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

(DS427)

U.S. COMMENTS ON CHINA'S RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

PUBLIC VERSION

Double brackets ("[[ ]]") indicate where
Business Confidential Information was redacted

January 14, 2013

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EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1.
Korea – Polyacetal Resins	GATT Panel Report, *Korea – Antidumping Duties on Imports of Polyacetal Resins*¸ ADP/92, 40S/205, adopted by the Anti-Dumping Committee on 27 April 1993.
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U.S. – Steel Plate (India)	Panel Report, *United States – Anti-Dumping and Counervailing Measures on Steel Plate from India*, WT/DS206/R, adopted 29 July 2002.

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES (WT/DS427)

U.S. Comments on China's Responses to the Questions from the Panel to the Parties Following the Second Substantive Meeting of the Panel

GENERAL

1. The United States appreciates this opportunity to comment on the Responses of China to the Questions of the Panel to the Parties Following the Second Substantive Meeting of the Panel. Many of the points that China raises have already been addressed by the United States in its prior written and oral submissions or are not relevant to the claims raised by the United States and the Panel's resolution of this dispute. In the comments below, the United States focuses principally on points that China raises that may be pertinent and have not been addressed in prior U.S. submissions. The absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response.[1]

Question 82: Please provide the Panel with any information on the record, other than that referenced in China's response to Panel question No. 30, that reflects analysis and reasoning by MOFCOM of:

(a) Whether respondents' costs "reasonably reflect[ed]" the costs associated with production and sale of the product under consideration;

(b) How the methodology that MOFCOM used would arrive at a proper allocation of costs.

2. The United States addresses China's responses to these questions in three parts. First, the United States will demonstrate that China's responses fail to show any analysis and reasoning by MOFCOM concerning respondents' kept costs or why MOFCOM believed its weight-based methodology was proper. Second, the United States will address China's allegation that the requirement to explain its reasoning is limited to a claim made under Article 12.2 of the AD Agreement. Finally, the United States will demonstrate that China's responses to these questions evince the *post hoc* nature of the explanations offered by China in these proceedings.

[1] To assist the Panel, the United States notes that it will not be providing comments on China's responses to the following questions: 79, 80, 83, 84, 105, 106, 110, 111, 112, 123, and 125.

MOFCOM's Lack of Reasoning and Analysis

3. As these questions recognize, it is critical to review the analysis and reasoning proffered by MOFCOM at the time of the investigation. As explained in prior submissions of the United States, MOFCOM's obligation, before rejecting U.S. producers' kept costs in favor of an alternative methodology, is to establish:

(1) that the respondents' kept costs are either not GAAP consistent or do not reasonably reflect the costs associated with the production and sale of the product under consideration;[2] and

(2) that the allocation implemented by the investigating authority in place of those reported costs is proper.[3]

In respect to establishing both findings, MOFCOM must demonstrate that it considered "all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer…provided that such allocations have been historically utilized by the exporter or producer …."[4] In respect to what was available for consideration in the present case, the United States, notes, as demonstrated in its prior submissions, that U.S. producers provided their historically utilized costs and submitted extensive evidence that those kept costs were consistent with GAAP and reasonably associated with production and sale. The United States has also demonstrated the respondents provided evidence addressing why a weight-based allocation was improper.

4. In its response, China asserts that its prior response to Question 30 more than sufficiently establishes the requisite findings and consideration. If so, in light of the evidence submitted by U.S. respondents, then, at a minimum, China's response to Question 30 should reflect reasoning and analysis by MOFCOM describing: (i) why the U.S. exporters' arguments and evidence were not accepted; and (ii) why MOFCOM's findings and selection of an alternative allocation methodology were proper. China's response to Question 30 contains neither.

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[2] AD Agreement, Article 2.2.1.1, first sentence ("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." (emphasis added)).

[3] AD Agreement, Article 2.2.1.1, second sentence ("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." (emphasis added)).

[4] AD Agreement, Article 2.2.1.1.

5. The lack of such reasoning and analysis can be demonstrated by comparing the evidence in the U.S. *prima facie* case against China with respect to the referenced determinations for each of the respective respondents. First, with respect to Tyson, the following chart summarizes, *inter alia*, Tyson's arguments and evidence during the investigation.

Tyson

Tyson Explaining Why It Keeps its Historically Utilized Costs in the Manner it Does	**Tyson Submitted Evidence Why Its Costs Are Reasonable**	**Tyson Submitted evidence that MOFCOM's calculation was not assigning costs to [[ ]] from the production process**
• Questionnaire Responses • Flowchart and narrative explaining cost center at a processing plant[5] • Noting that it uses market price, including for paws, based on pricing data collected by the oldest commodity reporting service in the United States[6]	• U.S. Accounting Literature[7] • Chinese Accounting Literature[8] • International Accounting Literature[9] • Auditor Statements[10] • Acceptance of value-based allocations by other administrating authorities[11]	• Tyson's Exhibits 8 & 9 explaining the proper data[12] • Evidence presented at verification[13] • Tyson's filing on Feb. 20, 2010 that notified MOFCOM that it lacked the necessary information for a meaningful calculation under MOFCOM's new methodology[14]

[5] Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) (Exhibit USA-26), pp. 4-5.

[6] *Id.* (Exhibit USA-26), p. 5, n. 4.

[7] *Id.* (Exhibit USA-26), pp. 7-8

[8] *Id.* (Exhibit USA-26), p. 8.

[9] *Id.* (Exhibit USA-26), p. 9.

[10] *Id.* (Exhibit USA-26), pp. 6-7; (Exhibit USA-40), p. 4.

[11] *Id.* (Exhibit USA-26), pp. 9-10.

In short, Tyson's evidence explained its cost system, why that cost system was reasonable, and that MOFCOM's methodology, besides being generally inappropriate, had a serious calculation error. Contrast those three overarching points against the specific determinations that China cites in its response to Question 30.

China's Rebuttal

China's Quoted Determinations in Response to Q. 30
• The investigation authority examined the production cost data submitted by the company [Tyson]. Your company only submitted the cost of production of specification product corresponding to those imported to China in the first questionnaire response, and then supplementary submitted the all production of cost of domestic sold products in the second supplemental questionnaire response. After examination, the investigation authority thinks that the specification cost alleged by the company does not reasonably reflect the production cost related to subject merchandise. For the preliminary determination the investigation authority temporarily determine to take the data as the base submitted in the supplementary questionnaire response and take the weighted average production cost of every specification product as the cost of production of subject merchandise and the like products.[15] • During the preliminary determination, the investigation authority thinks that the specification cost alleged by the company [Tyson] does not reasonably reflect the production cost related to subject merchandise, thus determines to use the data submitted in its 2nd supplementary response and adopts weighted average production cost of each specification as the production cost of the subject merchandise and like products. After the preliminary determination, the company made comments on the investigation authority's method, but the company did not provide sufficient reason to prove the reasonableness of different parts of the subject merchandise having different production cost. Through review and on-spot verification, the investigation authority finds that the

[12] *Id.* (Exhibit USA-26), pp. 11-12.

[13] *Id.* (Exhibit USA-26), pp. 5-6.

[14] Tyson, Comments on the Preliminary AD Determination (February 20, 2010) (Exhibit USA-25), p. 3.

[15] China, Responses to the Panel's First Set of Questions, para. 74, citing Tyson's submission, Preliminary AD Disclosure (Exhibit USA-8), pp. 1-2.

> facts determined in the preliminary determination does not change, thus determines to maintain its preliminary determination.[16]

As is clearly evident, the referenced determinations are completely silent with respect to those three points as well as what rationales supported MOFCOM's application of a weight-based methodology (a methodology that Tyson demonstrated suffered from a serious calculation error).[17] Indeed, even if one scrutinized the record outside what China proffered in response to Question 30, one still finds nothing by MOFCOM addressing or examining these issues.

6. With respect to Keystone, this exercise yields the same result. The following table summarizes some of Keystone's main arguments.

Keystone

Keystone Explaining Why It Keeps Cost in the Manner it Does	**Keystone Submitted Evidence Why its Costs Are Reasonable**	**Keystone Proffered Alternative Value Based Methodologies**
• Questionnaire Responses • Explaining Keystone's [[ ]] including at verification[18] • Noting why Keystone's management [[	• That its costing methodology is in accordance with what is taught at leading Chinese universities and Chinese government sanctioned textbooks[20] • That a Chinese textbook found its methodology superior to a weight-based methodology because it "makes up for the drawback … as it establishes a correlation between the allocation of joint costs and the final sales	• Based on existing data, MOFCOM could allocate [[ ]][25] • Based on existing data, MOFCOM could allocate [[ ]][26]

[16] China, Responses to the Panel's First Set of Questions, para. 75, citing Tyson's submission, Tyson Final AD Disclosure (Exhibit USA-12), p. 2.

[17] In respect to the calculation error, the United States submits this issue also illustrates why the calculations are essential facts. Tyson noted to MOFCOM, on February 20, 2010, that it was prejudiced by the lack of disclosure. Tyson, Comments on the Preliminary AD Determination (February 20, 2010) (Exhibit USA-25), p. 2. To the extent China now argues that there is no calculation error, such an argument should fail. There is evidence from the investigation suggesting a calculation error and nothing from the investigating authority, including MOFCOM's calculations, that suggests Tyson's evidence is wrong. *See also* Comments on Question 91.

[18] Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), pp. 20-21.

]][19]	value of the joint products, and allocates the joint costs of the joint products prior to the separation based on the proportion of the sales value of each joint products"[21] • That its costing methodology is in accordance with leading U.S. treatises, including Horngren[22] • That MOFCOM's weight methodology is distortive because it takes costs incurred after split-off and assigns it to other models[23] • The stark discrepancy between MOFCOM's total single cost as opposed to the costs incurred in the ordinary course of business[24]	

[20] Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), p. 22, Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 5.

[25] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 10, Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), pp. 21-23.

[26] *Id*.

[19] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), pp. 3-4.

[21] Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit US-29), p. 22, quoting Xu Zhengdan, et. al., Cost Accounting at Chapter 13 (Shanghai Sanlian Bookstore 1994).

[22] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 4, n. 1; Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), pp. 22-23.

[23] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 7

[24] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 8.

Thus, Keystone, like Tyson – and Pilgrim's as discussed below – presented evidence explaining its cost system and why that system was reasonable. Additionally, Keystone, after having its methodology rejected in the preliminary determination, also proffered alternative methodologies – methodologies still based on the initial data submitted. But MOFCOM, as demonstrated in the following table, did not address these points or explain how Keystone's methodology was "proper" under Article 2.2.1.1.

7. MOFCOM's failure to explain is particularly conspicuous because Keystone had proffered two more alternative methodologies. Although China in these proceedings has argued that the level of consideration due under Article 2.2.1.1 is a fact specific inquiry, China has yet to discuss the specific facts here. For all respondents, MOFCOM had the option of relying on the respondents' books and records and, to the extent that it needed the respondents to revise their data for purposes of the administration of the anti-dumping investigation, it could have worked with them to make such revisions. Otherwise, it had a second option, which was to reject the costs as reflected in the books and records and use an alternative allocation methodology from which to derive costs, which MOFCOM concluded in this case meant applying a weighted-average methodology. Furthermore, with respect to Keystone, MOFCOM had two additional methodologies proffered by Keystone as potential options. MOFCOM failed to even evaluate these additional methodologies.[27] In light of the various options, MOFCOM needed to evaluate the respective merits of these options in order to comply with its obligations under Article 2.2.1.1 of the AD Agreement. As the Appellate Body found in *Softwood Lumber*:

> in other instances—such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs—the investigating authority may be required to "reflect on" and "weigh the merits of " evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence".[28]

It is evident from the determinations below, no such evaluation can be found.

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[27] In short, this is not a case where there was only one methodology at issue or the facts entailed ancillary adjustments to allocations. The specific facts entailed various methodologies with serious distinctions and implications.

[28] *U.S. – Softwood Lumber V (AB)*, para. 138.

China's Quoted Determinations in Response to Q. 30

- The investigating authorities have also examined your production costs and expenses. In your response you reported a breakdown of your production costs during the period of investigation, including direct materials, direct labor, fuels and energy and shared manufacturing expenses etc. After the preliminary investigation, the authorities believe that the model basis costs as you claimed do not reasonably reflect the production costs related to the subject merchandise and decide to temporarily use the weighted average of production costs for these models as the production costs for the subject products and like products in the preliminary determination.[29]
- The investigating authorities have also examined your production costs and expenses. In the prelim the authorities believe that the model basis costs as you claimed do not reasonably reflect the production costs related to the subject products and decide to use the weighted average production costs for these models as the production costs.

  After the preliminary determination, your company submitted comments on the authority's methodology. However, your company did not provide sufficient reasons to justify the reason why different parts of the subject products have different cost. After examination and on-site verification, the authority found no changes with respect to the facts determined in the prelim and therefore decides to uphold its preliminary determination.[30]

As with Tyson, these determinations fail to address the evidence that explained why Keystone's methodology was reasonable. While China makes much of how Keystone assigned costs to paws in this proceeding, there is not one sentence making any such assertion either in China's response to Question 30 or anywhere else in the record. And for all the fault China aims at Keystone, it is clear from the above that Keystone proffered alternative methodologies – which also per the above chart, received absolutely no consideration.

8. With respect to Pilgrim's, it too submitted evidence explaining its costs and why they were reasonable. China's response to Question 30, however, does not even bother to cite any of MOFCOM's determinations relating to Pilgrim's. It now appears that China, per its response to Question 99, is making a new argument – that MOFCOM applied Facts Available to Pilgrim's. The United States will accordingly address this claim further in its comments on that response, although the United States notes now that the application of Facts Available is not an excuse to

[29] China, Responses to the Panel's First Set of Questions, para. 75, citing Keystone Prelim. AD Disclosure (Exhibit USA-10), p. 2.

[30] China, Responses to the Panel's First Set of Questions, para. 75, citing Keystone Final AD Disclosure (Exhibit USA-14), p. 3.

ignore what was properly submitted.[31] In the interests of totality and for the Panel's convenience, the United States provides a table summarizing some of Pilgrim's key points.

Pilgrims Explaining Why It Keeps Costs in the Manner it Does	**Pilgrim's Submitted Evidence Why Its Costs Are Reasonable**
• Questionnaire Responses • Explanation that its costing system does not conflict with its financial accounting system because it would undermine its use as a management tool[32]	• U.S. accounting literature noting poultry industry is classic example of joint product costing and explaining that joint product costing is considered the "best allocation method"[33] • U.S. accounting literature noting limitations and distortions from accounting according to physical unit measurements such as product weight[34] • Acceptance of value-based allocations by other administrating authorities[35] • Pilgrim's explained how to reconcile data that MOFCOM took issue with in the preliminary determination[36]

9. China's response to this Question (*i.e.,* its reference back to Question 30 from the Panel's First Set of Questions) also claims that MOFCOM's consideration is established by various queries in its questionnaires.[37] As an initial matter, China's argument fails because the questionnaires were submitted before the preliminary determinations were issued. It was only after the preliminary determinations that U.S. respondents learned that MOFCOM would reject

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[31] *See* China, Responses to the Panel's Second Set of Questions, Answer to Question 99.

