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

(DS427)

FIRST INTEGRATED EXECUTIVE SUMMARY
BY THE UNITED STATES OF AMERICA

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I. OVERVIEW

1. China's anti-dumping and countervailing duty measures on broiler products from the United States are the result of a flawed process yielding flawed results. This is confirmed by the *post-hoc* rationalizations offered by China during the course of these proceedings; they demonstrate that China's investigating authority, the Ministry of Commerce for the People's Republic of China (MOFCOM), simply ignored and discounted evidence and arguments that it found problematic throughout the underlying investigations.

2. The United States is alleging that the flawed process and results are inconsistent with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These obligations include:

- AD Agreement Article 6.2: MOFCOM's failure to grant the United States' request for a hearing;

- AD Agreement Article 6.9: MOFCOM's failure to allow U.S. respondents to see the calculations for their respective dumping margins;

- AD Agreement Article 6.5.1 and SCM Agreement Article 12.4.1: MOFCOM allowing the Petitioner to include confidential information in the Petition without providing non-confidential summaries;

- AD Agreement Article 2.2.1.1: MOFCOM's rejection – made without any explanation – of the costs kept in the books and records of U.S. producers to calculate the normal values for U.S. respondents, even though those costs were in accordance with generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with the production and sale of the products subject to the investigation and replacement of those costs with an unreasonable allocation methodology;

- AD Agreement Article 2.4: MOFCOM's failure to conduct a fair comparison of normal value and export price for Keystone, a U.S. respondent, by applying certain freezer storage fees in a manner that inflated Keystone's dumping margin;

- AD Agreement Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II and SCM Agreement Articles 12.7, 12.8, 22.3, 22.4, and 22.5: MOFCOM's imposition of an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact or why it

rejected facts and law raised by the United States and U.S. respondents in the Preliminary and Final Determinations;

- SCM Agreement Article 19.4 and Article VI:3 of the GATT 1994: MOFCOM's failure to properly allocate the alleged subsidy in relation to subject merchandise;

- AD Agreement Articles 3.1 and 4.1 and SCM Agreement Articles 15.1 and 16.1: MOFCOM wrongly defined the domestic industry to include only those firms that supported the AD and CVD investigations;

- AD Agreement Articles 3.1, 3.2, 6.4 and 12.2 and SCM Agreement Articles 15.1, 15.2, 12.3, and 22.3: MOFCOM's price effects analysis was based upon flawed price comparisons, failed to address conflicting evidence that the domestic industry was gaining market-share, and did not disclose MOFCOM's methodology for adjusting subject import price data with respect to different levels of trade.

- AD Agreement Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Agreement Articles: 15.1, 15.5, 22.3, and 22.5: MOFCOM's causation analysis relied exclusively on findings relating to volume and price but ignored data that contradicted those findings such as data indicating that any increase in subject import volume came wholly at the expense of other exporters and not domestic producers. Moreover, MOFCOM failed to explain in its final determination why it rejected the arguments put forward by U.S. respondents; and

- AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4: MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry" as it cannot be reconciled with all the evidence attesting to the overall health of the domestic industry.

II. PROCEDURAL AND FACTUAL BACKGROUND

3. China's measures imposing anti-dumping and countervailing duties on broiler products from the United States are set forth in MOFCOM Notice No. 8 [2010], Notice No. 26 [2010], Notice No. 51 [2010], and Notice No. 52 [2010], including any and all annexes.

4. Under these measures, China has levied the following antidumping and countervailing duty rates on imports of broiler products from U.S. producers and exporters.

Firm	Antidumping Duty Rates	Countervailing Duty Rates
Pilgrim's	53.4%	5.1%
Tyson	50.3%	12.5%
Keystone	50.3%	4.0%
Firms that registered for the investigation but were not selected as mandatory respondents	51.8%	7.4%
"All others"	105.4%	30.3%

5. On September 20, 2011, the United States requested consultations with China with respect to these measures. The United States and China held consultations on October 28, 2011. As these consultations did not resolve the dispute, the United States requested, on December 8, 2011, the establishment of a panel. The Dispute Settlement Body ("DSB") considered this request at its meeting on December 19, 2011, at which time China objected to the establishment of a panel. The United States renewed its request for the establishment of a panel at the January 20, 2011 meeting of the DSB, at which time a panel was established.

III. STANDARD OF REVIEW

6. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. The standard of review recognizes that investigating authorities in anti-dumping and countervailing duty investigations may have to consider conflicting arguments and evidence and that they will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

7. A WTO panel, per its standard of review, assesses whether a Member has abided by its obligations by looking at the contemporaneous explanations provided by the investigating authority. In short, because it is the task of a panel to assess the reasoning of an investigating authority, there is a concomitant duty on the investigating authority to set forth its reasoning in light of the obligation at issue because a defect in the reasoning, such as a failure to properly justify a position or address arguments means that the authority will be held to have acted inconsistently with the relevant provision. Therefore, *post-hoc* arguments offered by a defending Member cannot be taken into account.

IV. MOFCOM'S PROCEDURAL FAILINGS

A. China Breached Article 6.2 of the AD Agreement by Denying the U.S. Request for a Hearing.

8. The United States requested, in writing, that MOFCOM's Bureau of Industry Injury Investigation ("BIII") conduct a "public hearing" to address various procedural and substantive concerns relating to the conduct of the AD and CVD investigations. MOFCOM summarily rejected the U.S. request for a public hearing. Instead, MOFCOM, without any further inquiry, decided that the U.S. request was of no concern to any other interested party, and offered only a closed forum where the United States could present its views to MOFCOM and MOFCOM alone. In so doing, MOFCOM acted inconsistently with Article 6.2 of the AD Agreement.

