explanation for its choice of methodology, this clearly was not a finding that MOFCOM made.

7.56. China further argues that in the redetermination, MOFCOM stressed that feathers, blood, and viscera were not subject products. We had found otherwise in our original report[125], but that is of no moment here: in our view, the distinction between subject and non-subject products or product models is not, in itself, determinative for the purposes of determining whether MOFCOM, considering all evidence on the proper allocation of costs, came to a reasoned conclusion in choosing a methodology to allocate costs to subject broiler product models. On the facts of this case, we note:

a. MOFCOM could, and did, isolate the cost of production of a broiler;

b. in respect of a broiler, MOFCOM found that it could not distinguish between the costs of feed used to grow breast meat and feed used to grow chicken feet;

c. feathers, blood, and viscera are broiler product models that, while according to China not subject to the investigation, are no less intrinsic to the production of a live broiler than subject broiler product models such as its breasts or feet; and

d. the other non-subject products comprised "[l]iving chickens, broiler products packed in cans and other similar ways, broiler sausages and similar products, cooked broiler

[120] Redetermination, (Exhibit CHN-1 (translated version)), p. 35. (emphasis added)
[121] Redetermination, (Exhibit CHN-1 (translated version)), p. 33.
[122] China's first written submission, paras. 123 and 166; responses to Panel question No. 24(b), para. 65 and No. 29, para. 108.
[123] Redetermination, (Exhibit CHN-1 (translated version)), p. 34 (citing with apparent approval the petitioner's submission).
[124] Redetermination, (Exhibit CHN-1 (translated version)), p. 34.
[125] Panel Report, *China − Broiler Products*, fn 340.

products"[126] – they do not form part of a single live broiler that will be slaughtered and separated into various product models before export, and are thus not intrinsic to the production of subject broiler product models.

7.57. Article 2.2.1.1, second sentence requires consideration of all evidence on the proper allocation of costs, and a proper allocation of costs by an investigating authority is one that is appropriate to the circumstances of the subject product/product models and the company. We have already found that:

a. nothing in Article 2.2.1.1 requires an investigating authority to apply a single cost allocation methodology in all aspects of its investigation; and

b. in the facts of this case, use of both a value-based methodology and weight-based methodology was not, in itself, unreasonable.

7.58. However, in the facts of this case, certain of the broiler product models identified by MOFCOM as "non-subject" were inseparable from and intrinsic to the production of the subject broiler product models. In its consideration of all available evidence related to a proper cost allocation, MOFCOM was required, at a minimum, to explain why the concern – that allocations must "reasonably reflect costs" of production – it relied upon to choose a weight-based cost allocation for subject product models nonetheless allowed for the exclusion of certain parts of a live broiler (feathers, blood, and viscera) that are necessarily part of the production of the subject broiler product models from its cost allocation.

7.59. For this reason, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.2.4 Tyson's proposed weight-based methodology

7.60. Tyson proposed a weight-based allocation methodology that took into account feathers, blood, and viscera. MOFCOM found this approach "not reasonable".[127]

7.61. First, MOFCOM identified problems of an accounting nature in Tyson's proposed weight-based cost allocation:

a. Tyson's methodology did not account for weight loss due to dead birds or birds "inappropriate for processing"[128];

b. "costs of live chickens were monthly different during the period of the investigation. The Company did not explain in details [*sic*] which parts of live chickens were used for the production of the product concerned, and which parts were used for the production of other products"[129]; and

c. "by using the method claimed by the Company to calculate the cost, the total cost of the product concerned would be lower than the total cost of the product concerned in the Company's accounting book, but the Company did not explain in details [*sic*] what cost was reduced therefrom".[130]

Tyson disputed that these problems justified rejecting its proposed methodology.

7.62. When an investigating authority identifies "problems" with evidence made available to it by a producer purporting to reflect a proper cost allocation methodology and disregards the evidence or the methodology on that basis, it must explain why those problems support a decision that the proposed methodology is inappropriate. In this instance, MOFCOM nowhere explains how any of

[126] Redetermination, (Exhibit CHN-1 (translated version)), p. 2.
[127] Redetermination, (Exhibit CHN-1 (translated version)), p. 36.
[128] Redetermination, (Exhibit CHN-1 (translated version)), p. 36.
[129] Redetermination, (Exhibit CHN-1 (translated version)), p. 37.
[130] Redetermination, (Exhibit CHN-1 (translated version)), p. 37.

the accounting problems it identified justified the conclusion that the weight-based cost allocation proposed by Tyson was not reasonable.

7.63. Second, MOFCOM found that:

> [D]uring the original investigation and re-investigation, the Investigating Authority calculated the production costs of each model of the products concerned … this production cost didn't include that of the non-concerned products, such as feather, blood, etc. … [t]he cost allocation method for other products generated from the live chicken products (e.g. feather, blood, deep processed product, cooked product) is not the target of this investigation.[131]

As MOFCOM itself acknowledged, albeit indirectly, the production costs of "each model of the products concerned" are not separable from the production costs of the live broiler from which both subject and non-subject products derive: the same feed that allows chicken breasts and chicken feet to grow, also enables the growth and "production" of feathers, blood, and viscera, without which neither feet nor breasts would exist. As well, MOFCOM's observation that "[t]he cost allocation method for other products generated from the live chicken products … is not the target of this investigation" is true, but not germane. This is because the distinction between subject and non-subject products by Tyson, based on domestic-value and accepted by MOFCOM, in fact resulted in the following formula:

Total cost of production - cost of non-subject goods = cost of subject goods

And so the cost figure that MOFCOM used in its weight-based cost allocation for subject products was inextricably linked to "[t]he cost allocation method for other [non-subject] products generated from the live chicken products". As we have explained, Article 2.2.1.1 does not require an investigating authority to use the same cost allocation methodology throughout the investigation. Nevertheless, in respect of cost allocation to parts of a single animal, reliance on a value-based distinction between subject and non-subject products, in a context where the costs of producing both are entwined, does not suffice in itself to justify rejecting evidence of a proposed methodology that purports to take this into account.

7.64. For these reasons, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.2.5 "Historically utilized"

7.65. China argues that MOFCOM had no obligation to consider Tyson's weight-based cost allocation methodology because it did not constitute "evidence" for the purposes of Article 2.2.1.1.[132] MOFCOM does not appear to have addressed this point at all in the redetermination. Indeed, MOFCOM states that it conducted the reinvestigation "[b]ased on the evidence submitted by the interest [*sic*] parties and evidence collected by the Investigating Authority in the original investigation and re-investigation"[133] and makes no distinction between "evidence submitted" and a putative category of "information submitted that did not constitute evidence". China's argument is thus after the fact justification and cannot play a part in our review of the consistency of the redetermination with Article 2.2.1.1.

7.66. In any event, China's argument does not demonstrate that MOFCOM acted consistently with the second sentence of Article 2.2.1.1, for the following two reasons.

7.67. First, nothing in the WTO Agreement defines "evidence" or makes a distinction between information that is "evidence" and information that is not. Information that purports to support an asserted fact is evidence; it may be good or bad, weak or strong, relevant, or not.

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[131] Redetermination, (Exhibit CHN-1 (translated version)), fn 30. (emphasis original)

[132] China's first written submission, paras. 163 and 166; second written submission, paras. 144 and 146.

[133] Redetermination, (Exhibit CHN-1 (translated version)), p. 1.

7.68. Second, the subordinate clause starting with "including" does not limit the scope of the evidence to be considered; rather, it confirms the breadth of the phrase "all available evidence". This is *a fortiori* the case where, as here, the evidence submitted is expressly developed by an exporter or producer at the behest or request of an investigating authority, or in response to its concerns. We recall that MOFCOM had rejected Tyson's data based on its historical cost allocation methodology and demanded that Tyson generate new data based on a methodology inconsistent with Tyson's accounting system. To read the subordinate phrase in the second sentence as permitting an investigating authority to ignore any evidence of proper cost allocation unless it is "historically utilized" would mean that an investigating authority could simply ignore information and data submitted in response to its own questions and purporting to satisfy requirements without even examining it or weighing its merits.

7.69. This strikes us as an unacceptable outcome and an unwarranted limitation of the explicit requirement to consider "all available evidence". Having failed to do so in this case, MOFCOM could not reject the data submitted by Tyson based on the methodology it developed in an effort to conform to MOFCOM's requirements, solely because that methodology was not "historically utilized", as China contends.

7.70. For these reasons, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.3 Pilgrim's Pride

7.71. The threshold legal question before us with respect to MOFCOM's redetermination regarding Pilgrim's Pride is whether, in our original report, our findings under the second sentence of Article 2.2.1.1 applied in respect of Pilgrim's Pride, or were limited to Tyson and Keystone. In the original report we identified the question we were to resolve as "whether MOFCOM took into consideration 'compelling evidence' with respect to the reasonableness of its own methodology and available alternatives".[134] We then made the following observation:

> 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.[135]

7.72. According to China, this finding − including our specific references to Keystone and Tyson − should be read against the background of our findings in respect of Pilgrim's Pride. In particular, China relies on our findings in the original report in respect of evidence submitted by Pilgrim's Pride as to its cost allocation methodology:

> 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. … 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.[136]

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[134] In arriving at our findings, we relied on the statement of the Appellate Body in *US − Softwood Lumber V* that:

> [W]here 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".

(Panel Report, *China − Broiler Products*, para. 7.189 (quoting Appellate Body Report, *US − Softwood Lumber V*, para. 138))

[135] Panel Report, *China − Broiler Products*, para 7.194.

[136] Panel Report, *China − Broiler Products*, para 7.173. (emphasis added)

7.73. We note, of course, that these findings were made in the context of the first sentence of Article 2.2.1.1. Nothing in our original findings suggests that the fact that an investigating authority finds data to be "incorrect" or "irreconcilable" under the first sentence is or would be relevant in respect of "evidence" of a "potentially … appropriate" allocation methodology that an investigating authority would be required to "consider" under the second sentence. Nothing in our findings in the original report referring to "respondents" could be read to exclude any respondent on the basis that its data were rejected, consistently with the first sentence of Article 2.2.1.1, as being not a proper basis for the determination of costs of production.

7.74. Consequently, we confirm that in the original report we found China to have acted inconsistently with the second sentence of Article 2.2.1.1 in respect of "respondents", including Pilgrim's Pride as well as Tyson and Keystone. MOFCOM did not reinvestigate Pilgrim's Pride in this context or do anything else to satisfy its implementation obligations. Thus, we conclude that China acted inconsistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement with respect to Pilgrim's Pride.

7.2.4 Conclusion

7.75. In respect of Tyson, China did not act consistently with Article 2.2.1.1 of the Anti-Dumping Agreement because:

a. MOFCOM did not explain why the concern − that allocations must "reasonably reflect costs" of production − it had relied upon to choose a weight-based cost allocation for subject product models nonetheless allowed for the exclusion of certain parts of a live broiler (feathers, blood, and viscera) that are necessarily part of the production of the subject broiler product models from its cost allocation; and

b. MOFCOM did not provide a reasoned and adequate explanation for its rejection of Tyson's alternative weight-based cost allocation methodology.

7.76. In respect of Pilgrim's Pride, China did not act consistently with Article 2.2.1.1 of the Anti-Dumping Agreement because:

a. in the original report we found China to have acted inconsistently with the second sentence of Article 2.2.1.1 in respect of Pilgrim's Pride; and

b. China did not in any way address this implementation obligation.

7.3 Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement: price effects

7.3.1 Introduction

7.3.1.1 Our findings in the original report

7.77. We found in the original report that:

a. an investigating authority has "a certain level of discretion" in the methodology used for a price effects analysis[137];

b. that discretion is not unbounded: Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement[138] require that "the prices being compared must correspond to products and transactions that are comparable"[139];

c. "price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis"[140]; and

d. where an investigating authority performs a price comparison on the basis of a "basket" of products or sales transactions, it must:

[137] Panel Report, *China – Broiler Products*, para. 7.474.
[138] We will refer to these as Articles 3.2 and 15.2.
[139] Panel Report, *China – Broiler Products*, para. 7.475. (emphasis added)
[140] Panel Report, *China – Broiler Products*, para. 7.479. (emphasis added)

i. "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"[141], or

ii. "make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product".[142]

7.78. Turning to MOFCOM's determination, we took note of China's arguments that:

a. the "like product" at issue was a broiler and nothing in the Anti-Dumping Agreement or the SCM Agreement requires "a price comparison on the basis of product segments within the single like product"[143]; and

b. "MOFCOM … considered that all chicken parts competed and were substitutable with one another".[144]

7.79. We found in the original report that, as a matter of fact:

a. "the product mix varied considerably between the two sets of data compared by MOFCOM in the investigations at issue"[145]; and

b. "the information before MOFCOM … revealed important price differences between the different broiler products".[146]

7.80. We concluded 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 that included different product mixes without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments.[147]

7.3.1.2 The redetermination's consideration of price effects

7.3.1.2.1 Price undercutting

7.81. In the preliminary determination in the original investigation, MOFCOM had found that "the product concerned had caused price undercutting and suppression to the like product of the domestic industry".[148] The US interested parties objected that, "there is apparent difference in the product mixes between the imported product concerned and the domestic like product".[149] In response to these concerns, in the redetermination MOFCOM considered that it "can apply appropriate methodology based on specific facts of specific case".[150] To that end, MOFCOM:

a. "conducted on-site verifications on four domestic producers in the reinvestigation";

b. "collected supplemental sales data that distinguish the different product specifications";

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[141] Panel Report, *China – Broiler Products*, para. 7.483.
[142] Panel Report, *China – Broiler Products*, para. 7.483. See also ibid. para. 7.479: "the need for adjustments necessarily depends on the factual circumstances of the case and the evidence before the authority".
[143] Panel Report, *China – Broiler Products*, para. 7.468.
[144] Panel Report, *China – Broiler Products*, para. 7.605 (emphasis added); see also ibid. para. 7.468: "MOFCOM's methodology … recognises the substitutability among different types of products".
[145] Panel Report, *China – Broiler Products*, para. 7.490.
[146] Panel Report, *China – Broiler Products*, para. 7.490.
[147] Panel Report, *China – Broiler Products*, para. 7.494. (emphasis added)
[148] Redetermination, (Exhibit CHN-1 (translated version)), p. 73.
[149] Redetermination, (Exhibit CHN-1 (translated version)), p. 74.
[150] Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

c. "analyzed these sales data"; and

d. "cross-checked with the Customs import data of the product concerned and the data provided in the injury questionnaire responses of the exporters".[151]

7.82. On the basis of its reverification of the data, MOFCOM:

a. did not consider it necessary to conduct a new underselling analysis, as it had "confirmed" the reliability of the results of the original investigation and analysis;

b. found that "the basic facts on which the U.S. relevant claims were based are not consistent with the actual situation"[152]; and

c. "considered that the selling prices of the different product specifications in the domestic market supported by these evidences are representative".[153]

7.3.1.2.2 Price suppression

7.83. MOFCOM in the redetermination found that the volume and market share of imports of the product concerned had increased continuously since 2006. It also found that the "import price of the product concerned had significant effect on the selling prices of the like product of the domestic industry".[154] Specifically, according to MOFCOM:

> [B]ecause the import volume of the product concerned increased continuously afterwards, the import price 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 [*sic*] …
>
> During the investigation period, the increase of the import volume of the product concerned was obtained by making low-priced sales. Such low-prices [*sic*] sales caused price undercutting to the selling prices of the like product of the domestic industry, and further more suppressed the prices of the like product of the domestic industry significantly … [.][155]

7.84. In response to the arguments of the interested parties, MOFCOM noted that there was no disagreement with "the trend of substantial increase of the absolute import volume".[156] MOFCOM was not, however, required to look at increases in relative terms as well. In particular, MOFCOM:

> [C]onsidered that, from 2006 to 2008, although the domestic market had a continuously high demand in broiler products, the domestic like product also obtained some market shares. However, that did not imply that the domestic industry did not suffer from injury. On the contrary, because the import volume of the product concerned increased substantially and the import price remained at a relatively low

[151] Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

[152] Redetermination, (Exhibit CHN-1 (translated version)), p. 75. Because at issue is MOFCOM's methodology, the actual numbers are not essential for the Panel's determination. For the sake of completeness, we note that MOFCOM found that chicken feet, wings, and gizzards did not, in the Chinese market, belong to "broiler products of lowest value". Looking specifically at certain components of its own comparator basket of products, MOFCOM found that chicken breasts (included in the domestic basket but not in the import basket) were actually priced lower than chicken feet. On this basis, "the product specifications similar to the imported product concerned, as produced and sold by the domestic industry, belong to the product specifications of relatively high price."

[153] Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

[154] Redetermination, (Exhibit CHN-1 (translated version)), p. 70. According to MOFCOM:

> During the investigation period, the dumped and subsidized imports were imported in a large quantity and sold, which suppressed the selling price of the like product of the domestic industry significantly, the selling price had been below the sales cost for a long period of time, and the domestic industry could not obtain reasonable profit margin, and the like product was in losses all the time.

(emphasis added)

[155] Redetermination, (Exhibit CHN-1 (translated version)), p. 71. (emphasis added)

[156] Redetermination, (Exhibit CHN-1 (translated version)), p. 72. (emphasis added)

> level, resulted in significantly undercutting and suppression to the domestic like product …
>
> …
>
> [T]he effect of the import volume of the product concerned on the domestic industry should be investigated comprehensively combined with the situation of change of the import price in the corresponding period.[157]

7.85. According to MOFCOM:

> [T]he data indicates that the import price of the product concerned was still lower than the price of the domestic like product, and significantly undercut the price of the domestic like product. Affected by this, the domestic like product was forced to reduce the price substantially to maintain market share.[158]

7.3.2 Main arguments of the parties

7.3.2.1 Price undercutting

7.3.2.1.1 United States

7.86. MOFCOM's price effects analysis remains inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement[159], for two reasons.

7.87. First, the Panel in the original report found that China failed to ensure price comparability because it did not control for differences in product mix when comparing the prices of different chicken products. MOFCOM, however, "took no action that complied with the Panel's instructions".[160] It based its underselling findings "on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient".[161]

7.88. Second, China does not demonstrate that data collected from only four of the 17 domestic producers included in the domestic industry were representative. In particular, MOFCOM did not disclose why it narrowed down the sample, the methodology for selecting the producers, or their share in the total domestic sales.[162] The data relied on cannot be considered as "positive evidence" and the analysis as an "objective examination" within the meaning of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement[163]; MOFCOM's analysis is also inconsistent with the requirements in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement[164] that the injury analysis focus on the "domestic industry".[165] Where "samples" are used, they must be properly representative.

7.3.2.1.2 China

7.89. MOFCOM used AUVs rather than model-specific prices to compare price trends; the WTO Agreement permits reliance on AUVs for price comparison purposes[166] and Articles 3.2 and 15.2 do not mandate a particular price-comparison methodology.[167] Following the Panel's findings in the original report, MOFCOM collected additional data from four domestic producers to determine whether, as a factual matter, the product types exported by the United States were in

[157] Redetermination, (Exhibit CHN-1 (translated version)), p. 73. (emphasis added)
[158] Redetermination, (Exhibit CHN-1 (translated version)), p. 76.
[159] We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.
[160] United States' second written submission, para. 149.
[161] United States' second written submission, para. 149.
[162] United States' first written submission, paras. 135, 136, and 146.
[163] We will refer to these as Articles 3.1 and 15.1.
[164] We will refer to these as Articles 3.2 and 15.2.
[165] United States' first written submission, para. 142.
[166] China's first written submission, para. 277.
[167] China's first written submission, para. 278.

fact low-value products in China's market or were high-value products.[168] MOFCOM found that the subject imports consisted of products higher in value[169] than the domestic like product used in determining AUVs. As a result, the initial use of AUVs in the original investigation was in fact biased in favour of the respondents. In this light, MOFCOM did not need to make any adjustments for differences in the product mix in the redetermination.[170]

7.90. The underselling analysis therefore remained exactly the same as in the original investigation and is thus based on data from all domestic producers included in the original investigation. The more limited data collected in the redetermination served only to confirm that there was no bias in the original method (using aggregate AUVs rather than product-specific prices for the underselling analysis); for this more limited purpose, collecting data from four domestic producers was fully sufficient.

7.91. MOFCOM's choice of the four domestic firms from which it sought additional data during the reinvestigation was based on time and resource constraints and MOFCOM's familiarity with the four firms.[171] For three of the four firms MOFCOM had conducted full verifications in the original proceedings; the fourth was the largest of those for which it had conducted more limited verifications. MOFCOM made a specific finding in its redetermination, based on a review of all the evidence, "that the selling prices of the different product specifications in the domestic market supported by these evidences are representative".[172]

7.3.2.2 Price suppression

7.3.2.2.1 United States

7.92. MOFCOM's price suppression finding relied exclusively on the flawed finding of price underselling. Because the latter was flawed, the former was also necessarily inconsistent with Articles 3.1, 3.2, 15.1, and 15.2.[173]

7.93. The underselling analysis and product-specific pricing data did not support MOFCOM's findings of price suppression in the first half of 2009 because the evidence did not show any correlation between the alleged underselling and price suppression.[174] Specifically:

a. The long-term trend in the domestic industry's net loss does not support the conclusion of price suppression.

   i. The domestic industry's decrease in losses (due to prices increasing more than the increase in costs) during the period 2006 to 2008 is inconsistent with a finding of price suppression.

   ii. MOFCOM failed to explain or investigate how the alleged underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects between 2006 and 2008.[175]

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[168] China's response to Panel question No. 45(b), para. 166.

[169] China's response to Panel question No. 45(b), para. 167: "pricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum showing products like paws to be high value."

[170] This conclusion was based on the following analysis: (a) MOFCOM identified those product models mainly exported from the United States; (b) for those product models, MOFCOM calculated the overall average (domestic) price from price data collected from the four domestic producers selected during the reinvestigation; (c) this overall domestic price was relatively high; and (d) on that basis MOFCOM inferred that the corresponding product models exported from the US belong to higher-value product models. (China's first written submission, paras. 270-272). China further noted:

> [T]he verification and data collection were used to establish price relationships across product types, irrespective of their absolute values, to demonstrate that price differences shown in a comparison of aggregate AUVs drawn from the industry as a whole was not merely the result of product mix but could reasonably be attributed to price undercutting.

(China's response to Panel's question No. 45(c), para. 168)

[171] China's first written submission, para. 295.

[172] China's response to Panel question No. 45(c), para. 168.

[173] United States' first written submission, paras. 151-157.

[174] United States' first written submission, paras. 151, 158, and 159.

[175] United States' first written submission, para. 158.

b. The short-term price trend for domestic product types competing directly with subject imports compared to the price trend for other domestic product types suggests that other factors unrelated to the dumped imports were responsible for the alleged price suppression.[176] MOFCOM disregarded evidence that prices for domestically produced products that competed directly with most subject imports (i.e. chicken drumsticks, feet, and gizzards) declined far less than prices for other domestic products in the first half of 2009.

7.3.2.2.2 China

7.94. In relation to the United States' first argument, the price suppression finding relied not only on the underselling analysis but also on the effects of increased volumes of imports and the combined effects of both.[177]

7.95. In relation to the United States' second argument:

a. The legal standard under Articles 3.2 and 15.2 is not a full causation analysis but asks whether subject imports have "explanatory force" for the price suppression. MOFCOM made such a showing on the basis of the correlation between domestic and import prices, the consistent underselling and losses of the domestic industry, the increase in the margin of price undercutting in 2008, and the consistent increase in import volume.[178]

b. Regarding the US argument on decreasing losses, losses only narrowed in 2007 which cannot preclude a finding of price suppression on the basis of the totality of the evidence over the full period, in particular the increase in volume and market share of subject imports.[179]

c. Regarding the US argument on price suppression during the first half of 2009 being driven by other factors[180]:

   i. the US argument is not compatible with MOFCOM's aggregate approach;

   ii. there was a price undercutting effect for the product as a whole and model-specific prices fell even if the degree of the decline varied between product models; and

   iii. the price decline for those product models directly competing with imports was still "significant".

7.3.3 Evaluation

7.3.3.1 Price undercutting

7.3.3.1.1 Price comparison

7.96. We recall the second sentence of Article 3.2 of the Anti-Dumping Agreement:

> 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 <u>compared</u> with the price of a like product of the importing Member … [.][181]

[176] United States' first written submission, para. 159.
[177] China's first written submission, paras. 302-310.
[178] China's first written submission, paras. 317-320.
[179] China's first written submission, paras. 321-322.
[180] China's first written submission, paras. 323-327.
[181] Emphasis added. Article 15.2 of the SCM Agreement is essentially identical.

As we observed in the original report, "price comparability has to be ensured in terms of the various features of the products and transactions being compared".[182] We concluded that, as a matter of law, where an authority:

> [P]erforms 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.[183]

7.97. Neither party has directed us to any developments since that would require us to revisit this finding.

7.98. Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement[184] set out the rules and conditions that apply with respect to the determination of injury, which is one of the fundamental prerequisites for the imposition of an anti-dumping measure.[185] The provisions of Articles 3 and 15 requiring consideration, examination, and evaluation of various factors contemplate "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[186] The price comparison required in Articles 3.2 and 15.2 is an important analytical step in an investigating authority's injury and causation analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. It requires an investigating authority to consider whether any observed significant price undercutting is "the effect of the dumped imports".[187] A price comparison under Articles 3.2 and 15.2 is thus not a static snapshot of the relationship between two prices (or averages). It requires, rather, a dynamic consideration of two sets of prices in a specific market context and within a given time-frame. The consideration must address whether observed movements in domestic prices are the effect of the prices of the dumped imports.

7.99. The facts relevant to our Articles 3.2 and 15.2 analysis in this proceeding may be summarized as follows:

a. In the original case, MOFCOM disagreed with the arguments of US interested parties that imports from the United States contained "low value" products, as opposed to what the United States characterized as "high value" domestic product models in the domestic comparator basket.[188]

b. In the redetermination, MOFCOM sought to verify whether "the selling prices of the different product specifications in the domestic market supported by these evidences [*sic*] are representative".[189]

c. MOFCOM selected four domestic producers for additional verification of data and obtained further product-specific information from these companies. The data verified and gathered were not for the purpose of comparing prices, but rather, "to establish price relationships across product types, irrespective of their absolute values".[190]

[182] Panel Report, *China – Broiler Products*, para 7.480.
[183] Panel Report, *China – Broiler Products*, para. 7.483. We note that the parties did not appeal our findings.
[184] We will refer to these as Articles 3 and 15.
[185] Panel Report, *China – Cellulose Pulp*, para. 7.11.
[186] Appellate Body Report, *China – GOES*, para. 128; Panel Report, *China – Cellulose Pulp*, para. 7.14.
[187] Emphasis added.
[188] Panel Report, *China – Broiler Products*, para. 7.469.
[189] Redetermination, (Exhibit CHN-1 (translated version)), p. 74.
[190] China's response to Panel question No. 45(c), para. 168.

d. The data gathered from the four domestic producers indicated that product models identified by the United States as "low value"[191] or "high value" do not have similar "values" in the Chinese market[192], at least for those producers, and could not be considered "low value".

e. In the light of this model-specific evidence, MOFCOM considered that the domestic benchmark AUV it used for its price underselling analysis was more "conservative"[193] than an AUV based on a basket of product models including only models in the US-export basket.

7.100. The discussion of comparability in our original report concentrated on the following point: to consider whether the AUV of a basket of imported goods has had the effect of undercutting the AUV of a basket of domestic like products, the product composition of the two baskets must be "comparable" such that the price of the products in one basket can have an effect on the price of the products in the other basket. This is because where the baskets are composed of different product models a consideration of the effect of the price of a basket of imported goods on the prices of the basket of domestic goods becomes complicated: the more the divergence in composition, the less accurate the comparison of average values and the less reliable any consideration of the effects of one set of prices (or AUVs) on another.

7.101. In the original investigation[194], MOFCOM's price comparison was further complicated by at least two other factors, and these complications were not addressed or rectified in the redetermination.

7.102. First, in considering the price effects of dumped imports, MOFCOM undertook a price comparison between two baskets of dissimilar compositions and considered the effects of the AUV of a smaller import basket on the AUV of a larger domestic basket. In the original case MOFCOM had found that the "like product" for the purposes of the investigation was a broiler and not specific product models, and that many of the product models at issue were substitutable in the Chinese market.[195] MOFCOM was thus aware of potential price effects as a result of competition among product models within each basket. Given substitutability of the product models within the larger domestic basket, there was some risk that price effects were the effects of competition from product models within the domestic basket that were not in the dumped import basket.

7.103. Second, we note the observation by the United States that, "MOFCOM found that chilled chicken cuts accounted for 40 to 47 percent of subject imports and chicken feet accounted for 29 to 39 percent of subject imports, depending on the year".[196] We recall the model-specific prices that MOFCOM found in the course of the reverification. Given the range of prices among the various product models and the change in the composition of the domestic basket from year to year, it is not a given that any observed price effects are "not merely from differences in the composition of the two baskets being compared".[197] An unbiased and objective investigating authority would be expected to seek to control for these variations in considering the effect of the prices of subject imports on the prices of the domestic like product.

[191] Redetermination, (Exhibit CHN-1 (translated version)), p. 75: "the main product specifications exported from the U.S. to China were frozen chicken with bones (normally most of them are chicken legs, HS 02071411), chicken wing (HS02071421), paw (HS 02071422), gizzard (HS 05040021)".

[192] Redetermination, (Exhibit CHN-1 (translated version)), p. 75:

> From 2006 to first half year of 2009, the average prices of chicken legs sold by domestic producers in domestic market were 9,676 RMB, 12,566 RMB, 13,656 RMB and 11,875 RMB per ton, the average prices of chicken paw were 10,198 RMB, 12,142 RMB, 12,958 RMB and 12,837 RMB per ton, while at the same period the average prices of chicken breast were 9,342 RMB, 11,489 RMB, 12,573 RMB and 11,031 RMB per ton. According to the above data, the product specifications similar to the imported product concerned, as produced and sold by the domestic industry, belong to the product specifications of relatively high price.

[193] Redetermination, (Exhibit CHN-1 (translated version)), p. 75.

[194] We underline that MOFCOM did not undertake to reopen the investigation to consider price effects, but reverified its data and gathered additional information. On this basis, it found that the AUVs it relied upon in its consideration of price effects in the original investigation were "conservative".

[195] Panel Report, *China – Broiler Products*, para. 7.605 (referring to the Preliminary Determination in the original investigation, (Original Exhibit USA-2)).

[196] United States' second written submission, para. 150 (referring to Redetermination, (Exhibit USA-9 (translated version), section VII(ii)(2)).

[197] Panel Report, *China – Broiler Products*, para. 7.483.

7.104. As a matter of law, we continue to be of the view that:

a. a simple comparison of prices in respect of baskets with different compositions does not indicate the effect of one set of prices (of the subject import basket) on the other set of prices (the domestic basket, comprising a larger number of product models); and

b. where AUVs are based on baskets whose product mixes are not comparable, an investigating authority is required to seek to "control for differences in physical characteristics affecting price comparability or making necessary adjustments".[198]

7.105. China argues that the reverification amounted to "controlling" for the different basket compositions, because it demonstrated that the domestic AUVs used for comparison purposes are more "conservative" than an AUV that might be derived from a basket composed of the same product models as the subject imports.[199] While we might agree with China that, at least for the four producers subject to reverification, domestic AUVs appear to be more "conservative" than the dumped import AUVs, given our specific findings in the original case and the requirements of Article 3.2, this alone does not suffice to demonstrate that MOFCOM controlled for the different composition of the two baskets for the specific purpose of considering the effects of the price of subject imports on a comparator basket of the domestic like product.

7.106. In the original report, we did not find, because Articles 3.2 and 15.2 do not require, that in a price comparison, MOFCOM had to adopt the "lower of the two" price benchmarks; our findings were about the comparability of the baskets rather than the relative value of different AUVs. The fact that a domestic AUV is more or less "conservative" or might otherwise benefit exporters or foreign producers does not affect our analysis. Rather, at issue under Articles 3.2 and 15.2 is the effect of subject imports on domestic like product prices during the POI. This requires that the baskets of goods used for comparison be comparable, or at least that any price comparison controls for or adjusts in respect of different compositions to ensure sufficient comparability.

7.107. In this light, we find that MOFCOM's "reverification" did not suffice to bring China's measure into conformity with its obligations under Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement, in that it failed to address the comparability of AUVs derived from different baskets of products for the purpose of considering the effects of prices of subject imports on domestic like product prices.[200]

7.3.3.1.2 Representativeness

7.108. In response to the arguments of the United States that the data collected from four domestic companies were not representative, China submits that in its view:

> [T]he "representativeness" of the selected producers [is] a question regarding price comparability of specific products, which was not the purpose of the MOFCOM verification exercise and collection of supplemental information.[201] ...

China further argues that:

> The exercise did not require any direct product price comparisons, but merely to establish pricing relationships across product types, whatever the absolute prices may be.[202]
>
> [P]ricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum showing products like paws to be high value. None of the U.S. interested parties submitted any evidence or

[198] Panel Report, *China – Broiler Products*, para. 7.494.
[199] China's second written submission, para. 262; opening statement at the meeting of the Panel, para. 46.
[200] We do not mean to suggest, of course, that all MOFCOM had to do was to address the findings of the Panel in its original report. At issue in this case is the consistency of the redetermination with "the covered agreements".
[201] China's response to Panel question No. 45(b), para. 165.
[202] China's response to Panel question No. 45(b), para. 166. (emphasis added)

> argument during the re-investigation process in an attempt to rebut these facts and common knowledge.[203]

7.109. The question of "representativeness" arises in the context of "sampling". Sampling is an exercise in which observations about the whole of a population are based on data collected from a subset of that population. The methodology used to sample from a larger population depends on the type of analysis being performed, but may include simple random sampling or systematic sampling. Whatever the sampling methodology, in the context of the Anti-Dumping Agreement and the SCM Agreement, application of sampling as an analytical tool is valid where it can be demonstrated that the sample is sufficiently representative to allow for a reasoned conclusion about the population as a whole.[204] In this instance, MOFCOM obtained additional data from four domestic producers[205] on "volume, value, and unit value on a product-specific basis"[206] in the context of analysing "pricing relationships across product types". According to China, this was done "to establish" such relationships, in respect of not only the four domestic producers subject to verification, but also the domestic industry as defined. Moreover, according to China, "pricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum".[207]

7.110. That is, on the basis of data gathered from a subset of the population (four producers), MOFCOM drew certain conclusions about the population as a whole ("a pricing spectrum" or "pricing relationships across product types" in respect of all domestic producers defined as the domestic industry). This is, in effect, a sampling exercise, regardless of the methodology employed by MOFCOM.

7.111. Nothing in Articles 3.2 and 15.2 − or, indeed, in Articles 3 and 15 as a whole − expressly prohibits or permits, or specifically regulates, sampling as an analytical methodology.[208] Nonetheless, any sample that is used to "establish" a conclusion about the population as a whole must be representative.[209] An unbiased and objective investigating authority cannot reasonably

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[203] China's response to Panel question No. 45(b), para. 167. (emphasis added)

[204] See in particular, Appellate Body Report, *EC − Fasteners (China)*, para. 436:

> [W]e disagree with China's contention that the only way to ensure representativeness is through a statistically valid sample. In our view, as long as the domestic industry is defined consistently with the *Anti-Dumping Agreement*, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample. A statistically valid sample is a proper way to ensure the representativeness of the sample. Yet, the *Anti-Dumping Agreement* imposes no obligation on an investigating authority always to resort to statistically valid samples.

(emphasis added)

"Representativeness" is not about the methodology of sampling; even a randomly selected sample may need to be controlled to ensure representativeness, such that any observations based on the sample can be validly extended to the population as a whole.

[205] There were 17 domestic producers in the "domestic industry". (Redetermination, (Exhibit CHN-1 (translated version)), pp. 26-27).

[206] China's response to Panel question No. 5(c), para. 14.

[207] China's response to Panel question No. 45(b), para. 167. (emphasis added)

[208] Appellate Body Report, *EC − Fasteners (China)*, para. 435:

> Turning to the substance of China's claims, we note that the *Anti-Dumping Agreement* is silent on the issue of whether sampling may be used for purposes of the injury determination. The Agreement thus does not prevent an authority from using samples to determine injury, and China does not contest this view.

And para. 436:

> [B]ecause the *Anti-Dumping Agreement* does not specify whether sampling is allowed for purposes of an injury determination, it also does not contain guidance on how sampling should be conducted.

[209] Sampling is generally concerned with gathering data from a sub-set of a population for the purpose of drawing conclusions about the population as a whole. In this instance, the investigating authority already had considerable data − not just of the sub-set, but of the population as a whole; indeed, China stresses that the reason why MOFCOM reverified the four companies was that it knew the sub-set sampled. We are sympathetic to MOFCOM's stated reason for the selection: given tight timelines, it is not unreasonable for an investigating authority to seek data from producers that have already been verified and that are familiar to it. At the same time, and especially given the lack of any explanation in the redetermination for the choice of these producers, this sequence of events might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, which would not be consistent with an objective analysis of the evidence. We need not and do not make any findings on this point, but only note that MOFCOM's approach was not without risk.

draw conclusions about a population as a whole based on data gathered from a subset that is not representative.

7.112. The redetermination is silent as to the selection criteria, the selection process, and the representativeness of the sample. The explanations proffered by China in its submissions do not in any way address the question of representativeness of the sample, but rather contend that the choice of the four companies reverified was not arbitrary. Accordingly, even if MOFCOM's "reverification" amounted to the type of "control" required for a proper price comparison, MOFCOM did not explain in the redetermination in what way its sample was sufficiently representative that it could draw a reasoned conclusion about the population as a whole.

7.113. In this light, we find that China did not act consistently with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement because in conducting its "reverification", MOFCOM failed to explain in what way the companies chosen were "representative" such that a consideration of price effects based on data for these companies could be generalised to the domestic industry.

7.3.3.2 Price suppression

7.114. We found in the original report that even if there were contributing factors, at a minimum price undercutting was a factor in MOFCOM's price suppression analysis.[210]

7.115. For the redetermination, MOFCOM merely "confirmed" through the reverification of the four companies that the comparator basket was a "conservative" one and that its price undercutting analysis was accurate but left its original price effects analysis unchanged. MOFCOM did not, in the redetermination, seek to "disentangle" price undercutting, price suppression, and volume and market-share effects. We refer, for example, to MOFCOM's response to the argument that part of the injury to the domestic industry was attributable to grain price increases:

> [B]ecause the import price of the product concerned was always lower than the average selling price of the like product of the domestic industry, it undercut the price of the like product significantly, resulted in the suppression on the selling price of the domestic like product, and could not pass through the cost caused by price increase of raw materials downward, and the due price increase of the like product which should have occurred hadn't been realized.[211]

And again, responding to the pork price argument of the interested parties:

> While its price was significantly lower than that of the domestic like product, it caused apparent suppression on the price increase of the domestic like product, and the price was lower than the production cost for a long time, and could not gain the profit margin. Therefore, the low-priced activity of the product concerned was the direct reason causing the injury to the like product of the domestic market [*sic*].[212]

7.116. In this light, we find that China acted inconsistently with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement because MOFCOM's consideration of price suppression still rests on its consideration of price undercutting, such that its price suppression analysis was undermined by a flawed analysis of price undercutting.

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[210] Panel Report, *China – Broiler Products*, para. 7.511. In arriving at this conclusion, we relied on the findings of the Appellate Body in *China – GOES* to the effect that:

> 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.

(Panel Report, *China – Broiler Products*, para. 7.511)

[211] Redetermination, (Exhibit CHN-1 (translated version)), p. 85.

[212] Redetermination, (Exhibit CHN-1 (translated version)), p. 88.

7.117. Having made findings in respect of price undercutting and in the light of the foregoing, it is not necessary or useful for us to make additional findings in respect of the second line of argument of the United States regarding price suppression.

7.3.4 Conclusion

7.118. For the foregoing reasons, we find that:

a. China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in respect of price undercutting;

b. China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in respect of price suppression; and

c. as a consequence, China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.

7.4 Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement: impact on the domestic industry

7.4.1 Introduction

7.119. In our original report we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[213] We did not consider that making additional findings in respect of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement[214] would help the parties in resolving the dispute because:

a. MOFCOM's examination of the state of the domestic industry was "inextricably linked" to its flawed consideration of price effects; and

b. implementing the report on Articles 3.2 and 15.2 would require MOFCOM to re-examine its the impact of subject imports.

7.120. In this implementation proceeding, the United States again asserts that MOFCOM erred in various aspects of its examination of the impact of subject imports:

a. In its redetermination, MOFCOM limited the scope of its reinvestigation to "the implementation of the rulings and recommendation of the DS427 Panel on the issues of injury and causality".[215]

b. MOFCOM did not examine different or additional information; its evaluation of all relevant factors is not different from that in its original investigation.

In these circumstances, to assist the parties to secure a positive resolution to the current dispute, we consider it appropriate to make findings with respect to the US claims.[216]

7.4.2 Main arguments of the parties

7.4.2.1 United States

7.121. MOFCOM's impact analysis did not reflect an "examination of the impact of the subject imports on the domestic industry concerned" and an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" as required by Articles 3.4 and 15.4, for three reasons.

[213] We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2 or, where appropriate, Articles 3.2 and 15.2.
[214] We will refer to these as Articles 3.4 and 15.4.
[215] Redetermination, (Exhibit CHN-1 (translated version)), p. 15.
[216] This also reflects Japan's suggestion to the Panel in its third-party statement, para. 5.

7.122. First, MOFCOM relied exclusively[217] (or primarily[218]) on a flawed analysis of the decrease in capacity utilization and an increase in end-of-year inventories, instead of evaluating all relevant factors and taking into account evidence that nearly all other factors were positive for the period 2006 to 2008.[219]

7.123. Regarding capacity utilization:

a. MOFCOM ignored that between 2006 and 2008 the decline in capacity utilization was due to the fact that the domestic industry's capacity increased in excess of demand growth.[220]

b. The decline in capacity utilization between 2006 and 2008 was also not the effect of subject imports because their share of apparent consumption increased entirely at the expense of non-subject imports, not at the expense of the domestic industry, whose share of apparent consumption also increased.[221]

7.124. Regarding end-of-period inventories, MOFCOM focused on an absolute increase in domestic industry end-of-period inventories. The relative increase in end-of-period inventories, both as a share of domestic industry production and as a share of domestic industry shipments, ranged between only 2.9% and 3.5% for the period 2006-2008, which was not significant.[222]

7.125. Second:

> [B]y China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened.[223]

MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire POI, including those periods in which the industry's performance improved.[224] MOFCOM was not entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation" to the exclusion of other contradictory factors.[225]

7.126. Third, China expressly argues that MOFCOM also considered potential future imports. However, "future subject imports could have no impact whatsoever on the domestic industry during the period of investigation".[226]

7.4.2.2 China

7.127. US arguments in respect of capacity utilization are problematic because:

a. they relate to causation, which is irrelevant under Articles 3.4 and 15.4[227];

b. MOFCOM did not base its evaluation primarily or exclusively on capacity utilization, but evaluated "all of the injury factors, both individually and collectively"[228];

c. the observed capacity expansion is in part the result of "a shift from smaller producers to large producers", reflecting the "recent trend in the Chinese market" of "larger firms consolidating a growing portion of the market"[229]; and

[217] United States' first written submission, para. 170.
[218] United States' first written submission, para. 182.
[219] United States' first written submission, paras. 165 and 171.
[220] United States' first written submission, paras. 172-173.
[221] United States' first written submission, para. 174.
[222] United States' first written submission, paras. 177 and 179.
[223] United States' second written submission, para. 168.
[224] United States' second written submission, para. 170.
[225] United States' second written submission, para. 171 (quoting China's first written submission, para. 350).
[226] United States' second written submission, para. 172.
[227] China's first written submission, para. 358.
[228] China's second written submission, para. 301.
[229] China's first written submission, para. 357.

d. the "allegation that capacity grew in excess of increasing consumption is not factually true".[230]

7.128. In respect of inventories, the United States failed to consider that inventories were growing in absolute and relative terms and MOFCOM had discretion on which basis to evaluate this factor.[231]

7.129. In respect of US arguments on the POI, the United States focuses on the period from 2006 to 2008, and only on various non-financial indicators of the health of the domestic industry[232], ignoring the most recent part of the POI, the first half of 2009.[233] Thus, the United States:

a. improperly focused on volume indicators and ignored the weak financial indicators;

b. improperly focused on the period 2006-2008 and ignored the most recent period, the first half of 2009;

c. ignored the "cumulative impact of consistent pre-tax losses"[234]; and

d. did not take account of expected near term trends.

7.130. By contrast, in its evaluation, MOFCOM "considered all of the evidence for the period as a whole"[235] and put particular weight on[236]:

a. negative financial indicators over the full POI;

b. the deterioration in most injury factors during the first half of 2009[237]; and

c. expected negative near term trends.[238]

7.4.3 Evaluation

7.4.3.1 MOFCOM's redetermination

7.131. MOFCOM conducted the reinvestigation on "procedural and substantive issues which formed the basis ofr [*sic*] the original anti-dumping measure and original countervailing measure".[239] On injury, MOFCOM limited the scope of the reinvestigation to "the implementation of the rulings and recommendation of the DS427 Panel on the issues of injury and causality".[240] MOFCOM did not examine any additional or different information in its redetermination, and based on largely the same evaluation of the facts, reached the same conclusions regarding the impact of subject imports on the domestic industry as in the original investigation.

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[230] China's first written submission, para. 356:
The United States makes a misleading comparison of percentages that are being applied to very different base numbers – 780,700 metric tons is a 26 percent increase from 2.98 million, while 955,600 metric tons is only a 17 percent increase from 5.64 million tons. But the denominator for the consumption increase is almost twice the size of the denominator for the reported domestic capacity.
(fn omitted)

[231] China's first written submission, paras. 360-365.

[232] China's first written submission, para. 339.

[233] China's first written submission, para. 340.

[234] China's second written submission, para. 312.

[235] China's second written submission, para. 300.

[236] China's first written submission, paras. 340-350.

[237] China's first written submission, para. 342:
Aside from noting these negative indicators, the MOFCOM Redetermination also specifically highlighted this shift in 2009. MOFCOM noted that: "[i]n the first half of 2009, all the economic indexes of domestic industry continued to deteriorate". The MOFCOM focus on 2009 could not be mistaken.
(emphasis added; fn omitted)

[238] China's first written submission, para. 344.

[239] Redetermination, (Exhibit CHN-1 (translated version)), p. 1.

[240] Redetermination, (Exhibit CHN-1 (translated version)), p. 15.

7.132. MOFCOM found that volume indicators were generally improving in 2006-2008. Financial indicators appeared generally weak and fluctuated over the same period. However, based on a comparison between the first half of 2008 and the first half of 2009, all indicators showed declining performance in the first half of 2009.

Table 1: Market trends

Factor	Observed trends
Output volume of the domestic industry	Increased throughout the 2006-2008 period, declined (by 4.37 percentage points) from H1 2008 to H1 2009.
Capacity utilization	Remained at around 79-80% throughout the 2006-2008 period, decreased by 9.78 percentage points from H1 2008 to H1 2009, to 66.48%.[241]
Sales quantities	Increased throughout the 2006-2008 period, dropped in H1 2009 by 7.74 percentage points compared to H1 2008.
Market share	Increased slightly throughout the 2006-2008 period (37.81% in 2006, 41.62% in 2007, 42.42% in 2008), decreased very slightly in H1 2009 to 42.19%.[242]
Sales price	Increased in the 2006-2008 period, decreased in H1 2009.[243]
Gross profit margin	Fluctuated over the period considered; generally negative except for 2007; and worsened markedly in H1 2009: -2.46% in 2006, 5.03% in 2007, -0.21% in 2008, and -4.37% in H1 2009.
Sales income	Year-on-year increase of 57.62% in 2007 and 19.65% in 2008; declined 26.80% from H1 2008 to H1 2009.
Profit before tax	Negative throughout the period considered: -1.208 billion RMB in 2006, -0.084 billion RMB in 2007, -1.359 billion RMB in 2008, and -1.090 billion RMB in H1 2009. Losses grew by 1511.72% from 2007 to 2008 and by 307.28% from H1 2008 to H1 2009.
Return on investment	Negative throughout the period considered: -13.42% in 2006, -0.86% in 2007, -12.18% in 2008, and -9.10% H1 2009 over H1 2008; year-on-year change of 12.56%, -11.31%, and -6.69% in 2007, 2008, and H1 2009.
Employment figures	Increased in 2006-2008, but decreased by 11.29% in H1 2009.[244]
Labour productivity	Remained more or less stable over POI.
Per capita payroll	Rose throughout POI.
Ending inventory	Increased in absolute numbers during POI, from 68,257 tons in 2006 to 91,713 tons in 2007, 98,755 tons in 2008, and 105,402 tons in H1 2009. Year-on-year increase of 34.36% to 2007, 7.68% to 2008, and 6.73% to H1 2009 over H1 2008.
Net cash flows from operating activities	Fluctuated: -218 million RMB in 2006, -10 million RMB in 2007, +69 million RMB in 2008, -433 million RMB in H1 2009.

Source: Redetermination, (Exhibit CHN-1 (translated version)), pp. 65-68 and 78.

7.4.3.2 The law

7.133. Article 3.4 of the Anti-Dumping Agreement provides:

> 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.

[241] The baseline is not, however, constant. Capacity expanded throughout the period.

[242] MOFCOM found that the "growth rate" in the domestic industry's market share in the first half of 2009 "dropped by 4.80%" over that in the same period of 2008. It is not clear what MOFCOM means in its references to a decrease in the "growth rate".

[243] MOFCOM noted that the "growth rate in the first half of 2009 dropped by 20.65% from that in the same period of 2008".

[244] Total employment fell to 2006 levels, whereas total wages rose by over 40% in the same period.

7.134. Article 3 does not establish a strict order of analysis. It sets out substantive requirements for the determination of injury. The "consideration" required by Article 3.2 and the "examination" set out in Article 3.4 are meant to contribute to, rather than duplicate, the determination of causation required under Article 3.5.[245] Article 3.4 requires an "examination" of the impact of the dumped imports including an "evaluation" of all relevant economic factors having a bearing on the state of the domestic industry. This examination involves consideration of the "explanatory force of subject imports for the state of the domestic industry".[246] The fifteen factors listed in Article 3.4 are not exhaustive; other "economic factors" might well be relevant, and no one or several of the factors examined necessarily give decisive guidance. In examining the impact of dumped imports:

a. "[T]here is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury."[247]

b. The factors and indices evaluated under Article 3.4 may be found to be "negative" in terms of the state of the industry even in the absence of "an actual decline in performance".[248] Similarly, "positive" trends (that is, where there is no absolute decline) may nonetheless be negative in terms of the state of the industry, for instance "when those increases are significantly less than the expansion in demand".[249]

c. Even if there are no actual declines − in absolute or relative terms − an investigating authority may consider potential negative effects or declines in the industry. At issue when a "potential negative effect" is evaluated is still the impact of imports during the POI on the domestic industry during the POI, and not the possible impact of future (possible or likely) imports on the future state of the industry.[250] What is relevant is the existence of a latent, as yet unrealized decline (again, in absolute or relative terms).

d. Nothing in Article 3.4 prohibits an investigating authority from focussing on a part of the POI and undertaking a more detailed analysis of developments during that part of the POI in examining the impact of imports.[251]

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[245] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China − GOES*, para. 149).

[246] Appellate Body Report, *China − GOES*, para. 149

[247] Panel Report, *EC − Bed Linen (Article 21.5 − India)*, para. 6.163. That panel went on to observe that:

> [T]he fact that one or more factors do not, taken individually, point toward injury, does not preclude the possibility of a finding that there is material injury. An examination of the impact of the dumped imports on the domestic industry under Article 3.4 includes an evaluation of all relevant economic factors having a bearing on the state of the industry to produce an overall impression of the state of the domestic industry.

See also Panel Report, *Thailand − H-Beams*, para. 7.249:

> While we do not consider that such positive trends in a number of factors during the [POI] would necessarily preclude the investigating authorities from making an affirmative determination of injury ... 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 within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the [POI].

[248] Panel Report, *EC − Fasteners (China)*, para. 7.402:

> Our view is supported by the text of Article 3.4, which requires investigating authorities to evaluate all relevant factors, "including actual and potential decline" in certain factors, and "actual or potential negative effects" on certain other factors. The New Shorter Oxford English Dictionary defines "potential" as "Possible as opp[osed] to actual; capable of coming into being or action; latent". The use of the word "potential" in the context of the Article 3.4 non-exhaustive list of relevant economic factors indicates to us that a decline need not have occurred during the period under consideration in order for an investigating authority to find injury.

(fn omitted)

[249] Panel Report, *EC − Fasteners (China)*, para. 7.403.

[250] The impact of future imports on the future state of the industry is a question to be examined in the context of determining whether there is a threat of injury to the domestic industry.

[251] Panel Report, *Russia − Commercial Vehicles*, para. 7.41 (adoption/appeal pending).

7.4.3.3 Analysis

7.4.3.3.1 Capacity utilization

7.135. As we understand it, the US argument rests on two factual bases: first, that the domestic industry's capacity increased in excess of growth in demand; and second, that MOFCOM relied on negative trends in inventories and capacity utilization rates without regard for positive trends in other areas in the redetermination. The United States relies on the following data:

a. Domestic industry capacity increased by 780,000 tons, or 26.2%, in 2006-2008.

b. Domestic demand (apparent consumption) increased by 955,000 tons, or 17%, in 2006-2008 and the domestic industry's share of apparent consumption increased from 37.81% to 42.2% in 2006-2008.[252]

According to the United States, MOFCOM's reliance on capacity utilization rates without considering that total capacity (the denominator in the rates being compared) was actually expanding in this period was misplaced.

7.4.3.3.1.1 MOFCOM's comparison

7.136. In discussing "capacity utilization" in the redetermination, MOFCOM sets out capacity utilization rates for each of 2006, 2007, 2008, and the first half of 2009. It notes minor increases in the first three years and a decline in the first half of 2009 of 9.78 percentage points compared with the first half of 2008.[253] MOFCOM had also made the following findings in respect of production capacity, which establishes the denominator in the calculation of capacity utilization:

a. a continuous increase of domestic demand in broiler products, resulting in

b. expansion of capacity in each covered period[254]:

Table 2: Production capacity

	2006	2007	2008	2009 (H1)
Capacity (tons)	2,980,700	3,525,600	3,761,400	1,978,200
Increase (over previous corresponding period)		18.28%	6.69%	9.70%

Source: Redetermination, (Exhibit CHN-1 (translated version)), p. 65.

7.137. In MOFCOM's discussion of the change in capacity utilization rates, there is no recognition that industry capacity − the denominator in the calculation of capacity utilization − was increasing throughout the POI. This is not just a question of "causation", as China argues.[255] The US argument, as we understand it, is about the reliability of MOFCOM's comparison of capacity utilization rates over time in evaluating the impact of subject imports on the domestic industry: given the changing denominators, comparing raw percentages without some examination of the context would not enable an investigating authority to objectively evaluate capacity utilization as a factor in the examination of the impact of imports on the domestic industry, as required by Article 3.4.

7.138. China argues that an investigating authority has discretion in its choice of analytical methodology in examining and evaluating data related to the state of the domestic market. We agree. However, that discretion is not unlimited: an investigating authority must use whatever methodology it chooses to objectively examine the evidence before it. If either the methodology it employs or the evidence on which it relies is not appropriate to the analytical task before it, an

[252] United States' first written submission, para. 174 (referring to Redetermination, (Exhibit USA-9 (translated version)).
[253] Redetermination, (Exhibit CHN-1 (translated version)), p. 65
[254] Redetermination, (Exhibit CHN-1 (translated version)), p. 65.
[255] Or, for that matter, non-attribution. (China's first written submission, para. 358).

investigating authority is unlikely to be able to conduct the objective examination and evaluation that is required by the Anti-Dumping Agreement and the SCM Agreement. Thus, for instance, when examining trends or comparing data, an investigating authority may not rely upon conclusions based on flawed methodology in the evaluation of a relevant economic factor; otherwise, any "comparison" would say little about the impact of dumped or subsidized imports on the state of the domestic industry.

7.139. A capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry). Rates may be meaningfully compared for the domestic industry over a period of time where:

a. at least one factor is, or is kept, constant;

b. if both factors vary over time, at least one factor is controlled or adjusted for any changes; or

c. if both factors vary over time and are not controlled or adjusted for any changes, a reasonable explanation of the circumstances and any reliance on the comparison is provided.

We stress that there is nothing inherently wrong about comparing rates over time where both the numerator and the denominator change. Indeed, we do not understand the United States to be arguing that such a comparison is always faulty; the United States does not challenge the rate comparisons related to market share, profits or return on investment, even though in each case both factors were in a state of flux over the POI.

7.140. Rather, the US argument is that, on the facts of this case, because the domestic industry capacity increased throughout the POI, a simple comparison of rates was unreliable for the purposes of evaluating the impact of subject imports on the domestic industry. We agree. In the absence of any effort by MOFCOM to either control or adjust for this change, or any explanation of the circumstances and why reliance on the comparison was nonetheless appropriate, we cannot conclude that MOFCOM's examination was such as would be expected of an objective investigating authority in this context. MOFCOM merely set out figures for "apparent consumption" and "production quantity", but did not put the capacity utilization rates in perspective. MOFCOM's response to the objections of the interested parties during the redetermination in fact highlights its failure to engage with the question:

> [D]ata indicated that: when the domestic demand increased continuously, the production capacity utilization rate from 2006 to 2008 was lower than 80%, but … in the first half of 2009, the domestic demand further increased, but the production quantity of the like product of the domestic industry didn't increase correspondingly with the increase of production capacity, instead, it decreased by 4.37% compared to the same period of the previous year.[256]

MOFCOM did not address the problem of comparability of the rates in the light of continuous increases in production capacity. Given those increases, it is not clear what, if anything, the comparison of capacity utilization rates might explain in respect of the impact of imports. For instance, MOFCOM did not take into account in its evaluation:

a. whether capacity was increasing in response to, in tandem with, or ahead of domestic demand;

b. in what way any of these might affect the significance of any comparison of capacity utilization rates; or

c. how shifts in the industry from smaller producers outside the defined domestic industry[257] to larger producers within it could explain or affect the reliability of the data before it.

[256] Redetermination, (Exhibit CHN-1 (translated version)), p. 78.
[257] As argued before us by China.

7.141. On the basis of the information and explanation set out in the redetermination, we find that MOFCOM did not provide a reasoned and adequate explanation of its examination of "capacity utilization" rates.

7.4.3.3.1.2 Capacity utilization and overall analysis

7.142. The parties disagree about the importance of "capacity utilization rates" in MOFCOM's overall examination of the impact of subject imports. The United States argues that this was one of two negative factors on which MOFCOM impermissibly relied excessively. China responds that MOFCOM:

a. "reasonably focused on the adverse condition of the domestic industry at the end of its period of investigation, noting the sharp deterioration in numerous indicators of domestic industry health in the first half of 2009"[258]; and

b. "made a simple point about capacity utilization in its Redetermination – it was persistently low over the period of investigation".[259]

7.143. China argues that "although the authority must address each factor, the authority need not show that each individual factor by itself has been linked to subject imports".[260] We agree.[261] Under Articles 3.4 and 15.4, the necessary corollary to this observation is that an investigating authority in examining the impact of subject imports must evaluate "all relevant economic factors" not in isolation from, but rather in relation to, one another. Capacity utilization is not just "a simple point"; it is one of the factors required to be evaluated under Article 3.4. A capacity utilization comparison that is not reasonable affects not just this one factor, but the entire examination of the impact of subject imports. This is apparent from China's own arguments:

> But regardless of the increase in domestic capacity, the rate of capacity utilization would have been higher than it was, but for the presence of increasing volumes of subject imports.[262]

Where capacity increases outstrip increases in market demand, even a constant or declining volume of subject imports could result in a decline in capacity utilization without any decline in domestic production. We recall that MOFCOM found that: "When capacity utilization rate is at a relatively high level, the production of more chicken breast means increase of production quantity of more other broiler products."[263] Combined with China's argument about cross-price elasticity of all broiler product models[264], this would suggest that an expansion of production capacity in China would result in greater production of other broiler product models than wings and feet, with consequent impact on the prices of all product models. This is why an integrated examination of all of the factors evaluated is necessary in the examination of the impact of subject imports, and thus why a flawed capacity utilization comparison results in a flawed examination under Articles 3.4 and 15.4.

7.144. In this light, it is not necessary for us to determine whether MOFCOM's capacity utilization rate evaluation was "central" to its overall findings, as the United States argues, or a "simple point", as China contends. Because MOFCOM's evaluation of "capacity utilization rates" was flawed, its overall examination of all relevant economic factors was inconsistent with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

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[258] China's first written submission, para. 350.
[259] China's first written submission, para. 354.
[260] China's second written submission, para. 317.
[261] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.163: "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury".
[262] China's second written submission, para. 320.
[263] Redetermination, (Exhibit CHN-1 (translated version)), p. 69.
[264] Panel Report, *China – Broiler Products*, para. 7.605: "MOFCOM ... considered that all chicken parts competed and were substitutable with one another". See also para. 7.468: "MOFCOM's methodology ... recognises the substitutability among different types of products".

7.4.3.3.2 Inventories

7.145. The United States does not dispute that inventories rose in both absolute and relative terms. Rather, according to the United States:

a. "MOFCOM focused on the purported increase in end-of-period inventories", while the observed relative increases were not significant[265]; and

b. MOFCOM relied exclusively[266] (or primarily[267]) on such flawed analysis.

We have two observations in respect of these arguments.

7.146. First, under Articles 3.4 and 15.4, an investigating authority is required to evaluate "all economic factors" including "actual and potential negative effects on ... inventories".[268] The United States does not argue that MOFCOM did not do so; nor does it argue that inventories did not increase.[269] Rather, it argues that the observed negative effects were not "significant". The word "significant" does not appear in the text of the provisions, and the United States has not directed us to any authority that would require us to read a requirement to consider the significance of negative effects on inventories into Articles 3.4 and 15.4. Even if the "significance" of that increase were a required consideration in this context, the United States has not put forward any argument or explanation to demonstrate that the 2.9% or 3.5% increases are not "significant" in terms of the effect of imports on inventories in the specific context of the Chinese broiler market.

7.147. And even if we agree that the observed inventory increases were not "significant" by whatever measure, the United States has not explained how this observation undermines MOFCOM's examination of the impact of subject imports in the context of its evaluation of all relevant economic factors. We recall that even positive trends may indicate negative effects; in itself, an inventory increase that is not "significant" does not establish that the increase has no negative effects.

7.148. Second, nothing in the redetermination suggests that its evaluation of inventories was the sole or the primary focus of MOFCOM's examination of the impact of subject imports. After setting out the fifteen factors, MOFCOM set out the various factors it had considered, of which the "ending inventories" factor was one:

> However, the capacity utilization of the like product of the domestic industry during the same period always remain [*sic*] at a relatively low level, the ending inventories presented an increasing trend. Because the selling price of the like product of the domestic industry remained below the sales cost for the long period of time, it resulted in that the like product of the domestic industry could not obtain reasonable profit margins, and the pre-tax profits of the like product of the domestic industry remained negative. ... During the investigation period, the operational cash net flow of the like product experienced relatively significant fluctuations, which also influenced investment and financing activities of the domestic industry.[270]

The United States has not explained in what way this paragraph represents undue reliance on this one factor.

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[265] United States' first written submission, paras. 177 and 179.
[266] United States' first written submission, para. 170.
[267] United States' first written submission, para. 182.
[268] Emphasis added.
[269] United States' first written submission, para. 179 (emphasis added; fn omitted):
> End-of-period inventories as a share of domestic industry production increased only from 2.9 percent in 2006 to 3.3 percent in 2008, while end-of-period inventories as a share of domestic industry shipments increased only from 3.2 percent in 2006 to 3.5 percent in 2008. These ratios ... did not increase significantly between 2006 and 2008.

[270] Redetermination, (Exhibit CHN-1 (translated version)), p. 68.

7.149. In the light of the above, we find that the United States has not established that MOFCOM's evaluation of inventories was inconsistent with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

7.4.3.3.3 Focus on part of the POI

7.150. The United States argues that:

> [B]y China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened.[271]

The United States does not contest that industry performance "lagged" in the last half-year of the POI. As well, the United States does not contest MOFCOM's findings that some factors evaluated showed negative effects throughout the POI.[272] Rather, it asserts that "the domestic industry's performance strengthened" in 2006-2008, that MOFCOM did not adequately "focus" on this period and that MOFCOM focused its examination of impact "on the financial indicators that were consistently weak throughout the period of investigation", to the exclusion of other contradictory factors.[273]

7.151. In its redetermination, MOFCOM examined the information regarding each relevant factor and described both positive and negative developments, where relevant, in absolute and relative terms, for the entire period:

> The above evidence indicates that, during the investigation period, in order to meet the increasing demand of the domestic market, from 2006 to 2008, the production capacity, production quantity and sales volume of the like product of the domestic industry all increased, and the indicators including market share, employment, per capita wages and labor productivity also increased in different degrees. However, the capacity utilization of the like product of the domestic industry during the same period always remain [*sic*] at a relatively low level, the ending inventories presented an increasing trend. Because the selling price of the like product of the domestic industry remained below the sales cost for the long period of time, it resulted in that the like product of the domestic industry could not obtain reasonable profit margins, and the pre-tax profits of the like product of the domestic industry remained negative. ... In the first half of 2009, all the economic indexes of domestic industry continued to deteriorate.[274]

7.152. Even if we were to agree with the US assertion that MOFCOM "focused" on the first half of 2009, this does not, in itself, establish that MOFCOM acted inconsistently with Articles 3.4 and 15.4. In this respect, we make three observations.

7.153. First, nothing in Articles 3.1, 3.4, 15.1, or 15.4 prevents an investigating authority from "focusing" on a part of the POI, as long as it does not ignore relevant data and arguments, and its resulting determination is one that an objective and unbiased investigating authority could reach based on the evidence and arguments before it and the explanations given. The United States has not demonstrated that MOFCOM's "focus" was unreasonable or resulted in any lack of objectivity; the fact that there were or might have been different trends in the preceding time-frame (which MOFCOM did discuss) does not, without more, suggest lack of objectivity in focussing on the most recent information.

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[271] United States' second written submission, para. 168.

[272] **Profit before tax**: negative, at 2006, 2007, 2008, and H1 2009, at -1.208 billion RMB, -0.084 billion RMB, -1.359 billion RMB and -1.09 billion RMB (i.e. increase of the loss by 1511.72% in 2008 vs 2007 and of 307.28% from H1 2008 to H1 2009).

Return on investment: negative at -13.42%, -0.86%, -12.18% and -9.10%, in 2006, 2007, 2008, and H1 2009; year-on-year growth of 12.56%, -11.31%, and -6.69% in 2007, 2008, and H1 2009.

Net cash flows from operating activities: fluctuated: -218 million RMB in 2006, -10 million RMB in 2007, +69 million RMB in 2008, -433 million RMB in H1 2009. (Redetermination, (Exhibit CHN-1 (translated version)), pp. 67, 68, and 78).

[273] United States' second written submission, para. 171.

[274] Redetermination, (Exhibit CHN-1 (translated version)), p. 68. (emphasis added)

7.154. Second, the fact that industry performance might have "strengthened" in the 2006-2008 period does not, in itself, bring into question MOFCOM's determination based on its focus on 2009. Even positive trends in earlier parts of the POI may serve as evidence of negative effects[275]; here, domestic industry performance "strengthened" in some areas, though not others, and to the extent there were positive trends, it was in the context of an expanding market.[276] At the same time, as MOFCOM noted, in the first half of 2009, "the losses were close to that of the whole year of 2008".[277] The fact that it focused on the most recent data showing major losses does not, in itself, demonstrate that MOFCOM's examination was not objective or unreasonable.

7.155. Third, it is not unreasonable or not objective for an investigating authority to examine the cumulative impact of imports on a domestic industry, but focus its attention on the end of the period examined, when dumping and/or subsidization of imports has been found.

7.156. We find therefore that the United States has not established that MOFCOM's "focus" on the last part of the POI resulted in an examination of the impact of subject imports on the domestic industry inconsistent with the requirements of Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

7.4.3.3.4 "Potential" negative effect and future imports

7.157. MOFCOM had found that US exporters "may expand exports to China and will cause further adverse impact on the domestic industry".[278] In its first written submission China argued that the United States "improperly disregards MOFCOM's discussion of the continuing trend of U.S. exports".[279] The United States replied that "future subject imports could have no impact whatsoever on the domestic industry during the period of investigation".[280]

7.158. According to China, "the text of Articles 3.4 and 15.4 contemplate [*sic*] evaluation of both current adverse trends but also future declines".[281] It argues that the phrase "all relevant economic factors" in Article 3.4 is "a phrase that itself can include both present and future trends"[282], and "[t]o avoid any ambiguity, the text goes on to specify that these economic factors include the 'actual and potential decline' in a number of specifically enumerated factors".[283] In particular, China relies on the findings of the panel in *EC – Fasteners (China)* to the effect that:

a. "potential" means "possible as opp{osed} to actual; capable of coming into being or action; latent"; and

b. "a decline need not have occurred during the period under consideration in order for an investigation authority to find injury".[284]

7.159. We recall that in *EC – Fasteners (China)* the facts showed not "potential" decline but rather relative decline.[285] The panel's exploration of the meaning of "potential" was, in this light, not essential to its findings; for that reason, we do not consider that the discussion is necessarily relevant to or persuasive for our consideration of this issue. More to the point in the context of this

[275] Panel Report, *EC – Fasteners (China)*, para. 7.403.
[276] A fact that the United States readily acknowledges.
[277] Redetermination, (Exhibit CHN-1 (translated version)), p. 68.
[278] Redetermination, (Exhibit CHN-1 (translated version)), p. 70.
[279] China's first written submission, para. 344.
[280] United States' second written submission, para. 172.
[281] China's first written submission, para. 345.
[282] China's first written submission, para. 345.
[283] China's first written submission, para. 345.
[284] China's first written submission, para. 346 (quoting Panel Report, *EC – Fasteners (China)*, para. 7.402).
[285] Panel Report, *EC – Fasteners (China)*, paras. 7.399-7.404. In that case, China alleged that since the 4.4% profit margin achieved during the investigation period was close to the 5% level the European Commission considered appropriate, and profitability doubled between 2003 and the investigation period, there was no basis to conclude that dumped imports had a negative effect on profitability. The panel observed that "[t]he use of the word 'potential' in the context of the Article 3.4 non exhaustive list of relevant economic factors indicates to us that a decline need not have occurred during the period under consideration in order for an investigating authority to find injury". The panel concluded that the European Commission's evaluation that the increase in profitability was disproportionately low when compared to the increase in demand, was objective.

case is that MOFCOM's redetermination does not, in fact, appear to address "potential decline" in the sense that term is use in Articles 3.4 and 15.4.

7.160. Articles 3.4 and 15.4 are concerned with the impact of imports during a recent past period on the present state of the domestic industry, and not the impact of future imports on the future state of the industry. The latter is specifically addressed in Articles 3.7 and 15.7, which establish additional criteria for consideration in the context of determining "threat of material injury". A "potential decline" in the sense of Articles 3.4 and 15.4 could not, in our view, be found to support the view that material injury is "possible" as a result of future imports, or that future imports could cause injury in the future. Rather, "potential decline" as a relevant factor in the examination of the impact of subject imports on the present state of the domestic industry would have to be a consequence of the dumped or subsidized imports during the period examined. "Potential decline" exists where, despite the absence of an actual decline (in either absolute or relative terms) during the period examined, imports during the period examined have an impact on the domestic industry such that there is a latent or potential decline with respect to a particular factor which has not yet become manifest.

7.161. As part of its examination of the impact of subject imports, MOFCOM apparently considered the prospective impact of future imports on the state of the industry as a relevant factor. This is not an appropriate consideration in the context of an examination of the impact of dumped and subsidized imports on the domestic industry as part of a determination of present material injury caused by those imports. In our view, MOFCOM's understanding of the relevance of future imports in the context of evaluation of a "potential decline" was not consistent with a proper reading of Articles 3.4 and 15.4. In itself, this might suggest that the "potential decline" portions of MOFCOM's analysis are irrelevant, and nothing in the Agreements prohibits an investigating authority from examining or evaluating irrelevant factors if this does not otherwise have an impact on the investigating authority's overall examination and ultimate determination. In this case, however, China itself argues that MOFCOM relied on this irrelevant factor. In this context, we cannot conclude that MOFCOM's examination of the impact of subject imports was consistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, as we cannot know what MOFCOM's conclusion would have been had it not relied on this irrelevant factor.

7.162. In the light of the foregoing, we find that:

a. the requirement to consider "potential decline" under Articles 3.4 and 15.4 relates to the impact of current imports on the domestic industry such that even absent actual declines, the potential for such declines to materialise may be relevant to the examination of the present impact of subject imports; and

b. MOFCOM's overall examination and evaluation of all relevant economic factors was affected by its examination of and reliance on an irrelevant factor – the impact of likely future imports – such that its examination of the impact of subject imports on the domestic industry is not consistent with Articles 3.4 and 15.4.

7.4.4 Conclusion

7.163. We find that China acted inconsistently with the requirements of Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement because:

a. MOFCOM's evaluation of "capacity utilization rates" was faulty; and

b. MOFCOM relied on an irrelevant economic factor when it examined the impact of likely future imports on "potential decline" in the domestic industry.

7.164. As a consequence, we find that China acted inconsistently with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

7.165. We further find that the United States has not established 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 of MOFCOM's:

a. evaluation of inventories; or

b. "focus" on the last part of the POI.

7.5 Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement: causation

7.5.1 Introduction

7.166. In our original report we found MOFCOM's price undercutting and price suppression analysis inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[286] In the light of the relationship between the considerations set out in Article 3.2 of the Anti-Dumping Agreement and Article 15.2[287] of the SCM Agreement and the demonstration of causation required by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement[288], we were not in a position to determine whether MOFCOM properly demonstrated the existence of a causal link between the subject imports and injury to the domestic industry. We observed that because China's implementation of the Panel's findings in the original report concerning MOFCOM's consideration of price effects would necessarily require that it reconsider its findings of causation[289] we did not consider it necessary for the resolution of the dispute to make additional findings under Articles 3.5 and 15.5.

7.167. In this implementation proceeding, we have again found that MOFCOM's price effects analysis was not consistent with Articles 3.2 and 15.2. We have further found that MOFCOM's examination of the state of the industry was not consistent with Articles 3.4 and 15.4. Solely based on these two findings, we cannot conclude that MOFCOM properly demonstrated the existence of a causal link between the subject imports and any injury to the domestic industry.

7.168. Having said that, we recognize that the Panel might well help the parties "secure a positive resolution of the current dispute" if it were to "to make findings with respect to the claims of the United States that are within the terms of reference for this compliance proceeding".[290] Therefore, in order to enable the parties to secure a positive resolution of the dispute, whether through implementation of DSB recommendations and rulings in this dispute or otherwise, we will consider the parties' arguments and make findings on the US claims under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

7.5.2 Main arguments of the parties

7.5.2.1 United States

7.169. The US claims of violation of Articles 3.5 and 15.5 rest on four arguments.

7.170. First, MOFCOM's demonstration of causation relied on its consideration of price effects, but MOFCOM's consideration of price underselling and price suppression are WTO-inconsistent, and there is also no evidence of price depression.

7.171. Second, MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry:

a. the domestic industry gained market share at the same time as subject imports gained market share[291]; and

b. MOFCOM did not examine or explain why such evidence did not undermine its finding of causation, rather MOFCOM insisted that Chinese law allowed it to consider either the

[286] We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.
[287] We will refer to these as Articles 3.2 and 15.2.
[288] We will refer to these as Articles 3.5 and 15.5.
[289] Panel Report, *China – Broiler Products*, para. 7.584.
[290] Japan's third-party statement, para. 5.
[291] United States' first written submission, para. 195.

absolute volume increase or relative volume increase, but did not oblige it to consider both.[292]

7.172. Third, MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance had improved as subject import volume and market share increased:

a. almost all indicators (market share, capacity, output, sales quantity, sales revenue, employment, decrease in loss) show an improvement in the domestic industry's performance between 2006 and 2008, the period during which subject import volume increased by 47%.[293] Many performance indicators also show an improvement if the 2006 figures are compared to those for the first half of 2009[294];

b. MOFCOM predicated its demonstration of causation entirely on developments in the first half of 2009, whereas it was required to examine the causal relationship in relation to the entire POI, not just for a selected period[295]; and

c. the domestic industry's lagging performance in the first half of 2009 could not have been the result of subject imports when the bulk of the increase in subject import volume – 90% of the total increase – coincided with strengthening domestic industry performance during the 2006-2008 period.[296]

7.173. Fourth, MOFCOM ignored evidence that the substantial proportion of subject imports consisting of chicken feet could not have been injurious because domestic producers were incapable of producing more chicken feet without increasing production of other chicken products to uneconomic levels. Over 40% of subject imports consisted of chicken feet, which Chinese producers were incapable of supplying in adequate quantities.[297]

7.5.2.2 China

7.174. MOFCOM did a proper causation analysis. It was only required to demonstrate that subject imports contributed in some meaningful way to the injury.[298] MOFCOM based its determination of the existence of a causal link on a number of key factors, such as the increase in subject import volume and market share, consistent underselling, price suppression, and the domestic industry's inability to use available capacity.[299] In particular:

a. MOFCOM did not ignore evidence about the domestic industry's market share.[300] Rather, MOFCOM:

   i. acknowledged and discussed the increase in market share of domestic firms; and

   ii. focused on the increase in absolute volume, the drop in market share in the first half of 2009, and low prices/price suppression, which are sufficient to establish a causal link regardless of market share trends.

b. MOFCOM did not rely on a flawed analysis of price effects[301], and its conclusions on import volume and price suppression stand and sufficiently support MOFCOM's causation analysis regardless of the Panel's findings on price undercutting.

c. MOFCOM did not fail to reconcile its analysis of subject import volume and market share with its analysis of causation and the condition of the domestic industry[302]:

[292] United States' first written submission, paras. 197-198.
[293] United States' first written submission, paras. 203-204.
[294] United States' first written submission, para. 205.
[295] United States' first written submission, para. 207.
[296] United States' first written submission, paras. 208-209.
[297] United States' first written submission, paras. 215-216.
[298] China's first written submission, para. 370.
[299] China's first written submission, para. 380.
[300] China's first written submission, paras. 383-387.
[301] China's first written submission, paras. 388-394.
[302] China's first written submission, paras. 395-402.

i. the United States wrongly focuses on the period 2006-2008. MOFCOM drew a causal link between the increase of subject imports and the declining conditions particularly in the first half of 2009; and

ii. the United States selectively relies on volume indicators and downplays in particular the sharply weaker financial performance, which MOFCOM relied upon. The US argument that the operating loss narrowed between 2006 and 2008 ignores the growth of the operating loss in absolute terms (on which MOFCOM relied), the cumulative effect of continuing losses, and the increase in operative losses when taken as a percentage of sales.

7.5.3 Evaluation

7.5.3.1 The law

7.175. Article 3.5 of the Anti-Dumping Agreement provides:

> 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.[303]

7.176. Articles 3.5 and 15.5 thus requires that an investigating authority, on the basis of an objective examination of positive evidence[304]:

a. demonstrate that subject imports are causing injury to the domestic industry; and

b. ensure that injury caused by other known factors is not attributed to the subject imports.

In making its determination, the investigating authority must demonstrate a relationship of cause and effect, such that subject imports are shown to have contributed to the injury to the domestic industry. Subject imports need not be "the" cause of the injury suffered by the domestic industry, provided they are "a" cause of such injury; that other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship.[305]

7.177. With respect to non-attribution, Articles 3.5 and 15.5 require an investigating authority to:

a. examine other known factors that are causing injury to the domestic industry at the same time as subject imports; and

b. not attribute to subject imports injury caused by such other factors.

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[303] Article 15.5 is substantively the same.

[304] Panel Report, *China – Cellulose Pulp*, para. 7.26:

> While the investigating authority must find a sufficiently clear contribution by dumped imports to demonstrate that they are causing material injury, and explain its determination in that regard, nothing in the first two sentences of Article 3.5 suggests that those imports must be the sole cause of that injury. The language of Article 3.5 as a whole seems clear – the "causal relationship" between dumped imports and material injury may exist even though other factors are also contributing, "at the same time", to the situation of the domestic industry.