[32] Pilgrim's Pride, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-32), p. 56.

[33] Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010) (Exhibit USA-27), pp. 7-8

[34] *Id.* (Exhibit USA-27), pp. 7-8.

[35] *Id.* (Exhibit USA-27), pp. 8-10.

[36] Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010) (Exhibit USA-27), pp. 2-5.

[37] China, Responses to the Panel's First Set of Questions, paras. 71-74.

their kept costs in favor of a weight-based methodology. Accordingly, MOFCOM could not even have been cognizant of most of the evidence and data that would ultimately be advanced later by the respondents when it issued the various questionnaire requests.

10. Fundamentally though, the Appellate Body has explained that consideration under Article 2.2.1.1 is not satisfied by merely "receiving evidence" or "taking notice of evidence" – which is the most a questionnaire request could accomplish.[38] Here, the simple questionnaire requests identified by China do not even achieve what the Appellate Body said was unacceptable. Not a single MOFCOM question identified by China even mentions "value-based allocations," "joint-products," "by-products," or the specific arguments made by respondents, nor does MOFCOM even ask about the reasonableness of the respondents' kept costs. Therefore, China, per the terms of Article 2.2.1.1, was required to demonstrate that it had "reflect[ed] on and 'weigh[ed] the merits of' 'all available evidence on the proper allocation of costs.'"[39] Yet nothing in China's response to Question 30 or anything else MOFCOM did during the investigation suggests that was the case here.

Article 12.2 Informs – Not Limits – Article 2.2.1.1

11. In its response, China now appears to imply that if MOFCOM owed an explanation, it was due under Article 12.2, not Article 2.2.1.1. If China is conceding that it acted inconsistently with Article 12.2, the United States has no objection.[40] But to the extent China argues the existence of Article 12.2 serves as a limitation or exclusion on Article 2.2.1.1, China is in error.

12. As a preliminary matter, the United States references its answer to Panel Question 31, which addresses generally why MOFCOM owed an explanation per Article 2.2.1.1. With respect to the relationship between Articles 2.2.1.1 and 12.2, these two provisions of the AD Agreement serve to inform one another rather than act as limitations. In these proceedings, China has often referred to an "antidumping context," albeit without any reference to the text of the AD Agreement. Article 12.2 is a perfect example of context; it develops Article 2.2.1.1 as well as other WTO provisions. It provides as follows:

> 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

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38 *U.S. – Softwood Lumber V (AB)*, para. 133.

39 *Id.*

40 The WTO Agreement has been interpreted such that a breach of a particular provision of the WTO Agreement may *necessarily* results in the breach of another. For example, the Appellate Body has recognized that a breach of Article 5.1 of the SPS Agreement automatically results in a breach of Article 2.2 as well. *Australia – Apples (AB)*, para. 340.

> 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.[41]

In short, the provision requires a public notice as to certain findings and provides where the public findings should be made. By providing such notice, it does not vitiate the obligations in any other WTO provision – such as an obligation to demonstrate consideration – but rather serves as reinforcement by additionally providing that certain determinations and findings need to be publicly available. This principle was recognized even under the Tokyo Round Antidumping Code.[42] In *Korea – Polyacetal Resins*, a GATT panel considered the relationship between provisions in the Code, comparable to those in the WTO AD Agreement, mandating consideration of evidence and calling for disclosure. The panel's findings are instructive:

> Article 3 of the [Antidumping Code] Agreement required investigating authorities to consider certain factors and to make a determination based on positive evidence with regard to these factors. In the view of the Panel, effective review under Article 15 of an injury determination against the standards set forth in Article 3 required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that Article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice. An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the [Antidumping Code] Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination. The Panel therefore did not accept Korea's argument that the [Antidumping Code] Agreement did not limit an investigating authority's ability to demonstrate that it considered all of the required factors, and to demonstrate that dumped imports

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41 Emphasis added.

42 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("Tokyo Round Anti-dumping Code").

> caused material injury, to the text of the public notice which announced its determination.[43]

In sum, and for the reasons set out above, the existence of a transparency provision such as Article 12.2 does not excuse China from failing to demonstrate in its determinations how it made its findings for the purposes of Article 2.2.1.1. It serves as a conjunctive obligation that the explanation needs to be public and set forth in a specific place.

13. Additionally, it bears noting that to the extent China frames the U.S. claim as asserting that MOFCOM failed to demonstrate its consideration in the preliminary and final determinations, that is not correct. The United States is not simply challenging that MOFCOM's consideration was not public, but rather the United States requests that the Panel find China breached its obligations under Article 2.2.1.1 of the AD Agreement because MOFCOM failed to consider all available evidence on the proper allocation of costs.

China's Response Confirms its Arguments as *Post-Hoc*

14. China's failure to submit any reasoning of MOFCOM in the antidumping investigation – beyond that submitted by China in response to Question 30 – confirms that China's arguments are simply *post hoc* rationalizations. In this regard, it is instructive to compare MOFCOM's actual statements to the various arguments presented by China in this dispute. For example, China has focused in particular on Keystone and its purported failures, including that Keystone did not apply "a relative sales value allocation."[44] But as confirmed above, Keystone while arguing in favor of its own costs, went to the effort of preparing precisely such an allocation as well as another alternative. If China's argument was anything but *post hoc*, then MOFCOM's determinations should surely have explained what was unsatisfactory about Keystone's alternative offer. The following table highlights some of the arguments made by China in this dispute. As demonstrated by comparing China's arguments to the Panel to the MOFCOM's determinations cites in its response to the question (and that are quoted above), it is clear China's arguments formed no basis for MOFCOM's decision-making.

China's *Post Hoc* Arguments
• The very distinct markets for broiler products in the United States and China and how the respondents' cost methodologies were reported – over allocating costs to breasts popular in the United States and under allocating costs to paws and other parts popular in China – became important considerations for MOFCOM in evaluating whether

[43] *Korea – Polyacetal Resins*, para. 209.

[44] China, Second Written Submission, para. 57.

China's *Post Hoc* Arguments

respondents' reported product-specific costs reasonably reflected the cost of production of the subject merchandise for purposes of the antidumping investigation.[45]

- ➢ *However, China's arguments do not address that MOFCOM's determinations contain no explanations or analysis regarding purported Chinese or U.S. markets.*

- In the antidumping context, recorded costs based on such a methodology cannot reasonably reflect the actual costs of production for a given product. Moreover, the extreme bias resulting from this methodology given product preferences in China could not be justified.[46]

  - ➢ *The determinations though do not even reference any bias given product preferences in China or note what preferences Chinese consumers have.*

- This distortion is even more severe when using costs based on U.S. market values to determine the reasonableness of prices being charged in China.[47]

  - ➢ *However, the determinations do not reference a distortion, severe or otherwise. There is nothing on the record to suggest that MOFCOM's issue was interested in determining what market values the respondents' utilized. Indeed, MOFCOM did not even solicit such information from the respondents.*

- The respondents' real and/or practical treatment of the status of paws and other products under their cost allocation methodology was a point of initial concern for MOFCOM, given the relatively high sales value of such products.[48]

  - ➢ *The determinations do not reflect any concerns about the treatment of paws. Indeed, it is notable that the determinations for Keystone and Tyson are nearly identical, yet in these proceedings, China focuses primarily on how Keystone purportedly treated paws.*

- Tyson claimed to treat all products as joint products, but its treatment of products like paws in the allocation process did not really resemble standard joint product treatment.

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45 China, First Written Submission, para. 100.

46 China, First Written Submission, para. 111.

47 China, First Written Submission, para. 127.

48 China, Second Written Submission, para. 53.

China's *Post Hoc* Arguments

Rather, its allocation reflected a by-product approach.[49]

- ➢ *There is nothing in the determinations about joint products or byproducts or why one is acceptable and the other not. In fact, the determinations do not even call into question how Tyson characterized its accounting treatment of the products.*

- China's point is that in a value-based allocation one must take into account the circumstances of all sales to properly allocate costs to all production.[50]

- ➢ *There is nothing in the determinations even touching upon value-based allocations, let alone anything regarding what MOFCOM thought a value-based allocation must include.*

15. In sum, we see China argue about everything from "distortions" between the U.S. and Chinese market to problems with Tyson really treating its products as joint products to what a value-based allocation supposedly needs to do. Yet, an examination of the determinations reveals only conclusory allegations such as that the respondents did not "provide sufficient reasons to justify the reason why different parts of the subject products have different cost."[51]

16. An important example is a new argument that China advanced after the parties' first submissions: that not all value based allocations are inherently unreasonable, but the respondents' allocations were.[52] This argument is not set out anywhere in the underlying MOFCOM proceedings, and indeed is completely inconsistent with how MOFCOM conducted the antidumping investigation. As the United States has already noted, MOFCOM in fact made no efforts to work with respondents regarding value-based cost allocations, but instead categorically rejected respondents' allocations. Furthermore, China's response to Question 30 suggests that MOFCOM thought anything but a weight-based allocation that assigned the same cost to every product to be problematic. In particular, the United States notes China's reference in Question 30 to MOFCOM's response to U.S. comments on the final disclosure:

> According to the respondents, the basis of distinguishing different broiler products is the physical cutting of the product. However, the investigating

[49] China, Second Written Submission, para. 52.

[50] China, Second Written Submission, para. 64.

[51] Tyson Final AD Disclosure (Exhibit USA-12), p. 2; Keystone Final AD Disclosure (Exhibit USA-14), p. 3; *see also* Pilgrim's Final AD Disclosure (Exhibit USA-23), p. 7 (decided not to even take materials into consideration).

[52] *See, e.g.*, China, Second Written Submission, para. 86.

> authority does not think the method accurately reflects difference of cost of the subject merchandise.[53]

MOFCOM's statement suggests a failure to recognize the nature of joint products. Post-split chicken pieces are distinct or non-homogenous products and they have distinct values. MOFCOM's statement appears to reject the notion that split products could have different costs.[54] When read in conjunction with the other determinations, which claim the respondents did not provide "sufficient" reasons for why different part should have different prices, it is very clear that MOFCOM was not concerned about accuracy, but instead about identical costs. Under MOFCOM's analysis, it appears that China's obligations under Article 2.2.1.1 to use the respondents' books and records was trumped by MOFCOM's desire to ensure costs were the same for all the products. In short, China's various assertions about a "proper" value-based allocation or that respondents did not have "true" joint products is simply a fiction invented for the purposes of this dispute.

Question 85: Please provide an English translation of the letter that MOFCOM sent to the US Embassy in Beijing upon the initiation of the investigations.

17. China has submitted as Exhibit CHN-63 the letter sent by MOFCOM to the U.S. Embassy in Beijing upon initiation of the investigations. The United States notes that the letter does not request the United States to identify or contact U.S. producers or exporters of the subject merchandise, much less "all other" such producers. Indeed, China has previously acknowledged that no such request was communicated in writing.[55]

18. Although the question is not presented on the facts in this dispute, the United States would note that MOFCOM's application of facts available would not have been justified even if MOFCOM had made a written request to the U.S. government. In particular, it is inconsistent with obligations under the WTO Agreement to apply adverse facts available to calculate dumping margins and subsidy rates for producers or exporters that were not notified of the investigations, or of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. As the United States has demonstrated, by applying facts available to such producers or exporters, MOFCOM acted inconsistently with

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[53] China, Responses to the Panel's First Set of Questions, para. 76, citing MOFCOM, Reply to the United States Government's Comments on the Final Disclosure, [2010] No. 170 (August 13, 2010) (Exhibit USA-37), pp. 4-5.

[54] *See also* European Union, Oral Statement, para. 10 ("But if China asserts that "actual" costs exist for paws prior to separation, then it would appear to contradict China's own statement that such costs are incurred "uniformly", and the European Union would disagree with the criticism. One cannot address or record something that does not exist.")

[55] China, Responses to the Panel's First Set of Questions, para. 9.

China's obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.[56]

II. PROCEDURAL CLAIMS

A. OBLIGATIONS UNDER ARTICLE 6.2 OF THE ANTI-DUMPING AGREEMENT

Question 87: China has indicated that MOFCOM contacted the "Petitioner" with respect to the US Government's request for a meeting. Please indicate exactly whom MOFCOM contacted: CAAA, the 9 companies listed in the body of the Petition, the 20 companies listed in Exhibit 2 to the Petition, the 17 companies who responded to questionnaire responses, or another grouping of companies.

18. The United States raises three points regarding China's response. First, as a threshold matter, China's response continues to lack any support from the record. As the United States has already noted in its submissions, the only record evidence on this point, Exhibit USA-24, makes no reference to contact with the Petitioner or any other party.

19. Second, China's answer is non-responsive. Rather than answer exactly who was contacted, China has avoided the question by simply asserting everyone the Panel named in the question was contacted. A blanket assertion that every interested party listed in the Panel Question was contacted provides no insight on whether or who was precisely contacted. For example, does China's response mean that MOFCOM contacted the Petitioner's representative, which by implication meant it contacted the individual companies that comprised the Petitioner, or did it alternatively contact each of the individual companies? It strains credulity for China to imply that MOFCOM somehow contacted 47 parties within one business day by telephone and that all of these parties had an immediate answer regarding the hearing request. Therefore, China has not adduced the evidence in support of its assertion.

20. Moreover, this is not China's first opportunity to address the matter raised in Panel Question 87. Panel Question 7 already provided China an opportunity to identify other parties it contacted regarding the hearing request and explain the manner in which it did so. In that response, China noted it contacted the Petitioner via telephone and that it contacted "all interested parties with interests adverse to the U.S. government."[57] China's failure to identify exactly who was contacted demonstrates that China's vague assertion lacks any evidence to support it.

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[56] United States, First Written Submission, paras. 146-155, 184-201; United States, Second Written Submission, paras. 100-125; United States, Responses to Panel's First Set of Questions, paras. 37-46.

[57] China, Responses to the Panel's First Set of Questions, para. 16.

21. The final point about China's response is that it fails to address how an informal procedure of contacting potential hearing participants via telephone (a procedure described for the first time in China's submissions in this dispute settlement proceeding) would be in accord with China's own rules governing hearings. Per Article 16.5 of the AD Agreement, China is required to notify the Committee of Anti-Dumping Practices of "its domestic procedures governing the initiation and conduct of such investigations." The rules previously cited by the United States, Exhibits USA-24 and USA-47, were so notified.[58] Here, China does not even attempt to argue its purported telephone call(s) were in accordance with its procedures. The fact that China is asserting an action that has no basis in its rules or that was subject to notification calls into further question an assertion that lacks any support in the record of the administrative proceeding.

B. NON-CONFIDENTIAL SUMMARIES

Question 88: In your answer to Panel question No. 3(b) you state that Petition Exhibit 2 and 6 are confidential. Please confirm that this means that these two exhibits were not made available to other interested parties.