9. Article 6.2 of the AD Agreement sets forth four requirements on investigating authorities. First, it must allow any interested party to request a hearing. The United States made a request for a hearing through its July 12 letter. Once a request is made, the authorities "shall" provide the opportunities provided for in the provision. The qualification on the obligation is expressed in the following sentence of Article 6.2, which notes that "provision of such opportunities must take account of the need to preserve confidentiality" or "convenience to the parties." Here, MOFCOM did not claim the request was denied because prior opportunities had been provided or the United States had missed a reasonable deadline to request a hearing. MOFCOM denied the request on grounds that have no basis in Article 6.2: that the issues were not relevant to other interested parties (even though MOFCOM did not attempt to inquire further about what precisely the issues entailed) and that it has already decided that its investigations were being carried out "in a public, just and transparent manner."

10. Second, the provision states that the opportunity extends to "all interested parties." In its letter denying the U.S. request, MOFCOM appears to make a distinction between the United States and interested parties by suggesting the latter have no interest in the concerns identified by the United States. That is incorrect as Article 6.11(ii) of the AD Agreement provides that "interested parties" under the agreement includes "the government of the exporting Member," which in this case is the United States.

11. Third, Article 6.2 provides that the opportunity is to "meet those parties with adverse interests. Accordingly, the United States was entitled upon request to a meeting where it could be concurrently present with other parties that had adverse interests. In assessing this right, it is critical to remember that the point is not whether those with adverse positions would have ultimately chosen to meet with the United States, but that MOFCOM decided *ab initio* that no such gathering would occur.

12. Finally, Article 6.2 provides that the meeting should allow for opposing views and rebuttals to be offered. The opinion presentation meeting that MOFCOM offered as a substitute makes no such provision. MOFCOM's option needs to be considered in the context of Article 6.3 of the AD Agreement, which provides that the oral information provided in a hearing shall only be taken into account if it is reproduced in writing and made available to other interested parties. For a party such as the Petitioner, who would be adverse to the issues raised in the proposed hearing, MOFCOM's procedure of substituting a closed meeting as soon as a petitioner

declines to meet, allows a petitioner an easy way to avoid a hearing and limit the record of arguments it finds objectionable.

13. In respect to how the obligations in Article 6.2 may be satisfied, the United States considers that an investigating authority could satisfy its obligations in multiple ways. One simple method would be for an investigating authority to adopt a practice of routinely holding hearings in all its investigations. Alternatively, it could follow procedures similar to those MOFCOM provides in its own rules for hearings – and which were denied to the United States. These procedures include (1) a procedure whereby an interested party can initiate a hearing; (2) a procedure by which the investigating authority can announce the logistics for the hearing and allow all interested parties the opportunity to participate, perhaps through a registration process; and (3) procedures whereby the hearing is conducted so the parties can have a full opportunity to make their own presentations and then have an opportunity to comment on the presentations made by other interested parties. Here, MOFCOM by allowing only the United States to present its opinions to MOFCOM, without presentations of views of the Petitioner, any opportunity for comment, and rebuttal by other interested parties, acted inconsistently with Article 6.2 of the AD Agreement by summarily denying the U.S. request for a hearing.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

14. China breached Article 6.9 of the AD Agreement by failing to disclose to the interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. In particular, MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

1. *Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.*

15. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties. The obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of "facts", which is defined to mean "[a] thing known for certain to have occurred or to be true." The use of the adjective "essential" to modify "facts" indicates that this obligation does not encompass "any and all" facts, but rather is concerned only with those facts that are "absolutely indispensible or necessary." For purposes of the investigating authority's dumping determination, the essential facts under Article 6.9 are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. China presents a classic straw man argument by purporting to paraphrase the U.S. argument in an extreme manner, and then argues against it. The United States, however, relies fully and appropriately on the text of Article 6.9 of the AD Agreement.

16. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. They are "facts" because they are things "known for certain to have occurred", and they are "essential" because they are absolutely indispensible to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed. Moreover, unless the interested parties are provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

2. *MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.*

17. MOFCOM failed to make available the calculations and data it used to determine the existence and margin of dumping and thereby prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. The essential facts MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with respect to the determination of costs of production. For normal value, export price and costs of production, MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM's elimination or rejection of data provided by each respondent.

18. China asserts that it met its disclosure obligation because the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping. Disclosure of summary figures does not meet China's obligations under Article 6.9 of the AD Agreement because these summary figures represent merely the final stage of a margin calculation and at no point does MOFCOM disclose the data or calculations used to derive them. At most, these disclosures merely allowed the exporters to guess at or approximate the calculations. China provides exhibits that purportedly could direct the respondents to the information relied on by MOFCOM and allow them to reconstruct the calculations performed by MOFCOM. These tables were not provided to the interested parties during the investigation. However, even if they had been provided, they merely refer the respondents to the scattered and vague statements in the Final AD Determination and disclosure documents concerning adjustments purportedly made by MOFCOM. They do not provide the data and calculations used by MOFCOM to determine the existence and magnitude of dumping.

19. Without knowing the facts of the actual data used by MOFCOM, the respondents were not in a position to defend their interests in the investigation. In order to defend their interests, the respondents needed to be able to review and comment on the calculation performed by MOFCOM. Without access to the actual calculations performed, the respondents could not re-construct the exact calculations, contrary to China's suggestion, and certainly could not review the data and calculations used by MOFCOM to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.

20. The United States is challenging MOFCOM's failure to require the Petitioner to prepare non-confidential summaries in six instances in the Petition as breaches of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement. There are five facets to these provisions that are critical to their interpretation. First, the provisions apply to information submitted by any interested party participating in the investigation. The Petitioner was an interested party. Second, the obligation upon an investigating authority for the production of non-confidential summaries is not simply permissive, but obligatory in that the investigating authority must ensure that summaries are furnished. Third, the use of the term "exceptional" in the provisions qualifies the possibilities for deviation. The *only* instance when the investigating authority is excused from requiring an interested party to provide a non-confidential summary is when preparation is infeasible such as when the information cannot be summarized without revealing confidential information. Fourth, the obligation to either provide a non-confidential summary or an explanation of why summarization is not possible falls on the interested Member or interested party – not the investigating authority. Fifth, the obligations in these provisions are not contingent upon another interested party making a request for a non-confidential summary or a showing that an interested party was injured by the lack of a non-confidential summary.