[305] Panel Report, *Russia – Commercial Vehicles*, para. 7.178 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 67) (adoption/appeal pending).

Articles 3.5 and 15.5 also set out an illustrative list. For these obligations to be triggered, however, Articles 3.5 and 15.5 require that the factor at issue be[306]:

a. "known" to the investigating authority;

b. a factor "other than dumped imports"; and

c. injuring the domestic industry at the same time as the dumped imports.

The investigating authority must make an assessment of such other factors that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped [or subsidized] imports".[307] Neither Agreement, however, sets out specific guidance on how an investigating authority should undertake this assessment or ensure that injuries caused by other factors are not attributed to the subject imports.

7.5.3.2 MOFCOM's redetermination

7.178. At issue before us is whether MOFCOM fulfilled the requirements of Articles 3.1, 3.5, 15.1, and 15.5 in demonstrating causation, and examining and ensuring non-attribution of injury. Because MOFCOM did not change its consideration of price effects, it relied on the same consideration in determining causation and non-attribution in the redetermination as in the Final Anti-Dumping and Countervailing Duties Determinations in the original dispute. In this section we summarize MOFCOM's findings in the redetermination to provide factual context for our evaluation of the US claims.

7.5.3.2.1 Causation

7.179. MOFCOM found that throughout the POI, both the volume and the market share of subject imports "increased continuously"[308] against a background of a "significant effect on the selling prices of the like product of the domestic industry" of those imports.[309] At the same time, MOFCOM found that the domestic industry:

> [C]ould 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 [*sic*]. In addition, the operational net cash flow fluctuated significantly which also affected investment and financing activities of the domestic industry.[310]

7.180. MOFCOM noted that even as "the demand of the domestic market increased continuously" in the course of the POI, the domestic industry's capacity utilization rate declined, most sharply between the first half of 2008 (79.96%) and the first half of 2009 (66%).[311] It found a causal link

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[306] Panel Report, *Russia – Commercial Vehicles*, para. 7.179 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *China – GOES*, para. 151; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283; and *EC – Tube or Pipe Fittings*, para. 175) (adoption/appeal pending).

[307] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *EC –Tube or Pipe Fittings*, para. 188.

[308] Redetermination, (Exhibit CHN-1 (translated version)), p. 70.

[309] Redetermination, (Exhibit CHN-1 (translated version)), p. 70:

> During the investigation period, the developing trend of the import price of the product concerned and the selling price of the like product of the domestic industry were completely consistent, as they both increased from 2006 to 2008 and began to decrease in the first half of 2009. The selling prices of the like product of the domestic industry and the import prices of the product concerned were closely related.
>
> [The price] of the product concerned was consistently lower than the selling price of the like product of the domestic industry, and at the mean time [*sic*], under the effect and support of the U.S government's subsidies, in 2006, 2007, 2008 and the first half of 2009, was lower than the average selling price of the like product of the domestic market … [.]

We note, however, our findings in respect of MOFCOM's price effects analysis.

[310] Redetermination, (Exhibit CHN-1 (translated version)), p. 71.

[311] Redetermination, (Exhibit CHN-1 (translated version)), p. 71. In particular:

> The production quantity and the sales volumes of the like product of the domestic industry and the import volume of the product concerned changed in the opposite direction, the market share of the like product of the domestic industry and the market share of the product concerned changed in the opposite direction, the prices of the like production of the domestic industry and the prices of the production concerned changed in the same direction, which resulted in the sharp drop of the prices of the like product and more significant losses.

between the "large quantity" of dumped and subsidized imports originating in the United States and material injury to the domestic broiler product industry.[312]

7.181. US interested parties[313] had argued that "the absolute quantity of the product concerned did not increase greatly, and the increased quantity just complemented the lost market share of other foreign producers in [*sic*] Chinese market".[314] MOFCOM observed that China's anti-dumping law does not require an examination of both absolute and relative trends. As well, while the domestic like product gained market share in the first part of the POI, MOFCOM found that:

> [B]ecause the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product; and the domestic like product, while to stabilize the market share, was forced to be sold at a price lower than the production cost [*sic*].[315]

7.182. US interested parties had also argued that during the POI, "several economic indicators (production quantity, sales volume and sales revenue) presented a virtuously [*sic*] increasing trend".[316] MOFCOM found that because:

> [T]he domestic industry implemented some newly constructed projects and expansion projects, it was normal that the production capacity, production quantity, sales volume and market share of the like product presented an increase to certain extent [*sic*] in general, but this did not mean that the domestic industry did not suffer from injury. These indicators were not decisive for determining the injury of the domestic industry in its development period, and could not change the fact that the effective use of the production capacity and the inventory of the domestic industry increased continuously during the investigation period; neither could it change the worsening financial situations of the domestic industry.[317]

7.5.3.2.2 Non-attribution

7.183. MOFCOM found that during the POI, the dumped imports increased even as "the quantity of imports from other countries and regions dropped in general"[318], while "apparent consumption of the broiler products in China increased".[319] Accordingly, MOFCOM concluded, "the material injury currently suffered by the domestic industry was not caused by the change of demand or change of consumption modes of the like product of the domestic industry".[320] MOFCOM examined the technological competitiveness of the industry and noted that, "the industry has developed into a highly industrialized industry among domestic animal husbandry industries, with relatively complete industrial system and relatively smooth-running production chain".[321] For this reason, "[t]here was no negative impact on the domestic industry caused by backward production process and technology and mismanagement".[322] There were, MOFCOM observed, "no policies of limiting trade activities of the like product of the domestic industry".[323] Exports of domestic products "were not significant enough to influence the trend and conclusions of the relevant indicators of the like product of the domestic industry".[324] There was no *force majeure* and the financial crisis had no substantive impact on the domestic market.[325]

7.184. US interested parties had argued that an increase in grain prices would affect the profitability of the broiler industry. MOFCOM noted the increased costs, but pointed out that:

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[312] Redetermination, (Exhibit CHN-1 (translated version)), p. 72.
[313] The US Poultry and Egg Export Council and the US Government, in different submissions.
[314] Redetermination, (Exhibit CHN-1 (translated version)), p. 72.
[315] Redetermination, (Exhibit CHN-1 (translated version)), p. 73.
[316] Redetermination, (Exhibit CHN-1 (translated version)), p. 77.
[317] Redetermination, (Exhibit CHN-1 (translated version)), p. 78.
[318] Redetermination, (Exhibit CHN-1 (translated version)), p. 81.
[319] Redetermination, (Exhibit CHN-1 (translated version)), p. 81.
[320] Redetermination, (Exhibit CHN-1 (translated version)), p. 81.
[321] Redetermination, (Exhibit CHN-1 (translated version)), p. 81.
[322] Redetermination, (Exhibit CHN-1 (translated version)), p. 82.
[323] Redetermination, (Exhibit CHN-1 (translated version)), p. 82.
[324] Redetermination, (Exhibit CHN-1 (translated version)), p. 82.
[325] Redetermination, (Exhibit CHN-1 (translated version)), p. 83.

> [B]ecause the import price of the product concerned was always lower than the average selling price of the like product of the domestic industry, it undercut the price of the like product significantly, resulted in the suppression on the selling price of the domestic like product, and could not pass through the cost caused by price increase of raw materials downward, and the due price increase of the like product which should have occurred hadn't been realized.[326]

7.185. US interested parties had further contended that "the change of pork price was the main reason that the price of chicken decreased during the investigation period".[327] MOFCOM concluded that the evidence did not show a link between chicken and pork prices, observing that "the chicken price was not affected directly by the pork price, and was mainly decided by the supply and demand in the chicken market".[328] MOFCOM stressed that:

> [T]he demand of the domestic market increased continuously during the investigation period, but the good market environment didn't bring the due profit margin to the domestic industry. On the contrary, the impact of the low-priced import of the product concerned in a large quantity on the domestic industry was significant.[329]

7.5.3.3 Analysis

7.186. We recall our findings that MOFCOM's consideration of price effects was not consistent with Articles 3.2 and 15.2. The United States argues that on that basis alone, MOFCOM's causation and non-attribution analyses and determination are not consistent with Articles 3.1, 3.5, 15.1, and 15.5. Price effects were one among a number of factors MOFCOM took into account in its causation determination; as we observed in the original report, because its price effects consideration was inconsistent with the relevant provisions, we cannot conclude that MOFCOM properly demonstrated the existence of a causal link between the subject imports and any injury to the domestic industry. The United States raises three other arguments in this proceeding; we address these below.

7.5.3.3.1 Subject import volumes did not increase at the expense of the domestic industry

7.187. The United States argues that "MOFCOM ignored evidence that subject import volume did not increase at the expense of the domestic industry"[330] because it did not consider evidence that:

a. the domestic industry gained market share at the same time as subject imports;

b. "the domestic industry *gained more market share* between 2006 and the first half of 2009, 4.38 percentage points, than the 3.92 percentage points gained by subject imports over the same period"[331];

c. "any increases in U.S. imports simply filled the gap left by Brazil and Argentina when they effectively exited the China [*sic*] market"[332]; and

d. "40 percent of subject imports consisted of chicken paws that could not have injured the domestic industry, which was incapable of increasing its production of chicken paws".[333]

7.188. In response to the arguments of US interested parties, MOFCOM found:

> As to the above claims, the investigating authority considered that, from 2006 to 2008, although the domestic market had a continuously high demand in broiler products, the domestic like product also obtained some market shares. However, that

[326] Redetermination, (Exhibit CHN-1 (translated version)), p. 85.
[327] Redetermination, (Exhibit CHN-1 (translated version)), p. 86.
[328] Redetermination, (Exhibit CHN-1 (translated version)), p. 87.
[329] Redetermination, (Exhibit CHN-1 (translated version)), p. 88.
[330] United States' second written submission, para. 175.
[331] United States' first written submission, para. 196. (emphasis original)
[332] United States' first written submission, fn 248.
[333] United States' second written submission, para. 178.

> did not imply that the domestic industry did not suffer from injury. On the contrary, because the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product; and the domestic like product, while to stabilize the market share, was forced to be sold at a price lower than the production cost. [*sic*]
>
> ...
>
> When the market demand increased continuously, affected by the further increase of import volume of the product concerned and the continuous decline of price of the product concerned, the production quantity, sales volume, capacity utilization rate and market share of the like product of the domestic market all presented a trend of decrease or reduction of different degrees.[334]

7.189. Articles 3.5 and 15.5 require an examination of "all relevant evidence" to establish a "causal relationship" between subject imports and material injury to the domestic industry. Neither Article provides specific guidance as to how individual pieces of evidence − such as the volume of subject imports − should be taken into consideration in demonstrating causation.[335] At a minimum, however, where an interested party makes an argument before the investigating authority as to the impact of a given volume of imports or change in the volume of imports relative to domestic production or other imports, an objective and unbiased investigating authority may not simply ignore the argument on the basis that it has considered the absolute volume of subject imports. There is no disagreement between the parties that such evidence was, indeed, put before MOFCOM; the United States argues that MOFCOM "ignored evidence that subject import volume did not increase at the expense of the domestic industry".

7.190. We have examined MOFCOM's findings in the light of the US argument. We note that MOFCOM started its analysis by referring directly to the argument of the US interested parties:

> The U.S. Poultry and Egg Export Council claimed in Comments after the Preliminary Determination that, from 2006 to 2008, the increase of the absolute import volume of the product concerned was to complement sales on the domestic market in China, and the sale volume of the domestic producers in China also increased in the corresponding period, so the import volume of the product concerned had a small effect on the domestic industry. In the first half of 2009, the increase of the import volume of the product concerned was caused by "the seasonal characteristics".[336]

Immediately following this paragraph, MOFCOM found that "because the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product".[337] And later, MOFCOM noted: "When the market demand increased continuously, affected by the further increase of import volume of the product concerned and the continuous decline of price of the product concerned ...".[338] Given that MOFCOM expressly acknowledged the argument and responded to it, we cannot find that MOFCOM "ignored" the evidence before it, as the United States argues. Accordingly, we find that the United States has not established that China acted inconsistently with Articles 3.5 and 15.5 on the ground that MOFCOM ignored evidence of import volumes in relation to market share.

[334] Redetermination, (Exhibit CHN-1 (translated version)), p. 73.

[335] See, more generally, Panel Report, *China − Cellulose Pulp*: "Article 3 does not provide any specific guidance on how an investigating authority should undertake the examination of the relevant evidence in determining whether dumped imports are causing material injury." Cf. Appellate Body Report, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.141 (citing Appellate Body Report, *EC − Bed Linen (Article 21.5 − India)*, paras. 113 and 118).

[336] Redetermination, (Exhibit CHN-1 (translated version)), pp. 72-73.

[337] Emphasis added.

[338] Emphasis added.

7.5.3.3.2 MOFCOM failed to reconcile its analysis with evidence of improved performance

7.191. This argument of the United States has four supporting parts; we address each in turn.

7.192. First, the United States argues that MOFCOM "failed to address" evidence that "the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance".[339] We note, however, that the period in which the United States identifies certain "improvements" is not the entirety of the POI. MOFCOM did look at various trends in the POI, noted absolute and relative movements up and down, and drew certain conclusions. It did not "address" the data in the way the United States has done, but the United States has simply reorganized data that MOFCOM did address, and appears to be arguing that MOFCOM's analysis is deficient because it did not address the data organized in the same way. This does not, however, suffice to demonstrate that what MOFCOM did was insufficient or inconsistent with its obligations – merely that a different way of addressing the evidence might lead to a different outcome does not demonstrate error where, as here, there is no necessary reason why the different way should be preferred.

7.193. Second, the United States notes "the lack of any positive evidence linking the *increase* in subject import volume during the 2006-2008 period to any significant *decline* in the domestic industry's performance".[340] MOFCOM, however, is not required to find an actual decline in the performance of the domestic industry in order to find injury caused by dumped and subsidized imports.[341]

7.194. Third, the United States argues that performance indicators show an improvement if 2006 figures are compared to those for the first half of 2009. Again, we see no basis on which to conclude that MOFCOM was required to rely on such a comparison in its analysis.[342] Indeed, in some instances, such a comparison, without due consideration of intervening trends in the data considered, might well be misleading. The fact that certain performance indicators show improvement when data from 2006 are compared to data from 2009 says nothing about developments in the intervening period during which it is uncontested that the Chinese market expanded – for instance, whether any improvement tracked or lagged market expansion would seem to be a relevant consideration.

7.195. Fourth, the United States argues that MOFCOM predicated its causal link determination entirely on developments in the first half of 2009. However, it is clear that MOFCOM examined year-on-year trends in the first three years of the POI, and period-on-period movements for the last six months. More to the point, we see no basis to conclude that MOFCOM was precluded from focusing on the last part of the POI, for at least three reasons:

a. Performance indicators were moving in different directions throughout the first three years of the POI; most indicators, however, trended downward in the first half of 2009. MOFCOM was entitled to look at the information before it and assess the cumulative impact of years of dumped imports on the domestic industry during the most recent period.

b. Information regarding the most recent period is generally most relevant for an analysis of present material injury.

c. An investigating authority is entitled to consider the possibility of a time-lag between dumped and subsidized imports and injury to the domestic industry through their effects.

7.196. In the light of the foregoing, we find that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the

[339] United States' first written submission, para. 203. (emphasis original)
[340] United States' first written submission, para. 204. (emphasis original)
[341] Panel Report, *EC – Fasteners (China)*, paras. 7.402-7.403.
[342] Panel Report, *Russia – Commercial Vehicles*, para. 7.41 and fn 138 (referring to Appellate Body Reports, *US – Steel Safeguards*, paras. 354-355; and *Mexico – Anti-Dumping Measures on Rice*, para. 166; and Panel Report, *Ukraine – Passenger Cars*, para. 7.269) (adoption/appeal pending).

SCM Agreement because MOFCOM "failed to reconcile its analysis with evidence of improved performance" in the domestic industry.

7.5.3.3.3 Constraints on domestic production of chicken feet

7.197. The United States argues that domestic producers were incapable of producing more chicken feet without increasing production of other chicken product models to uneconomic levels. The United States does not question the fact, as found by MOFCOM, that the Chinese market was expanding, or that dumped and subsidized imports from the United States were increasing. China responds in two ways. First, it asserts that the domestic industry could "meet some of that demand with the excess capacity. In particular, since the domestic industry consistently had excess capacity of about 20 percent, the domestic industry could have provided 20 percent more chicken paws."[343] China does not, however, identify where in the redetermination MOFCOM made this finding. Second:

> MOFCOM was correct when it found that subject imports of chicken paws were adversely affecting the entire domestic industry producing the like product. The impact was felt on both domestic production of chicken paws, but also domestic production of other chicken parts.[344]

7.198. We recall our findings, under Article 12.2 of the Anti-Dumping Agreement and Article 22.2 of the SCM Agreement, in the original report in respect of the same US argument: "MOFCOM acknowledged the argument in its Preliminary Determinations and indicated that it considered that all chicken parts competed and were substitutable with one another".[345] We concluded that:

> 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.

7.199. In the redetermination, MOFCOM noted that "[t]he Investigating Authority has analyzed and made determination [*sic*] in the preliminary determination of the original investigation".[346] Indeed, in the preliminary determination, MOFCOM had found that:

> The Investigating Authority holds that as there are some differences between the Subject Products and the like products in terms of specific feature, usage and quality, they may have their respective types or specifications, and the relationship between them does not necessarily constitute a one-to-one correspondence. However, such differences do not prevent the Investigating Authority from deeming products of different types or specifications as the same category of product for the purpose of investigation. In 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 analyzed and examined injuries brought to the domestic industry by the Subject Products [*sic*].[347]

7.200. We find that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement on the ground that MOFCOM failed to adequately consider alleged market constraints on greater domestic production of chicken feet.

7.5.4 Conclusion

7.201. We have found that MOFCOM's consideration of price effects was inconsistent with Articles 3.2 and 15.2. MOFCOM took into account price effects as one element of its determination of causation. We further find that China acted inconsistently with Articles 3.5 and 15.5 by relying,

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[343] China's second written submission, para. 351.(fn omitted)
[344] China's second written submission, para. 354.
[345] Panel Report, *China – Broiler Products*, para. 7.605.
[346] Redetermination, (Exhibit CHN-1 (translated version)), p. 80.
[347] MOFCOM, Preliminary Determination in Anti-dumping Investigation on Imported White-feather Broiler Products from the U.S., (Exhibit USA-22 (translated version)), p. 31.

in MOFCOM's demonstration of a causal link between the subject imports and injury to the domestic industry, on a defective consideration of price effects.

7.202. As a consequence, we find China to have acted inconsistently with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

7.203. We find, however, that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement because MOFCOM:

a. did not consider the volume of dumped imports in both relative and absolute terms;

b. "failed to reconcile its analysis with evidence of improved performance" in the domestic industry; and

c. failed to adequately consider alleged market constraints on greater domestic production of chicken feet.

7.6 Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement: notice and ample opportunity to present written evidence

7.6.1 Introduction

7.204. In our original report, we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[348] During the reinvestigation, MOFCOM sought and collected new pricing data from four selected domestic Chinese producers and used these data for the purposes of its consideration of price effects in the redetermination.

7.205. This claim concerns MOFCOM's procedural obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement[349] in respect of the interested parties from the United States in the context of the request for pricing information from the Chinese producers.

7.6.2 Main arguments of the parties

7.6.2.1 United States

7.206. China acted inconsistently with Articles 6.1 and 12.1 because MOFCOM did not give notice to the investigated US producers and the US Government (US interested parties) of the information it required, the pricing data, from the Chinese producers during the reinvestigation.[350]

7.207. The notice requirements in Articles 6.1 and 12.1 are not limited to the interested party to which a request for information is directed.[351] In this instance, the provisions entitle "all interested parties", including the US interested parties, to notice of the information required from the Chinese producers (as well as ample opportunity to present written evidence).

7.208. The notice requirements relate to making all interested parties aware of the specific information that the investigating authority requires, including the specific questions and requests issued.[352] Also, the notice has to come in advance, such that interested parties are afforded the opportunity to defend their interests. These requirements were not met in this case.

7.209. China argues that read together, three documents in the reinvestigation record constitute the "notice" required by Articles 6.1 and 12.1: the Notice of Initiation, the General Verification Letter, and non-confidential summaries provided by the Chinese producers. Yet MOFCOM did not

[348] We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.
[349] We will refer to these as Articles 6.1 and 12.1.
[350] United States' first written submission, paras. 40 and 42.
[351] United States' first written submission, para. 40; response to Panel question No. 1, para. 6.
[352] United States' response to Panel question No. 1, paras. 1 and 3.

identify the information it required of Chinese producers in any of these documents.[353] They lacked the requisite content, in particular because they did not set out MOFCOM's questions or requests or in any other way identify the relevant information. Nor did they give notice to the US interested parties, in particular to the extent that they were merely made available in MOFCOM's trade remedy public information room without informing the US interested parties.[354]

7.210. Without notice of the information required from Chinese producers, the US interested parties were also necessarily denied ample opportunity to present written evidence pursuant to the second requirement in Articles 6.1 and 12.1.[355] None of the documents cited by China afforded such an opportunity.[356] Without knowledge of the required information, there could be no basis for ample opportunity to present relevant evidence.[357] Interested parties cannot address through relevant evidence what they do not know.[358]

7.6.2.2 China

7.211. Articles 6.1 and 12.1 do not apply to the US interested parties in respect of information required of Chinese producers. Rather, these provisions "should be read more directly in relation to those interested parties that are the target of information requests".[359] The obligations to give notice and to provide ample opportunity therefore only concern those interested parties that are the target of an information request.[360] This position is consistent with the arguments of the European Union.[361] Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement would protect other interested parties, such as the US interested parties.

7.212. Even if applicable to interested parties not subject to an information request, the requirement to give "notice" has a flexible meaning and can be met by different means depending on the situation of the interested party.[362] Articles 6.1 and Article 12.1 require:

a. giving advance and "active notification" in respect of the party from whom information is required[363]; and

b. access to the required information, in respect of all other interested parties, for example by placing the information provided in response to the information request in a public reading room.[364]

7.213. MOFCOM complied with its obligations under Articles 6.1 and 12.1 as they apply in respect of US interested parties who were not the target of an information request. MOFCOM was not required to provide to US interested parties the precise questions MOFCOM put to the Chinese producers.[365] MOFCOM provided appropriate notice in respect of newly solicited information and its nature and scope, by way of[366]:

[353] United States' second written submission, paras. 10-34.
[354] United States' response to Panel question No. 1, para. 4.
[355] United States' first written submission, para. 43; second written submission, paras. 8 and 10.
[356] United States' second written submission, paras. 15-18, 24, 32, and 33.
[357] United States' second written submission, para. 15.
[358] United States' second written submission, para. 17.
[359] China's response to Panel question No. 4, para. 11.
[360] China's responses to Panel question No. 1(b), paras. 4-5, No. 2, para. 7, and No. 4, para. 11.
[361] China's responses to Panel question No. 1(b), para. 5, No. 2, para. 7, and No. 4, para. 11. The European Union is a third party in this dispute.
[362] China's responses to Panel question No. 1(a), para. 2, and No. 4, para. 10.
[363] China's second written submission, paras. 31-32; response to Panel question Nos. 1(a) and (b), paras. 3-4.
[364] China's second written submission, paras. 32 and 34.
[365] China's second written submission, para. 35; see also comments on United States' response on Panel question No. 1, para. 1.
[366] We understand China to rely on the following three procedural steps, but not on the subsequent injury disclosure, as relevant elements through which MOFCOM allegedly gave notice. (China's first written submission, para. 53 ("procedural steps … before issuing the Disclosure of Injury Essential Facts dated on 21 May 2014") and para. 60; second written submission, para. 28).

a. the Notice of Initiation No. 88 (Notice of Initiation) of 25 December 2013.[367] The Notice of Initiation indicated that evidence would be re-examined. It referred to the scope of the Panel's finding in its original report, instead of providing interested parties with a listing of the specific information to be requested from the Chinese producers;

b. the General Verification Letter of 19 February 2014 addressed to Chinese producers and released in MOFCOM's trade remedy public information room, announcing on-the-spot "verifications"[368]; and

c. the non-confidential summaries of the sales data provided by the four Chinese producers made available on 20 May 2014 in MOFCOM's trade remedy public information room.[369]

7.214. A violation of the notice requirement does not necessarily result in a violation of the obligation to give ample opportunity to present written evidence.[370] In this instance, MOFCOM complied with its obligation to provide US interested parties ample opportunity to present written evidence because:

a. it gave adequate notice to the US interested parties; and

b. throughout the reinvestigation, US interested parties were free to present evidence, and in fact they did so.[371]

7.6.3 Main arguments of the third parties

7.215. The European Union argues that to avoid overburdening investigating authorities, Articles 6.1 and 12.1 should be interpreted narrowly. In particular the notice requirement should only concern information requests to those parties that are supposed to hold the relevant information but not to all other interested parties in an investigation.[372] Likewise, the "ample opportunity" should not relate to opportunities to present written evidence on information provided by other interested parties.[373]

7.6.4 Evaluation

7.6.4.1 The law

7.216. Article 6.1 of the Anti-Dumping Agreement provides:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

The text of Article 12.1 of the SCM Agreement is essentially identical, with references to "interested members" in addition to "all interested parties" and "countervailing duty" rather than "anti-dumping" investigation.

[367] MOFCOM, Announcement No. 88 on Casefiling for WTO Rulings on China's Measures of Imposing Countervailing and Antidumping Duties on White feather Broiler Chicken (25 December 2013) (Announcement No. 88), (Exhibit USA-1(translated version)); China's first written submission, para. 54; and second written submission, para. 36.

[368] Letter from MOFCOM dated 19 February 2014 on Notification on on-spot Verifications (General Verification Letter), (Exhibit CHN-2 (translated version)); China's first written submission, para. 56; and second written submission, para. 37.

[369] Referred to by China as the "public versions of verification exhibits and supplemental information". (China's first written submission, para. 58; second written submission, para. 41; and Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

[370] China's response to Panel question No. 2(a), para. 8.

[371] China's second written submission, paras. 52-53.

[372] European Union's third-party submission, paras. 18-20; third-party statement, para. 4.

[373] European Union's third-party statement, para. 6.

7.217. Each provision thus establishes two obligations on the investigating authority concerning the conduct of the investigation:

a. to give notice to all interested parties of information required by the investigating authorities; and

b. to provide to all interested parties ample opportunity to present relevant evidence in writing.

7.218. Articles 6.1 and 12.1 enshrine fundamental due process rights.[374] In each provision, the two obligations are distinct yet closely related, conferring rights on the same parties.[375] The obligations in each provision are inextricably linked, given that they are set out not only in the same paragraph but also in one single sentence. They must be read together; each obligation imparts meaning to the other. In particular, the second obligation clarifies a key purpose of giving notice of the information required to all interested parties: in order to present evidence that is "relevant in respect of the investigation in question", they need to know what the "investigation" is about – that is, what kind of information the investigating authority requires; and implicit in "presenting" written evidence is preparing such evidence, which requires foreknowledge of the contours of the investigation and time to do so.

7.219. Broken down to its constituent parts, the notice requirement has the following elements:

a. "all interested parties";

b. "shall be given notice"; and

c. "of the information which the authorities require".

Below, we consider the meaning of each of these phrases in context and in the light of the express purpose of the requirement embedded in the provisions themselves.

7.6.4.1.1 All interested parties

7.220. "Interested parties", as defined in Article 6.11 of the Anti-Dumping Agreement and Article 12.9 of the SCM Agreement, include exporters or foreign producers.[376] The term "interested parties" as used in Articles 6.1 and 12.1 is modified by the word "all". Unless otherwise defined or indicated, "all" means everyone. Nothing in Articles 6.1 and 12.1 suggests a different meaning of "all" in these provisions or otherwise suggests that "all" should be understood as anything other than all for purposes of both the notice requirement and the ample opportunity to present written evidence.

7.221. The context of the provisions supports the view that "all" means all. Where the drafters intended to make a distinction between various interested parties in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement, they did so expressly. For instance, the time-period for replies provided for in Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement is specifically for exporters or foreign producers receiving questionnaires.[377] Had it been the intent of the drafters to limit the scope of the notice requirement or the ample opportunity to present written evidence to the recipients of information requests, the drafters could have done so. This is not the case, in contrast to the immediately following provision of Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement.[378]

[374] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[375] "All interested parties" and, in case of Article 12.1 of the SCM Agreement, also "interested Members".
[376] Members may add to the list of who is considered an interested party set out in Article 6.11 of the Anti-Dumping Agreement and Article 12.9 of the SCM Agreement.
[377] See also Article 6.1.3 of the Anti-Dumping Agreement and Article 12.1.3 of the SCM Agreement in respect of providing the full text of the written application to the known exporters and to the authorities of the exporting Member, and upon request, to other interested parties.
[378] We also note the absence of any qualifier in respect of from whom the information is required. A requirement to give notice to all interested parties of "the information which the authorities require *of them*" would clearly establish a narrower scope for the notice requirement, as argued by China.

7.222. Nothing in the object and purpose of the Anti-Dumping Agreement or the SCM Agreement detracts from this conclusion.[379] The provisions at issue here protect the right of interested parties to present written evidence relevant to the investigation. To give effect to this right, all interested parties have an interest in being given notice of the information that an investigating authority requires − not only of them but also of other interested parties − so that they may meaningfully participate and fully defend their interests in an investigation. Notice of information required is, in this sense, fundamental to having an "ample" opportunity to prepare and present written evidence relevant to the investigation. To limit the scope of "all interested parties" to a subgroup of interested parties, those of whom information is required, would thus impermissibly render Articles 6.1 and 12.1 ineffective.

7.223. In the light of the above, the meaning of "all" interested parties is properly understood literally. Where an investigating authority requires information from a particular interested party, that interested party is one of the "all interested parties" to whom notice must be given, and so too are all other interested parties, from whom the information is not required.[380]

7.6.4.1.2 Shall be given notice

7.224. An obligation to give notice is a requirement to make aware, to transmit information − possibly in a summary fashion − of a state of affairs. In principle, the word "notice" denotes providing information in advance of a given event.[381] Nothing in Articles 6.1 and 12.1 establishes any guidance regarding the content, form or timing of notice. But turning to the context we discern some guidance in this regard.

7.225. The immediate context of the notice obligation is, of course, the second obligation in Articles 6.1 and 12.1. As we have observed, a key purpose of the notice obligation is to ensure that all interested parties have ample opportunity to present relevant written evidence; implicit in this is that to "present" evidence that is "relevant", interested parties require time to prepare such evidence and enough information to be aware of what the investigation is about. The event in advance of which notice is to be given is, in the light of the context of the provisions, the "opportunities" referred to in the second half of the provision. This, in turn, means that the notice has to come sufficiently "in advance" of the point at which interested parties are to present written evidence in the investigation such that they have the time to do so in a meaningful fashion.[382]

7.226. The context of the obligation to give "ample opportunity" in Articles 6.1 and 12.1 and the broader context of Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement as a whole provide additional guidance for the understanding of the obligation to "give notice":

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[379] Appellate Body Report, *EU − Biodiesel* (*Argentina*), para. 6.25:

> Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.

This view would seem to apply equally to Part V of the SCM Agreement, which establishes substantive and procedural rules on the investigation underlying and imposition of countervailing measures to counteract injurious dumping.

[380] In respect of the party from whom information is required, the notice of the information required is given through the information request itself, see Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement, and thus no separate notice is needed, again supporting the conclusion that the recipients of the notice must also be parties other than those from whom information is required. Regarding those other interested parties, the notice of the information required does not necessarily have to be given through the information request itself, see para. 7.233 below.

[381] For instance, it is also in this sense that the term "notice" has been used when describing the purpose of panel requests in the context of DSU Article 6.2, see e.g. Appellate Body Reports, *EC and certain member States − Large Civil Aircraft*, paras. 640, 646, and 792; and *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 118.

[382] China refers to the terms "notified" and "public notice" in Article 12 of the Anti-Dumping Agreement and the requirement for "sufficient advance notice" in paragraph 5 of Annex I of the Anti-Dumping Agreement. (China's response to Panel question No. 1(a), para. 3; comments on United States' response to Panel question No. 1, para. 4). China argues that in the absence of such language in Articles 6.1 and 12.1, "notice" has flexible meanings and in particular does not have to come in advance. In our view, however, the provisions China cites to do not detract from the temporal aspect of "notice" in Articles 6.1 and 12.1, as evidenced by the requirement to give "ample opportunity".

a. Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement require that written evidence provided by one interested party "shall be made available promptly" to other participating interested parties;

b. Article 6.2 of the Anti-Dumping Agreement establishes an obligation to "provide opportunities" for all interested parties to meet with parties with adverse interests;

c. Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement require that investigating authorities "provide timely opportunities" for all interested parties to see relevant non-confidential information used; and

d. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require the investigating authority to "inform" all interested parties of essential facts.

7.227. Although expressed in different ways, these provisions contemplate two modes of engagement between the investigating authority and interested parties in respect of the information in an investigation: the use of the verb "inform" denotes some form of "active" engagement on the part of the investigating authority, whereas the other formulations suggest a more "passive" obligation to provide opportunities or to make available. The obligation to "give notice" at issue here falls, in our view, closer to the requirement to "inform" on this spectrum of obligation, requiring a positive action on the part of the investigating authority.

7.228. We draw the following conclusions in respect of the obligation to give notice of the information required.

7.229. First, Articles 6.1 and 12.1 require an investigating authority to actively provide something (in this instance "notice of the information which the authorities require") to all interested parties. This obligation entails reaching out and making all interested parties aware of the information in question. Thus, it cannot be satisfied by merely providing access to something that conveys the required notice.

7.230. Second, Articles 6.1 and 12.1 do not set out a specific time-frame for the giving of notice, but they do link the notice requirement with the obligation to give "ample opportunity" to present relevant written evidence. The timing of "notice" must, therefore, be understood in that specific context: sufficiently "in advance" that an interested parties will be able to prepare and present written evidence within the deadlines set by the investigating authority for submission of written evidence on, *inter alia*, the matters as to which information was sought.[383]

7.231. Third, Articles 6.1 and 12.1 do not set out specific requirements for the form of the notice or the modalities by which notice is to be given. Form and modalities remain within the discretion of the investigating authority. There might be any number of ways for an investigating authority to give notice. In this regard, we are conscious of the concerns raised in respect of the administrative burden associated with giving notice of the information required to all interested parties. However, our interpretation does not require that an investigating authority give that notice immediately, or in individual communications to all other interested parties in each instance. An investigating authority may choose a manner of giving the required notice that imposes less of an administrative burden.

7.6.4.1.3 Of the information which the authorities require

7.232. The required content of the notice follows from the requirement that notice is to be given "of the information which the authorities require", read in the light of the second half of the provision. The particular information that an investigating authority requires from interested parties thus will determine what the notice must convey, and will vary with the circumstances. At a minimum, a notice must convey an understanding of what information is required in order to enable all interested parties to prepare and submit relevant written evidence regarding the matters as to which information is sought.

[383] In respect of the party from whom information is required, the notice of the information required is given through the information request itself. The notice to all other interested parties from whom information is not required might be given later, possibly even as late as after the information is received, if this is sufficiently early to allow other interested parties enough time to submit written evidence.

7.233. The obligation is to give notice of the information required; it is not an obligation to disclose the information request itself. Thus, an outline or description of the information required may well suffice to give the requisite notice. If an investigating authority issues a questionnaire to a particular interested party, sending or making available (to the extent this is made known to all other interested parties) this questionnaire to all other interested parties would certainly be one way of giving notice of the information the investigating authority requires. It is not, however, what the provisions necessarily require: nothing in Articles 6.1 and 12.1 specifically requires an investigating authority to provide to all other interested parties the actual questions or requests issued to a particular interested party, although this might be effective and good practice in this context.

7.234. Articles 6.1 and 12.1 require notice of the information required by the investigating authority to enable interested parties to prepare and submit relevant written evidence. For this reason, a notice that informs other interested parties of the information actually submitted by the responding interested party(ies) does not, without more, constitute notice within the meaning of these provisions.

7.6.4.2 The facts

7.235. During the reinvestigation, MOFCOM sought and obtained new pricing data from four Chinese producers through on-the-spot visits (referred to by China and MOFCOM as "verification" visits).[384] These took place in early May 2014.[385]

7.236. MOFCOM did not provide US interested parties with the questions posed to the Chinese producers, nor communicate in any other form directly with US interested parties in respect of the data requested from the Chinese producers.

7.237. MOFCOM placed each of the three documents that China refers to as collectively constituting the alleged "notice" in its trade remedy public information room for any interested party to consult. Other than through the Notice of Initiation, MOFCOM did not, at any point, actively inform the US interested parties that the documents would be or had been made available in the trade remedy public information room.[386]

7.6.4.3 Analysis

7.6.4.3.1 Notice requirement

7.238. China and the United States agree that "the scope of the notice requirement under the articles is not limited to the precise interested party from whom the information is requested".[387] We agree. The US interested parties were therefore entitled to notice of the information MOFCOM required from the Chinese producers.

7.239. China argues that MOFCOM did not act inconsistently with Articles 6.1 and 12.1 because "notice" has "flexible meanings" and can be "effected by different means depending on the situation of the interested party".[388] In respect of the interested party receiving the information request, advance and active notice must be given.[389] For all other interested parties, those not recipients of the information request, "the disclosure obligation under Articles 6.1 and 12.1 would be satisfied as long as those parties are provided with access to the required information".[390] On the facts of this case, China contends that MOFCOM discharged its obligation under Articles 6.1 and 12.1 to give notice in three documents taken together: the Notice of Initiation, the General

[384] China's second written submission, para. 39: "MOFCOM decided to use the verification as the tool to obtain further details on the chicken part-specific prices".
[385] China's second written submission, para. 51; see also Redetermination, (Exhibit CHN-1 (translated version)), p. 14.
[386] China's second written submission, paras. 34 and 38; response to the Panel's question No. 11, paras. 19-21.
[387] China's comments on United States' response to Panel question No. 1, para. 2 (quoting United States' response to Panel question No. 1 para. 6).
[388] China's responses to Panel question No. 1(a), para. 2, and No. 4, para. 10.
[389] China's second written submission, paras. 31-32; response to Panel question Nos. 1 (a) and (b), paras. 3-4.
[390] China's second written submission, para. 32.

Verification Letter, and the non-confidential summaries of the sales data provided by the Chinese producers.

7.240. The issue before us therefore is whether the documents invoked by China constitute, when viewed collectively[391], notice to the US interested parties of the information MOFCOM required from the Chinese producers, pursuant to Articles 6.1 and 12.1.

7.6.4.3.1.1 Notice of Initiation

7.241. The Notice of Initiation states:

> On September 25, 2013, WTO dispute settlement body passed the panel report on the dispute case of "China's antidumping and countervailing measures against whitefeather broiler chicken products originated in the U.S.".
>
> ... [T]he Ministry of Commerce decides to reinvestigate this case in accordance with the rulings and suggestions in above relevant reports of WTO upon the date of issuance.
>
> The Ministry of Commerce will re-examine the evidence and information obtained in the original anti-dumping and countervailing investigations, and carry out reinvestigations through questionnaires, hearings, and other measures.[392]

7.242. We make three observations concerning this document.

7.243. First, China asserts that the reference in the Notice of Initiation to the "panel report" provided sufficient notice of the information required by MOFCOM in its consideration of price effects under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.[393] However, our findings in the original report were not limited to price effects. Even if there had been a specific reference in the Notice of Initiation to our findings in the original report under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, it is not clear that that would have amounted to notice of the information required by MOFCOM in this reinvestigation. Indeed, our findings regarding price effects concerned the comparability of AUVs, whereas MOFCOM's information request to Chinese producers was with respect to a different issue.

7.244. Second, China relies on the reference to "questionnaires, hearings, and other measures" to be carried out during the reinvestigation. This is, however, solely a reference to the means by which MOFCOM might gather information, and says nothing about the information that might or would be required. Articles 6.1 and 12.1 do not set out a notice requirement in respect of <u>how</u> information required is obtained, but in respect of <u>what</u> information is, in fact, required. In this instance, stating that information may be sought through questionnaires, hearings or other means, gives no indication of "the information" that MOFCOM requires. It is possible that conveying, or even making available (if that is made known to the interested parties), the relevant questionnaire to all interested parties would suffice to give notice regarding "the information" that an investigating authority requires. By contrast, merely indicating that there may be "questionnaires" in the document giving notice of the initiation of a proceeding conveys no understanding at all in respect of "the information" that is or may be required in those questionnaires.

7.245. Third, China confirmed that "the earliest moment when US interested parties could learn of the fact that MOFCOM required information from Chinese producers and gain an understanding of what information was required" was through reading the General Verification Letter, dated 19 February 2014.[394] In itself, this undermines China's reliance on the Notice of Initiation as one of the documents constituting notice for the purposes of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

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[391] We understand that China is not arguing that each document could, on its own, be characterized as "notice" consistent with Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

[392] Announcement No. 88, (Exhibit USA-1(translated version)), p. 1; China's first written submission, para. 54.

[393] China's second written submission, para. 36.

[394] China's response to Panel question Nos. 5(e) (i) and (ii), paras. 16-17.

7.246. In the light of the above, we question whether the Notice of Initiation could have contributed to giving the required notice through the three documents at issue, considered in their totality.[395]

7.6.4.3.1.2 General Verification Letter

7.247. China also relies on the General Verification Letter in support of its position that MOFCOM fulfilled the notice requirement. China asserts that this letter was placed in MOFCOM's trade remedy public information room on 19 February 2014. The letter was addressed to the Chinese producers subject to the on-the-spot verification and data collection.[396] It states in part:

> You are requested to prepare for the verification beforehand and fully cooperate with the Investigating Team during the verification. Please prepare all the materials and produce relevant evidence in view of the Panel Report.[397]

7.248. The United States contends that the General Verification Letter constitutes neither in form nor in substance a notice pursuant to Articles 6.1 and 12.1.[398]

7.249. The letter refers to a "verification" and requests the Chinese producers to "prepare all the materials and produce relevant evidence". It does not mention that additional data may or will be required; perforce, it does not identify what information might or would be required. Reference to a "verification", "all the materials" and "relevant evidence" does not provide any understanding of "the information" that MOFCOM required; mentioning certain sources of information ("materials", "evidence") does not suffice to provide notice of the information required. As we have observed, the reference to the "Panel Report", without more, does not provide additional clarification.[399] Substantively, the contribution of the letter to MOFCOM's fulfilment of the "notice" requirement is questionable at best.

7.250. MOFCOM placed the letter in its trade remedy public information room but did not actively inform US interested parties of the letter, nor of the fact that it was available in MOFCOM's trade remedy public information room.[400] The Notice of Initiation did refer interested parties to the trade remedy public information room. Thus, interested parties that routinely "monitored the public reading room"[401] presumably would have become aware of the letter soon after it was placed in that room.[402] The Notice of Initiation states in this regard:

> Any interested parties may refer to the public evidence and information via Trade Remedy Public Information Room of the Ministry of Commerce. The Ministry of Commerce will guarantee the legal rights of interested parties though such procedures as disclosing information and providing chances for statement of opinions and comments.[403]

Thus, as we understand it, China argues that:

a. the Notice of Initiation referred interested parties to the public information room for access to public evidence and information;

b. MOFCOM placed the General Verification Letter in the public information room;

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[395] China's initial argument was that the Notice of Initiation (25 December 2013) was part of a series of three documents that taken together amounted to a notice of the information required within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.
[396] General Verification Letter, (Exhibit CHN-2 (translated version)), p. 1; China's first written submission, para. 56.
[397] General Verification Letter, (Exhibit CHN-2 (translated version)), p. 1; China's first written submission, para. 56.
[398] United States' second written submission, paras. 20-23.
[399] China's second written submission, para. 38.
[400] China's second written submission, para. 38.
[401] China's response to Panel question No. 11, para. 20.
[402] China's response to Panel question No. 11, paras. 19-21.
[403] Announcement No. 88, (Exhibit USA-1 (translated version)), p. 1.

c. an online index[404] was immediately updated to list the non-confidential summaries as available in the public information room; and

d. the General Verification Letter conveyed more precision about the information required of the Chinese producers.

7.251. China argues that "Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement do not mandate the specific means that investigating authorities must follow to provide notice".[405] We agree. Nothing in Article 6.1 or 12.1 specifies the form of a notice or how it is to be given. An investigating authority may give notice to all interested parties either individually in each instance that information is required or through more generalized means; properly worded and transmitted, a notice of initiation or verification letters might, singly or together, constitute "notice" within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

7.252. In this case, however, the Notice of Initiation simply refers all interested parties to the public information room but does not indicate what would be made available and when.[406] A general reference in the Notice of Initiation to a designated location where public information can be consulted, in connection with subsequently making available at that location a document that purports to convey an understanding of the information required, does not suffice to give notice within the meaning of Articles 6.1 and 12.1. MOFCOM did not inform interested parties of the placing of the document allegedly conveying the notice of the information required in the public reading room. Rather, interested parties were expected "to avail themselves of the public reading room to review themselves the public record" and thus to identify on their own the fact that a notice of the information required of Chinese producers had been given.[407] However, under Articles 6.1 and 12.1 it is for MOFCOM to "give" the interested parties notice – an obligation to give notice cannot be satisfied by expecting the interested parties to monitor the investigating authority to ensure they remain informed when the interested parties are not informed that that is the mechanism by which such notice will be given to them. China's position reduces the notice requirement to an obligation to make a general statement that interested parties may consult information in the public information room. The notice requirement would be stripped of its link to the information required; it would no longer be "of the information which authorities require". Such "notice" would fall short of the due process function of Articles 6.1 and 12.1. A panel may not adopt an interpretation that would render a treaty provision, or part of it, ineffective, and we do not do so in this instance.

7.253. The fact that information was only requested for what China alleges to be a "limited purpose" does not absolve MOFCOM of the obligation to comply with Articles 6.1 and 12.1.[408] The obligation under the notice requirement to inform all interested parties of the information required is not subject to any limitations with respect to the purpose or use for which information is required.

7.254. In view of the above, for at least two reasons we are not convinced that the General Verification Letter contributed to MOFCOM giving notice to the US interested parties through the three documents at issue considered together:

a. the letter did not convey any understanding of the additional (pricing) information MOFCOM required from the Chinese producers and thus did not relate to the information required; and

b. by merely placing the letter in MOFCOM's trade remedy public information room in connection with a reference to that room in the Notice of Initiation, MOFCOM failed to give notice.

[404] According to China, the online index functions as an overview of the content accessible in the trade remedy public information room. The online index is accessible through MOFCOM's main web page. China does not, however, suggest that the online index provides for any mechanism that (proactively) alerts interested parties that and when a document is made available. (China's response to Panel question No. 13, paras. 23-24).

[405] China's comments on United States' response to Panel question No. 1, para. 2.

[406] Also, the Notice of Initiation does not refer to the online index.

[407] China's comments on United States' response to Panel question No. 3, para. 8

[408] See, however, China's second written submission, para. 39.

7.6.4.3.1.3 Non-confidential summaries

7.255. China refers to the non-confidential summaries of the data provided by the Chinese producers as the last of the three documents through which MOFCOM allegedly satisfied the notice requirement at issue.[409] Chinese producers prepared these non-confidential summaries of information they provided to MOFCOM, and MOFCOM placed them its trade remedy public information room on 20 May 2014.[410]

7.256. Even if the non-confidential summaries conveyed the information required, MOFCOM failed to give US interested parties notice in respect of these documents. MOFCOM placed the non-confidential summaries in its trade remedy public information room. As with the General Verification Letter, this does not fulfil China's obligation in respect of the notice requirement. China neither alleges, nor provides evidence to suggest, that MOFCOM informed US interested parties specifically that the non-confidential summaries would be or were available in the trade remedy public information room. Merely making information available in this room without, in any way, calling the attention of the interested parties to this information is, however, not sufficient for purposes of Articles 6.1 and 12.1.

7.257. We are therefore not persuaded that the non-confidential summaries contributed to ensuring MOFCOM's compliance with the obligation to give notice.

7.6.4.3.1.4 Conclusion

7.258. China argues that the three documents at issue collectively satisfy the obligation to give "notice" pursuant to Articles 6.1 and 12.1. While each document may have some connection to China's obligation to give notice of the information required, none, in our view, makes enough of a contribution such that, taken together, they suffice to demonstrate that MOFCOM gave notice to US interested parties of the information required consistently with the requirements of Articles 6.1 and 12.1.

7.259. Neither the Notice of Initiation, nor the General Verification Letter conveyed any understanding in respect of "the information" that MOFCOM required. In respect of the General Verification Letter and the non-confidential summaries, MOFCOM also failed to convey to interested parties the fact that these documents were available for consultation in its trade remedy public information room. This failure was not remedied through the Notice of Initiation, which merely informed interested parties that evidence and information would be available in that room, but in no way informed them that notices required by Articles 6.1 and 12.1 would also be made available in the reading room. Therefore, all three documents, even considered together, do not add up to a complete whole whereby MOFCOM could have given the US interested parties notice of the information required from the Chinese producers.

7.260. Consequently, we find that China acted inconsistently with the notice requirement in Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement by failing to give notice to US interested parties of the information it required of Chinese producers during the reinvestigation.

[409] Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

[410] In the context of Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement, the United States disputes that these summaries were made available in MOFCOM's trade remedy public information room. China has, however, provided an internal registration document that states that "Post-Verification Supplemental Information Concerning the Re-Investigation on the Anti-dumping and countervailing Measures Imposed on the Broiler Products (public version)" of the four Chinese producers in question was received by the trade remedy public information room on 20 May 2014. (Reading Room for Public Information on Trade Remedy, Acknowledgement of Receipt of Documents (20 May 2014), (Exhibit CHN-44)). See below, paras. 7.298-7.299.

7.6.4.3.2 Obligation to provide ample opportunity to present written evidence

7.261. The United States argues that as a consequence of MOFCOM's failure to provide notice of the required information, MOFCOM also failed to provide the US interested parties with ample opportunity to present written evidence.

7.262. We have found that MOFCOM failed to give notice to the US interested parties and that China thereby acted inconsistently with the notice requirement in Articles 6.1 and 12.1. In this context, it is not necessary for us to make additional findings as to whether, as a consequence of the violation of the notice requirement, MOFCOM also failed to give interested parties ample opportunity to present in writing all evidence which they consider relevant.[411]

7.6.5 Conclusion

7.263. The United States has established that MOFCOM did not give notice to the US interested parties of the information it required from Chinese producers during the reinvestigation. We therefore find that China acted inconsistently with the notice requirement in Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. As a consequence, it is not necessary for us to make additional findings in respect of the obligation to provide ample opportunities to present written evidence under the same provisions.

7.7 Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement: timely opportunities to see information and to prepare presentations on the basis of this information

7.7.1 Introduction

7.264. In our original report, we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. During the reinvestigation, MOFCOM sought and collected new pricing data from four selected Chinese domestic producers and used these data in its consideration of price effects in the redetermination.

7.265. This claim concerns whether MOFCOM acted in accordance with its obligations under Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement to provide US interested parties timely opportunities to see information and to prepare presentations on the basis of this information, specifically with reference to information with respect to price effects.[412]

7.7.2 Main arguments of the parties

7.7.2.1 United States

7.266. MOFCOM failed to provide US interested parties timely opportunities to see information in respect of:

a. non-confidential summaries of pricing data provided by four Chinese producers during the reinvestigation at the request of MOFCOM[413];

[411] We also do not need to resolve, as a general matter, whether a violation of the obligation to give notice of the information required necessarily results in a violation of the obligation to give ample opportunity to present written evidence.

[412] We will refer to these as Articles 6.4 and 12.3.

[413] United States' first written submission, para. 53; response to Panel question No. 6(a), paras. 17-18. At paragraph 59 of its opening statement, the United States indicates that "MOFCOM was required to disclose not only the public summaries, but also the full data". At paragraph 56 of its second written submission, the United States argues that the release of non-confidential summaries did not fulfil the obligation of Articles 6.4 and 12.3. In its response to Panel question No. 6(b)(i), para. 21, the United States clarifies that it is not asserting that US interested parties were entitled to see Chinese producers' confidential data. We therefore understand the US claim to be limited to non-confidential information, including the non-confidential summaries.

b. the precise identities of these Chinese producers[414];

c. MOFCOM's questions or requests issued to these Chinese producers[415];

d. the "context"[416] of these data, including "the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample"[417];

e. aggregate data reflecting the information received from the Chinese producers[418]; and

f. MOFCOM's "basis for selecting [the four Chinese] producers for the sample and its methodology for collecting pricing data from them".[419]

7.267. MOFCOM did not make available non-confidential summaries of the pricing data provided by the Chinese producers in MOFCOM's trade remedy public information room on 20 May 2014, as China alleges.[420] Even if this were the case, MOFCOM did not give notice to the US interested parties, as required by Articles 6.4 and 12.3.[421] Moreover, in the light of the injury disclosure on 21 May 2014 and the deadline for comments one week later, the opportunity was not "timely" for purposes of these provisions.[422]

7.268. MOFCOM's failure to provide timely opportunities to see the information at issue "necessarily" resulted in a breach of the obligation to provide timely opportunities to prepare presentations on the basis of that information.[423] Also, a hearing that China refers to "in no way provided interested parties with an opportunity to prepare presentations" and "itself breached AD Agreement Article 6.4 and SCM Agreement Article 12.3".[424]

7.7.2.2 China

7.269. MOFCOM acted consistently with Articles 6.4 and 12.3. These provisions do not require active disclosure of information.[425] They contain an obligation of a passive nature that MOFCOM satisfied by releasing the information at issue in its trade remedy public information room. Moreover, the United States did not demonstrate that MOFCOM had denied a request by the US interested parties to see the information.[426]

7.270. Regarding the pricing data and identities of the Chinese producers, MOFCOM provided timely opportunities for all interested parties to see this information through non-confidential summaries submitted by Chinese producers of the information provided by them during the verifications. These non-confidential summaries were received by MOFCOM and made available to US interested parties in its trade remedy public information room on 20 May 2014.[427] They

[414] United States' first written submission, para. 53.
[415] United States' first written submission, para. 53; responses to Panel question No. 6(b)(i), para. 21, and No. 7, paras. 28-29.
[416] United States' second written submission, para. 57.
[417] United States' response to Panel question No. 6(b)(i), para. 23.
[418] United States' responses to Panel question No. 6(b)(i), paras. 21 and 23, and No. 6(b)(ii), para. 25.
[419] United States' first written submission, para. 150.
[420] United States' response to Panel question No. 6(a), paras. 17-18; comments on China's response to Panel question No. 11, para. 24.
[421] United States' second written submission, paras. 55 and 59; responses to Panel question No. 6(a), para. 19, No. 6(b)(i), paras. 22 and 23, and No. 10, paras. 36-37.
[422] United States' second written submission, paras. 54-55; responses to Panel question No. 6(b)(i), para. 23, and No. 9, paras. 34-35.
[423] United States' first written submission, para. 62; second written submission, paras. 60 and 62.
[424] United States' second written submission, paras. 61-62.
[425] China's second written submission, para. 86.
[426] China's second written submission, para. 87.
[427] China's first written submission, para. 90.

contained indexed information on unit prices, sales quantity and value.[428] They also disclosed in full the precise identities of the Chinese producers.[429]

7.271. In respect of the alleged questions or requests posed by MOFCOM, MOFCOM did not issue any questionnaires to the Chinese producers in order to collect additional information. MOFCOM was also not under an obligation under Articles 6.4 and 12.3 to give opportunities to see its oral questions or requests.[430] The questions or requests posed by MOFCOM were not "information" that was "used" by MOFCOM within the meaning of Articles 6.4 and 12.3.[431]

7.272. MOFCOM also afforded US interested parties the opportunity to prepare presentations because it complied with its obligation to give US interested parties opportunities to see all information.[432] Also, Pilgrim's Pride met with MOFCOM in a disclosure meeting[433] and all US interested parties in fact presented their cases in a hearing with MOFCOM.[434]

7.7.3 Main arguments of the third parties

7.273. The European Union argues that "relevant information" pursuant to Articles 6.4 and 12.3 includes information requests addressed to other interested parties.[435] "Timely opportunities" within the meaning of these provisions must enable interested parties to provide their comments on content, reliability and probative value of the information (and possible counter-evidence). To this end, the information must be made available early enough in the process that the comments can still be taken into account in the decision-making of the investigating authorities.[436] Making the information available in an electronic or physical reading room satisfies the obligation to provide opportunities to see the information. There is no requirement to give notice to the interested parties that the information is made available.[437]

7.7.4 Evaluation

7.7.4.1 The law

7.274. Article 6.4 of the Anti-Dumping Agreement provides:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

The text of Article 12.3 of the SCM Agreement is essentially identical, with references to "all interested Members and interested parties" instead of "all interested parties", "paragraph 4" instead of "paragraph 5" and "countervailing duty" rather than "anti-dumping" investigation.

7.275. Each provision thus requires the investigating authorities to:

a. whenever practicable, provide timely opportunities for all interested parties;

b. to see all information that is:

   i. relevant to the presentation of their cases,

[428] China's first written submission, paras. 90 and 92.
[429] China's second written submission, para. 89.
[430] China's second written submission, para. 85; comments on United States' responses to Panel question No. 6(b)(ii), para. 16, No. 7, para. 17, and No. 8, para. 18.
[431] China's comments on United States' response to Panel question No. 8, para. 18.
[432] China's first written submission, para. 94.
[433] China's second written submission, para. 90.
[434] China's first written submission, para. 95; second written submission, para. 91.
[435] European Union's third-party statement, para. 5.
[436] European Union's third-party submission, para. 14.
[437] European Union's third-party statement, para. 5.

ii. not confidential as defined in paragraph 5, and

iii. used by the authorities in the investigation; and

c. to prepare presentations on the basis of this information.

We address each of these criteria below.

7.7.4.1.1 Whenever practicable provide timely opportunities to see

7.276. "Timely opportunities" to see information must be provided "whenever practicable" throughout the investigation: they must be timely enough for the interested party to be able to prepare presentations on the basis of the information seen.[438] Whether "timely opportunities" have been provided to see information must be considered in the light of the circumstances of each case, including the specific information at issue, the step of the investigation to which such information relates, and the practicability of disclosure at certain points in time in the investigation vis-à-vis others.[439]

7.277. The obligation is to "provide … opportunities" to see all information. The verb "provide" refers to opportunities, not to the information itself. The obligation is to give opportunities to see the information, not to convey the information itself. At paragraphs 7.226 and 7.227 above, we observed that the modes of engagement between the investigating authority and interested parties in respect of information contemplated in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement ranged along a spectrum from some form of active engagement on the part of the investigating authority to "passive" obligations. The obligation to "provide … opportunities" falls closer to the passive end of the spectrum. Thus, the obligation to "provide … opportunities" to see information requires an investigating authority to make available or to provide access to the information at issue. It is not an "active" disclosure obligation in the sense that it requires an investigating authority to reach out to the interested parties, in particular by giving notice to, or otherwise informing the interested parties.

7.278. Nothing in Articles 6.4 and 12.3 sets out conditions for the manner in which an investigating authority must "provide … opportunities". An investigating authority may proceed in any number of ways, including by making available the information in a physical or electronic reading room.

7.7.4.1.2 All information

7.279. Articles 6.4 and 12.3 refer to "all information". The provisions thus apply to a broad range of information qualified only by three cumulative conditions: the information must be "relevant to the presentation of [the interested parties'] cases", "not confidential" and "used by the authorities".[440] The information may take various forms, including facts or raw data submitted by the interested parties and information that has been processed, organized or summarized by the investigating authority.[441] An investigating authority's reasoning, internal deliberations, analysis or methodologies in respect of the information, however, do not constitute "information" subject to the obligations under Articles 6.4 and 12.3.[442]

7.7.4.1.2.1 That is relevant to the presentation of their cases

7.280. Information is "relevant" for purposes of Articles 6.4 and 12.3 when the interested party considers that the information is relevant to the presentation of its case in the context of the investigation.[443]

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[438] Panel Report, *EU – Footwear (China)*, paras. 7.602 and 7.650 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.769).

[439] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.122.

[440] Appellate Body Report, *EC – Fasteners (China)*, paras. 480 and 495.

[441] Appellate Body Report, *EC – Fasteners (China)*, paras. 480 and 495.

[442] Appellate Body Report, *EC – Fasteners (China)*, para. 495; Panel Report, *EU – Footwear (China)*, para. 7.603.

[443] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 145; *EC – Fasteners (China)*, para. 479; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.111.

7.7.4.1.2.2 That is not confidential as defined in paragraph 5

7.281. Articles 6.4 and 12.3 only relate to information "that is not confidential as defined in paragraph 5 [paragraph 4 of the SCM Agreement]". Thus, information that has been accorded confidential treatment in accordance with Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement is excluded from the scope of these provisions. If information has been treated as confidential in a manner that does not conform to the requirements of Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement, there is no legal basis for according it confidential treatment and such information would, for the purposes of Article 6.4 of the Anti-Dumping Agreement, be considered as information "that is not confidential as defined in paragraph 5".[444]

7.7.4.1.2.3 That is used by the authorities

7.282. The "information" covered by Articles 6.4 and 12.3 is information that is relevant, non-confidential and used by the authorities. The term "used" is not further defined in the Anti-Dumping Agreement or the SCM Agreement, or indeed elsewhere in the WTO Agreement; it can have a broader or a narrower meaning. A narrow interpretation of the term "used" might restrict the information at issue to only those specific items of information that an investigating authority in fact relies upon in making its determinations. This interpretation has been rejected by panels and the Appellate Body.[445] A broader interpretation of the term might include all information that in one way or another comes before the investigating authority; there are other interpretations possible along this spectrum. For purposes of our task, it suffices to say that nothing in the term "used" in itself tells us where to draw the appropriate line.

7.283. In this light, we turn to the immediate context. The information, we recall, must be non-confidential and relevant "to the presentation of [the interested parties'] cases". The term "used" thus further limits the scope of information that is covered by the provisions. An overly narrow interpretation of the term "used" could so limit the scope of such information as to undermine the due process protection given by Articles 6.4 and 12.3, denying an interested party the opportunity to see non-confidential information that is relevant to the presentation of its case.

7.284. We now turn to the broader context. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement establish an obligation to disclose the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures. The "essential facts" for purposes of this provision are not all the facts before the investigating authority.[446] It would thus appear that where the negotiators envisaged a "narrow" scope of information, i.e. facts that, while they may be "used" are not necessarily "essential", they could and did formulate their intent in precise terms. While previous decisions suggest an unacknowledged premise that information for purposes of Articles 6.4 and 12.3 is in the nature of data, facts or other evidence bearing on the issues to be resolved by an investigating authority, it

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[444] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.101. The same conclusion applies in respect of Article 12.3 of the SCM Agreement.

[445] Whether the information was "used" by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to "a required step in the anti-dumping investigation". Thus, Article 6.4 concerns information relating to "issues which the investigating authority is required to consider under the [Anti-Dumping Agreement], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation."
(Appellate Body Report, *EC-Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147; and Panel Report, *EC – Salmon (Norway)*, para. 7.769) (fns omitted))

[446] Appellate Body Report, *China – GOES*, para. 240 ("Articles 6.9 and 12.8 do not require the disclosure of all the facts that are before an authority but, instead, those that are 'essential'; a word that carries a connotation of significant, important, or salient.") The Panel in *EC – Salmon (Norway)* observed that:

> [E]ssential facts under consideration which form the basis of the decision whether to apply definitive measures" are the body of facts essential to the determinations that must be made by the investigating authority before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the investigating authority, not only those that support the decision ultimately reached.

(Panel Report, *EC – Salmon (Norway)*, para. 7.807)

does not necessarily follow that the understanding of information "used" must be so limited.[447] The reference to information "used" in Articles 6.4 and 12.3, by contrast to Articles 6.9 and 12.8, thus suggests that information "used" may be broader than facts or data relevant to the issues that must be, or actually are, resolved in an investigation. Contextual guidance, though limited, therefore supports the view that a broader interpretation of the concept of information "used" is warranted.

7.285. The purpose of Articles 6.4 and 12.3, to which we must give effect in interpreting them, is clear: Interested parties must be able to prepare presentations on the basis of information which is before the investigating authority which they consider relevant, and which they are to be given opportunities to see under the first part of the provisions. Articles 6.4 and 12.3 are among the important procedural safeguards that ensure that interested parties can defend their interests. Our interpretation of the term "used" ought, we believe, give effect to this important purpose.

7.286. In the light of the above, we conclude that information "used" within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement can be broader than facts or data relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. Whether a particular item of information is one that is "used" by the authorities in a broader sense will depend on the facts and circumstances of each case.

7.7.4.1.3 Provide timely opportunities … to prepare presentations on the basis of this information

7.287. The two obligations in Articles 6.4 and 12.3 are distinct, yet related. In particular, the second obligation concerns providing opportunities to prepare presentations "on the basis of this information" − that is, the information that interested parties must be given timely opportunities to see. Where an investigating authority has not provided any opportunity to see relevant and non-confidential information that is used by it, it perforce cannot provide any opportunity to prepare presentations on the basis of this information. However, where an opportunity to see information is provided, it may be found to be insufficient if it is not provided in sufficient time to allow the interested parties seeing the information to prepare presentations based on it.

7.7.4.2 Analysis

7.288. The United States brings its claim under Articles 6.4 and 12.3 in respect of the opportunities to see different items of "information" and to prepare presentations on the basis of this information. We address each of these below.

7.7.4.2.1 Providing timely opportunities to see

7.7.4.2.1.1 Preliminary observations

7.289. China argues first that the US claim fails because the United States has not demonstrated that the US interested parties requested to see the information at issue and that MOFCOM denied such request. According to China, an investigating authority does not need to take any action at all in order to comply with Articles 6.4 and 12.3, unless an interested party requests to see the information at issue. It relies on the statement of the panel in *EC − Fasteners (China)* that:

[447] But see Panel Report, *EU − Footwear (China)*, para. 7.612. The Panel noted that "the mere fact that information 'relates' to a particular issue that is before the investigating authority does not establish that the information was 'used' by the authority in making its determination". It went on to observe that it failed:

> [T]o see how the "sending of the questionnaires" or "requests to complete questionnaire responses" could have constituted information per se that was "used" by Commission [*sic*] in the selection of the sample, which we understand to be the relevant determination. We do not see the relevance of the dates on which questionnaires were sent to the substantive issues involved in selecting the sample. Indeed, we see nothing in the evidence before us that would indicate that the Commission "used" the fact that the anti-dumping questionnaires were sent to the sampled EU producers on 10 October 2008 in any way in the sample determination.

(Panel Report, *EU − Footwear (China)*, para. 7.612)

> [A] violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential.[448]

7.290. Articles 6.4 and 12.3 contain "limited" procedural and due process rights[449]; they are limited by the requirements that providing opportunities be "practicable" and that the information be "relevant", "not confidential" and "used". China asks the Panel to further limit the rights of interested parties beyond the limitations already expressly set forth in the provisions by introducing a requirement for a "request".

7.291. We do not find any basis for requiring a "request" to see information before a claim of violation of Articles 6.4 and 12.3 can be made. Textually, the obligation is for investigating authorities to "provide" opportunities. This is in contrast to other obligations in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement that condition the obligation to "provide opportunities" or to "make available" on a "request":

a. Article 6.1.3 of the Anti-Dumping Agreement and Article 12.1.3 of the SCM Agreement require that the investigating authority "shall provide" the written application to the known exporters and the authorities of the exporting Member (without reference to any request), and "shall make it available, upon request, to other interested parties involved"[450]; and

b. Article 6.2 of the Anti-Dumping Agreement conditions the obligation to "provide opportunities" to meet with adverse interests with the phrase "on request".[451]

The fact that the "relevance" of the information must be assessed from the perspective of the interested party does not detract from our understanding that investigating authorities must provide opportunities irrespective of a request to see the information being made.[452] Interested parties that are not aware of the existence of certain information before the investigating authority obviously cannot make a request to see that information.[453] Such interested parties may well be most in need of the due process protection afforded by Articles 6.4 and 12.3. Yet, a requirement for a request would render void their right to have an opportunity to see information of which they are unaware.[454] Attributing such a meaning to a treaty provision would lead to an unreasonable result.

7.292. The failure to provide opportunities to see certain information is a violation by omission. There are evidentiary challenges associated with a claim based on an alleged omission. It may be difficult to prove the absence of an opportunity to see information. From an evidentiary perspective, it is therefore useful if a complainant can demonstrate, by reference to record evidence, that an interested party requested to see information that the investigating authority then failed to make available. But the absence of a request by an interested party in itself does not, as a matter of law or fact, mean that an investigating authority has satisfied its obligation to provide timely opportunities to see information under Articles 6.4 and 12.3. Viewed in context, the quotation from *EC – Fasteners (China)* relied on by China does not support its position to the contrary. The panel in that case had already observed that Article 6.4 did not require an investigating authority to "actively disclose" information, and was addressing China's argument that "the investigating authorities were under the obligation to provide" information even in the absence of a request.[455] The panel rejected the view that there was any obligation to actively

[448] Panel Report, *EC – Fasteners (China)*, para. 7.480; China's second written submission, para. 87; and comments on United States' response to Panel question No. 10, para. 21.

[449] Panel Reports, *EC – Fasteners (China)*, para. 7.479; *EU – Footwear (China)*, para. 7.601.

[450] Emphasis added.

[451] Similarly, Article 6.2 of the Anti-Dumping Agreement and Article 12.2 of the SCM Agreement provide a right to present information orally "[up] on justification".

[452] An investigating authority may well prefer to rely on an interested party's request to assure itself of the "relevance" of information.

[453] This is particularly problematic where, as in the case at hand, the investigating authority also failed to give interested parties notice of the information required pursuant to Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

[454] But see Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.78.

[455] Emphasis added.

disclose information under Article 6.4. In this context, the statement that a "violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information" in our view reflects that one way of demonstrating a violation of Article 6.4 would be to show that a request to see information was denied. This does not, however, mean that such a request (and denial) are necessary in order to demonstrate a violation of Articles 6.4 and 12.3.

7.293. In this case, the United States does not assert that a request by the US interested parties to see the information at issue was made and rejected. Rather, the United States points to a statement of the US Government to MOFCOM during the reinvestigation asserting a lack of procedural fairness to support its contention that interested parties were not provided timely opportunities to see information. Specifically, in respect of the information solicited from the Chinese producers, the US Government asserted to MOFCOM that US interested parties had no understanding of what evidence MOFCOM had obtained and relied upon during the reinvestigation.[456] This is in our view evidence supporting the US allegation that MOFCOM did not provide opportunities to see information.

7.7.4.2.1.2 Non-confidential pricing information

7.294. The United States claims that MOFCOM did not provide timely opportunities to see non-confidential pricing information submitted by the Chinese producers to MOFCOM. It refers in this regard to the fact that non-confidential summaries are not mentioned in the injury disclosure.[457] China contends that on 20 May 2014, MOFCOM made available in its trade remedy public information room non-confidential summaries which contained indexed pricing data from four Chinese producers.[458]

7.295. There is no disagreement between the parties that the pricing data contained in the non-confidential summaries constituted information that was relevant to the US interested parties' presentations of their cases, not confidential as defined in paragraph 5 of Article 6 of the Anti-Dumping Agreement (and paragraph 4 of Article 12 of the SCM Agreement) and used by MOFCOM. Thus, it is clear that the information at issue falls within the scope of Articles 6.4 and 12.3.

7.296. The disagreement between the parties relates to whether, as a matter of fact, the non-confidential summaries were made available in MOFCOM's trade remedy public information room and, if so, whether the opportunities to see that information were "timely". We address each issue in turn below.

7.297. First, regarding whether the non-confidential summaries were in fact made available in MOFCOM's trade remedy public information room, China contends that MOFCOM made them available there on 20 May 2014, relying on an internal "acknowledgement of receipt" from MOFCOM's trade remedy public information room, Exhibit CHN-44. This document, dated 20 May 2014, acknowledges "receipt of a total of four documents of Post-Verification Supplemental Information Concerning the Re-Investigation on the Anti-dumping and countervailing Measures Imposed on the Broiler Products (public version)" from the four Chinese producers in question.

7.298. The United States argues that Exhibit CHN-44 does not demonstrate that the non-confidential summaries were made available in the trade remedy public information room. The exhibit acknowledges "receipt" of the non-confidential summaries by the trade remedy public information room, but does not confirm that the documents were actually placed in the trade remedy public information room.[459] Moreover, while there is a signature on the receipt by the

[456] Statement of the US Government for MOFCOM's Injury Hearing, (Exhibit USA-10), pp. 1-2 of the English translation.

[457] United States' response to Panel question No. 6(a), paras. 17-18.

[458] Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

[459] United States' comments on China's response to Panel question No. 11, para. 24.

submitter, an investigating official, there is no signature by a MOFCOM official in the requisite signature line *acknowledging receipt*.[460]

7.299. While the United States notes that the receipt is not signed by an official of the trade remedy public information room, the United States does not assert that the receipt was not issued by MOFCOM's trade remedy public information room. It is not clear to us that an internal acknowledgement issued by the "Reading Room for Public Information on Trade Remedy" of MOFCOM's "Trade Remedy and Investigation Bureau" loses its probative value merely because it is not signed at the appropriate place by a responsible official. The United States further argues that there is a distinction between an acknowledgement of receipt of the non-confidential summaries and a confirmation that these summaries were made available. We agree. But this might well be a formal distinction without a material difference in this case. We note, for example, that:

a. the English translation version of the redetermination provided by China refers to all non-confidential information being "released to" MOFCOM's trade remedy public information room during the reinvestigation[461];

b. the same passages in the English translation of the redetermination submitted by the United States refer to non-confidential information being "delivered to" the trade remedy public information room[462]; and

c. both translations state that non-confidential information was "released" or "delivered" in accordance with domestic rules on non-confidential information, information access and disclosure, so that all interested parties were able to "search for [look up], read, extract and [photo-] copy" non-confidential information.[463]

In this context, in our view the references to "release", "delivery" or "receipt" refer to the making available of non-confidential information in MOFCOM's trade remedy public information room.[464] On balance, we therefore find that the acknowledgement issued by the trade remedy public information room, understood in the light of the redetermination, supports the conclusion that MOFCOM made the non-confidential summaries available in its trade remedy public information room on 20 May 2014, thus giving US interested parties opportunities to see the information at issue.[465]

7.300. We now turn to the second issue, whether MOFCOM provided these opportunities in a timely fashion. The non-confidential summaries of the pricing data were made available on 20 May 2014. The final injury disclosure was made on 21 May 2014, and a deadline for comments of ten days was established.[466] The redetermination was issued on 8 July 2014, taking effect on 9 July 2014.[467]

7.301. The United States emphasizes MOFCOM's obligation pursuant to Articles 6.4 and 12.3 to provide "timely" opportunities to see the information at issue, and asserts that MOFCOM failed to do so.[468] The US position is largely predicated on its view that MOFCOM did not make the non-confidential summaries available at all, and we have found otherwise. As a consequence of our decision, any alleged lack of timeliness cannot be simply a consequence of failing to make the information available, but must be assessed on its own merits.

7.302. The United States also argues that:

[460] United States' comments on China's response to Panel question No. 11, para. 24.
[461] Redetermination, (Exhibit CHN-1 (translated version)), pp. 9 and 13.
[462] Redetermination, (Exhibit USA-9 (translated version)), pp. 7 and 12.
[463] Redetermination, (Exhibit CHN-1 (translated version)), pp. 9 and 13; and Exhibit USA-9 (translated version), pp. 7 and 12.
[464] We note in this regard that to do otherwise might imply a lack of good faith in MOFCOM's actions, which we consider without any foundation and inappropriate in the circumstances of this case.
[465] Contrary to the US assertion, MOFCOM was not required under Articles 6.4 and 12.3 to notify US interested parties that the non-confidential summaries had been made available. (See para. 7.277 above).
[466] Letter from MOFCOM dated 21 May 2014 on disclosure of the determination regarding injury, (Exhibit USA-8 (translated version)), p. 1.
[467] Redetermination, (Exhibit CHN-1 (translated version)), pp. 1 and 3.
[468] United States' second written submission, paras. 54, 55, and 59; response to Panel question No. 6(a), para. 20. See also response to Panel question No 9, paras. 34-35.

> [E]ven if U.S. interested parties happened upon the summaries [on 20 May 2014] … they still would not have an opportunity to make timely presentations based on these summaries before MOFCOM issued its [final injury disclosure] − a report which is essentially equivalent to a draft opinion.[469]
>
> [R]egardless of whether or not MOFCOM actually released information to this public reading room [the fact that this would have been] the day before it issued the [final injury disclosure] … hardly reflects a timely effort by China to enable interested parties to review information relevant to the presentation of their cases − as required by AD Agreement Article 6.4 and SCM Agreement 12.3.[470]

MOFCOM did not give notice to the US interested parties, as required by Articles 6.4 and 12.3.[471] Without notice, and thus knowledge of the existence of the non-confidential summaries in MOFCOM's trade remedy public information room, US interested parties did not have a "timely" opportunity to see the information.[472] Moreover, the opportunities to see the information were not "timely" because the non-confidential summaries were made available only one day before the injury disclosure was issued.[473] Thus, US interested parties did not "have an opportunity to make timely presentations based on these summaries before MOFCOM issued its [injury disclosure] − a report which is essentially equivalent to a draft opinion".[474]

7.303. We understand the US position to be that the pricing information at issue here was made available too late before the issuance of the injury disclosure to be considered "timely". The United States does not, however, explain how the issuance of the final injury disclosure limited the opportunity of the US interested parties to see the information and prepare submissions based on it in time to prepare and submit submissions commenting on the final injury disclosure. Nor has the United States demonstrated that the 10 day period for comments on the injury disclosure was not sufficient to allow US interested parties to see the pricing information in MOFCOM's trade remedy public information room and prepare presentations based on it, to be submitted as comments on the injury disclosure. Timeliness in this context depends on whether interested parties can defend their interests, in particular by preparing (and submitting) presentations based on the information at issue.[475] This must be assessed on a case-by-case basis.[476] In this instance the United States has not demonstrated on the basis of the specific circumstances of the case, that the US interested parties did not have timely opportunities to see the information because the non-confidential summaries were only made available on 20 May 2014. In particular, by focusing its arguments on the assertion that there was "no opportunity whatsoever" to see the information[477], the United States has not demonstrated that in the circumstances of this case the US interested parties were unable to prepare presentations because they lacked "timely" opportunities to see the non-confidential summaries.[478]

[469] United States' response to Panel question No. 6(b)(i), para. 23.

[470] United States' response to Panel question No. 9, para. 35 (internal quotations and fn omitted). Similarly, but in the context of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement, United States' second written submission, paras. 25, 33, and 48.

[471] United States' second written submission, paras. 55 and 59; responses to Panel question No. 6(a), para. 19, No. 6(b)(i), paras. 22-23, and No. 10, paras. 36-37.

[472] United States' second written submission, para. 55; responses to Panel question No. 6(a), para. 20, and No. 9, para. 35.

[473] United States' responses to Panel question No. 6(a), paras. 18 and 20, and No. 9, para. 35.

[474] United States' response to Panel question No. 6(b)(i), para. 23 (emphasis added). We note that the United States does not even assert, unlike in the context of its claim under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement, that the period for comments following the injury disclosure was not enough to provide "timely" opportunities to see the information (and to prepare presentations on this basis).

[475] Such presentations "are the principal mechanisms through which an [interested party] can defend its interests". (Appellate Body Report, *EC − Tube or Pipe Fittings*, para. 149).

[476] Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.122. This case also relates to a situation in which the opportunities to see the information were provided towards the end of the investigation when the final disclosure was made.

[477] United States' response to Panel question No. 9, para. 34. (emphasis added)

[478] Moreover, the United States makes certain arguments in relation to the conduct of a hearing that allegedly impaired the US interested parties' ability to make presentations. None of these arguments are, however, relevant for the issue of the timeliness of the opportunity to see information provided through the making available of the non-confidential summaries on 20 May 2014.

7.304. In respect of the non-confidential summaries, the United States has thus failed to demonstrate that MOFCOM did not provide timely opportunities to see the information and to prepare presentations based on it within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement.