22. China's response confirms that a non-confidential summary of the information in these documents was due.

III. CALCULATION OF THE ANTI-DUMPING AND COUNTERVAILING DUTIES

A. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

Question 89: In paragraph 50 of its second written submission, China argues that there can only be <u>one</u> cost of production within the meaning of Article 2 of the AntiDumping Agreement. Thus, where value-based allocations are concerned, one must take into account the circumstances of <u>all</u> sales to properly allocate costs to <u>all</u> production. In this respect:

(a) Article 2.2 of the Anti-Dumping Agreement refers to the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs, and for profits. Given that Article 2.2.1.1 is for the purposes of Article 2.2, does China believe that this language relates to costs of production or costs of sales?

23. China's response: (i) advances a faulty interpretation of Articles 2.2 and 2.2.1.1; (ii) demands that investigating authorities and respondents adopt technically infeasible practices; and (iii) mischaracterizes the respondents' kept costs. The United States will address each point seriatim.

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[58] G/ADP/N/1/CHN/2/Suppl.2; G/ADP/N/1/CHN/2/Suppl.1.

China's Faulty Interpretation

24. China's response essentially asserts that "costing methodologies that rely on sales values" cannot constitute the "cost of production" under Article 2.2 unless the methodology somehow accounts for the value the products may hold in foreign markets.[59] Apparently allowing methodologies that are not tailored as China demands "distorts the purposes of Article 2.2.1.1." Not surprisingly, China's answer lacks any textual basis in the AD Agreement.

25. The provisions read together are clear. Article 2.2 and its subparts address how to determine normal value. Article 2.2 states the objective while Article 2.2.1.1 provides the route to achieve it. Specifically, Article 2.2 provides that when sales cannot be used to generate normal value, then normal value can be established by finding the "cost of production in the *country of origin* …." Although the plain text is more than sufficient to establish that the objective is a home market price, it is also the case that the drafting history explicitly noted that the intention was to create a notional ex factory sales price for the home market

> The Group noted the provision in paragraph 1(b)(ii) of Article VI that to the cost of production, when this criterion was being used for the determination of normal value, there was to be "a reasonable addition for selling cost and profit". The effect of this was to construct what might be regarded as a notional ex-factory sales price on the domestic market of the exporting country in circumstances where there was no such actual price or not one that could be used for the determination of normal value.[60]

The calculation of normal value, thus, even when determined through the cost of production method, is a means by which an investigating authority is attempting to determine a home market price. Article 2.2.1.1 explains the mechanism by which to calculate costs including the cost of production in the country of origin. The costs are to be calculated on the basis of records kept by the exporter or producer. The provisions do not allow special treatment simply because the kept records are based on "costing methodologies that rely on sales values" and it certainly does not mandate that books be tailored for an antidumping investigation. To the contrary, *it is the investigating authority* that must accept the costs in the kept records unless it can establish certain conditions and even then that its alternative methodology is proper.[61] Thus, China's

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[59] China, Responses to the Panel's Second Set of Questions, para. 17.

[60] Second Report of the Group of Exports on Anti-Dumping and Countervailing Duties, L/1141, 29 January 1960 (Exhibit USA-78), para. 13 (emphasis added).

[61] The United States notes that while China has continuously referenced in these proceedings the dangers of value based allocations, the fact is value based accounting had long been established and accepted as the standard cost allocation methodology in certain industries by the time the Uruguay Round Agreements were adopted. This is not a case where an investigating authority is encountering some esoteric or unknown accounting exception that would have been unforeseen to the Uruguay Round drafters.

position that an allocation methodology must be rejected unless it takes into account the fact that the product under consideration may be sold for a higher price in a particular market has no textual support and is accordingly misplaced.

China Demands the Irrational and the Impractical

26. The United States notes two practical consequences of China's assertion. First, in many antidumping investigations (aside from the instant proceeding involving broiler products), China's position could make a finding of dumping *less* likely. China has railed in these proceedings about circularity.[62] Indeed, in its first submission, China asserted that the cost of production must be "sufficiently independent of the export price to which it will be compared."[63] But what China has subsequently argued, including in its response to Question 89, in fact creates a circularity problem because it adjusts normal value by forcing it to somehow account for export prices. Thus, under China's theory, the lower the export price, the lower the costs used to determine normal value. The ultimate result would be that a firm with abnormally low export prices would – due to those low export prices – also have a corresponding low normal value, thus making a finding of dumping less likely. The ultimate result would have a firm allocating more costs to the export side thus making a finding of dumping less likely.[64] Accordingly, it is difficult to imagine any administering authority adopting the general rule that China advocates here; rather, it seems like China presents its theory because it increased the margins under the specific facts of the broiler products investigation.

27. Second, China has not explained why the methodology it now advocates would be technically feasible. In its response to Question 29, the United States explained that it would not be practical for a firm in its normal books and records to use the type of methodology China now advocates.[65] China has not presented any evidence whatsoever that the accounting it now demands is used by any firm anywhere. Although China in its responses here, as well as its second written submission, now claims to agree that value-based allocations are not inherently unreasonable, that is effectively what it is asserting as its methodology is problematic from a business perspective. China has not advanced evidence that the methodology it suggests to be a

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62 *See e.g.*, China, First Written Submission, paras. 118-121.

63 China, First Written Submission, para. 73.

64 *See also* European Union, Opening Statement, para. 20 ("China's argument would actually seem to imply that more of total costs should have been allocated to the export side as opposed to the domestic side, which would have reduced total domestic costs, and thus domestic costs allocated to both breasts and paws, thus tending to reduce or eliminate the dumping margin.")

65 United States, Responses to the Panel's First Set of Questions, para. 64; *see also* European Union, Oral Statement, para. 17 ("How is the firm supposed to select from or combine these different export values when adopting cost allocation methodologies pertinent to the situation pertaining in its domestic market?").

"true" value based allocation is practiced by anyone or called any such thing. Since what China is demanding does not exist, China, despite its assertions otherwise, is essentially holding all value-based allocations unreasonable *per se*.

China Mischaracterizes Respondents' Costs

28. China asserts that respondents' recorded costs are arbitrary and based "on completely fictional values."[66] However, China does not support its assertion with any citation to MOFCOM's determinations or, for that matter, with any other explanation. And contrary to China's unsupported assertion, the United States has explained in its submissions that the respondents submitted evidence explaining why they kept costs the way they did and why those costs were reasonable. China's retort in these proceedings has been to belittle the respondents or accuse them of improprieties that have no basis in the record. However, on the record of the actual investigation, there is not a single finding by MOFCOM regarding the values the respondents used to allocate costs, including that they were "fictional."

29. The United States would also emphasize MOFCOM did not make a single finding in the investigation regarding the bases for their costing systems. That such is the case is illustrated by two points.

30. First, China has not provided any evidence that MOFCOM engaged in any consideration regarding the values utilized by respondents. If MOFCOM was concerned, for example, that the values should have reflected global prices, it could have inquired about the basis for respondents' values and whether it was possible to make such adjustments. As the United States has noted, for at least some products in this investigation, the benchmark was in fact global prices. Notably, MOFCOM never solicited or analysed any record evidence on that point.[67]

31. Second, the evidence on the record does not suggest anything "fictional" about the values utilized by respondents. For example, China complains that Tyson used an "offal price" to value paws.[68] Tyson, however, explained that the "offal price" was based on sales in the United States. Tyson also noted that the Urner Barry service it utilized was the oldest commodity reporting service in the United States and that it obtained its data from various buyers, sellers and brokers. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price – and that Tyson's in fact sells paws as offal. With respect to Keystone, Keystone did not hide its cost methodology; it put in black and white that [[

66 China, Responses to Panel's Second Set of Questions, para. 18.

67 United States, Responses to Panel's First Set of Questions, para. 66.

68 China, Responses to Panel's Second Set of Questions, para. 18.

]][69] And Keystone explained why: [[
]].[70] Accordingly, U.S. respondents were forthright about their costs and rationales, and no "fiction" was involved.

(b) Furthermore, in this context, what does China mean by taking into account the circumstances of all sales to properly allocate costs to all production?

32. China's response is that a value based allocation is only permissible if it allocates costs in a manner that reflects sales in all markets. Any other value-based allocation is inherently unreasonable according to China. China claims that such an approach is necessary to be consistent with the statement in *EC – Salmon* that the cost of production is "the price to be said paid for the act of producing."[71]

33. China is right in that what was found by the Panel in *EC – Salmon* has direct relevance to the disposition of China's argument:

> [[XXX]] did provide the investigating authority with information about the accounting principles it had applied for "significant accounting entries", which included information about usual depreciation periods …The investigating authority's findings do not *explain why th*is information was inappropriate and could not be used to determine how to allocate the relevant NRCs. In any case, regardless of the relevance of [[XXX]] *reported* accounting principles, *we believe that it was incumbent on the investigating authority to at the very minimum explain* why it was appropriate to allocate the relevant NRCs over …. However, we can find no such explanation, even in general terms, anywhere in the investigating authority's findings. Absent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1**.**

China runs afoul of this finding in *EC – Salmon* because there is no explanation in the basis for its decision as to why respondents' information is wrong and MOFCOM's approach right. Indeed, not one sentence in the determinations, disclosures, or anywhere else in the record

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69 Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 4.

70 (Exhibit USA-29), p. 21.

71 China, Responses to the Panel's Second Set of Questions, para. 19, citing *EC – Salmon*, para. 7.481.

suggests that MOFCOM would accept the type of allocation it now holds "rational."[72] Having failed to establish such, China cannot argue this argument as a defense against the U.S. claim.

34. MOFCOM's determination did not make the finding or demonstrate any consideration of the argument China proffers now. If MOFCOM believed it was vitally important to account for the value that products may obtain in other markets, then why did MOFCOM proceed to a weight-based allocation using the very same figures that MOFCOM now argues are irrational and arbitrary, instead of requesting such data from the respondents? The fact that MOFCOM asked no questions on this point demonstrates both that China's argument is simply a *post hoc* rationalization and that MOFCOM's weight-based methodology is not proper.

35. In addition, the so-called problems that China cites in its response here illustrate MOFCOM's lack of consideration. The United States will provide two examples. Example 1: China asserts that the United States is trying to justify Keystone's approach by noting that Keystone [[ ]].[73] China's point is misplaced. The United States is not trying to re-litigate these issues *de novo*. The United States is establishing that MOFCOM failed to consider evidence and make requisite findings. The fact that Keystone's production is focused in this manner was explicitly justified by Keystone.[74] MOFCOM does not address this evidence – or any other evidence to suggest that it wanted Keystone to report some type of global allocation system.

36. Example 2: China's asserts that Keystone cannot be allowed to "dismiss paw production." But Keystone reported – as it should have – its costs as kept in its books and records. After having had those costs rejected, and without any guidance as to what MOFCOM wanted, Keystone went to the effort of preparing <u>two</u> alternatives for MOFCOM that allocated costs to paws. MOFCOM, without any analysis of the alternatives, maintained its position from the Preliminary Determination. Thus, the party that engaged in the improper dismissal was MOFCOM, as it refused to consider alternatives or explain what precisely it was seeking. These two examples illustrate that while China asserts MOFCOM had these purported concerns and rationales, MOFCOM did nothing during the investigation that would consistent with them.

37. With respect to China's claim that Keystone [[ ]], the United States refers to its comments on China's response to Question 94.

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[72] *See EC – Salmon*, para. 7.509 ("However, we can find no such explanation, even in general terms, anywhere in the investigating authority's findings. Absent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1.")

[73] China, Responses to the Panel's Second Set of Questions, para. 21.

[74] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), pp. 3-4.

(c) In paragraph 32 of its opening statement at the second meeting, China said that there cannot be multiple costs of production depending on different markets. Is it possible that preferences or regulatory frameworks (such as compliance with SPS, environmental, or other regulations) in some markets could result in higher production costs than others?

38. China's answer to the Panel's question is non-responsive. First, China completely sidesteps the Panel's question about whether preferences could affect costs of production. This is notable because in its first submission, China argued market preferences in China and the United States were an important issue in this dispute.[75] China appears to have subsequently repudiated its position.[76] The United States agrees that China was right to do as its position is unsupportable under the AD Agreement. Specifically, the United States notes again that Article 2.2.1.1 provides that the investigating authority is to calculate costs according to kept records. If the objective under Article 2.2 is to develop a surrogate home market price, then considerations about whether the products are highly valued in the Chinese market should be irrelevant as to whether a respondents' costs are reasonable or not.[77]

39. Second, in respect to regulatory frameworks, the United States does not understand precisely what China is asserting. China summarily asserts that such costs "may be readily distinguished" – but does not explain what is being distinguished, why it easy to do so, and what the investigating authority is to do once it has made any findings.[78] Of particular salience, China does not explain how its approach is consistent with the AD Agreement. Accordingly, the United States believes China's response in respect to regulatory frameworks is just as non-responsive as its answer regarding preferences.

Question 90: The United States argues that a value-based allocation methodology, which uses sales prices as a proxy for actual costs incurred, is an appropriate basis for calculating the cost of production under Article 2.2.1.1. In this context, please explain how cost allocations based on sales that have been determined to be outside the ordinary course of trade should be considered in the calculation of the costs.

40. The United States refers back to its response to this question regarding why China's assertions about respondents' value based allocations do not suffer from sales made outside the

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75 China, First Written Submission, para. 104.

76 China, Second Written Submission, paras. 60-61.

77 As the United States has previously noted, China's position of demanding prices be deemed "fair" per its so-called anti-dumping context lack not only textual support, but goes against the basic tenet of international trade: that countries with comparative advantage should be allowed to export their products. United States, Second Written Submission, para. 46.

78 China, Responses to the Panel's Second Set of Questions, para. 22.

course of ordinary trade. Additionally, the United States notes that China's response asserts that a value-based allocation is not inherently unreasonable, but will require a fact specific inquiry. However, there is nothing in the record reflecting any such inquiry by MOFCOM. While China may continue to claim – wrongly the United States believes – that Tyson's reliance on the offal market price is irrational, there is no finding by MOFCOM to that effect and certainly nothing on the record to suggest MOFCOM was interested in learning more about the issue. Accordingly, China's argument is simply *post hoc* rationalization.

Question 91: Please respond to the United States' claim in response to Panel question No. 28 that, in respect of the calculation for Tyson's normal value, MOFCOM's methodology resulted in the inclusion of costs not associated with the production and sale of the like product.

41. China's response continues to sidestep the principal question: not whether MOFCOM can perform division correctly, but did it divide the correct figures. Indeed, it even sidesteps Tyson by pointing to data for another respondent: Keystone. As with its arguments regarding the CVD numerator/denominator mismatch, China is essentially arguing that MOFCOM's conclusions are *ipso facto* correct provided MOFCOM used data submitted by a respondent at some point during the investigation, even if the respondent brought other information to the authority's attention or explained that the data was being misinterpreted. In the present case, China notes that since the average value of various products in Exhibit CHN-64 corresponds to the cost in the final AD disclosure, it must be correct. The problem, however, is not whether MOFCOM properly did division and transposed the value, but what precisely was divided. Thus, it does not matter whether Exhibit CHN-64 and the Final AD Disclosure line up, but rather what is in Exhibit CHN-64.