21. China attempts to sidestep its failure to require the Petitioner to provide non-confidential summaries by noting the United States is not challenging the underlying claims of confidentiality. That argument, however, fails to sequence the issues properly because the provisions require the investigating authority to assess the confidentiality claim. As the Appellate Body recognized in *EC – Fasteners*, the summary is critical because interested parties cannot defend their interests – including challenging the confidentiality claim – without an understanding of the information in question.

22. China's post-hoc attempt to cobble non-confidential summaries additionally fails because there is no indicia that would let an interested party know that the information China cites now as serving as a non-confidential summary was intended to serve as such and because they entail conclusions that an interested party must summarily accept rather than any summarization of the actual information. The panel in *China – GOES* was clear that the provisions "require the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information" and that a mere conclusion "does not provide an interested party with a basis to challenge whether the confidential information provides a basis for the conclusion drawn."

23. In short, the Petitioner did not provide any statement regarding why summarization was not possible, and MOFCOM saw no need for it to do so. Accordingly, China breached Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATIONS

A. China Breached Article 2.2.1.1 of the AD Agreement by Summarily Rejecting U.S. Producers' Costs of Production

24. During the investigation, U.S. producers presented to MOFCOM the costs of production they kept in their books and records for the various subject products. The producers explained that their records allocated higher production costs for more valuable chicken products, such as breast meat. U.S. producers put evidence on the record explaining why their costs were GAAP consistent and reasonably reflected the costs associated with the production and sale of the products. This evidence includes U.S. and Chinese accounting treatises, letters from auditors, precedents from other investigating authorities, Chinese GAAP, and International Accounting Standards. MOFCOM asserted in its Preliminary and Final AD Determinations, without providing any reasoning or analysis, that it did not believe that the reported costs reasonably reflected the actual costs of production. Instead, MOFCOM stated that U.S. producers had an affirmative responsibility to convince it otherwise.

25. Article 2.2.1.1 of the AD Agreement imposes positive obligations on an investigating authority. First, *the investigating authority must accept* the costs kept by the exporter or producer in its books and records if those costs of production are GAAP consistent and reasonably reflect the costs associated with the production and sale of subject products. The use of the term "normally" in the provision confirms that the obligation in the first sentence of Article 2.2.1.1 is for the investigating authority, as a rule, to calculate costs on the basis of a producer or exporter's records. The dependent clause of the provision indicates two circumstances [provisos] under which it would be possible to derogate from this rule: such records are not in accordance with [1] the generally accepted accounting principles of the exporting country and [2] do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the obligation is on the investigating authority to rely upon a producer's figures unless it demonstrates why one or both of the conditions do not apply.

26. In respect to these two provisos, Article 2.2.1.1. states the provision is "[f]or the purposes of paragraph 2," i.e. Article 2.2. Article 2.2 in turn states that when sales in the ordinary course of trade in the domestic market cannot be used, two other methods can, including cost of production method: the method specified in 2.2.1.1. Article 2.2 states the margin of dumping shall be determined by comparison "with the cost of production in the country of origin." Accordingly, the two provisos must be considered with respect to their objective of calculating the cost of production in the <u>country of origin</u>.

27. MOFCOM in rejecting these costs as unreasonable has an obligation to explain why they were so. The obligation stems from (1) the general requirement that an investigating authority's actions are subject to review by WTO panels; (2) because Article 2.2.1.1 is a "positive" obligation upon the investigating authority; and (3) because the second sentence of the provision requires an investigating authority to "consider" available evidence, which here was substantial. Critically, MOFCOM put nothing forward on the record as to why U.S. producers' costs were unreasonable. MOFCOM's *post-hoc* explanation that the costs were unreasonable because of

conditions in the Chinese market cannot be accepted by virtue of the fact that they are post-hoc. In any event, that basis to declare costs as unreasonable runs afoul of the AD Agreement.

28. If the investigating authority establishes that the costs are not reasonable or not consistent with GAAP, then *the investigating authority* bears the additional burden of demonstrating that it considered all available evidence, including historically utilized allocations made available by the exporter or producer to ensure that its alternative allocation is proper. A "proper" allocation is an allocation that captures the costs of production in the country of origin and one that can be accurately used to ensure that the anti-dumping duty is not greater than dumping as to the particular product. MOFCOM did not assert or accept that it was required to evaluate the evidence submitted by U.S. producers or the merits of its own methodology, or that it might need to make adjustments with respect to product scope. Not surprisingly, MOFCOM's application of a weight-based allocation here is not proper.

29. When there are joint products that are non-homogenous, the use of a unit based allocation such as weight eliminates any relationship with the cost of production in the country of origin. It results in the same amount of costs being assigned to low and high value products. The resulting antidumping duty margin would accordingly be distorted. MOFCOM's decision to adopt such a methodology seems to suggest the deliberative process ignored key concerns:

- Why is it reasonable to take costs that are in fact already associated with sale and remove that characteristic from them by averaging them according to weight?

- Why is it reasonable to take the specific processing costs incurred post-split and average them across all products, even though it is clear that some of those products did not incur those costs?

- Why is this methodology reasonable when producers cannot adopt it in the course of their normal records thus vitiating the principle that costs should reflects the costs of production in the country of origin? If they did, they would be allocating costs to low value products far in excess of the fair market value of such products. As a result, the producer's inventory, based on MOFCOM's methodology, would be in violation of the lower of cost or market [LCM] rules of accounting standards.