7.7.4.2.1.3 The identities of the Chinese producers

7.305. The United States claims that MOFCOM did not provide timely opportunities to see the identities of the Chinese producers from whom MOFCOM required pricing information.

7.306. Each non-confidential summary provided by the Chinese producers indicated the name, and thus the precise identity, of the respective responding producer.[479] Above, we found that MOFCOM made available the non-confidential summaries on 20 May 2014 and that the United States has not established that MOFCOM failed to provide timely opportunities to see these summaries and prepare presentations. Consequently, the same analysis and conclusions apply to the identities of the Chinese producers that were included in those non-confidential summaries.[480]

7.307. We therefore find that the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the identities of the Chinese producers.

7.7.4.2.1.4 Requests for information

7.308. The United States argues that MOFCOM acted inconsistently with Articles 6.4 and 12.3 because it did not provide timely opportunities for US interested parties to see the questions or requests for information that MOFCOM put to the Chinese producers in order to require additional pricing data. China argues that MOFCOM did not issue any questionnaires to the Chinese producers which MOFCOM could have provided interested parties an opportunity to see.

7.309. There is no disagreement between the parties that MOFCOM did request additional information from the Chinese producers in some way, even if not through formal questionnaires or other written requests. Moreover, it is undisputed that MOFCOM did not provide any opportunities for US interested parties to view the requests for information it put to the Chinese producers, in whatever form.

7.310. The first question we must address is whether MOFCOM's requests for additional information, in whatever form, to the four Chinese companies constitute "information" within the meaning of Articles 6.4 and 12.3. This is the first time a panel has been called upon to consider whether requests for information, in whatever form, fall within the scope of the term "information" in Articles 6.4 and 12.3. Nothing in these provisions or jurisprudence[481] suggests that "information" in Articles 6.4 and 12.3 refers solely to information in the form of evidence or data that is submitted to or obtained by an investigating authority. We see no reason to exclude, *a priori*, requests for information from the scope of "information" within the meaning of Articles 6.4 and 12.3.

7.311. China also argues that there is no obligation under Articles 6.4 and 12.3 to reduce into writing oral questions or requests of information and to make them available in that form to all other interested parties.[482] This is true. However, the "information" in respect of which the investigating authority has to provide timely opportunities to see is not further qualified in respect of its form; indeed, it "may take various forms …".[483] Nothing in Articles 6.4 and 12.3 limits the

[479] Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)), each on pp. 1-2.

[480] Our conclusion assumes that the identities of the responding Chinese producers are relevant to the presentation of the US interested parties' cases and used by the authorities, but we express no views as to whether this assumption is, in fact, justified.

[481] The Appellate Body refers to information "including data submitted by the interested parties". (Appellate Body Report, *EC – Fasteners (China)*, para. 480).

[482] China's comments on United States' response to Panel question No. 8, para. 18.

[483] Appellate Body Report, *EC – Fasteners (China)*, para. 480.

information at issue to written information. Context is helpful in this respect: the text in Articles 6 and 12 is specific when the obligation concerns information or evidence in a particular form. For example, Article 6.1 refers to an opportunity to "present in writing all evidence", Article 6.1.2 to "evidence presented in writing", and Article 6.2 to an opportunity, upon justification, to "present other information orally". In this light, the obligation in Articles 6.4 and 12.3 relates to any type of information, whether or not it is in writing, including oral requests for information. In fact, it would undermine the due process protection afforded by the obligation to provide timely opportunities to see information if an investigating authority could avoid giving such opportunities simply by avoiding putting the information at issue into writing. Thus, the term "information" in Articles 6.4 and 12.3, includes requests for information, even if made orally.

7.312. We recall that there are three limitations on the kinds of information subject to the requirements of Articles 6.4 and 12.3, and these limitations are cumulative. We now turn to the third of these[484]: whether the requests for information at issue here, whatever their form, constitute information that was "used" by MOFCOM. The United States contends that the requests were "used" because they were "applied by MOFCOM to generate new injury findings"[485] and because they "constituted a 'required step in the anti-dumping investigation'", in line with the findings of the Appellate Body in *EC – Tube or Pipe Fittings*.[486] In response to the Panel's oral questions at the substantive meeting, the United States argued that the requests were "used" because

a. they were "critical to how MOFCOM reached its ultimate finding";

b. they were "how MOFCOM got the information that it claims is so critical to its injury analysis";

c. "MOFCOM had to deliver [them] to a party to obtain something"; and

d. they "serve[d] a function", here to obtain more information.

7.313. China argues that:

a. the US position would mean that "any action taken by an authority as part of its conduct in an investigation could be construed as 'related' to a 'required step' in an antidumping (or countervailing duty) investigation". This interpretation would result in an administrative burden that is "impossible to administer"; and

b. the Appellate Body's findings in *EC – Tube or Pipe Fittings* specifically concern the characterization of data as "information" that is "used" by an investigating authority, not an (oral) request for information.[487]

7.314. We recall our finding at paragraph 7.286 above that the term "used" within the meaning of Articles 6.4 and 12.3 is not limited to information in the nature of data, facts or other evidence relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. We further note our finding in paragraph 7.311 that oral requests for information constitute "information" for the purposes of Articles 6.4 and 12.3. There is no dispute in this case that MOFCOM made, in some form, requests for information to four Chinese producers, that it received pricing data in response to those requests, and that it took that data into consideration in making findings on price undercutting in the redetermination. We make the following observations:

a. our finding in the original report under Article 3.2 of the Anti-Dumping Agreement related to the composition and comparability of product baskets;

[484] There is no dispute between the parties as to relevance; we deal with the confidentiality issue below.
[485] We note in fact that the information requests were used to generate additional data, which in turn were used in considering the issue of injury.
[486] United States' response to Panel question No. 8, paras. 30-31.
[487] China's comments on United States' response to Panel question No. 8, para. 18.

b. in seeking to address this finding in the reinvestigation MOFCOM collected and evaluated pricing data for various broiler product models. The reinvestigation thus did not directly pertain to the composition and comparability of the product baskets whose prices MOFCOM then compared; and

c. the requests for information to Chinese producers link the pricing information to the issue of composition and comparability of product baskets addressed in our original finding. Thus, in the specific circumstance of this case, those requests for information constitute background and context for understanding and evaluating the pricing data submitted by the producers in light of the issue to be addressed.

We therefore consider that, in the facts of this case, the requests for information constituted information used by MOFCOM in the sense of Articles 6.4 and 12.3, in the reinvestigation.

7.315. In view of the above, we find that China acted inconsistently with Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement because MOFCOM failed to provide timely opportunities for the US interested parties to see the requests for information issued to the Chinese producers.

7.7.4.2.1.5 Additional "context" regarding the data in the non-confidential summaries and aggregate data

7.316. The United States claims that MOFCOM did not provide opportunities to see the "context"[488] of the pricing information in the non-confidential summaries, including "the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample".[489] The United States also claims that MOFCOM did not provide opportunities to see "aggregate data reflecting the information received from the four [Chinese] producers".[490]

7.317. The United States did not demonstrate that these items of "context" themselves constitute "information" that was "relevant", "non-confidential" and "used" within the meaning of Articles 6.4 and 12.3. Thus, there is no basis for us to find that MOFCOM was required to provide timely opportunities to interested parties to see these items of "context". Moreover, the thrust of the US argument is that "the content of these summaries omitted certain critical relevant information that does not, on its face, appear to be data that is 'by nature confidential'".[491] The United States has not, however, demonstrated in what way certain non-confidential information "was withheld" from the non-confidential summaries.[492] There is no evidence before us to suggest that the non-confidential summaries were in fact incomplete. To the extent that the United States takes issue with the confidential treatment of certain information as such, this would fall within the scope of a claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement, which the United States has not made, not within a claim under Articles 6.4 and 12.3.

7.318. With respect to "aggregate data reflecting the information received from the four [Chinese] producers", there is also no evidence that MOFCOM had, in addition to the pricing information itself, non-confidential aggregate information that it used but in respect of which it failed to provide timely opportunities to see. Indeed, the formulation of the US argument suggests that the United States might have preferred that the pricing information from the four producers were provided in a non-confidential aggregate form and made available to interested parties to see. Articles 6.4 and 12.3 do not, however, establish any right to see the "information" recast in a different manner or to see additional, "contextual" details that go beyond the "information" at issue.

[488] United States' second written submission, para. 57.
[489] United States' response to Panel question No. 6(b)(i), para. 23.
[490] United States' responses to Panel question No. 6(b)(i), paras. 21 and 23, and No. 6(b)(ii), para. 25.
[491] United States' response to Panel question No. 6(b)(i), para. 23.
[492] United States' response to Panel question No. 6(b)(i), para. 21.

7.319. In the light of the foregoing, the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the additional "context" regarding the data in the non-confidential summaries and aggregate data.

7.7.4.2.1.6 Information in respect of "sampling"

7.320. The United States claims that MOFCOM did not disclose the basis for selecting the Chinese producers in the "sample" from which additional pricing data was sought, and the methodology for collecting pricing data from them, contrary to the requirements of Articles 6.4 and 12.3.

7.321. The basis for selecting Chinese producers from whom additional pricing data was sought and the methodology for collecting pricing data both are aspects of MOFCOM's methodology in its investigation and consideration of price effects. Articles 6.4 and 12.3 do not, however, apply to the methodology used by or determinations of the investigating authority and do not require investigating authorities to provide opportunities for interested parties to "see" such methodologies or determinations.[493]

7.322. We find therefore that the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the basis for selecting Chinese producers in the sample and the methodology for collecting pricing data from them.

7.7.4.2.2 Opportunities to prepare presentations

7.323. The United States argues that MOFCOM failed to provide US interested parties timely opportunities to prepare presentations, as required by the second obligation set forth in Articles 6.4 and 12.3.

7.324. Above, we found that China acted inconsistently with Articles 6.4 and 12.3 because MOFCOM failed to provide timely opportunities for the US interested parties to see the requests for information issued to the Chinese producers. As a consequence, MOFCOM also failed to provide timely opportunities for the US interested parties to prepare presentations on the basis of this information, that is, the information requests.

7.325. We therefore find that China also acted inconsistently with Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement because it did not provide timely opportunities to prepare presentations.

7.7.4.2.3 Issues related to the non-confidential treatment of information

7.326. The United States included a reference to Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement in its panel request. In its first written submission, the United States invoked a breach of Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement as an alternative claim to its principal claim under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement, which we ruled to fall outside of the Panel's terms of reference.[494] We do not understand the United States to be advancing an independent claim of violation under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement[495]; indeed, the United States has not demonstrated that MOFCOM acted inconsistently with the requirements set forth in those provisions.[496]

7.327. To the extent that Articles 6.4 and 12.3 refer, through the reference to non-confidential information as defined by paragraph 5 and 4 respectively, to Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement, the United States argues that certain information was "withheld" or "omitted", although not "by nature confidential" consistent with Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement.[497] Whether or not this information was properly treated as confidential is not a question within the

[493] Panel Report, *EU – Footwear (China)*, paras. 7.618 and 7.631.
[494] United States' first written submission, fn 75.
[495] United States' response to Panel question No. 6(b)(ii), paras. 26-27.
[496] United States' response to Panel question No. 6(b)(ii), paras. 26-27.
[497] United States' response to Panel question No. 6(b)(i), paras. 21 and 23.

scope of our jurisdiction in this proceeding. In any event, as discussed above, this information is not "information" that was "used" by MOFCOM.[498]

7.7.5 Conclusion

7.328. In respect of the requests for information made by MOFCOM to the Chinese producers, the United States has established that MOFCOM did not provide timely opportunities for the US interested parties to see this information and to prepare presentations on the basis of it. We therefore find that China acted inconsistently with the two obligations set forth in each of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement.

7.8 Article 6.8 of the Anti-Dumping Agreement and paragraphs 3 and 5 of Annex II: facts available

7.8.1 Introduction

7.329. In our original report, we found that MOFCOM had acted inconsistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in allocating costs for purposes of constructing normal value in respect of Tyson. In the reinvestigation, MOFCOM again constructed Tyson's normal value under Article 2.2 of the Anti-Dumping Agreement; MOFCOM rejected Tyson's reported cost data (including its calculations) and used what it described as "facts available".

7.330. This claim concerns whether MOFCOM acted in accordance with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement when it rejected Tyson's reported cost data and used facts available. The cost data at issue relate to the "raw material" cost incurred in raising a broiler up to split-off ("meat cost") and the processing cost incurred after split-off ("processing cost").

7.8.2 Factual background

7.331. In the original investigation:

a. Tyson provided, through several submissions, data for meat and processing costs to MOFCOM.

b. Tyson reported both sets of cost data by chicken "part", such as wing tips, leg quarters, etc. The processing costs were not broken down by processing step.

c. The data Tyson reported for meat costs included processing costs incurred before the final stage in the production process.

7.332. In the reinvestigation:

a. MOFCOM requested Tyson to report meat and processing costs at the product brand code level, rather than at the part level.[499] MOFCOM required Tyson to provide these cost data for each of the more than 1,000 product brand codes ("models") it produced.[500] MOFCOM also requested Tyson to report processing costs broken down by processing step.[501]

b. Tyson did not have actual cost data for meat and processing costs separated by model and processing step in its accounting records. Therefore, it generated the requested data according to the parameters set by MOFCOM, using the data available in its accounting system (the "aggregate total costs" incurred and the "standard costs").[502] The standard costs reflect Tyson's expectation as to costs incurred at each particular production step and were used to derive allocation percentages to distinguish meat and processing costs.

[498] See paras. 7.317-7.319 above.
[499] United States' second written submission, para. 135. MOFCOM initially only requested data on processing costs. Tyson also provided data on meat costs and MOFCOM in the following also requested data on meat costs.
[500] United States' first written submission, para. 121.
[501] United States' second written submission, para. 139.
[502] United States' first written submission, paras. 110-111; second written submission, para. 132.

Tyson disaggregated the available actual aggregate cost data using the allocation percentages derived from standard cost to determine meat and processing costs at each production step. On this basis, Tyson reported data for meat and processing costs for each production step.

c. Tyson's reported data changed in some aspects in the course of the reinvestigation and it differed in some aspects from the data that it had provided in the original investigation.

d. In the course of several iterations of questionnaires and supplemental questionnaires, MOFCOM requested Tyson to provide the "actual pure" meat and processing costs and to provide clarification regarding the meat and processing costs it had provided during the original investigation. In response, Tyson provided data and explanations.

e. In the redetermination, MOFCOM rejected Tyson's reported meat and processing cost data in its entirety. MOFCOM found that the reported data, generated by applying the methodology developed by Tyson using the data available in its accounting records, were not the meat and processing costs actually incurred:

> [Tyson] only submitted the meat cost and processing cost, calculated by ratio method (calculating the relevant proportion based on the data from the standard cost system), of each product model. The meat cost and processing cost of each model of the product concerned calculated by this method are not the actual pure meat cost and processing cost of each model of the product concerned. … Therefore, the Investigating Authority decides not to accept using the ratio method claimed by the Company to calculate the meat cost and processing cost of each model of the product concerned, nor to accept the meat cost and processing cost data of each model of the product concerned calculated by the ratio method.[503]

7.8.3 Main arguments of the parties

7.8.3.1 United States

7.333. MOFCOM violated Article 6.8 and paragraphs 3 and 5 of Annex II when it rejected the cost data reported by Tyson and used facts available. MOFCOM did not, contrary to the requirements of paragraph 3 of Annex II, establish that the information provided by Tyson was either not verifiable, not appropriately submitted so that it could be used in the investigation without undue difficulties, or not supplied in a timely fashion.[504] MOFCOM justified the rejection of Tyson's reported data without even considering, much less deciding, whether it could be used consistently with the criteria set out in paragraph 3 of Annex II, in particular in respect of the verifiability of the data. The reasons MOFCOM gave for rejecting Tyson's data were also factually incorrect and did not speak to the verifiability of the data.[505] In particular, MOFCOM:

a. incorrectly considered that the cost data reported by Tyson in the reinvestigation did not tie to the cost data reported in the original investigation.[506] Tyson had explained to MOFCOM that accounting for 20 product models for which data had not been provided during the original investigation resolved the data inconsistency;

b. wrongly found that Tyson had provided the reported costs for only "some" product models.[507] Tyson had reported cost data for all of the more than 1,000 product models, but had submitted detailed information for three representative models;

c. erroneously determined that Tyson had not provided the actual meat and processing costs as requested[508];

[503] Redetermination, (Exhibit CHN-1 (translated version)), p. 43. (emphasis added)
[504] United States' first written submission, paras. 114-118. See also response to Panel question No. 42, paras. 79-88.
[505] United States' first written submission, para. 119.
[506] United States' first written submission, para. 120; second written submission, para. 141.
[507] United States' first written submission, para. 121.
[508] United States' first written submission, para. 123; second written submission, paras. 132 and 142.

d. wrongly faulted Tyson for basing its reported cost data on only part of the POI.[509] Tyson had calculated the allocation ratios using standard costs for the first half of 2009, rather than for the entire POI, because only those costs were available in its records for the POI. Standard costs for the second half of 2008 were no longer available as they had been purged from Tyson's systems in the ordinary course of business after 118 weeks; and

e. wrongly faulted Tyson for failing to support the data it reported.[510]

7.334. In response to China's arguments, the United States maintains:

a. China misconstrues the "best of its ability" standard in paragraph 5 of Annex II.[511] Moreover, Tyson did act to the best of its ability.[512] Cost data according to MOFCOM's specifications were not available to Tyson. Tyson generated the requested cost data based on a reasonable methodology using the information available in its records. In this way, Tyson derived from the information in its records cost data corresponding as closely as possible to the form requested.

b. Inconsistencies in the cost data reported in the original investigation and in the reinvestigation were due to changes to the reporting methodology. In particular, costs were not reported by part in the reinvestigation but by model and processing step. Also, they were reported as values specifically constructed for this purpose and they were subject to revisions/corrections made in accordance with MOFCOM's request.[513] China cannot rely on changes to information submitted in the original investigation to reject data reported during the reinvestigation.[514]

c. Tyson did not misreport data in the original investigation. In the original investigation, Tyson reported its cost data as they were recorded in its cost accounting system in the ordinary course of business and explained that cost accounting system, all of which was also subject to verification, to MOFCOM.[515]

7.8.3.2 China

7.335. Article 6.8 and paragraph 5 of Annex II require an interested party to "act to the very best of its ability".[516] An investigating authority does not need to "accept information that 'may not be ideal in all respects' unless the party submitting that information has been acting 'to the best of its ability'".[517] Even if an interested party acts to the very best of its ability, the investigating authority can nevertheless resort to facts available if the requested information is not provided.[518] MOFCOM was entitled to reject Tyson's reported meat and processing cost data and resort to facts available because Tyson failed to act to the (very) best of its ability[519]:

In respect of the original investigation:

a. Tyson misreported cost data by including certain processing cost elements in the reported meat costs[520] and by failing to report certain cost data at all (the cost data for 20 product models[521] and the cost data for "some product codes" of chicken feet[522]).

[509] United States' first written submission, para. 124; second written submission, para. 140.
[510] United States' first written submission, para. 125.
[511] United States' second written submission, para. 129; comments on China's responses to Panel question No. 36(a), para. 55, No. 36(b), para. 57, and No. 37(a), para. 60.
[512] United States' second written submission, paras. 130, 132, 135, and 145.
[513] United States' second written submission, paras. 131, 143, and 144.
[514] United States' second written submission, para. 144.
[515] United States' second written submission, paras. 136-138.
[516] China's second written submission, paras. 221, 223, and 224. (emphasis added)
[517] China's first written submission, para. 196 (emphasis original); see also second written submission, para. 223; and responses to Panel question No. 36(a), paras. 133-134, and No. 36(b), paras. 135-136.
[518] China's second written submission, paras. 229 and 235.
[519] China's first written submission, paras. 195, 209, and 240; second written submission, paras. 221 and 250; and response to Panel question No. 36(b), paras. 137 and 141.
[520] China's first written submission, paras. 205-206; second written submission, para. 240.
[521] China's first written submission, paras. 206 and 233.
[522] China's first written submission, para. 228.

b. Tyson did not disclose the alleged misreporting of that data during the original investigation.[523]

c. Tyson provided inconsistent data over the course of the original investigation.[524]

In respect of the reinvestigation:

a. Tyson never provided the "actual pure" meat and processing costs that MOFCOM had requested.[525] Tyson could have provided the requested data; at least it did not explain, or explained too late, what its accounting records could provide.[526]

b. Tyson failed to provide timely and sufficient explanation and clarification in respect of the reported data.[527]

c. Tyson did not report cost data on the basis of the full POI.[528] Even assuming that Tyson did not have data for the entire period, the reported meat cost data were distorted and Tyson did not address MOFCOM's concerns raised in the disclosure.

d. Tyson provided inconsistent data.[529]

e. Tyson provided negative processing costs for "some individual models".[530] Tyson provided a satisfactory explanation too late, in its response to the second supplemental questionnaire.[531]

f. Regarding "some product codes" of chicken feet, Tyson failed to provide cost data at all or failed to provide sufficient explanation in a timely manner.[532]

7.8.4 Main arguments of third parties

7.336. The European Union argues that the instrument of facts available does not serve to punish non-cooperating interested parties but to overcome lacunae which arise from the absence of useable data.[533] Even if a respondent cooperates to the best of its ability, this does not necessarily preclude the use of facts available to replace missing or defective necessary information. To the extent that information is not missing, for instance because the respondent has provided partial information, it cannot be replaced.[534] But the obligation to take into account non-ideal data applies only in case of a fully cooperating respondent acting to the best of its ability. And even in case of a fully cooperating respondent, the data it submits must only be used insofar as it meets the criteria in paragraph 3 of Annex II. Where an investigating authority wants to disregard data as "unreliable" pursuant to paragraph 3, the burden of substantiating its unreliability falls on the investigating authority.[535]

[523] China's first written submission, paras. 205 and 233; comments on United States' response to Panel question No. 42, para. 70.
[524] China's first written submission, paras. 218-219.
[525] China's first written submission, paras. 207 and 217; response to Panel question No. 36(b), para. 140.
[526] China's second written submission, para. 246; responses to Panel question No. 36(b), para. 139, and No. 40, paras. 154 and 156; and comments on United States' response to Panel question No. 42, paras. 66 and 71.
[527] China's first written submission, paras. 234-237; response to Panel question No. 36(b), para. 140.
[528] China's first written submission, para. 238.
[529] China's first written submission, paras. 218-219 and 233.
[530] China's first written submission, paras. 224-227.
[531] China's first written submission, para. 227.
[532] China's first written submission, para. 228.
[533] European Union's third-party statement, para. 11.
[534] European Union's third-party statement, para. 12.
[535] European Union's third-party statement, para. 13.

7.8.5 Evaluation

7.8.5.1 The law

7.337. 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.[536]

7.338. The first sentence of paragraph 3 of Annex II of the Anti-Dumping Agreement provides:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

7.339. Paragraph 5 of Annex II of the Anti-Dumping Agreement provides:

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

7.340. The first sentence of Article 6.8 establishes a closed list of circumstances involving the unavailability of information in which an investigating authority is permitted to use facts available. The second sentence of Article 6.8 sets out the relationship between Article 6.8 and Annex II. It mandates that Annex II must be "observed" in the application of "this paragraph".[537] Paragraphs 3 and 5 of Annex II address the situation in which an interested party has provided necessary information, but the investigating authority may not be entirely satisfied.

7.341. Paragraph 3 provides that all submitted information that satisfies the criteria set out in that paragraph must be taken into account when determinations are made. The investigating authority must consider every element of information submitted in accordance with the criteria of paragraph 3.[538] Where information meets the requirements of paragraph 3 such that an investigating authority must take it into account, the investigating authority may not conclude that, in respect of that information, necessary information has not been provided within the meaning of Article 6.8. The investigating authority is therefore not entitled to reject that information and use facts available instead.[539]

7.342. Paragraph 3 sets out the specific criteria that an investigating authority must apply before rejecting information submitted to it and relying on facts available instead. To the extent the investigating authority is not satisfied with submitted information, it must consider whether those elements of information satisfy the criteria of paragraph 3.[540]

a. The information must be verifiable. Information is verifiable when the accuracy and reliability of the information can be assessed by an objective process of examination.[541] This process may be through on-the-spot verification, further requests for information or other means.[542]

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[536] Emphasis added.
[537] Even though Annex II is largely phrased in hortatory language, it is settled that the provisions of Annex II are mandatory. (Panel Report, *US – Steel Plate*, para. 7.56).
[538] Panel Report, *US – Steel Plate*, para. 7.57.
[539] Appellate Body Report, *US – Hot-Rolled Steel*, para. 81; Panel Report, *EC – Salmon (Norway)*, para. 7.355.
[540] Panel Report, *US – Steel Plate*, paras. 7.58, 7.61, and 7.62.
[541] Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, para. 7.357.
[542] Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, paras. 7.358-7.360.

b. The information must be "appropriately submitted so that it can be used in the investigation without undue difficulties". There is no particular circumstance or situation in which this criterion will be satisfied; rather, the investigating authority must explain the basis for its conclusion that information, which meets the other criteria of paragraph 3, cannot be used in the investigation without undue difficulties.[543]

c. The information must be supplied in a timely fashion, that is, submitted within a reasonable period of time.[544]

7.343. Because every element of information that satisfies the criteria of paragraph 3 must be taken into account, an investigating authority is not entitled to reject all information submitted and apply facts available, when only individual elements of that information fail to satisfy the criteria of paragraph 3.[545] An investigating authority must, at a minimum, explain in what way the information that it is rejecting does not meet the requirements of paragraph 3.

7.344. Paragraph 5, in turn, requires that an investigating authority may not disregard information that is less than ideal where the interested party submitting the information has acted to the "best of its ability". In this sense, it is supplemental to paragraph 3 and not an exception to it; information that satisfies the requirements of paragraph 3, even if not perfect, may not be disregarded.[546] The investigating authority must, in the first instance, use all the information provided by an interested party that acted to the "best of its ability", even if the information is less than perfect.[547]

7.345. Thus, paragraphs 3 and 5 require an investigating authority to take into account and not disregard the information submitted by an interested party that meets the conditions set out in those paragraphs.

7.8.5.2 Analysis

7.346. As we understand it, the principal claim of the United States is that in using facts available in respect of a constructed cost of production for Tyson, MOFCOM acted inconsistently with Article 6.8 and paragraph 3 of Annex II.[548]

7.347. The United States argues that MOFCOM did not demonstrate that Tyson's reported data did not meet the criteria of paragraph 3, and in particular that the data were not verifiable.[549] MOFCOM:

a. incorrectly considered that the cost data reported by Tyson in the reinvestigation did not tie to the cost data reported in the original investigation;

b. wrongly found that Tyson had provided the reported costs for only "some" product models;

c. erroneously determined that Tyson had not provided actual meat and processing costs as requested;

d. wrongly faulted Tyson for basing its reported cost data on only part of the POI; and

e. wrongly faulted Tyson for failing to support the data it reported.

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[543] Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74 (emphasis added); *EC – Salmon (Norway)*, para. 7.364.

[544] Appellate Body Report, *US – Hot-Rolled Steel*, para. 84; Panel Reports, *US – Steel Plate*, para. 7.76; *EC – Salmon (Norway)*, para. 7.369. The final criterion of paragraph 3, that the information must be supplied in a medium or computer language requested by the authorities, is not of relevance in this proceeding.

[545] Panel Report, *US – Steel Plate*, para. 7.75; but see ibid. paras. 7.59-7.60.

[546] Panel Report, *US – Steel Plate*, para. 7.65.

[547] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 288.

[548] United States' first written submission, paras. 114-126.

[549] United States' first written submission, paras. 115-118. There is no disagreement between the parties as to the legal standard that applies to establish that information is or is not "verifiable".

With reference to the reinvestigation's questionnaires and questionnaire responses, the United States also argues that MOFCOM "did not meaningfully engage with the data" Tyson did provide and did not take into account what Tyson could provide.[550] MOFCOM merely continued to insist that Tyson did not provide separate "pure" meat and processing costs; it did not take any steps to verify Tyson's reported data; it did not provide any, and much less an adequate, explanation that would justify the rejection of the data.[551] While the US argument has elements pertaining to both paragraphs 3 and 5 – what Tyson did and what it could provide – we understand the core of the US argument to be that MOFCOM failed:

a. to consider whether the information satisfied the criteria of paragraph 3; and

b. to explain in what way the information it rejected failed to satisfy the requirements of paragraph 3.

7.348. On its face, the redetermination supports the US argument. MOFCOM, we recall, rejected Tyson's reported data because, in its view, Tyson had failed to provide "actual pure" meat and processing cost data.[552] But nowhere in the redetermination does MOFCOM explain in what way it "observed", as required by Article 6.8, the criteria set out in paragraph 3 of Annex II in rejecting Tyson's data. As our questions to the parties made clear, we identified elements in the redetermination that might relate to the criteria of paragraph 3.[553] Clearly, an investigating authority is not required to signpost its analysis and each of its findings by expressly linking them to specific obligations in the Anti-Dumping Agreement. In this instance, however, nothing in the redetermination demonstrates meaningful consideration by MOFCOM of the criteria in paragraph 3. Nor is there any link between those criteria and MOFCOM's ultimate decision to reject all of the reported data. Our view that MOFCOM failed to "observe" the criteria set out in paragraph 3 is confirmed by China's arguments before us: throughout its submissions China linked MOFCOM's findings only to MOFCOM's alleged conclusion that Tyson had failed to act to the "best of its ability" in accordance with paragraph 5, not to Tyson's data failing any of the criteria in paragraph 3.

7.349. As we understand China's arguments, based on its submissions and including its answers to our questions, China's position rests on two lines of argument, a direct response in respect of paragraph 3 and an indirect response in respect of paragraph 5 of Annex II.

7.8.5.2.1 China's response in respect of paragraph 3 of Annex II

7.350. China makes two arguments in respect of paragraph 3.

7.351. First, China asserts that:

> MOFCOM would have been open to any reasonable (and verifiable) method to ensure that processing costs would be linked to a product specific model at each processing steps. But instead of presenting such a method in the original investigation or in the reinvestigation, Tyson obscured the fact that the reported meat costs in fact contained a significant portion of processing costs incurred at prior production stages. Tyson thus failed to provide information "which is appropriately submitted so that it can be used in the investigation without undue difficulties" as required by Paragraph 3 ...[.][554]

7.352. This argument gives rise to at least two concerns:

a. China does not refer to anything in the redetermination, or indeed anywhere else in the record of the investigation, indicating that MOFCOM found that Tyson failed to provide information "which is appropriately submitted so that it can be used in the investigation

[550] United States' response to Panel question No. 42, para. 79.
[551] United States' response to Panel question No. 42, paras. 79-88.
[552] See fn 503 above.
[553] Redetermination, (Exhibit CHN-1 (translated version)), pp. 40 and 42.
[554] China's response to Panel question No. 39, para. 152 (emphasis added). At the substantive meeting of the Panel with the parties, China also asserted in respect of whether – and if so, where – in the redetermination MOFCOM applied and made findings in respect of the criteria set out in paragraph 3 of Annex II, that "MOFCOM had not received 'appropriately submitted' information on the distinction between meat and processing cost".

without undue difficulties". We see nothing to suggest such a finding was either considered or made anywhere in the redetermination. China's argument thus appears to us to be an after the fact justification.

b. Even if we were to accept that MOFCOM rejected the data Tyson reported because they were not "appropriately submitted so that [they] can be used … without undue difficulties", we note that MOFCOM appears to have relied upon Tyson's cost data reported in the reinvestigation as the "best information available".[555] Thus, MOFCOM in fact used the information submitted by Tyson's, albeit in a different way. By definition, where MOFCOM has, in fact, used Tyson's data as "best information available", it seems to us that we cannot conclude that that same data was not "appropriately submitted so that [they] can be used … without undue difficulties".[556]

7.353. Second, in respect of the verifiability of Tyson's data, China argues:

> The United States also incorrectly accuses MOFCOM of not taking meaningful steps to clarify and verify the data provided by Tyson in response to MOFCOM's requests during the re-investigation. But this ignores the many insufficient Tyson questionnaires responses that shows MOFCOM took meaning action to clarify and verify.[557]

China does not argue that MOFCOM made a finding that all of Tyson's data were not verifiable. It asserts, but does not demonstrate by reference to the redetermination or the record, that MOFCOM took any meaningful action to verify Tyson's data, such that it could reasonably have arrived at the conclusion that the data were not verifiable.

7.354. We recall our task in helping the parties resolve their dispute: to make findings as to whether a complaining party has presented a *prima facie* case of inconsistency with the requirements of the WTO agreements, and whether in response, a responding party has effectively rebutted the *prima facie* case of the complainant. While a panel may develop its own reasoning in arriving at its findings and recommendations in respect of those claims of the complainant that are properly before it, it is of course not for a panel to make the case for either party. We underline that this core consideration is relevant in respect not just of evidence before a panel, but also of a disputing party's arguments: stressing and advancing some arguments rather than others, whether as a matter of litigation strategy or for policy reasons, is an important sovereign right of a disputing party; it is not for a panel to second guess a party's judgment in this respect. In that sense, we must respect China's decision not to elaborate arguments under paragraph 3, but this also means that it has not successfully rebutted the *prima facie* case put forward by the United States under this paragraph.

7.8.5.2.2 China's response in respect of paragraph 5 of Annex II

7.355. China's principal response to the US claim appears to be that Tyson did not act to the "[very] best of its ability" and therefore MOFCOM was entitled to reject all of Tyson's data and use facts available. China's position is premised on the view, reiterated throughout this proceeding, that:

> [Paragraph 5] recognizes that although information may not always be "ideal", the authority need not accept information that "may not be ideal in all respects" unless the party submitting that information has been acting "to the best of its ability".[558]

> "[R]esponding parties are required to act to the very best of their ability when responding to the investigating authority. Failure to do so entitles the investigating authority to resort to facts available … [.]"[559]

[555] Redetermination, (Exhibit CHN-1 (translated version)), p. 44. In the context of responding to the United States' Article 2.2.1.1 claim, China was adamant about the fact that MOFCOM had used Tyson's own data.

[556] Emphasis added.

[557] China's comments on United States' response to Panel question No. 42, para. 67. (fn omitted)

[558] China's first written submission, para. 196 (emphasis original); see also response to Panel question No. 36(a), paras. 133-134.

[559] China's second written submission, para. 223. (emphasis added)

> "[A]n investigating authority may resort to facts available whenever the responding party fails to act to the very best of its ability."[560]
>
> "[A]n investigating authority is entitled to resort to facts available if a responding party does not act to the very best of its ability, or when the information provided is not of the best quality ... [.]"[561]

As we understand it, therefore, China's argument posits paragraph 5 as a defence or an exception to paragraph 3: where an interested party does not act to the "very best of its ability" in providing information requested, an investigating authority is entitled to reject the submitted information and proceed to use fact available, even if the submitted information satisfies the criteria of paragraph 3.

7.356. Paragraph 5 provides that investigating authorities are "not justif[ied] ... from disregarding" information that is not ideal in all respects, provided the interested party acted to the "best of its ability".[562] We note that China repeatedly adds the word "very" to this latter standard, with no justification proffered.[563] China's proposed interpretation raises the level of effort required of an interested party submitting information and thus makes it more likely that information not ideal in all respects may be disregarded. It is elementary that a panel is enjoined from inserting words into the text of a provision; nor does anything in the context of paragraph 5 require or even permit such an interpretation. We decline China's invitation to read into paragraph 5 an adverb that is not there.

7.357. Turning to the text of that provision, nothing in its structure or actual wording suggests that paragraph 5 allows for the rejection of information that meets the criteria set forth in paragraph 3 but is not ideal in all respects.[564] Rather, the provision establishes an obligation for an investigating authority to use such information provided the interested party submitting it acted to the best of its ability. As described above, paragraph 5 is properly understood as supplementing paragraph 3. Information that satisfies the requirements of paragraph 3, even if not "ideal in all respects", may not be disregarded provided the interested party has acted to the best of its ability. It would turn paragraph 5 on its head to read it as a defence or exception entitling an investigating authority to reject submitted information and resort to facts available "unless the party submitting that information has been acting 'to the best of its ability'". We therefore do not agree with China's understanding of paragraph 5.

7.358. The United States has, as we have found, established its claim based on paragraph 3. It follows from our analysis of the relationship between paragraphs 3 and 5 that any argument solely in respect of paragraph 5, as China has made in this case, is not an effective rebuttal of the case of inconsistency with paragraph 3 substantiated by the United States.

7.8.6 Conclusion

7.359. In the light of the above, we find that the United States has established that China acted inconsistently with Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement in rejecting all of Tyson's submitted data in the reinvestigation and relying on facts available.

7.9 Article 6.9 of the Anti-Dumping Agreement: essential facts

7.9.1 Introduction

7.360. In the original dispute, we found that China had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement during the original investigation because MOFCOM did not inform

[560] China's second written submission, para. 224. (emphasis added)
[561] China's second written submission, para. 233 (emphasis added); see also response to Panel question No. 36(b), paras. 135-137.
[562] Emphasis added.
[563] When asked by the Panel, China did not explain the interpretative steps that led to its proposition. (China's response to Panel question No. 36, paras. 135-141).
[564] Paragraph 5 also neither requires an interested party to act to the "very" best of its ability, nor to provide information that is of "best quality".

US interested parties, including Pilgrim's Pride and Keystone, of the essential facts underlying the determination that dumping existed.[565]

7.361. The US claim in this compliance proceeding concerns whether China acted inconsistently with Article 6.9 during the reinvestigation by failing to inform Pilgrim's Pride and Keystone of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

7.9.2 Main arguments of the parties

7.9.2.1 United States

7.362. MOFCOM acted inconsistently with Article 6.9 by failing to disclose the essential facts underlying the determination of the dumping margin in respect of Pilgrim's Pride and Keystone.[566] The specific facts alleged not to have been disclosed during the reinvestigation are:

a. With respect to Pilgrim's Pride: The data and margin calculations from the original investigation. MOFCOM never revealed the data and calculations that led to its determination in the original investigation despite the Panel in the original dispute finding that the failure to disclose this information was inconsistent with Article 6.9.[567] During the reinvestigation, MOFCOM did not reinvestigate Pilgrim's Pride but did allegedly correct an error in the original dumping margin calculation. All of the original data and margin calculations therefore also constituted essential facts in the reinvestigation which MOFCOM had to disclose.[568] Without knowing them and the nature of the alleged error, Pilgrim's Pride could not defend itself in the reinvestigation.[569] MOFCOM's disclosure, however, including an Excel file provided to Pilgrim's Pride on 16 May 2014, only made available the new, "corrected" data and calculations.[570] This disclosure also came too late for Pilgrim's Pride to defend its interests.

b. With respect to Keystone: The data and margin calculations from the original investigation and the reinvestigation.[571] Although Keystone did not cooperate during the reinvestigation, it was entitled to disclosure of the essential facts, including its confidential data and calculations. MOFCOM did not disclose this information either to Keystone or its legal agents, although Keystone had provided proof of authorization of its agents to receive MOFCOM's disclosure of Keystone's information.

7.9.2.2 China

7.363. MOFCOM did not act inconsistently with Article 6.9:

a. With respect to Pilgrim's Pride: The data and calculations from the original investigation did not constitute essential facts for purposes of the reinvestigation.[572] Moreover, MOFCOM disclosed the essential facts of the redetermination to Pilgrim's Pride in an Excel file provided to Pilgrim's Pride on 16 May 2014.[573] This document contained all the

[565] Panel Report, *China – Broiler Products*, paras. 7.100 and 7.106.

[566] In its panel request, the United States also cited Article 12.8 of the SCM Agreement. Although the first written submission at paragraph 4 included a reference to this provision, the United States did not develop any arguments, nor adduced any evidence, in any of its submissions in respect of an alleged violation of Article 12.8. Indeed, the focus of the entirety of the US arguments is on the alleged lack of disclosure of the data and calculations underlying the dumping margins. We therefore do not further address Article 12.8. During this proceeding, the United States did not, however, pursue a claim under this provision.

[567] United States opening statement at the meeting of the Panel, para. 64.

[568] United States' response to Panel question No. 23(b), para. 47.

[569] United States' first written submission, paras. 73 and 77; second written submission, para. 65; and response to Panel question No. 23(b), paras. 48-49.

[570] United States' first written submission, para. 76; second written submission, para. 71; and comments on China's response to Panel question No. 16(a), para. 30.

[571] United States' second written submission, paras. 78 and 84; response to Panel question No. 22, para. 40.

[572] China's second written submission, paras. 94, 95, 100, 104, and 105.

[573] China's first written submission, paras. 103 and 109; second written submission, para. 106; and response to Panel question No. 16(a), paras. 27-29.

data from the original investigation and the modified data.[574] The changes that were made were explained in a narrative accompanying the document that contained the data.

b. With respect to Keystone: MOFCOM could not disclose the data and calculations at issue. This information was confidential to Keystone. Keystone, however, did not respond to MOFCOM during the reinvestigation. In particular, it did not authorize an agent to represent Keystone in the reinvestigation and to receive MOFCOM's disclosure containing Keystone's confidential information. In these circumstances, MOFCOM only made a public disclosure containing non-confidential information. In any case, there is a difference in disclosure obligations with respect to cooperating parties, on the one hand, and non-cooperating parties, on the other.[575] In respect of a non-cooperating party, such as Keystone, the essential facts that must be disclosed are those set out by this Panel in its original report (the basis for resort to facts available, the requested information, and the facts used to replace the missing information).[576] MOFCOM made all of these essential facts in respect of Keystone publicly available.

7.9.3 Evaluation

7.9.3.1 The law

7.364. 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.

The first sentence is the operative part of Article 6.9. It sets out the following required elements:

a. shall inform;

b. all interested parties;

c. before a final determination is made; and

d. of the essential facts.

The second sentence of Article 6.9 is, on its face, a temporal exhortation. As context for the central obligation in Article 6.9[577], it gives an indication both of why disclosure is to be made[578] and when it must be made.

7.9.3.1.1 Essential facts

7.365. Article 6.9 requires the disclosure of "the essential facts under consideration which form the basis for the decision whether to apply definitive measures". There are three cumulative elements defining what must be disclosed:

a. essential facts;

b. under consideration; and

c. which form the basis for the decision whether to apply definitive measures.

[574] China's first written submission, paras. 97, 103, and 109; responses to Panel question No. 15, para. 26, No. 16(a), para. 30, and No. 16(c), paras. 35-36.
[575] China's response to Panel question No. 17, paras. 41-43.
[576] China's first written submission, paras. 112 and 121; second written submission, paras. 119-120.
[577] Appellate Body Report, *China – GOES*, para. 240.
[578] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

7.366. It is now settled that "essential facts under consideration" are "those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping … duties".[579] Moreover, the essential facts must form the basis for the decision whether to apply definitive measures. This decision relates to the imposition of anti-dumping duties. For facts to form the basis of this decision, they must be significant in the process of reaching this decision, whether it is because they are salient for a decision to apply definitive measures or salient for a contrary outcome.[580] The decision to impose duties or not is necessarily linked to the final determination. Facts are therefore significant, for example, when they are supportive of the final determination and are thus relied upon in making an affirmative decision to impose duties.[581] Yet, facts may still be significant for the decision to impose duties if they are ultimately not used in and/or do not support the final determination.[582]

7.367. The Panel's findings on essential facts in the original report are relevant in this proceeding. First, the Panel found that Article 6.9 required the disclosure of the following essential facts in respect of the dumping determination for the cooperating and investigated exporters in the original investigation:

a. the data underlying the determination that form the basis for the calculation of the dumping margin, including any adjustments[583];

b. the comparisons of home market and export sales[584]; and

c. the formulae applied for these comparisons.[585]

In particular – and critical for this proceeding – the Panel found that "the calculations themselves (including any files or spreadsheets created during the calculations)" that are made to determine the dumping margin are not essential facts that must be disclosed.[586]

7.368. Second, the Panel addressed the Article 6.9 disclosure requirement in respect of "unknown" exporters to whom facts available were applied in establishing a "residual" rate:

> 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 … [.][587]

7.9.3.1.2 The obligation to "inform"

7.369. Among the different modes of engagement between the investigating authority and interested parties in respect of information contemplated in Article 6 of the Anti-Dumping Agreement and described above at paragraphs 7.226 and 7.227, the requirement to "inform" is an "active" disclosure obligation.

7.370. Article 6.9 does not set out rules or any guidance on how all interested parties are to be informed of the essential facts. In these circumstances, the investigating authority has a large margin of discretion.

[579] Appellate Body Report, *China – GOES*, para. 240. (emphasis added)
[580] Appellate Body Report, *China – GOES*, para. 240.
[581] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.246.
[582] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.246.
[583] Panel Report, *China – Broiler Products*, paras. 7.90-7.91.
[584] Panel Report, *China – Broiler Products*, para. 7.91.
[585] Panel Report, *China – Broiler Products*, para. 7.91.
[586] Panel Report, *China – Broiler Products*, para. 7.92. (emphasis added)
[587] Panel Report, *China – Broiler Products*, para. 7.317.

7.371. The requirement to inform is unqualified. It is in principle subject only to other obligations, such as Article 6.5 regarding the protection of confidential information, that run concurrently in respect of certain types of facts. As well, according to the second sentence in Article 6.9, the obligation to "inform" must be fulfilled in a timely fashion, so as to allow interested parties to defend their interests.[588]

7.9.3.1.3 Conclusion

7.372. In the light of the foregoing, under Article 6.9:

a. data that are the basis for the determination of the dumping margin must be disclosed, whereas there is no requirement to disclose the actual calculations themselves;

b. disclosure must be made in respect of essential facts that are under consideration – that is, facts that are significant or salient for the decision whether to impose definitive measures; and

c. an investigating authority has a margin of discretion in how to disclose essential facts, but this discretion is not absolute.

7.9.3.2 Analysis

7.9.3.2.1 Disclosure obligation in respect of dumping margin calculations

7.373. The United States argues that MOFCOM should have made available the dumping margin calculations in respect of Pilgrim's Pride from the original investigation and in respect of Keystone from the original investigation as well as the reinvestigation.

7.374. In this proceeding, the United States refers to "calculations". As the term itself implies, the United States appears to have in mind the "precise mathematical calculations" that MOFCOM "performed" or "conducted".[589] In a number of instances the United States refers to "calculation methodology" – and even then the United States links knowledge of the "precise calculation methodology" to the disclosure of the "calculations" themselves.[590] We therefore consider that the United States is asserting that MOFCOM should have disclosed the actual "calculations" underlying the dumping margin determination, not only the calculation methodology.

7.375. In support of its position, the United States argues that this Panel in the original dispute:

a. "recognized that Article 6.9 requires the *complete* disclosure of margin calculations"[591];

b. "found that MOFCOM failed to make available the calculations it performed … including the calculation of the normal value and export price for the respondents"[592]; and

c. "found that MOFCOM's failure to disclose the original calculations denied Pilgrim's Pride the ability to ascertain the accuracy of the new rate by evaluating what has changed."[593]

The United States relies upon paragraphs 7.91 and 7.100 of the Panel Report in the original dispute for these propositions.[594]

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[588] Panel Reports, *China – X-Ray Equipment*, para. 7.400; *Russia – Commercial Vehicles*, para. 7.254 (adoption/appeal pending).

[589] United States' first written submission, paras. 68 and 75; opening statement at the meeting of the Panel, para. 62; and response to Panel question No. 23(b), para. 51.

[590] United States' second written submission, para. 69 ("Pilgrim's was entitled to know the adjustments and precise calculation methodology – and that required knowing what the original calculations and data were"); opening statement at the meeting of the Panel, para. 64; and response to Panel question No. 23(a), para. 44.

[591] United States' first written submission, para. 70; second written submission, para. 67. (emphasis original)

[592] United States' first written submission, para. 68.

[593] United States' second written submission, para. 68.

[594] United States' first written submission, para. 70; second written submission, paras. 67-68.

7.376. At paragraphs 7.91 and 7.100 of the Panel Report in the original dispute, we found that in the context of the determination of dumping, the underlying data and formulae are essential facts that must be disclosed and that MOFCOM had failed to do so in respect of Pilgrim's Pride. Nowhere in these paragraphs did we mention calculations. Indeed, we specifically found that calculations "are not 'essential facts' that must be disclosed".[595]

7.377. The United States also argues that the requirement to disclose margin calculations was endorsed by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.[596] The United States refers to the following passage:

> Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping.[597]

However, a margin calculation methodology is different from margin calculations themselves. In fact, the term "calculation methodology" was used in this passage by the Appellate Body in the context of the European Union's argument that "the calculation methodology, such as the formulae used in calculations and the data applied in the formulae", must be disclosed under Article 6.9.[598] This confirms our findings in the original report in relation to what must be disclosed: data and formulae, but not the calculations.

7.378. We therefore find that the United States has not established its claim under Article 6.9 of the Anti-Dumping Agreement in respect of disclosure of margin calculations.

7.9.3.2.2 Disclosure obligation in respect of the "original" data of Pilgrim's Pride

7.379. The data at issue relate to the calculations underlying the dumping margin determination made in the original investigation (the "original" data). The United States claims that MOFCOM did not provide these original data to Pilgrim's Pride during the reinvestigation.

7.380. 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.[599] A complainant will satisfy its burden when it establishes a *prima facie* case, namely a case that, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complainant.[600] It is generally for each party asserting a fact to provide evidence supporting the assertion.[601] In this dispute, therefore, it is for the United States to establish that China did not provide the original data to Pilgrim's Pride and thereby acted inconsistently with Article 6.9.

7.381. We recognise that a claim of violation based on an alleged omission – here the lack of disclosure – raises evidentiary challenges.[602] Difficulties exist for the complainant to establish the absence of something, but also for a panel in making findings of fact in relation to an absence or actions not done. A panel must therefore exercise a measure of discretion in respect of the evidence required to establish a claim based on an alleged omission. Regardless of these difficulties, at a minimum it should be uncontroversial to say that mere allegation of an omission does not amount to proof.

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[595] In discussing the findings of the panel in *China – X-Ray Equipment*, we found that:

> 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.

(Panel Report, *China – Broiler Products*, para. 7.92 (emphasis added))

[596] United States' first written submission, para. 71.

[597] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131. (emphasis added)

[598] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.125. (emphasis added)

[599] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

[600] Appellate Body Report, *EC – Hormones*, para. 104.

[601] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[602] See our earlier observations in this respect at para. 7.292 above.

7.382. It is instructive to consider the arguments and evidence presented to us in the course of this proceeding to illustrate the difficulties a panel faces when the allegation concerns the failure to disclose.

7.383. The United States claims that MOFCOM did not provide the original data to Pilgrim's Pride during the reinvestigation.[603] However, in none of its submissions did the United States refer to any evidence that could support this factual assertion.[604] The United States relies only on statements in the redetermination.[605] But these simply confirm that MOFCOM identified and corrected a calculation error in the original determination and that it made a disclosure. They do not give any indication as to what MOFCOM did or did not disclose.[606]

7.384. The United States acknowledges that MOFCOM disclosed "new" data − data related to the reinvestigation − to Pilgrim's Pride. Initially, the United States asserted this to have occurred on 17 June 2014 in response to disclosure comments made by Pilgrim's Pride.[607] After China referred to an alleged disclosure of the original data on 16 May 2014, the United States agreed that MOFCOM disclosed the new data on that date.[608]

7.385. China argues that MOFCOM had, in fact, disclosed the original data to Pilgrim's Pride during the reinvestigation. Initially, it relied on an Excel file that MOFCOM allegedly provided to Pilgrim's Pride on 16 May 2014 (Exhibit CHN-8).[609] Exhibit CHN-8 contains empty tables; there is no reference to the investigation, or the reinvestigation, or to the type of data at issue, and none to Pilgrim's Pride. The generic labelling of the rows and columns indicates that the tables pertain to data related to the construction of normal value and the calculation of dumping margins. It is not apparent, however, that the data and calculations contained in these tables − redacted from the exhibit − are those from the original investigation and are those for Pilgrim's Pride.

7.386. China then submitted Exhibit CHN-45, which "provides a more detailed public version of the same underlying document" of which Exhibit CHN-8 was a public summary, and thus presumably a more detailed public version of the alleged disclosure of the original data on 16 May 2014.[610] While actual figures are redacted[611], China describes the content of Exhibit CHN-45 to "consist[] of six separate tabs":

> The first tab "5% test" shows the test of whether the home sales are sufficient to constitute a viable home market;
>
> The second tab "cost and expense for NV" lists the cost and expenses for constructed normal value for all different models of broiler products;
>
> The third tab "table 4-2" lists the price and expense data for all of the sales transactions, providing data for all distinct sales transactions;

[603] United States' second written submission, para. 65.

[604] For example, an objection in the course of the reinvestigation by an interested party to a failure to disclose.

[605] United States' first written submission, para. 75; comments on China's response to Panel question No. 16(b), para. 33.

[606] The United States could also be understood to suggest that the redetermination itself did not provide sufficient disclosure which, in its view, serves as evidence that MOFCOM did not disclose the original data. (United States' first written submission, para. 75: "MOFCOM's redetermination sheds no additional light on the data or calculation 'corrections'"). The issue between the parties is not, however, whether MOFCOM disclosed the original data through the redetermination but through a separate disclosure instrument.

[607] United States' first written submission, para. 76.

[608] United States' second written submission, para. 71. The redetermination refers to a disclosure on 16 May 2014. (Redetermination, (Exhibit CHN-1 (translated version)), p. 7).

[609] China's first written submission, paras. 103 and 109; second written submission, para. 106.

[610] China's response to Panel question No. 16(a), para. 28.

[611] China stated at the substantive meeting that the United States had not submitted an authorizing letter from Pilgrim's Pride for the compliance proceeding and therefore could not provide the underlying confidential data. The United States observes that "[u]nder the Panel's Working Procedures, China does not need an authorizing letter 'in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceeding proceedings', which Pilgrim's Pride did." (United States comments on China's response to Panel question No. 16(a), para. 29 (referring to the Additional Working Procedures of the Panel Concerning Business Confidential Information, para. 3) (fn omitted)).

> The fourth tab "domestic sales > cost" lists those all transactions that had sales prices above cost;
>
> The fifth tab "revised Table 3-4" provides export sales to China, which is used as the basis to determine the CIF price and the ex factory price (the net price after adjustments); and
>
> The sixth tab "calculation of Dumping Margin" provides the calculation of the overall average margin of dumping.
>
> ...
>
> [T]he first five tabs of the spreadsheet provided in Exhibit CHN-45 ... were unchanged from the original investigation; only tab six − the calculation of the dumping margin − changed in the re-investigation.[612]

7.387. China also submitted Exhibit CHN-46, which it describes as a narrative to Exhibit CHN-45 that MOFCOM provided to Pilgrim's Pride. Exhibit CHN-46 expressly refers to Pilgrim's Pride, but it is undated and the relationship to Exhibit CHN-45 is, on its face, not entirely clear. Exhibit CHN-46 may, however, be understood to refer to Exhibit CHN-45 and to provide explanations in respect of the data and the calculations in Exhibit CHN-45.[613]

7.388. The United States does not contest that Exhibits CHN-45 and CHN-46 were provided to Pilgrim's Pride as part of the disclosure on 16 May 2014.[614] "[W]hile the United States is not in a position to comment on what underlying data might be in Exhibit CHN-45 were it not redacted, the United States" challenges the cogency and reliability of Exhibit CHN-45 by noting that:

a. "on its face it does not appear to be the unmodified spreadsheet from the original investigation; it appears to be the spreadsheet *for the reinvestigation*"[615];

b. "China has not explained how this table would allow Pilgrim's to reconstruct its original rate of 53.4 percent − *and what has changed since*"[616]; and

c. "[in respect of Exhibits CHN-45 and CHN-46, China did not] identify[] the precise language or figures in those documents that constitute the changes between the margin calculated in the original investigation and in the reinvestigation".[617]

China responds that although prepared for the reinvestigation[618], this exhibit contains all the original data.

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[612] China's responses to Panel question No. 16(a), para. 29, and No. 16(c), para. 39. (emphasis added)

[613] For example, Exhibit CHN-46 mentions "modified Form 3-4" and "Form 4-2" which appears to refer to what China described as the third ("table 4-2") and fifth tab ("revised table 3-4") in Exhibit CHN-45.

[614] In its general comments on China's response to the Panel's questions (paras. 2-4), the United States raised concerns regarding the late submission of exhibits in China's response to the Panel's questions, including Exhibits CHN-45 and CHN-46. The United States argued that these exhibits were submitted outside of the deadlines prescribed by the Panel's Working Procedures. We have sympathy for the view that China could have initially provided evidence that did not raise the concerns that we identified in respect of Exhibit CHN-8. In response to our request to address these concerns, China submitted CHN-45 and CHN-46. These exhibits were therefore properly submitted in accordance with paragraph 8 of our Working Procedures as "evidence necessary for purposes of ... answers to questions".

[615] United States' comments on China's response to Panel question No. 16(a), para. 30. (emphasis original)

[616] United States' comments on China's response to Panel question No. 16(a), para. 30. (emphasis original)

[617] United States' comments on China's response to Panel question No. 16(b), para. 34.

[618] The United States argues that Exhibit CHN-45 is, in China's own submission, a public summary of the original data and that a summary cannot satisfy the disclosure obligation of Article 6.9. (United States' comments on China's response to Panel question No. 16(c), para. 35). The US statement mischaracterizes Exhibit CHN-45. During the substantive meeting and in its response to Panel question No. 16(a), paras. 27-28, China explained that Exhibit CHN-45 is a public summary of the underlying disclosure prepared for the purpose of this dispute.

7.389. The US claim here is that MOFCOM failed to disclose the essential facts, in this case, the original data. Article 6.9 is concerned with the disclosure of essential facts. It does not prescribe the format in which the disclosure should be made. The format of this disclosure, whether it is in a spreadsheet prepared for the reinvestigation containing the original data, or it is a spreadsheet from the original investigation containing the original data, is not relevant for this claim. What is pertinent is the substance of the disclosure, not its format.

7.390. Further, the United States claims that Exhibit CHN-45 does not "allow Pilgrim's to reconstruct its original rate of 53.4 per cent" and to identify "what has changed since". It also argues that China did not point to where the changes are set out in Exhibits CHN-45 and CHN-46. Exhibit CHN-46 on its face appears to explain the error in the equation for the dumping margin that MOFCOM corrected, which resulted in a change in the dumping margin.[619] It describes the equation that was used in the original determination, how it was corrected, and the corrected equation that was used during the reinvestigation. The United States has not questioned the authenticity of Exhibit CHN-46, challenged its probative value or otherwise addressed its content. In particular, the United States did not demonstrate that the specific explanations in CHN-46 in respect of the changes to the dumping margin equation, in connection with the dumping margin calculation disclosed in "tab six" of Exhibit CHN-45, were insufficient to allow Pilgrim's Pride to understand the changes and to ascertain their accuracy.

7.391. The United States does not contest that an unredacted version of Exhibit CHN-45 as well as Exhibit CHN-46 were disclosed to Pilgrim's Pride on 16 May 2014. We find therefore that, as a matter of fact, Pilgrim's Pride was in possession of the unredacted data set out in the first five "tabs" of Exhibit CHN-45 and the explanations in Exhibit CHN-46. Since China's first written submission, the parties made arguments and disagreed in respect of what MOFCOM disclosed to Pilgrim's Pride on 16 May 2014. This factual issue was also amply discussed during the substantive meeting of the Panel with the parties. At no point did the United States offer any evidence to support its allegation that the original data had not been disclosed, nor did it provide any evidence as to what was, in its view, disclosed to Pilgrim's Pride on 16 May 2014. In response to China's evidence, the United States also declined the opportunity to comment on whether Exhibit CHN-45 included the original data on the basis of extensive redactions for confidentiality purposes. As noted, we are sympathetic to the challenges inherent in establishing a claim of lack of disclosure.[620] However, it is ultimately the responsibility of the complainant to establish its case. In this proceeding, the allegation is not one of complete absence of disclosure: rather, the United States argues that MOFCOM disclosed the new, but not the original data. In such circumstances, the United States could have sought to establish the alleged omission by demonstrating what was provided and how that disclosure did not encompass what should, in its view, have also been disclosed. Moreover, it would have been open to the United States to refer to Pilgrim's Pride and verify the content of Exhibit CHN-45. The United States did not do so.

7.392. In the light of the above and based on the totality of the evidence before us and the arguments developed by the parties, we draw the following conclusions:

a. Considering Exhibit CHN-45 in the light of Exhibit CHN-46 suggests that at least part of the data in Exhibit CHN-45, namely the data in "table 4-2" and "revised Table 3-4", were original data.[621] The evidence therefore does not support the US assertion that MOFCOM did not provide any original data at all.

[619] Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), pp. 6-7.

[620] The United States relies on our findings in the preliminary ruling in the context of Articles 6.1 and 6.4 of the Anti-Dumping Agreement. In that context, we found that a complainant may not be expected to pin-point with any precision in a panel request information it does not have and might not even know about. The situation under this Article 6.9 claim is not, however, "analogous". (United States' comments on China's response to Panel question No. 16(b), para. 33). Contrary to the US assertion, the evidence suggests that Pilgrim's Pride had ascertained, and even commented on, the error and correction at issue here, see para. 7.392 below.

[621] Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), p. 2. See also Redacted Version of MOFCOM Response to Pilgrim's Pride Comments on Initial Disclosure (17 June 2014), (Exhibit CHN-47), p. 2 ("The data used in the disclosure of re-investigation was from the data submitted by your company. For example, the export price was based on the Table 3-4 submitted by you after the verification.")

b. The parties agree that MOFCOM made a disclosure to Pilgrim's Pride on 16 May 2014 and that Pilgrim's Pride provided comments. According to the uncontradicted evidence on the record, Pilgrim's Pride appears to have based its comments on original and new data and to have addressed in substance the change in the dumping margin equation as identified in Exhibit CHN-46.[622] The only documents that the Panel received from the parties to consider as the alleged "disclosure" in question were, apart from Exhibit CHN-8, Exhibits CHN-45 and CHN-46. In the absence of any evidence and arguments to the contrary, it appears that Pilgrim's Pride made its disclosure comments, including its comments on the correction of the calculation error, on the basis of the (unredacted) information conveyed through Exhibits CHN-45 and CHN-46. The evidence therefore does not support the US allegation that Pilgrim's Pride did not have the data from the original investigation and could not defend its interests because it did not know the alleged error that MOFCOM corrected in the reinvestigation.

7.393. On balance, we find that the United States has not established its claim in respect of the allegation that MOFCOM did not provide the original data to Pilgrim's Pride.[623]

7.394. Finally, we understand the US position to be that the disclosure on 16 May 2014 occurred too late for Pilgrim's Pride to defend its interests.[624] Beyond mere assertion, the United States does not explain how the disclosure on 16 May 2014 was not made in sufficient time for Pilgrim's Pride to defend its interests. The United States makes no arguments as to what would have been "early enough" or what would have been "adequate time" for Pilgrim's Pride to defend itself.[625] The fact that the disclosure occurred "at the tail end of the reinvestigation" does not in itself mean that Pilgrim's Pride did not have sufficient time to defend itself.[626] In fact, we recall that Pilgrim's Pride commented on the disclosure, including on the calculation error and the corrections.[627] We therefore have no basis to conclude that the disclosure on 16 May 2014 did not take place in sufficient time for Pilgrim's Pride to defend its interest.

7.395. As a consequence, we find that the United States has not established that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM did not disclose the original data to Pilgrim's Pride.

7.9.3.2.3 Disclosure obligation in respect of the data of Keystone

7.396. The United States claims that MOFCOM did not disclose the data from the original investigation underlying the original dumping determination and the data from the reinvestigation underlying the dumping redetermination (the "original" data and the "new" data, respectively) to Keystone during the reinvestigation, in violation of Article 6.9.[628]

[622] Comments of Pilgrim's Pride on Disclosure of the Final Ruling of the Reinvestigation (28 May 2014), (Exhibit USA-27 (BCI)); Redacted Version of MOFCOM Response to Pilgrim's Pride Comments on Initial Disclosure (17 June 2014), (Exhibit CHN-47).

[623] This finding is entirely contingent on the facts of this case. In particular, we do not mean to suggest that a complainant has to demonstrate, by reference to the investigation's record, that an interested party requested to see the information at issue during the investigation, or made a procedural objection in this respect, in order to establish a case of lack of disclosure.

[624] United States' second written submission, paras. 70, 71, and 73.

[625] United States' second written submission, para. 73.

[626] United States' second written submission, para. 70.

[627] See above fn 622.

[628] The United States at no point explained how or why the "original" data were essential facts that formed the basis for the decision to impose anti-dumping duties in the reinvestigation. Unlike the situation of Pilgrim's Pride, where the United States argues that the "original" data were necessary for Pilgrim's Pride to understand the corrected calculations and thus to defend its interests in the reinvestigation, for Keystone, the United States has not pointed to any link between the "original" data and the determination in the reinvestigation. Rather, we understand the United States to challenge the alleged lack of implementation of the DSB's recommendations and rulings in respect of the "original" data: "The Panel in the original dispute previously found that China acted inconsistently with its WTO obligations by failing to disclose this information from the original investigation. … Despite this finding from the Panel, MOFCOM has once again failed to disclose this information to Keystone, in contravention of Article 6.9." (United States' response to Panel question No. 22, paras. 41-42).

7.397. The following facts are not in dispute between the parties:

a. During the original investigation, Keystone was fully cooperating and provided data to MOFCOM, which MOFCOM used in making its determination of dumping. During the reinvestigation, MOFCOM sought to reinvestigate Keystone.

b. MOFCOM issued a questionnaire to Keystone but Keystone did not respond and did not cooperate throughout the reinvestigation.[629]

c. MOFCOM, as a result, used facts available in respect of two items of information in establishing a dumping margin for Keystone.[630]

d. In respect of other matters, MOFCOM used the information submitted by Keystone during the original investigation.

e. During the reinvestigation, MOFCOM did not disclose any Keystone-confidential information, including the data at issue, directly to Keystone or to any agent allegedly representing Keystone.

f. MOFCOM disclosed non-confidential information in respect of Keystone through a public disclosure.[631]

7.398. As well, there is no disagreement between the parties that Article 6.9 applies to non-cooperating exporters, and thus, in the context of the reinvestigation, to Keystone.[632] This is consistent with our findings in the original report applying the disclosure requirement to the essential facts in respect of the "residual" rate for "unknown" exporters established using facts available.[633]

7.399. China argues, however, that the facts that are "essential", and that therefore must be disclosed, differ as between cooperating interested parties, on the one hand, and non-cooperating interested parties, such as Keystone, on the other.[634] In respect of the latter, MOFCOM only needed to disclose the following essential facts: (a) the basis for resort to facts available; (b) the requested information; and (c) the facts used to replace the missing information.[635] MOFCOM disclosed all these essential facts through a number of publicly available documents.[636]

7.400. We see no basis in the text or context of Article 6.9 for distinguishing between cooperating and non-cooperating interested parties for purposes of the disclosure requirement.[637] Article 6.9 refers to "all interested parties" without making any distinctions among them. The facts that are "essential" may vary from interested party to interested party, but it is not the characterization of the particular interested party as cooperating or not that determines whether facts are "essential", but the relevance of those facts to the determinations to be made by the investigating authority. China refers to the use of the words "whenever practicable" in Article 6.4 and the disciplines on use of facts available under Article 6.8 to argue that Article 6.9 has different obligations in respect of cooperating and non-cooperating parties.[638] Article 6.9 does not contain the words "whenever practicable", nor does it refer to either Article 6.4 or 6.8. So the relevance of the words "whenever

[629] United States' second written submission, fn 93.
[630] These two items of information were "[t]he quantity and cost of free products listed in 'other products'" and "processing costs". (China's response to Panel question No. 18, para. 45).
[631] Disclosure of Essential Facts upon Which the Re-determination in DS 427 of Dumping and Subsidy on Broiler Products was Made (29 May 2014), (Exhibit CHN-33 (translated version)); Redacted Version of Disclosure Narrative Provided to Keystone (29 May 2014), (Exhibit CHN-48).
[632] The parties do however disagree as to which essential facts an investigating authority must disclose to a non-cooperating interested party, see below para. 7.399.
[633] Panel Report, *China – Broiler Products*, paras. 7.314-7.323.
[634] China's second written submission, para. 119; response to Panel question No. 17, paras. 41-43.
[635] China's first written submission, paras. 112 and 121; second written submission, paras. 119-120.
[636] China's first written submission, paras. 118-120; second written submission, paras. 120-122.
[637] But see China's response to Panel question No. 17, paras. 42-43.
[638] China's response to Panel question No. 17, para. 43.

practicable", found only in Article 6.4, and the disciplines on facts available specifically addressed in Article 6.8 to a Member's obligations under Article 6.9 is not self-evident.[639]

7.401. Regarding the distinction between cooperating and non-cooperating interested parties, China also relies on our findings in the original report concerning the disclosure of essential facts pertaining to the "residual" dumping margin for "unknown" exporters based on facts available.[640] We do not share China's understanding of our findings. We did not limit the universe of facts to be disclosed when using facts available to the matters China refers to above at paragraph 7.399. We specifically found that Article 6.9 required disclosure of the facts that are "used to replace the missing information".[641] These are clearly any facts that are significant in reaching the decision to impose duties and, therefore, constitute essential facts. Thus, we clarified the notion of essential facts in the case of use of facts available by also requiring the disclosure of the reasons for resort to facts available and the information that was requested from the interested party. In any event, our findings concerned the particular "essential facts" that the investigating authority arrived at through the use of facts available; they did not concern the disclosure of other essential facts to a non-cooperating interested party that are not based on or themselves facts available. In this instance, MOFCOM used facts available only to replace two particular items of information. For the rest, it used Keystone's information already on the record from the original investigation. Our findings in the original dispute could therefore only be relevant to the two specific items of information in respect of which MOFCOM used facts available in the reinvestigation, not to the rest of Keystone's essential facts.

7.402. China argues that it disclosed the essential facts through a public disclosure of non-confidential information of Keystone.[642] In this context, China, however, refers to the disclosure of information that is not the subject matter of the US claim. The US claim is not about the disclosure of non-confidential data through publicly available documents. Rather, it relates to Keystone's confidential data that the United States argues MOFCOM was required to make available to Keystone. In respect of the confidential information, China acknowledges that MOFCOM would have disclosed these confidential data to Keystone or its legal agents as essential facts had Keystone responded or provided a power of attorney authorizing its legal agents. According to China:

a. MOFCOM was required to maintain confidentiality of the data at issue;

b. Keystone did not respond to MOFCOM's questionnaire;

c. Keystone did not have an authorized legal agent; and

d. MOFCOM was legally precluded from making the required disclosure.

7.403. The United States does not argue that MOFCOM was under a positive obligation to actively seek out Keystone and inform it of the data at issue. Rather, the US challenge concentrates on the fact that MOFCOM did not disclose the information to Keystone's putative legal agents on the basis that it could not confirm that they were authorized to receive confidential data on behalf of Keystone.

7.404. The issue for us in this dispute therefore concerns MOFCOM's obligation to "inform" Keystone of the essential facts in the circumstances of this case. Below, we set out the sequence of events as we understand it:

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[639] In any event, nothing in the phrase "whenever practicable" as used in Article 6.4 with respect to the obligation for investigating authorities to provide opportunities to all interested parties to see information suggests such that it is intended to distinguish between cooperating and non-cooperating interested parties even in the context of Article 6.4 itself. Similarly, we fail to see, and China has not explained, how the fact that Article 6.8 establishes the conditions for use of facts available supports distinguishing between cooperating and non-cooperating interested parties in the context of Article 6.9. We recognize that paragraph 7 of Annex II of the Anti-Dumping Agreement does refer to an interested party that "does not cooperate" in the context of the use of facts available, but nothing in that provision has any bearing on the obligation to disclose essential facts pursuant to Article 6.9.

[640] Panel Report, *China – Broiler Products*, para. 7.317; see above, para. 7.368.

[641] Panel Report, *China – Broiler Products*, para. 7.317. (emphasis added)

[642] China's second written submission, para. 122; responses to Panel question No. 18, para. 46, and No. 19(c)(ii), para. 57.

a. On 7 January 2014, MOFCOM issued an anti-dumping questionnaire to Keystone in the reinvestigation.[643] Keystone did not respond.

b. On 16 May 2014, MOFCOM sent a letter to the US Embassy in Beijing stating:

> As Keystone Foods LLC has failed to submit its questionnaire response for the reinvestigation and also failed to participate in other dumping and subsidy reinvestigation procedures, the investigating authority is unable to disclose it the basic facts supporting the determination regarding the reinvestigation. According to the way of contact reported by the company in the original questionnaire response, we have sent a letter about this to the company. In order to ensure the company's right of comments on the disclosure, we request you to assist in notifying the company to contact with the investigating authority as soon as possible.[644]

c. On 20 May 2014, the US Embassy forwarded a "memorandum" from the US law firm Steptoe & Johnson LLP (Steptoe) that had represented Keystone in the original investigation purporting to give authorization for MOFCOM to serve any disclosure to Thomas J. Trendl at Steptoe or Scott Lindsay at the US Embassy in Beijing:

> With explicit authorization and approval from Keystone Foods, by this memorandum, Keystone Foods notifies MOFCOM that it may serve any and all disclosure documents in this matter on Thomas J. Trendl, Partner in Steptoe & Johnson's Washington, D.C. office or Scott Lindsay, Enforcement & Compliance, US Embassy. Their respective full contact information is provided below. Please contact Thomas J. Trendl should you have any questions.[645]

d. On 22 May 2014, MOFCOM responded to the memorandum by letter to the US Embassy, stating that:

> [T]he memorandum did not include Keystone Foods' power of attorney authorizing the law firm to represent the company in responding the re-investigation; nor did the memorandum include Keystone Foods' power of attorney authorizing the lawyers of the law firm to serve as the legal counsels of the company or authorizing Mr. Scott Lindsay to receive any disclosure documents on behalf of the company.
>
> To protect the business confidential information of the company, according to the relevant provision of the *Anti-dumping Regulations of the*

[643] According to China, MOFCOM sent the reinvestigation questionnaire to the Chinese law firm Jincheng Tongda & Neal (JT&N) that had represented Keystone during the original investigation. (China's response to Panel question No. 19(a), paras. 47-48 (referring to Redetermination, (Exhibit CHN-1 (translated version)), pp. 5 and 7)). China asserts that JT&N transmitted the questionnaire to Keystone, confirmed to MOFCOM that Keystone had received it and told MOFCOM that Keystone would not respond to it. (Responses to Panel question No. 19(b), para. 50, and No. 19(c)(ii), para. 55; see also the acknowledgement of receipt of Keystone's questionnaire signed by JT&N at Registration of Receipt of initial questionnaire by three law firms, (Exhibit CHN-50)). At the same time, China asserts that "JT&N confirmed that it no longer represented Keystone in the re-investigation". (Response to Panel question No. 19(b), para. 50; see also Email from Mr Fu Xin of JT&N dated 6 June 2017 to Mr Yu Jinbao on issues concerning the reinvestigation, (Exhibit CHN-57), apparently for purposes of this Panel proceeding, stating that JT&N was not authorized to act for Keystone during the reinvestigation). The United States, in turn, presented an alleged authorization by Keystone of Mr Fu at JT&N to receive disclosure documents from MOFCOM during the reinvestigation. (Memorandum from Keystone dated 21 May 2014 on service of Keystone-specific disclosure documents, (Exhibit USA-35); see below China's procedural objection and our assessment of this exhibit's probative value at paras. 7.410-7.413). Be that as it may, however, the United States' acknowledges that "[i]n the reinvestigation, MOFCOM sent a questionnaire to Keystone … but Keystone declined to cooperate." (United States' second written submission, fn 93).

[644] Letter from MOFCOM dated 16 May 2014 on disclosure of the redetermination, (Exhibit USA-5 (translated version)), p. 2; Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

[645] Memorandum from Keystone dated 20 May 2014 on service of Keystone-specific disclosure documents, (Exhibits CHN-10/USA-29 (translated version)). See also Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

> *People's Republic of China*, without the company's explicit authorization, the Investigating Authority is unable to provide the disclosure relating to the company to any third party. Given the tight schedule of the investigation, we ask that Keystone Foods be noted the requirement on comment period.[646]

e. In a "memorandum" dated 21 May 2014, signed by Crystal Graham, vice president finance of Keystone, and, according to the United States, faxed to MOFCOM on 29 May 2014, Keystone:

> [N]otifies and authorizes MOFCOM that it may serve any and all disclosure documents in this matter to Steptoe & Johnson, LLP and Jincheng Tongda & Neal ("JT&N"). Their respective full contact information is provided below.[647]

The contact information is given in respect of Eric C. Emerson at Steptoe's Beijing office and Fu Xin at JT&N.

f. On 29 May 2014, MOFCOM made a public disclosure in respect of Keystone's non-confidential information.[648]

7.405. At issue between the parties is whether MOFCOM violated Article 6.9 because it failed to disclose the confidential data in question to any agent allegedly representing Keystone, and in particular Steptoe. According to China, MOFCOM did not receive the additional documentation it was seeking as proof of appointment of agent and for that reason alone MOFCOM was not in a position to disclose Keystone's confidential data to an unauthorized third party.[649] The United States argues that Keystone had provided proof of authorization to MOFCOM so that it should have disclosed the data at issue to Steptoe.

7.406. MOFCOM's request for proof of appointment as agent was made, according to China, pursuant to an existing set of regulations. The United States does not question the fact of the legal requirement. It does not argue that such a legal requirement in itself leads to a biased or unobjective outcome and it does not allege that in this instance MOFCOM applied the regulations in a biased manner or unobjectively. Rather, it appears to argue that in objectively abiding by an otherwise unobjectionable legal requirement and not disclosing Keystone's information to a third party, MOFCOM acted inconsistently with Article 6.9.

7.407. The issue for us to resolve therefore is whether Keystone provided proof of authorization of its purported agent, in particular its legal counsel, to MOFCOM.

7.408. The United States relies on the "memorandum" of 20 May 2014. On at least three occasions in this proceeding, it characterized this document as a "power of attorney"; it also referred to it as an "authorization".[650] There is no evidence before us as to what constitutes a "power of attorney" or an "authorization" in US or Chinese law. But it is not necessary for us to

[646] Letter from MOFCOM dated 22 May 2014 to US Embassy on authorisation on the reinvestigation disclosure of Keystone, (Exhibit CHN-11 (translated version)) (emphasis original); see also Letter from MOFCOM dated 22 May 2014 to the US Embassy on the Keystone-specific disclosure authorisation, (Exhibit USA-30 (translated version)), relating to the same document.

[647] Memorandum from Keystone dated 21 May 2014 on service of Keystone-specific disclosure documents, (Exhibit USA-35); see below China's procedural objection and our assessment of this exhibit's probative value at paras. 7.410-7.413.

[648] Disclosure of Essential Facts upon Which the Re-determination in DS 427 of Dumping and Subsidy on Broiler Products was Made (29 May 2014), (Exhibit CHN-33 (translated version)); Redacted Version of Disclosure Narrative Provided to Keystone (29 May 2014), (Exhibit CHN-48).

[649] We do not agree with the United States' view that "China's argument that the purported lack of authorization somehow prevented disclosure … is simply a *post hoc* excuse." (Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, para. 3). The United States' own Exhibits USA-9, p. 7 and USA-30 demonstrate that the lack of authorization was indeed MOFCOM's concern at the time, as acknowledged by the United States in its second written submission, para. 87.

[650] United States' second written submission, para. 87; opening statement at the meeting of the Panel, para. 67; and response to Panel question No. 20, para. 38.

resolve that question. The "memorandum" of 20 May 2014 is a letter signed by Thomas J. Trendl at Steptoe stating that MOFCOM may serve Keystone's disclosure to him or Scott Lindsay at the US Embassy. There is a reference in the "memorandum" to an "authorization" by Keystone, but it is not accompanied or followed by Keystone's authorization of Mr Trendl and/or Mr Lindsay. As a matter of fact, we find that mere assertion by legal counsel of agency is not proof of an agency relationship.[651] As a matter of law, we find that MOFCOM did not act unreasonably in not accepting as proof of an agency relationship a mere assertion by the alleged agent itself.