42. China's provision of Exhibit CHN-64 allows us to confirm that there are in fact two errors in China's methodology. First, MOFCOM's approach results in an error in the aggregate basis, *i.e.*, the total pool of costs MOFCOM used to calculate the weight-based costs. Tyson's Comments on the Final AD Disclosure notes that products which MOFCOM had failed to account for included heads, bones, blood, feathers, organs, and viscera.[79] China's table, Exhibit CHN-64, clearly does not include these products. In other words, MOFCOM excluded the costs and values of these products. Moreover, the reported costs of these products in the normal books and records are done by value, not weight. In Tyson's normal books and records, the products have low values relative to their weight. Under MOFCOM's theory, however – the so called neutral weight-based methodology – these excluded products should have been valued equally. In other words, a pound of chicken heads or a pound of chicken blood should cost the same as a pound of paws or breast meat. Now doing the math with the data that Tyson provided MOFCOM, these products accounted for [[

]][80] In effect,

[79] Tyson, Comments on Final AD Disclosure (July 26, 2010) (Exhibit USA-40), p.6

[80] *See* Exhibit 2 to Tyson, Further Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-79) (Contains BCI).

MOFCOM used value-based allocation to allocate costs *to* subject merchandise, which had the effect of pushing more costs towards the subject merchandise, but then rejected value-based allocation *between* various types of subject merchandise.

43. The second distortion is on a product-specific basis. MOFCOM averaged the processing costs along with the meat costs. In Tyson's normal books and records, the processing costs are product-specific based on machine time or weight. They are not allocated based on value. MOFCOM's methodology distorted the costs by using weight to allocate all costs elements (materials, labour, and overhead), not just the meat cost. MOFCOM's calculation assumes that it takes the same amount of time to remove chicken paws from the carcass as it does to de-feather a bird, remove the giblets, separate the front half (breasts) from the back half (leg quarters), and debone and remove the skin from a thigh. As demonstrated in Tyson's submitted costs, the processing costs for a paw are only [[ ]] (Tab 36 to Tysons's Exhibit S2-5-Revised) while the processing costs for a boneless skinless thigh are [[ ]] (Tab 20 to Tysons's Exhibit S2-5-Revised). By using an across the board weight-based allocation, MOFCOM assigned more processing costs to the main products exported to China: paws and leg quarters.

44. The United States notes two final points. First, in its opening submission, the United States noted that this situation – not taking into account all products – is itself a breach of Article 2.2.1.1.[81] Second, the fact that Tyson alerted MOFCOM to this problem, and that MOFCOM did not respond <u>at all</u> confirms that MOFCOM did not consider the historically utilized costs of Tyson, again resulting in a breach of Article 2.2.1.1.

Question 92: Please explain your contention in paragraph 30 of your opening statement at the second meeting that anti-dumping proceedings are effectively "rate regulation proceedings".

45. It is notable that China's response does not even bother to try and define what a rate regulation proceeding is. When one does consider the purpose of rate regulation, and leaving aside for the moment that the text of the AD Agreement makes no reference to rate regulation or related concepts, it is clear that concepts of rate regulation cannot be imported wholesale into the exercise of interpreting the Antidumping Agreement.

46. That said, it is clear rate regulation and anti-dumping are very different proceedings. Rate regulation is typically concerned with determining the level of *profit* a firm may be allowed to earn. One of the classic instances of rate regulation is in regards to natural monopolies such as water and electric companies.[82] The rate regulator is seeking to determine a price that provides sufficient compensation to the firm to cover its costs and investors but also one that does not gouge customers. As the level of return is being set by a regulator, an allocation based on selling

[81] United States, First Written Submission, para. 113, n. 140.

[82] N. Gregory Mankiw, Principles of Economics (6th Ed. 2011) (Exhibit USA-80), pp. 321-322.

prices may not make accounting sense. For example, if the regulator determines the firm may set its prices at 20 percent above cost, the firm reasonably cannot use selling prices to determine its costs. Accordingly, the application of a physical measure basis for accounting is not desirable in rate regulation settings, but is often a necessary consequence of having the rate of return fixed by fiat rather than the market. This is an actual circularity issue. In contrast, antidumping proceedings do not touch upon the profit that may be obtained by a natural monopoly. Instead, antidumping proceedings address a different economic issue, involving price discrimination between markets. And in addressing that issue, the proceedings and findings must be within the parameters of the AD Agreement.[83]

47. In contrast, the AD Agreement is not about controlling a firm's profit. While China's submissions suggest MOFCOM was apparently concerned with what it perceives to be "distorted" profits earned by U.S. respondents, China fails to provide any textual support for why such concerns are relevant under the AD Agreement.[84] China's argument suggests there are questions of "fairness" and "appropriateness" that could be resolved in a similar fashion to a rate regulation proceeding. Put plainly though, one does not need to search the economic theories of rate regulation or the metaphysics of "fairness" in order to calculate normal value. One can proceed directly to the text of the AD Agreement, particularly Article 2.2 and its subparts. Not one word in those provisions addresses a "fair" profit or rate of return. Those provisions prescribe how to determine normal value, including if necessary, by the cost of production method that utilizes the producer's normal books and records. There is nothing in the provision that suggests the authority to scrutinize how much return the producer is earning and whether it is "fair." In short, China's arguments are without textual or logical support and must therefore be disregarded.

48. Finally, the United States wishes to address China's argument that the United States is holding others to a double-standard.[85] Specifically, China alleges that the United States' own investigating authority believes value based allocations are problematic or unreasonable in anti-dumping proceedings. In support of this assertion, China cites a U.S. administering authority's determination issued in relation to antidumping measures on magnesium metal from Russia.

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[83] AD Agreement, Art. 18.1 ("No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.")

[84] *See, e.g.*, China, Second Written Submission, para. 69.

[85] The United States observes that unfortunately, this is not the first time nor the first dispute where China has attempted to defend MOFCOM's antidumping determinations by attacking wholly unrelated U.S. practices and determinations. *See* United States, Closing Statement of the United States at the First Substantive Meeting of the Panel with the Parties, *China – GOES* (September 16, 2011) (Exhibit USA-81), para. 3. The strategy has not been successful.

49. While U.S. practice is not at issue here, the United States notes two points in response to China's allegation. First, U.S. practice is not inconsistent with the arguments presented in this dispute. For the particular anti-dumping measure cited by China, the U.S. Department of Commerce ("Commerce") calculated the cost of production through a value based allocation. That such is the case can be confirmed not simply from a description issued by Commerce, but also by a decision issued by the U.S. Court of Appeals for the Federal Circuit:

> Commerce adopted a methodology whereby magnesium and chlorine gas were treated as joint main products, with the costs of production being allocated between them at OPU-2, the split-off point where they become distinct products. Commerce performed the allocation based upon each product's net realizable value ("NRV") through OPU-2. … NRV is the selling price of a product less any costs necessary to complete and sell it. Anthony & Reece at 442. Accordingly, when costs are allocated to joint products based upon NRV in order to determine constructed value, they are allocated to each product in proportion to the amount of revenue contributed by that product. [86]

The second, and more important point, is that while China argues about U.S. practice here, it ignores that the evidence presented to MOFCOM by U.S. respondents, *during the investigation*, included examples of administering authorities accepting value based allocations. The examples submitted include:

Submitted[87]

- Pineapples from Thailand (U.S. determination)
- Softwood Lumber from Canada (U.S. determination)
- Lemon Juice from Argentina (U.S. determination)
- Hams from the United States (Mexican determination)
- Polyvinyl Alcohol from Taiwan (U.S. determination)

With respect to *Pineapples from Thailand*, the U.S. authority – which China accuses of having double standards – explicitly rejected a weight-based allocation, which was explained by Tyson to MOFCOM:

> We believe, however, that allocating the cost of pineapple evenly over the weight is not supportable. Using weight alone as the allocation criteria sets up the illogical supposition that a load of shells, cores, and ends cost just as much as an equal weight of

[86] *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d. 751, 756 (July 27, 2012) (Exhibit USA-82), pp. 7-8.

[87] (Exhibit USA-26), p 10; (Exhibit USA-27), pp. 8-10.

> trimmed and cored pineapple cylinders. Significantly, the use of physical weighting for allocation of joint costs, i.e., in this case the cost of the pineapple fruit, may have no relationship to the revenue-producing power of the individual products.[88]

In short, there was record evidence explaining to MOFCOM that other administering authorities in other countries, including the United States, utilize value based allocations – and that weight-based allocations can be problematic. There is nothing on the record though to suggest that MOFCOM considered any of this evidence. Accordingly, the United States finds puzzling China's accusations of so-called "double standards," as there is a good deal of support on the record of this case that contradicts China's claim on this point.

Question 94: The Panel is faced with two diametrically opposed readings of the facts concerning the US respondents' cost allocations. With reference to the exhibits, please explain how the record supports your view as to:

(a) How the data referred to by the United States in response to Panel question Nos. 34 and 38 (including Exhibit USA-60) as well as that referred to by China in response to Panel question No. 34, paragraphs 66-69 of China's second written submission, and paragraph 28 of China's opening statement at the second meeting, supports your view as to whether Keystone allocated zero cost to paws.

50. Keystone allocated costs to paws. As is clear in the evidentiary record, Keystone's practice in its books and records was to assign [[

]][89] It is correct that [[

]] but the notion that Keystone's normal books and records listed a total cost of zero for paws is flat wrong.[90] It bears emphasis that Keystone was not hiding any of this; its submissions set forth this accounting treatment in black and white.[91] China's response does not challenge any of the foregoing or try to claim that U.S. data is inaccurate.

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88 (Exhibit USA-27), p. 10.

89 (Exhibit USA-30), p. 4.

90 *Id.*

91 The United States references paragraph 18 of its answers to the Panel's Second Set of Questions. That paragraph provides a list of numerous submissions by Keystone setting forth its accounting methodology. *See also* Keystone, Investigation Questionnaire Response (Dec. 3, 2009) (Exhibit USA-34), p. 87 ([[

51. What China's response does do, by noting that U.S. submissions "do not really contradict" Keystone's statements, is highlight two flaws in its arguments. First, that China must cite to Keystone's submission rather than MOFCOM's determination confirms that this purported "zero cost" issue is simply *post hoc* rationalization.[92] The fact that China cannot draw upon anything in MOFCOM's determinations, as well the fact that Keystone prepared alternative allocations – which also received no analysis in the determination – establishes that MOFCOM was simply not concerned with this issue.

52. Second, China's response highlights that China's *post hoc* rationalizations often have no basis in the record of the antidumping investigation, or otherwise in the record of this dispute settlement proceeding. At the first panel meeting, China's counsel asserted that Keystone assigned a cost of zero to paws – full stop. China did not try to clarify that [[ ]] The United States in its closing statement tried to correct this misimpression:

> For example, one of the respondents that respondents that China claims as having zero costs may not have allocated the cost China wanted to allocate to paws, but the respondent did allocate some costs – such as labor costs.[93]

The United States subsequently provided additional evidence, such as USA-60, that validated that statement. Nonetheless, China continued to promote the impression that the cost was zero, including in Paragraph 28 of China's Opening Statement, which was identified in this question:

> Keystone [[ ]]. In other words, Keystone [[ ]].

The authority China cites for those assertions is again not the record, but China's Second Written Submission. The fact that China has mischaracterized the record highlights that the positions it advances are for the purposes of this litigation as opposed to reflecting any genuine reasoning used by MOFCOM in the investigation.[94]

]])

[92] What China quotes by the way is a selective portion of Keystone's submission that candidly acknowledges that [[ ]] China omits that, later in the same submission, Keystone explains that [[ ]]. Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 4.

[93] United States, Closing Statement at the First Substantive Meeting of the Panel, para. 4.

[94] The United States observes that China continues to blame the respondent rather than properly address the record. Specifically, MOFCOM claims that Keystone declined, after purported invitation, to provide sub-ledger expenses. For that assertion, China cites Exhibit USA-60, Keystone's Form 6-4. Keystone's Form 6-4 simply has a notation in one of the rows stating: "Manufacturing expenses (if

(c) With respect to China's arguments in paragraphs 51-59 of its second written submission, please explain with reference to the record evidence whether Tyson treated paws and other subject merchandise as "by products" or as "joint products".

53. The United States raises at the outset that China has not explained (i) what it considers to be the distinguishing features between a joint product and a by-product or co-product, (ii) where in the record is any consideration by MOFCOM of this issue, and (iii) why Article 2.2.1.1 would treat by-products and co-products disparately, when both are joint products. Accordingly, this entire line of argument is again *post hoc* rationalization.

54. China asserts that Tyson did not fairly represent its methodology "*perhaps*" because Tyson was not fairly allocating costs to paws.[95] But what precisely is "unfair" about Tyson's representations or the manner in which it allocated costs to paws? Again, China takes offense that the reference was an offal price, but cannot point to where in the record there is any indication that an offal price is problematic or why offal cannot be a joint product and, in particular, a co-product. If paws are offal and the offal price is the market price, then why is what Tyson doing arbitrary or worth penalizing?[96] Accordingly, China has not adduced any record evidence in support of its finding.

(d) With respect to the reasonableness of MOFCOM's weight-based methodology, please respond to the differences in processing costs the United States identified in response to Panel question No. 35, as well as the tables provided in Exhibits USA-61, 62, and 63. Please relate this information to that provided in China's response to Panel question No. 35

55. China asserts that MOFCOM's methodology did not have to meet a standard of "perfect." What China omits is that under the AD Agreement, MOFCOM's allocation in fact did have to meet a standard and under that standard the allocation needed to be a "proper allocation of costs." China's response goes on to concede that MOFCOM's methodology did not distinguish between processing costs – or rather that it spread distinct processing costs among all products. Under these circumstances, the issue is whether that methodology resulted in a proper allocation. The answer is plainly no, and the rationales offered by China in its response to Question 94(d) are untenable.

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possible, please add sub-ledger of manufacturing expenses by yourself.)" China does not claim that MOFCOM found Form 6-4 deficient, or highlight why it needed subledger expenses, or what difference it would make when the rest of the table already establishes that paws were assigned costs.

95 China, Responses to the Panel's Second Set of Questions, para. 35.

96 China does not cite any attempt by MOFCOM to work with Tyson on this matter or to understand the offal price better. Instead, it proceeded directly to apply a weight-based methodology.

56. First, China argues that respondents' meat costs are arbitrary and distortive. The United States has already explained why it disagrees and that there was no finding by MOFCOM to that effect in the AD investigation. In any event though, China does not explain why those circumstances make proper the averaging of distinct processing costs.

57. Second, China asserts that the processing costs are not reasonable or substantiated and that Tyson's costs changed during the investigation.[97] The United States disagrees. For example, the investigation questionnaires provided cost center or grow-out information for costs.[98] There is no finding on the record that any of the costs were "unsubstantiated" or "unreasonable." With respect to Tyson, the fact that a firm's processing costs may change over time is not surprising. China has not explained how the costs changed in a problematic matter. Assuming arguendo that there were problems, China has failed to explain why it would be proper to spread the apparently unreasonable costs rather than follow up with the respondents to determine what the proper costs should be.