30. In short, MOFCOM's methodology is anything but "proper," particularly when compared to using the costs kept in the producers' books and records.

B. China Breached Article 2.4 of the AD Agreement By Failing To Conduct a Fair Comparison Between Keystone's Constructed Normal Value And Export Price.

31. China breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. Specifically, MOFCOM improperly adjusted Keystone's export price to account for certain freezer storage expenses.

1. *Keystone's Reported Freezer Storage Expenses to MOFCOM*

41. Keystone incurred freezer storage expenses on all home market sales that would be comparable to the sales of product in China – all frozen product incurred the same freezer storage expenses, regardless of whether they were sold in the United States or exported to China. Those freezer storage expenses were reported to MOFCOM in response to MOFCOM's AD Questionnaire. In the Preliminary AD Determination, MOFCOM constructed a normal value for Keystone by summing Keystone's reported costs of production, expenses, and an amount for reasonable profits. Given that freezer fees were included both in the cost-of-production-based normal value, and were incurred on export sales, MOFCOM properly made no adjustment to the export price regarding freezer fees. In the Final AD Determination, however, MOFCOM deducted Keystone's freezer storage fees from its export price.

2. *Article 2.4 of the AD Agreement Requires Allowances for Differences in Normal Value and Export Price Affecting Price Comparability*

42. For purposes of conducting a fair comparison between the export price and normal value, Article 2.4 of the AD Agreement requires due allowances to be made for differences affecting price comparability. The Appellate Body has stated that the *a contrario* application of this directive prohibits allowances or adjustments for differences that do not affect price comparability. Moreover, if the allowances to be made pursuant to Article 2.4 are limited to differences affecting price comparability, it is clear that no allowance could be made where no difference exists at all (let alone a difference affecting price comparability).

3. *MOFCOM's Treatment of Keystone's Freezer Storage Fees Precluded MOFCOM from Conducting a Fair Comparison*

43. MOFCOM made an undue adjustment to exclude freezer storage expenses from Keystone's export price and therefore compared a normal value that included at least some portion of those expenses, as China admits, to an export price that did not. The adjustment to the dumping margin calculated by MOFCOM for Keystone did not reflect merely the presence or absence of dumping. Rather, the margin of dumping derived from comparing Keystone's normal value to its export price reflected the fact that the same freezer storage expenses were added to the cost of production, while subtracted from the export price. By conducting such a comparison, which overstates the difference between the normal value and export price attributable to this expense, MOFCOM acted inconsistently with Article 2.4 by failing to conduct a fair comparison.

44. China asserts that the adjustment was warranted because all of Keystone's exports to China were of frozen product, and therefore incurred freezer storage expenses, but only a fraction of Keystone's domestic sales incurred freezer storage expenses because not all of those products were frozen. However, China admits that its adjustment resulted in a mismatch. China relies on the *post-hoc* characterization of Keystone as failing to provide accurate or timely responses to MOFCOM's request to justify this result. However, China's assertion is contrary to the record which indicates that MOFCOM verified that all of the costs of Keystone's financial reports, which included freezer storage expenses, had been properly reported to MOFCOM.

4. *The U.S. Claim Regarding Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference*

45. The United States' claim under Article 2.4 of the AD Agreement concerning MOFCOM's failure to conduct a fair comparison between Keystone's constructed normal value and its export price is properly within the panel's terms of reference. Contrary to China's assertion, the legal basis for the United States' claim clearly evolved from the legal basis that formed the subject of consultations and is therefore properly within the scope of the panel's terms of reference. Moreover, Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request.

46. The United States is pursuing several claims regarding MOFCOM's treatment of the respondents' reported costs and MOFCOM's failures to disclose certain essential facts, information and reasoning associated with calculating the respondents' normal values and export prices. At the time of the United States' request for consultations, it was apparent that there was some discrepancy in MOFCOM's treatment of Keystone's reported costs in constructing Keystone's normal value, including MOFCOM's treatment of Keystone's reported costs for freezer storage expenses. Given MOFCOM's flawed disclosures, it was unclear precisely how MOFCOM had treated those costs. It was not until consultations that it became apparent that MOFCOM had made an undue adjustment to Keystone's export price. This is not unlike the situation discussed in the Appellate Body report for *Mexico—Beef and Rice*, where a complaining party learns of additional information during consultations that warrants revising the list of treaty provisions with which the measure is alleged to be inconsistent.

C. China Breached Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2 and Annex II of the AD Agreement by Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin, and Failing to Explain its Determination in the Anti-Dumping Investigation.

47. When MOFCOM initiated the AD and CVD investigations, it notified the six U.S. producers identified in the Petition of the investigation and requested the U.S. Embassy to notify any other exporters or producers. MOFCOM required any U.S. exporter that wished to participate in the investigation to register with MOFCOM. Three companies were investigated and MOFCOM assigned those companies individual margins of dumping in the Preliminary and Final AD Determinations. MOFCOM applied a weighted-average margin to other companies that registered with MOFCOM, but were not investigated. However, with regard to companies that MOFCOM did not notify, or even identify, MOFCOM assigned an "all others" dumping margin substantially higher than the highest margin assigned to any investigated company.

48. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the AD questionnaires, and were not otherwise provided the notice required by the AD Agreement, MOFCOM breached Article 6.8 and Annex II of the AD Agreement. MOFCOM also breached Article 6.9 of the AD Agreement by failing to inform the interested parties of the essential facts under consideration in calculating

the "all others" dumping margin and Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" Rate in the Final Antidumping Duty Determination is Inconsistent with Article 6.8 and Annex II of the AD Agreement.*

49. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied facts available apparently adverse to the interests of producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation.