7.409. In its letter of 22 May 2014 to the US Embassy, MOFCOM communicated its concern about lack of authorization to disclose Keystone's confidential information, indicated that in these circumstances it could not disclose the confidential information and urged Keystone to respond. We have no reason to believe that this letter did not reach Keystone[652], nor does the United States argue that it did not. Rather, the United States acknowledges that, "to [its] knowledge, Keystone did not respond to MOFCOM's letter".[653]

7.410. The United States also relies on a "memorandum" from Keystone, dated 21 May 2014 and allegedly faxed to MOFCOM on 29 May 2014, authorizing Eric C. Emerson at Steptoe's Beijing office and Fu Xin at JT&N to receive Keystone's disclosure. The United States submitted this "memorandum" as Exhibit USA-35 in its comments on China's responses to the Panel's written questions.[654] Relying on this exhibit, the United States asserts that it "has reason to believe that the statements proffered by China [in respect of the lack of proof of authorization of Keystone's purported representatives] are not completely accurate".[655] China objects to the submission of Exhibit USA-35 arguing that under the Panel's Working Procedures all evidence should have been submitted by the substantive meeting of the Panel with the parties and that the United States did not demonstrate any "good cause" for a late submission.[656]

7.411. We recall the arguments of the United States about the late submission of evidence by China and in particular that "China's provision of exhibits at this late stage raise concerns relating to procedural fairness".[657] The Panel's Working Procedures in this proceeding provide that:

> Each party shall submit all factual evidence to the Panel no later than during the 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.[658]

7.412. In this instance, the position of China with respect to the issue of the (lack of) authorization of Keystone's purported agents has been clear since 2014 and, in the context of this dispute, at least since the first written submission of China. Moreover, we put a specific question on this very subject to the United States both orally at the substantive meeting and subsequently in writing. The United States has had three years and multiple opportunities to clarify this specific point. It is therefore not entirely clear to us why the United States would be seeking to "confirm[] China's account" only at a late stage of the proceedings and, allegedly, only in respect of China's responses to our questions.[659] The United States even acknowledges that it submitted the exhibit

[651] The United States emphasizes the request in the "memorandum" to "contact 'Thomas J. Trendl should you [MOFCOM] have any questions'". (Response to Panel question No. 21, para. 39; Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, fn 4). But neither this request, nor MOFCOM's alleged failure to contact Mr Trendl, detract from our conclusion that mere assertion by legal counsel of agency is not proof of an agency relationship.

[652] The exchange of communications from 16 and 20 May 2014 supports the conclusion that Keystone also received the letter of 22 May 2014.

[653] United States' response to Panel question No. 21, para. 39.

[654] In an e-mail of 25 May 2017 to the Chairperson of the Panel, the United States clarified that the United States relies on Exhibit USA-35 to support the assertions made at paragraph 38 of its comments on China's response to Panel question No. 19.

[655] United States' comments on China's response to Panel question No. 19, para. 38.

[656] Letter from China dated 12 June 2017 to the Chairperson of the Panel, pp. 1-3.

[657] United States' general comments on China's response to Panel questions, paras. 1-4.

[658] Working Procedures of the Panel (adopted on 9 November 2016), para. 8.

[659] United States' comments on China's response to Panel question No. 19, para. 38; Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, paras. 6-7.

to us in order to address an assertion that China made in its second written submission.[660] We see no reason why the United States should be considered to have had, and the United States neither asserted nor demonstrated that it had, "good cause" to adduce evidence in its comments on China's responses to the Panel's written questions in order to rebut an assertion China had already made, by the United States' own admission, in the second written submission.

7.413. Be that as it may, it is not necessary for us to make a finding on whether we may or should accept the exhibit, because we do not in any event find it persuasive. As the United States itself observes in respect of China's arguments relating to MOFCOM's online index[661], there are no time-stamps or other records indicating when the "memorandum" was in fact faxed (or otherwise sent) to MOFCOM[662] – and here, we are not dealing with an internal receipt but an alleged communication between an interested party and the investigating authority. The exhibit does not mention a number to which it could have been faxed or sent. The United States argues that it has not found a record of MOFCOM's response[663]; but there is also no record of follow-up by the US Counsel or indeed by the US Government asserting to MOFCOM that the condition for disclosure had been met. In fact, and in contrast to the "memorandum" of 20 May 2014, the record of the reinvestigation does not mention the "memorandum" of 21 May 2014 allegedly faxed to MOFCOM on 29 May 2014.[664] We also note that the evidence demonstrates that on 16 and 22 May 2014, MOFCOM took repeated action to contact Keystone in respect of the disclosure. In its letter of 22 May 2014, it specifically responded to the "memorandum" of 20 May 2014 and addressed the lack of authorization of Keystone's purported agent. Against this background, MOFCOM's silence, after reaching out to Keystone on this very issue twice, in respect of an authorization allegedly provided to it on 29 May 2014 and the absence of follow up by Keystone, its counsel or the US Embassy is telling, as is the fact that MOFCOM listed the "memorandum" of 20 May 2014 in its records but left out any reference to the "memorandum" of 21 May 2014. For these reasons, we are not persuaded that Exhibit USA-35 establishes that Keystone did, in fact, provide MOFCOM with proof of authorization of its agents.

7.414. In the light of the above, we find as a matter of fact that:

a. MOFCOM disclosed non-confidential information in respect of Keystone;

b. MOFCOM did not disclose confidential information in respect of Keystone; and

c. when approached by certain persons purporting to be agents of Keystone for the purposes of disclosure, MOFCOM sought proof of authorization of agency.

7.415. In our view, it was not unreasonable for MOFCOM to consider that the memorandum of 20 May 2014 by Steptoe did not amount to such authorization. We further find that the United States has not established that Keystone provided such proof of authorization to MOFCOM at another time in another document.

7.416. In these circumstances, we find that MOFCOM did not act in a biased or unobjective manner in finding that the purported agents of Keystone were not authorized to receive disclosure of Keystone's confidential data at issue. Accordingly, we conclude that the United States has not demonstrated that MOFCOM's admitted failure to inform Keystone of the essential facts at issue was inconsistent with Article 6.9 of the Anti-Dumping Agreement.

7.9.4 Conclusion

7.417. We find that the United States has not established that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in respect of the failure to disclose data and

[660] At paragraph 2 of its letter of 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, the United States argues that "[t]he exhibit rebuts a specific assertion made by China – that MOFCOM lacked an authorization signed by Keystone Foods" and in footnote 2 to this statement it refers to "*e.g.*, China, Second Written Submission, para. 114 ('No other evidence was submitted that Keystone in fact actually authorized Steptoe & Johnson to act on its behalf, and neither Keystone nor the firm took any additional steps nor filed any additional information or explanation.')" (emphasis added)

[661] United States' comments on China's response to Panel question No. 11, para. 24.

[662] China disputes that MOFCOM had received the alleged fax. (Letter from China dated 12 June 2017 to the Chairperson of the Panel, p. 2).

[663] United States' comments on China's response to Panel question No. 19, para. 39.

[664] Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

calculations from the original investigation and/or the reinvestigation underlying the dumping margins for Pilgrim's Pride and Keystone.

7.10 Article 9.4(i) of the Anti-Dumping Agreement: maximum amount of anti-dumping duty for imports from exporters not individually examined

7.418. The United States alleges that MOFCOM acted inconsistently with Article 9.4(i) of the Anti-Dumping Agreement because, in the redetermination, it set the "residual" rate[665] for unknown exporters or producers[666] in excess of the weighted average margin of dumping established with respect to exporters individually examined under Article 6.10 of the Anti-Dumping Agreement.

7.10.1 Findings of the Panel in the original report

7.419. In the original report, we made findings regarding the use of facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement in establishing the "residual" rate.[667] In the original investigation, MOFCOM had used facts available to establish a "residual" rate of 105.4% for US exporters that had not registered with MOFCOM in response to the Notice of Initiation and, as a consequence, were considered unknown, and also did not file a questionnaire response.[668]

7.420. We found that MOFCOM's Notice of Initiation and registration requirement were sufficient to inform foreign exporters of the information required of them and of the possible use of facts available if they did not supply that information to MOFCOM within a reasonable time.[669] We thus considered that MOFCOM had fulfilled the conditions set forth in paragraph 1 of Annex II, allowing it to resort to facts available in establishing an anti-dumping duty rate for exporters that did not register with MOFCOM and provide requested information.[670]

7.421. Nevertheless, we found that MOFCOM acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in the manner in which it used facts available in determining that rate.[671] We found that the determination failed to sufficiently explain which facts on the record MOFCOM used to calculate the "residual" rate.

7.10.2 MOFCOM's findings in the redetermination

7.422. On 25 December 2013, MOFCOM issued a Notice of Initiation in respect of the reinvestigation.[672] Unlike in the original investigation, this Notice of Initiation did not set forth a requirement for interested parties to register or specify information that would be required.

7.423. In the redetermination, MOFCOM established anti-dumping duty rates for three groups of exporters:

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[665] In both its original investigation and the reinvestigation, in addition to determining individual rates for certain exporters individually examined, MOFCOM established a separate "all others" rate in accordance with Article 9.4 of the Anti-Dumping Agreement which it applied to exporters that had registered following the Notice of Initiation in the original investigation, and a second "all others" rate, based on facts available, which applied to any foreign exporter or producer that had not registered in the original investigation. While MOFCOM, and the parties in this dispute, refer to this second rate as an "all others" rate, in order to avoid the confusion which may arise from referring to two different anti-dumping duty rates established on different bases and applied to different categories of foreign exporters or producers, we will, as some other panels have, refer to this second "all others" rate as a "residual" rate. We note that the Anti-Dumping Agreement does not refer to either an "all others" rate or a "residual" rate, and thus these terms have no legal significance. We use them in this report in order to more clearly distinguish the rate applicable to exporters or producers that are not individually examined pursuant to Article 6.10 of the Anti-Dumping Agreement and for whom a separate anti-dumping duty rate is established under Article 9.4 ("all others" rate) from the rate that is at issue here ("residual" rate).

[666] References to "exporters" shall be understood to include foreign producers in this context.

[667] Panel Report, *China – Broiler Products*, paras. 7.298-7.313.

[668] Panel Report, *China – Broiler Products*, paras. 7.276 and 7.278.

[669] Panel Report, *China – Broiler Products*, para. 7.306.

[670] Panel Report, *China – Broiler Products*, para. 7.307.

[671] Panel Report, *China – Broiler Products*, paras. 7.308-7.313.

[672] Announcement No. 88, (Exhibit USA-1 (translated version)).

a. individual dumping margins for each examined exporter[673];

b. a single dumping margin for other exporters which had registered but were not individually examined in the original investigation, based on the weighted average of the margins of the examined exporters[674]; and

c. a single "residual" anti-dumping rate for all other US exporters.[675]

7.424. This latter "residual" rate applied to unknown exporters that "did not register for participating in the [original] investigation".[676] In the reinvestigation, MOFCOM did not seek out or ask these exporters to cooperate, and as noted, there was no provision for registration with MOFCOM in the context of the reinvestigation. In the redetermination, MOFCOM indicated that:

> Regarding all other U.S. companies who did not respond to, nor did they submit [*sic*] the questionnaire responses, in accordance with Article 21 of the *Anti-Dumping Regulation*, the Investigating Authority decides to use the facts available and the best information available to determine their normal value and export price.[677]

MOFCOM explained that it had decided "to use the evidence and materials of Pilgrim's Pride Corporation to determine the normal value, export price, price adjustment items and CIF prices for all other U.S. companies."[678] MOFCOM established the "residual" rate based on the rate determined for Pilgrim's Pride, 73.8%, the highest rate found for any of the examined exporters.

7.10.3 Main arguments of the parties

7.10.3.1 United States

7.425. Article 9.4(i) imposes a ceiling on the "residual" rate based on facts available in certain circumstances. This does not mean that Article 9.4 imposes a general cap on rates determined on the basis of Article 6.8; and it does not mean that Article 9.4 applies to unknown exporters that do not come forward when an investigating authority requires registration to identify and select exporters for the limited investigation.[679] Rather, on the facts of this case, the "residual" rate in the redetermination was in excess of the ceiling established by Article 9.4(i).[680]

7.426. In the original investigation, MOFCOM required foreign exporters to register in order to identify all companies from among which MOFCOM could select for limited examination. But in the reinvestigation MOFCOM did not provide for a similar process of registration.[681] MOFCOM had already limited the investigation during the original investigation to certain exporters and did not reopen the selection of the exporters for examination during the reinvestigation. Unlike in the original investigation, MOFCOM did not invite any exporters to register and cooperate.[682] In these

[673] Redetermination, (Exhibit CHN-1 (translated version)), appendix II, p. 89.
[674] Redetermination, (Exhibit CHN-1 (translated version)), p. 56 and appendix II, pp. 89-90.
[675] Redetermination, (Exhibit CHN-1 (translated version)), p. 56 and appendix II, p. 90.
[676] Redetermination, (Exhibit CHN-1 (translated version)), p. 57.
[677] Redetermination, (Exhibit CHN-1 (translated version)), p. 56. As in the original investigation (Panel Report, *China – Broiler Products*, para. 7.274) the examined companies in the reinvestigation were Keystone, Tyson and Pilgrim's Pride, although the latter was not reinvestigated during the reinvestigation. Questionnaires were only sent to Keystone and Tyson. (Redetermination, (Exhibit CHN-1 (translated version)), p. 5). Consequently, and as in the original dispute, the use of facts available for the "all others" rate did not attach to an alleged failure of "all other" US companies to submit questionnaire responses, but to the failure to register for the investigation.
[678] Redetermination, (Exhibit CHN-1 (translated version)), p. 57.
[679] United States' second written submission, para. 125: "[T]he exporters subject to MOFCOM's ["residual"] rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4", and fn 171: "The key point, consistent with the text of Article 9.4, is that [*sic*] applies to producers not subject to the examination period. **The United States agrees the situation would be different if a particular party was solicited information but declined to do so**." (emphasis added)
[680] United States' first written submission, para. 104.
[681] United States' response to the oral questions of the Panel at the meeting.
[682] United States' second written submission, para. 125; see also response to the Panel question No. 44, para. 92.

circumstances, MOFCOM applied the 73.8% facts available rate to exporters who did not have any opportunity to cooperate in the reinvestigation. In this instance, where "sampling" has already been done, all exporters that are not subject to the examination and that were not required to register, fall under the protection of Article 9.4(i) with respect to the ceiling.

7.427. China's position that this provision does not apply to non-cooperative exporters or producers is inconsistent with the plain text of Article 9.4.[683] The Panel should not follow the reasoning developed in *EC – Salmon (Norway)* and invoked by China. The findings made in *EC – Salmon (Norway)* create an "artificial distinction between exporters or producers that register with an investigating authority and who are not examined – and exporter [*sic*] or producers that are not simply examined".[684] Moreover, as the Appellate Body in *US – Hot Rolled Steel* stated, Article 9.4 applies to exporters or producers who were not asked to cooperate in the investigation.

7.10.3.2 China

7.428. In line with the panel's findings in *EC – Salmon (Norway)*, Article 9.4 only governs the maximum amount of anti-dumping duties that may be imposed on and collected from unexamined but cooperating exporters; it does not apply to non-cooperating exporters.[685] The "residual" rate challenged by the United States only applies to exporters that did not register and identify themselves for the purpose of the investigation; it does not apply to companies that cooperated but were not selected for the limited examination, for which a separate margin was determined in accordance with Article 9.4. Exporters that did not register and identify themselves for the purpose of the investigation are no different from non-cooperating exporters to which Article 9.4 does not apply.[686] Article 9.4(i) is therefore also inapplicable to the rate at issue here.

7.429. As part of its implementation obligation, MOFCOM was not required to, and in fact did not, offer the "unknown" exporters a second opportunity to cooperate during the reinvestigation.[687] In order to bring China into compliance with its WTO obligations, MOFCOM did not have to redo the entire investigation; in particular MOFCOM did not need to ask the unknown producers again to register.[688]

7.10.4 Evaluation

7.430. In the original report we confirmed that a "residual" rate for unknown exporters can be based on facts available, and the use of facts available in such a case is, in turn, subject to the disciplines of Article 6.8 and Annex II. In this compliance dispute, we are presented with a different but related question. The issue before us now is whether, in the particular circumstances of this case, the ceiling provided for in Article 9.4(i) applies to the "residual" rate established in the reinvestigation for exporters considered "unknown" because they had not registered in the original investigation.

7.10.4.1 The law

7.431. Article 9.4 of the Anti-Dumping Agreement provides:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or … [.]

[683] United States' second written submission, paras. 123 and 125.
[684] United States' second written submission, fn 171.
[685] China's first written submission, paras. 243 and 250 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.431-7.433).
[686] China's first written submission, para. 248.
[687] China's second written submission, para. 220; opening statement at the meeting of the Panel, para. 40.
[688] China's response to the oral questions of the Panel at the meeting.

7.432. Article 9.4 regulates the maximum amount of anti-dumping duty that may be imposed or collected in respect of imports from exporters that were not individually examined pursuant to Article 6.10.[689] Where, in accordance with Article 6.10, an investigating authority limits its examination to a selected group of exporters, the investigating authority may determine an anti-dumping duty rate to be applied to those exporters who were not included in the group selected for individual examination group, subject to the conditions set forth in Article 9.4, including the ceiling on the duty rate.[690] However, Article 9.4 does not specifically address the duty rate that may be applied to exporters not known to the investigating authority and which therefore are not available to be selected for individual examination.

7.10.4.2 Analysis

7.433. As we understand it, the US claim is premised on the assertions that:

a. the distinction between known and unknown exporters that MOFCOM properly made in the original investigation did not carry over into the reinvestigation; and

b. the factual predicate for determining unknown exporters in the original investigation, i.e. that they had not registered, did not hold in the reinvestigation, and therefore the duty-rate cap in Article 9.4(i) applied to all unexamined exporters, including those that were "unknown" to MOFCOM.

7.434. As we understand it, the United States does not argue that China was required to undertake an entirely new investigation as part of its implementation obligation. In fact, neither the Anti-Dumping Agreement nor the SCM Agreement, nor any other relevant WTO agreement, provides any guidance regarding how adopted recommendations and rulings of the DSB following findings of inconsistency with the Anti-Dumping and/or SCM Agreements are to be implemented. Implementation of DSB recommendations and rulings is left, in the first instance[691], to the discretion of the Member in question. Some, such as the United States, the European Union, and China itself, have specific legal instruments setting out procedures to be followed for implementation following findings of inconsistency with the Anti-Dumping and/or SCM Agreements.[692] China's rules allow MOFCOM to conduct a reinvestigation for implementation purposes, which MOFCOM did in this case. China's rules do not require, and MOFCOM in this instance did not ask for, re-registration by the exporters.

7.435. Our specific findings under Article 6.8 in the original dispute frame China's obligation to bring itself into conformity in respect of the "residual" rate established on facts available. In the present context, the key points from our findings are:

a. in the original investigation, the Notice of Initiation required exporters to register and to provide certain information;

b. MOFCOM was entitled to distinguish between known and unknown exporters − those that did not register − in establishing anti-dumping duty rates for these two groups; and

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[689] Article 6.10 provides:
The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

[690] Appellate Body Report, *US − Hot-Rolled Steel*, para. 115.

[691] The second sentence of Article 19.1 of the DSU allows for a panel or the Appellate Body to suggest ways in which a Member could implement its recommendations. Article 21.3 of the DSU provides for a Member to "inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". It has been recognized in jurisprudence that Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation. (Panel Reports, *US − Shrimp II (Viet Nam)*, para. 8.6; *EC − Fasteners (China)*, para. 8.8; and *US − Hot-Rolled Steel*, para. 8.11).

[692] See the reference to the "Interim Rules for Implementing the World Trade Organization Rulings on Trade Remedy Disputes" in Announcement No. 88, (Exhibit USA-1 (translated version)).

c. in the circumstances of the original investigation, MOFCOM could apply a "residual" anti-dumping duty based on facts available in respect of exporters that did not register and thus did not provide requested information – the "unknown" exporters.

7.436. China's obligation to bring its measure into conformity with the Anti-Dumping Agreement, and thus comply with the recommendations and rulings of the DSB, existed in respect of the aspects of the measure found to be WTO inconsistent.[693] China limited the reinvestigation to those matters it considered necessary to bring MOFCOM's original determination into conformity with the Anti-Dumping Agreement. With regard to the duty rate at issue here, this involved ensuring that the manner in which MOFCOM selected the facts available on the basis of which it established the duty rate to be applied to "unknown" exporters was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. The United States does not argue that anything in the Anti-Dumping Agreement, or any other relevant agreement, required China to relaunch the investigation as if it were a whole new investigation or, specifically on the facts of this case, to repeat the original, or provide for a new, registration mechanism to give "unknown" exporters a second chance to provide information.

7.437. That China issued a new Notice of Initiation with respect to the reinvestigation does not necessarily mean that in the reinvestigation, MOFCOM was required to re-open or undertake a new process for establishing which exporters would be examined individually. In fact, in the reinvestigation MOFCOM did not change its approach with respect to the US exporters to be individually examined, the exporters that had registered but were not examined, and the "unknown" foreign exporters or producers as determined in the original determination. For the purpose specifically of applying the ceiling in Article 9.4, the absence of a registration requirement in the reinvestigation does not reopen the question of which exporters may be treated as known but unexamined, and which may be treated as unknown. MOFCOM had originally limited the examination to three selected exporters and continued to do so in the reinvestigation. As far as we are aware, no previously "unknown" exporter sought to participate or provide information in the reinvestigation. In these circumstances, we see no basis to conclude that MOFCOM was somehow precluded in the reinvestigation from establishing a duty rate based on facts available for all other "unknown" exporters without regard to the limitation set forth in Article 9.4(i).[694]

7.10.5 Conclusion

7.438. In the light of the above, we find that the United States has not established that MOFCOM failed to comply with Article 9.4(i) of the Anti-Dumping Agreement in the reinvestigation by determining a "residual" duty rate based on facts available to be applied to "unknown" exporters.

7.11 Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement: public notice

7.11.1 Introduction

7.439. The United States alleges that MOFCOM failed to address in the redetermination key causation arguments raised by US respondents in the reinvestigation. This is inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement[695], which require investigating authorities to issue public notices of their final determinations that include "all relevant information on matters of fact and law" material to their determinations, including the reasons for the investigating authority's acceptance or rejection of relevant arguments or claims made by interested parties.

7.11.2 Main arguments of the parties

7.11.2.1 United States

7.440. US respondents raised the following arguments that were material to MOFCOM's determination of causation under Articles 3.5 and 15.5:

[693] See, e.g. Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, paras. 40-41.

[694] We note in this context that the United States has not made any claim under Article 6.8 or Annex II of the Anti-Dumping Agreement with respect to the "residual" rate established.

[695] We will refer to these as Articles 12.2, 12.2.2, 22.3, and 22.5.

a. there could be no 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[696]; and

b. subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken feet, which Chinese producers were incapable of supplying in adequate quantities.[697]

7.441. MOFCOM rejected these arguments without providing a sufficiently detailed or sound explanation of its reasoning in the public notices of the final determinations. MOFCOM thus failed to address in the redetermination key causation arguments raised by US respondents in the reinvestigation inconsistently with Articles 12.2, 12.2.2, 22.3, and 22.5.

7.11.2.2 China

7.442. MOFCOM sufficiently addressed both issues in the redetermination. In respect of the market share argument, the Panel in its original report did not find a violation, and MOFCOM has not done anything differently in the redetermination. In respect of the chicken feet argument, MOFCOM cross-referenced its rejection of the argument in the preliminary determination, in accordance with the findings of the Panel in the original dispute.

7.11.3 The law

7.443. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement provide:

> 12.2 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 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.
>
> 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.

7.444. Articles 22.3 and 22.5 of the SCM Agreement similarly provide:

> 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.

[696] United States' first written submission, paras. 212-213.
[697] United States' first written submission, paras. 214-216.

> 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.

7.445. Articles 12.2 and 22.3 require 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. The term "issue of fact and law considered material" includes "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"[698]; what may constitute such an issue is determined by the framework of the substantive provisions of the agreement concerned.[699]

7.446. Articles 12.2.2 and 22.5 require that the public notice contain all relevant information on the matters of fact and law and reasons that have led to the imposition of final measures. The notice 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.[700] Under these provisions, parties whose interests are affected by the imposition of final measures 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 for in the agreements.[701] An investigating authority is required to include in the public notice sufficient detail concerning the authority's findings and conclusions to allow interested parties to assess the conformity of those findings and conclusions with domestic law and the WTO Agreement.[702]

7.11.4 Analysis and conclusion

7.447. We recall our observation in the original report to the effect 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.[703] In the original report we refrained from making substantive findings in respect of Articles 3.5 and 15.5, but proceeded to make findings under Articles 12.2, 12.2.2, 22.3, and 22.5 given their relevance "for the purposes of implementation".

7.448. We have found that the redetermination's causation analysis is inconsistent with Articles 3.5 and 15.5. In this light, we consider it is not necessary to make additional findings as to whether a substantively flawed determination was adequately set out in the public notice of that determination in accordance with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

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[698] Panel Report, *China – Broiler Products*, para. 7.327.
[699] Panel Report, *China – Broiler Products*, para. 7.327 (referring to Appellate Body Report, *China – GOES*, para. 257).
[700] Panel Report, *China – Broiler Products*, para. 7.328 (referring to Appellate Body Report, *China – GOES*, para. 256).
[701] Panel Report, *China – Broiler Products*, para. 7.328 (referring to Appellate Body Report, *China – GOES*, para. 258).
[702] Panel Report, *China – Broiler Products*, para. 7.328 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.459).
[703] Panel Report, *China – Broiler Products*, para. 7.325 (referring to Panel Reports, *EC – Bed Linen*, para. 6.259; and *EC – Fasteners (China)*, para. 7.548).

7.12 Consequential claims

7.449. The United States claims that China acted inconsistently with Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994, as a consequence of the alleged violations of the Anti-Dumping Agreement and the SCM Agreement.[704]

7.450. China argues that the United States has not presented a *prima facie* case and therefore has not established its claims of consequential violations under Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994.[705]

7.451. As is clear from the panel request, the US claims under Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994 are consequential. That is, any findings of violation would necessarily depend on and follow our conclusions on violations with respect to the substantive claims brought by the United States under other provisions of the Anti-Dumping Agreement and the SCM Agreement. It is particular to the nature of a consequential claim that a *prima facie* case is effectively made out where a complaining party establishes a violation of a substantive provision and demonstrates that the consequential claim is predicated on the substantive provision. China does not dispute the predicate relationship; for its part, the United States asserted claims of consequential violations of Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994 on the basis of its substantive claims.[706]

7.452. China expressed concern because the United States did not set out arguments in support of its consequential claims in its first written submission.[707] China did not demonstrate that it suffered any prejudice or that the panel process was impeded in any way as a result. We recall that in an Article 21.5 proceeding, both first and rebuttal submissions are submitted before the panel meets with the parties. Given the nature of consequential claims, as described above, while it would have been preferable for the United States to include its arguments in support of those claims in its first written submission[708], in the circumstances of this dispute we see no reason not to consider and resolve these claims.

7.453. In the light of the foregoing, we conclude that, as a consequence of the inconsistencies with the Anti-Dumping Agreement and the SCM Agreement we have found, China acted inconsistently with Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this report, we conclude that the US claims under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement are not within our terms of reference.[709]

8.2. For the reasons set forth in this report, we conclude that the United States has demonstrated that China acted inconsistently with:

a. the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement;

b. Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;

c. Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement;

[704] United States' second written submission, para. 224.
[705] China's first written submission, para. 411; second written submission, paras. 365-367.
[706] United States' panel request, paras. 11, 12, and 13; second written submission, para. 224.
[707] China's first written submission, para. 411; second written submission, para. 365.
[708] Paragraph 6 of the Panel's Working Procedures specifies that, before the substantive meeting of the Panel with the parties, each party "shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively". The Panel retains the right to modify its working procedures.
[709] See the Panel's preliminary ruling, Annex E-1.

d. Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement;

e. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement;

f. Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement;

g. Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement; and

h. Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement and Article VI of the GATT 1994.

8.3. For the reasons set forth in this report, we conclude that the United States has not demonstrated that China acted inconsistently with:

a. Article 6.9 of the Anti-Dumping Agreement; and

b. Article 9.4(i) of the Anti-Dumping Agreement.

8.4. We do not consider it necessary to address the US claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

8.5. Pursuant to 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 of benefits under that agreement. Accordingly, to the extent MOFCOM has acted inconsistently with certain provisions of the Anti-Dumping and SCM Agreements, we conclude that China has nullified or impaired benefits accruing to the United States under these agreements.

8.6. Above, we concluded that China acted inconsistently with certain provisions of the Anti-Dumping and SCM Agreements. Accordingly, China's measures taken to comply with the DSB's recommendations and rulings in the original dispute, at issue in this proceeding, are inconsistent with the relevant covered agreements. China therefore failed to comply with the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements. To the extent that China failed to comply with the recommendations and rulings of the DSB, those recommendations and rulings remain operative.

WORLD TRADE ORGANIZATION

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS427/RW.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 9 November 2016

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 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.

4. 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.

5. 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.

Submissions

6. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, 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 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 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 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 exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. 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 US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

13. The substantive meeting of the Panel 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 opening statement as well as its closing statement, if available, 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 each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. 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. Each party shall then have an opportunity to answer these questions orally. 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.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of the 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.

16. 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. Each third party shall then have an opportunity to answer these questions orally. 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

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

18. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages. A summary submitted by a party of its opening and/or closing statements presented at the substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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

Interim review

21. 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.

22. 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.

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

Service of documents

24. 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 3 paper copies of all documents it submits to the Panel. However, when Exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 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, 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 XXXXXX@wto.org. 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 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. 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 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

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.

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 November 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include (1) information that was previously treated as confidential within the meaning of Articles 6.5 of the Anti-dumping Agreement and 12.4 of the Agreement on Subsidies and Countervailing Measures by the investigating authorities of China in the anti-dumping and countervailing investigations and subsequent proceedings at issue in this dispute, and (2) information that was previously treated as BCI in the original proceeding in this dispute, unless the person who provided the information in the course of those investigations or proceedings agrees in writing to make the information publicly available.

3. 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 proceedings 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 proceedings. An authorizing letter need not be provided in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceedings.

4. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

5. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.

6. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

7. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The

Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.

8. Submission of BCI:

   (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit US-1 (BCI)).

   (ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

   (iii) 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. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7(i).

9. Where a party submits a document containing BCI to the Panel, the other party or third party, when 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 and treated as described in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents or other media containing BCI in such a manner as to prevent unauthorized access to such information.

11. 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 and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the report of the Panel.

ANNEX A-3

INTERIM REVIEW

1.1. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out our response to the parties' requests made at the Interim Review stage. Our assessment of the parties' requests and comments is informed by the following considerations:

a. The Interim Review stage is not an opportunity for parties to reargue the case or to "introduce new legal issues and evidence or to enter into a debate with the Panel".[1]

b. The descriptions of the arguments of the parties in our Report are not meant to and do not reflect the entirety of the parties' arguments. Rather, they highlight the principal points of those arguments that we considered relevant to our resolution of the issues in dispute and addressed in our findings.[2] Finally, we note that, the executive summaries of the arguments of the parties, set out in Annexes B1-B4, were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments. However, as provided for in paragraph 17 of the Panel's Working Procedures, "These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case."

c. A panel may develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. A panel is not required to "test" its intended reasoning with the parties in advance.[3]

1.2. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including some identified by the parties.

1.1 The United States' request for review of the Interim Report

1.4. In respect of **paragraph 7.39(e) (paragraph 7.39(g) in the Final Report)**, the United States asks the Panel to clarify this paragraph and proposes two modifications.[4] China disagrees.[5] The proposed US language more clearly reflects our intent; we have therefore modified the paragraph to better reflect our intent.

1.5. In respect of **paragraph 7.51**, the United States requests that the Panel revisit, in particular, the second sentence, and either delete or reformulate it to ensure that it addresses the specific legal matter at issue in this Article 21.5 proceeding.[6] China disagrees with the proposal to delete the sentence.[7] On reflection, we have modified this paragraph to more clearly express our views regarding the specific legal question at issue.

[1] Panel Report, *India – Quantitative Restrictions*, para. 4.2.
[2] A panel has "the discretion to address explicitly in [its] reasoning only the arguments and evidence [it] deem[s] necessary to resolve a particular claim and support the reasoning [it is] required to provide." (Panel Report, *India – Agricultural Products*, para. 6.7 (referring to Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414)).
[3] Report of the Appellate Body, *U.S. – Tuna II (Mexico), Article 21.5*, para. 177.
[4] United States' request for interim review, paras. 4-5.
[5] China's comments on the United States' request for interim review, para. 2.
[6] United States' request for interim review, paras. 6-8.
[7] China's comments on the United States' request for interim review, para. 3.

1.6. In respect of **paragraph 7.52**, the United States requests that the Panel's reference to its original findings more closely track the language of those findings.[8] China disagrees, asserting that "in this Article 21.5 proceeding the Panel is addressing a particular methodology and the paragraph reflects this fact."[9] We have modified the text and added the appropriate reference to better reflect the original findings to which we refer.

1.2 China's request for review of the Interim Report

1.7. In respect of **paragraph 7.23(e)**, China asserts that **footnote 86 (footnote 89 of the Final Report)** refers to a different matter than the text, and asks the Panel to distinguish the two by adding a new footnote.[10] We agree that the reference in footnote 86 is incorrect, and have changed it. We also made a minor consequential modification to footnote 85 (footnote 88 of the Final Report). Having done so, we do not consider it necessary to add the additional footnote requested by China.

1.8. In respect of **paragraph 7.53(b)**, China requests that the reference to "MOFCOM" be removed from the sentence, asserting that "it is not MOFCOM's quote but is a statement attributed to Tyson."[11] The United States disagrees, contending that the text is accurate as drafted.[12]

1.9. This paragraph is based on the following passage in MOFCOM's redetermination:

> In the original investigation, considering that meat cost was the main cost constitution of the product concerned, and that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned, the Investigating Authority found that weight-based method could be more objective and more reasonable than the value-based method submitted by the Company in the questionnaire response to reflect the production cost associated with the product concerned, therefore, the weighted average production cost of all product groups was regarded as the production cost of the product concerned and the like product.[13]

Thus, MOFCOM found "that weight-based method could be more objective and more reasonable" on the basis of two considerations: first, that "meat cost was the main cost constitution of the product concerned", and second, "that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned". We recognize that it is not entirely clear in this translation of the redetermination, submitted by China, whether "it" in the second sentence refers to Tyson ("the Company") or to MOFCOM. As the United States noted, there is nothing cited or referred to in the redetermination that would attribute the statement in question to Tyson.[14] The United States translation[15] is also pertinent in this regard:

> In the original investigation, considering that chicken cost is the main composition of cost of the subject merchandise, when the company raises live chicken, it's hard to tell which feed is especially for production of which part of the subject merchandise. The investigating authority believes that using the weight-based method can reflect the cost related to production of the subject merchandise more objectively and reasonably. Therefore, the weighted average production cost of every group is regarded as production cost of the subject merchandise and like product thereof.[16]

Moreover, we recall China's argument in the original case: "After all, the different parts of the live bird do not have different costs of production. It does not cost more to grow a kilogram of breast

[8] United States' request for interim review, para. 9.
[9] China's comments on the United States' request for interim review, para. 5.
[10] China's request for interim review, para. 5.
[11] China's request for interim review, para. 6.
[12] United States' comments on China's request for interim review, para. 9.
[13] Redetermination, (Exhibit CHN-1 (translated version)), p. 33. (emphasis added)
[14] United States' comments on China's request for interim review, para. 10.
[15] China has not challenged the accuracy of the United States' translation of the redetermination.
[16] Redetermination, (Exhibit USA-9 (translated version)), p. 33. (emphasis added)

than it costs to grow a kilogram of paws."[17] Taken as a whole, it appears to us that MOFCOM accepted and expressly relied upon the proposition that which feeds were specifically used to produce which parts of the product concerned could not be distinguished. We therefore consider that the text as drafted is accurate. Accordingly we have not modified the text in this regard.

1.10. In respect of **paragraph 7.54**, China notes that neither the United States nor China made a claim that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models" and asks the Panel to "provide the basis for this characterization."[18] The United States disagrees that any clarification of or authority for this "incontrovertible point" is needed.[19]

1.11. As is clear from the opening phrase of the sentence quoted by China, we recognized that there was no direct evidence before the Panel on this point. At the same time, a panel is entitled, in our view, to recognize and refer to incontrovertible facts where relevant. In this case, one such fact is that the production of a "whole bird" requires the production of those parts of a bird without which the bird cannot be produced. Indeed, China itself, in its submission in the original dispute, stated that, "a significant portion of the total costs of production are incurred on a unitary basis for the whole bird".[20] China does not dispute the fact that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models", but rather asks the Panel to provide a basis for it. We consider this to be a self-evident fact, and therefore decline China's request.

1.12. In respect of **paragraph 7.58**, China argues that, "[i]n light of the Panel's finding of inadequate explanation, it should at least refer to MOFCOM's explanation in its Redetermination" and requests that the Panel delete the phrase "allowed for the exclusion of certain parts of a live broiler (feather, blood and viscera)", because, according to China, "MOFCOM never excluded any parts from its cost allocation".[21] The United States opposes both requests.[22]

1.13. In respect of the first aspect of this request, we have in fact referred to MOFCOM's explanation earlier in this section, in paragraph 7.53. We consider it unnecessary to do so again in this paragraph. Accordingly we have not modified the text in this regard.

1.14. In respect of the second aspect of this request, we recall that China argued that MOFCOM appropriately distinguished between what it termed "the product concerned" and other products, including feathers, blood and viscera. According to China, "MOFCOM specifically noted that the 'production cost didn't include that of the non-concerned products, such as feather, blood, etc.'."[23] It was this "product cost", i.e. a product cost excluding feathers, blood, and viscera, that was allocated to "the product concerned" on the basis of weight. We note that China has not requested review of paragraphs 7.54 and 7.55, in which we also refer to MOFCOM's "exclusion of feathers, blood, and viscera". In the light of the foregoing, we decline China's request that we delete the phrase in question.

1.15. In respect of **paragraphs 7.58 and 7.59**, China refers to not only our findings in these two paragraphs, but also to paragraphs 7.50 and 7.51 and the Panel's "remaining discussion", asserting that "the Panel does not make clear … whether it views the MOFCOM redetermination to have been at odds with the second aspect, the third aspect, or both" of the obligation in the second sentence of Article 2.2.1.1.[24] China suggests that "the Panel appears to take care to avoid suggesting anything about whether the MOFCOM approach was proper or not", and asks the Panel to "clarify that its findings address the third aspect of the obligation – the failure to explain – and not whether the MOFCOM allocation method was proper or not".[25] The United States opposes China's request, contending that China has failed to make a "request for review of a precise aspect

[17] United States' first written submission, para. 91 (quoting China's first written submission in the original dispute, para. 133). (emphasis added)
[18] China's request for interim review, para. 7.
[19] United States' comments on China's request for interim review, para. 11.
[20] China's first written submission in the original dispute, para. 133. (emphasis added)
[21] China's request for interim review, para. 8.
[22] United States' comments on China's request for interim review, para. 13.
[23] China's first written submission, para. 174 (quoting Redetermination, (Exhibit CHN-1 (translated version)), fn 30).
[24] China's request for interim review, para. 9.
[25] China's request for interim review, para. 9.

of the interim report" and that "It is clear that the Panel is examining the issue of MOFCOM's explanation as part of MOFCOM's consideration of all available evidence related to a proper cost allocation."[26]

1.16. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". The paragraphs discussed by China in its request concern different sections of the Panel's analysis. Paragraph 7.50 deals specifically with the argument that MOFCOM was required to use a single methodology throughout the investigation and rejects that view, while paragraph 7.51 concludes that MOFCOM's rejection of a value-based cost allocation in the redetermination was not inherently biased or unreasonable.

1.17. Paragraphs 7.52 through 7.58 specifically examine MOFCOM's explanations for and use of a weight-based cost allocation, concluding that MOFCOM failed to adequately explain its decision to use that allocation, and therefore failed to "consider all available evidence on the proper allocation of costs", that is, failed to act consistently with the second sentence of Article 2.2.1.1. We are unable to determine precisely what aspects of these paragraphs China considers require modification, and what changes it considers would be appropriate. We have, nonetheless, made minor modifications in paragraphs 7.51 and 7.52.

1.18. With respect to **paragraphs 7.63 and 7.64**, China argues that, as it contends with respect to paragraphs 7.58-7.59, "the Panel again seems to avoid making any findings about what is proper or not" and asks the Panel to "to clarify that its findings address the third aspect of the obligation − the failure to explain − and not whether the Tyson allocation method rejected by MOFCOM was proper or not."[27] The United States considers that, as with respect to paragraphs 7.58-7.59, China's "complaint here does not constitute a request for review of a precise aspect of the interim report".[28]

1.19. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.20. In respect of **paragraphs 7.66-7.70**, China asserts that the Panel failed to explain whether its interpretation of the term "historically utilized" in the second sentence of Article 2.2.1.1 was consistent with that of a previous panel report on the same issue, *US- Softwood Lumber V*, and contends that the Panel should "offer some reaction" to the points raised by China in this regard.[29] The United States disagrees, asserting that China has failed to make a "request for review of a precise aspect of the interim report".[30] In the United States' view:

> China fails to explain (i) what conclusion or statement in these paragraphs is inconsistent with the analysis in particular paragraphs in *US – Softwood Lumber V*; (ii) why, even if there is an inconsistency, it needs to be addressed in this Report; and (iii) why the Panel should assess China's characterization of the U.S. position in *another* dispute.[31]

1.21. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.22. In respect of **paragraphs 7.89-7.99**, China argues that the Report leaves "the impression that MOFCOM took fewer steps to corroborate and analyse the data from the four domestic

[26] United States' comments on China's request for interim review, para. 14.
[27] China's request for interim review, para. 11.
[28] United States' comments on China's request for interim review, para. 17.
[29] China's request for interim review, para. 10.
[30] United States' comments on China's request for interim review, para. 15.
[31] United States' comments on China's request for interim review, para. 15. (emphasis original)

producers".[32] China describes steps MOFCOM took[33] in relation to "the analytical process by which MOFCOM analysed the pricing data of the four re-verified domestic producers" and states that these details it describes "warrant further description" in the report.[34] The United States opposes China's request, contending that China has failed to make a "request for review precise aspects of the interim report".[35] Moreover, in the United States' view, China has failed:

a. "to identify how the Panel's analysis misstates the approach noted in the redetermination"[36]; and

b. "to explain why the analysis in the interim report is deficient".[37]

1.23. We make two observations.

1.24. First, China does not explain precisely what aspects of these paragraphs it considers should be modified and what changes it considers would be appropriate. Rather, it simply contends that a more detailed exposition of the facts regarding MOFCOM's reinvestigation and analysis of product-specific pricing data is important to its legal position in this case. This is not enough to help us determine what precisely should be modified and how.

1.25. Second, we have carefully considered all of the arguments and evidence put before us; there is, however, no requirement that we reflect in our report all the facts that each party may consider important to its positions. Rather, we must set out in our report those facts that are important to our resolution of the issues in the dispute before us, in the context of our analysis, reasoning, and conclusions. We recall that our findings in the original dispute concerned the comparability of two baskets of goods in the light of differences in the composition of those baskets.[38] In this proceeding, China argued that MOFCOM verified the prices of individual components of the Chinese basket for four of seventeen domestic producers. This argument does not address the concerns we had originally, and again in this proceeding, with respect to the comparability of the domestic and imported prices as a consequence of the composition of the baskets of broiler products being compared. We fail to see how a more detailed exposition of the facts concerning how MOFCOM went about verifying the prices of certain domestic producers relates to the issue we were addressing.

1.26. We consider that China has failed to make a proper request for "review precise aspects of the interim report". We do not consider that our findings need modification as requested by China. Accordingly we have not modified the text in this regard.

1.27. In respect of **paragraph 7.102**, China asserts that:

a. "it is important for the Panel to point out that although the two baskets may have been of dissimilar composition, MOFCOM considered that their composition was in fact known such that MOFCOM believed it controlled for product mix"[39];

b. "[t]he current description suggests MOFCOM did not take any steps to understand the respective compositions of the two baskets"[40]; and

c. with respect to the "risk that price effects were the effects of competition from product models within the domestic basket", "for the same reason of substitutability, there may

[32] China's request for interim review, para. 15.
[33] China's request for interim review, para. 16.
[34] China's request for interim review, para. 17.
[35] United States' comments on China's request for interim review, para. 23.
[36] United States' comments on China's request for interim review, para. 24.
[37] United States' comments on China's request for interim review, para. 25.
[38] See paragraph [7.106] above:
In the original report, we did not find, because Articles 3.2 and 15.2 do not require, that in a price comparison, MOFCOM had to adopt the "lower of the two" price benchmarks; our findings were about the comparability of the baskets rather than the relative value of different AUVs.
(emphasis added)
[39] China's request for interim review, para. 19.
[40] China's request for interim review, para. 19. (emphasis added)

be price effects resulting from product models in the dumped import basket on product models within the domestic basket that were not in the dumped import basket".[41]

1.28. The United States opposes any change to this paragraph, asserting that:

a. "the Panel, in paragraph 7.105 of the interim report, expressly considered and rejected MOFCOM's argument that it controlled for product mix differences"[42]; and

b. "China is essentially asking the Panel revise and dilute its findings", in particular in a manner that "would create ambiguity" in these findings.[43]

1.29. We consider that China has failed to make a proper request for "review of precise aspects of the interim report." Rather, in our view, China is attempting to re-argue issues that the Panel has resolved, rather than clearly indicating what precise aspects of the report it considers should be modified and why. We therefore decline to modify this paragraph.

1.30. In respect of **footnote 205 (footnote 209 of the Final Report)**, China requests that we delete the final two sentences, asserting that the "statement that MOFCOM's price effects determination 'might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome' is purely speculative."[44] The United States opposes China's request, contending that it reflects a well-supported evaluation of a "key matter before the Panel" and noting that it had argued during the proceeding that one of the principal problems with the selection of four firms for reverification was that "their selection appeared biased in light of the lack of any explanation".[45]

1.31. The penultimate sentence of footnote 205 does not state that MOFCOM's "price effects determination" itself may give rise to an appearance of selectivity. Rather, it makes clear that it is the "lack of any explanation in the redetermination for the choice" of which producers' prices were reverified that may give rise "to an appearance of selecting among domestic producers based on their data to ensure a particular outcome". The last sentence makes clear that the Panel did not make any findings on this point. We consider it appropriate to raise such concerns in the course of resolving a dispute, in order to assist parties in the course of their efforts to implement DSB rulings and recommendations, and act consistently with their obligations. We therefore decline China's request.

1.32. In respect of **paragraphs 7.150-7.162**, China requests that the Panel delete the discussion in these paragraphs, and any findings, from the report. China argues that:

a. "[T]he Panel analyses two issues under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement that do not reflect proper claims before the Panel. The issues of: (1) whether MOFCOM inadequately focused on the later part of the POI; and (2) potential negative effect and future imports both appear to arise as rebuttal responses by the United Sates in its Second Written Submission."[46]

b. "It is unclear to China how these issues rise to the level of specific claims for which the Panel makes specific findings."[47]

c. Paragraph 6 of the Working Procedures "makes clear that any claim raised by the United States for purpose of its challenge should be presented in its First Written Submission".[48]

[41] China's request for interim review, para. 20. (emphasis added)
[42] United States' comments on China's request for interim review, para. 27.
[43] United States' comments on China's request for interim review, para. 28.
[44] China's request for interim review, para. 21.
[45] United States' comments on China's request for interim review, para. 30.
[46] China's request for interim review, para. 22.
[47] China's request for interim review, para. 22.
[48] China's request for interim review, para. 23.

d. "As such, these arguments are 'counter arguments' as contemplated by paragraph 6 of the Working Procedures and do not represent claims upon which the Panel should rule."[49]

e. "For these reasons, the Panel should strike this discussion and any findings from the final report."[50]

1.33. The United States opposes China's request, noting that:

a. there is a difference between claims and arguments[51];

b. the arguments (and counterarguments) at issue were properly raised and the Panel properly considered them[52]; and

c. "That the arguments China itself raised undermined its defence − rather than supported it − does not, as China now argues, somehow implicate procedural fairness."[53]

1.34. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". Rather, in our view, China's request amounts to an attempt to re-argue issues that the Panel has resolved and does not clearly indicate what precise aspects of the report it considers should be modified and why.

1.35. In these paragraphs, the Panel is addressing various arguments in the context of considering the United States' claim that MOFCOM's redetermination is inconsistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement.[54] This claim is properly before us.[55] Over the course of the proceedings, starting with the first written submissions, and then in the second written submissions and at the hearing, and finally in responses to questions and comments on those responses:

a. the United States made certain arguments in support of its claim;

b. China responded with arguments of its own; and

c. the United States replied to China's arguments.

1.36. Each party in a dispute has the right to make the arguments and submit the evidence it wishes in defence of the positions it adopts in respect of a given claim. Having presented its arguments and evidence and advanced its position, a party may not, however, seek the assistance of the panel to deny to the other party the same right to present its arguments and evidence in reply. Nothing in the Working Procedures contemplates any such departure from basic rules of fairness in an adjudicative proceeding.

1.37. China seems to be of the view that because some of the United States' arguments in support of its claim were first advanced in its second written submission, and the Panel considered and made findings addressing those arguments, the United States has wrongly been allowed to advance claims at a late stage of the proceedings which the Panel then resolved. This is not the case. The Panel's conclusions are in respect of the claims of the United States under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement. To arrive at those conclusions, and consistently with our obligations under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU, we took into account all the arguments and the respective replies of the parties, and as necessary made findings in respect of those arguments and replies. We did so in accordance with our responsibility to "make an objective assessment of the matter before [us], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

[49] China's request for interim review, para. 23.
[50] China's request for interim review, para. 23.
[51] United States' comments on China's request for interim review, para. 32.
[52] United States' comments on China's request for interim review, para. 33.
[53] United States' comments on China's request for interim review, para. 33.
[54] United States' panel request, para. 2.
[55] Ruling by the Panel on Jurisdictional Issues dated 22 March 2017, para. 3.10.

1.38. We therefore decline China's request to delete this entire section of the report.

1.39. In respect of **paragraphs 7.332(e) and 7.335**, China requests that we modify the report "to reflect that MOFCOM did not reject Tyson's reported data in its entirety"[56] and "did not reject all of Tyson's data".[57] The United States disagrees because, in its view, China has not shown any errors in these paragraphs.[58]

1.40. Paragraph 7.332(e) sets out the factual background to our consideration of the United States' claims regarding use of facts available. Paragraph 7.332 as a whole sets out, in sequence, MOFCOM's requests and Tyson's responses on the issue of meat and processing cost information. At paragraph 7.332(e), the statement that MOFCOM rejected Tyson's reported data in its entirety in the redetermination is immediately followed by the explanation that "MOFCOM found that the reported data, generated by applying the methodology developed by Tyson using the data available in its accounting records, were not the *meat and processing costs* actually incurred"[59], thus making clear what reported data were rejected. Moreover, the same paragraph goes on to set out MOFCOM's decision not "to accept the *meat cost and processing cost data* of each model of the product concerned calculated by the ratio method".[60] Thus, it is clear that in referring to MOFCOM's rejection of "Tyson's reported data in its entirety" and "all of Tyson's data", we were referring to the rejection of all of the meat and processing cost data that Tyson had generated and provided during the reinvestigation. In order to avoid any uncertainty in this regard, we have modified the text to explicitly state that that data that was rejected in its entirety was Tyson's reported meat and processing cost data.

1.41. In respect of **paragraph 7.335(d)**, China requests adjustments to "further reflect" that Tyson provided "inconsistent cost data" in every response.[61] The United States disagrees, contending that the requested changes cannot be drawn from the paragraphs of China's first written submission cited by the Panel, and China has provided no other citation or justification for the request.[62]

1.42. In its request for review China does not indicate where, in its submissions in this proceeding, it argued that Tyson provided inconsistent cost data in every questionnaire and supplemental questionnaire response in the reinvestigations. We have, nevertheless, modified paragraph 7.335(d) to clarify that the asserted inconsistencies were not just between data provided in the original investigation and data provided in the reinvestigation.

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[56] China's request for interim review, para. 12.
[57] China's request for interim review, para. 13.
[58] United States' comments on China's request for interim review, paras. 18-19.
[59] Underlining original, italics added.
[60] Emphasis added.
[61] China's request for interim review, para. 14.
[62] United States' comments on China's request for interim review, para. 21.

ANNEX B

ARGUMENTS OF THE UNITED STATES

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Articles 7 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) charge a WTO panel with making those findings that will assist the DSB in making the recommendations provided for in the covered agreements − namely, the recommendation to bring a measure found to be inconsistent with a covered agreement into conformity with the Member's WTO obligations under that agreement (DSU Art. 19.1). And that is precisely what the Panel did in this dispute, finding that China's antidumping and countervailing duty determinations were inconsistent with numerous basic 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). Unfortunately, China did not take those findings and recommendations as an opportunity to comply and, thus, to bring about a positive solution to the dispute (DSU Art. 3.7).

2. Both the conduct of the reinvestigation and the findings in the redetermination confirm that MOFCOM adheres − without justification − to problematic practices or reasoning − and even moves in precisely the wrong direction: toward less transparency, less due process, and less objectivity.

II. PROCEDURAL BACKGROUND

3. On July 15, 2014, the United States and China informed the DSB that the two parties had concluded Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding ("Agreed Procedures"). On May 10, 2016, the United States requested consultations pursuant to Article 21.5 of the DSU concerning China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, which were held on May 24, 2016.

4. On May 27, 2016, the United States filed a panel request requesting recourse to Article 21.5 of the DSU. At the June 22, 2016 meeting of the DSB, the DSB agreed to refer to the original panel, if possible, the matter raised by the United States. Brazil, Ecuador, the European Union, and Japan reserved their third party rights. On July 18, 2016, the compliance panel was composed with the members from the original panel.

III. FACTUAL BACKGROUND

5. The Panel found that MOFCOM breached Article 6.9 of the AD Agreement by failing to disclose margin calculations and data used to determine the existence of dumping.

6. The United States contended in the original dispute that MOFCOM breached the second sentence of Article 2.2.1.1, because, *inter alia*, MOFCOM allocated Tyson's production costs of non-subject merchandise − including blood, feathers, and organs − to subject merchandise, thereby inflating normal value. The Panel considered the evidence presented by the United States regarding the products produced by Tyson and China's materials and found that the United States had established a breach of Article 2.2.1.1. Moreover, the Panel found that one particular aspect of MOFCOM's methodology − straight allocation of total processing costs − was inherently unreasonable.

7. The Panel found that MOFCOM's price effects analysis in its injury determination was inconsistent with China's WTO obligations because it failed to account for differences in the product mix between subject imports and domestic products. The Panel also noted that MOFCOM's finding of price suppression is "at least partly dependent" on its finding of price undercutting − and that "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." The Panel also asserted judicial economy on the

United States' claim concerning MOFCOM's flawed impact and causation analyses – and explicitly recognized that MOFCOM would need to revisit such analyses.

IV. SCOPE OF AN ARTICLE 21.5 PROCEEDING

8. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding.

V. STANDARD OF REVIEW

9. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel would normally reach the same conclusions as the original panel. The investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

VI. MOFCOM'S REINVESTIGATION BREACHED THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

10. MOFCOM's reinvestigation breached key procedural protections contained within the AD and SCM Agreements.

A. Factual Background

11. Before the Reinvestigation Injury Disclosure (RID), U.S. interested parties received no notice as to which Chinese firms were being specifically investigated; why they were chosen; what questions and information requested were posed to these firms; and what data and information the Chinese firms provided in response. The critical questions of (i) what information was specifically required by MOFCOM from these firms and (ii) what they provided remain entirely unanswered.

B. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because MOFCOM Denied Interested Parties Notice or Knowledge of the Information MOFCOM Required in its Reinvestigation

12. Here, it is clear from the RID that MOFCOM *required* pricing information from four domestic Chinese companies in order to revise its price effects analysis. Specifically, these four companies provided MOFCOM with sales data concerning chicken feet, chilled chicken cuts with bone, chicken wings, and gizzards, which MOFCOM then purportedly used to compare against prices for subject imports, and ultimately reach its finding of price undercutting. It is also clear that interested parties, such as U.S. respondents and the United States, did not have notice that MOFCOM required this information.

C. China Breached Articles 6.1.2, 6.2, and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying Interested Parties of Evidence Presented by the Other Interested Parties Participating in the Reinvestigation

13. It is undisputed that the four Chinese domestic companies that received requests for information from MOFCOM during the reinvestigation are "producers of the like product in the Importing Member." MOFCOM was thus required to "promptly" make available to U.S. respondents the information provided by interested parties in response to MOFCOM's requests during the reinvestigation. Because MOFCOM failed to make the information available *at all* to respondents, China is in breach of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2.

14. MOFCOM's failure to permit interested parties access to the information relied on by MOFCOM and to enable those parties, through review of that information, to prepare their cases is also inconsistent with Articles 6.2 and 6.4 of the AD Agreement and SCM Agreement Article 12.3. These provisions provide that interested parties have both timely opportunities (i) to see "all

information" that is relevant, non-confidential, and used by competent authorities and (ii) timely opportunities to prepare their presentations "on the basis of" that information. In the reinvestigation, the information subject to this obligation includes: (1) the pricing information provided by the four Chinese domestic enterprises to MOFCOM during the reinvestigation; (2) the precise identity of those Chinese enterprises; and (3) the specific questionnaires and information requests issued by MOFCOM to those Chinese companies.

15. First, MOFCOM failed to disclose information "relevant" to the interested parties' presentation of their cases. The *information* requested by MOFCOM from the four Chinese domestic enterprises during the reinvestigation constitutes product-specific pricing data that MOFCOM sought and that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis. Second, as noted previously, MOFCOM has *not* claimed that any of this information is confidential. Third, the information was "used" by MOFCOM in the reinvestigation because it is the explicit basis by which MOFCOM maintains its price effects findings.

16. In addition, China breached the obligation under AD Agreement Article 6.4 and SCM Agreement Article 12.3 "to provide timely opportunities" for interested parties "to *prepare presentations* on the basis of this information" because MOFCOM did not permit interested parties to see the information. If a party is denied access to information, then it follows that the party was also denied an *opportunity* to prepare a presentation. Thus, MOFCOM's failure also constituted a breach of Article 6.2 of the AD Agreement.

D. China, Once Again, has Breached Article 6.9 of the AD Agreement by Failing to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

17. Despite the original Panel's finding that China breached Article 6.9 of the AD Agreement by failing to disclose essential facts related to the dumping margins for Pilgrim's Pride, Tyson, and Keystone, MOFCOM has, once again, failed to disclose dumping margin calculations and underlying data for two of these respondents − Pilgrim's Pride and Keystone. With respect to Pilgrim's Pride, it was denied access to the data calculations from the original investigation even though MOFCOM used a purported error in the data and calculations to increase the margin of Pilgrim's Pride. Similarly, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation.

VII. MOFCOM'S ANTIDUMPING DUTY FINDINGS ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 9.4, AND 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Breached the Second Sentence of Article 2.2.1.1 of the AD Agreement

1. MOFCOM Applied to Tyson a Biased Weight-Based Methodology that Improperly Allocated Costs Not Associated with the Production and Sale of the Product Under Consideration

18. China has breached the second sentence of Article 2.2.1.1 because MOFCOM did not "consider all available evidence on the proper allocation of costs." The essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology. The position advocated by China through its prior WTO submissions and in MOFCOM's redetermination is that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products. But, under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them. Thus, products that might earn little revenue, particularly in respect to their weight, such as blood, organs, feathers, etc., still would need to have costs distributed to them, rather than leave the costs focused on the remaining products − which artificially inflates normal value. MOFCOM did not do that apportionment in its first determination, and it has not done so now in its redetermination.

19. During the redetermination, Tyson argued that MOFCOM should accept the value-based accounting reflected in its books and records. However, Tyson also argued that "in the event that MOFCOM incorrectly continues to rely on a weight-based allocation, it must fully account for all products that are produced from the live birds that are processed into both subject and

non-subject merchandise." To that end, Tyson made a straightforward request: if MOFCOM erroneously resorts to allocating costs by weight rather than as reflected in Tyson's books and records, then MOFCOM (per its own logic) would need to "divid[e] the total cost of the live birds by their total weight" − and not simply omit products it finds inconvenient from the calculation. A supposed weight-based methodology that fails to actually account for the weight contributed by all the products derived from the bird is internally incoherent and therefore cannot be a "proper allocation of costs" consistent with Article 2.2.1.1.

20. The reasons proffered by MOFCOM for rejecting Tyson's position − and the consistency of MOFCOM's own position − are not reasoned or adequate. First, MOFCOM seems to be suggesting that it does not apportion costs across all products because some chickens died *en route* to the processing plant or were otherwise not processed. But that assertion does not speak to the point at hand, which is that costs must be allocated across all products that are produced. Moreover, the data provided by Tyson explicitly made proper allowance for "costs of any birds that are not processed because they die at the farm or are condemned at the plant. . . ." Second, MOFCOM asserts that Tyson confirmed that the costs to produce subject merchandise were exclusive. That position cannot be reconciled with either the data submitted by Tyson referenced above, or Tyson's explicit argument seeking for costs to reflect all products. Third, China is claiming that Tyson's value based cost allocation methodology is perfectly reasonable *when it comes to products that are not subject to the investigation*. This reason, again, does not address the point that all costs need to be accounted for. Finally, MOFCOM cites as support that the monthly costs for live birds changes and that Tyson does not specify which are used for subject merchandise and non-subject merchandise is misplaced as well. Whether costs change from month to month does not obviate the need to ensure costs are properly allocated.

2. MOFCOM has not Addressed the Article 2.2.1.1 Findings with respect to Pilgrim's Pride

21. Despite the Panel's findings, MOFCOM's redetermination refused to consider any alternative allocation methodologies for Pilgrim's Pride. Instead, MOFCOM only investigated and modified the dumping margin for Pilgrim's Pride on the basis of the purported errors in calculation. Thus, because China's redetermination does not contain any additional "evidence of consideration" of alternative methodologies, China's redetermination remains in breach for the same reasons as in the original investigation.

B. China Breached Article 9.4 of the AD Agreement through the "All Others" Rate Set by MOFCOM

22. MOFCOM's arbitrary selection of the highest rate found is not consistent with the disciplines of Article 9.4, which establishes that the all others' rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers."

C. China's Resort to and Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement

23. MOFCOM has not presented any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information. Tyson took appropriate steps to use the data available in its records to satisfy MOFCOM's request for information to the fullest extent that it could.

24. Over the period of investigation, Tyson recorded, as part of its accounting practice, only the aggregate actual costs incurred and the "standard costs," the latter of which reflect Tyson's expectation as to what was incurred at a particular segment. Tyson used the standard costs to create allocation percentages, which it then applied to the aggregate actual cost to generate the specific costs MOFCOM requested. Tyson did not track the data requested by MOFCOM as part of its standard practice. MOFCOM completely disregarded what Tyson proffered and, instead used the best information available. MOFCOM did not present any evidence or explanation that the costs reported by Tyson were not "supplied in a timely fashion" and in the "requested medium" or "appropriately submitted so that {they} can be used in the investigation without undue difficulties." Moreover, the claims cited by MOFCOM for rejecting Tyson's reported costs do not

indicate any efforts by MOFCOM to undertake an "objective process of examination" and to attempt to verify their accuracy and reliability.

25. MOFCOM's assertion that Tyson's costs reported in the reinvestigation do not tie to those in the original investigation is contradicted by the very exhibit relied upon MOFCOM. Moreover, Tyson in fact reported costs for each of the combinations. Further, MOFCOM erroneously asserts that Tyson failed to report actual meat and processing costs incurred during the period of investigation. In addition, Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation.

VIII. MOFCOM'S FINDINGS IN ITS INJURY REDETERMINATION REMAIN INCONSISTENT WITH THE AD AND SCM AGREEMENTS

A. China's Biased Price Effects Analysis Breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

26. MOFCOM purported to control for the "clear differences in product mix that affected price comparability" found by the Panel by analyzing product-specific pricing data collected from only four of the 17 domestic producers included in the domestic industry. MOFCOM did not disclose its methodology for selecting producers for inclusion in its sample of the domestic industry or for collecting product-specific pricing data from these producers, however. Nor did MOFCOM disclose the percentage of domestic industry sales covered by the product-specific data collected. Accordingly, MOFCOM failed to establish that the pricing data it collected was sufficiently representative to permit an objective underselling analysis.

27. Absent any explanation to the contrary, MOFCOM was in a position to collect pricing data from all members of the domestic industry. MOFCOM thus failed to ensure that its new underselling analysis was based on an objective examination of positive evidence. The above facts also confirm that MOFCOM has also breached China's obligations under Article 6.4 of the AD and Article 12.3 of the SCM Agreement.

28. MOFCOM also based its finding of price suppression on underselling in the redeterminations. Significantly, MOFCOM revised the concluding paragraph of its price section in the redetermination to eliminate the references to subject import volume and market share found in the corresponding paragraphs of the original determinations, clarifying its view that price suppression resulted from subject import underselling, not subject import volume. In responding to various arguments raised by USAPEEC, MOFCOM likewise resorted to the notion that subject import underselling necessarily means that those imports suppressed domestic prices. Given MOFCOM's reliance on its new underselling analysis for its price suppression finding, the deficiencies of that underselling analysis render MOFCOM's price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2. Because this deficient underselling analysis is also the foundation for MOFCOM's finding of price suppression, MOFCOM's price suppression finding is inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

29. MOFCOM's reliance on underselling to support its price suppression finding was also unsupported by the evidence because the record showed no correlation between underselling and price suppression. MOFCOM failed to explain or investigate how subject import underselling could have significantly suppressed domestic prices in the first half of 2009 when the same underselling had no "significant" price suppressive effects between 2006 and 2008. Thus, there is no evidence to support MOFCOM's price suppression finding. By failing to recognize or consider that the domestic industry's prices increased faster than its costs between 2006 and 2008, MOFCOM also therefore failed to base its analysis of price suppression on an objective examination of positive evidence. By ignoring evidence that factors other than subject imports drove domestic price trends in the first half of 2009, MOFCOM failed to properly establish that price suppression was "the effect" of subject imports. By ignoring such evidence, MOFCOM also failed to base its price analysis on an objective examination of positive evidence.

B. China's Impact Analysis in its Redetermination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

30. MOFCOM's finding that subject imports had an adverse impact on the domestic industry does not satisfy the requirement for an objective evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." In addressing impact, MOFCOM ignored evidence that the domestic industry's performance improved according to almost every other measure during the period. MOFCOM also ignored evidence that the domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth. It also failed to address evidence that domestic industry end-of-period inventories were not significant relative to domestic industry production or shipments.

31. MOFCOM's finding that subject import competition had an adverse impact on the domestic industry's rate of capacity utilization over the 2006-2008 period does not reflect an "objective examination" because it is clearly contradicted by the record evidence. Capacity utilization was increasing at the same time subject imports were also increasing. Critically though, an objective examination would consider this trend in conjunction with the record evidence regarding the domestic industry's own capacity expansion in excess of demand, which MOFCOM ignored. Moreover, subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports did not increase their share of apparent consumption at the expense of the domestic industry. Had the domestic industry not expanded its capacity in excess of apparent consumption growth, the domestic industry's increase in share of apparent consumption would have translated into a higher rate of capacity utilization. Thus, MOFCOM's finding was not based on an "objective examination" of "positive evidence" in breach of Article 3.1 of the AD Agreement and Article 15.1.

32. MOFCOM also found that the increase in the domestic industry's end-of-period inventories was caused by subject imports. This finding too cannot be the result of an "objective examination". What MOFCOM crucially neglected to consider was the significance of that increase relative to the domestic industry's actual performance, including, how that increase related to the domestic industry's production and shipments.

33. MOFCOM's finding that subject imports had an adverse impact on the domestic industry from 2006 to 2008 rests primarily on its flawed findings regarding capacity utilization and end-of-period inventories, which failed to reflect an objective examination of positive evidence, as discussed above. In light of MOFCOM's dependence on these flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted is unsubstantiated. Moreover, in contrast to MOFCOM's finding, the record evidence clearly indicates that the domestic industry's performance improved markedly according to almost every measure during this period, when the bulk of the increase in subject import volume and market share took place. Therefore, MOFCOM's examination and evaluation was not based on an "objective examination" of "positive evidence."

C. MOFCOM's Causal Link Analysis in its Redetermination 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

34. MOFCOM's causation analysis in its redeterminations remains as flawed as the one it provided in its original determination because MOFCOM continues to (1) ignore record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) relies on flawed analysis of price undercutting and suppression; and (3) fails to reconcile its analysis with evidence that the domestic industry's performance *improved* as subject import volume and market share increased.

35. Here, MOFCOM cited no evidence that the increase in subject import volume or subject import price competition was injurious to the domestic industry. During that same period, the domestic industry increased its market share to *an even greater degree* than subject imports. With respect to the price effects of subject imports, MOFCOM relied on its flawed price comparisons and finding of price suppression. Further, MOFCOM disregarded evidence that subject import competition was significantly attenuated because nearly half of subject import volume consisted of

chicken paws, which the domestic industry could not produce in quantities sufficient to satisfy demand.

36. MOFCOM's findings on import volume and market share are clearly contradicted by evidence on the record. For example, MOFCOM failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share did not come at the expense of the domestic industry, which also *gained* market share during the POI. MOFCOM also failed to address USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws. MOFCOM did not address the issue in its final determinations or in its redetermination.

37. MOFCOM's causation analysis is inconsistent with the obligations of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because the analysis disregarded evidence that subject import volume did not increase at the expense of the domestic industry. In addition, 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 because it was based on MOFCOM's flawed price and impact analyses.

38. MOFCOM's determination of a causal link rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. But relevant record evidence indicated that the increase in subject import volume and market share did not negatively impact the domestic industry because the domestic industry gained market share during the same period. MOFCOM does not examine or explain such evidence, contrary to Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Additionally, with no evidence linking the increase in subject import and market share to material injury, MOFCOM's causal link analysis also failed to demonstrate that any material injury suffered by the domestic industry was the effect of subject import volume, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

39. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, and other evidence ignored by MOFCOM contradicts the finding, MOFCOM's price suppression finding, too, is WTO-inconsistent. Moreover, given that domestic like product prices increased over the period examined, there was no evidence of price depression. With no evidence that subject imports suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link 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 for the reasons outlined above.

40. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance. MOFCOM does not explain how subject imports could have caused any material injury to the domestic industry when the domestic industry's worst performance of the period examined occurred in 2006, before any increase in subject import volume and market share. An investigating authority cannot be said to have examined "the relationship between subject imports and the state of the domestic industry" by focusing, without reasonable explanation, solely on a discrete portion of the period of investigation. 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 conduct an objective evaluation of positive evidence.

41. MOFCOM ignored at least two compelling arguments concerning the absence of any causal link between subject imports and material injury. First, both USAPEEC and the United States argued that there could be no link between subject imports and material injury because subject import market share increased entirely at the expense of non-subject imports. This issue was clearly "material" to MOFCOM's causal link analysis. MOFCOM necessarily had to resolve the issue before relying on the increase in subject import volume and market share to establish a causal link. Consequently, MOFCOM was obligated to provide "all relevant information" on its resolution of the issue in the public notice of its final determinations. It was also obligated to provide the reasons for its rejection of U.S. respondents' argument concerning the issue.

42. USAPEEC also 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 Chinese producers were incapable of supplying in adequate quantities. By failing to provide the reasons for its rejection of USAPEEC's argument concerning chicken paws, MOFCOM breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. MOFCOM's misplaced response to USAPEEC's chicken paws argument also ignores evidence that the substantial proportion of subject imports consisting of chicken paws could not have been injurious. MOFCOM thus failed to base its causation analysis on an objective examination of positive evidence and an examination of all relevant evidence.

IX. CONCLUSION

43. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that the challenged measures are inconsistent with China's obligations under the AD Agreement and SCM Agreement and that China has failed to implement the recommendations of the DSB to bring its antidumping and countervailing measures on broiler chickens from the United States into conformity with those agreements.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The aggressive rhetoric found in China's rebuttal does not address − no less refute − the many flaws in MOFCOM's reinvestigation and redeterminations explained in the U.S. First Written Submission. Instead of addressing the legal issues in this dispute, China's rebuttal often focuses on irrelevant or extraneous matters. These types of arguments do not engage with the main task in this proceeding − namely, to determine whether China has brought its measures into compliance with the recommendations of the Dispute Settlement Body (DSB). In this second submission, the United States will continue to focus on demonstrating − through reference to record evidence − that MOFCOM failed to abide by China's WTO obligations.

II. CHINA CANNOT DEFEND MOFCOM'S PROCEDURAL FAILINGS DURING THE INVESTIGATION

A. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement through MOFCOM's Failure to Provide Notice to All Interested Parties of the Pricing Information It Required from Domestic Producers

2. The United States' claims under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement are straightforward. MOFCOM sought and obtained pricing data from domestic firms, which it then used to underpin its findings for its pricing analysis in its injury redetermination. In this process, MOFCOM failed to provide known interested parties, such as U.S. respondents, with any notice as to what specific data it required the domestic industry to produce. Without notice of what MOFCOM was requiring, U.S. respondents were not in a position to address effectively the significance of the pricing information − and therefore were denied the "ample opportunity to present evidence." Thus, MOFCOM breached China's obligations under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because it failed to provide affirmatively to U.S. interested parties both (1) notice of the information it required from Chinese firms and (2) concomitantly, opportunity to present in writing all evidence that U.S. interested parties might consider relevant.

1. Notice 88

3. Notice 88 is simply the notice of initiation for the reinvestigation. It does not provide any details as to the specifics of the information that the investigating authority will be requesting, nor does it explain in detail the conduct of the investigation, including any opportunities for interested parties to present evidence.

2. The General Verification Letter

4. The General Verification Letter is deficient in both form and substance as to MOFCOM's obligations to provide notice. With respect to form, MOFCOM did not *notify* U.S. interested parties of the General Verification Letter. Although it appears the letter is made out as "To Whom it May Concern," China's rebuttal clarifies that the letter is addressed to Chinese domestic producers. Accordingly, the interested parties MOFCOM put on notice − i.e., to "alert or warn" − were Chinese domestic producers. Substantively, China fares no better. An investigating authority's notation that it intends to conduct "on spot verifications," without any specifics regarding the precise information it requires from participating parties, falls far short of the requirements to provide notice to interested parties of information *required* by MOFCOM.

3. Chinese Producers' Summaries

5. The Chinese producer summaries suffer from two significant deficiencies, each of which preclude China establishing that it provided notice consistent with AD Agreement Article 6.1 and

SCM Agreement Article 12.1: (1) China did not provide interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform interested parties of the information MOFCOM required. First, to the extent China points to Exhibit CHN-14, a webpage that lists what China deems public documents, there is no indication as to when the materials were loaded on the webpage or that China provided any notice to interested parties that such information could be found there. Second, the summaries cannot be construed as notice of the *information that MOFCOM required*. They are summaries of what *information Chinese producers purportedly provided*. Knowledge of the precise parameters that MOFCOM required for this information is of course necessary to understanding the significance of and potential errors in the responses. Further, China glosses over the fact that these May 20 documents were ***submitted one day before*** release of the RID.

B. China Breached Articles 6.1.2 and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying U.S. Interested Parties the Evidence Presented by the Domestic Producers Participating in the Reinvestigation

6. The Chinese producer summaries do not satisfy China's obligations as to AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 because, once again, (1) China did not provide U.S. interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform U.S. interested parties of the information MOFCOM required. Even assuming the notice was not deficient, the *only* information it provided to interested parties consisted of *summaries* of the pricing information. They do not *convey* the context surrounding what positions were advocated by the domestic producers providing the information, and the corresponding issues that MOFCOM sought to resolve during the reinvestigation.

C. China Breached AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 Because it Failed to Permit Access to Evidence that would have Enabled the Interested Parties to Prepare their Cases

7. China acted inconsistently with AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 because it failed to permit access to information to interested parties that would have enabled them to prepare their cases and defend their interests. MOFCOM failed, per AD Agreement Article 6.4 and SCM Agreement Article 12.3, to provide interested parties timely opportunities to see information that is relevant, non-confidential, and used by authorities in their investigation. China's public release of summaries does not excuse its failure to provide the context for these data, including the specific products for which pricing data was requested, that clearly fall within the scope of the articles. The same deficiencies apply to China's failure to provide the precise identity of the four Chinese domestic enterprises that provided information to MOFCOM. Moreover, although an oral "hearing" took place on June 13, 2014, that "hearing" in no way provided interested parties with an opportunity to prepare presentations in defense of their interests. U.S. respondents were told by MOFCOM during this meeting that the re-investigation was closed, and that no further comments could be submitted by interested parties.

D. China's Failure to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins was Inconsistent with AD Agreement Article 6.9

8. China's failure to disclose "essential facts," i.e., the margin calculations and data it relied upon to determine the existence of dumping by U.S. respondents Pilgrim's Pride and Keystone, was inconsistent with AD Agreement Article 6.9. Pilgrim's Pride was denied access to the data calculations from the original investigation in the reinvestigation while MOFCOM used a purported error in the data and calculations from the original investigation to increase the margin of Pilgrim's Pride. Without the *original* calculations and data, Pilgrim's Pride had no ability to identify precisely what had changed – which entirely denied Pilgrim's the opportunity to defend its interests. Similarly, MOFCOM did not abide by the obligation to ensure that a disclosure was made "in sufficient time for … [Pilgrim's] to defend … [its] interests." Likewise, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation. Although Keystone did not cooperate in the reinvestigation, and MOFCOM applied facts available to it, Keystone was an "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the duties.

III. CHINA CANNOT DEFEND MOFCOM'S ANTIDUMPING REDETERMINATION

A. China Has Not Rebutted U.S. Claims That MOFCOM Failed to Properly Allocate Tyson's Costs Under the Second Sentence of AD Agreement Article 2.2.1.1

9. The substantive obligation in the second sentence of AD Agreement Article 2.2.1.1 demands that investigating authorities deliberate and evaluate the "proper" allocation of costs based on its consideration of the evidence presented. The Panel recognized this fact. China's suggestion to the contrary is wholly unsupported and should be rejected.

10. China failed to meet the requirement in the second sentence of AD Agreement Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs" because of MOFCOM's decision to adhere to a weight-based methodology while failing to allocate costs by weight to all products that derive revenue from the production of the product under consideration − including a failure to allocate costs to blood, organs, feathers, and other viscera. China itself recognized this problem in its prior WTO submissions and its redetermination, which explicitly noted, in support of its weight-based methodology, that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across all products. Yet China chose to ignore these distortions and allocate costs over a more limited range of products − resulting in artificially inflated normal values for those products.

B. MOFCOM's Failure to Consider Any Alternative Allocation Methodologies for Pilgrim's Pride was Inconsistent with AD Agreement Article 2.2.1.1

11. China's suggestion that the general findings were exclusive of Pilgrim's Pride is not supported by the plain text of the Panel's decision. Moreover, China's suggestion that it did not need to consider Pilgrim's data at all because it believed the data to be flawed is flatly inconsistent with the original panel's finding that China failed to explain why its methodology led to a "proper" allocation of costs. The only way that China could have engaged in a neutral, fact-driven consideration of the "proper" allocation of costs, as required under the second sentence of AD Agreement Article 2.2.1.1, is if it had considered data submitted by Pilgrim's Pride.

C. China Acted Inconsistently with Article 9.4 of the AD Agreement on Account of MOFCOM's "All Others" Rate

12. China ignored its obligation under the general rule of Article 9.4 to calculate an all-others rate that "shall not exceed . . . the weighted average margin of dumping established with respect to the selected exporters or producers" and, instead, arbitrarily applied the highest antidumping duty rate found, as a result of the reinvestigation of Pilgrim Pride's rate. MOFCOM's investigation was limited to three companies: Tyson, Pilgrim's Pride, and Keystone. In the present circumstances, there were no new respondents that MOFCOM could potentially add to the investigation − nor were there any respondents who failed to cooperate. The exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4.