58. Third, China claims its weight-based methodology was a neutral approach that removed preferences between the U.S. and Chinese markets. The United States has already explained why such an argument has no merit, but additionally notes that it has no bearing on why processing costs should be averaged.

59. Fourth, China claims that respondents provided evidence that weight-based allocations were reasonable in rate regulation proceedings and they proposed their use.[99] As an initial matter, this argument fails because it appears that MOFCOM had decided upon a weight-based methodology that improperly averaged costs before the materials it cites were submitted and it does not address why averaging distinct processing costs is proper. Moreover, the submission China cites clearly does not propose the adoption of a weight-based methodology. China cites footnote 19 of Keystone's Comments on the AD Disclosure, which of course was submitted after MOFCOM decided on this approach. Footnote 19 provides various treatises that state the preferable method in account for joint products is a value based allocation. (China has yet to cite a single reputable authority that suggests unit based accounting should be used for non-homogenous joint products.) The sentence to which footnote 19 is attached states:

> Because the proper measure of dumping margins requires a reliable unit cost of production for every product within the scope of the investigation, Keystone

[97] China does not assert that there are any findings on the record to this point or that MOFCOM issued any questionnaire requests to clarify these purported distortions.

[98] *See, e.g.*, Keystone, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-34), Tyson Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-36), Pilgrim's Pride, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-32).

[99] The United States has explained in its response to Question 92 why anti-dumping proceedings are not rate regulation proceedings and refers back to those points.

> provided BOFT with two widely used cost methods which are recognized as acceptable under U.S. GAAP, and International Accounting Standards.[100]

Thus, China is arguing that respondents proposed the adoption of a weight-based allocation to MOFCOM by doing the following:

- Filling out their questionnaires;
- Making submissions months after MOFCOM had already arrived at its decision;
- Filing a submission whose section title is "IN ITS FINAL DISCLOSURE, BOFT INCORRECTLY USED AN AVERAGE COST, RATHER THAN A PRODUCT SPECIFIC COST"[101]
- Noting in a submission that although physical measures are used in accounting that "The sales value at split-off method is preferable when selling-price dates exists at split-off (even if further processing is done)."[102]

In short, China's argument is that respondents, by providing their kept costs and making submissions *after* MOFCOM decided upon a weight methodology that noted there were two methods for keeping costs and that value-based allocation are *better* than physical measure allocations somehow requested a weight-based methodology. If this is the best China can offer, in a *post hoc* rationalization, then it is beyond dispute that MOFCOM's allocation not proper.

60. The final point the United States observes is China's Exhibit CHN-65, which appears to have been prepared for this dispute and was thus not disclosed to Keystone. According to China, the United States erred in its computation of processing costs. The United States will not engage in a *de novo* fight over a cost treatment that is not recorded in the record. The United States simply notes that China's response still does not explain how MOFCOM considered the issue of processing costs in deciding that its own methodology was "proper."

Question 95: How were the US respondents informed that their cost allocations were being rejected? How did MOFCOM indicate to the US respondents the data and the specificity required to enable MOFCOM to apply the methodology that it had decided to use (e.g., reporting of itemized costs)?

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100 Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), p. 21.

101 Keystone, Comments on the AD Final Disclosure (July 26, 2010) (Exhibit USA-29), p. 20.

102 *Id.*, p. 22, quoting Charles T. Horngren, et al., Cost Accounting: A Managerial Emphasis at 581 (Prentice Hall 2009) (parentheses original).

61. China's response acknowledges that respondents did not know that their kept records would not be applied until after the preliminary determination. Thus, certain assertions by China in these proceedings are simply impossible from a chronological perspective. They include:

- That respondents proposed a weight-based methodology;
- That MOFCOM considered respondents' arguments through questionnaires that were submitted before the preliminary determination was issued; and
- MOFCOM had concerns regarding the averaging of processing costs.

62. With respect to China's response regarding the forms MOFCOM sent respondents to collect their data, China fails to explain a key point. Specifically, if the form China cites breaks out different expenses by model, such as labour and fuel and power, and MOFCOM was allegedly concerned about the averaging of those costs, why then did MOFCOM nonetheless average those costs in applying its alternative cost allocation methodology? If China's alleged concerns are to be believed, then this was apparently MOFCOM fighting a perceived grease fire with more grease. More likely, this is China inventing a reason for MOFCOM's actions, *post hoc*, and finding itself trapped in a contradiction as a result.

Question 96: With respect to China's response to Panel question No. 35 and your statements at the second meeting that MOFCOM's methodology did not account for differences in processing costs, but did account for differences in other non-production costs such as transportation, freezer storage, selling expenses, etc., please provide the Panel with an explanation for each company as to what factors that went into the allocation of costs to each model (see Exhibits USA-60, 61, 62).

63. MOFCOM's failure to disclose the calculations leaves it ill-positioned to address China's response. The United States further notes that respondents did request information during the investigation in order to evaluate the adjustments made by MOFCOM, and noted problems they were facing as a result of the limited disclosure.[103]

[103] *See* Tyson, Comments on the Preliminary AD Determination (February 20, 2010) (Exhibit USA-25), p. 1 (Tyson respectfully requests that BOFT provide a more detailed disclosure that shows: …(3). Calculation processes and detailed data for the normal value (including adjustment items); Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010) (Exhibit USA-27), pp.11-12 ("Because the disclosure was limited in scope, our Company is not able to accurately replicate how the normal values for all products were calculated by BOFT, but our Company has found that at least the calculation results for the following products were obviously unreasonable.")

Question 97: How did the respondents allocate the values in the supplemental set(s) of costs submitted to MOFCOM? Please explain in particular:

(a) On which basis (or using which benchmark) each respondent estimated the values of subject products in its books and records (i.e. did the values relate to prices, an average, etc.)

64. China's response distorts the situation with respect to both Tyson and Keystone. In respect to Tyson, China now makes the unsupportable claim that Tyson proffered a weight-based methodology and agreed that it was permissible. With respect to Keystone, China mischaracterizes the alternative methodologies provided. While China claims various faults with the alternatives proffered by Keystone, what it cannot do is show that MOFCOM gave any consideration as to their viability and merits.

65. With respect to Tyson, China asserts that Tyson's Further Comments on the Preliminary AD Disclosure proposed a weight-based alternative and agreed that such a methodology could be used to allocate the meat costs.[104] It is unfortunate that China chooses to mischaracterize the record evidence. Tyson, as noted in the United States' comments on Question 91, found that MOFCOM had errors in its weight-based methodology and sought, if it could not gain acceptance of the methodology used in books and records, to at least minimize the wrong being done to it. China's logic appears to be that an attempt to remedy a calculation error – which MOFCOM refused to do here – must mean the party forfeits it ability to dispute that such a calculation should take place at all. Indeed, under China's logic the party somehow turned into a proposer and endorser.

66. As is clear in Tyson's submission, it in no way proposed a weight-based methodology or thought it proper. Tyson's submission begins by noting the following:

> First, BOFT is required under Article 2.2.1.1 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") to use Tyson's product specific costs because they are in accordance with Generally Accepted Accounting Principles ("GAAP") in the United States and reasonably reflect the costs incurred to produce the subject merchandise. As far as Tyson is aware, there is no accounting literature in the United States, China, or elsewhere that supports the conclusion that its allocation methodology does not reasonably reflect production costs. Thus, while there may be other reasonable allocation methodologies to those used by Tyson in the ordinary course of business, BOFT is required to use Tyson's product-specific costs.

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104 China, Responses to the Panel's Second Set of Questions, para. 40.

> Second, assuming for the sake of argument that BOFT is permitted to recalculate Tyson's product-specific costs using the allocation methodology described in the preliminary determination, BOFT must change its cost calculation to ensure that production costs are allocated [[
>]].[105]

Tyson subsequently noted that if "If BOFT incorrectly elects to use a weight-based allocation in the final determination, it must take into account [[
]].[106] China's assertion that the above somehow leads to "Tyson agreed with MOFCOM that weight-based allocation could be used to allocate the meat cost" is farcical.[107]

67. With respect to Keystone, China's mischaracterizes both of Keystone's suggested alternatives. Notably, China does not cite any of MOFCOM's determinations to suggest there was any consideration of these alternative methodologies.[108] With respect to the alternative to allocate meat costs on the basis of relative sales value, China asserts that Keystone did not "reveal the precise basis" by which it determined relative sales value. This assertion is false. Keystone's Comments on the Preliminary AD Determination explained that the [[

]][109] Contrary to China's assertion, Keystone identified its basis, a basis [[ ]]. Moreover, Keystone also included [[

]] Thus, to claim that MOFOM was not provided the method or the basis for Keystone's relative sales value allocation is belied by the facts.

68. With respect to the other alternative, China asserts that it was identical to MOFCOM's method and that Keystone's processing costs were ill-defined. Both arguments are again false. With respect to whether the method was identical, Keystone's alternative created a product specific cost per model rather than a uniform value. As explained by Keystone, this alternative [[

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105 Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) (Exhibit USA-26), pp. 1-2.

106 *Id.*, p. 11. (emphasis added)

107 China, Responses to the Panel's Second Set of Questions, para. 40.

108 *U.S. – Softwood Lumber V (AB)*, paras. 133, 138

109 Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 9.

]][110] With respect to MOFCOM's assertion that processing costs were ill-defined, there is not a single question from MOFCOM on the record questioning the authenticity or accuracy of the processing costs. Indeed, in its responses to the Panel, China proffers an exhibit, Exhibit CHN-65, that it asserts can be used to calculate the extent of Keystone's costs that can be attributed to processing. If China has sufficient confidence to present that exhibit to the Panel, why did MOFCOM not have sufficient confidence to at least consider Keystone's alternative allocation?

(b) Were respondents adjusting these values on the basis of new information about sales?

69. As China never disclosed the calculations, the United States is not in a position to comment on the specific figures in Exhibit CHN-76. However, China's answer does not actually answer the question as to whether new sales data was utilized or not, but simply reflects a complaint about that data. If MOFCOM had concerns though, it certainly did not express any in its determinations or issue any supplemental questions. The final point the United States notes is that China is incorrect again that Keystone proffered an alternative basis on weight that MOFCOM chose to accept.[111]

(c) Did the information differentiate the costs of raising a bird and the processing of the different parts?

70. The United States references its comments to part (a) of this question.

(d) Were paws given a value of what was obtained in the market or were they given a different value?

71. The United States references its comments on China's answer to part (b) of this question. The United States notes again that China's basic argument is to take issue with data that MOFCOM did not take issue with in the underlying investigation.

Question 98: Do you agree that the totals used in MOFCOM's allocation methodology reflected the actual totals of the respondents?

72. The United States references its own answer to this question as well as its comments on China's answer to Question 91. Additionally, the United States emphasizes that China's response addresses neither whether Form 6-3 is correct nor why MOFCOM did not address the arguments advanced by Tyson.

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[110] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30), p. 11.

[111] United States, Comments on China's Answers to the Second Set of Panel Questions, Comments on Question 94(d).

Question 99: Please clarify whether, in respect to Pilgrim's, MOFCOM applied facts available (see Exhibit USA-13).

73. China's latest assertion – that MOFCOM applied facts available to Pilgrim's – is simply an admission that MOFCOM did not consider Pilgrim's evidence, including some of its kept costs, thus breaching Article 2.2.1.1. As the Panel's question anticipates, the factual record is not clear as to whether Pilgrim's was subject to Facts Available. The reason the record lacks clarity is that MOFCOM failed to abide by the procedures mandated by the AD Agreement before application of Facts Available – and because nothing on the record suggests that Pilgrim's did anything that would warrant such treatment.

74. Indeed, China's submissions until now never claimed that Pilgrim's was subject to Facts Available, although there were clearly indications that China did not want to address MOFCOM's treatment of Pilgrim's data.

China's First Written Submission

- The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data later provided by Pilgrim's Pride after the disclosure on the preliminary determination were rejected as out of time.[112]

China's Response to the Panel's First Set of Questions

- Question 30 (Evidence of MOFCOM's Consideration): China makes no mention at all of any determination or questionnaire response relating to Pilgrim's.

China's Second Written Submission

- Finally, with respect to Pilgrim's, *whose reported allocated costs* were rejected for reasons unrelated to the allocations themselves, China notes that the U.S. description is consistent with MOFCOM's concerns regarding U.S. respondents' value-based methods.

[112] China, First Written Submission, para. 115. While China makes this claim, it omits that Pilgrim's explained to MOFCOM that the issue concern its use of pounds in its daily financial accounting while for the purposes of the investigation the unit was changed to "ton." Pilgrim's apologized and explained how to correct the error. Pilgrim's Pride, Comments on the Preliminary Calculation (March 5, 2010) (Exhibit USA-27), pp. 2-5.

In short, until the Panel directly posed the question to China, China avoided addressing MOFCOM's failure to consider Pilgrim's evidence. Now faced with a direct question, China essentially claims MOFCOM should be excused under the guise of Facts Available. As demonstrated below, however, MOFCOM never took any of the steps necessary to assert Facts Available pursuant to the AD Agreement.

75. China attempts to defend MOFCOM by summarily asserting that MOFCOM properly applied facts available in accordance with Article 6.8 of the AD Agreement. But that is not so. Article 6.8 requires that the provisions of Annex II of the AD Agreement be observed before determinations can be made on the basis of facts available. Paragraph 1 of Annex II provides, in relevant part, that:

> The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available … (emphasis added)

In essence, paragraph 1 requires the investigating authority to issue a warning to the interested party that facts available will be applied if the party does not submit information within a reasonable time frame.[113] The United States understands that during the course of the investigation that Pilgrim's requested extensions of time to submit data and filings. But the United States wishes to make perfectly clear that at no time did MOFCOM ever issue a warning that Facts Available would be applied if requested information was not provided. China's assertions that such notice is provided for in AD Final Disclosure are untenable. To begin with, the AD Final Disclosure; it simply reflects decisions made and in fact notes as much:

> Investigating authority determined that the company did not provide materials needed in the investigation within a reasonable time. "As to this part of new materials, investigating authority decided not to take into consideration during the final ruling."[114]

Thus, there is no warning to submit information by deadline and no reference that Facts Available would be applied for non-compliance and thus this cannot constitute a warning per paragraph 1. There is also another reason why the AD Disclosure does not include a deadline by which to submit the requested information: it had already been submitted.

- 5 March 2010: Pilgrim's Comments on the Preliminary AD Determination

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[113] *EC – Salmon*, para. 7.343 ("When read together with Article 6.8, this language [paragraph 1] suggests that "necessary information" refers to the specific information held by an interested party that is requested by an investigating authority for the purpose of making determinations.") (emphasis original).

[114] Pilgrim's Final AD Disclosure (Exhibit USA-13), pp. 7-8.

