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

(DS427)

SECOND WRITTEN SUBMISSION OF

THE UNITED STATES OF AMERICA

PUBLIC VERSION

Double brackets ("[[ ]]") indicate where
Business confidential information was redacted

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China – GOES (AB)	Appellate Body Report, China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, WT/DS414/AB/R, circulated 18 October 2012.
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001.
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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.
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 2003, adopted as modified by Appellate Body 18 August 2003.

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Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, 2008, adopted 21 October 2008.
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US – AD/CVD (Panel)	Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, 2010, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R.
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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 2001, adopted 23 August 2001.
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US – OCTG Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004.
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US – Softwood Lumber IV (AB)	Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 2004, adopted 17 February 2004.
US – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report WT/DS264/AB/R.
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004.

US – Softwood Lumber V (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006.
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006.
US – Zeroing (Panel)	*United States – Laws, Regulations and Methodology for Calculating Dumping Margins* (Zeroing), WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R.
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, adopted 19 January 2001.

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CAAA	China Animal Agriculture Association
CVD	Countervailing duties
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Keystone	Keystone Foods, LLC (U.S. Respondent)
MOFCOM	Ministry of Commerce of the People's Republic of China
Petitioner	China Animal Agriculture Association
Pilgrim's	Pilgrim's Pride Corporation (U.S. Respondent)
POI	Period of investigation
Tyson	Tyson Foods, Inc. (U.S. Respondent)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USAPEEC	USA Poultry & Egg Export Council
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF EXHIBITS

USA-70	The New Shorter Oxford English Dictionary (Clarendon Press, 1993)
USA-71	The Concise Oxford English Dictionary (Oxford University Press, 11th ed. 2009)
USA-72	Charles T. Horngren, Srikant M. Datar, & George Foster, Cost Accounting: A Managerial Emphasis (11th Edition 2003)

I. INTRODUCTION

1. In its First Written Submission, the United States demonstrated that China's investigating authority, the Ministry of Commerce for the People's Republic of China ("MOFCOM") imposed anti-dumping and countervailing duty measures on broiler products from the United States through a flawed process that yielding flawed results. The United States explained how these various flaws result in China breaching various 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").

2. China's response thus far has been telling. In its closing statement before the Panel, China asserted the United States was wrong to focus on whether documents were in the investigatory record and indeed appeared to go so far as to suggest the AD and SCM Agreement lacked any requirements regarding the need for record evidence.[1] It is not difficult to surmise why China made such assertions. The evidentiary record clearly does not support the imposition of MOFCOM's measures on broiler products from the United States.

3. Lacking evidentiary support for MOFCOM's findings and conclusions, China instead, offers *post hoc* rationalizations to defend MOFCOM. But such rationalizations are not permissible in WTO dispute settlement. Moreover, they serve only to prove the United States' point: that MOFCOM's process and findings were flawed and there is accordingly nothing from the investigations that justifies anti-dumping and countervailing duty measures on U.S. broiler products.

II. CHINA CANNOT DEFEND MOFCOM'S PROCEDURAL FAILINGS

A. China Breached Article 6.2 of the AD Agreement Through MOFCOM's Summary Denial of the U.S. Request for a Hearing.

4. It is undisputed that the United States made a request for a hearing. It is also undisputed that MOFCOM did not grant a hearing. China also does not appear to be arguing that its opinion presentation meeting is the type of meeting envisioned under Article 6.2. Thus, the only question is whether MOFCOM had grounds to refuse the U.S. hearing request that is permissible under ADA Article 6.2. Because the only argument proffered by China – that it contacted the Petitioner (and only the Petitioner) and the Petitioner did not believe a hearing was necessary – is not documented in the record, the answer is no, MOFCOM did not have grounds to refuse such a request.

[1] China, First Closing Statement, para. 3.

5. China has argued that it contacted the Petitioner via telephone and that the Petitioner refused to meet with the United States.[2] Assuming *arguendo* that a telephone call by MOFCOM to the Petitioner was relevant to the question of whether MOFCOM satisfied its obligations, MOFCOM can present no evidence from the record to suggest such contact was made and accordingly cannot present this claim to the Panel.[3] The United States notes, however, that the evidence on the record as well as MOFCOM's own procedures do not suggest that the Petitioner's lack of interest was MOFCOM's rationale in denying the U.S. request.

6. First, as the U.S. noted in its opening submission, MOFCOM provided a letter to the United States setting forth its reasons for denying the U.S. request.[4] The rationales MOFCOM offered in that letter are that it had conducted the investigations in a "public, just, and transparent manner in accordance with Chinese laws" and that the issues "are not relevant to the interested parties directly."[5] There is no mention of any contact with the Petitioner.

7. Second, China's own procedures do not even provide for the scenario that China advances in these proceedings. Specifically, Article 8 of MOFTEC's hearing rules provide:

> Interested parties shall, within 15 days following the date of publication of the notice or issue of written notices for the public hearing on investigations of injury to industry, register with SETC in accordance with the specified requirements and submit a summary of the presentation and relevant supporting materials for the public hearing, which shall be in the common language and be made in 10 originals.[6]

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[2] China, First Written Submission, para. 9; China, Response to the Panel's First Set of Questions, para. 15. China appears to assume that only the Petitioner would have had adverse interests. The fact is that other potential parties, such as other producers, may have had adverse interests as well. China does not appear to claim that it engaged in any inquiry to determine who these other parties might be and how to notify them.