D. China's Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.

13. China's use of facts available instead of Tyson's reported costs is inconsistent with Article 6.8 and Annex II of the AD Agreement. Contrary to China's suggestions, Tyson did not refuse access to, fail to provide, or other otherwise impede MOFCOM's ability to obtain requested information − such that MOFCOM could justify the application of facts available under Article 6.8. China's claims that Tyson made unexplained changes in its data during the redetermination proceedings are baseless. Rather, all changes made by Tyson during the reinvestigation were made at the specific request of MOFCOM and because MOFCOM altered its approach compared with the original investigation. China's argument rests on its belief that it can make an unreasonable and unrealistic demand for data in a reinvestigation that is fundamentally at odds with its requests during the original investigation, and that the investigating authority knows will be impossible for a respondent to provide in light of its standard accounting and business practice. Tyson made every effort that it could to comply with MOFCOM's requests for information, and cooperated to the best of its ability.

IV. MOFCOM'S INJURY REDETERMINATION BREACHED THE AD AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Remains Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

14. There is nothing in MOFCOM's redetermination that establishes MOFCOM actually controlled "for differences in physical characteristics affecting price comparability" − a deficiency the Panel found in its report with respect to the original determination. In its redetermination, MOFCOM apparently sought and collected product-specific pricing data from only four of 17 domestic producers that in its view justified its original average unit value comparisons, without ensuring that its sample of domestic industry sales prices was representative. MOFCOM's redetermination fails to explain why MOFCOM chose these four producers, how it ensured their data was reliable, and how it could ensure that this limited data could be extrapolated to support MOFCOM's findings.

1. MOFCOM's Underselling Analysis Remains WTO-Inconsistent

15. MOFCOM based its finding that subject import underselling was significant on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient. China readily acknowledges that MOFCOM's AUV comparisons remain the sole basis for its finding that subject imports undersold the domestic like product significantly, and that MOFCOM took no steps to adjust these data or otherwise control for differences in product mix in its redetermination.

16. Because the average unit value of subject imports differed dramatically by product, changes in the product mix of subject imports during the period of investigation would have directly influenced the average unit value of all subject imports during the period; for example, an increase in the proportion of lower-priced products from one year to the next would have caused the average unit value of all subject imports to decline. By failing to control for changes in the product mix of subject imports, MOFCOM's underselling analysis relied on subject import underselling margins that reflected not only differences in product mix between subject imports and domestic industry sales but also changes in the product mix of subject imports over time.

17. China argues that MOFCOM was justified in relying on its original average unit value comparisons because the product-specific pricing data it collected from four of the 17 domestic producers comprising the domestic industry suggested that the product mix of subject imports contained a higher proportion of high-value products than the product mix of domestic producers. But MOFCOM's AUV comparisons cannot be deemed objective or reliable. Specifically, both the magnitude and the trend of subject import underselling margins calculated from AUV comparisons would have reflected differences in product mix and changes in the product mix of subject imports over time. In other words, MOFCOM cannot proceed to compare and draw conclusions because no controls had been applied to ensure the underlying data − which by nature was in flux − was in fact comparable. Furthermore, MOFCOM's analysis of product-specific pricing data did not establish that subject imports were comprised of a higher proportion of high-value products because MOFCOM failed to ensure that its sample of domestic producers and their sales prices on specific products was representative.

2. MOFCOM's Price Suppression Finding Remains WTO-Inconsistent

18. 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." As the Appellate Body explained in *China − GOES*, the obligation of investigating authorities to consider whether subject imports have "explanatory force" for price depression and suppression, under AD Agreement Article 3.2 and SCM Agreement Article 15.2, and "the state of the domestic industry," under AD Agreement Article 3.4 and SCM Agreement Article 15.4, is an integral part of an authority's consideration of causation under AD Agreement Article 3.5 and SCM Agreement Article 15.5. Thus, MOFCOM was required under AD Agreement Article 3.2 and SCM Agreement Article 15.2 to establish that subject imports caused the significant suppression of domestic like product prices.

19. Because the principal basis for MOFCOM's finding that subject imports caused price suppression in the redetermination was its deficient underselling analysis, the Panel should find that MOFCOM's price suppression finding remains WTO-inconsistent. Although China also claims that MOFCOM supported its price suppression finding with reference to subject import volume, MOFCOM did not find in its redetermination that subject import volume alone suppressed domestic like product prices to a significant degree. On the contrary, MOFCOM emphasized in the section of its redetermination titled "Impact of the Import Price of the Subject Merchandise to the Price of the Domestic Like Products" that it was subject import underselling, not subject import volume, that suppressed domestic like product prices. It was MOFCOM's reliance on its deficient underselling analysis in finding price suppression that led the original panel to find MOFCOM's price suppression finding inconsistent. MOFCOM's continued reliance on its deficient underselling analysis in finding price suppression in the redetermination is likewise inconsistent with those articles.

20. MOFCOM also failed to establish that the alleged underselling by subject imports caused the significant suppression of domestic like product prices. Most of the alleged underselling by subject imports, which occurred between 2006 and 2008, was not accompanied by the "prevent[ion of] price increases, which otherwise would have occurred, to a significant degree," contrary to MOFCOM's finding that subject imports significantly suppressed domestic like product prices. MOFCOM not only ignored this evidence that contradicted its analysis of price suppression, but also failed to explain how subject imports could have suppressed domestic like product prices in the first half of 2009 when most of the increase in subject import volume and market share, and most of the alleged subject import underselling, did not suppress domestic like product prices between 2006 and 2008.

B. MOFCOM's Impact Analysis Breached AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4

21. MOFCOM was required under AD Agreement Article 3.4 and SCM Agreement Article 15.4 to not only examine the domestic industry's performance during the period of investigation but to also examine "the consequent impact" of subject imports on that performance. Furthermore, an investigating authority cannot examine the impact of subject imports on the domestic industry during the period of investigation without considering the relationship between subject imports and domestic industry performance over the entire period of investigation. Doing so would not be an "objective examination," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, because it would ignore periods in which subject imports coincided with improving or stable domestic industry performance, thereby making an affirmative determination more likely. Such an analysis would also ignore "relevant economic factors," namely the industry's improving performance over most of the period of investigation. Here, it was particularly important that MOFCOM examine the impact of subject imports on the domestic industry over the entire period of investigation because most of the increase in subject import volume and market share occurred between 2006 and 2008.

22. Yet, by China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened. The record before MOFCOM established that during the three full years of the period of investigation, which coincided with most of the increase in subject import volume and most of the alleged underselling by subject imports, the domestic industry's performance improved substantially according to most measures. Although the domestic industry's end-of-period inventories increased, they remained insignificant relative to industry production and sales (equivalent to around 3 percent of both), as China concedes. By failing to account for the bulk of the record evidence showing that subject imports had no adverse impact on the domestic industry between 2006 and 2008, MOFCOM failed to conduct an evaluation of all relevant economic factors, contrary to AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

23. None of the factors cited by China in its first written submission excuse these deficiencies in MOFCOM's impact analysis. MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire period of investigation, including those periods in which the industry's performance improved. Nor was MOFCOM entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation," to the exclusion of other contradictory factors. That the domestic industry had pre-tax losses throughout the period of investigation says nothing about the changes or trends in the industry's financial

performance. Nor does it take into consideration the multiple other "relevant economic factors" enumerated in AD Agreement Article 3.4 and SCM Agreement Article 15.4. The record before MOFCOM showed that the domestic industry's worst financial performance during the 2006-2008 period occurred in 2006, before the increase in subject import volume and market share. The data show that most of the increase in subject import volume and market share coincided with an improvement in the industry's financial performance, according to every measure. By ignoring these trends, just as it discounted all other positive trends in the industry's performance, MOFCOM failed to objectively evaluate "all relevant economic factors," in violation of AD Agreement Article 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4. The third factor that China cites in defense of MOFCOM's impact analysis, alleged future subject import volume, was completely irrelevant to MOFCOM's analysis of the impact of subject imports on the domestic industry during the period of investigation. MOFCOM found that "U.S. producers of chicken products or broiler products are likely to expand exports to China, and cause further adverse effects to China's industry." China's argument has two fundamental problems. First, this finding on likely future trends was not supported by the record. Second, future subject imports could have no impact whatsoever on the domestic industry during the period of investigation.

24. Finally, China is incorrect that MOFCOM's analysis of the domestic industry's capacity utilization supported its finding that subject imports adversely impacted the domestic industry during the 2006-2008 period. China argues that the domestic industry's capacity did not grow in excess of demand between 2006 and 2008 because the increase in capacity, at 780,700 MT, was less than the increase in demand, at 955,600 MT. The increase in the domestic industry's capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period. Only the domestic industry's 26.2 percent increase in capacity, in excess of the 17.0 percent increase in apparent consumption, prevented the industry's capacity utilization rate from improving just as dramatically as other measures of industry performance.

C. MOFCOM's Causation Analysis Breached 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

25. MOFCOM's reliance on a flawed analysis of the effects of subject imports to demonstrate a causal link breaches the first sentence of AD Agreement Article 3.5 and SCM Agreement Article 15.5. Moreover, MOFCOM acted inconsistently with the second sentence of these articles by failing to base its causation analysis on "an examination of all relevant evidence." Specifically, MOFCOM ignored evidence that the increase in subject import volume and market share was not at the expense of the domestic industry, which increased its market share by an even greater amount.

1. MOFCOM Failed to Examine All Relevant Evidence in Breach of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Article 15.1 and 15.5

26. MOFCOM explicitly predicated its finding of a causal link between subject imports and injury on "the increase of the import volume" and "the large volume of dumped imports originating in the U.S.," yet ignored that the 3.92 percentage point increase in subject import market share during the period of investigation did not prevent the domestic industry from increasing its market share by an even greater 4.38 percentage points. This evidence that subject imports captured no market share from the domestic industry during the period of investigation, and did not prevent the industry from growing its market share during the period, was clearly "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.1. That MOFCOM "noted" the increase in the domestic industry's market share somewhere in the redetermination does not remedy this deficiency.

27. MOFCOM's isolated reliance on the increase in subject import volume and market share in finding a causal link between subject imports and injury also ignored that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of chicken paws that could not, as a factual matter, have injured the domestic industry. An uncontested fact on the record before MOFCOM, which China does not dispute, was that domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to

uneconomic levels. The clear implication of this irrefutable fact is that subject imports of chicken paws could not have injured the domestic industry.

28. China asserts that MOFCOM's reference to its preliminary finding that chicken feet were within the scope of the investigation somehow satisfied its obligation. MOFCOM's observation that chicken feet were within the scope was a complete *non sequitur*. By ignoring that subject imports of chicken feet could not have injured the domestic industry, MOFCOM's causation analysis relied on an increase in subject import volume and market share that was greatly inflated by the inclusion of non-injurious chicken feet. Relying on its defective impact analysis, MOFCOM's finding of a causal link between subject import and injury also ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008. By limiting its causation analysis to those portions of the period of investigation in which the industry's performance weakened while ignoring those portions coinciding with most of the increase in subject imports, MOFCOM failed to base its causation analysis on an "objective examination," and "all relevant evidence."

29. Contrary to China's claim that the United States has made no challenge to MOFCOM's analysis of adverse volume effects, the United States continues to argue, as it did before the original panel, that MOFCOM ignored evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance between 2006 and 2008, and did not prevent the domestic industry from increasing its own market share to an even greater degree. These deficiencies in MOFCOM's volume effects finding underscore the WTO-inconsistency of MOFCOM's causation analysis.

2. MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents Violated AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5

30. MOFCOM's approach manifestly failed to provide "in sufficient detail . . . the reasons for the . . . rejection of relevant arguments." Specifically, China argues that MOFCOM "addressed" USAPEEC's and the United States' argument that subject imports had no adverse volume effects because they captured no market share from the domestic industry by stating that "[d]uring the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product . . . ." Conspicuously absent from MOFCOM's response is any mention or consideration of market share, and specifically the record evidence highlighted by USAPEEC and the United States showing that subject imports captured no market share from the domestic industry. Having failed to address the very point raised by USAPEEC and the United States, MOFCOM cannot be said to have provided "in sufficient detail" its reasons for rejecting the argument.

31. China also argues that MOFCOM "addressed" USAPEEC's argument that the 40 percent of subject imports consisting of chicken paws could not have injured the domestic industry by referencing its finding from the preliminary determination 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 . . . ." That MOFCOM included the words "chicken paws" in its response to USAPEEC's argument revealed nothing about the "reasons" why MOFCOM decided to ignore completely uncontested evidence on the record that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of non-injurious chicken paws.

V. CHINA'S TERMS OF REFERENCE ARGUMENTS ARE WITHOUT MERIT

32. The United States' Panel Request provides more information than is required under the DSU to present the claims at issue in this dispute. In particular, the United States often previewed some of the specific arguments it intended to advance by providing indicative examples of how China breached its WTO obligations. In each of the instances China complains of, the U.S. Panel Request has clearly stated the measures and claims at issue − and is thus entitled to have the Panel consider them. China's position essentially demands that Members not only identify claims, but that they must also provide in the Panel Request the precise arguments that will be presented in their submissions. The DSU does not compel this result.

33. The Panel Request clearly identifies that the measures at issue are those leading to the continued imposition of AD and CVD duties on U.S. broiler products – and further clarifies for China that the United States is concerned with MOFCOM's conduct during the reinvestigation. For each of its claims, the United States has identified the relevant obligation in the covered agreement. The United States has done so not only by identifying treaty provisions, but also by providing appropriate narrative descriptions when necessary. Moreover, the United States has also provided in some instances precise examples of how it might seek to demonstrate breach. The Appellate Body's prior analysis has correctly recognized that Members may provide indicative examples of how the claim might be established. Such an examples are simply foreshadowed arguments; they do not detract from the claim itself.

VI. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

34. Because China has not rebutted the foregoing claims demonstrated by the United States, China as a consequence is also unable to rebut that it has breached AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994.

VII. CONCLUSION

35. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the AD Agreement, SCM Agreement, and the GATT 1994, and thus that China has failed to comply with the DSB recommendations in this dispute.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. We are here today because China, notwithstanding the clear findings earlier in this dispute – and other disputes – has breached the basic procedural and substantive obligations of the AD and SCM Agreements in maintaining antidumping and countervailing duties on U.S. broiler products. To a large extent, China has not addressed the legal and factual arguments of the United States, but rather relies on rhetoric and conclusory statements. Rather, China's arguments are primarily, as this Panel put it in the original proceeding, simply *post-hoc* rationalizations that are "irrelevant for the purposes of our assessment of MOFCOM's actions."

II. MOFCOM'S FLAWED INJURY REDETERMINATION BREACHES THE AD AND SCM AGREEMENTS

2. China's defense of MOFCOM's injury redetermination centers on the assertion that the United States is seeking to substitute its judgment for MOFCOM's. The issue is not whether MOFCOM has discretion, but whether the exercise of that discretion comports with the obligations in the AD and SCM Agreements.

A. China Cannot Defend MOFCOM's Price Effects Analysis

3. An objective examination of pricing data requires that the prices the investigating authority compares must correspond to comparable products. Tellingly, MOFCOM's price effects analysis in the redetermination continues to rely on its original flawed analysis of AUVs, rather than make any of the requisite adjustments to ensure comparability.

4. First, MOFCOM's determination does not explain why its approach of using domestic pricing data from these four particular firms would resolve the issue of product mix. As is evident, we have no understanding how this data was applied to ensure that product mix is not an issue. Second, there is nothing in the redetermination about why or how these firms were selected. Nor does the record indicate the coverage of their product-specific data. Even the *post hoc* rationalization offered by China in its submissions suggests the only reason these firms were chosen was that it was convenient for MOFCOM since it was already familiar with these four firms and decided it lacked the time and resources to examine all 17 firms. It is important to keep in mind that the data from these four firms is a sample of a sample. As the Panel may recall, in defending against the U.S. challenge on how MOFCOM defined its domestic industry in the original proceeding, China stressed the large number of firms that comprised its domestic industry. Particularly, in the absence of any explanation as to the methodology employed by MOFCOM to select these firms, it is clear that MOFCOM's attempt to remedy the AUV deficiency is not an "objective examination" based on "positive evidence." Third, as our submissions explain, the record demonstrated that the product mix of subject imports was dynamic in that it changed over time. China's attempted response is that MOFCOM's "spot check" confirmed that this was not an issue. China's argument, which lacks any citation to the record or the determinations, is a *non-sequitur*. It ignores that a "spot check" cannot, by definition, examine a changing market situation. Fourth, China fails to address that MOFCOM did not even attempt to examine the product mix pricing for imports. The limited data indicated that paws tended to be ranked 3rd or 4th in terms of price, and the sales price index for paws was little higher than the sales price index for breast meat, which China characterizes as a "lowest price product." The products ranked 1st and 2nd in terms of price, wings and gizzards, were sold by the four domestic producers, but not imported from the United States in appreciable quantities. In light of this, MOFCOM could not objectively conclude that the product mix sold by the domestic industry was comparable to that of the imported subject merchandise.

5. China's defense of MOFCOM's price suppression finding appears to rest on two points. First, China appears to argue that a price suppression finding does not need to be well explained under the relevant obligations. This position has no legal basis. Second, China asserts that the United States is misreading the record. But the relevant portions of the record are clear, and the United States has accurately described MOFCOM's reasoning: MOFCOM predicated its finding that subject imports significantly suppressed prices for the domestic like product on its deficient underselling analysis. In addition, MOFCOM failed to address record evidence that prices for the domestic like product were not, in fact, suppressed during the 2006-2008 period. In particular, even as subject imports allegedly undersold the domestic like product, the Chinese domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008.

B. China Cannot Defend MOFCOM's Impact Analysis

6. China has confirmed that MOFCOM's analysis on the impact of subject imports on the domestic industry in the redetermination remains *completely unchanged* from that in the original determination. Accordingly, MOFCOM has taken no steps to address any of the arguments concerning why its impact analysis is deficient under the AD and SCM Agreements.

7. First, MOFCOM's examination of the impact of subject imports on the domestic industry failed to consider the numerous factors attesting to the overall health of the industry. Almost every metric during the period of investigation *improved*. China claims MOFCOM "systematically addressed" these factors. But the text of the redetermination indicates otherwise. Only two factors in the Chinese broiler industry did not appear to improve over the period of investigation: the domestic industry's rate of capacity utilization and end-of period inventories. With respect to inventories, MOFCOM failed to consider the increase in inventories in relation to the domestic industry's production and shipments. Also, the industry's inventories were objectively small, equivalent to only around three percent of industry output and shipments. Likewise, MOFCOM's findings on capacity utilization fail to address evidence indicating that the level was not due to subject imports. As our submissions explain, capacity utilization actually increased slightly during the 2006-2008 period corresponding to most of the increase in subject import volume. The only reason the industry's capacity utilization did not increase dramatically during the period was the industry's own decision to increase capacity far beyond growth in domestic demand.

C. China Cannot Defend MOFCOM's Causal Link Analysis

8. Our submissions highlight that MOFCOM's causation analysis in its redetermination remains flawed for precisely the same reasons as the original determination. With respect to the first point, the redetermination failed to address that the increase in subject import market share during the period of investigation failed to prevent the domestic industry from increasing its market share by an even greater amount. The second reason MOFCOM's finding of causation is inconsistent with the AD and SCM agreements is because it relies on MOFCOM's price underselling analysis, which remains flawed for the reasons already discussed. The third flaw in MOFCOM's finding of a causal link between subject import and injury is that MOFCOM ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008.

III. MOFCOM'S FLAWED REINVESTIGATION BREACHES THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

A. MOFCOM Failed to Provide Notice to Interested Parties of the Pricing Information it Required from Chinese Domestic Producers and Denied Them Ample Opportunity

9. As the Panel has noted in its Preliminary Ruling, "MOFCOM required, sought, and obtained additional information from Chinese domestic producers in the course of its reinvestigation." And, because MOFCOM failed to afford both notice and opportunity to interested parties in connection with the information that it required from Chinese producers, China is in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Indeed, the United States notes that it is striking that even after two rounds of submissions, no one other than China still knows the precise requests that were actually posed to the Chinese producers.

B. MOFCOM Failed to Permit Interested Parties Timely Access to Information Such that they could Defend Their Interests

10. China has also breached Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement, which requires investigating authorities to permit *timely* access to information to interested parties, to *enable them to prepare their cases, and defend their interests.* China failed to afford those opportunities as to the data MOFCOM requests from China's domestic producers, including the identity of those producers and the specific information requests issued by MOFCOM. China asserts that its supposed deposit of documents to the public information room at China's Ministry of Commerce satisfied its obligations. The deposit of documents in the reading room is not meaningful, absent notice to interested parties.

C. China's Failure to Disclose the Anti-dumping Calculations and Data

11. In the reinvestigation, Pilgrim's Pride was denied access to the data calculations from the original investigation, even though MOFCOM cited a purported error in the data and calculations from the original determination to increase the margin of Pilgrim's Pride by 20 points. Keystone likewise was denied access to its margin calculations and data from the original investigation. Keystone, as a foreign producer, was indeed an "interested party" as defined under Article 6.11, whether or not it chose to participate by submitting new data. In addition, China's explanation concerning Keystone's supposed lack of an authorized representative is without merit. Keystone's duly appointed representative indicated through a memorandum that it was authorized to "act on behalf of Keystone and to receive any document on Keystone's behalf."

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATION BREACHES THE AD AGREEMENT

A. China Cannot Point to Any Record Evidence to Support MOFCOM's Assertion that U.S. Producers' Recorded Costs Were Unreasonable

1. The Methodology Applied to Tyson is Not Proper

12. The Panel found in the original dispute that China breached the second sentence of AD Agreement Article 2.2.1.1 by relying upon a distortive weight-based allocation methodology for Tyson. In its redetermination, MOFCOM did not address this error. China's attempt to manipulate a value-based allocation method to distinguish total meat costs into categories, but then rely on a separate weight-based method to allocate total meat costs for only one of those categories into specific products, is not consistent with Article 2.2.1.1. Furthermore, if China indeed wanted to use a weight-based methodology, it by necessity needed to allocate costs across all products – and not just to broiler products. To allocate costs selectively introduces substantial distortions.

13. Further, China's claim that the scope of its investigation only included chicken for "human consumption" must be rejected. China's own response submission implicitly recognizes such, in stating that "Tyson's normal books and records demonstrated that the little cost [sic] was assigned to feathers and blood because the sales revenues of these items were very low." All parts of a chicken, including both those for human consumption and those that are rendered, are co-products, and a consistent, reasonable methodology must be used to allocate production costs to all co-products.

2. The Methodology Applied to Pilgrim's Pride is Not Proper

14. China similarly failed to give any consideration of the "proper" allocation of costs with respect to Pilgrim's Pride. The Panel's decision made two findings that applied to *all* respondents – specifically, that China failed to give proper consideration to "alternative allocation methodologies presented by the respondents," and that China "improperly allocated all processing costs to all products." MOFCOM failed to do any evaluation with respect to Pilgrim's Pride's costs, and for this reason alone breached Article 2.2.1.1's obligation to "consider all available evidence on the proper allocation of costs," and resulted in a failure to provide a reasoned and adequate explanation for its determination.

B. MOFCOM's "All-Others" Rate

15. The plain text of Article 9.4 establishes a cap on the duty that may be applied to imports from "exporters or producers not included in the examination." Here, MOFCOM's investigation was limited to only three companies; no other exporter was examined. Article 9.4 does not allow for distinctions between classes of exporters or producers "not included in the examination". Any exporters or producers not included in the examination are entitled to a rate consistent with AD Agreement Article 9.4.

C. China's Reliance on Facts Available for Tyson was Unsupported because Tyson Fully Cooperated to the Best of its Ability

16. MOFCOM's use of facts available is inconsistent with Article 6.8 and Annex II of the AD Agreement. China has failed to present any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information – such that could justify the application of facts available. Rather, MOFCOM during the reinvestigation sought information that simply did not exist, and Tyson still made every reasonable effort to use the data available in its business records to satisfy MOFCOM's request. Contrary to China's assertion, Tyson did not make unexplained changes to its data during the redetermination proceedings. Rather, Tyson used the standard costs data it had to breakdown these total actual costs for each product-brand code into meat and processing costs for each cost center. Tyson was forthcoming with MOFCOM on why and how it was proceeding in this manner. Yet China completely rejected this information provided by Tyson in the reinvestigation, without engaging in an objective process of examining the submitted data or an effort to verify its accuracy or reliability.

17. Finally, China's reliance on the Panel report findings, at paragraph 7.196 with regard to "pure meat" and "pure processing" costs is disingenuous. In fact, Tyson provided this information in the only way that it could. And it is obvious why the processing costs changed: those processing costs were embedded in the total meat costs during the original investigation, and Tyson had to disaggregate those processing costs during the reinvestigation, using the data Tyson had at its disposal. Such extensive efforts by Tyson do not reflect a failure to cooperate.

V. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

18. These claims are consequential and therefore do not require any independent evidence to be established – they simply result from breaches of other provisions of the AD and SCM Agreements. Accordingly, the Panel may issue findings on these claims if it finds breaches on the foregoing claims we have discussed.

VI. CONCLUSION

19. For these reasons and those set forth in our submissions, the United States respectfully requests the compliance panel to find that China's measures taken to comply with the recommendations and rulings of the DSB are inconsistent with China's obligations under the AD Agreement, the SCM Agreement, and GATT 1994.

ANNEX C

ARGUMENTS OF CHINA

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. The United States seriously mischaracterized the factual context and the findings made by MOFCOM during the redetermination proceedings that bring the antidumping and countervailing duty measures at issue in DS427 into compliance with China's obligations under the WTO. First, the United States seeks to pursue several specific claims that are beyond this Panel's Terms of Reference. In other areas, the U.S. First Written Submission drops any argument about provisions that were included in the Panel Request. Second, the United States argues for other approaches to issues that would have also been permissible, had MOFCOM decided to adopt them, but that simply were not required given the Panel findings. Third, when focusing on the specifics of each U.S. claim, it is important not to lose sight of what the United States has not challenged and therefore concedes to be WTO-consistent. The Panel focus, of course, will be on the U.S. claims, but the evaluation of those claims needs to take into account the factual and legal context that has not been challenged.

II. THE FACTUAL BACKGROUND PROVIDED BY THE UNITED STATES CONCERNING MOFCOM'S INVESTIGATIVE PROCESS OMITS OR MISSTATES KEY FACTS

2. The United States has presented a somewhat self-serving summary of the redetermination proceeding, omitting or misstating key facts that are important for the Panel's consideration.

3. China promptly began the procedure to implement the Panel findings in this dispute. On 25 December 2013, MOFCOM issued its Announcement No.88 of 2013 notifying its intention to reinvestigate the anti-dumping and countervailing measures on imports of broiler products originating in the United States. The purpose of the reinvestigation was to implement the findings of the Panel in DS427.

4. Questionnaires were issued to those U.S. exporters for which the Panel findings required some reconsideration by MOFCOM on 7 January 2014. Investigative procedures were tailored appropriately, seeking specific information regarding the issues about which the Panel had made findings. No company was asked to prepare entirely new responses for a new period of time or for a new product. U.S. exporters had a typical due date of two weeks to respond to the initial questionnaire. They requested more time, and MOFCOM granted the requests to the extent practicable, as well as multiple opportunities to clarify their responses.

5. MOFCOM also reinvestigated the Chinese domestic producers. On 19 February 2014, the MOFCOM released its Notification on On-spot Verifications in the Anti-dumping and Anti-subsidy Re-investigation on Broiler Products, which provided the schedule and the methodology of the investigations to be carried out. Given the Panel Report findings on MOFCOM's failure to ensure price comparability with regard to its analysis of price effects, the parties had a clear sense of what was expected from them through the Notice.

6. MOFCOM conducted on-site verifications of the same three producers whose questionnaire responses had been verified in the original verification, as well as the largest producer that was visited before the original final determination. Product-specific price data were sourced using standard verification methodologies and on the basis of the companies' questionnaire responses from the original investigation. MOFCOM requested a breakdown of the sales quantity and value reported to show product-specific pricing data. MOFCOM also verified these data by requesting product coding, sales ledgers and sampled invoices.

7. On 16 May 2014 MOFCOM issued disclosures to Pilgrim's Pride, Tyson, and the U.S. Government. These disclosures covered all issues for the two U.S. exporters. Keystone had not designated an agent and was otherwise not cooperating with the reinvestigation, so MOFCOM tried

reaching out to Keystone directly and through the U.S. Embassy, but MOFCOM was not able to provide any disclosure directly to Keystone.

8. On 20 May 2014, the four domestic producers filed the public versions of their Post-Verification Supplemental Information. The names of these producers were disclosed in the public version. On 21 May 2014, MOFCOM released its injury disclosure and the essential facts to all known interested parties, and provided an opportunity for comment.

9. On May 23, 2014, the Investigating Authority issued its Notification on Hearing and on May 30, 2014, the hearing was held. The domestic parties declined to attend the hearing. The U.S. Government, Tyson Foods Inc and Pilgrim's Pride Corporation attended the hearing. At the hearing, the U.S. Government gave a presentation. The U.S. exporters choose not to make their own presentations, but they attended.

III. MOFCOM ABIDED BY ITS PROCEDURAL OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT AND THE SCM AGREEMENT

A. China Did Not Act Inconsistently with Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

10. This U.S. claim falls outside the Panel Request. The U.S. claim cites to documents that do not even exist, and does not "present the problem clearly" as required by Article 6.2 of the DSU. It only identifies MOFCOM's alleged failure to disclose questionnaires submitted to the domestic industry and it is preceded by the phrase "for example". Although such language might serve to specify a previously generally identified measure, it does not reference any specific part of the Redetermination, and instead references only "questionnaires" that do not even exist.

11. Even if the claim were properly raised, it nevertheless fails on its merits as factually incorrect and legally baseless. The U.S. argument simply ignores all of the disclosure, including the initiation notice of re-investigation, the general verification letter, and the public versions of verification exhibits, that took place earlier in the process and was more than sufficient to satisfy Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

B. China Did Not Act Inconsistently with Article 6.4 and Article 6.5 of the Anti-Dumping Agreement and Articles 12.3 and 12.4 of the SCM Agreement

12. This U.S. claim is outside the Panel's Terms of Reference because it does not identify the "specific measures" at issue nor does it provide a "brief summary of the legal basis" for its claim. The U.S. purports to have identified the "specific measures" at issue and to have provided a "brief summary of the legal basis" but there are several key aspects of this language that ignore the requirements of Article 6.2 of the DSU. In its First Written Submission, the U.S. contends that China acted inconsistently with certain specific provisions, yet paragraph 5 of the Panel Request does not even mention Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement at all. Nor do the claims under Articles 6.4 and 12.3 present the problem clearly. To include these provisions now would be contrary to Article 6.2 of the DSU.

13. Even if the Panel were to consider such claim as within its Terms of Reference, the U.S. claim that MOFCOM acted inconsistently with these provisions is without merit. These provisions require that relevant information provided by one party in an investigation is promptly made available to other participating parties. China promptly made available evidence in writing to the interested parties participating in the investigation in accordance with these provisions by releasing as timely as possible − that is on the very same day of receipt − the Public Versions of the Post-Verification Exhibits by the domestic producers and by providing to all interested parties in the reinvestigation access to the files in the Public Information Room.

14. The United States has dropped its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. But even if considered, this claim fails. MOFCOM provided the parties with access to all relevant information through notice and public summaries. The parties had sufficient time to prepare their defenses and in fact did so.

C. China Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

15. MOFCOM in fact disclosed the "essential facts" to Pilgrim's Pride. The U.S. narrative is factually inaccurate. MOFCOM not only provided Pilgrim's Pride with all of the data and calculations used in the reinvestigation, which included the data from the original investigation, but also discussed its corrections with Pilgrim's Pride. In fact, MOFCOM made additional adjustments to its calculations based on Pilgrim's Pride input, further evidencing that Pilgrim's Pride in fact had all of the essential facts necessary to have a meaningful participation.

16. The other objection raised by the United States is that Pilgrim's Pride received the essential facts too late. This statement is factually wrong. MOFCOM disclosed the essential facts to Pilgrim's Pride at the opportune moment and before its decision was final. Moreover, MOFCOM discussed its corrections with Pilgrim's Pride. By indicating calculation errors and corresponding corrections, Pilgrim's Pride was fully aware of the data and calculations of dumping margin from the original investigation. Consequently, there is no factual basis to argue that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride.

17. MOFCOM also disclosed essential facts to Keystone. The U.S. argument fails to note that although Keystone was duly notified of the reinvestigation through the publication of Notice No. 88 on MOFCOM's website, and that MOFCOM also attempted to contact Keystone directly, as well as through the U.S. Embassy, Keystone refused to participate in the reinvestigation proceedings. The precise calculations were business confidential information, and could not be released publicly. Since Keystone did not duly appoint any representative, there was no one to whom MOFCOM could have disclosed such confidential information and so MOFCOM was limited in its ability to disclose. Nonetheless, it is clear in the Redetermination that MOFCOM did comply with its obligation to disclose essential facts to Keystone.

IV. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 2.2.1.1, 6.8, 9.4, AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

A. China Did Not Act Inconsistently with the Second Sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

18. In terms of Pilgrim's Pride, the U.S. claim is outside the Panel's terms of reference because nothing in the Panel request provided a summary sufficient to understand this particular claim. But even if the U.S. claim is within the Terms of Reference, it fails because it depends on a finding that the Panel in fact never made. The Panel finding under the second sentence of Article 2.2.1.1 applied only to Tyson and Keystone, not to Pilgrim's Pride. MOFCOM made no change in the redetermination proceedings with regard to Pilgrim's Pride on cost allocations because the Panel had made no finding that MOFCOM needed to address in its Redetermination.

19. With regard to the Tyson claim, the United States misstates the nature of the obligation under the second sentence of Article 2.2.1.1. This provision requires only that the authority "consider all available evidence". MOFCOM did in fact "consider all available evidence" on the alternative cost allocation proposed by Tyson, including whether they were "historically utilized" by Tyson, as required by Article 2.2.1.1. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs and instead applied a weight-based cost allocation to Tyson for the products under investigation.

20. MOFCOM made the reasonable choice to adopt a weight allocation for the meat cost of the product under consideration, and not to include products not under consideration, and explained its rationale for doing so in some detail. The U.S. claim that Tyson's costs of blood and feathers were not allocated appropriately under MOFCOM's weight based allocation method is flawed.

21. First, the Redetermination confirms the original determination that MOFCOM reasonably replaced Tyson's flawed value-based allocation method with a weight-based allocation method to allocate meat cost among different models of the product concerned − the edible parts of the broiler products. Tyson had misused the price of offal (waste products) to estimate unreasonably the cost of paws (edible products), which led to distorted costs for each model of the product concerned. The Redetermination confirms MOFCOM's reasonable rejection of Tyson accounting

records for allocating the cost of each model of the product concerned. The United States does not challenge it under the first sentence of Art. 2.2.1.1.

22. Second, Tyson treated the inedible part of the broiler product − blood and feathers − as waste products under its cost allocation. Unlike the treatment of edible products, the Redetermination finds that the use of prices of waste products to allocate the cost of inedible products did not unreasonably reflect costs, which also means that Tyson's accounting records on this specific point could be accepted. The United States does not challenge MOFCOM's finding under the first sentence of Art. 2.2.1.1.

23. Third, the essence of the U.S. claim is to challenge appropriateness of the MOFCOM's rejection of Tyson's alternative by using a total live-chicken weight-based method under second sentence of Art.2.2.1.1. This U.S. alternative, however, is not based on any cost allocation that had been historically utilized by Tyson, and cannot be considered as evidence under second sentence of Art. 2.2.1.1.

24. Fourth, Tyson tried to obfuscate the nature of the different products to distort the costs. For instance, at the beginning, Tyson tried to confuse offal and broiler products such as paws; later, Tyson tried to equate the waste products, such as feathers and blood, with edible products including the products concerned; finally, Tyson even tried to treat dead birds equally with live chicken. Tyson argued for all these alternatives for the same purpose − to obscure the nature of different products to distort the costs. The Tyson approaches that the United States now defends could not reasonably reflect the cost of the product concerned, nor appropriately allocate the costs for the product concerned. It would depart from common sense notions about edible products and non-edible products, primary products and waste products, and basic antidumping rules to distinguish the product concerned and the non-product concerned.

25. The U.S. argument is little more than a disagreement with MOFCOM's determination on this issue. The United States is essentially asking the Panel to second-guess MOFCOM and substitute the Panel's opinion about the proper cost allocation for the decision that MOFCOM made on this issue.

B. China Did Not Act Inconsistently with Article 6.8 of the Anti-Dumping Agreement with Respect to Tyson

26. The United States focuses exclusively on the MOFCOM`s decision to apply "facts available", but presents no argument at all about MOFCOM`s choice of particular facts. The Appellate Body and several panels have concluded that Article 6.8 and Annex II impose a particularly high standard on responding parties, explaining that a respondent is required to act "to the best of its ability". Failing that, the investigating authority is entitled to resort to facts available under Article 6.8. Furthermore, even if an interested party cooperates and acts "to the very best of its ability", if the requested information is not obtained, investigating authorities may resort to facts available.

27. Tyson did not meet this high standard during the reinvestigation. There were significant discrepancies between what Tyson said about costs in the original proceedings and what Tyson was saying in the redetermination proceedings. In the original Panel proceeding, the United States claimed that MOFCOM did not allocate Tyson's product-specific processing cost as they were actually incurred in the production of those specific products. MOFCOM made repeated efforts during the reinvestigation to obtain the cost of raw material used to grow broiler chickens, without any processing costs. Yet, Tyson never satisfactorily provided this information and did not participate in the original investigation and reinvestigation proceedings to the "best of its ability". Instead, Tyson provided MOFCOM with unreliable and inconsistent answers to several questionnaires. For instance, the meat cost was discovered containing processing costs, while some processing costs became negative. Under these circumstances, MOFCOM was completely justified in applying "facts available" under Article 6.8 and Annex II.

C. China Did Not Act Inconsistently with Article 9.4 of the Anti-Dumping Agreement Through the "All Others" Rate Assigned to Exporters or Producers that did Not Identify Themselves

28. The United States argues that China acted inconsistently with Article 9.4 of the Anti-Dumping Agreement by setting a rate for those exporters who did not identify themselves for purposes of the proceeding based on the rate applied to Pilgrim's Pride rather than the weight average of rates for individually investigated companies.

29. The argument is mistaken because Article 9.4 does not apply to the "all others" rate set in the underlying proceeding. In the underlying proceeding "all others" pertained to producers and exporters who did not cooperate in the selection of respondents. Thus, the facts involved in MOFCOM's reinvestigation do not implicate Article 9.4 of the Anti-Dumping Agreement. The flaw in the U.S. argument is in its apparent assumption that "all others" as used by MOFCOM in the reinvestigation has the same meaning the U.S. Department of Commerce assigns to "all others" in its own domestic proceedings. In U.S. Department of Commerce cases, "all others" refers to those parties not asked to cooperate in the investigation. But this term was used differently by MOFCOM. In the reinvestigation "all others" referred to those companies that chose not to register and provide information as requested in MOFCOM's Notice of Initiation.

V. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 3 AND 12 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15 AND 22 OF THE SCM AGREEMENT

A. China's Price Effects Analysis Was Consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2, and 15.4 of the SCM Agreement

30. The United States makes two specific and relatively narrow claims concerning MOFCOM's price effects analysis, focused on: (i) the way that MOFCOM found price undercutting, and (ii) the implications of that price undercutting for the price suppression analysis. Both claims should be dismissed.

31. First, the United States claims that MOFCOM failed to ensure objective price comparisons in its underselling analysis because the product-specific price data relied upon for that purpose were not representative. But this argument fundamentally misstates MOFCOM's analysis to create the false issue of representativeness. In its original determination MOFCOM analyzed annual trends in the average unit price of subject imports and in the price of the domestic like product. The Panel found that differences in product mix risked affecting price comparability and distorting any price effects analysis if steps were not taken to control for product mix, or if necessary adjustments were not made. Consistent with the Panel's findings and conclusions, MOFCOM's Redetermination took steps to control for differences in physical characteristics affecting price comparability to determine if any adjustments were necessary.

32. Specifically, MOFCOM performed an additional round of on-site verifications of the domestic industry in order to collect supplemental price data with which to distinguish among product specifications. MOFCOM also analyzed product-specific import statistics from Chinese Customs and cross-checked it with export data from the respondents. MOFCOM's approach was sufficiently representative for the limited purposes to which it was applied. MOFCOM found that imports from the United States were concentrated in products that the Chinese market valued at the high end of the value chain. As such, any bias existing in its aggregate AUV price comparison in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product. Therefore, MOFCOM's use of AUVs to reflect price undercutting was a cautious and conservative approach given the specific facts of this case.

33. Having met its obligations to take additional steps to ensure that product mix and price comparability were not problems in this specific case, MOFCOM reasonably relied on price undercutting based on overall annual AUVs for the domestic industry. These AUVs reflected all products for all 17 domestic firms that were part of the domestic industry as defined by MOFCOM, and as previously upheld by the Panel.

34. Second, the United States also claims that China failed to establish that subject import prices had the effect of suppressing domestic like product prices. But this U.S. claim also relies upon a mischaracterization of the record and MOFCOM's approach in the redetermination. MOFCOM did not rely solely or principally on its price undercutting findings, and presented various other reasons in support of its price suppression analysis.

B. 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

35. At the outset, we note this claim is outside the Panel's Terms of Reference. There were no changes in the MOFCOM determination on this issue and therefore no measure taken to comply with regard to this issue now before the Panel. To find otherwise would sanction China for not making changes when no changes were required, and would deny China any chance to bring its findings into conformity with regard to this issue.

36. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. By doing so the United States ignores the totality of the evidence before MOFCOM, and selectively picks time periods to create the illusion of a domestic industry doing well, when it in fact was suffering material injury.

37. The United States makes three analytical errors. First, it focuses on an earlier period, the period from 2006-2008, and ignores the sharp declines in various indicators during the most relevant and most recent period, the first half of 2009. Second, it also ignores MOFCOM's findings that U.S. exporters may expand exports to China, causing continued adverse effects to the domestic industry. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. Third, it focuses on volume indicators, and ignores the weak financial indictors over the entire period. A domestic industry with net operating losses every year is suffering material injury.

38. The U.S. arguments regarding two specific injury indicators, production capacity utilization and end-of-period inventories, are similarly flawed. Note that although Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement list numerous factors to be considered in the examination of the impact of the subject imports, the United States raises claims about only two. MOFCOM's Redetermination 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 factors does not mean the MOFCOM evaluation was not an "objective examination".

C. China 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

39. At the outset, China notes that certain aspects of this U.S. claim are beyond the Panel's Terms of Reference. The third part of the U.S. claim − that MOFCOM did not reconcile its causation analysis with the improving domestic industry performance − was excluded from the Panel Request and cannot be included now.

40. 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 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.

41. 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.

42. Second, MOFCOM did not rely on a flawed analysis of price effects as the sole basis of its discussion of causal relationship. Rather, MOFCOM reasonably relied on both a proper price undercutting analysis and a proper price suppression analysis as legally independent bases for

adverse price effects. Moreover, in the Redetermination, MOFCOM also proved that the differences in the product specifications alleged by the United States has not distorted the price undercutting reflected in the average prices comparison, and the price undercutting reflected in the average prices comparison was not caused by differences in the specifications. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

43. 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 negate the conclusions MOFCOM drew from weak and deteriorating financial performance over the period. Thus, MOFCOM's determination that subject imports were causing injury is not based on a flawed impact analysis.

D. China Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

44. Contrary to the U.S. argument, MOFCOM did not "merely reiterated its unfounded assertions" regarding gains in domestic market share. The United States may not agree with MOFCOM's conclusion, and the focus on other aspects of the factual record to draw its conclusions about causal link, but MOFCOM sufficiently addressed this issue.

45. MOFCOM noted the specific U.S. argument about the domestic industry market share, and then responded at length in the original determination. MOFCOM again noted this specific argument during the redetermination process, and then responded once again. As MOFCOM summarized: "During the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product, impacted by which, the domestic industry have been suffering long-term losses, the pre-tax profit margin and ratio of return on investment have stayed at a very low level". There is no doubt that MOFCOM addressed this issue and explained why it rejected the U.S. argument. As important, the Panel previously addressed this same U.S. argument, and rejected the U.S. argument. The United States has not presented any reasons for the Panel to reach a different conclusion in this Article 21.5 proceeding.

46. Also contrary to the U.S. argument, the impact of subject imports of chicken paws was in fact injurious and MOFCOM explained why. The U.S. argument focuses on the physical quantity of chicken paws in isolation, without addressing the price effects that were so important to MOFCOM's causation analysis. MOFCOM addressed this issue twice: once in the original determination, and again in the Redetermination.

47. The Redetermination proceedings provided particularly relevant discussions relating to chicken paws, and the importance of considering not just the physical quantity but also the prices. The Redetermination collected data that showed price undercutting for chicken paws ranging from 9.51 percent to 24.74 percent. The volume of chicken paws, therefore, was lower priced and had adverse price effects on the domestic industry. The Panel has previously addressed this same U.S. argument. In the original proceeding, the Panel found that MOFCOM would need only to cross reference its rejection of the argument in the preliminary determination. That is precisely what MOFCOM has done, referencing the preliminary determination and the lack of any need to repeat those findings again. This is more than sufficient. The United States now simply repeated the argument from the original investigation. Therefore, there is no new element that MOFCOM needed to address other than cross-referencing the preliminary determination.

VI. THE REDETERMINATION IS CONSISTENT WITH ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT 1994

48. The United States raised three consequential claims in its Panel Request but did not present any substantive arguments in this regard. It appears that the United States has decided to waive these three consequential claims as it did not even present a *prima facie* case regarding these claims. Even if the Panel decides to reach these claims, they fail for reasons explained above.

VII. CONCLUSION

49. For the reasons set forth above, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's WTO obligations under all of the covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

INTRODUCTION

1. The themes that China highlighted in its First Written Submission continue to apply after the U.S. Second Written Submission. The United States has not seriously addressed any of these concerns. First, the United States continues to press several claims that are wholly or partially beyond the Panel's terms of reference. Since China's arguments under Article 6.2 of the DSU go to the Panel's very jurisdiction to hear those challenged claims, the Panel has no choice but to address those arguments and confirm the precise limits of the Panel's jurisdiction in this dispute.

2. Second, the United States continues to assert a single approach to issues for which the text of the relevant obligation contemplates a range of approaches, arguing that MOFCOM should have agreed with the U.S. respondents and their efforts to distort the per unit cost of producing different types of edible broiler parts, and to dismiss the injurious impact of the increasing volume of low-priced subject imports. But MOFCOM met its obligation by unbiasedly and objectively considering all available evidence and alternative cost allocations, and then explaining reasonably, objectively, and thoroughly why it chose one reasonable and proper allocation method, as mandated by Article 17.6 of the Anti-Dumping Agreement, as well as why Tyson's alternative was not acceptable. It met the same obligation by objectively and reasonably ensuring that its underselling analysis, based on a comparison of aggregate average unit values ("AUVs"), was not distorted. The underselling found was not merely a function of product mix. Indeed, the U.S. contention that that price of chicken paws is lower than the price of chicken breast was proven false. Thus, the analysis conservatively showed that imports undersold the domestic like product given the extremely limited volume of breast imports.

3. Third, the United States continues to press claims that make little sense in light of what the United States did not challenge in MOFCOM's Redetermination and concedes was WTO consistent. The specific U.S. claims must be evaluated in the context of the overall Redetermination. The MOFCOM Redetermination addressed all the findings made by the Panel in its original report, and did so in a way that respected China's obligations under the Anti-dumping and SCM Agreements.

I. CHINA RAISES SERIOUS OBJECTIONS UNDER ARTICLE 6.2 OF THE DSU THAT THE UNITED STATES SEEKS TO DISREGARD

4. The United States filed a deficient Panel Request that prevented China from anticipating the scope of several of the claims the United States raised in its First Written Submission. In its Second Written Submission, the United States attempts to disregard China's challenges under Article 6.2 of the DSU, claiming them to be "irrelevant or extraneous matters" to implementation proceedings under Article 21.5 of the DSU. This is simply wrong. On numerous occasions panels and the Appellate Body have affirmed the fundamental nature of an assessment of the scope of their jurisdiction in consideration of the text of the panel request, emphasising the due process objective of such assessment. They have also affirmed that such a jurisdictional assessment is relevant and applicable to implementation procedures under Article 21.5 of the DSU. The United States failed to identify with sufficient detail the measures taken to comply with the original panel report by China that it seeks to challenge, nor did it identify the specific omissions or deficiencies in such measures. Instead, the United States presents broad references, ambiguous language, and seeks to challenge unchanged aspects of the original determination. If also fails "to provide the legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies".

II. MOFCOM'S REDETERMINATION FULLY COMPLIED WITH THE PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM Fulfilled Its Obligations Under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

5. The claims under Article 6.1 of the Anti-Dumping Agreement and 12.1 of the SCM Agreement fall outside the panel's terms of reference and should be dismissed without consideration of its merits. The United States has failed to demonstrate that a reference to the Redetermination *in toto* accompanied by the use of non-exclusive language suffice to satisfy the requirements of Article 6.2 of the DSU in respect of its claim under Articles 6.1 and 12.1.

6. Moreover, China complied with its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. This U.S. claim rests on an artificial isolation of the procedural steps adopted by MOFCOM in the reinvestigation. But the facts for the reinvestigation taken as a whole show that the U.S. respondents were provided with the information requested from the Chinese producers, including their identities. The facts also show that through the hearing held by MOFCOM on 30 May 2014 at the request of the U.S. parties, they were provided with ample opportunities to present evidence in writing but only the United States chose to do so on June 3. The other parties failed to do so.

B. MOFCOM Fulfilled Its Obligations Under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement

7. The United States has not rebutted China's arguments for dismissing the U.S. claims under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement. Once again, the U.S. claim rests on the basis of an untenable mischaracterization of China's procedural obligation and should be rejected by the Panel.

8. First, as China explained in its First Written Submission, the United States simply failed to cite Article 6.1.2 and Article 12.1.2 in its Request for Panel. Given the nature of the obligations contained in the sub-provisions of Article 6 and 12, the absence of the reference to these specific sub-provisions is fatal for the proper identification of the legal basis for the U.S. claim. It therefore falls outside of the terms of reference of the Panel.

9. Second, and even if the Panel were to consider the U.S. claim as within its terms of reference, China respectfully submits that the claim must still be dismissed on the merits as legally baseless. The United States has fundamentally mischaracterized MOFCOM's obligations under these specific provisions, emptying them of content and equating them to its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. Contrary to what the United States argues, by releasing the public versions of the verification exhibits in the Public Reading Room, MOFCOM promptly made available non-confidential evidence provided by the Chinese producers in the reinvestigation.

C. MOFCOM Fulfilled Its Obligations Under Articles 6.4 and 6.2 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement

10. The Panel should also dismiss the U.S. claims under Articles 6.4 and 6.2 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. Once more, the United States attempts to fault China for the failure of the U.S. respondents during the redetermination proceeding and as such these claims are factually incorrect and legally baseless.

11. First, the United States fails to rebut China's terms of reference objection with respect to these claims. China has demonstrated that a general reference to the Redetermination accompanied by the language "for example" and followed by the reference to a non-existent measure does not suffice to fulfil the identification requirement set forth in Article 6.2 of the DSU in respect of the U.S. claims under Articles 6.4 of the Anti-dumping Agreement and 12.3 of the SCM Agreement. Furthermore, the United States is bringing a new claim under Article 6.2 of the Anti-dumping Agreement not included at all in its Request for Panel. China respectfully submits that these claims should be rejected without consideration of their merits.

12. Second, and even if the Panel were to consider these claims within its terms of reference, China submits that the United States fails to demonstrate that MOFCOM breached its obligations under Article 6.4 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. In particular, the United States fails to demonstrate that the U.S. respondents were denied by MOFCOM access to the record where the public version of the information provided by the Chinese producers is located. Nor has the United States demonstrated that China failed to give the U.S. respondents opportunities to make a presentation of their views.

13. It should be further noted that the United States does not contest China's argument in respect of the waiver of its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. Indeed the U.S. Second Written Submission confirms such waiver. While the United States includes a reference to this provision in the title of the section where it attempts to rebut China's terms of reference objections, these claims are not substantially argued by the United States.

D. MOFCOM Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

14. The U.S. arguments rest on the mistaken assumption that the "essential facts" in a reinvestigation proceeding are the same as the "essential facts" of the original investigation. According to the United States, any and all facts of the original investigation are also essential facts in the Redetermination. This view is wrong. The facts of the original investigation do not automatically become essential facts in the reinvestigation, and so what constitutes an "essential fact" of the reinvestigation might be different from what constitutes an "essential fact" of the original investigation. As a consequence, MOFCOM was not under the obligation to automatically disclose any and all data and calculations from the original investigation to all parties to the reinvestigation, except insofar as they were also "essential facts" for purposes of the Redetermination.

15. As regards Pilgrim's Pride, the United States argues that MOFCOM breached Article 6.9 because (1) it did not inform Pilgrim's Pride of all of its data and calculations from the original investigation; and (2) it disclosed the information too late in the process for Pilgrim's Pride to defend its interests. Both arguments are mistaken. First, MOFCOM only had to disclose the "essential facts" considered during the Redetermination proceedings. MOFCOM nonetheless disclosed data from the original investigation to Pilgrim's Pride. Second, the timeline of the disclosure presented by the United States is misleading. The facts show that Pilgrim's Pride made good use of the information and had ample opportunity to defend its interests before MOFCOM. In fact, MOFCOM made adjustments to its margins based on Pilgrim's Pride comments. In light of these circumstances, the U.S. argument that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride must be rejected.

16. The arguments concerning Keystone are equally misguided. MOFCOM recognizes that, notwithstanding Keystone's non-cooperation, MOFCOM had an obligation to disclose "essential facts" to Keystone. But China submits that MOFCOM properly discharged this obligation because the "essential facts" as regards Keystone are not the same as those of a cooperating party. In any case, MOFCOM was unable to disclose all data and calculations to Keystone, either directly or through the U.S. Embassy, in light of its failure to appear in the proceedings or duly appoint a representative to receive confidential information.

III. MOFCOM'S DUMPING REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Allocation of Tyson's Costs Was Consistent With Article 2.2.1.1

1. The second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs" and MOFCOM did so

17. This U.S. claim about Tyson is wrong both legally and factually. Legally, the United States tries to read more into the second sentence of Article 2.2.1.1 than the provision requires. China has presented an interpretation grounded in the text and context that the United States still has

not addressed: the second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs". China now confirms that interpretation by showing it better reflects the three equally authentic texts of Article 2.2.1.1 and the meaning of "proper", "juste", and "adecuada" in that provision. Moreover, under the second sentence of Article 2.2.1.1 the allocations not "historically utilized" by the exporter should not be considered as "evidence" for the authority. The "proper" allocation shall be interpreted in the context of Article 2.2.1.1 as whole; a cost allocation which is reasonably reflected under the first sentence of Article 2.2.1.1 shall be considered as "proper" under the second sentence. The United States, by withdrawing its claim on "reasonable reflection" under the first sentence and limiting its claim to "proper allocation" under the second sentence, presents an argument unhinged from that context. Finally, there is no legal requirement under Article 2.2.1.1 to investigate all products, as wrongly claimed by the United States.

18. China is not arguing that the authority can adopt an "improper" allocation of costs. China's point is that there is not a single "proper" allocation like the solution to a math problem. Rather, there are range of permissible "proper" allocations, provided the authority has considered the alternatives and sufficiently explained its reasoning. MOFCOM met this obligation.

2. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs

19. In the original investigation, Tyson's records did not reasonably reflect the cost of the product under consideration because Tyson misallocated the price of offal (waste products) to certain edible products, such as paw. MOFCOM corrected the distortion applying a weight-based methodology to allocate costs to specific models of the product under consideration.

20. Factually, MOFCOM thoroughly explained why it rejected Tyson's proposed alternative methodology. During the original panel proceedings, the Panel found insufficient evidence in the determination itself of MOFCOM's consideration. Given this finding, during the reinvestigation, MOFCOM clarified the facts and then explained the effect of Tyson's misallocation and its distortion in much more detail its reasons for adopting a weight-based allocation for the product under consideration, and for not accepting the Tyson alternative weight-based allocation for all products. MOFCOM thus complied with all findings by the original Panel, and eliminated any procedural deficiencies of MOFCOM's original determination.

21. After reviewing the Redetermination, the United States has not pursued its original claim for "reasonable reflection" under the first sentence, nor its prior claims under the second sentence that blood and feather were not allocated any cost under MOFCOM's weight-based method, and has now shifted to a claim about whether the cost allocation for blood, feathers, and other inedible parts was proper under the second sentence of Article 2.2.1.1, and whether all available evidence on the proper cost allocation had been considered. Indeed, the United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false.

22. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between the products under consideration and those products <u>not</u> under consideration, a distinction well-grounded in the anti-dumping practice and the specific facts of this particular investigation. The United States tries to misrepresent a statement by this Panel, reading a narrow statement about the "ambiguity" of a document as somehow embracing the U.S. substantive theory about how costs should be allocated. This time there is no ambiguity. China has submitted Tyson's Table 6.3, and the U.S. argument does not address this actual document. The Redetermination sets forth at some length the numerous and specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. Tyson's alternative was not supported by its accounting records, was deficient in terms of missing data (dead birds), was not verifiable (no indication of accounting sources), and was contradictory (unit costs were incomparable to previously reported costs). The U.S, argued that only a reallocation of costs to all products (not to the products under consideration only) by weight can justify the MOFCOM's weight-based allocation method. This is fundamentally wrong. It is indeed Tyson itself to have applied different cost method for edible and inedible products (waste products) in its accounting practice. In response, the U.S. arguments invite the Panel to substitute its views for those of authority, something contrary to the standard of review in Article 17.6(i) of the Anti-Dumping Agreement.

B. MOFCOM's treatment of Pilgrim's Pride's costs was also consistent with Article 2.2.1.1

23. This U.S. claim about Pilgrim's Pride is also wrong. One legal defect is that this claim about Pilgrim's Pride is outside the Panel's terms of reference. The Panel had not made any findings about Pilgrim's Pride under the second sentence of Article 2.2.1.1 and the U.S. Panel Request must be read in that context. Article 6.2 of the DSU does not allow the United States to craft a vague claim and then define that claim only later during the dispute.

24. Another legal defect is that the United States now seeks to enforce a finding the Panel never made. The finding in the original Panel Report regarding the second sentence of Article 2.2.1.1 did not apply to Pilgrim's Pride. MOFCOM completely implemented the Panel's actual finding. Since the Panel had accepted MOFCOM's decision to reject the Pilgrim's Pride reported information as unreliable, it underscores that the Panel finding about the second sentence was limited to those companies that had submitted reliable information as mentioned by the Panel in its conclusion.

25. A final legal defect is that the United States has not presented any argument in support of its claim sufficient to establish a *prima facie* case. Merely asserting that China did not comply with the finding − without any legal or factual discussion − is not enough to establish a *prima facie* case. And the MOFCOM explanations of the reasons for choosing the weight based allocation more than rebut the unsupported U.S. argument.

C. MOFCOM acted consistently with Article 9.4 of the Anti-Dumping Agreement in its selection of the rate for "all others"

26. The United States continues to argue the general rule of Article 9.4 that when an investigation is limited according to the second sentence of Article 6.10 an all-others rate shall not exceed the weighted average margin of dumping of the selected respondents. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

27. Finally, the U.S. assertion that exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's *reinvestigation* is irrelevant. The Panel in the original proceeding expressly upheld the sufficiency of MOFCOM's notice to interested parties. MOFCOM had no obligation as part of its implementation of DS427 to offer such parties a second opportunity to cooperate through the reinvestigation.

D. MOFCOM acted consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement with respect to Tyson

28. Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information. Since Tyson did not provide MOFCOM with the necessary data, MOFCOM was thus forced to turn to the "facts available" on the record − which included the data provided by Tyson. The United States does not challenge MOFCOM's legal argument nor the proposed standard that a responding party has to act to the "very best of its ability" or face the consequence that the investigating authority may resort to facts available. Rather, the United States challenges only the factual basis for MOFCOM's decision to resort to facts available, attempting to show that Tyson acted "to the best of its ability", while remaining silent on MOFCOM's choice of data as "facts available".

29. MOFCOM's purpose in the Redetermination was to implement the Panel's findings. The Panel found that MOFCOM's weight-based method was improper because the U.S. respondents such as Tyson claimed that China did not determine the real processing cost occurring at each processing step to each specific model. Thus, MOFCOM sought to ensure proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon earning the result from the Panel, Tyson complained in the redetermination that MOFCOM sought too much information. To the contrary, MOFCOM sought

only what was claimed by Tyson and required of it by the Panel, and without such information it could not accomplish its task. Tyson was the cause of this result.

30. China reiterates that responding parties such as Tyson are required to act to the very best of their ability when responding to the investigating authority. Failure to do so entitles the investigating authority to resort to facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement. The United States has neither disputed the existence of this rigorous standard, nor China's interpretation of this standard. Instead, the United States attempts to shift the debate by focusing on Tyson's failed attempts at responding adequately to MOFCOM's questionnaires and trying to explain away the deficiencies of Tyson's responses. The United States is mistaken. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement. The reinvestigation was driven by Tyson's claims, yet Tyson was not then prepared to comply through the provision of adequate information. Even if that was the "best" of Tyson's ability, MOFCOM was fully justified in resorting to facts available in light of the fact that it did not receive the necessary information from Tyson.

IV. MOFCOM'S INJURY REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Were Consistent with Anti-Dumping Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

31. The United States continues to claim that MOFCOM took "no action" that complied with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. As established by China, MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel in this proceeding.

32. Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing. This approach was a reasonable and objective method to address the issue of price comparability consistent with Article 17.6 of the Anti-Dumping Agreement. From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products. This was the Panel's concern, and therefore MOFCOM's approach was the direct way to address that concern. The evidence showed that, contrary to U.S. understanding about the value of different parts of the chicken in the Chinese market, U.S. imports were actually concentrated in high value products, and therefore price comparisons conducted on an aggregate AUV basis would be reasonable – there would be no risk that any price underselling showing in the comparisons would merely be the result of product mix. The United States is unhappy with MOFCOM's approach, but that does not make the approach unreasonable or WTO inconsistent.

33. With respect to price suppression, the United States adds nothing new. It repeats the same factual arguments that China already rebutted in its First Written Submission. The only new aspect of the U.S. argument is its insistence that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 under the SCM Agreement is the equivalent of the causation analysis called for under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. This much is confirmed from the very authority cited by the United States – the Appellate Body Report in *China – GOES* – in arguing the contrary conclusion. MOFCOM's Redetermination met the relevant standard.

B. MOFCOM's Analysis of Adverse Impact Was Consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

34. The United States complains that MOFCOM did not redo its analysis of adverse impact. This complaint, however, is misplaced for two reasons. First, since there was no measure taken to

comply and there was no need for MOFCOM to redo its analysis, this claim is outside the Panel's terms of reference for this Article 21.5 proceeding. It would be fundamentally unfair to subject China to potential consequences for acting inconsistently with Articles 3.4 and 15.4 when China has had no chance to react to specific concerns identified by a Panel. China and other WTO Members should not have to react to arguments, as opposed to findings by panels.

35. Second, MOFCOM's finding of adverse impact completely respected the obligations of Articles 3.4 and 15.4. MOFCOM expressly considered all enumerated factors, including those raised by the United States in its arguments. MOFCOM considered all those factors in context, putting particular weight on the domestic industry's consistently bad financial performance throughout the period, and the severely deteriorating overall performance at the end of the period in 2008 and early 2009. It is reasonable and objective to put particular weight on financial performance and the more recent period. That the United States can point to some positive trends for some factors earlier in the period does not render the MOFCOM findings unreasonable or biased. Those positive trends were discussed, but in the end MOFCOM correctly considered all of the factors.

C. MOFCOM's Analysis of the Causal Link Was Consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

36. The United States continues to seek an impermissible expansion of its claim #3. The United States defined that claim as ignoring certain WTO provisions "because" MOFCOM's determination "was not based on an examination of all relevant evidence". This language is a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore, relates to the specific obligations found in the second sentence. The U.S. claim then specified the two categories of evidence that were ignored as part of the very same sentence. The claim was thus defined by reference to these two specific categories of evidence. The United States cannot now avoid the implications of its narrowly drawn claim and add a third and entirely different aspect about an alleged failure by MOFCOM to reconcile the causation finding with improving domestic industry performance. The Panel must see this effort for what it is and limit its consideration to the claim as it was specifically framed in the U.S. Panel Request.

37. Regarding the issue of chicken paws, the Panel finding on this issue was limited to the procedural claim about proper disclosure of the MOFCOM discussion. Since the United States had only raised the issue about chicken paws as a procedural claim under Article 12.2.2, the Panel only addressed that issue, and MOFCOM only addressed that issue. MOFCOM fully addressed the finding the Panel actually made regarding chicken paws. MOFCOM did precisely what the Panel required – which was a cross reference to the earlier discussion of this issue in the MOFCOM preliminary determination.

38. Turning to the merits of the U.S. claim, MOFCOM established the necessary causal link between subject imports and the condition of the industry, and that none of the U.S. arguments break this causal link. To this end, the United States concedes that MOFCOM need only show that subject imports contributed to the adverse condition of the domestic industry. The United States also concedes the adverse impact from the increasing volumes of low-priced subject imports that undersold domestic prices. These subject imports injured the domestic industry throughout the period of investigation (as reflected by the consistent operating losses), and led to a dramatic fall in indicators from 2007 to 2008, and in early 2009. Its rebuttal consists of an argument that MOFCOM did not consider certain other facts, that MOFCOM did not examine "all" relevant evidence. But this argument is wrong. The Redetermination shows that MOFCOM did consider "all relevant evidence".

39. First, MOFCOM did not ignore the evidence regarding domestic market share. China addressed this point at some length in its First Written Submission. The United States simply ignores that discussion. Second, MOFCOM did not ignore the evidence regarding chicken paws. The United States asserts that imports of chicken paws "could not have injured the domestic industry", but this assertion is just wrong and rests on several flawed premises about the market and the evidence before MOFCOM. Third, MOFCOM did not ignore the evidence of correlations between subject imports and the condition of the industry. The United States largely repeats is own prior arguments, without addressing China's arguments. The United States continues to cite the change by comparing 2006 to 2008, in a disingenuous effort to mask the sharp decline from 2007 to

2008, and to avoid the further decline in interim 2009. Overall, the domestic industry had an unacceptable level of financial performance throughout the period of investigation. Finally, the United States also makes a consequential claim based on allegedly defective MOFCOM analysis of price effects. But as already discussed MOFCOM did not rely on a defective analysis of price effects.

40. In sum, MOFCOM established that subject imports were contributing to the adverse condition of the domestic industry, and established the requisite causal link, particularly given the absence of any other possible causes. The Panel should uphold the Redetermination as fully consistent with Articles 3.1 and 15.1 as well as Articles 3.5 and 15.5.

D. MOFCOM Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

41. The United States reiterates its earlier argument that MOFCOM did not really address in the Redetermination the substance of the arguments made in the proceeding, but does not really respond to China's arguments that MOFCOM in fact did address these arguments. Regarding domestic market share, the U.S. argument is really a complaint that MOFCOM considered all of the evidence and put into context the single fact that the domestic industry gained market share with all of other facts showing a domestic industry suffering material injury because of unfairly traded subject imports. The United States apparently thinks that increasing domestic share is somehow entitled to more weight than other facts, but it is not. Regarding chicken paws, the United States continues to argue that MOFCOM's response was not enough, but without addressing either of China's arguments. China explained how the Redetermination included new information about the price effects of chicken paws, including specific margins of chicken paw price underselling; further, China also explained that it made the very correction to the final determination the Panel had suggested.

V. MOFCOM'S REDETERMINATION WAS CONSISTENT WITH ARTICLE I OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT

42. The United States presents no argument at all in support of its three consequential claims. Although these claims were raised in the Panel Request, they were not mentioned at all in the First Written Submission. It is not enough to raise a consequential claim in a Panel Request and then present no argument at all. These claims have either been waived, or the United States has failed to present a *prima facie* case. The United States has not responded to this legal objection at all. The Appellate Body has made clear that (1) the complaining party bears the burden of proof with regard to its claims, and (2) a *prima facie* case requires more than just an allegation without any discussion of the facts or legal basis. In this dispute, the United States has made this issue easy for the Panel by providing no discussion at all in the U.S. First Written Submission, and essentially no rebuttal or discussion in the U.S. Second Written Submission. For these reasons, whatever the Panel decides about the other U.S. claims, it must reject the U.S. consequential claims as not having been established.

CONCLUSION

43. For the reasons set forth in China's First Written Submission and Second Written Submission, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's obligations under all of the covered agreements.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING OF THE PANEL

1. This document summarizes the key points presented by China during its opening and closing statement at the substantial meetings with the Panel on 25 and 26 April, 2017.

2. China notes at the outset that the United States has effectively abandoned one of its claims under the first sentence of **Article 2.2.1.1 of the Anti-dumping Agreement** and its other two claims under the second sentence. The U.S. claims that MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 by including costs for products not subject to investigation into the costs for the products subject to investigation.

3. China did not address in detail the U.S. argument concerning Pilgrim's Pride as Panel acknowledged in its preliminary ruling on jurisdictional issues that in the original dispute, the Panel made no specific findings of violation under the second sentence of Article 2.2.1.1 regarding Pilgrim's Pride. But even if the Panel allows the U.S. claim on Pilgrim's Pride cost allocation, the United States merely asserted that China did not comply with the findings and has not provided any legal or factual discussion during this proceeding. This is not enough to establish a *prima facie* case.

4. In regards of Tyson and what it concerns the proper allocation of cost, China considers that the U.S. interpretation of the second sentence in isolation from the context provided in the first sentence improperly eliminates the logical interrelationship between the two sentences, an approach that is contrary to the U.S. interpretative approach in the original dispute. Instead, it is China's belief that Article 2.2.1.1 focuses on the correct process to consider evidence for the proper allocation of costs and that the second sentence needs to be read in conjunction with the first sentence of Article 2.2.1.1. Indeed, the "proper" allocation of costs under the second sentence is supplemental to "reasonable" reflection under the first sentence of Article 2.2.1.1. Since China's weight-based allocation method does "reasonably reflect" the cost under first sentence, it should be considered as the "proper" allocation of costs under second sentence of Article 2.2.1.1. China's argument is that, depending on the facts of each case, there may well be more than one "proper" way to allocate costs. China's interpretation has not been challenged by the United States and can be confirmed easily by looking at the text of Article 2.2.1.1 in all three authentic languages.

5. The United States challenges MOFCOM's decision to reject Tyson's proposed alternative cost methodology. However, China notes that MOFCOM's redetermination satisfies the Panel's ruling in the original proceeding; and that MOFCOM was entitled under Article 2.2.1.1 not to accept Tyson's proposal as evidence since it had not been historically utilized. This has been confirmed by the findings of the panel in *US – Softwood Lumber V* and the U.S. position in that case.

6. As to the factual grounds of this claim, China noted that during the original investigation MOFCOM found that Tyson's records did not reasonably reflect the cost of the product under consideration because it misused the price of offal (waste products) to estimate the cost of certain edible products, such as paws. MOFCOM corrected the distortion by applying a weight-based methodology to properly allocate costs to specific models of the product under consideration. During the reinvestigation, MOFCOM clarified the facts surrounding Tyson's costs and MOFCOM's findings, and explained in much more detail why MOFCOM decided to adopt a weight-based allocation for the products. In short, the problem is that Tyson tried to confuse the product subject to investigation with products not subject to investigation to assert that MOFCOM did not properly reallocate the cost to all products.

7. The Redetermination sets forth at some length the four specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. First, Tyson did not take into account weight loss resulting from dead birds. Second, Tyson provided only the cost of product under investigation in Table 6-3 without including weight and cost of non-subject product. Third, MOFCOM did not determine that

the cost allocation methodology for non-subject products was unreasonable. And fourth, Tyson did not provide the cost of live chickens used for the product concerned.

8. The United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between subject products and non-subject products. This distinction is well-grounded in the anti-dumping practice and the specific facts of this particular investigation. Moreover, Tyson was fully aware of the distinction. For example, in the original investigation, Tyson submitted cost table 6-3 listing many specific products, all edible, none inedible; and in the reinvestigation, when it submitted some information on products not within the scope in its first supplemental questionnaire response, Tyson provided that information under the heading "inedible".

9. MOFCOM's definition of the subject products (i.e., edible products) is reasonable. The United States cannot require MOFCOM to use a different definition because doing so violates Article 17.6(ii) of the Anti-Dumping Agreement − requiring MOFCOM to replace its permissible interpretation of the like product (i.e., edible products) with a different one.

10. In respect of the U.S. claim under **Article 6.8**, China notes that Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information as requested. Consequently, MOFCOM was thus forced to turn to the "facts available" on the record −facts that were based on the data provided by Tyson. For the purpose of implementing the findings by the original Panel, MOFCOM sought to ensure a proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon learning the result from the Panel, Tyson complained during the redetermination proceeding that MOFCOM sought too much information while Keystone failed to cooperate in the redetermination. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement.

11. We now turn to the **Article 9.4** issue. The United States argues that when an investigation is limited according to the second sentence of Article 6.10, an "all-others" rate shall not exceed the weighted average margin of dumping of the selected respondents as per the general rule of Article 9.4. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

12. Let me turn to **price suppression and underselling**. The U.S. claim is that MOFCOM took "no action" to comply with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. But MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel by collecting the full range of product specific pricing data from the verified producers in the reinvestigation −and by expressly addressing the product mix issue.

13. First, under **Articles 3.2 of the Anti-Dumping Agreement** and **15.2 of the SCM Agreement**, MOFCOM is free to select its own method of pricing analysis, provided it conducts an "objective examination" of "positive evidence"; and two, the Panel did not require MOFCOM to abandon its use of average annual AUVs. MOFCOM was simply required to "consider" whether there was "significant" price undercutting and had ample discretion to choose its methodology.

14. MOFCOM disproved the U.S. assertion that subject imports were dominated by low value products. MOFCOM examined: (1) import data compiled by China Customs; (2) export data provided by USPEEC; (3) product-specific pricing by four domestic producers, data which was verified during the Redetermination; and (4) the prices shown on the invoices. This data proved that imports were concentrated in high value products, suggesting that any comparison of aggregate AUVs would work against the domestic industry, not in favor. The United States no longer directly challenges this argument; rather, it attacks the representativeness of the domestic data. The United States effectively conceded the point in the redetermination proceeding and now

seeks to ignore this reality. But the reality is clear: in the Chinese market even Tyson charges more for products like paws than products like chicken breast.[1]

15. First, MOFCOM has the discretion to select the method it considers best depending on the particular circumstances of the investigation. And second, MOFCOM's underselling analysis was based on complete industry data, not the data of four producers. There was no sampling of data. MOFCOM's limited examination of product-specific data was merely to confirm the two key points: (1) whether U.S. imports were concentrated in lower value products; and (2) whether the overall AUV comparison was conservative, including whether the underselling would have been higher using product specifications. On both points, the supplemental analysis confirmed MOFCOM's conclusions in the original determination, an approach that is both reasonable and objective.

16. As to price suppression, it needs to be noted that MOFCOM considered the combined effects of increasing volume and underselling and found price suppressing effects from both. As explained in the redetermination, the dumped and subsidized imports had two effects. First, they created a situation of price undercutting. Second, they also caused price suppression, as reflected in the decreasing profit levels. Both of these effects were the result of the dumped and subsidized subject imports.

17. The United States further insists that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 of the SCM Agreement is equivalent to the causation analysis under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. In this case, MOFCOM's Redetermination met the relevant standard.

18. The United States complains that MOFCOM did not redo its entire analysis of adverse impact. But contrary to the U.S. complaints, the Panel did not make a finding requiring MOFCOM to carry out its analysis anew.

19. In its redetermination, MOFCOM listed the injury factors, and then provided an explicit overall discussion of how those factors interacted and how subject imports were explaining that adverse impact. MOFCOM was careful in drawing an explicit link to both lower domestic prices and lower domestic profits. MOFCOM also discussed the causal link extensively, and explained how the subject imports were linked to specific injury indicators. The increasing volume and market share of low priced subject imports led MOFCOM to conclude: (1) such imports had a "material impact on the sales price" of the domestic industry; (2) the domestic industry could not "reach a reasonable profit margin"; (3) domestic industry capacity utilization "has been on a relative low level"; (4) the return on investment was on a "relative low level"; and (5) the inconsistent cash flow "impacted the investment and financing". **Articles 3.4 and 15.4** expressly include these as injury factors.

20. The other arguments raised by the United States also miss the point. Contrary to the U.S. argument, the prospect of future imports is not irrelevant to MOFCOM's current injury analysis. China presented a specific argument regarding the meaning of the key phrase "potential decline". In China's opinion, this language contemplates a forward-looking analysis. The United States simply ignores this part of the text of Article 3.4 and instead cites to language from the decision of the Appellate Body in *China – GOES* that was not addressing this specific issue. The United States has simply not responded to China's argument based on the text.

21. The weak capacity utilization reinforced the severe financial problems of the domestic industry, and reinforced MOFCOM's finding of current material injury. First, the United States has not seriously challenged MOFCOM's finding about increasing inventories; in fact, it largely dropped this part of its claim and does not address at all the increase in inventory in 2009. The U.S. argument on adverse impact thus comes down to its argument about capacity utilization. Yet by focusing on one or two of the many injury factors, the United States misses the point that although the authority must address each factor, the authority need not show that each individual

[1] *See, e.g.,* https://list.tmall.com/search_product.htm?q=%CC%A9%C9%AD&type=p&vmarket=&spm=875.7931836%2FB.a2227oh.d100&from=mallfp..pc_1_searchbutton (listing Tyson chicken prices in China).

factor by itself has been linked to subject imports. The authorities are to consider all the factors, but then consider them as a whole when making the broader conclusion that subject imports have explanatory force with regard to the condition of the domestic industry.

22. The evidence on the record fully supports MOFCOM's finding. China's argument is straightforward: by definition, any volume of subject imports was having some impact on the excess domestic capacity. Any volume not supplied by subject imports would have been available for domestic suppliers. Even if non-subject imports supplied some of that volume, domestic suppliers would also have supplied some and therefore, would have had higher capacity utilization.

23. Instead, the United States argues that there was low capacity utilization because of expanding domestic capacity. Regardless, the rate of utilization would have been higher, but for the presence of increasing volumes of subject imports.

24. MOFCOM properly focused on the actual situation of the domestic industry, and properly found material injury consistent with Articles 3.4 and 15.4.

25. Let me briefly touch on the issue of **causation**. We refer the Panel to paragraph 31 of the U.S. opening statement and the U.S. claim that MOFCOM in its redetermination ignored U.S. arguments concerning increasing market share. There, the United States cites to a single page in the redetermination and contends this constitutes MOFCOM's entire analysis of the market share issue as contended by China in its First Written Submission. The United States ignores other sections of China's First Written Submission, such as paragraph 385, where China demonstrated that MOFCOM took into account all the factors as a whole, including market share. The United States also ignored China's discussion of this issue at paragraphs 345 and 346 of its Second Written Submission. But perhaps most glaring is that the United States ignored MOFCOM's specific response to this U.S. argument about market share at page 79 of its Redetermination, which is provided as Exhibit China-1. The redetermination, read as a whole, clearly addresses and responds to the U.S. argument.

26. China wishes to conclude its remarks with two very important matters that we believe play a very important role and that came to a head during these meetings.

27. The first is the standard of review under **Article 17.6.** A Panel's role is to review the authority's determination, but not to arrive at its own separate conclusion about what the Panel would have done under similar circumstances. To this end, we expect the Panel to conclude that if MOFCOM's redetermination was reasonable, it will be upheld, even if the Panel would have approached the matter differently.

28. Second, China believes it is extremely important to establish and respect who bears the burden of proof in this proceeding. China requests the Panel to review whether the United States has met its own burden by presenting evidence in support of its claim. To this end, the fact that China has produced a document at the request of the Panel does not necessarily mean that the burden has shifted to China.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 26 April 2017.

2. On the United States' **procedural claims relating to disclosure requirements**, the European Union notes that following the Panel's Preliminary Ruling of 22 March 2017, the United States' claims under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement (ADA) are outside the Panel's terms of reference, while the United States' claims under Articles 6.1 and 6.4 ADA are within the Panel's terms of reference.