(and submits 16 attachments containing data)[115]

- 3-15 June 2010 — MOFCOM verifies the ultimately rejected data
- 16 July 2010 — MOFCOM in its AD Disclosure Rejects the figures as untimely

Thus, 133 days (or over 4 months) after Pilgrim's submission of revised data and comments and one month after MOFCOM subjected the data to verification.

76. In respect to this information, the United States observes that MOFCOM never, until the AD Disclosure, provided any explanation that the evidence was being rejected and often an opportunity for Pilgrim's to explain. Paragraph 6 of Annex II requires precisely that:

> If evidence is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of the evidence or information should be given in any published determination.

The AD Disclosure cited by China does not state anywhere that Pilgrim's would have an opportunity to contest the rejection of evidence or explain why the evidence should be rejected as untimely even though it had been subject to verification. The issue of verification is critical because paragraph 3 of Annex II also provides that appropriated submitted information which is verifiable should be taken account if possible.[116] Paragraph 3, provides in pertinent part, that:

> 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.

The panel in *EC – Salmon* explained the operation of this provision:

> Paragraph 3 of Annex II directs investigating authorities to take all submitted information into account for the purpose of its determinations when it is: (i)

[115] Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010) (Exhibit USA-27), p. 17.

[116] *See U.S. – Hot Rolled (AB)*, para. 89 ("Rather, we conclude simply that, under Article 6.8, USDOC was not entitled to reject this information for the sole reason that it was submitted beyond the deadlines for responses to the questionnaires.").

> "verifiable"; (ii) "appropriately submitted so that it can be used in the investigation without undue difficulties"; (iii) "supplied in a timely fashion"; and, where applicable, (iv) "supplied in a medium or computer language requested by the authorities". Thus, paragraph 3 of Annex II calls upon investigating authorities to take into account all information that satisfies three, or sometimes four, cumulative conditions when making determinations. It follows that where all of the conditions are satisfied, an investigating authority will not be entitled to reject information submitted when making determinations.

Considering that MOFCOM actually verified the data in question here, it is clear that Pilgrim's information met all of the aforementioned criteria and should have been accepted and considered.[117] Therefore, since China cannot adduce any evidence to establish that MOFCOM could properly invoke Facts Available, the only conclusion left is that MOFCOM's failure to examine Pilgrim's evidence resulted in a breach of Article 2.2.1.1.

B. ALLOCATION OF THE SUBSIDY BENEFIT

Question 100: With respect to the US respondents' responses to the second supplemental questionnaire (I.4 for Tyson and I.6 for Pilgrim's) in Exhibits CHN-37 and CHN-38, please support your view as to whether the data relates to total purchases of corn and soybeans or to purchases of corn and soybeans per unit of subject merchandise.

77. China's response begins by failing to address the Panel's Question. China addresses the purported clarity of the question in MOFCOM's second supplemental questionnaire rather than address what the Panel has asked: what data was produced in response to it. Thus, although the United States thinks MOFCOM's question was far from, as China puts it, "unambiguous" or "quite clear," the clarity of the question is not the pertinent issue. Rather, the issue is what data did Tyson and Pilgrim's put on the record; the answer to that is that they provided their total purchases of corn and soybean, and that their responses demonstrated accordingly.

Tyson

78. With respect to Tyson, China advances three arguments. First, China quibbles with Tyson's response to the questionnaire request. In particular, China notes that Tyson's response states that the only feed grains used in the production of broiler products were corn and soybeans and to look at CS2-I-3 to determine the quantity and value of those raw materials. China still apparently fails to recognize the point United States made in its opening submission: there are

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[117] *See U.S. – Steel Plate (India)*, para. 7.58 ("However, to the extent the authority is **not** satisfied with the information submitted, it must examine those elements of information with which it is not satisfied, in light of the criteria of paragraph 3.") (emphasis original).

broiler products besides subject merchandise.[118] What Tyson is saying does not preclude the fact that its purchases would include feed grains used to produce non-subject merchandise.

79. Second, China argues that its new exhibit, Exhibit CHN-66, supports its argument by having a caption about materials consumed in Producing Unit Broiler Products. That caption is not inconsistent with what the United States just noted in that it can reflect non-subject merchandise. Moreover, China does not address why the critical columns in Exhibit CHN-66 are not the ones labeled "production quantity of live broiler chicken-ton" and "quantity received." These labels indicate the data reflects production of live broiler chicken tons, which is obviously more than subject merchandise.

80. Third, China argues that the verification report supports its interpretation that these figures relate solely to subject merchandise because it found at verification the data was 10% higher. In other words, it appears China is arguing, without any support that MOFCOM made this finding, that the ten percent higher figure is total purchases while those reported in the table must be subject merchandise. The fact that MOFCOM never made this finding or investigated this matter is sufficient to discount China's latest assertion. There is one more point though that calls into question China's assertion. China is not questioning that in Tyson reported in Table 1-4 total chicken sales of [[ ]] MT of which only [[ ]] MT were subject merchandise. Now, those figures compared to the figures in the verification report means that China's position would somehow have 10 percent more feed produce [[ ]] percent more chicken. Clearly, China's interpretation is illogical.

Pilgrim's

81. With respect to Pilgrim's, China again focuses on the purportedly "unambiguous" question rather than focusing on the data provided in response.[119] Pilgrim's response – to refer to a chart – in no way suggests its data was limited to simply subject merchandise. China goes on to take issue with the fact that the chart has a notation stating that over time the purchases are "reflective of consumption." This point again exemplifies China's misplaced focus on the question rather than the data. China's implication is that since its question provides for the quantity and value of feed grains "consumed" in broiler products, amounts reported for consumption must equal amount consumed for subject merchandise. The United States has already explained why that premise is wrong: not all broiler products are subject merchandise. China goes further though by arguing the notation is Pilgrim's "affirmatively stating purchases and consumption are equal." The Panel can review the notation and see that this is far from the case.[120]

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[118] United States, First Written Submission, paras. 232-235.

[119] China, Responses to the Panel's Second Set of Questions, para. 54.

[120] The notation does not appear to indicate anything other than an unremarkable proposition. Specifically, it may not be possible to know how much food a chicken consumed at a specific meal, but

82. Regarding what actual data was produced, China does not – because it cannot – dispute that it shows feed being allocated to pullets and breeders – both of which are non-subject merchandise. China's response to this information is to criticize the respondents rather than to address it head on. In particular, China argues that Pilgrim's did not "substantiate" why the feed should be deducted. The more pertinent question is why did MOFCOM, when presented with data regarding feed grain used in the production of non-subject merchandise, not take any steps to investigate the matter and to determine whether its calculation of the level of the subsidy relating to feed grain was accurate? U.S. submissions note that the record establishes that respondents and the U.S. government reached out to MOFCOM about this error.[121]

83. MOFCOM, however, was not willing to engage on this key issue regarding the proper level of the subsidy. This is illustrated by a point China makes regarding how Pilgrim's proposed to fix the error. Pilgrim's provided a table from the anti-dumping investigation, Table I-5, and provided it to MOFCOM in order to explain how to address the error. What China calls an "estimate" is actually a calculation based upon information that was reviewed in the anti-dumping investigation. China appears to argue this information can be rejected on some type of procedural default because it was purportedly submitted in the anti-dumping investigation rather the CVD investigation. Of course, these statements by China about MOFCOM's failure to consider Pilgrim's Table I-5 are more *post hoc* rationalizations – nowhere did MOFCOM discuss why the data was not considered. But regardless, the treatment of this information is further proof that MOFCOM had no interest in correcting a plain error in its calculation methodology.

The "Reluctant" Participants Argument

84. With respect to both respondents, China appears to assert that they were "reluctant" or uncooperative and that the United States has not supposedly rebutted China's assertions about their responses to the initial questionnaires. China apparently holds that it is entitled to two things as a result of the respondents' supposed behaviour. First, it appears that China finds these circumstances should support its interpretation. For example, China suggests its view of the questionnaire data carries weight because it was supposedly the first instance that Tyson had cooperated with MOFCOM on this matter. Second, it appears China is arguing that it should be excused because the alternative would have been to toss out the respondents' records.

85. China does not substantiate its assertions either legally or factually. China has not explained and cannot support the proposition that Article 19.4's requirement to ensure the countervailing duty matches the subsidy is somehow excused when an investigating authority believes that a respondent's submission have been less than perfect. The AD Agr**e**ement, which sets out specific processes that must be followed before an authority may reject submitted data, including a process known as Facts Available. In short, the authority has an affirmative

with detailed records on how much food is being purchased, one can over time have an idea how much the chickens are eating.

[121] *See, e.g.*, United States, First Written Submission, para. 236.

obligation to reach the correct result; the authority cannot knowingly reach the wrong result simply because it is dissatisfied by some aspect of a questionnaire response.

86. Regarding the facts, China cites no record evidence to suggest the respondents were anything but responsive. The United States has already demonstrated that Pilgrim's tried to establish the correct calculation with data that had been subject to scrutiny in the anti-dumping investigation. That MOFCOM dismissed it out of hand points to failings by MOFCOM, not Pilgrim's. With respect to Tyson, in addition to what has already been noted in U.S. submissions, the United States also notes that Tyson sent China a clerical error allegation on April 30, 2010 regarding the CVD preliminary determination. Tyson expressly stated the following in that submission:

> The error is that MOFCOM used Tyson's sales of just raw (unprocessed) chicken (the "subject merchandise") as the denominator in the subsidy calculation instead of Tyson's sales of all chicken (both raw and further-processed). Tyson uses the allegedly subsidized corn and soybean meal to produce feed for all of its chickens. These chickens are used to produce subject merchandise (raw chicken) and non-subject merchandise (further-processed chicken).

Tyson went on to demonstrate that the denominator MOFCOM used was just subject merchandise and asked MOFCOM to recalculate the subsidy margin. In contrast, China has put nothing on the record demonstrating that MOFCOM had any interest in addressing the issue here or at any of the other junctures where the respondents and the United States tried to engage MOFCOM.

Question 102: With respect to paragraphs 50-59 of China's opening statement at the second meeting of the Panel, please provide the report of the verification relevant to subsidy allocation for both Tyson's and Pilgrim's.

87. As an initial matter, the United States refers back to its comments on China's answer for Question 100. The United States also notes that this latest argument is also not in the administrative record, nor in China's First or Second Written Submissions. Thus, it is unquestionable that this claim is a merely a last ditch *post hoc* attempt by China to save MOFCOM's improper finding.

88. With respect to Pilgrim's, the United States again notes that the notation regarding consumption in Exhibit S-II-I-2 does not support the interpretation China posits. The actual data on the chart about feed going to pullets and breeders in fact contradicts it. China's assertion that it verified Pilgrim's figures simply means that it verified figures relation to the purchase of feed for chickens, not subject merchandise.

89. With respect to Tyson, the United States again notes, as with its comments on China's response to Question 100, that to assume these verification figures are the larger figures for all chicken results in absurdity considering how many [[ ]] would be generated by a

moderate increase in feed. If MOFCOM believed this figure created a discrepancy or was significant in any way, it could, of course, have followed with a request to Tyson. As noted by the United States in response to several of the Panel's questions, China never made such efforts during the investigations. Finally, if this figure was so crucial, then MOFCOM did not cite it anywhere in the record, including in its reply to the U.S. Government's Comments on the Final Disclosure.[122] In the absence of any findings on the record regarding the figures in the verification report and in light of the evidence presented by Tyson – that went unanswered – the United States submits that China has not supported its new allegation.

IV. USE OF FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATES

Question 103: Does the Final Disclosure to the US Government (Exhibit USA-49) indicate that the subsidy programme used for determining the "all others" rate was a countervailable feed programme.

90. The United States explained in its response to the Panel's question that the Final Disclosure does not indicate that the "all others" subsidy rate was based on a countervailable "feed program."[123] In fact, MOFCOM did not investigate a feed program.[124] China's response continues to confuse the issue, and only serves to highlight that MOFCOM adopted an unsupportable approach to calculating the subsidy rate for "all other" producers.[125] Although China acknowledges that there "was no single 'countervailable feed program'" and that there were instead "multiple 'upstream subsidy programs'", China's assertion that those programs concerned feed production is incorrect.[126] MOFCOM's use of "upstream subsidy" referred to the subsidy allegedly provided by the Direct Payments and Crop Insurance programs, both of which pertain to crop production occurring upstream from feed production.[127]

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122 MOFCOM, Reply to the U.S. Government's Comments on the Final Disclosure (Aug. 13, 2010) (Exhibit USA-42), p. 4.

123 United States, Responses to the Panel's Second Set of Questions, paras. 38-42.

124 United States, Responses to the Panel's Second Set of Questions, paras. 38-40.

125 China, Responses to the Panel's Second Set of Questions, para. 65.

126 China, Responses to the Panel's Second Set of Questions, para. 65.

127 China's assertion that the subsidy programs concerned feed production and that "upstream subsidy" is an "explicit reference" to a feed subsidy, is not accurate. Unlike China, MOFCOM consistently referred to upstream subsidies, rather than "feed subsidy programs." China cites to Page 17 of MOFCOM's Preliminary CVD Determination to support its claim, but no reference to a feed subsidy program can be found on that page or anywhere else in the document. China, Response to Second Set of Panel Questions, para. 66.

91. For the purpose of understanding the record in this dispute, the difference between, on the one hand, a "countervailable feed program" and, on the other hand, upstream subsidies to crop production may be important. In particular, China's insistence that the "all others" rate was based on the subsidy provided by a feed program or programs (when instead the rate – as described below – was based on MOFCOM's so-called 'competitive benefit' analysis) makes it somewhat more difficult to appreciate a key flaw in MOFCOM's determination of the facts available subsidy rate.

92. As the United States has explained in prior submissions, MOFCOM in fact conducted two separate analyses: (1) a pass-through analysis of the upstream crop subsidies;[128] and (2) a so-called "competitive benefit" analysis.[129] The pass-through analysis concerned the alleged subsidy provided by the upstream crop programs that arguably pass-through to affect feed prices. The so-called "competitive benefit," as MOFCOM determined it, was the difference between the purchase price of feed in the United States and the purchase price of feed in Argentina.[130] To calculate the subsidy rates, MOFCOM, without justification, applied these analyses differently for investigated companies and for "all others."

93. With regard to calculating the subsidy rates for investigated companies, China's response explains that MOFCOM treated the pass-through amount as a maximum: "[i]f the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies."[131] In other words, for investigated companies, MOFCOM used the lesser of the pass-through or the competitive benefit amounts. For Tyson and Keystone, China indicates that the pass-through amount was less than the competitive benefit, so MOFCOM used the pass-through amount as the basis of those companies' subsidy rates. [132]

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[128] China's response explains that the pass-through analysis calculated "the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. China, Response to Second Set of Panel Questions, para. 67 (emphasis added). In other words, MOFCOM calculated the amount of the upstream subsidy allegedly provided by the Direct Payments and Crop Insurance program to the production of crops and then assumed this entire amount was ultimately passed-through to the downstream broiler producer.

[129] United States, Second Written Submission, paras. 121-125.