50. Article 6.8 of the AD Agreement limits the circumstances in which investigating authorities may resort to the use of facts available to where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation. Together with Annex II, paragraph 1 of the AD Agreement, Article 6.8 ensures that an exporter or producer has an opportunity to provide information required by an investigating authority before the investigating authority resorts to the use of facts available. An investigating authority that calculates dumping margins adverse to the interests of a party on the basis of facts available for exporters or producers that the authority did not give notice, will be in breach of Article 6.8.

51. MOFCOM did not notify "all other" U.S. producers or exporters. In the absence of being notified of the necessary information required by MOFCOM, those unregistered exporters or producers cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation. By applying facts available adverse to the interests of the companies that were not notified of the information required of them, were never sent copies of the antidumping questionnaire or otherwise provided the notice the AD Agreement requires, MOFCOM breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin*.

52. MOFCOM's failure to inform interested parties "of the essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin in time for the interested parties to defend their interests is inconsistent with Article 6.9 of the AD Agreement. At no time in the dumping investigation did MOFCOM identify the essential facts that formed the basis for its imposition of the 105.4 percent "all others" dumping margin. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate. Likewise, without disclosure of the factual information MOFCOM used to calculate the 105.4 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. In short, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by Failing to Explain its Determination.*

53. China acted inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" dumping margin. MOFCOM breached Article 12.2 of the AD Agreement because it failed to provide in sufficient detail the findings and conclusions that led to the application of facts available. MOFCOM breached Article 12.2.1 of the AD Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 12.2.2 of the AD Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" dumping margin. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the dumping margin for "all other" respondents and, thus, fails to satisfy China's obligations.

D. China Breached Article 1 of the AD Agreement.

54. Because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the AD Agreement.

V. MOFCOM'S FLAWED CVD DETERMINATIONS

A. China Breached Articles 12.7, 12.8, 22.3, 22.4 and 22.5 Of The SCM Agreement By Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate, and Failing to Explain its Determination in the Countervailing Duty Investigation.

55. As it did in the antidumping investigation, MOFCOM assigned an "all others" subsidy rate to companies that MOFCOM did not notify, or even identify, that was substantially higher than the highest subsidy rate assigned to any investigated company. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the CVD questionnaires, and were not otherwise provided the notice required by the SCM Agreement, MOFCOM breached Article 12.7 of the SCM Agreement. MOFCOM also breached Article 12.8 of the SCM Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" subsidy rate and Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to adequately explain the "all others" determinations.

1. *MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Article 12.7 of the SCM Agreement.*

56. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFOCM did not notify of the information required of them. Without notice of the information required of interested parties subject to the investigation, no other, unidentified U.S. producers or exporters can be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period. Neither can other, unidentified U.S. producers or exporters be said to have significantly impeded an investigation for which they received no information requests. MOFCOM acted inconsistently with its obligations under Article 12.7 by using facts available adverse to a company's interests to calculate subsidy rates for producers or exporters that the authorities did not investigate. Moreover, to the extent that such non-countervailable programs are factored into MOFCOM's calculation of the all others rate, MOFCOM ignored substantiated facts already on the record of the investigation.

2. *MOFCOM Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate*.

57. MOFCOM's failure to inform the United States and other interested parties "of the essential facts under consideration" that formed the basis for the "all others" subsidy rate calculation is inconsistent with Article 12.8 of the SCM Agreement. At no time in the CVD investigation did MOFCOM identify the essential facts that formed the basis for its imposition of a 30.3 percent all others subsidy rate. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests. Without disclosure of the factual information MOFCOM used to calculate the 30.3 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. With these essential facts, the interested parties could not defend their interests.

3. *MOFCOM Acted Inconsistently with Article 22.3, 22.4 and 22.5 of the SCM Agreement by Failing to Explain its Determination of the "All Others" Subsidy Rate.*

58. China acted inconsistently with Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact" in regard to the "all others" subsidy rate. MOFCOM breached Article 22.3 of the SCM Agreement because it failed to provide in sufficient detail the findings and conclusions that led to the application of facts available. MOFCOM breached Article 22.4 of the SCM Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 22.5 of the SCM Agreement because it failed to provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" subsidy rate. The

single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the subsidy rate for "all other" respondents and, thus, fails to satisfy China's obligations.

B. China Breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by Failing Properly to Allocate the Alleged Subsidy in Relation to Subject Products.

59. Investigating authorities, when calculating CVD rates, must ensure that the amount of subsidy received by a producer or exporter is properly allocated to the producer's or exporter's products under investigation. The result of this calculation is a per-unit, countervailing duty rate that can be applied to the producer's or exporters' sales of subject merchandise. Thus, an investigating authority, at a minimum, must ensure that any countervailing duty reflects only the subsidies provided to the subject products and not to any other products.

60. Here, MOFCOM found that the respondents purchased the corn and soybean meal used to feed and raise chickens on preferential terms. MOFCOM attempted to quantify the amount of the subsidy and factored it into the aggregate numerators when calculating the CVD rates for U.S. producers. Putting aside whether MOFCOM's subsidy theory is correct, MOFCOM's approach ignores a critical point: "all chickens" are not the products subject to the investigation; certain "broiler products" are.

32. Although one U.S. respondent, Keystone, used chickens to produce only subject products, the other two respondents, Tyson and Pilgrim's, used chickens to produce a significant quantity of non-subject merchandise. MOFCOM, however, made no adjustments for these two producers and instead incorrectly allocated the entire amount of the purported subsidy solely to the production of subject merchandise.

33. Tyson, Pilgrim's, and the United States proffered solutions to MOFCOM regarding this error. For example, the United States explained that MOFCOM could redress this error by applying either of two possible adjustments:

> [1] Because the numerator reflects the companies' total purchases of corn and soybean during the period of investigation, the denominator should be revised to reflect the companies' total sales of all chicken products (both subject and non-subject poultry products).
>
> [2] Alternatively, BOFT could reduce the numerator to reflect the amount of corn and soybean meal used to produce chicken feed for those chickens used to produce the subject merchandise, while maintaining the denominator reflecting the companies' sales of subject merchandise only.