3. The European Union considers that **Article 6.4 ADA** is more directly relevant to the alleged omission than Article 6.1 ADA. The data provided by the domestic firms, which was the main pillar of the revised price effects analysis, is "relevant information" "used by the authorities" pursuant to Article 6.4. MOFCOM thus had to give interested parties a timely opportunity to see such information and prepare presentations accordingly. "Timely opportunities" means that the information must be made available early enough in the process, so that the comments can still be taken into account in the decision-making of the investigating authorities. The European Union invites the Panel to closely scrutinize whether this was the case here.

4. The European Union is of the view that the obligations set out in **Article 6.1 ADA** (both alternatives) concern information requests to those parties that are supposed to hold the relevant information. It should not be read as establishing a general obligation to systematically *notify* any information request to all players in the investigation, regardless of whether the information required falls within their remit.

5. On **Article 6.9 ADA**, the European Union considers that calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute essential facts pursuant to Article 6.9. As far as the redetermination is concerned, this means that all data and calculations for determining this duty must be disclosed, including data from the original investigation, if it was determinative/ relied on in the redetermination. On the other hand, data from the original investigation which had no direct relevance for the re-determined duty would not qualify as an essential fact. Where facts available are used to determine a duty, the same disclosure obligation applies in principle. Thus, specific data and calculation methods used must be disclosed, subject to the requirements of Article 6.5 ADA.

6. Regarding the United States' **claims on dumping**, the European Union's position is that **Article 2.2.1.1 ADA** sets up a substantive obligation of proper cost allocation, not just a procedural obligation to consider evidence. Such a procedural obligation would be void and empty if it did not reflect, and were not tied to, the existence of a substantial obligation. In this regard, the European Union agrees with the original Panel[1] and the panel in *EC – Salmon (Norway)*[2] that the allocation method applied by an investigating authority must not result in the calculation of a cost of production that includes costs not "associated" with production and sale of this product in the period of investigation. The European Union also agrees with the United States that the allocation method used must be applied consistently. Thus, if the allocation is done on the basis of weight, and not value, costs which occur with regard to the whole chicken, must be spread over all products according to their weight, even if they generate little value – to the extent they are associated with the product in question.

7. On the use of facts available pursuant to **Article 6.8 ADA**, the European Union stresses that the aim of the provisions on the use of facts available is not to punish non-cooperating interested parties. It is to allow investigating authorities to arrive at accurate determinations based on reliable data, where interested parties do not provide such data. Thus, an investigating authority is

[1] Panel Report, paras. 7.196-7.197.
[2] Panel Report, *EC – Salmon (Norway)*, paras. 7.491, 7.507.

allowed to replace any necessary information that has been requested from an interested party but has not been provided, whatever the reason for not providing it (non-cooperation or not). To the extent that information is not missing, for instance because the respondent has provided partial information, it cannot be replaced[3], unless it is unreliable. Non-cooperation is one case where data is considered unreliable, but there are others, as Annex II.3 ADA shows. Untimely submission which makes a necessary verification impossible is one example. Another example, a selective submission of data, where one sub-set of data is provided but not another one, may cast doubts on the reliability of the whole data set. In this context, costs of production have been identified as a particularly crucial sub-set of data, the absence of which may very well have ramifications beyond the pure cost analysis. If an investigating authority wants to disregard data as unreliable, the burden of substantiating the unreliability falls on the authority; lack of cooperation will make findings of unreliability more plausible.

8. Regarding the United States' **claims relating to the findings on injury**, as far as the price effects analysis under **Article 3.1 ADA** is concerned, the European Union notes that the requirement to base the "determination of injury" on positive evidence and an objective examination extends to all fundamental elements of the injury analysis. Any finding on this issue should thus be supported by "positive evidence" pursuant to Article 3.1 ADA (i.e., evidence of an affirmative, objective and verifiable character, which is credible[4]), which is gathered, inquired into and, subsequently, evaluated in a way that conforms to the basic principles of good faith and fundamental fairness. The analysis must be based on data which provides an accurate and unbiased picture of what it is that one is examining[5]. The European Union acknowledges that where samples are used, the samples must be "properly representative of the domestic industry"[6]. Samples that represent a too low proportion of the domestic industry can be problematic.

9. However, in the European Union's view, the standards for representativeness of samples for general price levels of products (as at stake in the present case) are not necessarily the same as for samples on price trends. Price trends depend on a range of factors and easily vary from one segment of the industry to another, in particular due to different economic performance of different segments of the industry. On the other hand, the European Union would a priori imagine that the difference in value of certain product types is less likely to change fundamentally according to which segment of the industry is being looked at, as it does normally not depend on the economic performance of the industry segment in question. Depending on the circumstances of the case, a smaller sample could thus be sufficient for assessing differences in value of product types.

10. On the impact analysis under **Article 3.4 ADA**, the European Union expects that the Panel will be guided by the high standard that the Appellate Body has set in this field. According to this standard all factors having a bearing on the state of the industry must *always* be evaluated by the investigating authorities in every investigation[7]; this evaluation consists of an analysis and interpretation of the facts established in relation to each listed factor, its role, relevance and relative weight[8]. Where several factors show positive trends, an overall evaluation of all factors becomes even more indispensable. This evaluation, which puts data on all factors in context to each other, must explain why and how, *despite the positive factors*, the domestic industry was injured, and whether and how the positive movements were outweighed by any other factors[9].

11. The Panel might wish to examine in particular the two main aspects highlighted by China, namely the weaker financial indicators and the trends in the first half of 2009, in order to assess how "heavy" they weigh in relation to the other factors examined, in particular those that were positive. The European Union invites the Panel to assess carefully whether the consideration that China submits it has given to all relevant factors is apparent not only from the submissions to the Panel, but duly reflected in relevant documentation from the investigation[10].

[3] Appellate Body Report, *Mexico – Anti-Dumping measures on Rice*, para. 288.
[4] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192; *China – GOES*, para. 126.
[5] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; *China – GOES*, para. 126.
[6] Appellate Body Report, *EC – Fasteners (China)*, paras. 435–436.
[7] Appellate Body Reports, *China – HP-SSST*, paras. 5.203-5.209, and cases cited therein.
[8] Panel Reports, *Egypt – Steel Rebar*, paras. 7.42-7.51; *EC – Tube or Pipe Fittings*, para. 7.314
[9] Panel Reports, *Thailand – H-Beams*, paras. 7.249 and 7.255; *Korea – Certain Paper*, para. 7.273.
[10] Appellate Body Report, *China – GOES*, para. 131.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. In this proceeding, Japan addresses its views on systemic aspects regarding the interpretation of Articles 2.2.1.1, 3.1, 3.2, and 6.9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Articles 15.1 and 15.2 of the Agreement on Subsidies and Countervailing Measures (the "SCM"), as well as regarding its view on judicial economy regarding the claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5. Japan does not take any particular position on factual aspects on this dispute.

I. MOFCOM'S Analysis of Price Comparability under ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2

2. The original panel found that the product mix of the subject imports and that of the domestic like products varied considerably. The subject imports were composed of limited parts of chicken products, including a high proportion of paws, legs, wings and gizzards, whereas the domestic like products included all other parts of chicken, including breast meat.[1] Despite such difference, MOFCOM simply compared their average unit values (AUVs) and found that the subject imports had undersold the domestic like products.[2] The panel found that the evidence showing price differences between different chicken parts "should [] 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'".[3] The original panel thus found that MOFCOM failed to ensure price comparability in terms of product mix in violation of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

3. In this dispute, the United States alleges that, MOFCOM collected product-specific pricing data from four out of the seventeen domestic producers that constituted the domestic industry in the course of the Reinvestigation[4]. According to the United States, MOFCOM found that, these data from the four domestic producers show that chicken paws, legs, wings and gizzards were priced higher than other parts of chicken, indicating that subject imports consisted primarily of higher-value products, not lower-value products as respondents alleged.[5] MOFCOM thus concluded in the Redetermination that "the price undercutting reflected in the average price difference is not caused by different product mix".[6]

4. The United States argues in its first written submission that MOFCOM still failed to ensure the price comparability, because MOFCOM failed to establish that the data collected from only four domestic producers were sufficiently representative of the prices of the domestic like products.[7] The United States also argues that MOFCOM's analysis of price comparability is deficient.

5. China argues that MOFCOM's additional findings based on the product-specific price data in the Reinvestigation were made only to establish that the comparison based on the overall AUVs did not negatively bias the US producers.[8] China explains that "[i]f any bias existed in the comparison, it in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product."[9]

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[1] Panel Report, *China – Broiler Products*, para. 7.490.
[2] Panel Report, *China – Broiler Products*, paras. 7.490-494.
[3] Panel Report, *China – Broiler Products*, para. 7.493.
[4] United States' first written submission para. 145.
[5] United States' first written submission, para. 134.
[6] United States' first written submission, para. 38, quoting RID, Section VII (ii) (2) p. 18-19 (Exhibit USA-8).
[7] United States' first written submission, paras. 145-149.
[8] China's first written submission, para. 288. ("MOFCOM made additional findings about product-specific underselling based on the available data. But these findings were only to establish there was no bias in using the overall AUV approach.")
[9] China's first written submission, para. 274.

6. Japan agrees with the United States that the analysis of price effects of the subject imports on the domestic like products would not be performed properly unless MOFCOM would show that the product-specific price data collected by MOFCOM were sufficiently representative of the entire sales of the domestic like products. Other domestic producers, who were not reinvestigated by MOFCOM, may have different product-specific pricing. Thus, the investigating authority must make sure that the sales data on the chicken paws, legs, wings and gizzards collected from a limited number of domestic producers are sufficiently representative of the entire sales by the domestic industry.

7. In addition to the above, Japan notes that the need to ensure the price comparability between the subject imports and the domestic like products in conducting the price effects analysis is well-established in the WTO jurisprudence. According to the Appellate Body in *China – GOES*, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[10] The Appellate Body has stated that a failure to ensure price comparability is inconsistent with the requirement under ADA Article 3.1 and SCM Article 15.1, which provide that a determination of injury be based on "positive evidence" and involve an "objective examination".[11] The Appellate Body has emphasised that "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."[12] The requirement to ensure the price comparability between the subject imports and the domestic like products is therefore an integral aspect of the obligation to consider the price effects of subject imports under ADA Article 3.2 and SCM Article 15.2.

8. The requirement to ensure the price comparability between them is supported by the notion of the "logical progression of inquiry" under ADA Article 3 and SCM Article 15. Drawing on this notion, the panel in *China – X-ray Equipment* stated, in the context of ADA Article 3, that:

> It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports "through the effects of dumping, as set forth in paragraphs 2 and 4" are causing injury to the domestic industry, that it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable.[13]

9. As the panel in *China – X-Ray Equipment* also correctly observed, prices of the subject imports and the domestic like products are not comparable if they are not in a competitive relationship, and consequently do not interact to each other in the domestic market. The original panel also stated to this effect: "the focus of the comparison performed under ADA Article 3.2 and SCM Article 15.2 is on the competitive relationship".[14]

10. Recently, the Appellate Body has confirmed in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that the analysis "must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 3.5 of the Anti-Dumping Agreement."[15] Accordingly, in order to reach the ultimate determination of the causation, "[a]n examination of the competitive relationship between products is … required so as to determine whether such products form part of the same market."[16]

11. It is therefore irrelevant whether the product-mix difference between the subject imports and the domestic like products would work in favour of the former or the latter. Japan considers that in this regard, China's argument does not speak to the propriety of such comparison and cannot cure the flawed price comparability analysis.

12. Japan also notes that the likeness finding between the product under investigation and the domestic like products as a whole would not provide sufficient basis to conclude that each

[10] Appellate Body Report, *China – GOES*, para. 200.
[11] Appellate Body Report, *China – GOES*, para. 200.
[12] Appellate Body Report, *China – GOES*, para. 200.
[13] Panel Report, *China – X-Ray Equipment*, para. 7.50. *See* also Panel Report, *China – Broiler Products*, para. 7.475. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.162.
[14] The original panel expressly stated that "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". Panel Report, *China – Broiler Products*, fn 737.
[15] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.180.
[16] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.262.

individual type of the products under investigation competes with, and accordingly are comparable with, each of the domestic like products.

13. In this regard, the panel in *China – X-ray Equipment* clarified that an investigating authority's conclusion of "likeness" for the purpose of defining the product under consideration and the domestic like products cannot automatically form the basis for the price comparability between individual products. The panel in *China – Autos (US)* also noted, "these issues arise at and relate to different stages of an investigation"[17], and accordingly, "[e]ven granting that a like product determination may be relevant as the starting point of an assessment of price comparability…it will not always be determinative".[18]

14. As the original panel found, "evidence of [price differences between different chicken parts] 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 'basket' [and would] have required MOFCOM to take necessary steps to ensure price comparability".[19] As discussed above, it is irrelevant whether the difference in product-mix would favour the US imports or the domestic products. The focus should be on whether, for example, chicken gizzards and chicken breasts are in a competitive relationship and thus comparable for the purpose of price effects analysis. If the average price of chicken gizzards is substantially higher than that of chicken breasts in the Chinese market, this suggests that different parts of chicken may have limited substitutability and a weak competitive relationship. If this is the case, a price undercutting of chicken gizzards would have little, if any, effects on the price of chicken breasts and thus the AUV comparison between the broad basket of the subject imports and that of the domestic like products would be inappropriate for the purpose of the price effect analysis under Articles 3.2 and 15.2. Japan invites the Panel to take into account these legal considerations in deciding on this issue in this dispute.

II. The Practice of Judicial Economy regarding the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5

15. The original panel found that MOFCOM's price effects analysis was inconsistent with ADA Article 3.2 and SCM Article 15.2. With respect to the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5, the panel exercised judicial economy and did not make any findings. The panel stated that making additional findings with regard to ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 would not assist the resolution of the dispute, because "[i]mplementing the Panel's findings with respect to MOFCOM's price effects analysis will require China to re-examine MOFCOM's Determination concerning the impact [and causation]".[20] However, in implementing the original panel's finding with respect to the price effects, MOFCOM did not change its impact analysis in the re-determination.

16. In this compliance proceeding, China alleges that MOFCOM was not in a position to change its impact analysis and causation analysis, given that the original panel exercised judicial economy and did not make any findings on whether its impact and causation analyses are WTO consistent. Irrespective of whether China's allegation is correct or wrong, Japan considers that it might have assisted in resolving this issue of dispute had the panel made findings with respect to ADA Articles 3.4 and 3.5 and SCM Articles 15. 4 and 15.5.

17. In this respect, Japan recalls that the Appellate Body has stated, in *Australia – Salmon* that "the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system……A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member."[21] A panel should carefully assess how its findings or non-findings regarding a claim would affect the Member's implementation of DSB recommendations and rulings.

[17] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, fn 441.

[18] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, para. 7.278.

[19] Panel Report, *China – Broiler Products*, para. 7.493. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.181 ("a proper analysis of price effects ought to have taken into account the fact that there were significant differences in the prices of these product types.").

[20] Panel Report, *China – Broiler Products*, paras. 7.555, 584.

[21] Appellate Body Report, *Australia – Salmon,* para. 223. (underline added).

18. In the Panel's preliminary ruling of 22 March 2017, the Panel held that the claims of the United States under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 were within the terms of reference for this compliance proceeding. To secure a positive resolution of the current dispute, Japan encourages the Panel to make findings with respect to the claims of the United States that are within the terms of reference for this compliance proceeding.

III. Proper Allocation of Costs under ADA Article 2.2.1.1

19. With respect to ADA Article 2.2.1.1, Japan agrees with the United States that the investigating authority is required to evaluate all available evidence and undertake a "proper" allocation of cost to calculate the normal value. On this point, the original panel suggested that the investigating authority may weigh in mind the facts of a particular case under investigation when considering the evidence relating to cost allocation methods.

20. ADA Article 2.2.1.1 read together with Article 2.2, for the purpose of this paragraph, provides conditions an investigating authority needs to satisfy when constructing the normal value on the basis of production costs in the country of origin. Japan understands that in principle, the normal value should be an appropriate proxy of the price in the "ordinary course of trade" for the products when destined for the consumption in the exporting country. Japan notes that in circumstances where a certain part of joint-products has little commercial value in the exporting country's market, while all joint products are commercially marketed in the importing market, due to consumers' different eating habits, such facts in a particular case may need to be taken into account in calculating the dumping margin. The question is whether an investigating authority can take into consideration the actual market practices of relevant countries, such as differences in consumers' perceptions, as against only evidences of exporting countries, when deciding the proper allocation of costs.

21. In the original panel proceeding there was a debate on whether the investigating authority should have used weight-based cost allocation or value-based cost allocation. The issue disputed could be understood as whether the investigating authority may take into consideration the relevant countries' proper market practices under the circumstances of the case. In this compliance proceeding, the United States focused its argument on MOFCOM's use of alleged distortive weight-based allocation methodology in its redetermination, and challenged that MOFCOM's cost allocation methodology was not "proper". Japan considers that whether or not the cost allocation is "proper" cannot be determined in the abstract. If the investigating authority chooses to deviate from the cost allocation used by exporters and foreign producers, it should adhere to the actual market practices of the relevant countries and fully explain its deviation. In this regard, Japan views that China has not adequately explained why MOFCOM's decision regarding cost-allocation was "proper" based on the market practices of the relevant countries.

IV. Disclosure of Essential Facts

22. Finally, Japan would like to emphasise the importance of the disclosure of "essential facts" which form the investigating authority's basis of determination, pursuant to ADA Article 6.9.[22] The necessity to secure the transparency and due process of interested parties in anti-dumping investigations remains the same under reinvestigations. ADA Article 6.9 obliges the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis. In other words, disclosure by investigating authorities should provide the interested parties with the necessary information that enables them to comment on the completeness and correctness of the facts being considered by the investigating authority, and thus ensure a fair determination by the investigating authority. In light of the above, while Japan takes no position on the factual issues of this case, Japan respectfully request the panel to review the consistency of MOFCOM's disclosure during its reinvestigation with *AD Agreement* Article 6.9.

[22] Panel Report, *China – Broiler Products*, para. 7.90.

ANNEX E

PRELIMINARY RULING

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ANNEX E-1

RULING BY THE PANEL ON JURISDICTIONAL ISSUES

22 March 2017

1 INTRODUCTION

1.1. In its written submissions, China has requested that the Panel rule a number of claims outside its jurisdiction. To enable the parties to better focus their arguments at the substantive meeting, we have decided to resolve at this stage of the proceeding China's assertions that certain US claims set out in its panel request[1] are outside the Panel's terms of reference either because they do not comply with Article 6.2 of the Dispute Settlement Understanding (DSU), or as a consequence of the Panel's exercise of judicial economy in the original dispute.

2 ARTICLE 6.2 OF THE DSU

2.1 Arguments of the parties

2.1.1 China

2.1. Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2 are not within the Panel's terms of reference because they are not set out in the panel request.

2.2. The claim under the second sentence of AD Agreement Article 2.2.1.1 in respect of Pilgrim's Pride is not within the Panel's terms of reference because:

a. the Panel made no findings in respect of Pilgrim's Pride under the second sentence of Article 2.2.1.1 in the original dispute[2];

b. cost allocation issues with regard to Pilgrim's Pride were not addressed by MOFCOM in the redetermination, and are therefore not before the Panel, and the original determination in this respect cannot be raised in this Article 21.5 proceeding[3]; and

c. the narrative language of the panel request concerns cost allocation issues related to Tyson and is unrelated to the reinvestigation of Pilgrim's Pride.[4]

2.3. Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 are not within the Panel's terms of reference because the panel request does not identify the specific measure[5] and does not "present the problem clearly". In particular, the panel request refers, as "an example", to documents that do not exist (i.e. questionnaires).

2.4. The United States asserts in its first written submission that MOFCOM failed to reconcile its causation analysis with the improving domestic industry performance. This assertion constitutes a new element of the claim under AD Agreement Articles 3.1 and 3.5 and SCM Agreement

[1] Request for the establishment of a panel by the United States, WT/DS427/11 and WT/DS427/11/Corr.1.
[2] China's first written submission, para. 131; second written submission, paras. 199 and 202.
[3] China's first written submission, para. 133.
[4] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[5] China's second written submission, para. 82:

> [T]he United States general reference to measures imposing AD/CVD duties to U.S. products, accompanied with the reference to the Redetermination without any further specification, does not fulfil the requirements of Article 6.2 of the DSU since it fails to identify with sufficient precision the challenged measure.

China's second written submission, para. 83: "China is arguing that the United States has failed to identify the measure".

Articles 15.1 and 15.5 that had not been set out in the panel request. In particular, the use of the word "including" in the panel request, as opposed to "including but not limited to", indicates an intention on the part of the United States to set out an exhaustive list of the elements of its claims under these provisions.

2.1.2 United States

2.5. In respect of the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, "China's argument is misplaced because it rests on an erroneous assumption: that the United States simply cited AD Agreement Article 6 and SCM Agreement Article 12 – and nothing more."[6] In fact, the panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[7]; thus, the United States "narrowed its concerns to those that flow from AD Agreement Article 6.1 and SCM Agreement Article 12.1".[8] The findings of the Appellate Body in respect of DSU Article 23 in *US – Countervailing Measures on Certain EC Products* that "there is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23"[9] and finding a claim within the panel's terms of reference as a result are "directly on point" in this context. In a similar way, the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1".[10] The claims are included in the claims under Articles 6.1 and 12.1 because the "factual predicate" is the same as that of the claims under Articles 6.1 and 12.1.

2.6. Regarding its claim under Article 2.2.1.1 with respect to Pilgrim's Pride, the United States asserts:

> The Panel Request clearly states that the United States is bringing a claim under the second sentence of Article 2.2.1.1. Moreover, the language the United States uses is with respect to "producers," not simply Tyson. There is no reason from the language of the claim to believe that the United States circumscribed its claim with respect to Tyson only.[11]

"[T]he DSU requires identification of measures and claims – not particular interested parties."[12] Because the Panel's findings under the second sentence of Article 2.2.1.1 in the original report were "with respect to consideration of allocation methodologies and allocation of processing [costs] extended to all respondents, including Pilgrim's Pride"[13], this matter falls within the jurisdiction of the Panel.

2.7. The "example" referred to in connection with the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 in the second sentence of paragraph 5 of the panel request is "wholly unnecessary" to the statement of the US claim as it was "simply a preview of what the United States might argue in its submissions".[14] In particular, "[t]he questionnaire is not the measure at issue; the continued imposition of AD and CVD duties are, including the conduct of the reinvestigation".[15]

2.8. In respect of the claim under AD Agreement Article 6.4 and SCM Agreement Article 12.3, the United States maintains it is clear that "the measures at issue are those that continue to lead to imposition of AD and CVD duties on U.S. broiler products";[16] the second sentence example simply foreshadows US arguments. In particular, the reference to questionnaires is simply an example.

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[6] United States' second written submission, para. 203.
[7] United States' second written submission, para. 204.
[8] United States' second written submission, para. 204.
[9] United States' second written submission, para. 205 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 111).
[10] United States' second written submission, para. 205.
[11] United States' second written submission, para. 212. (emphasis added)
[12] United States' second written submission, para. 211.
[13] United States' second written submission, para. 213.
[14] United States' second written submission, para. 195.
[15] United States' second written submission, para. 197.
[16] United States' second written submission, para. 207.

> Whether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers.[17]

2.9. In respect of the claim under AD Agreement Article 3.5 and SCM Agreement Article 15.5, "China conflates claims with arguments".[18] Responding to the arguments of China in respect of the scope of the term "including" in the panel request:

> What panel and the Appellate Body have appropriately recognized is that the term's open-ended meaning cannot be used to keep claims undefined. At no time has any panel or the Appellate Body ever found that it cannot be used as part of an indication to preview some – but not all – arguments.[19]

2.2 Relevant Law

2.10. Articles 7 and 6.2 of the DSU govern the jurisdiction of the Panel. Article 7 provides that, unless the parties agree otherwise, a panel shall have the standard terms of reference set out in that provision, which encompass the "matter referred to the DSB" by the complainant in the request for establishment. Article 6.2 sets out the requirements for a request for establishment of a panel (panel request), which describes the "matter referred to the DSB" and thus establishes the parameters of the jurisdiction of the panel. Article 6.2 states:

> 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.

2.11. It is well settled that:

a. The "matter" referred to the DSB comprises the measure(s) at issue and the claims as set out in the request for establishment.[20]

b. Where a matter, including claims, does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.[21]

c. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.[22]

d. A defect in the panel request may not be "cured" in later submissions.[23]

e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".[24]

f. There is a difference between the claims of a complainant and its arguments in support of those claims. The Panel may only address the claims set out in the panel request. However, arguments need not be included in the request for establishment, and a party may raise any arguments in support of those claims it wishes. Moreover, a panel is not limited to arguments submitted by the parties in resolving the matter before it, but may develop its own reasoning.[25]

[17] United States' second written submission, para. 207.
[18] United States' second written submission, para. 220.
[19] United States' second written submission, para. 221.
[20] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[21] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; and *US – Carbon Steel*, para. 126.
[22] Appellate Body Report, *US – Carbon Steel*, para. 127.
[23] Appellate Body Report, *EC – Bananas III*, para. 143.
[24] Appellate Body Reports, *EC – Fasteners* (China), para. 597; and *India – Patents (US)*, para. 90.
[25] Appellate Body Reports, *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156.

g. Article 6.2 protects Members' due process interests in the course of dispute settlement.[26] At the same time, the procedural rules of the WTO should not be used as litigation techniques, but so as to promote the fair, prompt and effective resolution of disputes.[27]

h. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference, and may need to do so even in the absence of any request by a party.[28]

2.3 Analysis

2.3.1 Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2

2.12. DSU Article 6.2 requires that a complainant "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint". It is axiomatic that "the listing of the treaty provision(s) allegedly violated is normally a prerequisite for a panel request to be consistent with Article 6.2 of the DSU".[29] At the same time, because a finding under DSU Article 6.2 goes to the parameters of our jurisdiction, deciding whether a claim is sufficiently set out in the panel request is not a mechanical task. Rather, we are required to read the panel request in its entirety; the statement of a claim may be inferred from the totality of a panel request, such that a complainant's failure to list a specific provision would not necessarily deprive a panel of jurisdiction to address a claim under that provision.[30]

2.13. The question before us in this proceeding is whether the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, as argued in its first written submission, were properly set out in the panel request. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[31]

On its face, the panel request does not refer to AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2.

2.14. China's jurisdictional challenge is simple: AD Agreement Article 6.2 is not referred to in the panel request. The United States does not make any arguments in response to China's arguments. In the absence of any response from the United States that would explain that a claim under that provision is nonetheless set out in the panel request, we conclude that no claim under AD Agreement Article 6.2 is properly before us in this dispute.

2.15. According to the United States, the claim in respect of AD Agreement Article 6.1.2 and SCM Agreement 12.1.2 may be understood to be within the terms of reference under paragraph 5 of the panel request, because:

a. the US panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[32];

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[26] Appellate Body Report, *US – Carbon Steel*, para 126; *Argentina – Import Measures*, Annex D-2, para. 4.26. This extends to third parties, to ensure that they receive "sufficient notice" of the specific measures that a complainant is challenging. (*Argentina – Import Measures*, Annex D-2, para. 4.20).

[27] Appellate Body Report, *Thailand – H-Beams*, para. 97 (citing Appellate Body Report, *US – FSC*, para. 166).

[28] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

[29] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.31.

[30] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.33. We also recall our findings to this effect regarding claims under Articles 12.2.2 and 22.5 of the AD and SCM Agreements respectively in the original panel report, para. 7.520.

[31] United States' request for the establishment of a panel, WT/DS427/11 (United States' panel request), para. 5.

[32] United States' second written submission, para. 204.

b. US concerns in respect of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 "flow from" its concerns under AD Agreement Article 6.1 and SCM Agreement Article 12.1[33];

c. there is a "close relationship"[34] between AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 on the one hand, and the listed provisions on the other, in that the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1"; and

d. the claims at issue are included in the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 because they have the same "factual predicate".

2.16. We recall that Articles 6.1.2 and 12.1.2 were addressed in the US first written submission but not mentioned in the US panel request. At issue is whether these Articles are so closely related to Articles 6.1 and 12.1 that, as a consequence, and in the light of the narrative in paragraph 5 of the panel request, the statement of claims specifically under Articles 6.1 and 12.1 may be found to include claims under Articles 6.1.2 and 12.1.2. To resolve this question, we first examine the provisions at issue. Articles 6.1 and 6.1.2 of the AD Agreement provide:

> 6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
>
> ...
>
> > 6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

The corresponding provisions of the SCM Agreement, Articles 12.1 and 12.1.2, are largely identical − the minor textual differences are not relevant in this context.

2.17. AD Agreement Article 6 and SCM Agreement Article 12, entitled "Evidence", address a wide range of topics beyond strictly evidentiary matters and establish a number of diverse but often related obligations in respect of the conduct of anti-dumping and countervailing duty investigations. AD Agreement Article 6.1 and SCM Agreement Article 12.1 contain <u>two</u> distinct but related obligations on the investigating authority concerning the conduct of the investigation:

a. to give notice to all interested parties of information required by the investigating authorities; and

b. to provide to all interested parties an ample opportunity to present relevant evidence in writing.

AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 require that non-confidential evidence presented in writing by one party must be made available to other participating interested parties promptly.[35]

2.18. There is no question that AD Agreement Articles 6.1 and 6.1.2 and SCM Agreement Articles 12.1 and 12.1.2 are related to some extent, as they all refer to the presentation of evidence in writing. However, it is not at all clear to us that Articles 6.1.2 and 12.1.2 are, as the United States argues, "nothing less than a specific application of the denial of opportunity that

[33] United States' second written submission, para. 204.
[34] United States' second written submission, para. 205.
[35] Articles 6.1.1 and 12.1.1, not at issue here, set out a time-frame for exporters and producers (and in countervailing duty investigations, interested Members) to reply to questionnaires they receive; Articles 6.1.3 and 12.1.3 require the provision of the full text of the application to known exporters and the authorities of the exporting Member, and other interested parties upon request, with due regard for the protection of confidential information.

AD Agreement Article 6.1 and SCM Agreement Article 12.1 require".[36] Articles 6.1.2 and 12.1.2 require that evidence submitted by one interested party in writing be made available promptly to other participating interested parties. In our view, this is a very different obligation from those set out in Articles 6.1 and 12.1, requiring notice of the information required and "ample opportunity" for interested parties to present relevant evidence in writing. Thus, while the obligation in Articles 6.1.2 and 12.1.2 may be related to the "ample opportunity" to present evidence in writing required under Articles 6.1 and 12.1, compliance with the one does not require or establish compliance with the other. It is entirely possible for an investigating authority to give notice of the information required and ample opportunity to submit evidence in writing, but fail to ensure that evidence presented in writing is made available promptly to other interested parties, and vice versa. Neither in form nor in substance do we consider the provisions so "closely related" that the statement of a claim under Articles 6.1 and 12.1 in a panel request can, without more, be understood to include a claim under Articles 6.1.2 and 12.1.2. Merely that Articles 6.1.2 and 12.1.2 concern information submitted in writing pursuant to the opportunity required by Articles 6.1 and 12.1, does not suffice to bring the former within the scope of the latter.

2.19. Nonetheless, according to the United States, "The U.S. Panel request explicitly references the lack of opportunity afforded by MOFCOM in the reinvestigation thus placing clear parameters on the scope of the claim."[37] This, we understand, refers to the statement in paragraph 5 of the panel request concerning "ample opportunity to present in writing all evidence they considered relevant". This language is in the text of Articles 6.1 and 12.1. It does not appear in Articles 6.1.2 and 12.1.2. Moreover, it is not clear to us how the failure to make information submitted in writing available to other interested parties is linked to the alleged lack of ample opportunity to present evidence in writing referred to in the narrative in paragraph 5 of the panel request. This reference cannot, in our view, bring the asserted failure to make information available within the scope of the obligations in Articles 6.1 and 12.1, and thus paragraph 5 fails to state a claim under Articles 6.1.2 and 12.1.2. The United States also relies on its first written submission to "confirm" the scope of its claim in the panel request. However, given our view that the panel request, read as whole, does not state a claim under Articles 6.1.2 and 12.1.2, there is nothing to "confirm".

2.20. In the light of the foregoing, we find that the United States' claims under Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 are not within our terms of reference.

2.4 Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement and 12.1 and 12.3

2.21. The question before us in this context is whether the claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 as set out in the panel request provide the required clarity and specificity. The questions at issue are similar and so we deal with them together.

2.22. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[38]

Paragraph 4 of the panel request states:

> Articles 6.4 and 6.5 of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to

[36] United States' second written submission, para. 205.
[37] United States' second written submission, para. 205.
[38] Emphasis added.

disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[39]

2.23. China's principal argument is that "the United States has failed to identify the measure".[40] Moreover, because no "questionnaires" were sent to domestic producers, these claims as set out in the panel request caused China puzzlement. The use of the words "for example" does not save each claim by enlarging it to encompass other forms of information request than "questionnaires". Neither claim presents the problem "clearly"; each is therefore inconsistent with DSU Article 6.2.

2.24. The United States responds that:

a. the measures at issue are "those that continue to lead to imposition of AD and CVD duties on U.S. broiler products" and the panel request properly identifies the measures by explicitly referencing the reinvestigation[41];

b. the reference in the panel request to "the questionnaire" foreshadows US arguments, and is not relevant to the identification of the claim[42]; and

c. "[w]hether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers."[43]

2.25. Articles 6.1 and 12.1 require notice of the information required by the investigating authorities. Articles 6.4 and 12.3 require the authorities to provide opportunities to see relevant non-confidential information used by the authorities. The alleged violation in respect of each provision as stated in the panel request is an omission: that is, for Articles 6.1 and 12.1, the alleged failure to provide "notice of the information which the authorities require", and for Articles 6.4 and 12.3, the alleged failure to "provide interested parties timely opportunities to see all non-confidential information that was relevant to their case". As an "example" of the information subject to these requirements, the panel request refers to "questionnaires [MOFCOM] submitted to Chinese domestic producers during the re-investigation".

2.26. We make the following observations:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The question, then, is whether the references to questionnaires as examples in paragraphs 4 and 5 of the panel request result in the claims as set out not presenting the problem "clearly":

i. China asserts that no questionnaires were sent to Chinese producers. All MOFCOM did in the course of the reinvestigation was engage in a verification exercise. At the same time, however, throughout the redetermination MOFCOM states that it not only verified the information it had, but sought and obtained additional information.[44] Whether or not "questionnaires" in some formal sense were used in this effort, there were clearly requests made to Chinese domestic producers for further information, and information was submitted.

ii. Where, as in this case, claims are based on alleged omissions by the investigating authority, the investigating authority is in possession of information that it allegedly did not give notice of as required under Articles 6.1 and 12.1, and did not provide

[39] Emphasis added.
[40] China's second written submission, para. 83.
[41] United States' second written submission, para. 207.
[42] United States' second written submission, para. 207.
[43] United States' second written submission, para. 207.
[44] We note also China's second written submission, para. 252: "Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing." (emphasis added)

ample opportunities to see under Articles 6.4 and 12.3. The complaining Member, of course, does not know what the relevant information is, or in what form it was required or received − or indeed, whether it exists − but does believe that information was requested and submitted to the investigating authorities. In these circumstances, it is difficult to see how the complainant could be expected to pin-point with any precision in a panel request information (including its format − in the form of a questionnaire or otherwise) it does not have and might not even know about.

iii. Whether a claim as set out in the panel request presents the problem clearly depends on not just the specific words used in the panel request but also the underlying obligations. The term "questionnaire" has a generally understood technical meaning in the context of anti-dumping and countervailing duty practice more generally; MOFCOM might not have sent a "questionnaire" in the technical sense to domestic producers during the reinvestigation. But that does not render the claim as a whole, which refers to "questionnaires" only as an example of the problem, opaque to the point of vitiating China's due process rights under DSU Article 6.2.

iv. MOFCOM required, sought, and obtained additional information from Chinese domestic producer in the course of its reinvestigation. Under Articles 6.1 and 6.4 and 12.1 and 12.3, it had obligations with respect to notice of the information required (which is not limited to information required in questionnaires) and providing opportunities to see relevant information. It is not disputed that the information provided by the Chinese domestic producers in the reinvestigation was relevant and used by MOFCOM.[45] Regardless of the limited example − reference to questionnaires − in the panel request, in our view there is little doubt as to the scope of the claims under Articles 6.1, 6.4, 12.1, and 12.3.

2.27. In the light of the foregoing, we find that the claims of the United States under Articles 6.1 and 6.4 of the AD Agreement and Articles 12.1 and 12.3 of the SCM Agreement are within our terms of reference.

2.4.1 Second sentence of Article 2.2.1.1 and Pilgrim's Pride

2.28. The question before us here is the scope of the claim of violation of Article 2.2.1.1, second sentence, specifically whether it encompasses MOFCOM's alleged violation in respect of the calculation of a dumping margin for Pilgrim's Pride in the reinvestigation. In this respect, China advances two lines of argument:

a. While the claim in the panel request is drafted broadly, the narrative language concerns only the allocation issues related to the calculation of Tyson's dumping margin. The claim itself, as set out in the panel request, appears to be unrelated to the issues surrounding the calculation of a dumping margin for Pilgrim's Pride during the reinvestigation. Accordingly, the claim as developed in the first written submission of the United States is not within the terms of reference of the Panel.[46]

b. In the original dispute the Panel made no findings in respect of the calculation of a dumping margin for Pilgrim's Pride under the second sentence of Article 2.2.1.1. Indeed, the findings of the Panel in respect of the first sentence underline that its findings under the second sentence could not have applied to Pilgrim's Pride. For these reasons, MOFCOM did not address any cost allocation issues with regard to Pilgrim's Pride during the reinvestigation, and therefore the consistency of the dumping margin for Pilgrim's Pride with Article 2.2.1.1 is not within the terms of reference of the Panel.[47]

2.29. The United States responds that:

[45] China's second written submission, para. 252: "From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products."
[46] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[47] China's first written submission, para. 131; second written submission, paras. 199 and 202.

a. the claim in the panel request is clear in that it refers to "producers", and not just Tyson[48];

b. the Panel's findings of violation of the second sentence of Article 2.2.1.1 in the original dispute were not limited to Tyson[49]; and

c. in any event, DSU Article 6.2 requires identification of measures and claims of violation – not particular interested parties.[50]

2.30. Turning to the first basis for China's challenge, we recall paragraph 8 of the panel request:

> Articles 2.2 and 2.2.1.1 of the AD Agreement because MOFCOM improperly calculated the cost of production for US producer**s**, failed to calculate costs on the basis of the records kept by the US producer**s** under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.[51]

2.31. For purposes of considering the scope of the Panel's jurisdiction, there is an important distinction between claims and arguments. The claim here is that the redetermination in respect of the calculation of costs for US producers does not meet the requirements of Articles 2.2 and 2.2.1.1. We note that:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The legal basis for the claim is set out as Article 2.2 and both sentences of Article 2.2.1.1. The two examples provide additional clarity, but they neither expand nor restrict the scope of the claim, and are not limited as to the producers to which they refer.

Nothing in the DSU requires that the arguments in support of a claim be specified in the request for establishment. It is true that in the original dispute, there was no specific finding of violation of the second sentence of Article 2.2.1.1 with respect to Pilgrim's Pride. Nonetheless, the Panel's findings regarding that provision were not strictly limited to Tyson, but were more general in some aspects. Thus, we see no reason to foreclose the possibility of a claim under Article 2.2.1.1 involving arguments concerning other producers. We note that the panel request refers to US producers in the plural. This clearly opens the possibility for arguments concerning the alleged failure of MOFCOM to comply with the cited AD Agreement provisions in calculating a dumping margin for more than one US producer. We see no basis to require the identification of specific interested parties in respect of which an investigating authority has made a determination with respect to each claim of violation.

2.32. Among the various arguments made in support of the US claim under the second sentence of Article 2.2.1.1 is the argument in respect of Pilgrim's Pride. These arguments do not go beyond the claim as set out in the panel request. Accordingly, the claim of violation as set out in the panel request meets the requirements of DSU Article 6.2 and is properly before us.

2.33. Having so concluded, we do not consider it necessary to address China's second ground for its jurisdictional challenge.

2.34. We therefore find that China has not established that the US claims in respect of Articles 2.2 and 2.2.1.1 insofar as they relate to Pilgrim's Pride fall outside our jurisdiction.

[48] United States' second written submission, para. 212.
[49] United States' second written submission, para. 213.
[50] United States' second written submission, para. 211.
[51] Emphasis added.

2.5 Alleged failure to reconcile causation analysis with evidence

2.35. The question before us here is the scope of claims of violation of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5, and whether they encompass MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. China refers to the specific language of paragraph 3 of the panel request:

> Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

2.36. China argues that:

a. The use of the word "including" instead of "including but not necessarily limited to" must be understood as setting out an exhaustive list of elements of the US claim under Articles 3.1, 3.5, 15.1, and 15.5.[52]

b. "The contrast between the phrase 'for example' for all of the other claims, but the term 'including' only for claim #3 shows an explicit effort to distinguish the two types of claims. In this context, 'including' is being used in a limiting sense."[53]

c. The language of the paragraph is "a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore relates to the specific obligations found in the second sentence."[54]

2.37. The United States argues that:

a. "The claim is that MOFCOM's continued imposition of AD/CVD measure on U.S. broiler products is inconsistent with the cited provisions."[55] The examples set out in the panel request are arguments; the United States was not under an obligation to set any of its arguments out in the panel request.

b. The term "include" is not exclusive.[56]

2.38. We make the following observations:

a. The phrase "including but not necessarily limited to" is an unfortunate redundancy that clutters many a legal document. We note that in certain contexts, of course, the term "including" may have a limiting effect. For example, the legal maxim *eiusdem generis* provides that a listing of items "included" in a general term could limit the scope of that term to the genre of the included items. But that is not what China argues. We are asked to find that the use of the term "including" in a jurisdictional document creates an exhaustive list for the sole reason that it is not accompanied by a redundant qualifier. We are not aware of a canon of interpretation that would require us to reach this conclusion.

b. The use of "including" in one paragraph of the panel request and "for example" in the other paragraphs is not determinative of the meaning of either term. It is the case that in certain circumstances, in a treaty the use of one term rather than another may give rise to the presumption that a different meaning was intended by its drafters. In this instance, read in the context of the panel request as a whole, nothing in the use of "for

[52] China's first written submission, para. 378.
[53] China's second written submission, para. 330.
[54] China's second written submission, para. 328.
[55] United States' second written submission, para. 220.
[56] United States' second written submission, para. 221.

example" in some paragraphs suggests a "limiting" – that is, an exhaustive – sense for the term "including".

c. As we have observed, in addressing questions of panel jurisdiction, there is an important distinction between claims and arguments. The claims here allege that the redetermination, which is the measure take to comply, does not satisfy the requirements of Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement. We note in this respect that the four sentences of Articles 3.5 and 15.5 are inextricably linked. Among the various arguments the United States makes in support of those claims is MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. Merely because this argument is not set out in the panel request does not preclude the United States from making it in the course of the dispute.

2.39. In the light of the foregoing, we find that the argument that MOFCOM allegedly failed to reconcile its causation analysis with the improving domestic industry performance is within the scope of the United States' claims that China has acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, and within the jurisdiction of the Panel.

2.6 Conclusion on DSU Article 6.2

2.40. We find that US claims in respect of Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 of the SCM Agreement are not within the scope of our terms of reference and we will make no findings on such claims.

2.41. We find that US claims in respect of Articles 3.1, 6.1, 2.2.1.1, and 3.5 of the AD Agreement and Articles 15.1, 12.1, and 15.5 of the SCM Agreement are within the scope of our terms of reference.

3 THE PANEL'S EXERCISE OF JUDICIAL ECONOMY IN THE ORIGINAL DISPUTE

3.1 Introduction and arguments of the parties

3.1. In the original dispute, the Panel found that MOFCOM's findings of price undercutting and of price suppression were inconsistent with the relevant obligations. It observed that "MOFCOM's examination of the situation of the domestic industry was inextricably linked to its earlier analysis of the price effects of subject imports" and that implementation of its findings regarding price effects would "require China to re-examine MOFCOM's Determination concerning the impact of subject imports on the domestic industry".[57] In this situation, the Panel took 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[58], and made no findings with respect to the United States' claims under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.[59] The Panel in the original dispute also made no findings, on the same grounds, in respect of US claims under AD Agreement Article 3.5 and SCM Agreement Article 15.5.[60]

3.1.1 China

3.2. The US claims under AD Agreement Articles 3.1, 3.4, and 3.5[61] and SCM Agreement Articles 15.1, 15.4, and 15.5 in this proceeding are beyond the scope of the Panel's terms of reference because the Panel exercised judicial economy in respect of these claims in the original dispute. Specifically:

[57] Panel Report, *China – Broiler Products*, para. 7.555.
[58] Panel Report, *China – Broiler Products*, para. 7.555.
[59] Panel Report, *China – Broiler Products*, para. 7.556.
[60] Panel Report, *China – Broiler Products*, paras. 7.584 and 7.585.
[61] China raised arguments in respect of AD Agreement 3.5 and SCM Agreement Article 15.5 for the first time in its second written submission. (China's second written submission, paras. 335 and 336). As the issues are the same as the arguments under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.5, we address all these arguments at the same time.

a. The Panel exercised judicial economy and did not rule on the US claims or otherwise address in any way the merits of the US arguments in support of these claims. "Neither China nor the United States 'lost' this claim − the claim was not addressed"[62]; this rendered the claims of no effect.[63]

b. "China recognizes that the Panel believed in good faith that the Panel findings on price effects 'will require' MOFCOM to reconsider its impact analysis. But with all due respect, that belief was incorrect."[64] And so, the unchanged part of the redetermination was not an "inseparable element" of the measure taken to comply[65]; MOFCOM did not need to revisit it.[66] Indeed, "there was no measure taken to comply and there was no need for MOFCOM to redo its analysis".[67]

c. The reassertion of these claims in this proceeding creates a fundamental unfairness to the detriment of China.[68] Because this is a compliance proceeding, China is deprived of any chance to address any inconsistency that may now be found or otherwise to bring its measure into compliance.

d. "If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact. The additional claim would not add anything to the overall U.S. challenge and rights under the WTO. The separate claims on impact thus really matters to the United States only if it has lost its claims regarding price effects (and other claims), and needs some independent basis to establish the WTO inconsistencies of the AD and CVD measures."[69]

e. This situation is "functionally the same" as the case in which a party did not bring a claim in the original dispute that it could have brought.[70] The United States is thus barred from bringing these claims in these 21.5 proceedings.

3.1.2 United States

3.3. The claims under AD Agreement Article 3.4 and SCM Agreement Article 15.4 are within the Panel's terms of reference[71], because:

a. "[W]here a Member fails to prove inconsistency on a claim, that claim may not be re-litigated in a compliance proceeding. The Appellate Body has never found that the exercise of judicial economy precludes consideration of a claim in a compliance proceeding. The logic for this distinction is compelling. A Member is not entitled to a second chance to prove a claim that has been already rejected. There is no justification for rejecting a claim that *was never decided*."[72]

b. The Panel exercised judicial economy in the original dispute "on the basis that MOFCOM would need to undertake a reexamination of its impact analysis − and thus decide how to address the US claim. MOFCOM's decision to decline to do so cannot absolve it from having its injury findings assessed."[73]

[62] China's second written submission, para. 291.
[63] China's first written submission, para. 336.
[64] China's second written submission, para. 292.
[65] China's second written submission, para. 293.
[66] China's second written submission, para. 291.
[67] China's second written submission, para. 287.
[68] China's first written submission, paras. 333 and 335.
[69] China's second written submission, para. 294.
[70] China's first written submission, para. 336.
[71] The United States has responded to the arguments set out in China's first written submission. Given that the arguments in respect of AD Agreement Article 3.4 and SCM Agreement Article 15.4 are the same as those in respect of AD Agreement Article 3.5 and SCM Agreement Article 15.5, we believe we can dispose of this matter without further submission by the United States.
[72] United States' second written submission, para. 215. (emphasis original; fn omitted)
[73] United States' second written submission, para. 216.

c. "Precluding consideration of claims in a compliance proceeding on the basis that judicial economy was exercised" would undermine Articles 3.4 and 3.7 of the DSU.[74]

d. "[T]here was no barrier to China engaging in a reexamination of its impact analysis."[75]

3.2 Analysis

3.4. First, the findings of the panel and the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* relied on by China do not support its position. We recall that in that case, the panel in its original report found that the complainant had failed to establish a *prima facie* case in respect of the claim at issue. The complainant then sought to raise the same claim in the Article 21.5 proceedings. The Appellate Body upheld the panel's finding that the claim was not within the scope of is jurisdiction, noting due process and fairness concerns:

> A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel.[76]

Accordingly, the focus of the Appellate Body in that case was the actions of the complainant in failing to establish a *prima facie* case in the original dispute. More important for the question before us here, both the panel and the Appellate Body were aware of the potential consequences of their findings and explained further:

> We also recall that the Panel noted, in paragraph 6.44 of the Panel Report, that the original panel's dismissal of India's claim under Article 3.5 relating to "other factors" was *not* an exercise of "judicial economy". The issue raised in this appeal is different from a situation where a panel, on *its* own initiative, exercises "judicial economy" by not ruling on the substance of a claim.[77]

3.5. The Appellate Body had occasion to revisit the question of the effect of an exercise of judicial economy on the admissibility of a claim in the context of Article 21.5 proceedings involving redeterminations in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. At issue in that case was whether,

> [T]he USDOC's finding that the volume of imports of OCTG from Argentina declined after the imposition of the anti-dumping duty order – which was made in the original sunset determination and incorporated into the Section 129 Determination – is part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU.[78]

The Appellate Body noted that while Argentina had in fact challenged the USDOC's volume analysis in the original panel proceedings, the panel had not made a finding regarding the WTO-consistency of that analysis.[79] In that case the panel did not expressly exercise judicial economy, but both disputing parties characterized the panel's approach to the issue in the original *OCTG* dispute as an exercise of judicial economy. In that case, the United States argued that the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* applied to the USDOC's findings on volume of imports, asserting – as China does in this case – that because there had been no panel findings,

[74] United States' second written submission, para. 217.
[75] United States' second written submission, para. 218.
[76] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.
[77] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, fn. 115 to para. 96. (italics original; underline added)
[78] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 138.
[79] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 141.

there had been no change in the USDOC findings, and the complainant could not raise the matter again in an Article 21.5 proceeding. The Appellate Body disagreed:

> [E]ven if the original panel's approach should properly be characterized as judicial economy, it would still mean that the central rationale of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* would not be applicable. The Appellate Body explained that the issue raised in that case differed "from a situation where a panel, on its own initiative, exercises 'judicial economy' by not ruling on the substance of a claim."[80]

3.6. China expressly acknowledges that the Panel exercised judicial economy in respect of the claims at issue in the original dispute. It does not argue that the Panel did not have the authority to exercise judicial economy or that it did so improperly in the original dispute; if anything, China encourages the Panel to continue to exercise judicial economy in respect of claims under Articles 3.4 and 15.4 if the Panel makes findings adverse to its interests under Articles 3.2 and 15.2.[81] In addition, China did not appeal the findings of the original Panel in this regard.[82] In our view, the findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* and *EC – Bed Linen (Article 21.5 – India)* clearly establish that the exercise of judicial economy by a panel in respect of a claim does not, for that reason alone, preclude a complaining party from bringing that same claim before a subsequent Article 21.5 panel.

3.7. In this instance, the Panel in its original report did not make any substantive findings in respect of the US claims under Articles 3.1, 3.4, 15.1, and 15.4. This was because, having found China in breach of AD Agreement Article 3.2 and SCM Agreement Article 15.2, the Panel concluded that re-examination of the analysis under those provisions would require re-examination of the impact of subject imports on the domestic industry, and therefore additional findings with respect to MOFCOM's analysis under Articles 3.4 and 15.4 would not assist in the resolution of the dispute. As it turned out, MOFCOM did not change its analysis under Articles 3.2 and 15.2, and did not deem it necessary to change its analysis under Articles 3.4 and 15.4. Nevertheless, this is not a case where the "central rationale" of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* is directly applicable, because it was not the complainant that failed to establish its claim in the original dispute, it was the Panel that opted to not rule on the claim. The fairness and due process concerns cited by the Appellate Body in denying a second chance to raise the same claim in an Article 21.5 proceeding are simply not relevant here.

3.8. Second, we note China's argument that:

> If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact.[83]

Neither of these arguments is relevant to whether these claims are within our terms of reference in this proceeding. Whether or not we erred in not making findings under Articles 3.4 and 15.4 in the original dispute does not change the fact that we did not make such findings, and that exercise of judicial economy was not challenged on appeal. That MOFCOM did not act as we had anticipated does not, of course, demonstrate that we erred. In any event, it would not be appropriate for us to make a finding in respect of our terms of reference in this proceeding on the basis of a potential finding or exercise of judicial economy that might be the result of our consideration of the claims in this proceeding.

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[80] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148. (fn omitted)

[81] China's second written submission, para. 294: "If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact." (emphasis added)

[82] We recall the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para 96:

> Moreover, here, India decided not to appeal the panel finding at issue in the original proceedings, even though it could have done so, inasmuch as the issue was not of an exclusively factual nature. Hence, India itself seems to have accepted the finding as final.

(emphasis added)

[83] China's second written submission, para. 294.

3.9. Finally, we do not consider the premise of China's assertion of "fundamental unfairness" to be correct or to suffice to change our view that the United States is not precluded from raising its claims under Articles 3.1, 3.4, 15.1, and 15.4 in this proceeding. Nothing suggests that "China will never have any chance to address that inconsistency or otherwise bring its measure into compliance"[84], should the Panel find that the redetermination is inconsistent with Articles 3.1, 3.4, 3.5, 15.1, 15.4, and 15.5. It is true that China would not have the benefit of another reasonable period of time to do so, but that is not the same thing as being "deprived" of the opportunity to do so.[85] The fact that in making its redetermination, MOFCOM did not have the benefit of Panel findings in respect of the original determination did not absolve China of its obligation, under the WTO Agreement, to ensure that the measure taken to comply is consistent with all its obligations under the WTO Agreement.

3.3 Conclusion

3.10. In the light of the foregoing, we find that the claims of the United States under AD Agreement Articles 3.1, 3.4, and 3.5 and SCM Agreement 15.1, 15.4, and 15.5 are within our terms of reference.

[84] China's first written submission, para. 333.

[85] We note that should there be continuing disagreement between the parties as to whether China has brought itself into compliance, China has recourse to Article 21.5 to resolve such a disagreement. (Appellate Body Reports, *Canada/US – Continued Suspension*, para. 347).

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS427/RW.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 9 November 2016

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 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.

4. 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.

5. 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.

Submissions

6. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, 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 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 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 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 exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. 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 US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

13. The substantive meeting of the Panel 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 opening statement as well as its closing statement, if available, 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 each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. 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. Each party shall then have an opportunity to answer these questions orally. 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.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of the 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.

16. 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. Each third party shall then have an opportunity to answer these questions orally. 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

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

18. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages. A summary submitted by a party of its opening and/or closing statements presented at the substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

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

Interim review

21. 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.

22. 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.

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

Service of documents

24. 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 3 paper copies of all documents it submits to the Panel. However, when Exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 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, 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 XXXXXX@wto.org. 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 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. 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 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

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.

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 November 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include (1) information that was previously treated as confidential within the meaning of Articles 6.5 of the Anti-dumping Agreement and 12.4 of the Agreement on Subsidies and Countervailing Measures by the investigating authorities of China in the anti-dumping and countervailing investigations and subsequent proceedings at issue in this dispute, and (2) information that was previously treated as BCI in the original proceeding in this dispute, unless the person who provided the information in the course of those investigations or proceedings agrees in writing to make the information publicly available.

3. 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 proceedings 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 proceedings. An authorizing letter need not be provided in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceedings.

4. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

5. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.

6. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

7. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The

Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.

8. Submission of BCI:

   (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit US-1 (BCI)).

   (ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

   (iii) 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. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7(i).

9. Where a party submits a document containing BCI to the Panel, the other party or third party, when 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 and treated as described in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents or other media containing BCI in such a manner as to prevent unauthorized access to such information.

11. 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 and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the report of the Panel.

ANNEX A-3

INTERIM REVIEW

1.1. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out our response to the parties' requests made at the Interim Review stage. Our assessment of the parties' requests and comments is informed by the following considerations:

a. The Interim Review stage is not an opportunity for parties to reargue the case or to "introduce new legal issues and evidence or to enter into a debate with the Panel".[1]

b. The descriptions of the arguments of the parties in our Report are not meant to and do not reflect the entirety of the parties' arguments. Rather, they highlight the principal points of those arguments that we considered relevant to our resolution of the issues in dispute and addressed in our findings.[2] Finally, we note that, the executive summaries of the arguments of the parties, set out in Annexes B1-B4, were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments. However, as provided for in paragraph 17 of the Panel's Working Procedures, "These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case."

c. A panel may develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. A panel is not required to "test" its intended reasoning with the parties in advance.[3]

1.2. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including some identified by the parties.

1.1 The United States' request for review of the Interim Report

1.4. In respect of **paragraph 7.39(e) (paragraph 7.39(g) in the Final Report)**, the United States asks the Panel to clarify this paragraph and proposes two modifications.[4] China disagrees.[5] The proposed US language more clearly reflects our intent; we have therefore modified the paragraph to better reflect our intent.

1.5. In respect of **paragraph 7.51**, the United States requests that the Panel revisit, in particular, the second sentence, and either delete or reformulate it to ensure that it addresses the specific legal matter at issue in this Article 21.5 proceeding.[6] China disagrees with the proposal to delete the sentence.[7] On reflection, we have modified this paragraph to more clearly express our views regarding the specific legal question at issue.

[1] Panel Report, *India – Quantitative Restrictions*, para. 4.2.
[2] A panel has "the discretion to address explicitly in [its] reasoning only the arguments and evidence [it] deem[s] necessary to resolve a particular claim and support the reasoning [it is] required to provide." (Panel Report, *India – Agricultural Products*, para. 6.7 (referring to Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414)).
[3] Report of the Appellate Body, *U.S. – Tuna II (Mexico), Article 21.5*, para. 177.
[4] United States' request for interim review, paras. 4-5.
[5] China's comments on the United States' request for interim review, para. 2.
[6] United States' request for interim review, paras. 6-8.
[7] China's comments on the United States' request for interim review, para. 3.

1.6. In respect of **paragraph 7.52**, the United States requests that the Panel's reference to its original findings more closely track the language of those findings.[8] China disagrees, asserting that "in this Article 21.5 proceeding the Panel is addressing a particular methodology and the paragraph reflects this fact."[9] We have modified the text and added the appropriate reference to better reflect the original findings to which we refer.

1.2 China's request for review of the Interim Report

1.7. In respect of **paragraph 7.23(e)**, China asserts that **footnote 86 (footnote 89 of the Final Report)** refers to a different matter than the text, and asks the Panel to distinguish the two by adding a new footnote.[10] We agree that the reference in footnote 86 is incorrect, and have changed it. We also made a minor consequential modification to footnote 85 (footnote 88 of the Final Report). Having done so, we do not consider it necessary to add the additional footnote requested by China.

1.8. In respect of **paragraph 7.53(b)**, China requests that the reference to "MOFCOM" be removed from the sentence, asserting that "it is not MOFCOM's quote but is a statement attributed to Tyson."[11] The United States disagrees, contending that the text is accurate as drafted.[12]

1.9. This paragraph is based on the following passage in MOFCOM's redetermination:

> In the original investigation, considering that meat cost was the main cost constitution of the product concerned, and that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned, the Investigating Authority found that weight-based method could be more objective and more reasonable than the value-based method submitted by the Company in the questionnaire response to reflect the production cost associated with the product concerned, therefore, the weighted average production cost of all product groups was regarded as the production cost of the product concerned and the like product.[13]

Thus, MOFCOM found "that weight-based method could be more objective and more reasonable" on the basis of two considerations: first, that "meat cost was the main cost constitution of the product concerned", and second, "that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned". We recognize that it is not entirely clear in this translation of the redetermination, submitted by China, whether "it" in the second sentence refers to Tyson ("the Company") or to MOFCOM. As the United States noted, there is nothing cited or referred to in the redetermination that would attribute the statement in question to Tyson.[14] The United States translation[15] is also pertinent in this regard:

> In the original investigation, considering that chicken cost is the main composition of cost of the subject merchandise, when the company raises live chicken, it's hard to tell which feed is especially for production of which part of the subject merchandise. The investigating authority believes that using the weight-based method can reflect the cost related to production of the subject merchandise more objectively and reasonably. Therefore, the weighted average production cost of every group is regarded as production cost of the subject merchandise and like product thereof.[16]

Moreover, we recall China's argument in the original case: "After all, the different parts of the live bird do not have different costs of production. It does not cost more to grow a kilogram of breast

[8] United States' request for interim review, para. 9.
[9] China's comments on the United States' request for interim review, para. 5.
[10] China's request for interim review, para. 5.
[11] China's request for interim review, para. 6.
[12] United States' comments on China's request for interim review, para. 9.
[13] Redetermination, (Exhibit CHN-1 (translated version)), p. 33. (emphasis added)
[14] United States' comments on China's request for interim review, para. 10.
[15] China has not challenged the accuracy of the United States' translation of the redetermination.
[16] Redetermination, (Exhibit USA-9 (translated version)), p. 33. (emphasis added)

than it costs to grow a kilogram of paws."[17] Taken as a whole, it appears to us that MOFCOM accepted and expressly relied upon the proposition that which feeds were specifically used to produce which parts of the product concerned could not be distinguished. We therefore consider that the text as drafted is accurate. Accordingly we have not modified the text in this regard.

1.10. In respect of **paragraph 7.54**, China notes that neither the United States nor China made a claim that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models" and asks the Panel to "provide the basis for this characterization."[18] The United States disagrees that any clarification of or authority for this "incontrovertible point" is needed.[19]

1.11. As is clear from the opening phrase of the sentence quoted by China, we recognized that there was no direct evidence before the Panel on this point. At the same time, a panel is entitled, in our view, to recognize and refer to incontrovertible facts where relevant. In this case, one such fact is that the production of a "whole bird" requires the production of those parts of a bird without which the bird cannot be produced. Indeed, China itself, in its submission in the original dispute, stated that, "a significant portion of the total costs of production are incurred on a unitary basis for the whole bird".[20] China does not dispute the fact that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models", but rather asks the Panel to provide a basis for it. We consider this to be a self-evident fact, and therefore decline China's request.

1.12. In respect of **paragraph 7.58**, China argues that, "[i]n light of the Panel's finding of inadequate explanation, it should at least refer to MOFCOM's explanation in its Redetermination" and requests that the Panel delete the phrase "allowed for the exclusion of certain parts of a live broiler (feather, blood and viscera)", because, according to China, "MOFCOM never excluded any parts from its cost allocation".[21] The United States opposes both requests.[22]

1.13. In respect of the first aspect of this request, we have in fact referred to MOFCOM's explanation earlier in this section, in paragraph 7.53. We consider it unnecessary to do so again in this paragraph. Accordingly we have not modified the text in this regard.

1.14. In respect of the second aspect of this request, we recall that China argued that MOFCOM appropriately distinguished between what it termed "the product concerned" and other products, including feathers, blood and viscera. According to China, "MOFCOM specifically noted that the 'production cost didn't include that of the non-concerned products, such as feather, blood, etc.'."[23] It was this "product cost", i.e. a product cost excluding feathers, blood, and viscera, that was allocated to "the product concerned" on the basis of weight. We note that China has not requested review of paragraphs 7.54 and 7.55, in which we also refer to MOFCOM's "exclusion of feathers, blood, and viscera". In the light of the foregoing, we decline China's request that we delete the phrase in question.

1.15. In respect of **paragraphs 7.58 and 7.59**, China refers to not only our findings in these two paragraphs, but also to paragraphs 7.50 and 7.51 and the Panel's "remaining discussion", asserting that "the Panel does not make clear … whether it views the MOFCOM redetermination to have been at odds with the second aspect, the third aspect, or both" of the obligation in the second sentence of Article 2.2.1.1.[24] China suggests that "the Panel appears to take care to avoid suggesting anything about whether the MOFCOM approach was proper or not", and asks the Panel to "clarify that its findings address the third aspect of the obligation – the failure to explain – and not whether the MOFCOM allocation method was proper or not".[25] The United States opposes China's request, contending that China has failed to make a "request for review of a precise aspect

[17] United States' first written submission, para. 91 (quoting China's first written submission in the original dispute, para. 133). (emphasis added)
[18] China's request for interim review, para. 7.
[19] United States' comments on China's request for interim review, para. 11.
[20] China's first written submission in the original dispute, para. 133. (emphasis added)
[21] China's request for interim review, para. 8.
[22] United States' comments on China's request for interim review, para. 13.
[23] China's first written submission, para. 174 (quoting Redetermination, (Exhibit CHN-1 (translated version)), fn 30).
[24] China's request for interim review, para. 9.
[25] China's request for interim review, para. 9.

of the interim report" and that "It is clear that the Panel is examining the issue of MOFCOM's explanation as part of MOFCOM's consideration of all available evidence related to a proper cost allocation."[26]

1.16. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". The paragraphs discussed by China in its request concern different sections of the Panel's analysis. Paragraph 7.50 deals specifically with the argument that MOFCOM was required to use a single methodology throughout the investigation and rejects that view, while paragraph 7.51 concludes that MOFCOM's rejection of a value-based cost allocation in the redetermination was not inherently biased or unreasonable.

1.17. Paragraphs 7.52 through 7.58 specifically examine MOFCOM's explanations for and use of a weight-based cost allocation, concluding that MOFCOM failed to adequately explain its decision to use that allocation, and therefore failed to "consider all available evidence on the proper allocation of costs", that is, failed to act consistently with the second sentence of Article 2.2.1.1. We are unable to determine precisely what aspects of these paragraphs China considers require modification, and what changes it considers would be appropriate. We have, nonetheless, made minor modifications in paragraphs 7.51 and 7.52.

1.18. With respect to **paragraphs 7.63 and 7.64**, China argues that, as it contends with respect to paragraphs 7.58-7.59, "the Panel again seems to avoid making any findings about what is proper or not" and asks the Panel to "to clarify that its findings address the third aspect of the obligation − the failure to explain − and not whether the Tyson allocation method rejected by MOFCOM was proper or not."[27] The United States considers that, as with respect to paragraphs 7.58-7.59, China's "complaint here does not constitute a request for review of a precise aspect of the interim report".[28]

1.19. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.20. In respect of **paragraphs 7.66-7.70**, China asserts that the Panel failed to explain whether its interpretation of the term "historically utilized" in the second sentence of Article 2.2.1.1 was consistent with that of a previous panel report on the same issue, *US- Softwood Lumber V*, and contends that the Panel should "offer some reaction" to the points raised by China in this regard.[29] The United States disagrees, asserting that China has failed to make a "request for review of a precise aspect of the interim report".[30] In the United States' view:

> China fails to explain (i) what conclusion or statement in these paragraphs is inconsistent with the analysis in particular paragraphs in *US – Softwood Lumber V*; (ii) why, even if there is an inconsistency, it needs to be addressed in this Report; and (iii) why the Panel should assess China's characterization of the U.S. position in *another* dispute.[31]

1.21. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.22. In respect of **paragraphs 7.89-7.99**, China argues that the Report leaves "the impression that MOFCOM took fewer steps to corroborate and analyse the data from the four domestic

[26] United States' comments on China's request for interim review, para. 14.
[27] China's request for interim review, para. 11.
[28] United States' comments on China's request for interim review, para. 17.
[29] China's request for interim review, para. 10.
[30] United States' comments on China's request for interim review, para. 15.
[31] United States' comments on China's request for interim review, para. 15. (emphasis original)

producers".[32] China describes steps MOFCOM took[33] in relation to "the analytical process by which MOFCOM analysed the pricing data of the four re-verified domestic producers" and states that these details it describes "warrant further description" in the report.[34] The United States opposes China's request, contending that China has failed to make a "request for review precise aspects of the interim report".[35] Moreover, in the United States' view, China has failed:

a. "to identify how the Panel's analysis misstates the approach noted in the redetermination"[36]; and

b. "to explain why the analysis in the interim report is deficient".[37]

1.23. We make two observations.

1.24. First, China does not explain precisely what aspects of these paragraphs it considers should be modified and what changes it considers would be appropriate. Rather, it simply contends that a more detailed exposition of the facts regarding MOFCOM's reinvestigation and analysis of product-specific pricing data is important to its legal position in this case. This is not enough to help us determine what precisely should be modified and how.

1.25. Second, we have carefully considered all of the arguments and evidence put before us; there is, however, no requirement that we reflect in our report all the facts that each party may consider important to its positions. Rather, we must set out in our report those facts that are important to our resolution of the issues in the dispute before us, in the context of our analysis, reasoning, and conclusions. We recall that our findings in the original dispute concerned the comparability of two baskets of goods in the light of differences in the composition of those baskets.[38] In this proceeding, China argued that MOFCOM verified the prices of individual components of the Chinese basket for four of seventeen domestic producers. This argument does not address the concerns we had originally, and again in this proceeding, with respect to the comparability of the domestic and imported prices as a consequence of the composition of the baskets of broiler products being compared. We fail to see how a more detailed exposition of the facts concerning how MOFCOM went about verifying the prices of certain domestic producers relates to the issue we were addressing.

1.26. We consider that China has failed to make a proper request for "review precise aspects of the interim report". We do not consider that our findings need modification as requested by China. Accordingly we have not modified the text in this regard.

1.27. In respect of **paragraph 7.102**, China asserts that:

a. "it is important for the Panel to point out that although the two baskets may have been of dissimilar composition, MOFCOM considered that their composition was in fact known such that MOFCOM believed it controlled for product mix"[39];

b. "[t]he current description suggests MOFCOM did not take any steps to understand the respective compositions of the two baskets"[40]; and

c. with respect to the "risk that price effects were the effects of competition from product models within the domestic basket", "for the same reason of substitutability, there may

[32] China's request for interim review, para. 15.
[33] China's request for interim review, para. 16.
[34] China's request for interim review, para. 17.
[35] United States' comments on China's request for interim review, para. 23.
[36] United States' comments on China's request for interim review, para. 24.
[37] United States' comments on China's request for interim review, para. 25.
[38] See paragraph [7.106] above:
In the original report, we did not find, because Articles 3.2 and 15.2 do not require, that in a price comparison, MOFCOM had to adopt the "lower of the two" price benchmarks; our findings were about the comparability of the baskets rather than the relative value of different AUVs.
(emphasis added)
[39] China's request for interim review, para. 19.
[40] China's request for interim review, para. 19. (emphasis added)

be price effects resulting from product models in the dumped import basket on product models within the domestic basket that were not in the dumped import basket".[41]

1.28. The United States opposes any change to this paragraph, asserting that:

a. "the Panel, in paragraph 7.105 of the interim report, expressly considered and rejected MOFCOM's argument that it controlled for product mix differences"[42]; and

b. "China is essentially asking the Panel revise and dilute its findings", in particular in a manner that "would create ambiguity" in these findings.[43]

1.29. We consider that China has failed to make a proper request for "review of precise aspects of the interim report." Rather, in our view, China is attempting to re-argue issues that the Panel has resolved, rather than clearly indicating what precise aspects of the report it considers should be modified and why. We therefore decline to modify this paragraph.

1.30. In respect of **footnote 205 (footnote 209 of the Final Report)**, China requests that we delete the final two sentences, asserting that the "statement that MOFCOM's price effects determination 'might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome' is purely speculative."[44] The United States opposes China's request, contending that it reflects a well-supported evaluation of a "key matter before the Panel" and noting that it had argued during the proceeding that one of the principal problems with the selection of four firms for reverification was that "their selection appeared biased in light of the lack of any explanation".[45]

1.31. The penultimate sentence of footnote 205 does not state that MOFCOM's "price effects determination" itself may give rise to an appearance of selectivity. Rather, it makes clear that it is the "lack of any explanation in the redetermination for the choice" of which producers' prices were reverified that may give rise "to an appearance of selecting among domestic producers based on their data to ensure a particular outcome". The last sentence makes clear that the Panel did not make any findings on this point. We consider it appropriate to raise such concerns in the course of resolving a dispute, in order to assist parties in the course of their efforts to implement DSB rulings and recommendations, and act consistently with their obligations. We therefore decline China's request.

1.32. In respect of **paragraphs 7.150-7.162**, China requests that the Panel delete the discussion in these paragraphs, and any findings, from the report. China argues that:

a. "[T]he Panel analyses two issues under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement that do not reflect proper claims before the Panel. The issues of: (1) whether MOFCOM inadequately focused on the later part of the POI; and (2) potential negative effect and future imports both appear to arise as rebuttal responses by the United Sates in its Second Written Submission."[46]

b. "It is unclear to China how these issues rise to the level of specific claims for which the Panel makes specific findings."[47]

c. Paragraph 6 of the Working Procedures "makes clear that any claim raised by the United States for purpose of its challenge should be presented in its First Written Submission".[48]

[41] China's request for interim review, para. 20. (emphasis added)
[42] United States' comments on China's request for interim review, para. 27.
[43] United States' comments on China's request for interim review, para. 28.
[44] China's request for interim review, para. 21.
[45] United States' comments on China's request for interim review, para. 30.
[46] China's request for interim review, para. 22.
[47] China's request for interim review, para. 22.
[48] China's request for interim review, para. 23.

d. "As such, these arguments are 'counter arguments' as contemplated by paragraph 6 of the Working Procedures and do not represent claims upon which the Panel should rule."[49]

e. "For these reasons, the Panel should strike this discussion and any findings from the final report."[50]

1.33. The United States opposes China's request, noting that:

a. there is a difference between claims and arguments[51];

b. the arguments (and counterarguments) at issue were properly raised and the Panel properly considered them[52]; and

c. "That the arguments China itself raised undermined its defence − rather than supported it − does not, as China now argues, somehow implicate procedural fairness."[53]

1.34. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". Rather, in our view, China's request amounts to an attempt to re-argue issues that the Panel has resolved and does not clearly indicate what precise aspects of the report it considers should be modified and why.

1.35. In these paragraphs, the Panel is addressing various arguments in the context of considering the United States' claim that MOFCOM's redetermination is inconsistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement.[54] This claim is properly before us.[55] Over the course of the proceedings, starting with the first written submissions, and then in the second written submissions and at the hearing, and finally in responses to questions and comments on those responses:

a. the United States made certain arguments in support of its claim;

b. China responded with arguments of its own; and

c. the United States replied to China's arguments.

1.36. Each party in a dispute has the right to make the arguments and submit the evidence it wishes in defence of the positions it adopts in respect of a given claim. Having presented its arguments and evidence and advanced its position, a party may not, however, seek the assistance of the panel to deny to the other party the same right to present its arguments and evidence in reply. Nothing in the Working Procedures contemplates any such departure from basic rules of fairness in an adjudicative proceeding.

1.37. China seems to be of the view that because some of the United States' arguments in support of its claim were first advanced in its second written submission, and the Panel considered and made findings addressing those arguments, the United States has wrongly been allowed to advance claims at a late stage of the proceedings which the Panel then resolved. This is not the case. The Panel's conclusions are in respect of the claims of the United States under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement. To arrive at those conclusions, and consistently with our obligations under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU, we took into account all the arguments and the respective replies of the parties, and as necessary made findings in respect of those arguments and replies. We did so in accordance with our responsibility to "make an objective assessment of the matter before [us], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

[49] China's request for interim review, para. 23.
[50] China's request for interim review, para. 23.
[51] United States' comments on China's request for interim review, para. 32.
[52] United States' comments on China's request for interim review, para. 33.
[53] United States' comments on China's request for interim review, para. 33.
[54] United States' panel request, para. 2.
[55] Ruling by the Panel on Jurisdictional Issues dated 22 March 2017, para. 3.10.

1.38. We therefore decline China's request to delete this entire section of the report.

1.39. In respect of **paragraphs 7.332(e) and 7.335**, China requests that we modify the report "to reflect that MOFCOM did not reject Tyson's reported data in its entirety"[56] and "did not reject all of Tyson's data".[57] The United States disagrees because, in its view, China has not shown any errors in these paragraphs.[58]

1.40. Paragraph 7.332(e) sets out the factual background to our consideration of the United States' claims regarding use of facts available. Paragraph 7.332 as a whole sets out, in sequence, MOFCOM's requests and Tyson's responses on the issue of meat and processing cost information. At paragraph 7.332(e), the statement that MOFCOM rejected Tyson's reported data in its entirety in the redetermination is immediately followed by the explanation that "MOFCOM found that the reported data, generated by applying the methodology developed by Tyson using the data available in its accounting records, were not the *meat and processing costs* actually incurred"[59], thus making clear what reported data were rejected. Moreover, the same paragraph goes on to set out MOFCOM's decision not "to accept the *meat cost and processing cost data* of each model of the product concerned calculated by the ratio method".[60] Thus, it is clear that in referring to MOFCOM's rejection of "Tyson's reported data in its entirety" and "all of Tyson's data", we were referring to the rejection of all of the meat and processing cost data that Tyson had generated and provided during the reinvestigation. In order to avoid any uncertainty in this regard, we have modified the text to explicitly state that that data that was rejected in its entirety was Tyson's reported meat and processing cost data.

1.41. In respect of **paragraph 7.335(d)**, China requests adjustments to "further reflect" that Tyson provided "inconsistent cost data" in every response.[61] The United States disagrees, contending that the requested changes cannot be drawn from the paragraphs of China's first written submission cited by the Panel, and China has provided no other citation or justification for the request.[62]

1.42. In its request for review China does not indicate where, in its submissions in this proceeding, it argued that Tyson provided inconsistent cost data in every questionnaire and supplemental questionnaire response in the reinvestigations. We have, nevertheless, modified paragraph 7.335(d) to clarify that the asserted inconsistencies were not just between data provided in the original investigation and data provided in the reinvestigation.

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[56] China's request for interim review, para. 12.
[57] China's request for interim review, para. 13.
[58] United States' comments on China's request for interim review, paras. 18-19.
[59] Underlining original, italics added.
[60] Emphasis added.
[61] China's request for interim review, para. 14.
[62] United States' comments on China's request for interim review, para. 21.

ANNEX B

ARGUMENTS OF THE UNITED STATES

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Articles 7 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) charge a WTO panel with making those findings that will assist the DSB in making the recommendations provided for in the covered agreements − namely, the recommendation to bring a measure found to be inconsistent with a covered agreement into conformity with the Member's WTO obligations under that agreement (DSU Art. 19.1). And that is precisely what the Panel did in this dispute, finding that China's antidumping and countervailing duty determinations were inconsistent with numerous basic 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). Unfortunately, China did not take those findings and recommendations as an opportunity to comply and, thus, to bring about a positive solution to the dispute (DSU Art. 3.7).

2. Both the conduct of the reinvestigation and the findings in the redetermination confirm that MOFCOM adheres − without justification − to problematic practices or reasoning − and even moves in precisely the wrong direction: toward less transparency, less due process, and less objectivity.

II. PROCEDURAL BACKGROUND

3. On July 15, 2014, the United States and China informed the DSB that the two parties had concluded Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding ("Agreed Procedures"). On May 10, 2016, the United States requested consultations pursuant to Article 21.5 of the DSU concerning China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, which were held on May 24, 2016.

4. On May 27, 2016, the United States filed a panel request requesting recourse to Article 21.5 of the DSU. At the June 22, 2016 meeting of the DSB, the DSB agreed to refer to the original panel, if possible, the matter raised by the United States. Brazil, Ecuador, the European Union, and Japan reserved their third party rights. On July 18, 2016, the compliance panel was composed with the members from the original panel.

III. FACTUAL BACKGROUND

5. The Panel found that MOFCOM breached Article 6.9 of the AD Agreement by failing to disclose margin calculations and data used to determine the existence of dumping.

6. The United States contended in the original dispute that MOFCOM breached the second sentence of Article 2.2.1.1, because, *inter alia*, MOFCOM allocated Tyson's production costs of non-subject merchandise − including blood, feathers, and organs − to subject merchandise, thereby inflating normal value. The Panel considered the evidence presented by the United States regarding the products produced by Tyson and China's materials and found that the United States had established a breach of Article 2.2.1.1. Moreover, the Panel found that one particular aspect of MOFCOM's methodology − straight allocation of total processing costs − was inherently unreasonable.