[130] United States, Second Written Submission, para. 123. Given that the 'competitive benefit' amount is based on this price differential, that amount would be the same regardless of the number of programs MOFCOM found to be countervailable.

[131] China, Responses to the Panel's Second Set of Questions, para. 67 (emphasis added).

[132] China, Responses to the Panel's Second Set of Questions, para. 67. For Pilgrim's, China indicates that the competitive benefit amount was less than the pass-through, so MOFCOM used the competitive benefit amount as the basis of Pilgrim's subsidy rate.

94. With regard to "all others", however, China did not treat the amount of the subsidy that may have actually passed-through as a maximum and, instead, relied solely on the so-called 'competitive benefit' amount to calculate the subsidy rate. MOFCOM provided no explanation for its departure from the approach it took with regard to investigated companies, nor did it explain why it was treating the "all other" producers as if they could receive a subsidy greater than what MOFCOM considered could actually have been passed through by the countervailable programs.

95. China's response to the Panel's question explains that the "all others" subsidy rate was the 'competitive benefit' amount derived for either Tyson or Keystone, but fails to indicate which company.[133] With respect to both of those companies, MOFCOM used the smaller pass-through amount as the basis for calculating their subsidy rates. MOFCOM's unexplained and unjustifiable decision to rely on the higher 'competitive benefit' amount for one of those companies, but to disregard the amount of subsidy that the company could actually have received, explains why the "all others" rate is almost three times greater than the rate assigned to Tyson and over seven times greater than the rate assigned to Keystone.

96. The United States' prior submissions have demonstrated that MOFCOM's application of facts available adverse to the interests of "all other" producers was inconsistent with China's obligations under Article 12.7 of the SCM Agreement because MOFCOM failed to notify those unidentified producers or exporters of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available.[134] The manner in which MOFCOM applied "facts available" underscores the significance of China's breach.

Question 104: Does the Chinese Government (including any of its agencies) maintain information with respect to importation of goods which identifies the exporters of those goods: (a) for customs purposes; (b) for sanitary purposes; (c) for any other purposes.

97. In response to the Panel's question, China indicated that the Chinese government does not generally maintain information with respect to the importation of goods which identifies the exporters of those goods, and that it did not do so with respect to the exporters involved in this dispute.[135]

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133 China claims that MOFCOM could not disclose that information "because it came from confidential sources." China, First Written Submission, para. 194. That response does not explain why China, despite the Panel's procedures for protecting confidential BCI, has failed to disclose that information for the purpose of this proceeding.

134 *See, e.g.*, United States, Second Written Submission, paras. 100-116.

135 China, Response to Second Set of Panel Questions, paras. 68-69.

98. Although the United States is not in a position to address all mechanisms through which the Government of China collects information on the identity of exporters of goods imported into China, the United States would emphasize that China's pre-existing mechanisms (or lack thereof) would not excuse MOFCOM's application of facts available adverse to the interests of unknown producers or exporters. The record contains no indication that MOFCOM made any affirmative effort to attempt to identify unknown exporters or producers. As the United States has explained in its prior submissions, MOFCOM's application of facts available to those producers that MOFCOM did not notify of the investigation or of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping or countervailing duty investigations, was inconsistent with Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.[136]

V. INJURY DETERMINATION

A. DEFINITION OF THE DOMESTIC INDUSTRY

Question 108: In its response to Panel question No. 11, Mexico provides an illustrative list of possible actions an investigating authority could take to investigate the extent of the domestic industry such as questioning government agencies at the local level and producers' associations, checking lists of beneficiaries of subsidy programmes, consulting zoosanitary control agencies, etc.

(b) Did MOFCOM take any of the actions Mexico describes?

99. As an initial matter, the United States observes that Mexico suggested these actions within a specific context: that of an active investigating authority. Specifically, Mexico's response noted:

> En consecuencia, una autoridad investigadora debe realizar, dentro de lo razonable, los esfuerzos necesarios para tratar de identificar a tantos productores como le sea posible, para con esa base, definir la rama de producción nacional y, posteriormente, realizar su análisis sobre la determinación de la existencia de daño.
>
> US Translation: Consequently, an investigating authority must make, within reason, the effort to try to identify as many producers as possible, for on that basis, define the domestic industry and subsequently its analysis on determining of injury.[137]

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[136] United States, First Written Submission, paras. 146-155, 184-201; United States, Second Written Submission, paras. 100-125.

[137] Mexico, Responses to the Panel's Questions, para. 12 (U.S. translation).

In other words, the actions cited by Mexico do not appear to be exhaustive from its perspective; they appear rather to be illustrative of the types of activities an investigating authority should do with the objective of identifying as many producers as possible.

100. In contrast, the manner in which China describes its actions in response to this question suggests assumption rather than investigation. For example, China notes that it somehow knew CAAA would include most major producers or that it confirmed that there were no lists of white feather broiler producers. But an authority engaged in investigation would not merely accept an interested party's – such as the CAAA – statements or simply assume that the absence of a readily available list precluded the ability to compile one. It would, in accord with the purpose Mexico states, engage in investigation to determine whether a list could be compiled. Thus when China notes that zoosanitary functions are supervised by the Ministry of Agriculture and that the Ministry lacks any lists of producers, its response is misplaced. The reason that is so is because China does not answer whether it asked about *data* – such as whether records of firms contacted or consulted about zoosanitary issues existed – and whether that data could be used to compile a list of firms. That would be the distinction between assumption and investigation and none of the actions listed by China indicate the latter occurred here.

Question 110: In response to Panel question No. 64, China refers to the flexibility an investigating authority has to define the domestic industry where it is highly fragmented. Does MOFCOM discuss on the record the fragmented nature of the white feather broilers products industry? If so, where?

101. The short and narrow of China's statement is no, there is nothing in the record that discusses the fragmented nature of the industry. At no point in the investigation did MOFCOM state or imply that the industry was actually fragmented. China seems to assert that since it was part of the "known factual background," there was no need to discuss the situation. The problem with that assertion, if it was true, is that one would still expect the determination to contain consideration of how to best address the situation. For example, it would be one thing for an authority evaluating a highly fragmented industry to consider sampling and find it infeasible. It is another to suggest the authority would forego all attempts to understand the industry.

B. PRICE EFFECTS ANALYSIS

Question 113: With respect to MOFCOM's price effects analysis, how did MOFCOM consider the potential levels of trade issue? Please direct us to the relevant parts of the determinations and, if relevant, any other evidence from the record where MOFCOM considered the issue.

102. China's principal response to this question is that MOFCOM could not have been expected to consider the level of trade issue because "this issue arose very late in the investigation."[138] Contrary to China's argument, however, consideration of the level of trade is

[138] China, Responses to the Panel's Second Set of Questions, paras. 98, 101.

inherent in any price comparison, and thus the issue in fact arose the very first time that China decided to compare pricing data at different levels of trade. As the Appellate Body found in *China – GOES*, "'{a}s soon as price comparisons are made, price comparability necessarily arises as an issue.'"[139] Because domestic producer prices to first arms-length customers are clearly at a different level of trade than subject import prices on a CIF basis,[140] MOFCOM was obligated to consider the level of trade issue irrespective of any party arguments raising the issue.

103. China's response also asserts that MOFCOM did, in fact, somehow address the level of trade issue – but China's assertion only underscores MOFCOM's failure to do so. For the first time in these proceedings, China asserts that MOFCOM considered the level of trade issue in the context of MOFCOM's analysis of the appropriate definition of the domestic like product. To support this assertion, China points to MOFCOM's finding that subject imports and domestically-produced broiler products "overlapped in terms of sales channels."[141] The flaw in China's assertion is that it fails to recognize that the "sales channels" that MOFCOM found to have overlapped are for subject imports "*sold* around the country via direct sales and other channels," and domestically-produced broiler products "*sold* around the country via direct sales or via distribution."[142] In other words, MOFCOM found that subject imports "sold" in China by importers and domestically-produced broiler products "sold" by domestic producers competed in the same channels of distribution, and were hence at the same level of trade. That finding directly contradicts China's assertion that MOFCOM considered importer *purchases from U.S. exporters* – not importer *sales* – to be at the same level of trade as domestic producer sales to the first arm's-length customers. [143] MOFCOM's like product analysis therefore, confirms that China's assertion is simply a *post hoc* rationalization of MOFCOM's failure to adjust its pricing data to account for the differences in levels of trade between import prices and domestic producer sales to first arm's-length customers.

Question 114: Please indicate what was included in each of the two average unit values that were compared by MOFCOM. With respect to the price of subject imports, please confirm whether they included customs clearance fees, in addition to the customs duties which China says were added to the price.

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139 *China – GOES (AB)*, para. 200.

140 *See, e.g.*, United States, Second Written Submission, paras. 167-70.

141 China, Responses to the Panel's Second Set of Questions, para. 99 (quoting MOFCOM, Final AD Determination at sec. 3.1.5; MOFCOM, Final CVD Determination at sec. 4.1.5).

142 MOFCOM, Final AD Determination at sec. 3.1.5 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 4.1.5 (Exhibit USA-5) (emphasis added).

143 China, Second Written Submission, para. 204; *see also* China, Opening Statement at the Second Panel Meeting, para. 85; China, First Written Submission, para. 289.

104. China's response to the Panel's question provides further confirmation that MOFCOM failed to account for the difference in levels of trade when comparing import prices to domestic sales prices. With regard to import prices, China's response indicates that "the prices used are ex works prices, without any loading, handling, or freight fees included."[144] As the United States has explained in its prior submissions, those import prices also do not include additional costs incurred before the imports compete with domestic sales to the first arm's length customers, such as transportation costs from the border to the importers' warehouse and the importers' mark-up for sales, general and administrative expenses.[145]

105. China's response also indicates that the import pricing data did not include an adjustment for customs clearance fees and asserts that such fees correspond to the handling fees that were not included in the domestic pricing data. However, China's exclusion of customs clearance fees, which, contrary to China's suggestion, correspond to handling fees only in the sense that both are fees, does not render the import price comparable to domestic prices because they nevertheless are at different levels of trade. The United States has explained in prior submissions that MOFCOM's failure to ensure the comparability of the average unit value data underlying its underselling analysis resulted in a breach of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.[146]

Question 115: Was the document in Exhibit CHN-24 prepared by MOFCOM at the time of the investigation, or was it prepared by China for the purposes of this proceeding?

106. The United States first notes China's confirmation that Exhibit CHN-24 was prepared for the purposes this proceeding and therefore, was not on the record or provided to the parties during the investigation.[147] Second, although China asserts that CHN-24 is based on an internal calculation worksheet that MOFCOM purportedly used during the investigation, no such worksheet can be found in the record, nor can one find any indication of its existence (other than China's assertion in its submissions).

107. Additionally, and also without citation to the record, China claims that "[t]he Final Determination had discussed the adjustment based on Chinese Customs statistics."[148] The only "discussion" provided by MOFCOM was the following:

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144 China, Responses to the Panel's Second Set of Questions, para. 102.

145 *See, e.g.*, United States, First Written Submission, para. 294.

146 United States, First Written Submission, para. 279-296; United States, Second Written Submission, paras. 164-189.

147 China, Responses to the Panel's Second Set of Questions, para. 104.

148 China, Responses to the Panel's Second Set Questions, para. 104.

> [W]hen comparing the import price of the Subject Products and the sales price of the domestic like products, the Investigating Authority has taken the difference of sales levels into consideration, adjusting the import price based on the Customs data accordingly. [149]

Given that MOFCOM's statement immediately follows MOFCOM's recitation of the interested parties' argument concerning levels of trade, this text indicates that MOFCOM was purporting to make a level of trade adjustment – although China now admits it did not do so. It is unreasonable to expect the interested parties to have understood such a summary statement to mean that MOFCOM was not making an adjustment for levels of trade, but was merely making an adjustment to add customs duties to the CIF price reported by Chinese customs statistics.[150] China's response also cites to the Petition and indicates that MOFCOM used the same numbers included in the Petition, but that fact would not relieve MOFCOM of its duty to explain the adjustment, much less excuse MOFCOM's failure to make an adjustment to ensure comparability of its pricing data.

Question 116: With respect to China's indication that 80% of the customers of both US producers/exporters and the Chinese domestic producers were resellers:

(a) When was the determination that 80% of the customers were resellers made? Is there evidence on the record that this was MOFCOM's reason for electing to compare CIF prices to ex-factory prices in this investigation?

(b) With respect to the US producers/exporters' customers, please confirm that this figure was arrived at by looking at the names of the companies the US respondents listed as their top 10 importers.

108. China's response confirms that its "estimate" that 80 percent of the customers of U.S. producers or exporters and Chinese producers were resellers is nothing more than a *post hoc* rationalization offered by China in an attempt to justify MOFCOM's flawed and deficient analysis. First, China concedes that MOFCOM made no such estimate during the investigation: "the estimate itself was not an explicit part of MOFCOM's determination."[151] In other words, the 80 percent figure was derived by China for the purposes of these proceedings. Second, although China asserts that the estimate was based on record evidence before MOFCOM during

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149 MOFCOM, Final AD Determination, sec. 6.2.2 (Exhibit USA-4); MOFCOM, Final CVD Determinatino, sec. 7.2.2 (Exhibit USA-5).

150 China, First Written Submission, paras. 304-305.

151 China, Responses to the Panel's Second Set of Questions, para. 105.

the investigation, it cannot cite to any such record evidence (or even non-record evidence) to support that assertion.[152]

109. Rather than rely on record evidence, China's response asserts that the estimate "qualifies a more general qualitative finding that MOFCOM had already made, back at the time of the preliminary determination."[153] China's response refers to its response to Question 113, but as discussed in the United States' Comment on China's response to that question, China's response references MOFCOM's determination that U.S. broiler products and domestic product were "like products." The United States has already explained the flaw in China's argument in the United States' comment on China's response to Question 113. Moreover, China cannot cite to any discussion by MOFCOM in the context of its pricing analysis to indicate that MOFCOM's consideration of any finding regarding resellers was a factor in its decision to ignore differences in levels of trade. Rather, the record indicates that MOFCOM agreed that there was a level of trade issue and purported to adjust the pricing data "accordingly." The United State has demonstrated that MOFCOM's failure to make such an adjustment, which China concedes, is a breach of China's WTO obligations.

(c) Did MOFCOM contact any of these importers or customers during the course of the investigation?

110. China's response confirms that MOFCOM made no affirmative effort to contact any of the importers identified by the respondents. As the United States explained in its Second Written Submission, at the very least, MOFCOM was in a position to mail blank importers' questionnaires to most of the significant importers of subject merchandise from the United States.[154] MOFCOM, however, made no such effort. China's response also implies that it was the burden of U.S. exporters to compel Chinese importers to provide information: "[e]ven though U.S. exporters were participating, they were not successful in persuading any of their importers to participate in the investigation."[155] Of course, it was MOFCOM's burden to ensure it relied on comparable pricing data – to the extent it needed information from importers, it was MOFCOM's failure to "persuade" them to participate. Not surprisingly, MOFCOM's failure in this regard is due in large part to the fact that it made no effort to ask them to participate.