61. Either adjustment was technically feasible. With respect to the first option, the questionnaire responses included data regarding the volume of non-subject merchandise that was produced from chickens. In regard to the alternative option, Tyson and Pilgrim's quantified for MOFCOM the percentage of poultry sales that could be attributed to subject merchandise.

Accordingly, MOFCOM could have proceeded to use that data to properly proportion the numerator. MOFCOM did not do so.

62. In respect to the arguments proffered by China regarding questionnaire and data responses, the United States has two preliminary points. First, it seems China's logic is that respondents somehow both knew what the data requested of them was to be used for and that they still knowingly obstructed the questions in a manner that would increase their margins. Not surprisingly, the record does not lend credence to that supposition. Second, what is the bearing of these questions on the ultimate inquiry: was MOFCOM apprised of the fault – that the numerator and denominator did not line up – and did it have a method by which to correct it? To that point, China's answer says nothing.

63. In short, MOFCOM mismatched the respective numerators and denominators for Tyson's and Pilgrim's subsidy calculations. MOFCOM was made aware of this error as well as acceptable options for correcting it. Nonetheless, MOFCOM refused to correct its mistake and proceeded to levy countervailing duties that are clearly in excess of any subsidy that may exist with respect to the subject merchandise. Accordingly, MOFCOM's CVD calculations for Pilgrim's and Tyson are inconsistent with Articles 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

C. China Breached Article 10 of the SCM Agreement.

64. Because MOFCOM's conduct in the subsidy investigation was inconsistent with the provisions of the SCM Agreement noted above, China also breached Article 10.

VI. MOFCOM'S FLAWED INJURY DETERMINATIONS

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

65. MOFCOM limited its definition of the domestic industry to domestic producers that voluntarily returned domestic producers' questionnaire responses. China should have, but did not, independently identify the universe of domestic producers in order to provide questionnaires to either each producer or, alternatively, a representative sample of domestic producers. Instead, MOFCOM only provided blank questionnaires to the 20 producers listed in the petition, which were all members of CAAA and therefore petitioners. MOFCOM did so, even though respondents had identified other large domestic producers not included in the definition of the domestic industry and notified MOFCOM as to their existence.

66. MOFCOM also failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the domestic industry. According to MOFCOM, such producers could have received blank questionnaire to complete and return either by registering for participation in the investigations or by downloading a blank questionnaire off of MOFCOM's website. MOFCOM's notices mentioned none of this. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by completing a questionnaire response, MOFCOM also imposed a self-selection

process among the domestic producers that introduced a material risk of distortion. Only producers posting the weakest performance would have had any incentive to come forward.

67. By so proceeding, MOFCOM increased the likelihood that petitioners and domestic producers hand- picked by them would return questionnaire responses and thus be included in the data set used by China to perform the analysis leading to its final determinations. By contrast, MOFCOM's approach to identifying domestic producers other than "known domestic producers" listed in the petition was calculated to elicit no response.

68. An investigating authority must independently collect information relevant to its definition of the domestic industry. An investigating authority cannot define the domestic industry consistently with Articles 3.1 and 4.1 of the ADA or Articles 15.1 and 16.1 of the SCM Agreement without making active, independent efforts to identify the universe of domestic producers of the like product. 121. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain{} passive in the face of possible shortcomings in the evidence submitted."

69. Accordingly, a process for defining the domestic industry that inevitably results in an examination of only producers selected or identified by the Petitioner cannot comport with the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. This is the same type of biased analysis the Appellate Body found inconsistent in *EC – Fasteners*. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to participate in the injury investigation by either joining the petition, responding to the notice, or downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack any incentive to respond to MOFCOM's notice or to otherwise participate in the investigation. Indeed, domestic producers posting the strongest performance would have every incentive <u>not</u> to make themselves known. That is because withholding their performance data from the investigating authority could only increase the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

70. Thus, MOFCOM's approach of limiting the domestic industry data to that from the Petitioner and select other producers named by Petitioner favored the interests of the Petitioner and petition supporters and prejudiced respondents. Further, because MOFCOM's biased and flawed definition of the domestic industry would have tainted its analysis of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5 of the ADA and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, respectively, China acted inconsistently with those articles as well by not conducting its analysis in relation to an appropriately defined "domestic industry."

71. MOFCOM's definition of the domestic industry was also inconsistent with Article 4.1 of

the ADA because it did not include "the domestic producers as a whole of the like products or to those of them whose collective output of the {like} products constitutes a major proportion of the total domestic production of those products." In light of its knowledge of the existence of domestic producers based on the data source it relied on to establish total domestic production, as discussed above, MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by defining the domestic industry so as to effectively exclude domestic producers accounting for approximately half of Chinese broiler production.

B. China's Price Effects Analysis Final Determination Breached Articles 3.1, 3.2, 6.4 and 12.2 of the AD Agreement and Articles 15.1, 15.2, 12.3, and 22.3 of the SCM Agreement.

72. MOFCOM's price effects analysis is inconsistent with China's WTO obligations in three key respects: first, MOFCOM's finding that subject imports undersold the domestic like product to a significant degree was based on fundamentally flawed price comparisons; second, MOFCOM's only basis for finding that subject imports suppressed domestic like product prices is its flawed finding that subject imports undersold the domestic like product to a significant degree; and third, MOFCOM failed to disclose the methodology it purportedly used to adjust the pricing data to reflect their different level of trade.