7. The Panel found that MOFCOM's price effects analysis in its injury determination was inconsistent with China's WTO obligations because it failed to account for differences in the product mix between subject imports and domestic products. The Panel also noted that MOFCOM's finding of price suppression is "at least partly dependent" on its finding of price undercutting − and that "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." The Panel also asserted judicial economy on the

United States' claim concerning MOFCOM's flawed impact and causation analyses – and explicitly recognized that MOFCOM would need to revisit such analyses.

IV. SCOPE OF AN ARTICLE 21.5 PROCEEDING

8. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding.

V. STANDARD OF REVIEW

9. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel would normally reach the same conclusions as the original panel. The investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

VI. MOFCOM'S REINVESTIGATION BREACHED THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

10. MOFCOM's reinvestigation breached key procedural protections contained within the AD and SCM Agreements.

A. Factual Background

11. Before the Reinvestigation Injury Disclosure (RID), U.S. interested parties received no notice as to which Chinese firms were being specifically investigated; why they were chosen; what questions and information requested were posed to these firms; and what data and information the Chinese firms provided in response. The critical questions of (i) what information was specifically required by MOFCOM from these firms and (ii) what they provided remain entirely unanswered.

B. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because MOFCOM Denied Interested Parties Notice or Knowledge of the Information MOFCOM Required in its Reinvestigation

12. Here, it is clear from the RID that MOFCOM *required* pricing information from four domestic Chinese companies in order to revise its price effects analysis. Specifically, these four companies provided MOFCOM with sales data concerning chicken feet, chilled chicken cuts with bone, chicken wings, and gizzards, which MOFCOM then purportedly used to compare against prices for subject imports, and ultimately reach its finding of price undercutting. It is also clear that interested parties, such as U.S. respondents and the United States, did not have notice that MOFCOM required this information.

C. China Breached Articles 6.1.2, 6.2, and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying Interested Parties of Evidence Presented by the Other Interested Parties Participating in the Reinvestigation

13. It is undisputed that the four Chinese domestic companies that received requests for information from MOFCOM during the reinvestigation are "producers of the like product in the Importing Member." MOFCOM was thus required to "promptly" make available to U.S. respondents the information provided by interested parties in response to MOFCOM's requests during the reinvestigation. Because MOFCOM failed to make the information available *at all* to respondents, China is in breach of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2.

14. MOFCOM's failure to permit interested parties access to the information relied on by MOFCOM and to enable those parties, through review of that information, to prepare their cases is also inconsistent with Articles 6.2 and 6.4 of the AD Agreement and SCM Agreement Article 12.3. These provisions provide that interested parties have both timely opportunities (i) to see "all

information" that is relevant, non-confidential, and used by competent authorities and (ii) timely opportunities to prepare their presentations "on the basis of" that information. In the reinvestigation, the information subject to this obligation includes: (1) the pricing information provided by the four Chinese domestic enterprises to MOFCOM during the reinvestigation; (2) the precise identity of those Chinese enterprises; and (3) the specific questionnaires and information requests issued by MOFCOM to those Chinese companies.

15. First, MOFCOM failed to disclose information "relevant" to the interested parties' presentation of their cases. The *information* requested by MOFCOM from the four Chinese domestic enterprises during the reinvestigation constitutes product-specific pricing data that MOFCOM sought and that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis. Second, as noted previously, MOFCOM has *not* claimed that any of this information is confidential. Third, the information was "used" by MOFCOM in the reinvestigation because it is the explicit basis by which MOFCOM maintains its price effects findings.

16. In addition, China breached the obligation under AD Agreement Article 6.4 and SCM Agreement Article 12.3 "to provide timely opportunities" for interested parties "to *prepare presentations* on the basis of this information" because MOFCOM did not permit interested parties to see the information. If a party is denied access to information, then it follows that the party was also denied an *opportunity* to prepare a presentation. Thus, MOFCOM's failure also constituted a breach of Article 6.2 of the AD Agreement.

D. China, Once Again, has Breached Article 6.9 of the AD Agreement by Failing to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

17. Despite the original Panel's finding that China breached Article 6.9 of the AD Agreement by failing to disclose essential facts related to the dumping margins for Pilgrim's Pride, Tyson, and Keystone, MOFCOM has, once again, failed to disclose dumping margin calculations and underlying data for two of these respondents − Pilgrim's Pride and Keystone. With respect to Pilgrim's Pride, it was denied access to the data calculations from the original investigation even though MOFCOM used a purported error in the data and calculations to increase the margin of Pilgrim's Pride. Similarly, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation.

VII. MOFCOM'S ANTIDUMPING DUTY FINDINGS ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 9.4, AND 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Breached the Second Sentence of Article 2.2.1.1 of the AD Agreement

1. MOFCOM Applied to Tyson a Biased Weight-Based Methodology that Improperly Allocated Costs Not Associated with the Production and Sale of the Product Under Consideration

18. China has breached the second sentence of Article 2.2.1.1 because MOFCOM did not "consider all available evidence on the proper allocation of costs." The essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology. The position advocated by China through its prior WTO submissions and in MOFCOM's redetermination is that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products. But, under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them. Thus, products that might earn little revenue, particularly in respect to their weight, such as blood, organs, feathers, etc., still would need to have costs distributed to them, rather than leave the costs focused on the remaining products − which artificially inflates normal value. MOFCOM did not do that apportionment in its first determination, and it has not done so now in its redetermination.

19. During the redetermination, Tyson argued that MOFCOM should accept the value-based accounting reflected in its books and records. However, Tyson also argued that "in the event that MOFCOM incorrectly continues to rely on a weight-based allocation, it must fully account for all products that are produced from the live birds that are processed into both subject and

non-subject merchandise." To that end, Tyson made a straightforward request: if MOFCOM erroneously resorts to allocating costs by weight rather than as reflected in Tyson's books and records, then MOFCOM (per its own logic) would need to "divid[e] the total cost of the live birds by their total weight" − and not simply omit products it finds inconvenient from the calculation. A supposed weight-based methodology that fails to actually account for the weight contributed by all the products derived from the bird is internally incoherent and therefore cannot be a "proper allocation of costs" consistent with Article 2.2.1.1.

20. The reasons proffered by MOFCOM for rejecting Tyson's position − and the consistency of MOFCOM's own position − are not reasoned or adequate. First, MOFCOM seems to be suggesting that it does not apportion costs across all products because some chickens died *en route* to the processing plant or were otherwise not processed. But that assertion does not speak to the point at hand, which is that costs must be allocated across all products that are produced. Moreover, the data provided by Tyson explicitly made proper allowance for "costs of any birds that are not processed because they die at the farm or are condemned at the plant. . . ." Second, MOFCOM asserts that Tyson confirmed that the costs to produce subject merchandise were exclusive. That position cannot be reconciled with either the data submitted by Tyson referenced above, or Tyson's explicit argument seeking for costs to reflect all products. Third, China is claiming that Tyson's value based cost allocation methodology is perfectly reasonable *when it comes to products that are not subject to the investigation*. This reason, again, does not address the point that all costs need to be accounted for. Finally, MOFCOM cites as support that the monthly costs for live birds changes and that Tyson does not specify which are used for subject merchandise and non-subject merchandise is misplaced as well. Whether costs change from month to month does not obviate the need to ensure costs are properly allocated.

2. MOFCOM has not Addressed the Article 2.2.1.1 Findings with respect to Pilgrim's Pride

21. Despite the Panel's findings, MOFCOM's redetermination refused to consider any alternative allocation methodologies for Pilgrim's Pride. Instead, MOFCOM only investigated and modified the dumping margin for Pilgrim's Pride on the basis of the purported errors in calculation. Thus, because China's redetermination does not contain any additional "evidence of consideration" of alternative methodologies, China's redetermination remains in breach for the same reasons as in the original investigation.

B. China Breached Article 9.4 of the AD Agreement through the "All Others" Rate Set by MOFCOM

22. MOFCOM's arbitrary selection of the highest rate found is not consistent with the disciplines of Article 9.4, which establishes that the all others' rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers."

C. China's Resort to and Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement

23. MOFCOM has not presented any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information. Tyson took appropriate steps to use the data available in its records to satisfy MOFCOM's request for information to the fullest extent that it could.

24. Over the period of investigation, Tyson recorded, as part of its accounting practice, only the aggregate actual costs incurred and the "standard costs," the latter of which reflect Tyson's expectation as to what was incurred at a particular segment. Tyson used the standard costs to create allocation percentages, which it then applied to the aggregate actual cost to generate the specific costs MOFCOM requested. Tyson did not track the data requested by MOFCOM as part of its standard practice. MOFCOM completely disregarded what Tyson proffered and, instead used the best information available. MOFCOM did not present any evidence or explanation that the costs reported by Tyson were not "supplied in a timely fashion" and in the "requested medium" or "appropriately submitted so that {they} can be used in the investigation without undue difficulties." Moreover, the claims cited by MOFCOM for rejecting Tyson's reported costs do not

indicate any efforts by MOFCOM to undertake an "objective process of examination" and to attempt to verify their accuracy and reliability.

25. MOFCOM's assertion that Tyson's costs reported in the reinvestigation do not tie to those in the original investigation is contradicted by the very exhibit relied upon MOFCOM. Moreover, Tyson in fact reported costs for each of the combinations. Further, MOFCOM erroneously asserts that Tyson failed to report actual meat and processing costs incurred during the period of investigation. In addition, Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation.

VIII. MOFCOM'S FINDINGS IN ITS INJURY REDETERMINATION REMAIN INCONSISTENT WITH THE AD AND SCM AGREEMENTS

A. China's Biased Price Effects Analysis Breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

26. MOFCOM purported to control for the "clear differences in product mix that affected price comparability" found by the Panel by analyzing product-specific pricing data collected from only four of the 17 domestic producers included in the domestic industry. MOFCOM did not disclose its methodology for selecting producers for inclusion in its sample of the domestic industry or for collecting product-specific pricing data from these producers, however. Nor did MOFCOM disclose the percentage of domestic industry sales covered by the product-specific data collected. Accordingly, MOFCOM failed to establish that the pricing data it collected was sufficiently representative to permit an objective underselling analysis.

27. Absent any explanation to the contrary, MOFCOM was in a position to collect pricing data from all members of the domestic industry. MOFCOM thus failed to ensure that its new underselling analysis was based on an objective examination of positive evidence. The above facts also confirm that MOFCOM has also breached China's obligations under Article 6.4 of the AD and Article 12.3 of the SCM Agreement.

28. MOFCOM also based its finding of price suppression on underselling in the redeterminations. Significantly, MOFCOM revised the concluding paragraph of its price section in the redetermination to eliminate the references to subject import volume and market share found in the corresponding paragraphs of the original determinations, clarifying its view that price suppression resulted from subject import underselling, not subject import volume. In responding to various arguments raised by USAPEEC, MOFCOM likewise resorted to the notion that subject import underselling necessarily means that those imports suppressed domestic prices. Given MOFCOM's reliance on its new underselling analysis for its price suppression finding, the deficiencies of that underselling analysis render MOFCOM's price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2. Because this deficient underselling analysis is also the foundation for MOFCOM's finding of price suppression, MOFCOM's price suppression finding is inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

29. MOFCOM's reliance on underselling to support its price suppression finding was also unsupported by the evidence because the record showed no correlation between underselling and price suppression. MOFCOM failed to explain or investigate how subject import underselling could have significantly suppressed domestic prices in the first half of 2009 when the same underselling had no "significant" price suppressive effects between 2006 and 2008. Thus, there is no evidence to support MOFCOM's price suppression finding. By failing to recognize or consider that the domestic industry's prices increased faster than its costs between 2006 and 2008, MOFCOM also therefore failed to base its analysis of price suppression on an objective examination of positive evidence. By ignoring evidence that factors other than subject imports drove domestic price trends in the first half of 2009, MOFCOM failed to properly establish that price suppression was "the effect" of subject imports. By ignoring such evidence, MOFCOM also failed to base its price analysis on an objective examination of positive evidence.

B. China's Impact Analysis in its Redetermination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

30. MOFCOM's finding that subject imports had an adverse impact on the domestic industry does not satisfy the requirement for an objective evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." In addressing impact, MOFCOM ignored evidence that the domestic industry's performance improved according to almost every other measure during the period. MOFCOM also ignored evidence that the domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth. It also failed to address evidence that domestic industry end-of-period inventories were not significant relative to domestic industry production or shipments.

31. MOFCOM's finding that subject import competition had an adverse impact on the domestic industry's rate of capacity utilization over the 2006-2008 period does not reflect an "objective examination" because it is clearly contradicted by the record evidence. Capacity utilization was increasing at the same time subject imports were also increasing. Critically though, an objective examination would consider this trend in conjunction with the record evidence regarding the domestic industry's own capacity expansion in excess of demand, which MOFCOM ignored. Moreover, subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports did not increase their share of apparent consumption at the expense of the domestic industry. Had the domestic industry not expanded its capacity in excess of apparent consumption growth, the domestic industry's increase in share of apparent consumption would have translated into a higher rate of capacity utilization. Thus, MOFCOM's finding was not based on an "objective examination" of "positive evidence" in breach of Article 3.1 of the AD Agreement and Article 15.1.

32. MOFCOM also found that the increase in the domestic industry's end-of-period inventories was caused by subject imports. This finding too cannot be the result of an "objective examination". What MOFCOM crucially neglected to consider was the significance of that increase relative to the domestic industry's actual performance, including, how that increase related to the domestic industry's production and shipments.

33. MOFCOM's finding that subject imports had an adverse impact on the domestic industry from 2006 to 2008 rests primarily on its flawed findings regarding capacity utilization and end-of-period inventories, which failed to reflect an objective examination of positive evidence, as discussed above. In light of MOFCOM's dependence on these flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted is unsubstantiated. Moreover, in contrast to MOFCOM's finding, the record evidence clearly indicates that the domestic industry's performance improved markedly according to almost every measure during this period, when the bulk of the increase in subject import volume and market share took place. Therefore, MOFCOM's examination and evaluation was not based on an "objective examination" of "positive evidence."

C. MOFCOM's Causal Link Analysis in its Redetermination 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

34. MOFCOM's causation analysis in its redeterminations remains as flawed as the one it provided in its original determination because MOFCOM continues to (1) ignore record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) relies on flawed analysis of price undercutting and suppression; and (3) fails to reconcile its analysis with evidence that the domestic industry's performance *improved* as subject import volume and market share increased.

35. Here, MOFCOM cited no evidence that the increase in subject import volume or subject import price competition was injurious to the domestic industry. During that same period, the domestic industry increased its market share to *an even greater degree* than subject imports. With respect to the price effects of subject imports, MOFCOM relied on its flawed price comparisons and finding of price suppression. Further, MOFCOM disregarded evidence that subject import competition was significantly attenuated because nearly half of subject import volume consisted of

chicken paws, which the domestic industry could not produce in quantities sufficient to satisfy demand.

36. MOFCOM's findings on import volume and market share are clearly contradicted by evidence on the record. For example, MOFCOM failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share did not come at the expense of the domestic industry, which also *gained* market share during the POI. MOFCOM also failed to address USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws. MOFCOM did not address the issue in its final determinations or in its redetermination.

37. MOFCOM's causation analysis is inconsistent with the obligations of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because the analysis disregarded evidence that subject import volume did not increase at the expense of the domestic industry. In addition, 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 because it was based on MOFCOM's flawed price and impact analyses.

38. MOFCOM's determination of a causal link rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. But relevant record evidence indicated that the increase in subject import volume and market share did not negatively impact the domestic industry because the domestic industry gained market share during the same period. MOFCOM does not examine or explain such evidence, contrary to Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Additionally, with no evidence linking the increase in subject import and market share to material injury, MOFCOM's causal link analysis also failed to demonstrate that any material injury suffered by the domestic industry was the effect of subject import volume, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

39. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, and other evidence ignored by MOFCOM contradicts the finding, MOFCOM's price suppression finding, too, is WTO-inconsistent. Moreover, given that domestic like product prices increased over the period examined, there was no evidence of price depression. With no evidence that subject imports suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link 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 for the reasons outlined above.

40. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance. MOFCOM does not explain how subject imports could have caused any material injury to the domestic industry when the domestic industry's worst performance of the period examined occurred in 2006, before any increase in subject import volume and market share. An investigating authority cannot be said to have examined "the relationship between subject imports and the state of the domestic industry" by focusing, without reasonable explanation, solely on a discrete portion of the period of investigation. 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 conduct an objective evaluation of positive evidence.

41. MOFCOM ignored at least two compelling arguments concerning the absence of any causal link between subject imports and material injury. First, both USAPEEC and the United States argued that there could be no link between subject imports and material injury because subject import market share increased entirely at the expense of non-subject imports. This issue was clearly "material" to MOFCOM's causal link analysis. MOFCOM necessarily had to resolve the issue before relying on the increase in subject import volume and market share to establish a causal link. Consequently, MOFCOM was obligated to provide "all relevant information" on its resolution of the issue in the public notice of its final determinations. It was also obligated to provide the reasons for its rejection of U.S. respondents' argument concerning the issue.

42. USAPEEC also 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 Chinese producers were incapable of supplying in adequate quantities. By failing to provide the reasons for its rejection of USAPEEC's argument concerning chicken paws, MOFCOM breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. MOFCOM's misplaced response to USAPEEC's chicken paws argument also ignores evidence that the substantial proportion of subject imports consisting of chicken paws could not have been injurious. MOFCOM thus failed to base its causation analysis on an objective examination of positive evidence and an examination of all relevant evidence.

IX. CONCLUSION

43. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that the challenged measures are inconsistent with China's obligations under the AD Agreement and SCM Agreement and that China has failed to implement the recommendations of the DSB to bring its antidumping and countervailing measures on broiler chickens from the United States into conformity with those agreements.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The aggressive rhetoric found in China's rebuttal does not address − no less refute − the many flaws in MOFCOM's reinvestigation and redeterminations explained in the U.S. First Written Submission. Instead of addressing the legal issues in this dispute, China's rebuttal often focuses on irrelevant or extraneous matters. These types of arguments do not engage with the main task in this proceeding − namely, to determine whether China has brought its measures into compliance with the recommendations of the Dispute Settlement Body (DSB). In this second submission, the United States will continue to focus on demonstrating − through reference to record evidence − that MOFCOM failed to abide by China's WTO obligations.

II. CHINA CANNOT DEFEND MOFCOM'S PROCEDURAL FAILINGS DURING THE INVESTIGATION

A. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement through MOFCOM's Failure to Provide Notice to All Interested Parties of the Pricing Information It Required from Domestic Producers

2. The United States' claims under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement are straightforward. MOFCOM sought and obtained pricing data from domestic firms, which it then used to underpin its findings for its pricing analysis in its injury redetermination. In this process, MOFCOM failed to provide known interested parties, such as U.S. respondents, with any notice as to what specific data it required the domestic industry to produce. Without notice of what MOFCOM was requiring, U.S. respondents were not in a position to address effectively the significance of the pricing information − and therefore were denied the "ample opportunity to present evidence." Thus, MOFCOM breached China's obligations under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because it failed to provide affirmatively to U.S. interested parties both (1) notice of the information it required from Chinese firms and (2) concomitantly, opportunity to present in writing all evidence that U.S. interested parties might consider relevant.

1. Notice 88

3. Notice 88 is simply the notice of initiation for the reinvestigation. It does not provide any details as to the specifics of the information that the investigating authority will be requesting, nor does it explain in detail the conduct of the investigation, including any opportunities for interested parties to present evidence.

2. The General Verification Letter

4. The General Verification Letter is deficient in both form and substance as to MOFCOM's obligations to provide notice. With respect to form, MOFCOM did not *notify* U.S. interested parties of the General Verification Letter. Although it appears the letter is made out as "To Whom it May Concern," China's rebuttal clarifies that the letter is addressed to Chinese domestic producers. Accordingly, the interested parties MOFCOM put on notice − i.e., to "alert or warn" − were Chinese domestic producers. Substantively, China fares no better. An investigating authority's notation that it intends to conduct "on spot verifications," without any specifics regarding the precise information it requires from participating parties, falls far short of the requirements to provide notice to interested parties of information *required* by MOFCOM.

3. Chinese Producers' Summaries

5. The Chinese producer summaries suffer from two significant deficiencies, each of which preclude China establishing that it provided notice consistent with AD Agreement Article 6.1 and

SCM Agreement Article 12.1: (1) China did not provide interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform interested parties of the information MOFCOM required. First, to the extent China points to Exhibit CHN-14, a webpage that lists what China deems public documents, there is no indication as to when the materials were loaded on the webpage or that China provided any notice to interested parties that such information could be found there. Second, the summaries cannot be construed as notice of the *information that MOFCOM required*. They are summaries of what *information Chinese producers purportedly provided*. Knowledge of the precise parameters that MOFCOM required for this information is of course necessary to understanding the significance of and potential errors in the responses. Further, China glosses over the fact that these May 20 documents were ***submitted one day before*** release of the RID.

B. China Breached Articles 6.1.2 and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying U.S. Interested Parties the Evidence Presented by the Domestic Producers Participating in the Reinvestigation

6. The Chinese producer summaries do not satisfy China's obligations as to AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 because, once again, (1) China did not provide U.S. interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform U.S. interested parties of the information MOFCOM required. Even assuming the notice was not deficient, the *only* information it provided to interested parties consisted of *summaries* of the pricing information. They do not *convey* the context surrounding what positions were advocated by the domestic producers providing the information, and the corresponding issues that MOFCOM sought to resolve during the reinvestigation.

C. China Breached AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 Because it Failed to Permit Access to Evidence that would have Enabled the Interested Parties to Prepare their Cases

7. China acted inconsistently with AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 because it failed to permit access to information to interested parties that would have enabled them to prepare their cases and defend their interests. MOFCOM failed, per AD Agreement Article 6.4 and SCM Agreement Article 12.3, to provide interested parties timely opportunities to see information that is relevant, non-confidential, and used by authorities in their investigation. China's public release of summaries does not excuse its failure to provide the context for these data, including the specific products for which pricing data was requested, that clearly fall within the scope of the articles. The same deficiencies apply to China's failure to provide the precise identity of the four Chinese domestic enterprises that provided information to MOFCOM. Moreover, although an oral "hearing" took place on June 13, 2014, that "hearing" in no way provided interested parties with an opportunity to prepare presentations in defense of their interests. U.S. respondents were told by MOFCOM during this meeting that the re-investigation was closed, and that no further comments could be submitted by interested parties.

D. China's Failure to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins was Inconsistent with AD Agreement Article 6.9

8. China's failure to disclose "essential facts," i.e., the margin calculations and data it relied upon to determine the existence of dumping by U.S. respondents Pilgrim's Pride and Keystone, was inconsistent with AD Agreement Article 6.9. Pilgrim's Pride was denied access to the data calculations from the original investigation in the reinvestigation while MOFCOM used a purported error in the data and calculations from the original investigation to increase the margin of Pilgrim's Pride. Without the *original* calculations and data, Pilgrim's Pride had no ability to identify precisely what had changed – which entirely denied Pilgrim's the opportunity to defend its interests. Similarly, MOFCOM did not abide by the obligation to ensure that a disclosure was made "in sufficient time for … [Pilgrim's] to defend … [its] interests." Likewise, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation. Although Keystone did not cooperate in the reinvestigation, and MOFCOM applied facts available to it, Keystone was an "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the duties.

III. CHINA CANNOT DEFEND MOFCOM'S ANTIDUMPING REDETERMINATION

A. China Has Not Rebutted U.S. Claims That MOFCOM Failed to Properly Allocate Tyson's Costs Under the Second Sentence of AD Agreement Article 2.2.1.1

9. The substantive obligation in the second sentence of AD Agreement Article 2.2.1.1 demands that investigating authorities deliberate and evaluate the "proper" allocation of costs based on its consideration of the evidence presented. The Panel recognized this fact. China's suggestion to the contrary is wholly unsupported and should be rejected.

10. China failed to meet the requirement in the second sentence of AD Agreement Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs" because of MOFCOM's decision to adhere to a weight-based methodology while failing to allocate costs by weight to all products that derive revenue from the production of the product under consideration − including a failure to allocate costs to blood, organs, feathers, and other viscera. China itself recognized this problem in its prior WTO submissions and its redetermination, which explicitly noted, in support of its weight-based methodology, that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across all products. Yet China chose to ignore these distortions and allocate costs over a more limited range of products − resulting in artificially inflated normal values for those products.

B. MOFCOM's Failure to Consider Any Alternative Allocation Methodologies for Pilgrim's Pride was Inconsistent with AD Agreement Article 2.2.1.1

11. China's suggestion that the general findings were exclusive of Pilgrim's Pride is not supported by the plain text of the Panel's decision. Moreover, China's suggestion that it did not need to consider Pilgrim's data at all because it believed the data to be flawed is flatly inconsistent with the original panel's finding that China failed to explain why its methodology led to a "proper" allocation of costs. The only way that China could have engaged in a neutral, fact-driven consideration of the "proper" allocation of costs, as required under the second sentence of AD Agreement Article 2.2.1.1, is if it had considered data submitted by Pilgrim's Pride.

C. China Acted Inconsistently with Article 9.4 of the AD Agreement on Account of MOFCOM's "All Others" Rate

12. China ignored its obligation under the general rule of Article 9.4 to calculate an all-others rate that "shall not exceed . . . the weighted average margin of dumping established with respect to the selected exporters or producers" and, instead, arbitrarily applied the highest antidumping duty rate found, as a result of the reinvestigation of Pilgrim Pride's rate. MOFCOM's investigation was limited to three companies: Tyson, Pilgrim's Pride, and Keystone. In the present circumstances, there were no new respondents that MOFCOM could potentially add to the investigation − nor were there any respondents who failed to cooperate. The exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4.

D. China's Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.

13. China's use of facts available instead of Tyson's reported costs is inconsistent with Article 6.8 and Annex II of the AD Agreement. Contrary to China's suggestions, Tyson did not refuse access to, fail to provide, or other otherwise impede MOFCOM's ability to obtain requested information − such that MOFCOM could justify the application of facts available under Article 6.8. China's claims that Tyson made unexplained changes in its data during the redetermination proceedings are baseless. Rather, all changes made by Tyson during the reinvestigation were made at the specific request of MOFCOM and because MOFCOM altered its approach compared with the original investigation. China's argument rests on its belief that it can make an unreasonable and unrealistic demand for data in a reinvestigation that is fundamentally at odds with its requests during the original investigation, and that the investigating authority knows will be impossible for a respondent to provide in light of its standard accounting and business practice. Tyson made every effort that it could to comply with MOFCOM's requests for information, and cooperated to the best of its ability.

IV. MOFCOM'S INJURY REDETERMINATION BREACHED THE AD AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Remains Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

14. There is nothing in MOFCOM's redetermination that establishes MOFCOM actually controlled "for differences in physical characteristics affecting price comparability" − a deficiency the Panel found in its report with respect to the original determination. In its redetermination, MOFCOM apparently sought and collected product-specific pricing data from only four of 17 domestic producers that in its view justified its original average unit value comparisons, without ensuring that its sample of domestic industry sales prices was representative. MOFCOM's redetermination fails to explain why MOFCOM chose these four producers, how it ensured their data was reliable, and how it could ensure that this limited data could be extrapolated to support MOFCOM's findings.

1. MOFCOM's Underselling Analysis Remains WTO-Inconsistent

15. MOFCOM based its finding that subject import underselling was significant on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient. China readily acknowledges that MOFCOM's AUV comparisons remain the sole basis for its finding that subject imports undersold the domestic like product significantly, and that MOFCOM took no steps to adjust these data or otherwise control for differences in product mix in its redetermination.

16. Because the average unit value of subject imports differed dramatically by product, changes in the product mix of subject imports during the period of investigation would have directly influenced the average unit value of all subject imports during the period; for example, an increase in the proportion of lower-priced products from one year to the next would have caused the average unit value of all subject imports to decline. By failing to control for changes in the product mix of subject imports, MOFCOM's underselling analysis relied on subject import underselling margins that reflected not only differences in product mix between subject imports and domestic industry sales but also changes in the product mix of subject imports over time.

17. China argues that MOFCOM was justified in relying on its original average unit value comparisons because the product-specific pricing data it collected from four of the 17 domestic producers comprising the domestic industry suggested that the product mix of subject imports contained a higher proportion of high-value products than the product mix of domestic producers. But MOFCOM's AUV comparisons cannot be deemed objective or reliable. Specifically, both the magnitude and the trend of subject import underselling margins calculated from AUV comparisons would have reflected differences in product mix and changes in the product mix of subject imports over time. In other words, MOFCOM cannot proceed to compare and draw conclusions because no controls had been applied to ensure the underlying data − which by nature was in flux − was in fact comparable. Furthermore, MOFCOM's analysis of product-specific pricing data did not establish that subject imports were comprised of a higher proportion of high-value products because MOFCOM failed to ensure that its sample of domestic producers and their sales prices on specific products was representative.

2. MOFCOM's Price Suppression Finding Remains WTO-Inconsistent

18. 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." As the Appellate Body explained in *China − GOES*, the obligation of investigating authorities to consider whether subject imports have "explanatory force" for price depression and suppression, under AD Agreement Article 3.2 and SCM Agreement Article 15.2, and "the state of the domestic industry," under AD Agreement Article 3.4 and SCM Agreement Article 15.4, is an integral part of an authority's consideration of causation under AD Agreement Article 3.5 and SCM Agreement Article 15.5. Thus, MOFCOM was required under AD Agreement Article 3.2 and SCM Agreement Article 15.2 to establish that subject imports caused the significant suppression of domestic like product prices.

19. Because the principal basis for MOFCOM's finding that subject imports caused price suppression in the redetermination was its deficient underselling analysis, the Panel should find that MOFCOM's price suppression finding remains WTO-inconsistent. Although China also claims that MOFCOM supported its price suppression finding with reference to subject import volume, MOFCOM did not find in its redetermination that subject import volume alone suppressed domestic like product prices to a significant degree. On the contrary, MOFCOM emphasized in the section of its redetermination titled "Impact of the Import Price of the Subject Merchandise to the Price of the Domestic Like Products" that it was subject import underselling, not subject import volume, that suppressed domestic like product prices. It was MOFCOM's reliance on its deficient underselling analysis in finding price suppression that led the original panel to find MOFCOM's price suppression finding inconsistent. MOFCOM's continued reliance on its deficient underselling analysis in finding price suppression in the redetermination is likewise inconsistent with those articles.

20. MOFCOM also failed to establish that the alleged underselling by subject imports caused the significant suppression of domestic like product prices. Most of the alleged underselling by subject imports, which occurred between 2006 and 2008, was not accompanied by the "prevent[ion of] price increases, which otherwise would have occurred, to a significant degree," contrary to MOFCOM's finding that subject imports significantly suppressed domestic like product prices. MOFCOM not only ignored this evidence that contradicted its analysis of price suppression, but also failed to explain how subject imports could have suppressed domestic like product prices in the first half of 2009 when most of the increase in subject import volume and market share, and most of the alleged subject import underselling, did not suppress domestic like product prices between 2006 and 2008.

B. MOFCOM's Impact Analysis Breached AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4

21. MOFCOM was required under AD Agreement Article 3.4 and SCM Agreement Article 15.4 to not only examine the domestic industry's performance during the period of investigation but to also examine "the consequent impact" of subject imports on that performance. Furthermore, an investigating authority cannot examine the impact of subject imports on the domestic industry during the period of investigation without considering the relationship between subject imports and domestic industry performance over the entire period of investigation. Doing so would not be an "objective examination," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, because it would ignore periods in which subject imports coincided with improving or stable domestic industry performance, thereby making an affirmative determination more likely. Such an analysis would also ignore "relevant economic factors," namely the industry's improving performance over most of the period of investigation. Here, it was particularly important that MOFCOM examine the impact of subject imports on the domestic industry over the entire period of investigation because most of the increase in subject import volume and market share occurred between 2006 and 2008.

22. Yet, by China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened. The record before MOFCOM established that during the three full years of the period of investigation, which coincided with most of the increase in subject import volume and most of the alleged underselling by subject imports, the domestic industry's performance improved substantially according to most measures. Although the domestic industry's end-of-period inventories increased, they remained insignificant relative to industry production and sales (equivalent to around 3 percent of both), as China concedes. By failing to account for the bulk of the record evidence showing that subject imports had no adverse impact on the domestic industry between 2006 and 2008, MOFCOM failed to conduct an evaluation of all relevant economic factors, contrary to AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

23. None of the factors cited by China in its first written submission excuse these deficiencies in MOFCOM's impact analysis. MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire period of investigation, including those periods in which the industry's performance improved. Nor was MOFCOM entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation," to the exclusion of other contradictory factors. That the domestic industry had pre-tax losses throughout the period of investigation says nothing about the changes or trends in the industry's financial

performance. Nor does it take into consideration the multiple other "relevant economic factors" enumerated in AD Agreement Article 3.4 and SCM Agreement Article 15.4. The record before MOFCOM showed that the domestic industry's worst financial performance during the 2006-2008 period occurred in 2006, before the increase in subject import volume and market share. The data show that most of the increase in subject import volume and market share coincided with an improvement in the industry's financial performance, according to every measure. By ignoring these trends, just as it discounted all other positive trends in the industry's performance, MOFCOM failed to objectively evaluate "all relevant economic factors," in violation of AD Agreement Article 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4. The third factor that China cites in defense of MOFCOM's impact analysis, alleged future subject import volume, was completely irrelevant to MOFCOM's analysis of the impact of subject imports on the domestic industry during the period of investigation. MOFCOM found that "U.S. producers of chicken products or broiler products are likely to expand exports to China, and cause further adverse effects to China's industry." China's argument has two fundamental problems. First, this finding on likely future trends was not supported by the record. Second, future subject imports could have no impact whatsoever on the domestic industry during the period of investigation.

24. Finally, China is incorrect that MOFCOM's analysis of the domestic industry's capacity utilization supported its finding that subject imports adversely impacted the domestic industry during the 2006-2008 period. China argues that the domestic industry's capacity did not grow in excess of demand between 2006 and 2008 because the increase in capacity, at 780,700 MT, was less than the increase in demand, at 955,600 MT. The increase in the domestic industry's capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period. Only the domestic industry's 26.2 percent increase in capacity, in excess of the 17.0 percent increase in apparent consumption, prevented the industry's capacity utilization rate from improving just as dramatically as other measures of industry performance.

C. MOFCOM's Causation Analysis Breached 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

25. MOFCOM's reliance on a flawed analysis of the effects of subject imports to demonstrate a causal link breaches the first sentence of AD Agreement Article 3.5 and SCM Agreement Article 15.5. Moreover, MOFCOM acted inconsistently with the second sentence of these articles by failing to base its causation analysis on "an examination of all relevant evidence." Specifically, MOFCOM ignored evidence that the increase in subject import volume and market share was not at the expense of the domestic industry, which increased its market share by an even greater amount.

1. MOFCOM Failed to Examine All Relevant Evidence in Breach of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Article 15.1 and 15.5

26. MOFCOM explicitly predicated its finding of a causal link between subject imports and injury on "the increase of the import volume" and "the large volume of dumped imports originating in the U.S.," yet ignored that the 3.92 percentage point increase in subject import market share during the period of investigation did not prevent the domestic industry from increasing its market share by an even greater 4.38 percentage points. This evidence that subject imports captured no market share from the domestic industry during the period of investigation, and did not prevent the industry from growing its market share during the period, was clearly "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.1. That MOFCOM "noted" the increase in the domestic industry's market share somewhere in the redetermination does not remedy this deficiency.

27. MOFCOM's isolated reliance on the increase in subject import volume and market share in finding a causal link between subject imports and injury also ignored that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of chicken paws that could not, as a factual matter, have injured the domestic industry. An uncontested fact on the record before MOFCOM, which China does not dispute, was that domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to

uneconomic levels. The clear implication of this irrefutable fact is that subject imports of chicken paws could not have injured the domestic industry.

28. China asserts that MOFCOM's reference to its preliminary finding that chicken feet were within the scope of the investigation somehow satisfied its obligation. MOFCOM's observation that chicken feet were within the scope was a complete *non sequitur*. By ignoring that subject imports of chicken feet could not have injured the domestic industry, MOFCOM's causation analysis relied on an increase in subject import volume and market share that was greatly inflated by the inclusion of non-injurious chicken feet. Relying on its defective impact analysis, MOFCOM's finding of a causal link between subject import and injury also ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008. By limiting its causation analysis to those portions of the period of investigation in which the industry's performance weakened while ignoring those portions coinciding with most of the increase in subject imports, MOFCOM failed to base its causation analysis on an "objective examination," and "all relevant evidence."

29. Contrary to China's claim that the United States has made no challenge to MOFCOM's analysis of adverse volume effects, the United States continues to argue, as it did before the original panel, that MOFCOM ignored evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance between 2006 and 2008, and did not prevent the domestic industry from increasing its own market share to an even greater degree. These deficiencies in MOFCOM's volume effects finding underscore the WTO-inconsistency of MOFCOM's causation analysis.

2. MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents Violated AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5

30. MOFCOM's approach manifestly failed to provide "in sufficient detail . . . the reasons for the . . . rejection of relevant arguments." Specifically, China argues that MOFCOM "addressed" USAPEEC's and the United States' argument that subject imports had no adverse volume effects because they captured no market share from the domestic industry by stating that "[d]uring the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product . . . ." Conspicuously absent from MOFCOM's response is any mention or consideration of market share, and specifically the record evidence highlighted by USAPEEC and the United States showing that subject imports captured no market share from the domestic industry. Having failed to address the very point raised by USAPEEC and the United States, MOFCOM cannot be said to have provided "in sufficient detail" its reasons for rejecting the argument.

31. China also argues that MOFCOM "addressed" USAPEEC's argument that the 40 percent of subject imports consisting of chicken paws could not have injured the domestic industry by referencing its finding from the preliminary determination 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 . . . ." That MOFCOM included the words "chicken paws" in its response to USAPEEC's argument revealed nothing about the "reasons" why MOFCOM decided to ignore completely uncontested evidence on the record that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of non-injurious chicken paws.

V. CHINA'S TERMS OF REFERENCE ARGUMENTS ARE WITHOUT MERIT

32. The United States' Panel Request provides more information than is required under the DSU to present the claims at issue in this dispute. In particular, the United States often previewed some of the specific arguments it intended to advance by providing indicative examples of how China breached its WTO obligations. In each of the instances China complains of, the U.S. Panel Request has clearly stated the measures and claims at issue − and is thus entitled to have the Panel consider them. China's position essentially demands that Members not only identify claims, but that they must also provide in the Panel Request the precise arguments that will be presented in their submissions. The DSU does not compel this result.

33. The Panel Request clearly identifies that the measures at issue are those leading to the continued imposition of AD and CVD duties on U.S. broiler products – and further clarifies for China that the United States is concerned with MOFCOM's conduct during the reinvestigation. For each of its claims, the United States has identified the relevant obligation in the covered agreement. The United States has done so not only by identifying treaty provisions, but also by providing appropriate narrative descriptions when necessary. Moreover, the United States has also provided in some instances precise examples of how it might seek to demonstrate breach. The Appellate Body's prior analysis has correctly recognized that Members may provide indicative examples of how the claim might be established. Such an examples are simply foreshadowed arguments; they do not detract from the claim itself.

VI. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

34. Because China has not rebutted the foregoing claims demonstrated by the United States, China as a consequence is also unable to rebut that it has breached AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994.

VII. CONCLUSION

35. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the AD Agreement, SCM Agreement, and the GATT 1994, and thus that China has failed to comply with the DSB recommendations in this dispute.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. We are here today because China, notwithstanding the clear findings earlier in this dispute – and other disputes – has breached the basic procedural and substantive obligations of the AD and SCM Agreements in maintaining antidumping and countervailing duties on U.S. broiler products. To a large extent, China has not addressed the legal and factual arguments of the United States, but rather relies on rhetoric and conclusory statements. Rather, China's arguments are primarily, as this Panel put it in the original proceeding, simply *post-hoc* rationalizations that are "irrelevant for the purposes of our assessment of MOFCOM's actions."

II. MOFCOM'S FLAWED INJURY REDETERMINATION BREACHES THE AD AND SCM AGREEMENTS

2. China's defense of MOFCOM's injury redetermination centers on the assertion that the United States is seeking to substitute its judgment for MOFCOM's. The issue is not whether MOFCOM has discretion, but whether the exercise of that discretion comports with the obligations in the AD and SCM Agreements.

A. China Cannot Defend MOFCOM's Price Effects Analysis

3. An objective examination of pricing data requires that the prices the investigating authority compares must correspond to comparable products. Tellingly, MOFCOM's price effects analysis in the redetermination continues to rely on its original flawed analysis of AUVs, rather than make any of the requisite adjustments to ensure comparability.

4. First, MOFCOM's determination does not explain why its approach of using domestic pricing data from these four particular firms would resolve the issue of product mix. As is evident, we have no understanding how this data was applied to ensure that product mix is not an issue. Second, there is nothing in the redetermination about why or how these firms were selected. Nor does the record indicate the coverage of their product-specific data. Even the *post hoc* rationalization offered by China in its submissions suggests the only reason these firms were chosen was that it was convenient for MOFCOM since it was already familiar with these four firms and decided it lacked the time and resources to examine all 17 firms. It is important to keep in mind that the data from these four firms is a sample of a sample. As the Panel may recall, in defending against the U.S. challenge on how MOFCOM defined its domestic industry in the original proceeding, China stressed the large number of firms that comprised its domestic industry. Particularly, in the absence of any explanation as to the methodology employed by MOFCOM to select these firms, it is clear that MOFCOM's attempt to remedy the AUV deficiency is not an "objective examination" based on "positive evidence." Third, as our submissions explain, the record demonstrated that the product mix of subject imports was dynamic in that it changed over time. China's attempted response is that MOFCOM's "spot check" confirmed that this was not an issue. China's argument, which lacks any citation to the record or the determinations, is a *non-sequitur*. It ignores that a "spot check" cannot, by definition, examine a changing market situation. Fourth, China fails to address that MOFCOM did not even attempt to examine the product mix pricing for imports. The limited data indicated that paws tended to be ranked 3rd or 4th in terms of price, and the sales price index for paws was little higher than the sales price index for breast meat, which China characterizes as a "lowest price product." The products ranked 1st and 2nd in terms of price, wings and gizzards, were sold by the four domestic producers, but not imported from the United States in appreciable quantities. In light of this, MOFCOM could not objectively conclude that the product mix sold by the domestic industry was comparable to that of the imported subject merchandise.

5. China's defense of MOFCOM's price suppression finding appears to rest on two points. First, China appears to argue that a price suppression finding does not need to be well explained under the relevant obligations. This position has no legal basis. Second, China asserts that the United States is misreading the record. But the relevant portions of the record are clear, and the United States has accurately described MOFCOM's reasoning: MOFCOM predicated its finding that subject imports significantly suppressed prices for the domestic like product on its deficient underselling analysis. In addition, MOFCOM failed to address record evidence that prices for the domestic like product were not, in fact, suppressed during the 2006-2008 period. In particular, even as subject imports allegedly undersold the domestic like product, the Chinese domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008.

B. China Cannot Defend MOFCOM's Impact Analysis

6. China has confirmed that MOFCOM's analysis on the impact of subject imports on the domestic industry in the redetermination remains *completely unchanged* from that in the original determination. Accordingly, MOFCOM has taken no steps to address any of the arguments concerning why its impact analysis is deficient under the AD and SCM Agreements.

7. First, MOFCOM's examination of the impact of subject imports on the domestic industry failed to consider the numerous factors attesting to the overall health of the industry. Almost every metric during the period of investigation *improved*. China claims MOFCOM "systematically addressed" these factors. But the text of the redetermination indicates otherwise. Only two factors in the Chinese broiler industry did not appear to improve over the period of investigation: the domestic industry's rate of capacity utilization and end-of period inventories. With respect to inventories, MOFCOM failed to consider the increase in inventories in relation to the domestic industry's production and shipments. Also, the industry's inventories were objectively small, equivalent to only around three percent of industry output and shipments. Likewise, MOFCOM's findings on capacity utilization fail to address evidence indicating that the level was not due to subject imports. As our submissions explain, capacity utilization actually increased slightly during the 2006-2008 period corresponding to most of the increase in subject import volume. The only reason the industry's capacity utilization did not increase dramatically during the period was the industry's own decision to increase capacity far beyond growth in domestic demand.

C. China Cannot Defend MOFCOM's Causal Link Analysis

8. Our submissions highlight that MOFCOM's causation analysis in its redetermination remains flawed for precisely the same reasons as the original determination. With respect to the first point, the redetermination failed to address that the increase in subject import market share during the period of investigation failed to prevent the domestic industry from increasing its market share by an even greater amount. The second reason MOFCOM's finding of causation is inconsistent with the AD and SCM agreements is because it relies on MOFCOM's price underselling analysis, which remains flawed for the reasons already discussed. The third flaw in MOFCOM's finding of a causal link between subject import and injury is that MOFCOM ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008.

III. MOFCOM'S FLAWED REINVESTIGATION BREACHES THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

A. MOFCOM Failed to Provide Notice to Interested Parties of the Pricing Information it Required from Chinese Domestic Producers and Denied Them Ample Opportunity

9. As the Panel has noted in its Preliminary Ruling, "MOFCOM required, sought, and obtained additional information from Chinese domestic producers in the course of its reinvestigation." And, because MOFCOM failed to afford both notice and opportunity to interested parties in connection with the information that it required from Chinese producers, China is in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Indeed, the United States notes that it is striking that even after two rounds of submissions, no one other than China still knows the precise requests that were actually posed to the Chinese producers.

B. MOFCOM Failed to Permit Interested Parties Timely Access to Information Such that they could Defend Their Interests

10. China has also breached Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement, which requires investigating authorities to permit *timely* access to information to interested parties, to *enable them to prepare their cases, and defend their interests.* China failed to afford those opportunities as to the data MOFCOM requests from China's domestic producers, including the identity of those producers and the specific information requests issued by MOFCOM. China asserts that its supposed deposit of documents to the public information room at China's Ministry of Commerce satisfied its obligations. The deposit of documents in the reading room is not meaningful, absent notice to interested parties.

C. China's Failure to Disclose the Anti-dumping Calculations and Data

11. In the reinvestigation, Pilgrim's Pride was denied access to the data calculations from the original investigation, even though MOFCOM cited a purported error in the data and calculations from the original determination to increase the margin of Pilgrim's Pride by 20 points. Keystone likewise was denied access to its margin calculations and data from the original investigation. Keystone, as a foreign producer, was indeed an "interested party" as defined under Article 6.11, whether or not it chose to participate by submitting new data. In addition, China's explanation concerning Keystone's supposed lack of an authorized representative is without merit. Keystone's duly appointed representative indicated through a memorandum that it was authorized to "act on behalf of Keystone and to receive any document on Keystone's behalf."

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATION BREACHES THE AD AGREEMENT

A. China Cannot Point to Any Record Evidence to Support MOFCOM's Assertion that U.S. Producers' Recorded Costs Were Unreasonable

1. The Methodology Applied to Tyson is Not Proper

12. The Panel found in the original dispute that China breached the second sentence of AD Agreement Article 2.2.1.1 by relying upon a distortive weight-based allocation methodology for Tyson. In its redetermination, MOFCOM did not address this error. China's attempt to manipulate a value-based allocation method to distinguish total meat costs into categories, but then rely on a separate weight-based method to allocate total meat costs for only one of those categories into specific products, is not consistent with Article 2.2.1.1. Furthermore, if China indeed wanted to use a weight-based methodology, it by necessity needed to allocate costs across all products – and not just to broiler products. To allocate costs selectively introduces substantial distortions.

13. Further, China's claim that the scope of its investigation only included chicken for "human consumption" must be rejected. China's own response submission implicitly recognizes such, in stating that "Tyson's normal books and records demonstrated that the little cost [sic] was assigned to feathers and blood because the sales revenues of these items were very low." All parts of a chicken, including both those for human consumption and those that are rendered, are co-products, and a consistent, reasonable methodology must be used to allocate production costs to all co-products.

2. The Methodology Applied to Pilgrim's Pride is Not Proper

14. China similarly failed to give any consideration of the "proper" allocation of costs with respect to Pilgrim's Pride. The Panel's decision made two findings that applied to *all* respondents – specifically, that China failed to give proper consideration to "alternative allocation methodologies presented by the respondents," and that China "improperly allocated all processing costs to all products." MOFCOM failed to do any evaluation with respect to Pilgrim's Pride's costs, and for this reason alone breached Article 2.2.1.1's obligation to "consider all available evidence on the proper allocation of costs," and resulted in a failure to provide a reasoned and adequate explanation for its determination.

B. MOFCOM's "All-Others" Rate

15. The plain text of Article 9.4 establishes a cap on the duty that may be applied to imports from "exporters or producers not included in the examination." Here, MOFCOM's investigation was limited to only three companies; no other exporter was examined. Article 9.4 does not allow for distinctions between classes of exporters or producers "not included in the examination". Any exporters or producers not included in the examination are entitled to a rate consistent with AD Agreement Article 9.4.

C. China's Reliance on Facts Available for Tyson was Unsupported because Tyson Fully Cooperated to the Best of its Ability

16. MOFCOM's use of facts available is inconsistent with Article 6.8 and Annex II of the AD Agreement. China has failed to present any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information – such that could justify the application of facts available. Rather, MOFCOM during the reinvestigation sought information that simply did not exist, and Tyson still made every reasonable effort to use the data available in its business records to satisfy MOFCOM's request. Contrary to China's assertion, Tyson did not make unexplained changes to its data during the redetermination proceedings. Rather, Tyson used the standard costs data it had to breakdown these total actual costs for each product-brand code into meat and processing costs for each cost center. Tyson was forthcoming with MOFCOM on why and how it was proceeding in this manner. Yet China completely rejected this information provided by Tyson in the reinvestigation, without engaging in an objective process of examining the submitted data or an effort to verify its accuracy or reliability.

17. Finally, China's reliance on the Panel report findings, at paragraph 7.196 with regard to "pure meat" and "pure processing" costs is disingenuous. In fact, Tyson provided this information in the only way that it could. And it is obvious why the processing costs changed: those processing costs were embedded in the total meat costs during the original investigation, and Tyson had to disaggregate those processing costs during the reinvestigation, using the data Tyson had at its disposal. Such extensive efforts by Tyson do not reflect a failure to cooperate.

V. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

18. These claims are consequential and therefore do not require any independent evidence to be established – they simply result from breaches of other provisions of the AD and SCM Agreements. Accordingly, the Panel may issue findings on these claims if it finds breaches on the foregoing claims we have discussed.

VI. CONCLUSION

19. For these reasons and those set forth in our submissions, the United States respectfully requests the compliance panel to find that China's measures taken to comply with the recommendations and rulings of the DSB are inconsistent with China's obligations under the AD Agreement, the SCM Agreement, and GATT 1994.

ANNEX C

ARGUMENTS OF CHINA

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. The United States seriously mischaracterized the factual context and the findings made by MOFCOM during the redetermination proceedings that bring the antidumping and countervailing duty measures at issue in DS427 into compliance with China's obligations under the WTO. First, the United States seeks to pursue several specific claims that are beyond this Panel's Terms of Reference. In other areas, the U.S. First Written Submission drops any argument about provisions that were included in the Panel Request. Second, the United States argues for other approaches to issues that would have also been permissible, had MOFCOM decided to adopt them, but that simply were not required given the Panel findings. Third, when focusing on the specifics of each U.S. claim, it is important not to lose sight of what the United States has not challenged and therefore concedes to be WTO-consistent. The Panel focus, of course, will be on the U.S. claims, but the evaluation of those claims needs to take into account the factual and legal context that has not been challenged.

II. THE FACTUAL BACKGROUND PROVIDED BY THE UNITED STATES CONCERNING MOFCOM'S INVESTIGATIVE PROCESS OMITS OR MISSTATES KEY FACTS

2. The United States has presented a somewhat self-serving summary of the redetermination proceeding, omitting or misstating key facts that are important for the Panel's consideration.

3. China promptly began the procedure to implement the Panel findings in this dispute. On 25 December 2013, MOFCOM issued its Announcement No.88 of 2013 notifying its intention to reinvestigate the anti-dumping and countervailing measures on imports of broiler products originating in the United States. The purpose of the reinvestigation was to implement the findings of the Panel in DS427.

4. Questionnaires were issued to those U.S. exporters for which the Panel findings required some reconsideration by MOFCOM on 7 January 2014. Investigative procedures were tailored appropriately, seeking specific information regarding the issues about which the Panel had made findings. No company was asked to prepare entirely new responses for a new period of time or for a new product. U.S. exporters had a typical due date of two weeks to respond to the initial questionnaire. They requested more time, and MOFCOM granted the requests to the extent practicable, as well as multiple opportunities to clarify their responses.

5. MOFCOM also reinvestigated the Chinese domestic producers. On 19 February 2014, the MOFCOM released its Notification on On-spot Verifications in the Anti-dumping and Anti-subsidy Re-investigation on Broiler Products, which provided the schedule and the methodology of the investigations to be carried out. Given the Panel Report findings on MOFCOM's failure to ensure price comparability with regard to its analysis of price effects, the parties had a clear sense of what was expected from them through the Notice.

6. MOFCOM conducted on-site verifications of the same three producers whose questionnaire responses had been verified in the original verification, as well as the largest producer that was visited before the original final determination. Product-specific price data were sourced using standard verification methodologies and on the basis of the companies' questionnaire responses from the original investigation. MOFCOM requested a breakdown of the sales quantity and value reported to show product-specific pricing data. MOFCOM also verified these data by requesting product coding, sales ledgers and sampled invoices.

7. On 16 May 2014 MOFCOM issued disclosures to Pilgrim's Pride, Tyson, and the U.S. Government. These disclosures covered all issues for the two U.S. exporters. Keystone had not designated an agent and was otherwise not cooperating with the reinvestigation, so MOFCOM tried

reaching out to Keystone directly and through the U.S. Embassy, but MOFCOM was not able to provide any disclosure directly to Keystone.

8. On 20 May 2014, the four domestic producers filed the public versions of their Post-Verification Supplemental Information. The names of these producers were disclosed in the public version. On 21 May 2014, MOFCOM released its injury disclosure and the essential facts to all known interested parties, and provided an opportunity for comment.

9. On May 23, 2014, the Investigating Authority issued its Notification on Hearing and on May 30, 2014, the hearing was held. The domestic parties declined to attend the hearing. The U.S. Government, Tyson Foods Inc and Pilgrim's Pride Corporation attended the hearing. At the hearing, the U.S. Government gave a presentation. The U.S. exporters choose not to make their own presentations, but they attended.

III. MOFCOM ABIDED BY ITS PROCEDURAL OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT AND THE SCM AGREEMENT

A. China Did Not Act Inconsistently with Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

10. This U.S. claim falls outside the Panel Request. The U.S. claim cites to documents that do not even exist, and does not "present the problem clearly" as required by Article 6.2 of the DSU. It only identifies MOFCOM's alleged failure to disclose questionnaires submitted to the domestic industry and it is preceded by the phrase "for example". Although such language might serve to specify a previously generally identified measure, it does not reference any specific part of the Redetermination, and instead references only "questionnaires" that do not even exist.

11. Even if the claim were properly raised, it nevertheless fails on its merits as factually incorrect and legally baseless. The U.S. argument simply ignores all of the disclosure, including the initiation notice of re-investigation, the general verification letter, and the public versions of verification exhibits, that took place earlier in the process and was more than sufficient to satisfy Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

B. China Did Not Act Inconsistently with Article 6.4 and Article 6.5 of the Anti-Dumping Agreement and Articles 12.3 and 12.4 of the SCM Agreement

12. This U.S. claim is outside the Panel's Terms of Reference because it does not identify the "specific measures" at issue nor does it provide a "brief summary of the legal basis" for its claim. The U.S. purports to have identified the "specific measures" at issue and to have provided a "brief summary of the legal basis" but there are several key aspects of this language that ignore the requirements of Article 6.2 of the DSU. In its First Written Submission, the U.S. contends that China acted inconsistently with certain specific provisions, yet paragraph 5 of the Panel Request does not even mention Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement at all. Nor do the claims under Articles 6.4 and 12.3 present the problem clearly. To include these provisions now would be contrary to Article 6.2 of the DSU.

13. Even if the Panel were to consider such claim as within its Terms of Reference, the U.S. claim that MOFCOM acted inconsistently with these provisions is without merit. These provisions require that relevant information provided by one party in an investigation is promptly made available to other participating parties. China promptly made available evidence in writing to the interested parties participating in the investigation in accordance with these provisions by releasing as timely as possible − that is on the very same day of receipt − the Public Versions of the Post-Verification Exhibits by the domestic producers and by providing to all interested parties in the reinvestigation access to the files in the Public Information Room.

14. The United States has dropped its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. But even if considered, this claim fails. MOFCOM provided the parties with access to all relevant information through notice and public summaries. The parties had sufficient time to prepare their defenses and in fact did so.

C. China Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

15. MOFCOM in fact disclosed the "essential facts" to Pilgrim's Pride. The U.S. narrative is factually inaccurate. MOFCOM not only provided Pilgrim's Pride with all of the data and calculations used in the reinvestigation, which included the data from the original investigation, but also discussed its corrections with Pilgrim's Pride. In fact, MOFCOM made additional adjustments to its calculations based on Pilgrim's Pride input, further evidencing that Pilgrim's Pride in fact had all of the essential facts necessary to have a meaningful participation.

16. The other objection raised by the United States is that Pilgrim's Pride received the essential facts too late. This statement is factually wrong. MOFCOM disclosed the essential facts to Pilgrim's Pride at the opportune moment and before its decision was final. Moreover, MOFCOM discussed its corrections with Pilgrim's Pride. By indicating calculation errors and corresponding corrections, Pilgrim's Pride was fully aware of the data and calculations of dumping margin from the original investigation. Consequently, there is no factual basis to argue that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride.

17. MOFCOM also disclosed essential facts to Keystone. The U.S. argument fails to note that although Keystone was duly notified of the reinvestigation through the publication of Notice No. 88 on MOFCOM's website, and that MOFCOM also attempted to contact Keystone directly, as well as through the U.S. Embassy, Keystone refused to participate in the reinvestigation proceedings. The precise calculations were business confidential information, and could not be released publicly. Since Keystone did not duly appoint any representative, there was no one to whom MOFCOM could have disclosed such confidential information and so MOFCOM was limited in its ability to disclose. Nonetheless, it is clear in the Redetermination that MOFCOM did comply with its obligation to disclose essential facts to Keystone.

IV. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 2.2.1.1, 6.8, 9.4, AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

A. China Did Not Act Inconsistently with the Second Sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

18. In terms of Pilgrim's Pride, the U.S. claim is outside the Panel's terms of reference because nothing in the Panel request provided a summary sufficient to understand this particular claim. But even if the U.S. claim is within the Terms of Reference, it fails because it depends on a finding that the Panel in fact never made. The Panel finding under the second sentence of Article 2.2.1.1 applied only to Tyson and Keystone, not to Pilgrim's Pride. MOFCOM made no change in the redetermination proceedings with regard to Pilgrim's Pride on cost allocations because the Panel had made no finding that MOFCOM needed to address in its Redetermination.

19. With regard to the Tyson claim, the United States misstates the nature of the obligation under the second sentence of Article 2.2.1.1. This provision requires only that the authority "consider all available evidence". MOFCOM did in fact "consider all available evidence" on the alternative cost allocation proposed by Tyson, including whether they were "historically utilized" by Tyson, as required by Article 2.2.1.1. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs and instead applied a weight-based cost allocation to Tyson for the products under investigation.

20. MOFCOM made the reasonable choice to adopt a weight allocation for the meat cost of the product under consideration, and not to include products not under consideration, and explained its rationale for doing so in some detail. The U.S. claim that Tyson's costs of blood and feathers were not allocated appropriately under MOFCOM's weight based allocation method is flawed.

21. First, the Redetermination confirms the original determination that MOFCOM reasonably replaced Tyson's flawed value-based allocation method with a weight-based allocation method to allocate meat cost among different models of the product concerned − the edible parts of the broiler products. Tyson had misused the price of offal (waste products) to estimate unreasonably the cost of paws (edible products), which led to distorted costs for each model of the product concerned. The Redetermination confirms MOFCOM's reasonable rejection of Tyson accounting

records for allocating the cost of each model of the product concerned. The United States does not challenge it under the first sentence of Art. 2.2.1.1.

22. Second, Tyson treated the inedible part of the broiler product − blood and feathers − as waste products under its cost allocation. Unlike the treatment of edible products, the Redetermination finds that the use of prices of waste products to allocate the cost of inedible products did not unreasonably reflect costs, which also means that Tyson's accounting records on this specific point could be accepted. The United States does not challenge MOFCOM's finding under the first sentence of Art. 2.2.1.1.

23. Third, the essence of the U.S. claim is to challenge appropriateness of the MOFCOM's rejection of Tyson's alternative by using a total live-chicken weight-based method under second sentence of Art.2.2.1.1. This U.S. alternative, however, is not based on any cost allocation that had been historically utilized by Tyson, and cannot be considered as evidence under second sentence of Art. 2.2.1.1.

24. Fourth, Tyson tried to obfuscate the nature of the different products to distort the costs. For instance, at the beginning, Tyson tried to confuse offal and broiler products such as paws; later, Tyson tried to equate the waste products, such as feathers and blood, with edible products including the products concerned; finally, Tyson even tried to treat dead birds equally with live chicken. Tyson argued for all these alternatives for the same purpose − to obscure the nature of different products to distort the costs. The Tyson approaches that the United States now defends could not reasonably reflect the cost of the product concerned, nor appropriately allocate the costs for the product concerned. It would depart from common sense notions about edible products and non-edible products, primary products and waste products, and basic antidumping rules to distinguish the product concerned and the non-product concerned.

25. The U.S. argument is little more than a disagreement with MOFCOM's determination on this issue. The United States is essentially asking the Panel to second-guess MOFCOM and substitute the Panel's opinion about the proper cost allocation for the decision that MOFCOM made on this issue.

B. China Did Not Act Inconsistently with Article 6.8 of the Anti-Dumping Agreement with Respect to Tyson

26. The United States focuses exclusively on the MOFCOM`s decision to apply "facts available", but presents no argument at all about MOFCOM`s choice of particular facts. The Appellate Body and several panels have concluded that Article 6.8 and Annex II impose a particularly high standard on responding parties, explaining that a respondent is required to act "to the best of its ability". Failing that, the investigating authority is entitled to resort to facts available under Article 6.8. Furthermore, even if an interested party cooperates and acts "to the very best of its ability", if the requested information is not obtained, investigating authorities may resort to facts available.

27. Tyson did not meet this high standard during the reinvestigation. There were significant discrepancies between what Tyson said about costs in the original proceedings and what Tyson was saying in the redetermination proceedings. In the original Panel proceeding, the United States claimed that MOFCOM did not allocate Tyson's product-specific processing cost as they were actually incurred in the production of those specific products. MOFCOM made repeated efforts during the reinvestigation to obtain the cost of raw material used to grow broiler chickens, without any processing costs. Yet, Tyson never satisfactorily provided this information and did not participate in the original investigation and reinvestigation proceedings to the "best of its ability". Instead, Tyson provided MOFCOM with unreliable and inconsistent answers to several questionnaires. For instance, the meat cost was discovered containing processing costs, while some processing costs became negative. Under these circumstances, MOFCOM was completely justified in applying "facts available" under Article 6.8 and Annex II.

C. China Did Not Act Inconsistently with Article 9.4 of the Anti-Dumping Agreement Through the "All Others" Rate Assigned to Exporters or Producers that did Not Identify Themselves

28. The United States argues that China acted inconsistently with Article 9.4 of the Anti-Dumping Agreement by setting a rate for those exporters who did not identify themselves for purposes of the proceeding based on the rate applied to Pilgrim's Pride rather than the weight average of rates for individually investigated companies.

29. The argument is mistaken because Article 9.4 does not apply to the "all others" rate set in the underlying proceeding. In the underlying proceeding "all others" pertained to producers and exporters who did not cooperate in the selection of respondents. Thus, the facts involved in MOFCOM's reinvestigation do not implicate Article 9.4 of the Anti-Dumping Agreement. The flaw in the U.S. argument is in its apparent assumption that "all others" as used by MOFCOM in the reinvestigation has the same meaning the U.S. Department of Commerce assigns to "all others" in its own domestic proceedings. In U.S. Department of Commerce cases, "all others" refers to those parties not asked to cooperate in the investigation. But this term was used differently by MOFCOM. In the reinvestigation "all others" referred to those companies that chose not to register and provide information as requested in MOFCOM's Notice of Initiation.

V. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 3 AND 12 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15 AND 22 OF THE SCM AGREEMENT

A. China's Price Effects Analysis Was Consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2, and 15.4 of the SCM Agreement

30. The United States makes two specific and relatively narrow claims concerning MOFCOM's price effects analysis, focused on: (i) the way that MOFCOM found price undercutting, and (ii) the implications of that price undercutting for the price suppression analysis. Both claims should be dismissed.

31. First, the United States claims that MOFCOM failed to ensure objective price comparisons in its underselling analysis because the product-specific price data relied upon for that purpose were not representative. But this argument fundamentally misstates MOFCOM's analysis to create the false issue of representativeness. In its original determination MOFCOM analyzed annual trends in the average unit price of subject imports and in the price of the domestic like product. The Panel found that differences in product mix risked affecting price comparability and distorting any price effects analysis if steps were not taken to control for product mix, or if necessary adjustments were not made. Consistent with the Panel's findings and conclusions, MOFCOM's Redetermination took steps to control for differences in physical characteristics affecting price comparability to determine if any adjustments were necessary.

32. Specifically, MOFCOM performed an additional round of on-site verifications of the domestic industry in order to collect supplemental price data with which to distinguish among product specifications. MOFCOM also analyzed product-specific import statistics from Chinese Customs and cross-checked it with export data from the respondents. MOFCOM's approach was sufficiently representative for the limited purposes to which it was applied. MOFCOM found that imports from the United States were concentrated in products that the Chinese market valued at the high end of the value chain. As such, any bias existing in its aggregate AUV price comparison in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product. Therefore, MOFCOM's use of AUVs to reflect price undercutting was a cautious and conservative approach given the specific facts of this case.

33. Having met its obligations to take additional steps to ensure that product mix and price comparability were not problems in this specific case, MOFCOM reasonably relied on price undercutting based on overall annual AUVs for the domestic industry. These AUVs reflected all products for all 17 domestic firms that were part of the domestic industry as defined by MOFCOM, and as previously upheld by the Panel.

34. Second, the United States also claims that China failed to establish that subject import prices had the effect of suppressing domestic like product prices. But this U.S. claim also relies upon a mischaracterization of the record and MOFCOM's approach in the redetermination. MOFCOM did not rely solely or principally on its price undercutting findings, and presented various other reasons in support of its price suppression analysis.

B. 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

35. At the outset, we note this claim is outside the Panel's Terms of Reference. There were no changes in the MOFCOM determination on this issue and therefore no measure taken to comply with regard to this issue now before the Panel. To find otherwise would sanction China for not making changes when no changes were required, and would deny China any chance to bring its findings into conformity with regard to this issue.

36. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. By doing so the United States ignores the totality of the evidence before MOFCOM, and selectively picks time periods to create the illusion of a domestic industry doing well, when it in fact was suffering material injury.

37. The United States makes three analytical errors. First, it focuses on an earlier period, the period from 2006-2008, and ignores the sharp declines in various indicators during the most relevant and most recent period, the first half of 2009. Second, it also ignores MOFCOM's findings that U.S. exporters may expand exports to China, causing continued adverse effects to the domestic industry. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. Third, it focuses on volume indicators, and ignores the weak financial indictors over the entire period. A domestic industry with net operating losses every year is suffering material injury.

38. The U.S. arguments regarding two specific injury indicators, production capacity utilization and end-of-period inventories, are similarly flawed. Note that although Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement list numerous factors to be considered in the examination of the impact of the subject imports, the United States raises claims about only two. MOFCOM's Redetermination 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 factors does not mean the MOFCOM evaluation was not an "objective examination".

C. China 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

39. At the outset, China notes that certain aspects of this U.S. claim are beyond the Panel's Terms of Reference. The third part of the U.S. claim − that MOFCOM did not reconcile its causation analysis with the improving domestic industry performance − was excluded from the Panel Request and cannot be included now.

40. 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 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.

41. 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.

42. Second, MOFCOM did not rely on a flawed analysis of price effects as the sole basis of its discussion of causal relationship. Rather, MOFCOM reasonably relied on both a proper price undercutting analysis and a proper price suppression analysis as legally independent bases for

adverse price effects. Moreover, in the Redetermination, MOFCOM also proved that the differences in the product specifications alleged by the United States has not distorted the price undercutting reflected in the average prices comparison, and the price undercutting reflected in the average prices comparison was not caused by differences in the specifications. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

43. 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 negate the conclusions MOFCOM drew from weak and deteriorating financial performance over the period. Thus, MOFCOM's determination that subject imports were causing injury is not based on a flawed impact analysis.

D. China Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

44. Contrary to the U.S. argument, MOFCOM did not "merely reiterated its unfounded assertions" regarding gains in domestic market share. The United States may not agree with MOFCOM's conclusion, and the focus on other aspects of the factual record to draw its conclusions about causal link, but MOFCOM sufficiently addressed this issue.

45. MOFCOM noted the specific U.S. argument about the domestic industry market share, and then responded at length in the original determination. MOFCOM again noted this specific argument during the redetermination process, and then responded once again. As MOFCOM summarized: "During the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product, impacted by which, the domestic industry have been suffering long-term losses, the pre-tax profit margin and ratio of return on investment have stayed at a very low level". There is no doubt that MOFCOM addressed this issue and explained why it rejected the U.S. argument. As important, the Panel previously addressed this same U.S. argument, and rejected the U.S. argument. The United States has not presented any reasons for the Panel to reach a different conclusion in this Article 21.5 proceeding.

46. Also contrary to the U.S. argument, the impact of subject imports of chicken paws was in fact injurious and MOFCOM explained why. The U.S. argument focuses on the physical quantity of chicken paws in isolation, without addressing the price effects that were so important to MOFCOM's causation analysis. MOFCOM addressed this issue twice: once in the original determination, and again in the Redetermination.

47. The Redetermination proceedings provided particularly relevant discussions relating to chicken paws, and the importance of considering not just the physical quantity but also the prices. The Redetermination collected data that showed price undercutting for chicken paws ranging from 9.51 percent to 24.74 percent. The volume of chicken paws, therefore, was lower priced and had adverse price effects on the domestic industry. The Panel has previously addressed this same U.S. argument. In the original proceeding, the Panel found that MOFCOM would need only to cross reference its rejection of the argument in the preliminary determination. That is precisely what MOFCOM has done, referencing the preliminary determination and the lack of any need to repeat those findings again. This is more than sufficient. The United States now simply repeated the argument from the original investigation. Therefore, there is no new element that MOFCOM needed to address other than cross-referencing the preliminary determination.

VI. THE REDETERMINATION IS CONSISTENT WITH ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT 1994

48. The United States raised three consequential claims in its Panel Request but did not present any substantive arguments in this regard. It appears that the United States has decided to waive these three consequential claims as it did not even present a *prima facie* case regarding these claims. Even if the Panel decides to reach these claims, they fail for reasons explained above.

VII. CONCLUSION

49. For the reasons set forth above, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's WTO obligations under all of the covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

INTRODUCTION

1. The themes that China highlighted in its First Written Submission continue to apply after the U.S. Second Written Submission. The United States has not seriously addressed any of these concerns. First, the United States continues to press several claims that are wholly or partially beyond the Panel's terms of reference. Since China's arguments under Article 6.2 of the DSU go to the Panel's very jurisdiction to hear those challenged claims, the Panel has no choice but to address those arguments and confirm the precise limits of the Panel's jurisdiction in this dispute.

2. Second, the United States continues to assert a single approach to issues for which the text of the relevant obligation contemplates a range of approaches, arguing that MOFCOM should have agreed with the U.S. respondents and their efforts to distort the per unit cost of producing different types of edible broiler parts, and to dismiss the injurious impact of the increasing volume of low-priced subject imports. But MOFCOM met its obligation by unbiasedly and objectively considering all available evidence and alternative cost allocations, and then explaining reasonably, objectively, and thoroughly why it chose one reasonable and proper allocation method, as mandated by Article 17.6 of the Anti-Dumping Agreement, as well as why Tyson's alternative was not acceptable. It met the same obligation by objectively and reasonably ensuring that its underselling analysis, based on a comparison of aggregate average unit values ("AUVs"), was not distorted. The underselling found was not merely a function of product mix. Indeed, the U.S. contention that that price of chicken paws is lower than the price of chicken breast was proven false. Thus, the analysis conservatively showed that imports undersold the domestic like product given the extremely limited volume of breast imports.

3. Third, the United States continues to press claims that make little sense in light of what the United States did not challenge in MOFCOM's Redetermination and concedes was WTO consistent. The specific U.S. claims must be evaluated in the context of the overall Redetermination. The MOFCOM Redetermination addressed all the findings made by the Panel in its original report, and did so in a way that respected China's obligations under the Anti-dumping and SCM Agreements.

I. CHINA RAISES SERIOUS OBJECTIONS UNDER ARTICLE 6.2 OF THE DSU THAT THE UNITED STATES SEEKS TO DISREGARD

4. The United States filed a deficient Panel Request that prevented China from anticipating the scope of several of the claims the United States raised in its First Written Submission. In its Second Written Submission, the United States attempts to disregard China's challenges under Article 6.2 of the DSU, claiming them to be "irrelevant or extraneous matters" to implementation proceedings under Article 21.5 of the DSU. This is simply wrong. On numerous occasions panels and the Appellate Body have affirmed the fundamental nature of an assessment of the scope of their jurisdiction in consideration of the text of the panel request, emphasising the due process objective of such assessment. They have also affirmed that such a jurisdictional assessment is relevant and applicable to implementation procedures under Article 21.5 of the DSU. The United States failed to identify with sufficient detail the measures taken to comply with the original panel report by China that it seeks to challenge, nor did it identify the specific omissions or deficiencies in such measures. Instead, the United States presents broad references, ambiguous language, and seeks to challenge unchanged aspects of the original determination. If also fails "to provide the legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies".

II. MOFCOM'S REDETERMINATION FULLY COMPLIED WITH THE PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM Fulfilled Its Obligations Under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

5. The claims under Article 6.1 of the Anti-Dumping Agreement and 12.1 of the SCM Agreement fall outside the panel's terms of reference and should be dismissed without consideration of its merits. The United States has failed to demonstrate that a reference to the Redetermination *in toto* accompanied by the use of non-exclusive language suffice to satisfy the requirements of Article 6.2 of the DSU in respect of its claim under Articles 6.1 and 12.1.

6. Moreover, China complied with its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. This U.S. claim rests on an artificial isolation of the procedural steps adopted by MOFCOM in the reinvestigation. But the facts for the reinvestigation taken as a whole show that the U.S. respondents were provided with the information requested from the Chinese producers, including their identities. The facts also show that through the hearing held by MOFCOM on 30 May 2014 at the request of the U.S. parties, they were provided with ample opportunities to present evidence in writing but only the United States chose to do so on June 3. The other parties failed to do so.

B. MOFCOM Fulfilled Its Obligations Under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement

7. The United States has not rebutted China's arguments for dismissing the U.S. claims under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement. Once again, the U.S. claim rests on the basis of an untenable mischaracterization of China's procedural obligation and should be rejected by the Panel.

8. First, as China explained in its First Written Submission, the United States simply failed to cite Article 6.1.2 and Article 12.1.2 in its Request for Panel. Given the nature of the obligations contained in the sub-provisions of Article 6 and 12, the absence of the reference to these specific sub-provisions is fatal for the proper identification of the legal basis for the U.S. claim. It therefore falls outside of the terms of reference of the Panel.

9. Second, and even if the Panel were to consider the U.S. claim as within its terms of reference, China respectfully submits that the claim must still be dismissed on the merits as legally baseless. The United States has fundamentally mischaracterized MOFCOM's obligations under these specific provisions, emptying them of content and equating them to its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. Contrary to what the United States argues, by releasing the public versions of the verification exhibits in the Public Reading Room, MOFCOM promptly made available non-confidential evidence provided by the Chinese producers in the reinvestigation.

C. MOFCOM Fulfilled Its Obligations Under Articles 6.4 and 6.2 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement

10. The Panel should also dismiss the U.S. claims under Articles 6.4 and 6.2 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. Once more, the United States attempts to fault China for the failure of the U.S. respondents during the redetermination proceeding and as such these claims are factually incorrect and legally baseless.

11. First, the United States fails to rebut China's terms of reference objection with respect to these claims. China has demonstrated that a general reference to the Redetermination accompanied by the language "for example" and followed by the reference to a non-existent measure does not suffice to fulfil the identification requirement set forth in Article 6.2 of the DSU in respect of the U.S. claims under Articles 6.4 of the Anti-dumping Agreement and 12.3 of the SCM Agreement. Furthermore, the United States is bringing a new claim under Article 6.2 of the Anti-dumping Agreement not included at all in its Request for Panel. China respectfully submits that these claims should be rejected without consideration of their merits.

12. Second, and even if the Panel were to consider these claims within its terms of reference, China submits that the United States fails to demonstrate that MOFCOM breached its obligations under Article 6.4 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. In particular, the United States fails to demonstrate that the U.S. respondents were denied by MOFCOM access to the record where the public version of the information provided by the Chinese producers is located. Nor has the United States demonstrated that China failed to give the U.S. respondents opportunities to make a presentation of their views.

13. It should be further noted that the United States does not contest China's argument in respect of the waiver of its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. Indeed the U.S. Second Written Submission confirms such waiver. While the United States includes a reference to this provision in the title of the section where it attempts to rebut China's terms of reference objections, these claims are not substantially argued by the United States.

D. MOFCOM Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

14. The U.S. arguments rest on the mistaken assumption that the "essential facts" in a reinvestigation proceeding are the same as the "essential facts" of the original investigation. According to the United States, any and all facts of the original investigation are also essential facts in the Redetermination. This view is wrong. The facts of the original investigation do not automatically become essential facts in the reinvestigation, and so what constitutes an "essential fact" of the reinvestigation might be different from what constitutes an "essential fact" of the original investigation. As a consequence, MOFCOM was not under the obligation to automatically disclose any and all data and calculations from the original investigation to all parties to the reinvestigation, except insofar as they were also "essential facts" for purposes of the Redetermination.

15. As regards Pilgrim's Pride, the United States argues that MOFCOM breached Article 6.9 because (1) it did not inform Pilgrim's Pride of all of its data and calculations from the original investigation; and (2) it disclosed the information too late in the process for Pilgrim's Pride to defend its interests. Both arguments are mistaken. First, MOFCOM only had to disclose the "essential facts" considered during the Redetermination proceedings. MOFCOM nonetheless disclosed data from the original investigation to Pilgrim's Pride. Second, the timeline of the disclosure presented by the United States is misleading. The facts show that Pilgrim's Pride made good use of the information and had ample opportunity to defend its interests before MOFCOM. In fact, MOFCOM made adjustments to its margins based on Pilgrim's Pride comments. In light of these circumstances, the U.S. argument that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride must be rejected.

16. The arguments concerning Keystone are equally misguided. MOFCOM recognizes that, notwithstanding Keystone's non-cooperation, MOFCOM had an obligation to disclose "essential facts" to Keystone. But China submits that MOFCOM properly discharged this obligation because the "essential facts" as regards Keystone are not the same as those of a cooperating party. In any case, MOFCOM was unable to disclose all data and calculations to Keystone, either directly or through the U.S. Embassy, in light of its failure to appear in the proceedings or duly appoint a representative to receive confidential information.

III. MOFCOM'S DUMPING REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Allocation of Tyson's Costs Was Consistent With Article 2.2.1.1

1. The second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs" and MOFCOM did so

17. This U.S. claim about Tyson is wrong both legally and factually. Legally, the United States tries to read more into the second sentence of Article 2.2.1.1 than the provision requires. China has presented an interpretation grounded in the text and context that the United States still has

not addressed: the second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs". China now confirms that interpretation by showing it better reflects the three equally authentic texts of Article 2.2.1.1 and the meaning of "proper", "juste", and "adecuada" in that provision. Moreover, under the second sentence of Article 2.2.1.1 the allocations not "historically utilized" by the exporter should not be considered as "evidence" for the authority. The "proper" allocation shall be interpreted in the context of Article 2.2.1.1 as whole; a cost allocation which is reasonably reflected under the first sentence of Article 2.2.1.1 shall be considered as "proper" under the second sentence. The United States, by withdrawing its claim on "reasonable reflection" under the first sentence and limiting its claim to "proper allocation" under the second sentence, presents an argument unhinged from that context. Finally, there is no legal requirement under Article 2.2.1.1 to investigate all products, as wrongly claimed by the United States.