(d) How was the 80% arrived at with respect to Chinese producers' customers?

111. China's response fails to provide a credible explanation of how it derived the figure of 80 percent. China fails to cite to any record evidence or other information providing the basis of the

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152 China, Responses to the Panel's Second Set of Questions, para. 105.

153 China, Responses to the Panel's Second Set Questions, para. 106.

154 United States, Second Written Submission, para. 174.

155 China, Responses to the Panel's Second Set of Questions, para. 108.

figure, preventing the Panel and United States from confirming the accuracy of China's assertion. Nor does China describe the estimate with any level of specificity: to the contrary, China's description leaves open many important questions. For example, China states the estimate was based on the "largest customers reported for the period of investigation" [156] – but China does not say how large, or how many customers were covered. Similarly, China states the total volume was based on companies that "appeared" to be resellers – but China does not identify any resellers or explain how the assessment was made. Of course, even if China's estimate was accurate – and there is no reason to believe that to be the case – it cannot serve to support the MOFCOM determination at issue in this dispute. China has already conceded that no such estimate was made by MOFCOM during this investigation and there is no evidence on the record supporting such a finding. Moreover, there is no indication in the determinations that MOFCOM failed to adjust the pricing data to account for differences in levels of trade based on such a finding.

Question 118: With respect to the 63 invoices China provided to the Panel (Exhibit CHN-31B), please indicate approximately what percentages of: (i) the total number of the producers' invoices during the POI, and (ii) the volume of Chinese domestic producers' sales during the POI, these 63 invoices represent.

112. The United States would observe that invoices covering [[ ]] percent of domestic industry sales during the period examined could not represent "positive evidence" of domestic prices for purposes of the underselling analysis contemplated under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. Further contradicting China's claim that these invoices are "reliable and representative" is the far from representative distribution of the four chicken parts reflected on the invoices, by weight. We calculate that [[ ]] percent of the sales ([[ ]] kg) consisted of breast meat and [[ ]] percent ([[ ]] kg) consisted of paws. By contrast, legs accounted for [[ ]] percent of the sales ([[ ]] kg) and wings [[ ]] percent ([[ ]] kg). This is not the distribution of parts that one would expect from the slaughter of whole chickens, suggesting that there is nothing representative about China's selection of invoices. In any event, China's analysis of these invoices, found nowhere in the determinations, is a *post hoc* rationalization of MOFCOM's deficient pricing analysis and cannot, as China argues, serve to justify the administrative determinations at issue in this dispute.

Question 119: In the Final Determination, Exhibit CHN-3, p. 50 third paragraph, MOFCOM writes:

> **"In the first half of 2009, although the price decrease margin of the domestic like product was larger than the price decrease margin of the product concerned, the 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**

[156] China, Responses to the Panel's Second Set of Questions, para. 109.

domestic like product was forced to reduce the price substantially to maintain market share."

Is the leading portion of the second sentence ("Affected by this") a reference to the significant undercutting referred to in the previous sentence? If so, how do you reconcile this with China's position that MOFCOM's price suppression finding is not based on MOFCOM's price undercutting finding.

113. It is important to note at the outset that the Panel's question quotes text from China's translation of the Final AD Determination. The United States' translation of the Final AD Determination, the relevant text of which China has not questioned, reads as follows:

> In the first half of 2009, although the decreasing margin of the domestic like products was much larger than that of the imported Subject Products' price, there are data showing the price of the Subject Products was lower than that of the domestic like products, showing obvious price under-cutting effect on the domestic like products. With this effect, the domestic like products were forced to cut prices by a large margin in order to maintain the market share.[157]

114. The phrase, "with *this* effect" in second sentence is a direct and unambiguous reference to the "price under-cutting effect" described by MOFCOM in the previous sentence, and it is clear that MOFCOM was therefore referring to price undercutting, and price undercutting alone, in relation to its finding that domestic producers were "forced to cut prices." China's response fails to reconcile this fact with its assertion that MOFCOM's price suppression finding was not based on its finding of price undercutting.

115. Irrespective of which translation is used, however, it is clear that MOFCOM was referring to price undercutting alone as causing price suppression. China outlines several points that it considers must be taken into account – the United States addresses each of these points below.

116. First, the United States agrees with China that MOFCOM, in the text quoted above, is responding to a specific argument raised by the U.S. respondents. However, China's assertion that the context of the argument did not concern the causation of price suppression[158] is incorrect. MOFCOM quotes the specific argument asserted by the respondents in the paragraph immediately preceding the text above:

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[157] MOFCOM, Final AD determination, p.48 (Exhibit USA-4) (emphasis added). MOFCOM's Final CVD Determination contains this same phrase and China has not provided an alternative translation to that text. (Exhibit USA-5).

[158] China, Responses to the Panel's Second Set Questions, para. 113.

> In the first half of 2009, the average selling price of the domestic like product decreased by 20.65% compared to the same period of the previous year, but the export price of the product concerned to China only decreased by 8.35%. The decrease margin of the domestic like product was far larger than that of the product concern exported to China. Therefore, there is no evidence indicating that the decrease of the average selling price of the domestic like product was caused by the imported products of the U.S in the first half of 2009.[159]

117. The respondents' argue that subject imports did not cause the decrease in price of the domestic like products because domestic prices decreased by a greater margin than the price of subject imports.

118. Second, China also suggests that "affected by this" refers to MOFCOM's consideration of import competition and market share. The sentence China references includes the words "substitutable" and "market share", but the relevant phrase makes clear that the issue concerns the effect of subject import price alone: "the price change of the product concerned inevitably would have some effects on the domestic like product."[160]

119. Third, in the third paragraph of China's response, China asserts that the "specific point" made by the sentence at issue is that "price undercutting earlier in the period led to a sharper price reduction by domestic producers in the first half of 2009 to avoid further loss of market share."[161] The text does not refer to whether price undercutting and its effect on price occurred early or late in the first half of 2009, but the United States would agree that MOFCOM's "specific point" was that price undercutting impacted the price of the domestic like product.

120. Fourth, in the last paragraph of China's response, China asserts that MOFCOM concluded that "the activity of price reduction" had the effect of price undercutting and price suppression. The implication of China's assertion that MOFCOM considered "price undercutting" to be an effect of price reduction, rather than its cause, is unclear. Nevertheless, given that the price reduction referenced in that sentence is the reduction in price of subject imports, it does not imply that MOFCOM's finding of price suppression relied on anything other than its finding of price undercutting.

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159 MOFCOM, Final AD Determination, p. 50 (citing Comments on the Preliminary Determination of Injury in the Anti-Dumping Investigation on Broiler Products submitted by The U.S. Poultry and Egg Export Council in February 24, 2010, pp. 18-19.)

160 Exhibit CHN-3, p. 50.

161 China, Responses to the Panel's Second Set Questions, para. 115.

121. Finally, the United States notes that China's response refers in a footnote to "the U.S. translation mistake."[162] The United States has explained that it stands by its translation as proper.[163]

Question 120: China has drawn the Panel's attention to the first sentence of the last paragraph on p. 36 of the Final AD Determination (Exhibit CHN-3), which reads: "The low-priced sales of the product concerned also suppressed the selling price of the like product of the domestic industry." Please discuss whether the last sentence of the same paragraph, on p. 37, ("In particular, since 2008 the like product of the domestic industry was in a loss because the further price undercutting of the product concerned") is a reference to price undercutting leading to price suppression.

122. The United States agrees with China that the sentence cited by the Panel refers to price undercutting leading to price suppression. That sentence is consistent with MOFCOM's finding of price suppression, which rested solely on MOFCOM's flawed finding of price undercutting, as the United States has demonstrated.[164] The United States would also note that the use of the words "in particular" and MOFCOM's reference to "further price undercutting" indicate that the sentence serves as a more specific example of the general price undercutting discussed in the preceding sentences.

123. The United States has already demonstrated that China's *post hoc* assertion that MOFCOM's price suppression finding rested on its consideration of volume effects, which China repeats in response to the Panel's question, is without merit and nowhere reflected in the record.[165] This issue is also discussed in the United States' comments on China's response to Question 124.

C. IMPACT ON THE DOMESTIC INDUSTRY AND CAUSATION

Question 122: At the second meeting of the Panel, China indicated that for purposes of the injury analysis, MOFCOM considered the information collected from the 17 Chinese producers who responded to the domestic producer questionnaire for each of the injury factors except for calculation of the total apparent consumption and for the representativity of the 17 companies.

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[162] China, Responses to the Panel's Second Set Questions, n. 82.

[163] United States, Responses to Panel's Second Set of Questions, para. 73.

[164] United States, First Written Submission, paras. 306-310; United States, Second Written Submission, paras. 190-198.

[165] United States, Second Written Submission, paras. 190-198.

(a) Please confirm that this is true for each of the factors enumerated under Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement which MOFCOM discusses in its determinations. If not, please indicate whether MOFCOM took into account data pertaining to: (i) the Chinese producers of the domestic like product as a whole, including non-responding domestic producers; (ii) the 17 producers from whom MOFCOM received questionnaire responses; (iii) a subset of these responses, for instance the 3 producers that MOFCOM verified; (iv) other. Finally, for each indicator, identify the source of the data (Petition, questionnaire responses, other source).

(b) Please reconcile this with the statement in China's second written submission, paragraph 245, that MOFCOM could not ignore evidence about the total industry ("The fact that MOFCOM may not have had full questionnaire responses from the other, smaller producers does not require (or even allow) MOFCOM to ignore the evidence about the total industry before the authority"). And please clarify whether, in relation to market share, MOFCOM took into consideration the evolution of the market share of non-responding Chinese domestic producers. If so, please refer to the specific paragraphs of the determination or other record documentation.

124. In China's response to part (a) of this question, China acknowledges that "MOFCOM used data for the 17 responding domestic producers for each injury factor."[166] Given that acknowledgement, China concedes in response to part (b) that MOFCOM did not in fact consider the evolution of the market share of non-responding Chinese domestic producers, contrary to the arguments made in its own written submissions. In its written submissions, China argued that MOFCOM considered alleged evidence that non-responding Chinese domestic producers, excluded from the domestic industry definition, lost market share to subject imports,[167] despite the absence of any data or findings concerning such producers in the final determinations. China now concedes that "MOFCOM's determination focused on analyzing the market share of the 17 responding domestic producers" as "the absolute level of market share MOFCOM reported in its Final Determinations" and "the basis of the market share trends that MOFCOM relied upon in its analysis."[168] These data show that the 3.92 percentage point gain in subject import market share during the period examined did not come at the expense of the domestic industry, which gained 4.38 percentage points of market share during the same

[166] China, Responses to the Panel's Second Set of Questions, para. 119.

[167] *See* China, First Written Submission, para. 402; China, Second Written Submission, para. 245. By China's own admission, most of the market share lost by non-responding domestic producers was captured by the 17 domestic producers included within MOFCOM's domestic industry definition. *See* China, First Written Submission, para. 401.

[168] China, Responses to the Panel's Second Set of Questions, para. 122.

period.[169] China has failed to rebut the United States' showing that MOFCOM's failure to address this evidence, which directly contradicted MOFCOM's causal link analysis, breached China's WTO obligations.[170]

(c) Is it permissible under Article 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement for an investigating authority to rely, in its injury analysis, on data pertaining to producers who were not included in the "domestic industry" as defined by the investigating authority.[171]

125. China's response to this question highlights the problems both with China's theory of how the domestic industry is to be defined under the AD and SCM Agreements, as well as with China's views on what constitutes an "objective" examination. Contrary to China's response, there is indeed something in the agreements that prevents an investigating authority from selecting one definition of 'industry' for the purposes of assessing certain factors under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement and using another definition of 'industry' for purposes of assessing other factors under those same provisions. Most importantly, China's approach is inconsistent with the requirements in Articles 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement that an investigation must be conducted in an objective manner. For, if investigating authorities are, as China proposes, free to selectively define the 'domestic industry' for each separate factor, then nothing would prevent an authority from biasing the outcome of the investigation by limiting each separate 'industry' for a specific factor to those producers who have exhibited negative trends for that factor. In contrast, using one definition of the domestic industry, and then evaluating all the relevant economic factors for that "industry", ensures that the authority is investigating the actual effects of the subject imports on a defined universe of producers.

126. Furthermore, the language of Article 3 of the AD Agreement and Article 15 of the SCM Agreement does in fact require that the volume, price effects and impact analysis apply to the domestic industry comprehensively. Thus, throughout these two Articles, the Agreement refers to "*the*" domestic industry, not to various versions of the domestic industry.[172]

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169 *See* MOFCOM, Final AD Determination at sec. 5.3.6 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3.6 (Exhibit USA-5).

170 *See* United States, First Written Submission, paras. 348-54; United States, Second Written Submission, paras. 212-18.

171 *See, e.g.*, *EC – Bed Linen (Panel)*, para. 6.182, cited in United States, Second Written Submission, n. 281.

172 *See* Articles 3.1, 3.4 and 3.4 of the AD Agreement and Articles 15.1, 15.4 and 15.5 of the SCM Agreement.

127. As a final point, the United States would note its agreement with China that the language of Articles 3.4 and 15.4 may cover "more than just the facts narrowly defined by the responding domestic producers in a case."[173] But this only emphasizes the potential deficiencies that result from narrowly defining the domestic industry in the manner that China did in this investigation.

Question 124: How, specifically, did MOFCOM discuss the explanatory force of imports with regard to the suppression of prices due to adverse volume effects (see para. 96 of China's opening statement at the second meeting).

128. China's response to the Panel's question fails to identify any explanation offered by MOFCOM of the suppression of prices due to adverse volume effects. It is revealing that the only text that China points to in support of its assertion that MOFCOM did not base its price effects finding solely on its price undercutting analysis is a *one-sentence* "summary paragraph."[174] China does not – because it cannot – point to any prior, more extensive discussion by MOFCOM of the effects of volume on price that China asserts is being summarized by this sentence.

129. The United States has previously explained that China's reliance on this single concluding sentence is misplaced.[175] This sentence merely sums up MOFCOM's preceding sections on volume and price and, on its face, simply encapsulates MOFCOM's view that subject import volume in combination with subject import prices had an adverse impact on domestic like product prices and profitability. MOFCOM does not specifically reference price suppression or indicate that subject import volume and market share alone, in the absence of significant underselling, would have been enough to suppress domestic like product prices to a significant degree. Indeed, such a finding would conflict with MOFCOM's preceding price analysis, which concluded that domestic like product prices were suppressed by subject import underselling.[176]

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[173] China, Responses to the Panel's Second Set of Questions, para. 125.

[174] China, Responses to the Panel's Second Set of Questions, para. 129.

[175] United States, Second Written Submission, para. 195.

[176] It also would conflict with evidence that the increase in subject import volume and market share during the period examined did not come at the expense of the domestic industry, which gained more market share than subject imports. *See* MOFCOM, Final AD Determination, secs. 5.1.2 and 5.3.6 (Exhibit USA-4); MOFCOM, Final CVD Determination, secs. 6.1.2 and 6.3.6 (Exhibit USA-5).