1. *MOFCOM's Failure to Control for Differences in Level of Trade and Product Mix is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.*

73. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require the investigating authority to base its injury determination on "positive evidence" and conduct an "objective examination." To conduct a price effects analysis consistent with the objectivity and positive evidence requirements, an investigating authority must utilize domestic and subject import pricing data that permit reasonably accurate price comparisons. By failing to control for obvious differences in level of trade and product mix and, therefore, MOFCOM's analysis of price effects violated Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

a. *MOFCOM's Comparison of Subject Import Prices and Domestic Like Product Prices at Different Levels of Trade is Not an Objective Examination.*

74. MOFCOM compared the value of subject imports with the value of the domestic like product at different levels of trade. Specifically, MOFCOM used the pricing data in the Petition to compare subject import prices based on official import statistics – on a CIF basis – to the domestic producers' sales prices to their first arm's-length customers. Because the average unit value of subject imports on a CIF basis does not include transportation costs from the border to an importer's warehouse and the importer's markup, such unit values would naturally be lower than the average unit value of subject imports sold by importers to first arms-length customers.

75. China confirmed in its first written submission that MOFCOM failed to adjust the CIF prices to account for the fact that they were at a different level of trade than the domestic

producers' sales. By making the comparison of prices at different levels of trade, MOFCOM made a finding of price undercutting by the subject imports nearly inevitable. China also asserts that it was proper to compare these pricing data, notwithstanding the different levels of trade, because both were "ready to enter further sales channels". This assertion does not address the inherent problem that by comparing this data, without adjustment, MOFCOM ignored the series of additional costs normally incurred before the imported goods can reach the point of actually competing on the market with domestic like products. In short, the prices were at different levels of trade and not comparable. Thus, MOFCOM's price analysis cannot constitute an objective examination of price effects, and is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

b. *MOFCOM Compared Subject Import Prices and Domestic Industry Sale Prices Influenced by Obvious Differences in Product Mix.*

76. MOFCOM's price analysis also failed to control for obvious and significant differences in the mix of products among subject import shipments and domestic industry shipments reflected by the record evidence. Where subject imports and the domestic like product differ significantly in terms of product mix and value, as here, a comparison of the average unit value of subject imports to the average unit value of the domestic like product would reflect differences in product mix rather than meaningful price comparisons. Such price comparisons therefore could not properly allow an investigating authority to "consider whether there has been significant price undercutting," as required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, or to conduct an "objective examination" of "positive evidence" pertaining to subject import price effects, as required under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. China fails to refute the fact that by comparing the average unit value of subject imports to the average unit value of the domestic like products, despite record evidence that significant differences existed between the relative mix of products, MOFCOM failed to conduct a pricing analysis based on positive evidence and an objective examination.

2. *MOFCOM's Adverse Price Effects Findings Were Predicated Entirely on Its Defective Underselling Analysis, and Therefore Inconsistent with WTO Requirements.*

77. MOFCOM's finding that subject imports suppressed domestic like product prices is predicated entirely on its flawed underselling analysis and, therefore, that finding is not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

78. China's suggestion that MOFCOM's underselling analysis was only one component of that finding is not reflected by the determinations, which focus exclusively on MOFCOM's price undercutting analysis. With no evidence of subject import underselling, MOFCOM lacked the necessary positive evidence to support its finding that subject import prices had the effect of suppressing domestic like product prices. The United States does not disagree that an authority can make a finding of significant price effects without finding that there has been "significant" price undercutting during the period of investigation. In this case, however, MOFCOM based its

price suppression analysis entirely on its flawed undercutting analysis. MOFCOM made no finding that subject import volume and market share alone could have suppressed domestic like product prices to a significant degree, and the record would not have supported such a finding. Notwithstanding the theoretical possibility of an investigating authority finding price suppression in the absence of underselling, the United States emphasizes that here, MOFCOM explicitly predicated its finding that subject imports suppressed domestic like product prices on its finding that subject imports undersold the domestic like product to a significant degree.

79. MOFCOM's finding of price suppression is also inconsistent with the requirement to "consider whether there has been a significant price undercutting" by the dumped or subsidized imports as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. The absence of any valid price comparisons or positive record evidence that subject imports influenced domestic like product prices made it impossible for MOFCOM to consider properly whether subject imports had the effect of depressing or suppressing domestic like product prices, as required by those articles.

3. *MOFCOM Failed to Disclose Its Alleged Methodology for Adjusting Subject Import Pricing Data to Reflect Its Different Level of Trade Relative to Domestic Like Product Pricing Data.*

80. MOFCOM failed to disclose the methodology that it allegedly used to adjust subject import prices to account for their different level of trade as compared to domestic industry sale prices. Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement require the investigating authority to provide interested parties with "all non-confidential information relevant to the presentation of their cases and used by the investigating authority." The methodology MOFCOM purported to use to adjust the pricing data is clearly information relevant to the presentation of the interested parties' cases and used by the investigating authority, and therefore MOFCOM's failure to disclose that information is inconsistent with those requirements.

81. MOFCOM's purported methodology for adjusting import prices also constituted relevant information on the matters of fact and law, and reasons which have led to the imposition of final measures, within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. That methodology was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. MOFCOM's failure to disclose this methodology is also inconsistent with those articles as well. Additionally, MOFCOM's alleged methodology for adjusting subject import prices to account for their different levels of trade also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement, and MOFCOM's failure to disclose this information is inconsistent with those provisions as well.

82. China has now apparently conceded that MOFCOM made no adjustment to subject import prices to account for their different level of trade relative to domestic like product prices. If that is the case, then the United States recognizes that MOFCOM would have had no methodology for making such an adjustment to disclose to the parties in accordance with Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement. But if MOFCOM did

actually reject the U.S. argument concerning the need for proper price comparisons, MOFCOM would be in breach of ADA Article 12.2.2 and SCM Article 22.5 for failure to provide in its determinations the reasons for rejection of this very relevant argument that goes to the heart of the pricing analysis relied on by MOFCOM.