18. China is not arguing that the authority can adopt an "improper" allocation of costs. China's point is that there is not a single "proper" allocation like the solution to a math problem. Rather, there are range of permissible "proper" allocations, provided the authority has considered the alternatives and sufficiently explained its reasoning. MOFCOM met this obligation.

2. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs

19. In the original investigation, Tyson's records did not reasonably reflect the cost of the product under consideration because Tyson misallocated the price of offal (waste products) to certain edible products, such as paw. MOFCOM corrected the distortion applying a weight-based methodology to allocate costs to specific models of the product under consideration.

20. Factually, MOFCOM thoroughly explained why it rejected Tyson's proposed alternative methodology. During the original panel proceedings, the Panel found insufficient evidence in the determination itself of MOFCOM's consideration. Given this finding, during the reinvestigation, MOFCOM clarified the facts and then explained the effect of Tyson's misallocation and its distortion in much more detail its reasons for adopting a weight-based allocation for the product under consideration, and for not accepting the Tyson alternative weight-based allocation for all products. MOFCOM thus complied with all findings by the original Panel, and eliminated any procedural deficiencies of MOFCOM's original determination.

21. After reviewing the Redetermination, the United States has not pursued its original claim for "reasonable reflection" under the first sentence, nor its prior claims under the second sentence that blood and feather were not allocated any cost under MOFCOM's weight-based method, and has now shifted to a claim about whether the cost allocation for blood, feathers, and other inedible parts was proper under the second sentence of Article 2.2.1.1, and whether all available evidence on the proper cost allocation had been considered. Indeed, the United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false.

22. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between the products under consideration and those products <u>not</u> under consideration, a distinction well-grounded in the anti-dumping practice and the specific facts of this particular investigation. The United States tries to misrepresent a statement by this Panel, reading a narrow statement about the "ambiguity" of a document as somehow embracing the U.S. substantive theory about how costs should be allocated. This time there is no ambiguity. China has submitted Tyson's Table 6.3, and the U.S. argument does not address this actual document. The Redetermination sets forth at some length the numerous and specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. Tyson's alternative was not supported by its accounting records, was deficient in terms of missing data (dead birds), was not verifiable (no indication of accounting sources), and was contradictory (unit costs were incomparable to previously reported costs). The U.S, argued that only a reallocation of costs to all products (not to the products under consideration only) by weight can justify the MOFCOM's weight-based allocation method. This is fundamentally wrong. It is indeed Tyson itself to have applied different cost method for edible and inedible products (waste products) in its accounting practice. In response, the U.S. arguments invite the Panel to substitute its views for those of authority, something contrary to the standard of review in Article 17.6(i) of the Anti-Dumping Agreement.

B. MOFCOM's treatment of Pilgrim's Pride's costs was also consistent with Article 2.2.1.1

23. This U.S. claim about Pilgrim's Pride is also wrong. One legal defect is that this claim about Pilgrim's Pride is outside the Panel's terms of reference. The Panel had not made any findings about Pilgrim's Pride under the second sentence of Article 2.2.1.1 and the U.S. Panel Request must be read in that context. Article 6.2 of the DSU does not allow the United States to craft a vague claim and then define that claim only later during the dispute.

24. Another legal defect is that the United States now seeks to enforce a finding the Panel never made. The finding in the original Panel Report regarding the second sentence of Article 2.2.1.1 did not apply to Pilgrim's Pride. MOFCOM completely implemented the Panel's actual finding. Since the Panel had accepted MOFCOM's decision to reject the Pilgrim's Pride reported information as unreliable, it underscores that the Panel finding about the second sentence was limited to those companies that had submitted reliable information as mentioned by the Panel in its conclusion.

25. A final legal defect is that the United States has not presented any argument in support of its claim sufficient to establish a *prima facie* case. Merely asserting that China did not comply with the finding − without any legal or factual discussion − is not enough to establish a *prima facie* case. And the MOFCOM explanations of the reasons for choosing the weight based allocation more than rebut the unsupported U.S. argument.

C. MOFCOM acted consistently with Article 9.4 of the Anti-Dumping Agreement in its selection of the rate for "all others"

26. The United States continues to argue the general rule of Article 9.4 that when an investigation is limited according to the second sentence of Article 6.10 an all-others rate shall not exceed the weighted average margin of dumping of the selected respondents. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

27. Finally, the U.S. assertion that exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's *reinvestigation* is irrelevant. The Panel in the original proceeding expressly upheld the sufficiency of MOFCOM's notice to interested parties. MOFCOM had no obligation as part of its implementation of DS427 to offer such parties a second opportunity to cooperate through the reinvestigation.

D. MOFCOM acted consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement with respect to Tyson

28. Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information. Since Tyson did not provide MOFCOM with the necessary data, MOFCOM was thus forced to turn to the "facts available" on the record − which included the data provided by Tyson. The United States does not challenge MOFCOM's legal argument nor the proposed standard that a responding party has to act to the "very best of its ability" or face the consequence that the investigating authority may resort to facts available. Rather, the United States challenges only the factual basis for MOFCOM's decision to resort to facts available, attempting to show that Tyson acted "to the best of its ability", while remaining silent on MOFCOM's choice of data as "facts available".

29. MOFCOM's purpose in the Redetermination was to implement the Panel's findings. The Panel found that MOFCOM's weight-based method was improper because the U.S. respondents such as Tyson claimed that China did not determine the real processing cost occurring at each processing step to each specific model. Thus, MOFCOM sought to ensure proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon earning the result from the Panel, Tyson complained in the redetermination that MOFCOM sought too much information. To the contrary, MOFCOM sought

only what was claimed by Tyson and required of it by the Panel, and without such information it could not accomplish its task. Tyson was the cause of this result.

30. China reiterates that responding parties such as Tyson are required to act to the very best of their ability when responding to the investigating authority. Failure to do so entitles the investigating authority to resort to facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement. The United States has neither disputed the existence of this rigorous standard, nor China's interpretation of this standard. Instead, the United States attempts to shift the debate by focusing on Tyson's failed attempts at responding adequately to MOFCOM's questionnaires and trying to explain away the deficiencies of Tyson's responses. The United States is mistaken. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement. The reinvestigation was driven by Tyson's claims, yet Tyson was not then prepared to comply through the provision of adequate information. Even if that was the "best" of Tyson's ability, MOFCOM was fully justified in resorting to facts available in light of the fact that it did not receive the necessary information from Tyson.

IV. MOFCOM'S INJURY REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Were Consistent with Anti-Dumping Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

31. The United States continues to claim that MOFCOM took "no action" that complied with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. As established by China, MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel in this proceeding.

32. Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing. This approach was a reasonable and objective method to address the issue of price comparability consistent with Article 17.6 of the Anti-Dumping Agreement. From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products. This was the Panel's concern, and therefore MOFCOM's approach was the direct way to address that concern. The evidence showed that, contrary to U.S. understanding about the value of different parts of the chicken in the Chinese market, U.S. imports were actually concentrated in high value products, and therefore price comparisons conducted on an aggregate AUV basis would be reasonable – there would be no risk that any price underselling showing in the comparisons would merely be the result of product mix. The United States is unhappy with MOFCOM's approach, but that does not make the approach unreasonable or WTO inconsistent.

33. With respect to price suppression, the United States adds nothing new. It repeats the same factual arguments that China already rebutted in its First Written Submission. The only new aspect of the U.S. argument is its insistence that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 under the SCM Agreement is the equivalent of the causation analysis called for under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. This much is confirmed from the very authority cited by the United States – the Appellate Body Report in *China – GOES* – in arguing the contrary conclusion. MOFCOM's Redetermination met the relevant standard.

B. MOFCOM's Analysis of Adverse Impact Was Consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

34. The United States complains that MOFCOM did not redo its analysis of adverse impact. This complaint, however, is misplaced for two reasons. First, since there was no measure taken to

comply and there was no need for MOFCOM to redo its analysis, this claim is outside the Panel's terms of reference for this Article 21.5 proceeding. It would be fundamentally unfair to subject China to potential consequences for acting inconsistently with Articles 3.4 and 15.4 when China has had no chance to react to specific concerns identified by a Panel. China and other WTO Members should not have to react to arguments, as opposed to findings by panels.

35. Second, MOFCOM's finding of adverse impact completely respected the obligations of Articles 3.4 and 15.4. MOFCOM expressly considered all enumerated factors, including those raised by the United States in its arguments. MOFCOM considered all those factors in context, putting particular weight on the domestic industry's consistently bad financial performance throughout the period, and the severely deteriorating overall performance at the end of the period in 2008 and early 2009. It is reasonable and objective to put particular weight on financial performance and the more recent period. That the United States can point to some positive trends for some factors earlier in the period does not render the MOFCOM findings unreasonable or biased. Those positive trends were discussed, but in the end MOFCOM correctly considered all of the factors.

C. MOFCOM's Analysis of the Causal Link Was Consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

36. The United States continues to seek an impermissible expansion of its claim #3. The United States defined that claim as ignoring certain WTO provisions "because" MOFCOM's determination "was not based on an examination of all relevant evidence". This language is a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore, relates to the specific obligations found in the second sentence. The U.S. claim then specified the two categories of evidence that were ignored as part of the very same sentence. The claim was thus defined by reference to these two specific categories of evidence. The United States cannot now avoid the implications of its narrowly drawn claim and add a third and entirely different aspect about an alleged failure by MOFCOM to reconcile the causation finding with improving domestic industry performance. The Panel must see this effort for what it is and limit its consideration to the claim as it was specifically framed in the U.S. Panel Request.

37. Regarding the issue of chicken paws, the Panel finding on this issue was limited to the procedural claim about proper disclosure of the MOFCOM discussion. Since the United States had only raised the issue about chicken paws as a procedural claim under Article 12.2.2, the Panel only addressed that issue, and MOFCOM only addressed that issue. MOFCOM fully addressed the finding the Panel actually made regarding chicken paws. MOFCOM did precisely what the Panel required – which was a cross reference to the earlier discussion of this issue in the MOFCOM preliminary determination.

38. Turning to the merits of the U.S. claim, MOFCOM established the necessary causal link between subject imports and the condition of the industry, and that none of the U.S. arguments break this causal link. To this end, the United States concedes that MOFCOM need only show that subject imports contributed to the adverse condition of the domestic industry. The United States also concedes the adverse impact from the increasing volumes of low-priced subject imports that undersold domestic prices. These subject imports injured the domestic industry throughout the period of investigation (as reflected by the consistent operating losses), and led to a dramatic fall in indicators from 2007 to 2008, and in early 2009. Its rebuttal consists of an argument that MOFCOM did not consider certain other facts, that MOFCOM did not examine "all" relevant evidence. But this argument is wrong. The Redetermination shows that MOFCOM did consider "all relevant evidence".

39. First, MOFCOM did not ignore the evidence regarding domestic market share. China addressed this point at some length in its First Written Submission. The United States simply ignores that discussion. Second, MOFCOM did not ignore the evidence regarding chicken paws. The United States asserts that imports of chicken paws "could not have injured the domestic industry", but this assertion is just wrong and rests on several flawed premises about the market and the evidence before MOFCOM. Third, MOFCOM did not ignore the evidence of correlations between subject imports and the condition of the industry. The United States largely repeats is own prior arguments, without addressing China's arguments. The United States continues to cite the change by comparing 2006 to 2008, in a disingenuous effort to mask the sharp decline from 2007 to

2008, and to avoid the further decline in interim 2009. Overall, the domestic industry had an unacceptable level of financial performance throughout the period of investigation. Finally, the United States also makes a consequential claim based on allegedly defective MOFCOM analysis of price effects. But as already discussed MOFCOM did not rely on a defective analysis of price effects.

40. In sum, MOFCOM established that subject imports were contributing to the adverse condition of the domestic industry, and established the requisite causal link, particularly given the absence of any other possible causes. The Panel should uphold the Redetermination as fully consistent with Articles 3.1 and 15.1 as well as Articles 3.5 and 15.5.

D. MOFCOM Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

41. The United States reiterates its earlier argument that MOFCOM did not really address in the Redetermination the substance of the arguments made in the proceeding, but does not really respond to China's arguments that MOFCOM in fact did address these arguments. Regarding domestic market share, the U.S. argument is really a complaint that MOFCOM considered all of the evidence and put into context the single fact that the domestic industry gained market share with all of other facts showing a domestic industry suffering material injury because of unfairly traded subject imports. The United States apparently thinks that increasing domestic share is somehow entitled to more weight than other facts, but it is not. Regarding chicken paws, the United States continues to argue that MOFCOM's response was not enough, but without addressing either of China's arguments. China explained how the Redetermination included new information about the price effects of chicken paws, including specific margins of chicken paw price underselling; further, China also explained that it made the very correction to the final determination the Panel had suggested.

V. MOFCOM'S REDETERMINATION WAS CONSISTENT WITH ARTICLE I OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT

42. The United States presents no argument at all in support of its three consequential claims. Although these claims were raised in the Panel Request, they were not mentioned at all in the First Written Submission. It is not enough to raise a consequential claim in a Panel Request and then present no argument at all. These claims have either been waived, or the United States has failed to present a *prima facie* case. The United States has not responded to this legal objection at all. The Appellate Body has made clear that (1) the complaining party bears the burden of proof with regard to its claims, and (2) a *prima facie* case requires more than just an allegation without any discussion of the facts or legal basis. In this dispute, the United States has made this issue easy for the Panel by providing no discussion at all in the U.S. First Written Submission, and essentially no rebuttal or discussion in the U.S. Second Written Submission. For these reasons, whatever the Panel decides about the other U.S. claims, it must reject the U.S. consequential claims as not having been established.

CONCLUSION

43. For the reasons set forth in China's First Written Submission and Second Written Submission, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's obligations under all of the covered agreements.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING OF THE PANEL

1. This document summarizes the key points presented by China during its opening and closing statement at the substantial meetings with the Panel on 25 and 26 April, 2017.

2. China notes at the outset that the United States has effectively abandoned one of its claims under the first sentence of **Article 2.2.1.1 of the Anti-dumping Agreement** and its other two claims under the second sentence. The U.S. claims that MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 by including costs for products not subject to investigation into the costs for the products subject to investigation.

3. China did not address in detail the U.S. argument concerning Pilgrim's Pride as Panel acknowledged in its preliminary ruling on jurisdictional issues that in the original dispute, the Panel made no specific findings of violation under the second sentence of Article 2.2.1.1 regarding Pilgrim's Pride. But even if the Panel allows the U.S. claim on Pilgrim's Pride cost allocation, the United States merely asserted that China did not comply with the findings and has not provided any legal or factual discussion during this proceeding. This is not enough to establish a *prima facie* case.

4. In regards of Tyson and what it concerns the proper allocation of cost, China considers that the U.S. interpretation of the second sentence in isolation from the context provided in the first sentence improperly eliminates the logical interrelationship between the two sentences, an approach that is contrary to the U.S. interpretative approach in the original dispute. Instead, it is China's belief that Article 2.2.1.1 focuses on the correct process to consider evidence for the proper allocation of costs and that the second sentence needs to be read in conjunction with the first sentence of Article 2.2.1.1. Indeed, the "proper" allocation of costs under the second sentence is supplemental to "reasonable" reflection under the first sentence of Article 2.2.1.1. Since China's weight-based allocation method does "reasonably reflect" the cost under first sentence, it should be considered as the "proper" allocation of costs under second sentence of Article 2.2.1.1. China's argument is that, depending on the facts of each case, there may well be more than one "proper" way to allocate costs. China's interpretation has not been challenged by the United States and can be confirmed easily by looking at the text of Article 2.2.1.1 in all three authentic languages.

5. The United States challenges MOFCOM's decision to reject Tyson's proposed alternative cost methodology. However, China notes that MOFCOM's redetermination satisfies the Panel's ruling in the original proceeding; and that MOFCOM was entitled under Article 2.2.1.1 not to accept Tyson's proposal as evidence since it had not been historically utilized. This has been confirmed by the findings of the panel in *US – Softwood Lumber V* and the U.S. position in that case.

6. As to the factual grounds of this claim, China noted that during the original investigation MOFCOM found that Tyson's records did not reasonably reflect the cost of the product under consideration because it misused the price of offal (waste products) to estimate the cost of certain edible products, such as paws. MOFCOM corrected the distortion by applying a weight-based methodology to properly allocate costs to specific models of the product under consideration. During the reinvestigation, MOFCOM clarified the facts surrounding Tyson's costs and MOFCOM's findings, and explained in much more detail why MOFCOM decided to adopt a weight-based allocation for the products. In short, the problem is that Tyson tried to confuse the product subject to investigation with products not subject to investigation to assert that MOFCOM did not properly reallocate the cost to all products.

7. The Redetermination sets forth at some length the four specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. First, Tyson did not take into account weight loss resulting from dead birds. Second, Tyson provided only the cost of product under investigation in Table 6-3 without including weight and cost of non-subject product. Third, MOFCOM did not determine that

the cost allocation methodology for non-subject products was unreasonable. And fourth, Tyson did not provide the cost of live chickens used for the product concerned.

8. The United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between subject products and non-subject products. This distinction is well-grounded in the anti-dumping practice and the specific facts of this particular investigation. Moreover, Tyson was fully aware of the distinction. For example, in the original investigation, Tyson submitted cost table 6-3 listing many specific products, all edible, none inedible; and in the reinvestigation, when it submitted some information on products not within the scope in its first supplemental questionnaire response, Tyson provided that information under the heading "inedible".

9. MOFCOM's definition of the subject products (i.e., edible products) is reasonable. The United States cannot require MOFCOM to use a different definition because doing so violates Article 17.6(ii) of the Anti-Dumping Agreement − requiring MOFCOM to replace its permissible interpretation of the like product (i.e., edible products) with a different one.

10. In respect of the U.S. claim under **Article 6.8**, China notes that Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information as requested. Consequently, MOFCOM was thus forced to turn to the "facts available" on the record −facts that were based on the data provided by Tyson. For the purpose of implementing the findings by the original Panel, MOFCOM sought to ensure a proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon learning the result from the Panel, Tyson complained during the redetermination proceeding that MOFCOM sought too much information while Keystone failed to cooperate in the redetermination. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement.

11. We now turn to the **Article 9.4** issue. The United States argues that when an investigation is limited according to the second sentence of Article 6.10, an "all-others" rate shall not exceed the weighted average margin of dumping of the selected respondents as per the general rule of Article 9.4. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

12. Let me turn to **price suppression and underselling**. The U.S. claim is that MOFCOM took "no action" to comply with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. But MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel by collecting the full range of product specific pricing data from the verified producers in the reinvestigation −and by expressly addressing the product mix issue.

13. First, under **Articles 3.2 of the Anti-Dumping Agreement** and **15.2 of the SCM Agreement**, MOFCOM is free to select its own method of pricing analysis, provided it conducts an "objective examination" of "positive evidence"; and two, the Panel did not require MOFCOM to abandon its use of average annual AUVs. MOFCOM was simply required to "consider" whether there was "significant" price undercutting and had ample discretion to choose its methodology.

14. MOFCOM disproved the U.S. assertion that subject imports were dominated by low value products. MOFCOM examined: (1) import data compiled by China Customs; (2) export data provided by USPEEC; (3) product-specific pricing by four domestic producers, data which was verified during the Redetermination; and (4) the prices shown on the invoices. This data proved that imports were concentrated in high value products, suggesting that any comparison of aggregate AUVs would work against the domestic industry, not in favor. The United States no longer directly challenges this argument; rather, it attacks the representativeness of the domestic data. The United States effectively conceded the point in the redetermination proceeding and now

seeks to ignore this reality. But the reality is clear: in the Chinese market even Tyson charges more for products like paws than products like chicken breast.[1]

15. First, MOFCOM has the discretion to select the method it considers best depending on the particular circumstances of the investigation. And second, MOFCOM's underselling analysis was based on complete industry data, not the data of four producers. There was no sampling of data. MOFCOM's limited examination of product-specific data was merely to confirm the two key points: (1) whether U.S. imports were concentrated in lower value products; and (2) whether the overall AUV comparison was conservative, including whether the underselling would have been higher using product specifications. On both points, the supplemental analysis confirmed MOFCOM's conclusions in the original determination, an approach that is both reasonable and objective.

16. As to price suppression, it needs to be noted that MOFCOM considered the combined effects of increasing volume and underselling and found price suppressing effects from both. As explained in the redetermination, the dumped and subsidized imports had two effects. First, they created a situation of price undercutting. Second, they also caused price suppression, as reflected in the decreasing profit levels. Both of these effects were the result of the dumped and subsidized subject imports.

17. The United States further insists that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 of the SCM Agreement is equivalent to the causation analysis under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. In this case, MOFCOM's Redetermination met the relevant standard.

18. The United States complains that MOFCOM did not redo its entire analysis of adverse impact. But contrary to the U.S. complaints, the Panel did not make a finding requiring MOFCOM to carry out its analysis anew.

19. In its redetermination, MOFCOM listed the injury factors, and then provided an explicit overall discussion of how those factors interacted and how subject imports were explaining that adverse impact. MOFCOM was careful in drawing an explicit link to both lower domestic prices and lower domestic profits. MOFCOM also discussed the causal link extensively, and explained how the subject imports were linked to specific injury indicators. The increasing volume and market share of low priced subject imports led MOFCOM to conclude: (1) such imports had a "material impact on the sales price" of the domestic industry; (2) the domestic industry could not "reach a reasonable profit margin"; (3) domestic industry capacity utilization "has been on a relative low level"; (4) the return on investment was on a "relative low level"; and (5) the inconsistent cash flow "impacted the investment and financing". **Articles 3.4 and 15.4** expressly include these as injury factors.

20. The other arguments raised by the United States also miss the point. Contrary to the U.S. argument, the prospect of future imports is not irrelevant to MOFCOM's current injury analysis. China presented a specific argument regarding the meaning of the key phrase "potential decline". In China's opinion, this language contemplates a forward-looking analysis. The United States simply ignores this part of the text of Article 3.4 and instead cites to language from the decision of the Appellate Body in *China – GOES* that was not addressing this specific issue. The United States has simply not responded to China's argument based on the text.

21. The weak capacity utilization reinforced the severe financial problems of the domestic industry, and reinforced MOFCOM's finding of current material injury. First, the United States has not seriously challenged MOFCOM's finding about increasing inventories; in fact, it largely dropped this part of its claim and does not address at all the increase in inventory in 2009. The U.S. argument on adverse impact thus comes down to its argument about capacity utilization. Yet by focusing on one or two of the many injury factors, the United States misses the point that although the authority must address each factor, the authority need not show that each individual

[1] *See, e.g.,* https://list.tmall.com/search_product.htm?q=%CC%A9%C9%AD&type=p&vmarket=&spm=875.7931836%2FB.a2227oh.d100&from=mallfp..pc_1_searchbutton (listing Tyson chicken prices in China).

factor by itself has been linked to subject imports. The authorities are to consider all the factors, but then consider them as a whole when making the broader conclusion that subject imports have explanatory force with regard to the condition of the domestic industry.

22. The evidence on the record fully supports MOFCOM's finding. China's argument is straightforward: by definition, any volume of subject imports was having some impact on the excess domestic capacity. Any volume not supplied by subject imports would have been available for domestic suppliers. Even if non-subject imports supplied some of that volume, domestic suppliers would also have supplied some and therefore, would have had higher capacity utilization.

23. Instead, the United States argues that there was low capacity utilization because of expanding domestic capacity. Regardless, the rate of utilization would have been higher, but for the presence of increasing volumes of subject imports.

24. MOFCOM properly focused on the actual situation of the domestic industry, and properly found material injury consistent with Articles 3.4 and 15.4.

25. Let me briefly touch on the issue of **causation**. We refer the Panel to paragraph 31 of the U.S. opening statement and the U.S. claim that MOFCOM in its redetermination ignored U.S. arguments concerning increasing market share. There, the United States cites to a single page in the redetermination and contends this constitutes MOFCOM's entire analysis of the market share issue as contended by China in its First Written Submission. The United States ignores other sections of China's First Written Submission, such as paragraph 385, where China demonstrated that MOFCOM took into account all the factors as a whole, including market share. The United States also ignored China's discussion of this issue at paragraphs 345 and 346 of its Second Written Submission. But perhaps most glaring is that the United States ignored MOFCOM's specific response to this U.S. argument about market share at page 79 of its Redetermination, which is provided as Exhibit China-1. The redetermination, read as a whole, clearly addresses and responds to the U.S. argument.

26. China wishes to conclude its remarks with two very important matters that we believe play a very important role and that came to a head during these meetings.

27. The first is the standard of review under **Article 17.6.** A Panel's role is to review the authority's determination, but not to arrive at its own separate conclusion about what the Panel would have done under similar circumstances. To this end, we expect the Panel to conclude that if MOFCOM's redetermination was reasonable, it will be upheld, even if the Panel would have approached the matter differently.

28. Second, China believes it is extremely important to establish and respect who bears the burden of proof in this proceeding. China requests the Panel to review whether the United States has met its own burden by presenting evidence in support of its claim. To this end, the fact that China has produced a document at the request of the Panel does not necessarily mean that the burden has shifted to China.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 26 April 2017.

2. On the United States' **procedural claims relating to disclosure requirements**, the European Union notes that following the Panel's Preliminary Ruling of 22 March 2017, the United States' claims under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement (ADA) are outside the Panel's terms of reference, while the United States' claims under Articles 6.1 and 6.4 ADA are within the Panel's terms of reference.

3. The European Union considers that **Article 6.4 ADA** is more directly relevant to the alleged omission than Article 6.1 ADA. The data provided by the domestic firms, which was the main pillar of the revised price effects analysis, is "relevant information" "used by the authorities" pursuant to Article 6.4. MOFCOM thus had to give interested parties a timely opportunity to see such information and prepare presentations accordingly. "Timely opportunities" means that the information must be made available early enough in the process, so that the comments can still be taken into account in the decision-making of the investigating authorities. The European Union invites the Panel to closely scrutinize whether this was the case here.

4. The European Union is of the view that the obligations set out in **Article 6.1 ADA** (both alternatives) concern information requests to those parties that are supposed to hold the relevant information. It should not be read as establishing a general obligation to systematically *notify* any information request to all players in the investigation, regardless of whether the information required falls within their remit.

5. On **Article 6.9 ADA**, the European Union considers that calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute essential facts pursuant to Article 6.9. As far as the redetermination is concerned, this means that all data and calculations for determining this duty must be disclosed, including data from the original investigation, if it was determinative/ relied on in the redetermination. On the other hand, data from the original investigation which had no direct relevance for the re-determined duty would not qualify as an essential fact. Where facts available are used to determine a duty, the same disclosure obligation applies in principle. Thus, specific data and calculation methods used must be disclosed, subject to the requirements of Article 6.5 ADA.

6. Regarding the United States' **claims on dumping**, the European Union's position is that **Article 2.2.1.1 ADA** sets up a substantive obligation of proper cost allocation, not just a procedural obligation to consider evidence. Such a procedural obligation would be void and empty if it did not reflect, and were not tied to, the existence of a substantial obligation. In this regard, the European Union agrees with the original Panel[1] and the panel in *EC – Salmon (Norway)*[2] that the allocation method applied by an investigating authority must not result in the calculation of a cost of production that includes costs not "associated" with production and sale of this product in the period of investigation. The European Union also agrees with the United States that the allocation method used must be applied consistently. Thus, if the allocation is done on the basis of weight, and not value, costs which occur with regard to the whole chicken, must be spread over all products according to their weight, even if they generate little value – to the extent they are associated with the product in question.

7. On the use of facts available pursuant to **Article 6.8 ADA**, the European Union stresses that the aim of the provisions on the use of facts available is not to punish non-cooperating interested parties. It is to allow investigating authorities to arrive at accurate determinations based on reliable data, where interested parties do not provide such data. Thus, an investigating authority is

[1] Panel Report, paras. 7.196-7.197.
[2] Panel Report, *EC – Salmon (Norway)*, paras. 7.491, 7.507.

allowed to replace any necessary information that has been requested from an interested party but has not been provided, whatever the reason for not providing it (non-cooperation or not). To the extent that information is not missing, for instance because the respondent has provided partial information, it cannot be replaced[3], unless it is unreliable. Non-cooperation is one case where data is considered unreliable, but there are others, as Annex II.3 ADA shows. Untimely submission which makes a necessary verification impossible is one example. Another example, a selective submission of data, where one sub-set of data is provided but not another one, may cast doubts on the reliability of the whole data set. In this context, costs of production have been identified as a particularly crucial sub-set of data, the absence of which may very well have ramifications beyond the pure cost analysis. If an investigating authority wants to disregard data as unreliable, the burden of substantiating the unreliability falls on the authority; lack of cooperation will make findings of unreliability more plausible.

8. Regarding the United States' **claims relating to the findings on injury**, as far as the price effects analysis under **Article 3.1 ADA** is concerned, the European Union notes that the requirement to base the "determination of injury" on positive evidence and an objective examination extends to all fundamental elements of the injury analysis. Any finding on this issue should thus be supported by "positive evidence" pursuant to Article 3.1 ADA (i.e., evidence of an affirmative, objective and verifiable character, which is credible[4]), which is gathered, inquired into and, subsequently, evaluated in a way that conforms to the basic principles of good faith and fundamental fairness. The analysis must be based on data which provides an accurate and unbiased picture of what it is that one is examining[5]. The European Union acknowledges that where samples are used, the samples must be "properly representative of the domestic industry"[6]. Samples that represent a too low proportion of the domestic industry can be problematic.

9. However, in the European Union's view, the standards for representativeness of samples for general price levels of products (as at stake in the present case) are not necessarily the same as for samples on price trends. Price trends depend on a range of factors and easily vary from one segment of the industry to another, in particular due to different economic performance of different segments of the industry. On the other hand, the European Union would a priori imagine that the difference in value of certain product types is less likely to change fundamentally according to which segment of the industry is being looked at, as it does normally not depend on the economic performance of the industry segment in question. Depending on the circumstances of the case, a smaller sample could thus be sufficient for assessing differences in value of product types.

10. On the impact analysis under **Article 3.4 ADA**, the European Union expects that the Panel will be guided by the high standard that the Appellate Body has set in this field. According to this standard all factors having a bearing on the state of the industry must *always* be evaluated by the investigating authorities in every investigation[7]; this evaluation consists of an analysis and interpretation of the facts established in relation to each listed factor, its role, relevance and relative weight[8]. Where several factors show positive trends, an overall evaluation of all factors becomes even more indispensable. This evaluation, which puts data on all factors in context to each other, must explain why and how, *despite the positive factors*, the domestic industry was injured, and whether and how the positive movements were outweighed by any other factors[9].

11. The Panel might wish to examine in particular the two main aspects highlighted by China, namely the weaker financial indicators and the trends in the first half of 2009, in order to assess how "heavy" they weigh in relation to the other factors examined, in particular those that were positive. The European Union invites the Panel to assess carefully whether the consideration that China submits it has given to all relevant factors is apparent not only from the submissions to the Panel, but duly reflected in relevant documentation from the investigation[10].

[3] Appellate Body Report, *Mexico – Anti-Dumping measures on Rice*, para. 288.
[4] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192; *China – GOES*, para. 126.
[5] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; *China – GOES*, para. 126.
[6] Appellate Body Report, *EC – Fasteners (China)*, paras. 435–436.
[7] Appellate Body Reports, *China – HP-SSST*, paras. 5.203-5.209, and cases cited therein.
[8] Panel Reports, *Egypt – Steel Rebar*, paras. 7.42-7.51; *EC – Tube or Pipe Fittings*, para. 7.314
[9] Panel Reports, *Thailand – H-Beams*, paras. 7.249 and 7.255; *Korea – Certain Paper*, para. 7.273.
[10] Appellate Body Report, *China – GOES*, para. 131.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. In this proceeding, Japan addresses its views on systemic aspects regarding the interpretation of Articles 2.2.1.1, 3.1, 3.2, and 6.9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Articles 15.1 and 15.2 of the Agreement on Subsidies and Countervailing Measures (the "SCM"), as well as regarding its view on judicial economy regarding the claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5. Japan does not take any particular position on factual aspects on this dispute.

I. MOFCOM'S Analysis of Price Comparability under ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2

2. The original panel found that the product mix of the subject imports and that of the domestic like products varied considerably. The subject imports were composed of limited parts of chicken products, including a high proportion of paws, legs, wings and gizzards, whereas the domestic like products included all other parts of chicken, including breast meat.[1] Despite such difference, MOFCOM simply compared their average unit values (AUVs) and found that the subject imports had undersold the domestic like products.[2] The panel found that the evidence showing price differences between different chicken parts "should [] 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'".[3] The original panel thus found that MOFCOM failed to ensure price comparability in terms of product mix in violation of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

3. In this dispute, the United States alleges that, MOFCOM collected product-specific pricing data from four out of the seventeen domestic producers that constituted the domestic industry in the course of the Reinvestigation[4]. According to the United States, MOFCOM found that, these data from the four domestic producers show that chicken paws, legs, wings and gizzards were priced higher than other parts of chicken, indicating that subject imports consisted primarily of higher-value products, not lower-value products as respondents alleged.[5] MOFCOM thus concluded in the Redetermination that "the price undercutting reflected in the average price difference is not caused by different product mix".[6]

4. The United States argues in its first written submission that MOFCOM still failed to ensure the price comparability, because MOFCOM failed to establish that the data collected from only four domestic producers were sufficiently representative of the prices of the domestic like products.[7] The United States also argues that MOFCOM's analysis of price comparability is deficient.

5. China argues that MOFCOM's additional findings based on the product-specific price data in the Reinvestigation were made only to establish that the comparison based on the overall AUVs did not negatively bias the US producers.[8] China explains that "[i]f any bias existed in the comparison, it in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product."[9]

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[1] Panel Report, *China – Broiler Products*, para. 7.490.
[2] Panel Report, *China – Broiler Products*, paras. 7.490-494.
[3] Panel Report, *China – Broiler Products*, para. 7.493.
[4] United States' first written submission para. 145.
[5] United States' first written submission, para. 134.
[6] United States' first written submission, para. 38, quoting RID, Section VII (ii) (2) p. 18-19 (Exhibit USA-8).
[7] United States' first written submission, paras. 145-149.
[8] China's first written submission, para. 288. ("MOFCOM made additional findings about product-specific underselling based on the available data. But these findings were only to establish there was no bias in using the overall AUV approach.")
[9] China's first written submission, para. 274.

6. Japan agrees with the United States that the analysis of price effects of the subject imports on the domestic like products would not be performed properly unless MOFCOM would show that the product-specific price data collected by MOFCOM were sufficiently representative of the entire sales of the domestic like products. Other domestic producers, who were not reinvestigated by MOFCOM, may have different product-specific pricing. Thus, the investigating authority must make sure that the sales data on the chicken paws, legs, wings and gizzards collected from a limited number of domestic producers are sufficiently representative of the entire sales by the domestic industry.

7. In addition to the above, Japan notes that the need to ensure the price comparability between the subject imports and the domestic like products in conducting the price effects analysis is well-established in the WTO jurisprudence. According to the Appellate Body in *China – GOES*, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[10] The Appellate Body has stated that a failure to ensure price comparability is inconsistent with the requirement under ADA Article 3.1 and SCM Article 15.1, which provide that a determination of injury be based on "positive evidence" and involve an "objective examination".[11] The Appellate Body has emphasised that "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."[12] The requirement to ensure the price comparability between the subject imports and the domestic like products is therefore an integral aspect of the obligation to consider the price effects of subject imports under ADA Article 3.2 and SCM Article 15.2.

8. The requirement to ensure the price comparability between them is supported by the notion of the "logical progression of inquiry" under ADA Article 3 and SCM Article 15. Drawing on this notion, the panel in *China – X-ray Equipment* stated, in the context of ADA Article 3, that:

> It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports "through the effects of dumping, as set forth in paragraphs 2 and 4" are causing injury to the domestic industry, that it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable.[13]

9. As the panel in *China – X-Ray Equipment* also correctly observed, prices of the subject imports and the domestic like products are not comparable if they are not in a competitive relationship, and consequently do not interact to each other in the domestic market. The original panel also stated to this effect: "the focus of the comparison performed under ADA Article 3.2 and SCM Article 15.2 is on the competitive relationship".[14]

10. Recently, the Appellate Body has confirmed in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that the analysis "must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 3.5 of the Anti-Dumping Agreement."[15] Accordingly, in order to reach the ultimate determination of the causation, "[a]n examination of the competitive relationship between products is … required so as to determine whether such products form part of the same market."[16]

11. It is therefore irrelevant whether the product-mix difference between the subject imports and the domestic like products would work in favour of the former or the latter. Japan considers that in this regard, China's argument does not speak to the propriety of such comparison and cannot cure the flawed price comparability analysis.

12. Japan also notes that the likeness finding between the product under investigation and the domestic like products as a whole would not provide sufficient basis to conclude that each

[10] Appellate Body Report, *China – GOES*, para. 200.
[11] Appellate Body Report, *China – GOES*, para. 200.
[12] Appellate Body Report, *China – GOES*, para. 200.
[13] Panel Report, *China – X-Ray Equipment*, para. 7.50. *See* also Panel Report, *China – Broiler Products*, para. 7.475. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.162.
[14] The original panel expressly stated that "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". Panel Report, *China – Broiler Products*, fn 737.
[15] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.180.
[16] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.262.

individual type of the products under investigation competes with, and accordingly are comparable with, each of the domestic like products.

13. In this regard, the panel in *China – X-ray Equipment* clarified that an investigating authority's conclusion of "likeness" for the purpose of defining the product under consideration and the domestic like products cannot automatically form the basis for the price comparability between individual products. The panel in *China – Autos (US)* also noted, "these issues arise at and relate to different stages of an investigation"[17], and accordingly, "[e]ven granting that a like product determination may be relevant as the starting point of an assessment of price comparability…it will not always be determinative".[18]

14. As the original panel found, "evidence of [price differences between different chicken parts] 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 'basket' [and would] have required MOFCOM to take necessary steps to ensure price comparability".[19] As discussed above, it is irrelevant whether the difference in product-mix would favour the US imports or the domestic products. The focus should be on whether, for example, chicken gizzards and chicken breasts are in a competitive relationship and thus comparable for the purpose of price effects analysis. If the average price of chicken gizzards is substantially higher than that of chicken breasts in the Chinese market, this suggests that different parts of chicken may have limited substitutability and a weak competitive relationship. If this is the case, a price undercutting of chicken gizzards would have little, if any, effects on the price of chicken breasts and thus the AUV comparison between the broad basket of the subject imports and that of the domestic like products would be inappropriate for the purpose of the price effect analysis under Articles 3.2 and 15.2. Japan invites the Panel to take into account these legal considerations in deciding on this issue in this dispute.

II. The Practice of Judicial Economy regarding the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5

15. The original panel found that MOFCOM's price effects analysis was inconsistent with ADA Article 3.2 and SCM Article 15.2. With respect to the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5, the panel exercised judicial economy and did not make any findings. The panel stated that making additional findings with regard to ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 would not assist the resolution of the dispute, because "[i]mplementing the Panel's findings with respect to MOFCOM's price effects analysis will require China to re-examine MOFCOM's Determination concerning the impact [and causation]".[20] However, in implementing the original panel's finding with respect to the price effects, MOFCOM did not change its impact analysis in the re-determination.

16. In this compliance proceeding, China alleges that MOFCOM was not in a position to change its impact analysis and causation analysis, given that the original panel exercised judicial economy and did not make any findings on whether its impact and causation analyses are WTO consistent. Irrespective of whether China's allegation is correct or wrong, Japan considers that it might have assisted in resolving this issue of dispute had the panel made findings with respect to ADA Articles 3.4 and 3.5 and SCM Articles 15. 4 and 15.5.

17. In this respect, Japan recalls that the Appellate Body has stated, in *Australia – Salmon* that "the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system……A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member."[21] A panel should carefully assess how its findings or non-findings regarding a claim would affect the Member's implementation of DSB recommendations and rulings.

[17] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, fn 441.

[18] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, para. 7.278.

[19] Panel Report, *China – Broiler Products*, para. 7.493. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.181 ("a proper analysis of price effects ought to have taken into account the fact that there were significant differences in the prices of these product types.").

[20] Panel Report, *China – Broiler Products*, paras. 7.555, 584.

[21] Appellate Body Report, *Australia – Salmon,* para. 223. (underline added).

18. In the Panel's preliminary ruling of 22 March 2017, the Panel held that the claims of the United States under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 were within the terms of reference for this compliance proceeding. To secure a positive resolution of the current dispute, Japan encourages the Panel to make findings with respect to the claims of the United States that are within the terms of reference for this compliance proceeding.

III. Proper Allocation of Costs under ADA Article 2.2.1.1

19. With respect to ADA Article 2.2.1.1, Japan agrees with the United States that the investigating authority is required to evaluate all available evidence and undertake a "proper" allocation of cost to calculate the normal value. On this point, the original panel suggested that the investigating authority may weigh in mind the facts of a particular case under investigation when considering the evidence relating to cost allocation methods.

20. ADA Article 2.2.1.1 read together with Article 2.2, for the purpose of this paragraph, provides conditions an investigating authority needs to satisfy when constructing the normal value on the basis of production costs in the country of origin. Japan understands that in principle, the normal value should be an appropriate proxy of the price in the "ordinary course of trade" for the products when destined for the consumption in the exporting country. Japan notes that in circumstances where a certain part of joint-products has little commercial value in the exporting country's market, while all joint products are commercially marketed in the importing market, due to consumers' different eating habits, such facts in a particular case may need to be taken into account in calculating the dumping margin. The question is whether an investigating authority can take into consideration the actual market practices of relevant countries, such as differences in consumers' perceptions, as against only evidences of exporting countries, when deciding the proper allocation of costs.

21. In the original panel proceeding there was a debate on whether the investigating authority should have used weight-based cost allocation or value-based cost allocation. The issue disputed could be understood as whether the investigating authority may take into consideration the relevant countries' proper market practices under the circumstances of the case. In this compliance proceeding, the United States focused its argument on MOFCOM's use of alleged distortive weight-based allocation methodology in its redetermination, and challenged that MOFCOM's cost allocation methodology was not "proper". Japan considers that whether or not the cost allocation is "proper" cannot be determined in the abstract. If the investigating authority chooses to deviate from the cost allocation used by exporters and foreign producers, it should adhere to the actual market practices of the relevant countries and fully explain its deviation. In this regard, Japan views that China has not adequately explained why MOFCOM's decision regarding cost-allocation was "proper" based on the market practices of the relevant countries.

IV. Disclosure of Essential Facts

22. Finally, Japan would like to emphasise the importance of the disclosure of "essential facts" which form the investigating authority's basis of determination, pursuant to ADA Article 6.9.[22] The necessity to secure the transparency and due process of interested parties in anti-dumping investigations remains the same under reinvestigations. ADA Article 6.9 obliges the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis. In other words, disclosure by investigating authorities should provide the interested parties with the necessary information that enables them to comment on the completeness and correctness of the facts being considered by the investigating authority, and thus ensure a fair determination by the investigating authority. In light of the above, while Japan takes no position on the factual issues of this case, Japan respectfully request the panel to review the consistency of MOFCOM's disclosure during its reinvestigation with *AD Agreement* Article 6.9.

[22] Panel Report, *China – Broiler Products*, para. 7.90.

ANNEX E

PRELIMINARY RULING

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ANNEX E-1

RULING BY THE PANEL ON JURISDICTIONAL ISSUES

22 March 2017

1 INTRODUCTION

1.1. In its written submissions, China has requested that the Panel rule a number of claims outside its jurisdiction. To enable the parties to better focus their arguments at the substantive meeting, we have decided to resolve at this stage of the proceeding China's assertions that certain US claims set out in its panel request[1] are outside the Panel's terms of reference either because they do not comply with Article 6.2 of the Dispute Settlement Understanding (DSU), or as a consequence of the Panel's exercise of judicial economy in the original dispute.

2 ARTICLE 6.2 OF THE DSU

2.1 Arguments of the parties

2.1.1 China

2.1. Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2 are not within the Panel's terms of reference because they are not set out in the panel request.

2.2. The claim under the second sentence of AD Agreement Article 2.2.1.1 in respect of Pilgrim's Pride is not within the Panel's terms of reference because:

a. the Panel made no findings in respect of Pilgrim's Pride under the second sentence of Article 2.2.1.1 in the original dispute[2];

b. cost allocation issues with regard to Pilgrim's Pride were not addressed by MOFCOM in the redetermination, and are therefore not before the Panel, and the original determination in this respect cannot be raised in this Article 21.5 proceeding[3]; and

c. the narrative language of the panel request concerns cost allocation issues related to Tyson and is unrelated to the reinvestigation of Pilgrim's Pride.[4]

2.3. Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 are not within the Panel's terms of reference because the panel request does not identify the specific measure[5] and does not "present the problem clearly". In particular, the panel request refers, as "an example", to documents that do not exist (i.e. questionnaires).

2.4. The United States asserts in its first written submission that MOFCOM failed to reconcile its causation analysis with the improving domestic industry performance. This assertion constitutes a new element of the claim under AD Agreement Articles 3.1 and 3.5 and SCM Agreement

[1] Request for the establishment of a panel by the United States, WT/DS427/11 and WT/DS427/11/Corr.1.
[2] China's first written submission, para. 131; second written submission, paras. 199 and 202.
[3] China's first written submission, para. 133.
[4] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[5] China's second written submission, para. 82:

> [T]he United States general reference to measures imposing AD/CVD duties to U.S. products, accompanied with the reference to the Redetermination without any further specification, does not fulfil the requirements of Article 6.2 of the DSU since it fails to identify with sufficient precision the challenged measure.

China's second written submission, para. 83: "China is arguing that the United States has failed to identify the measure".

Articles 15.1 and 15.5 that had not been set out in the panel request. In particular, the use of the word "including" in the panel request, as opposed to "including but not limited to", indicates an intention on the part of the United States to set out an exhaustive list of the elements of its claims under these provisions.

2.1.2 United States

2.5. In respect of the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, "China's argument is misplaced because it rests on an erroneous assumption: that the United States simply cited AD Agreement Article 6 and SCM Agreement Article 12 – and nothing more."[6] In fact, the panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[7]; thus, the United States "narrowed its concerns to those that flow from AD Agreement Article 6.1 and SCM Agreement Article 12.1".[8] The findings of the Appellate Body in respect of DSU Article 23 in *US – Countervailing Measures on Certain EC Products* that "there is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23"[9] and finding a claim within the panel's terms of reference as a result are "directly on point" in this context. In a similar way, the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1".[10] The claims are included in the claims under Articles 6.1 and 12.1 because the "factual predicate" is the same as that of the claims under Articles 6.1 and 12.1.

2.6. Regarding its claim under Article 2.2.1.1 with respect to Pilgrim's Pride, the United States asserts:

> The Panel Request clearly states that the United States is bringing a claim under the second sentence of Article 2.2.1.1. Moreover, the language the United States uses is with respect to "producers," not simply Tyson. There is no reason from the language of the claim to believe that the United States circumscribed its claim with respect to Tyson only.[11]

"[T]he DSU requires identification of measures and claims – not particular interested parties."[12] Because the Panel's findings under the second sentence of Article 2.2.1.1 in the original report were "with respect to consideration of allocation methodologies and allocation of processing [costs] extended to all respondents, including Pilgrim's Pride"[13], this matter falls within the jurisdiction of the Panel.

2.7. The "example" referred to in connection with the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 in the second sentence of paragraph 5 of the panel request is "wholly unnecessary" to the statement of the US claim as it was "simply a preview of what the United States might argue in its submissions".[14] In particular, "[t]he questionnaire is not the measure at issue; the continued imposition of AD and CVD duties are, including the conduct of the reinvestigation".[15]

2.8. In respect of the claim under AD Agreement Article 6.4 and SCM Agreement Article 12.3, the United States maintains it is clear that "the measures at issue are those that continue to lead to imposition of AD and CVD duties on U.S. broiler products";[16] the second sentence example simply foreshadows US arguments. In particular, the reference to questionnaires is simply an example.

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[6] United States' second written submission, para. 203.
[7] United States' second written submission, para. 204.
[8] United States' second written submission, para. 204.
[9] United States' second written submission, para. 205 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 111).
[10] United States' second written submission, para. 205.
[11] United States' second written submission, para. 212. (emphasis added)
[12] United States' second written submission, para. 211.
[13] United States' second written submission, para. 213.
[14] United States' second written submission, para. 195.
[15] United States' second written submission, para. 197.
[16] United States' second written submission, para. 207.

> Whether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers.[17]

2.9. In respect of the claim under AD Agreement Article 3.5 and SCM Agreement Article 15.5, "China conflates claims with arguments".[18] Responding to the arguments of China in respect of the scope of the term "including" in the panel request:

> What panel and the Appellate Body have appropriately recognized is that the term's open-ended meaning cannot be used to keep claims undefined. At no time has any panel or the Appellate Body ever found that it cannot be used as part of an indication to preview some – but not all – arguments.[19]

2.2 Relevant Law

2.10. Articles 7 and 6.2 of the DSU govern the jurisdiction of the Panel. Article 7 provides that, unless the parties agree otherwise, a panel shall have the standard terms of reference set out in that provision, which encompass the "matter referred to the DSB" by the complainant in the request for establishment. Article 6.2 sets out the requirements for a request for establishment of a panel (panel request), which describes the "matter referred to the DSB" and thus establishes the parameters of the jurisdiction of the panel. Article 6.2 states:

> 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.

2.11. It is well settled that:

a. The "matter" referred to the DSB comprises the measure(s) at issue and the claims as set out in the request for establishment.[20]

b. Where a matter, including claims, does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.[21]

c. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.[22]

d. A defect in the panel request may not be "cured" in later submissions.[23]

e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".[24]

f. There is a difference between the claims of a complainant and its arguments in support of those claims. The Panel may only address the claims set out in the panel request. However, arguments need not be included in the request for establishment, and a party may raise any arguments in support of those claims it wishes. Moreover, a panel is not limited to arguments submitted by the parties in resolving the matter before it, but may develop its own reasoning.[25]

[17] United States' second written submission, para. 207.
[18] United States' second written submission, para. 220.
[19] United States' second written submission, para. 221.
[20] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[21] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; and *US – Carbon Steel*, para. 126.
[22] Appellate Body Report, *US – Carbon Steel*, para. 127.
[23] Appellate Body Report, *EC – Bananas III*, para. 143.
[24] Appellate Body Reports, *EC – Fasteners* (China), para. 597; and *India – Patents (US)*, para. 90.
[25] Appellate Body Reports, *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156.

g. Article 6.2 protects Members' due process interests in the course of dispute settlement.[26] At the same time, the procedural rules of the WTO should not be used as litigation techniques, but so as to promote the fair, prompt and effective resolution of disputes.[27]

h. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference, and may need to do so even in the absence of any request by a party.[28]

2.3 Analysis

2.3.1 Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2

2.12. DSU Article 6.2 requires that a complainant "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint". It is axiomatic that "the listing of the treaty provision(s) allegedly violated is normally a prerequisite for a panel request to be consistent with Article 6.2 of the DSU".[29] At the same time, because a finding under DSU Article 6.2 goes to the parameters of our jurisdiction, deciding whether a claim is sufficiently set out in the panel request is not a mechanical task. Rather, we are required to read the panel request in its entirety; the statement of a claim may be inferred from the totality of a panel request, such that a complainant's failure to list a specific provision would not necessarily deprive a panel of jurisdiction to address a claim under that provision.[30]

2.13. The question before us in this proceeding is whether the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, as argued in its first written submission, were properly set out in the panel request. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[31]

On its face, the panel request does not refer to AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2.

2.14. China's jurisdictional challenge is simple: AD Agreement Article 6.2 is not referred to in the panel request. The United States does not make any arguments in response to China's arguments. In the absence of any response from the United States that would explain that a claim under that provision is nonetheless set out in the panel request, we conclude that no claim under AD Agreement Article 6.2 is properly before us in this dispute.

2.15. According to the United States, the claim in respect of AD Agreement Article 6.1.2 and SCM Agreement 12.1.2 may be understood to be within the terms of reference under paragraph 5 of the panel request, because:

a. the US panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[32];

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[26] Appellate Body Report, *US – Carbon Steel*, para 126; *Argentina – Import Measures*, Annex D-2, para. 4.26. This extends to third parties, to ensure that they receive "sufficient notice" of the specific measures that a complainant is challenging. (*Argentina – Import Measures*, Annex D-2, para. 4.20).

[27] Appellate Body Report, *Thailand – H-Beams*, para. 97 (citing Appellate Body Report, *US – FSC*, para. 166).

[28] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

[29] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.31.

[30] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.33. We also recall our findings to this effect regarding claims under Articles 12.2.2 and 22.5 of the AD and SCM Agreements respectively in the original panel report, para. 7.520.

[31] United States' request for the establishment of a panel, WT/DS427/11 (United States' panel request), para. 5.

[32] United States' second written submission, para. 204.

b. US concerns in respect of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 "flow from" its concerns under AD Agreement Article 6.1 and SCM Agreement Article 12.1[33];

c. there is a "close relationship"[34] between AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 on the one hand, and the listed provisions on the other, in that the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1"; and

d. the claims at issue are included in the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 because they have the same "factual predicate".

2.16. We recall that Articles 6.1.2 and 12.1.2 were addressed in the US first written submission but not mentioned in the US panel request. At issue is whether these Articles are so closely related to Articles 6.1 and 12.1 that, as a consequence, and in the light of the narrative in paragraph 5 of the panel request, the statement of claims specifically under Articles 6.1 and 12.1 may be found to include claims under Articles 6.1.2 and 12.1.2. To resolve this question, we first examine the provisions at issue. Articles 6.1 and 6.1.2 of the AD Agreement provide:

> 6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
>
> ...
>
> > 6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

The corresponding provisions of the SCM Agreement, Articles 12.1 and 12.1.2, are largely identical − the minor textual differences are not relevant in this context.

2.17. AD Agreement Article 6 and SCM Agreement Article 12, entitled "Evidence", address a wide range of topics beyond strictly evidentiary matters and establish a number of diverse but often related obligations in respect of the conduct of anti-dumping and countervailing duty investigations. AD Agreement Article 6.1 and SCM Agreement Article 12.1 contain <u>two</u> distinct but related obligations on the investigating authority concerning the conduct of the investigation:

a. to give notice to all interested parties of information required by the investigating authorities; and

b. to provide to all interested parties an ample opportunity to present relevant evidence in writing.

AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 require that non-confidential evidence presented in writing by one party must be made available to other participating interested parties promptly.[35]

2.18. There is no question that AD Agreement Articles 6.1 and 6.1.2 and SCM Agreement Articles 12.1 and 12.1.2 are related to some extent, as they all refer to the presentation of evidence in writing. However, it is not at all clear to us that Articles 6.1.2 and 12.1.2 are, as the United States argues, "nothing less than a specific application of the denial of opportunity that

[33] United States' second written submission, para. 204.
[34] United States' second written submission, para. 205.
[35] Articles 6.1.1 and 12.1.1, not at issue here, set out a time-frame for exporters and producers (and in countervailing duty investigations, interested Members) to reply to questionnaires they receive; Articles 6.1.3 and 12.1.3 require the provision of the full text of the application to known exporters and the authorities of the exporting Member, and other interested parties upon request, with due regard for the protection of confidential information.

AD Agreement Article 6.1 and SCM Agreement Article 12.1 require".[36] Articles 6.1.2 and 12.1.2 require that evidence submitted by one interested party in writing be made available promptly to other participating interested parties. In our view, this is a very different obligation from those set out in Articles 6.1 and 12.1, requiring notice of the information required and "ample opportunity" for interested parties to present relevant evidence in writing. Thus, while the obligation in Articles 6.1.2 and 12.1.2 may be related to the "ample opportunity" to present evidence in writing required under Articles 6.1 and 12.1, compliance with the one does not require or establish compliance with the other. It is entirely possible for an investigating authority to give notice of the information required and ample opportunity to submit evidence in writing, but fail to ensure that evidence presented in writing is made available promptly to other interested parties, and vice versa. Neither in form nor in substance do we consider the provisions so "closely related" that the statement of a claim under Articles 6.1 and 12.1 in a panel request can, without more, be understood to include a claim under Articles 6.1.2 and 12.1.2. Merely that Articles 6.1.2 and 12.1.2 concern information submitted in writing pursuant to the opportunity required by Articles 6.1 and 12.1, does not suffice to bring the former within the scope of the latter.

2.19. Nonetheless, according to the United States, "The U.S. Panel request explicitly references the lack of opportunity afforded by MOFCOM in the reinvestigation thus placing clear parameters on the scope of the claim."[37] This, we understand, refers to the statement in paragraph 5 of the panel request concerning "ample opportunity to present in writing all evidence they considered relevant". This language is in the text of Articles 6.1 and 12.1. It does not appear in Articles 6.1.2 and 12.1.2. Moreover, it is not clear to us how the failure to make information submitted in writing available to other interested parties is linked to the alleged lack of ample opportunity to present evidence in writing referred to in the narrative in paragraph 5 of the panel request. This reference cannot, in our view, bring the asserted failure to make information available within the scope of the obligations in Articles 6.1 and 12.1, and thus paragraph 5 fails to state a claim under Articles 6.1.2 and 12.1.2. The United States also relies on its first written submission to "confirm" the scope of its claim in the panel request. However, given our view that the panel request, read as whole, does not state a claim under Articles 6.1.2 and 12.1.2, there is nothing to "confirm".

2.20. In the light of the foregoing, we find that the United States' claims under Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 are not within our terms of reference.

2.4 Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement and 12.1 and 12.3

2.21. The question before us in this context is whether the claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 as set out in the panel request provide the required clarity and specificity. The questions at issue are similar and so we deal with them together.

2.22. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[38]

Paragraph 4 of the panel request states:

> Articles 6.4 and 6.5 of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to

[36] United States' second written submission, para. 205.
[37] United States' second written submission, para. 205.
[38] Emphasis added.

disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[39]

2.23. China's principal argument is that "the United States has failed to identify the measure".[40] Moreover, because no "questionnaires" were sent to domestic producers, these claims as set out in the panel request caused China puzzlement. The use of the words "for example" does not save each claim by enlarging it to encompass other forms of information request than "questionnaires". Neither claim presents the problem "clearly"; each is therefore inconsistent with DSU Article 6.2.

2.24. The United States responds that:

a. the measures at issue are "those that continue to lead to imposition of AD and CVD duties on U.S. broiler products" and the panel request properly identifies the measures by explicitly referencing the reinvestigation[41];

b. the reference in the panel request to "the questionnaire" foreshadows US arguments, and is not relevant to the identification of the claim[42]; and

c. "[w]hether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers."[43]

2.25. Articles 6.1 and 12.1 require notice of the information required by the investigating authorities. Articles 6.4 and 12.3 require the authorities to provide opportunities to see relevant non-confidential information used by the authorities. The alleged violation in respect of each provision as stated in the panel request is an omission: that is, for Articles 6.1 and 12.1, the alleged failure to provide "notice of the information which the authorities require", and for Articles 6.4 and 12.3, the alleged failure to "provide interested parties timely opportunities to see all non-confidential information that was relevant to their case". As an "example" of the information subject to these requirements, the panel request refers to "questionnaires [MOFCOM] submitted to Chinese domestic producers during the re-investigation".

2.26. We make the following observations:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The question, then, is whether the references to questionnaires as examples in paragraphs 4 and 5 of the panel request result in the claims as set out not presenting the problem "clearly":

i. China asserts that no questionnaires were sent to Chinese producers. All MOFCOM did in the course of the reinvestigation was engage in a verification exercise. At the same time, however, throughout the redetermination MOFCOM states that it not only verified the information it had, but sought and obtained additional information.[44] Whether or not "questionnaires" in some formal sense were used in this effort, there were clearly requests made to Chinese domestic producers for further information, and information was submitted.

ii. Where, as in this case, claims are based on alleged omissions by the investigating authority, the investigating authority is in possession of information that it allegedly did not give notice of as required under Articles 6.1 and 12.1, and did not provide

[39] Emphasis added.
[40] China's second written submission, para. 83.
[41] United States' second written submission, para. 207.
[42] United States' second written submission, para. 207.
[43] United States' second written submission, para. 207.
[44] We note also China's second written submission, para. 252: "Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing." (emphasis added)

ample opportunities to see under Articles 6.4 and 12.3. The complaining Member, of course, does not know what the relevant information is, or in what form it was required or received − or indeed, whether it exists − but does believe that information was requested and submitted to the investigating authorities. In these circumstances, it is difficult to see how the complainant could be expected to pin-point with any precision in a panel request information (including its format − in the form of a questionnaire or otherwise) it does not have and might not even know about.

iii. Whether a claim as set out in the panel request presents the problem clearly depends on not just the specific words used in the panel request but also the underlying obligations. The term "questionnaire" has a generally understood technical meaning in the context of anti-dumping and countervailing duty practice more generally; MOFCOM might not have sent a "questionnaire" in the technical sense to domestic producers during the reinvestigation. But that does not render the claim as a whole, which refers to "questionnaires" only as an example of the problem, opaque to the point of vitiating China's due process rights under DSU Article 6.2.

iv. MOFCOM required, sought, and obtained additional information from Chinese domestic producer in the course of its reinvestigation. Under Articles 6.1 and 6.4 and 12.1 and 12.3, it had obligations with respect to notice of the information required (which is not limited to information required in questionnaires) and providing opportunities to see relevant information. It is not disputed that the information provided by the Chinese domestic producers in the reinvestigation was relevant and used by MOFCOM.[45] Regardless of the limited example − reference to questionnaires − in the panel request, in our view there is little doubt as to the scope of the claims under Articles 6.1, 6.4, 12.1, and 12.3.

2.27. In the light of the foregoing, we find that the claims of the United States under Articles 6.1 and 6.4 of the AD Agreement and Articles 12.1 and 12.3 of the SCM Agreement are within our terms of reference.

2.4.1 Second sentence of Article 2.2.1.1 and Pilgrim's Pride

2.28. The question before us here is the scope of the claim of violation of Article 2.2.1.1, second sentence, specifically whether it encompasses MOFCOM's alleged violation in respect of the calculation of a dumping margin for Pilgrim's Pride in the reinvestigation. In this respect, China advances two lines of argument:

a. While the claim in the panel request is drafted broadly, the narrative language concerns only the allocation issues related to the calculation of Tyson's dumping margin. The claim itself, as set out in the panel request, appears to be unrelated to the issues surrounding the calculation of a dumping margin for Pilgrim's Pride during the reinvestigation. Accordingly, the claim as developed in the first written submission of the United States is not within the terms of reference of the Panel.[46]

b. In the original dispute the Panel made no findings in respect of the calculation of a dumping margin for Pilgrim's Pride under the second sentence of Article 2.2.1.1. Indeed, the findings of the Panel in respect of the first sentence underline that its findings under the second sentence could not have applied to Pilgrim's Pride. For these reasons, MOFCOM did not address any cost allocation issues with regard to Pilgrim's Pride during the reinvestigation, and therefore the consistency of the dumping margin for Pilgrim's Pride with Article 2.2.1.1 is not within the terms of reference of the Panel.[47]

2.29. The United States responds that:

[45] China's second written submission, para. 252: "From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products."
[46] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[47] China's first written submission, para. 131; second written submission, paras. 199 and 202.

a. the claim in the panel request is clear in that it refers to "producers", and not just Tyson[48];

b. the Panel's findings of violation of the second sentence of Article 2.2.1.1 in the original dispute were not limited to Tyson[49]; and

c. in any event, DSU Article 6.2 requires identification of measures and claims of violation – not particular interested parties.[50]

2.30. Turning to the first basis for China's challenge, we recall paragraph 8 of the panel request:

> Articles 2.2 and 2.2.1.1 of the AD Agreement because MOFCOM improperly calculated the cost of production for US producer**s**, failed to calculate costs on the basis of the records kept by the US producer**s** under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.[51]

2.31. For purposes of considering the scope of the Panel's jurisdiction, there is an important distinction between claims and arguments. The claim here is that the redetermination in respect of the calculation of costs for US producers does not meet the requirements of Articles 2.2 and 2.2.1.1. We note that:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The legal basis for the claim is set out as Article 2.2 and both sentences of Article 2.2.1.1. The two examples provide additional clarity, but they neither expand nor restrict the scope of the claim, and are not limited as to the producers to which they refer.

Nothing in the DSU requires that the arguments in support of a claim be specified in the request for establishment. It is true that in the original dispute, there was no specific finding of violation of the second sentence of Article 2.2.1.1 with respect to Pilgrim's Pride. Nonetheless, the Panel's findings regarding that provision were not strictly limited to Tyson, but were more general in some aspects. Thus, we see no reason to foreclose the possibility of a claim under Article 2.2.1.1 involving arguments concerning other producers. We note that the panel request refers to US producers in the plural. This clearly opens the possibility for arguments concerning the alleged failure of MOFCOM to comply with the cited AD Agreement provisions in calculating a dumping margin for more than one US producer. We see no basis to require the identification of specific interested parties in respect of which an investigating authority has made a determination with respect to each claim of violation.

2.32. Among the various arguments made in support of the US claim under the second sentence of Article 2.2.1.1 is the argument in respect of Pilgrim's Pride. These arguments do not go beyond the claim as set out in the panel request. Accordingly, the claim of violation as set out in the panel request meets the requirements of DSU Article 6.2 and is properly before us.

2.33. Having so concluded, we do not consider it necessary to address China's second ground for its jurisdictional challenge.

2.34. We therefore find that China has not established that the US claims in respect of Articles 2.2 and 2.2.1.1 insofar as they relate to Pilgrim's Pride fall outside our jurisdiction.

[48] United States' second written submission, para. 212.
[49] United States' second written submission, para. 213.
[50] United States' second written submission, para. 211.
[51] Emphasis added.

2.5 Alleged failure to reconcile causation analysis with evidence

2.35. The question before us here is the scope of claims of violation of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5, and whether they encompass MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. China refers to the specific language of paragraph 3 of the panel request:

> Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

2.36. China argues that:

a. The use of the word "including" instead of "including but not necessarily limited to" must be understood as setting out an exhaustive list of elements of the US claim under Articles 3.1, 3.5, 15.1, and 15.5.[52]

b. "The contrast between the phrase 'for example' for all of the other claims, but the term 'including' only for claim #3 shows an explicit effort to distinguish the two types of claims. In this context, 'including' is being used in a limiting sense."[53]

c. The language of the paragraph is "a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore relates to the specific obligations found in the second sentence."[54]

2.37. The United States argues that:

a. "The claim is that MOFCOM's continued imposition of AD/CVD measure on U.S. broiler products is inconsistent with the cited provisions."[55] The examples set out in the panel request are arguments; the United States was not under an obligation to set any of its arguments out in the panel request.

b. The term "include" is not exclusive.[56]

2.38. We make the following observations:

a. The phrase "including but not necessarily limited to" is an unfortunate redundancy that clutters many a legal document. We note that in certain contexts, of course, the term "including" may have a limiting effect. For example, the legal maxim *eiusdem generis* provides that a listing of items "included" in a general term could limit the scope of that term to the genre of the included items. But that is not what China argues. We are asked to find that the use of the term "including" in a jurisdictional document creates an exhaustive list for the sole reason that it is not accompanied by a redundant qualifier. We are not aware of a canon of interpretation that would require us to reach this conclusion.

b. The use of "including" in one paragraph of the panel request and "for example" in the other paragraphs is not determinative of the meaning of either term. It is the case that in certain circumstances, in a treaty the use of one term rather than another may give rise to the presumption that a different meaning was intended by its drafters. In this instance, read in the context of the panel request as a whole, nothing in the use of "for

[52] China's first written submission, para. 378.
[53] China's second written submission, para. 330.
[54] China's second written submission, para. 328.
[55] United States' second written submission, para. 220.
[56] United States' second written submission, para. 221.

example" in some paragraphs suggests a "limiting" – that is, an exhaustive – sense for the term "including".

c. As we have observed, in addressing questions of panel jurisdiction, there is an important distinction between claims and arguments. The claims here allege that the redetermination, which is the measure take to comply, does not satisfy the requirements of Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement. We note in this respect that the four sentences of Articles 3.5 and 15.5 are inextricably linked. Among the various arguments the United States makes in support of those claims is MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. Merely because this argument is not set out in the panel request does not preclude the United States from making it in the course of the dispute.

2.39. In the light of the foregoing, we find that the argument that MOFCOM allegedly failed to reconcile its causation analysis with the improving domestic industry performance is within the scope of the United States' claims that China has acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, and within the jurisdiction of the Panel.

2.6 Conclusion on DSU Article 6.2

2.40. We find that US claims in respect of Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 of the SCM Agreement are not within the scope of our terms of reference and we will make no findings on such claims.

2.41. We find that US claims in respect of Articles 3.1, 6.1, 2.2.1.1, and 3.5 of the AD Agreement and Articles 15.1, 12.1, and 15.5 of the SCM Agreement are within the scope of our terms of reference.

3 THE PANEL'S EXERCISE OF JUDICIAL ECONOMY IN THE ORIGINAL DISPUTE

3.1 Introduction and arguments of the parties

3.1. In the original dispute, the Panel found that MOFCOM's findings of price undercutting and of price suppression were inconsistent with the relevant obligations. It observed that "MOFCOM's examination of the situation of the domestic industry was inextricably linked to its earlier analysis of the price effects of subject imports" and that implementation of its findings regarding price effects would "require China to re-examine MOFCOM's Determination concerning the impact of subject imports on the domestic industry".[57] In this situation, the Panel took 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[58], and made no findings with respect to the United States' claims under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.[59] The Panel in the original dispute also made no findings, on the same grounds, in respect of US claims under AD Agreement Article 3.5 and SCM Agreement Article 15.5.[60]

3.1.1 China

3.2. The US claims under AD Agreement Articles 3.1, 3.4, and 3.5[61] and SCM Agreement Articles 15.1, 15.4, and 15.5 in this proceeding are beyond the scope of the Panel's terms of reference because the Panel exercised judicial economy in respect of these claims in the original dispute. Specifically:

[57] Panel Report, *China – Broiler Products*, para. 7.555.
[58] Panel Report, *China – Broiler Products*, para. 7.555.
[59] Panel Report, *China – Broiler Products*, para. 7.556.
[60] Panel Report, *China – Broiler Products*, paras. 7.584 and 7.585.
[61] China raised arguments in respect of AD Agreement 3.5 and SCM Agreement Article 15.5 for the first time in its second written submission. (China's second written submission, paras. 335 and 336). As the issues are the same as the arguments under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.5, we address all these arguments at the same time.

a. The Panel exercised judicial economy and did not rule on the US claims or otherwise address in any way the merits of the US arguments in support of these claims. "Neither China nor the United States 'lost' this claim − the claim was not addressed"[62]; this rendered the claims of no effect.[63]

b. "China recognizes that the Panel believed in good faith that the Panel findings on price effects 'will require' MOFCOM to reconsider its impact analysis. But with all due respect, that belief was incorrect."[64] And so, the unchanged part of the redetermination was not an "inseparable element" of the measure taken to comply[65]; MOFCOM did not need to revisit it.[66] Indeed, "there was no measure taken to comply and there was no need for MOFCOM to redo its analysis".[67]

c. The reassertion of these claims in this proceeding creates a fundamental unfairness to the detriment of China.[68] Because this is a compliance proceeding, China is deprived of any chance to address any inconsistency that may now be found or otherwise to bring its measure into compliance.

d. "If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact. The additional claim would not add anything to the overall U.S. challenge and rights under the WTO. The separate claims on impact thus really matters to the United States only if it has lost its claims regarding price effects (and other claims), and needs some independent basis to establish the WTO inconsistencies of the AD and CVD measures."[69]

e. This situation is "functionally the same" as the case in which a party did not bring a claim in the original dispute that it could have brought.[70] The United States is thus barred from bringing these claims in these 21.5 proceedings.

3.1.2 United States

3.3. The claims under AD Agreement Article 3.4 and SCM Agreement Article 15.4 are within the Panel's terms of reference[71], because:

a. "[W]here a Member fails to prove inconsistency on a claim, that claim may not be re-litigated in a compliance proceeding. The Appellate Body has never found that the exercise of judicial economy precludes consideration of a claim in a compliance proceeding. The logic for this distinction is compelling. A Member is not entitled to a second chance to prove a claim that has been already rejected. There is no justification for rejecting a claim that *was never decided*."[72]

b. The Panel exercised judicial economy in the original dispute "on the basis that MOFCOM would need to undertake a reexamination of its impact analysis − and thus decide how to address the US claim. MOFCOM's decision to decline to do so cannot absolve it from having its injury findings assessed."[73]

[62] China's second written submission, para. 291.
[63] China's first written submission, para. 336.
[64] China's second written submission, para. 292.
[65] China's second written submission, para. 293.
[66] China's second written submission, para. 291.
[67] China's second written submission, para. 287.
[68] China's first written submission, paras. 333 and 335.
[69] China's second written submission, para. 294.
[70] China's first written submission, para. 336.
[71] The United States has responded to the arguments set out in China's first written submission. Given that the arguments in respect of AD Agreement Article 3.4 and SCM Agreement Article 15.4 are the same as those in respect of AD Agreement Article 3.5 and SCM Agreement Article 15.5, we believe we can dispose of this matter without further submission by the United States.
[72] United States' second written submission, para. 215. (emphasis original; fn omitted)
[73] United States' second written submission, para. 216.

c. "Precluding consideration of claims in a compliance proceeding on the basis that judicial economy was exercised" would undermine Articles 3.4 and 3.7 of the DSU.[74]

d. "[T]here was no barrier to China engaging in a reexamination of its impact analysis."[75]

3.2 Analysis

3.4. First, the findings of the panel and the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* relied on by China do not support its position. We recall that in that case, the panel in its original report found that the complainant had failed to establish a *prima facie* case in respect of the claim at issue. The complainant then sought to raise the same claim in the Article 21.5 proceedings. The Appellate Body upheld the panel's finding that the claim was not within the scope of is jurisdiction, noting due process and fairness concerns:

> A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel.[76]

Accordingly, the focus of the Appellate Body in that case was the actions of the complainant in failing to establish a *prima facie* case in the original dispute. More important for the question before us here, both the panel and the Appellate Body were aware of the potential consequences of their findings and explained further:

> We also recall that the Panel noted, in paragraph 6.44 of the Panel Report, that the original panel's dismissal of India's claim under Article 3.5 relating to "other factors" was *not* an exercise of "judicial economy". The issue raised in this appeal is different from a situation where a panel, on *its* own initiative, exercises "judicial economy" by not ruling on the substance of a claim.[77]

3.5. The Appellate Body had occasion to revisit the question of the effect of an exercise of judicial economy on the admissibility of a claim in the context of Article 21.5 proceedings involving redeterminations in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. At issue in that case was whether,

> [T]he USDOC's finding that the volume of imports of OCTG from Argentina declined after the imposition of the anti-dumping duty order – which was made in the original sunset determination and incorporated into the Section 129 Determination – is part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU.[78]

The Appellate Body noted that while Argentina had in fact challenged the USDOC's volume analysis in the original panel proceedings, the panel had not made a finding regarding the WTO-consistency of that analysis.[79] In that case the panel did not expressly exercise judicial economy, but both disputing parties characterized the panel's approach to the issue in the original *OCTG* dispute as an exercise of judicial economy. In that case, the United States argued that the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* applied to the USDOC's findings on volume of imports, asserting – as China does in this case – that because there had been no panel findings,

[74] United States' second written submission, para. 217.
[75] United States' second written submission, para. 218.
[76] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.
[77] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, fn. 115 to para. 96. (italics original; underline added)
[78] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 138.
[79] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 141.

there had been no change in the USDOC findings, and the complainant could not raise the matter again in an Article 21.5 proceeding. The Appellate Body disagreed:

> [E]ven if the original panel's approach should properly be characterized as judicial economy, it would still mean that the central rationale of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* would not be applicable. The Appellate Body explained that the issue raised in that case differed "from a situation where a panel, on its own initiative, exercises 'judicial economy' by not ruling on the substance of a claim."[80]

3.6. China expressly acknowledges that the Panel exercised judicial economy in respect of the claims at issue in the original dispute. It does not argue that the Panel did not have the authority to exercise judicial economy or that it did so improperly in the original dispute; if anything, China encourages the Panel to continue to exercise judicial economy in respect of claims under Articles 3.4 and 15.4 if the Panel makes findings adverse to its interests under Articles 3.2 and 15.2.[81] In addition, China did not appeal the findings of the original Panel in this regard.[82] In our view, the findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* and *EC – Bed Linen (Article 21.5 – India)* clearly establish that the exercise of judicial economy by a panel in respect of a claim does not, for that reason alone, preclude a complaining party from bringing that same claim before a subsequent Article 21.5 panel.

3.7. In this instance, the Panel in its original report did not make any substantive findings in respect of the US claims under Articles 3.1, 3.4, 15.1, and 15.4. This was because, having found China in breach of AD Agreement Article 3.2 and SCM Agreement Article 15.2, the Panel concluded that re-examination of the analysis under those provisions would require re-examination of the impact of subject imports on the domestic industry, and therefore additional findings with respect to MOFCOM's analysis under Articles 3.4 and 15.4 would not assist in the resolution of the dispute. As it turned out, MOFCOM did not change its analysis under Articles 3.2 and 15.2, and did not deem it necessary to change its analysis under Articles 3.4 and 15.4. Nevertheless, this is not a case where the "central rationale" of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* is directly applicable, because it was not the complainant that failed to establish its claim in the original dispute, it was the Panel that opted to not rule on the claim. The fairness and due process concerns cited by the Appellate Body in denying a second chance to raise the same claim in an Article 21.5 proceeding are simply not relevant here.

3.8. Second, we note China's argument that:

> If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact.[83]

Neither of these arguments is relevant to whether these claims are within our terms of reference in this proceeding. Whether or not we erred in not making findings under Articles 3.4 and 15.4 in the original dispute does not change the fact that we did not make such findings, and that exercise of judicial economy was not challenged on appeal. That MOFCOM did not act as we had anticipated does not, of course, demonstrate that we erred. In any event, it would not be appropriate for us to make a finding in respect of our terms of reference in this proceeding on the basis of a potential finding or exercise of judicial economy that might be the result of our consideration of the claims in this proceeding.

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[80] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148. (fn omitted)

[81] China's second written submission, para. 294: "If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact." (emphasis added)

[82] We recall the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para 96:

> Moreover, here, India decided not to appeal the panel finding at issue in the original proceedings, even though it could have done so, inasmuch as the issue was not of an exclusively factual nature. Hence, India itself seems to have accepted the finding as final.

(emphasis added)

[83] China's second written submission, para. 294.

3.9. Finally, we do not consider the premise of China's assertion of "fundamental unfairness" to be correct or to suffice to change our view that the United States is not precluded from raising its claims under Articles 3.1, 3.4, 15.1, and 15.4 in this proceeding. Nothing suggests that "China will never have any chance to address that inconsistency or otherwise bring its measure into compliance"[84], should the Panel find that the redetermination is inconsistent with Articles 3.1, 3.4, 3.5, 15.1, 15.4, and 15.5. It is true that China would not have the benefit of another reasonable period of time to do so, but that is not the same thing as being "deprived" of the opportunity to do so.[85] The fact that in making its redetermination, MOFCOM did not have the benefit of Panel findings in respect of the original determination did not absolve China of its obligation, under the WTO Agreement, to ensure that the measure taken to comply is consistent with all its obligations under the WTO Agreement.

3.3 Conclusion

3.10. In the light of the foregoing, we find that the claims of the United States under AD Agreement Articles 3.1, 3.4, and 3.5 and SCM Agreement 15.1, 15.4, and 15.5 are within our terms of reference.

[84] China's first written submission, para. 333.

[85] We note that should there be continuing disagreement between the parties as to whether China has brought itself into compliance, China has recourse to Article 21.5 to resolve such a disagreement. (Appellate Body Reports, *Canada/US – Continued Suspension*, para. 347).