C. China's Impact Analysis in its Final Determination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

83. MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in violation of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

1. *MOFCOM's Consideration of the Domestic Industry's Capacity Utilization was not an "Objective Examination" of "Positive Evidence."*

84. MOFCOM's finding that the domestic industry's low level of capacity utilization resulted from subject import competition does not reflect an "objective examination" because it was contradicted by record evidence that the decline in capacity utilization was driven by the domestic industry's expansion of its capacity far in excess of demand growth. An objective examination would have considered the minor increase in capacity utilization in context with the domestic industry's expansion of its capacity and the increase in apparent consumption. Subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports increased their share of apparent consumption entirely at the expense of non-subject imports. Rather, the record showed that the domestic industry's capacity utilization trend resulted entirely from the industry's capacity expansion. Given this record evidence, MOFCOM's finding that subject imports had an adverse impact on the domestic industry's rate of capacity utilization was not based on an "objective examination" of "positive evidence" in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

2. *MOFCOM's Consideration of End-of-Period Inventories was not an "Objective Examination" of "Positive Evidence."*

85. MOFCOM's finding that the increase in the domestic industry's end-of-period inventories was caused by subject imports cannot be the result of an "objective examination" because the record established that neither the level of end-of-period inventories nor the increase in end-of-period inventories were significant relative to domestic industry output and shipments. MOFCOM's finding that the increase in domestic industry inventories was significant was therefore not based on an "objective examination" of "positive evidence" and inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. MOFCOM relied on this factor, together with its flawed consideration of capacity utilization, to find that the domestic industry was adversely impacted, despite the record evidence that its performance otherwise improved.

3. *MOFCOM's Adverse Impact Finding was Predicated on its Flawed Examination of Capacity Utilization and End-of-Period Inventories, and Therefore Inconsistent with WTO Requirements.*

86. MOFCOM's finding that subject imports had an adverse impact on the domestic industry over the entire period of investigation rested entirely on its flawed findings regarding capacity utilization and end-of-period inventories. MOFCOM failed to reconcile its impact analysis with evidence that the domestic industry's performance strengthened substantially during the bulk of the increase in subject import volume between 2006 and 2008. Given MOFCOM's dependence on those flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted was not based on an "objective examination" of "positive evidence" and, therefore, inconsistent with Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

D. China's Causal Link Analysis in its Final Determination Breached Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.

87. MOFCOM's causation analysis is flawed because (1) MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) it relies on the flawed price undercutting analysis described above; and (3) MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance improved during the bulk of the increase in subject import volume between 2006 and 2008. These flaws confirm that MOFCOM's analysis is not based on an objective examination of positive evidence, in breach of China's obligations under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also means that MOFCOM failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury", in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

1. *MOFCOM's Causation Analysis is Inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.*

a. *MOFCOM Ignored Evidence that Subject Import Volume Did Not Increase at the Expense of the Domestic Industry.*

88. MOFCOM's determination of a causal link between subject imports and the domestic industry's purported material injury rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. However, the record evidence clearly contradicts this finding and it indicates that subject import volume and market share did not increase at the expense of the domestic industry. The increase in subject import volume and market share did not negatively impact the domestic industry because the record indicated that the domestic industry gained even more market share than subject imports during the same period.

89. China asserts that subject imports gained market share at the expense of Chinese producers that did not complete questionnaire responses and were therefore not included within

MOFCOM's definition of the domestic industry. China's new market share data was not considered by MOFCOM and does not provide an answer to the question of how subject imports could have caused injury to the domestic industry defined by MOFCOM, if subject imports did not gain market share at the expense of that industry.. MOFCOM could not have examined the impact of subject imports on domestic producers not included within the domestic industry definition because it lacked data on the performance of such producers -- – and China offers no other argument to rebut the U.S. argument.

90. MOFCOM failed to base its finding of a causal link between subject imports and the domestic industry's performance on an objective examination of positive evidence, in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, because it neglected to factor this evidence into its causal link analysis. MOFCOM's analysis is also inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement because MOFCOM failed to examine all relevant evidence.

b. ***MOFCOM's Causation Analysis Relies on its Flawed Price Effects Findings***.

91. MOFCOM's finding of causation is also inconsistent with the AD and SCM agreements because it was premised on MOFCOM's price underselling analysis. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, this finding, too, is inconsistent with WTO requirements. Furthermore, in light of MOFCOM's flawed price undercutting analysis, MOFCOM failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Finally, by relying on its defective pricing analysis, MOFCOM failed to base its causal link analysis on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

c. ***MOFCOM Failed to Reconcile Its Causation Analysis with Evidence that the Domestic Industry's Performance Improved as Subject Import Volume and Market Share Increased.***

92. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the bulk of the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance between 2006 and 2008. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to predicate its causation analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

2. *MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents is Inconsistent with Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.*

93. MOFCOM also failed to address key causation arguments raised by the respondents during the investigation. The obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their determinations that include "all relevant information on the matters of fact and law" material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

94. The U.S. respondents raised two principal arguments concerning the absence of any causal link between subject imports and material injury that went unanswered by MOFCOM. First, they argued that there could be no causal link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports. MOFCOM responded that it was under no obligation under Chinese domestic law to consider market share data. Second, USAPEEC argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which the Chinese domestic industry was incapable of supplying in adequate quantities. MOFCOM purported to address this argument in its preliminary determination, but was clearly under the misapprehension that the respondents' argument concerned whether chicken paws were within the scope of the investigation.

95. MOFCOM's failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' arguments is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. As these issues were material to MOFCOM's causal link analysis, MOFCOM's failure to address them was also inconsistent with Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement.

VII. Conclusion

96. China in these proceedings has chosen to defend its interests by discussing arguments and data that were nowhere on the record. That raises, however, a corresponding thought: if China cannot defend its investigations without having to resort to information and arguments not on the record, what hope was there that the respondents, who never saw that information or those arguments during the investigation, could have defended their interests?

97. The United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and AD Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and AD Agreement.