[3] China, Response to the Panel's First Set of Questions, para. 17 ("MOFCOM has no official records with respect to the communications referenced above."); European Union, Response to the Panel's First Set of Questions, para. 1 ("In the eventuality that the contact and response is not recorded in the file, or otherwise evidenced, then the key point in China's response would not appear to be supported by the evidence.").

[4] United States, First Written Submission, para. 43; MOFCOM, Reply of MOFCOM to Request of the U.S. Government for a Public Hearing In the Antidumping and Countervailing Duty Investigations of Broiler and Chicken Products from the United States [2010] No. 131 (July 13, 2010) ("MOFCOM, Letter to USG [2010] No. 131 (July 14, 2010)") (USA-24).

[5] MOFCOM, Letter to USG [2010] No. 131 (July 14, 2010) (USA-24).

[6] MOFTEC, Rules on Public Hearings with Regard to Investigations of Injury to Industry (2002) (USA-47).

Per China's own procedures, a decision to have a hearing is made first and then parties may decide whether to participate or not via registration. Accordingly, this is not a case where MOFCOM decided to organize a hearing and the Petitioner or other parties with adverse interests chose not to participate. This is a case where MOFCOM decided first no hearing would take place. It appears that China recognizes in the abstract that this is improper:

> China does not view the authority's discretion under Article 6.2 as encompassing the right to "refuse" to organize and hold such a meeting of parties with adverse interests. This wrongly implies that it is the authority's decision, in the first instance, as to whether such a meeting should or must take place.[7]

But that is precisely what happened here. Article 6.2 provides that no party has an obligation to attend a meeting. That is very different from saying the meeting will never take place without a specific party's advance permission. As the United States noted in its opening statement before the Panel, the Petitioner would have had every interest in denying the request from the start to minimize the arguments that could be proffered.[8] In short, granting the adverse party a veto denies the "opportunity" the interested party is compelled to provide pursuant to Article 6.2.

8. The last point the United States makes is regarding China's concerns about the United States requesting a "public hearing." This is unfortunately misdirection. China's rules are labeled "Rules on Public Hearings with Regard to Investigations of Injury to Industry"[9] and "Provisional Rules on the Conduct of Public Hearings in Anti-dumping Duty Investigations."[10] China is essentially blaming the United States for describing MOFCOM's rules as MOFCOM labeled them.

9. In short, the United States requested a hearing. China denied that request and can provide nothing on the record to justify its decision other than a letter from MOFCOM asserting that it had already decided it had conducted the investigation properly and that the United States' concerns were of no interest to anyone. In so doing, MOFCOM breached Article 6.2 of the AD Agreement.

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[7] China, Response to the Panel's First Set of Questions, para. 13.

[8] United States, First Opening Statement, para. 8.

[9] MOFTEC, Rules on Public Hearings with Regard to Investigations of Injury to Industry (2002) (USA-47).

[10] MOFTEC, Provisional Rules on the Conduct of Public Hearings in Antidumping Duty Investigations, Order No. 3 (Jan. 16, 2002) (USA-23).

B. China Breached Article 6.9 of the AD Agreement Through MOFCOM's Failure to Disclose the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

10. As demonstrated in the U.S. first written submission, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. This included a failure by MOFCOM to make available the data and calculations it performed to determine the existence and margins of dumping. China does not deny that MOFCOM failed to provide the actual data and calculations that formed the basis of its dumping determination. Rather, it claims that it was under no obligation to do so because the U.S. respondents, based on the limited information disclosed by MOFCOM, could have replicated MOFCOM's calculations. In fact, however, the limited data disclosed by MOFCOM was far too scant to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

1. The Disclosure Obligation Under Article 6.9 Includes the Data and Calculations Performed by an Investigating Authority to Determine the Existence and Margin of Dumping

11. The United States demonstrated in its first written submission that the calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations (such as various production costs and sales data), constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9.[11] The calculations and data are "essential facts" because they are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. In other words, without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed. Moreover, without disclosure of the actual calculations and data performed, the interested parties cannot check the investigating authority's math for errors or whether the authority did what it purported to do.

12. In response, China asserts that MOFCOM complied with Article 6.9 because it disclosed sufficient information to allow the interested parties to more likely than not surmise the facts that MOFCOM relied upon in making its calculations. This assertion is based on a flawed interpretation of Article 6.9, as discussed below.

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[11] *See, e.g.*, United States, First Written Submission, paras. 55-56 ("The ordinary meaning of 'essential' includes 'of or pertaining to a thing's essence' and 'absolutely indispensible or necessary.'"), 58-60. The United States also notes that Article 6.9 does not impose a disclosure obligation without limit because it is subject to at least three important limitations: (1) it applies only to *facts*; (2) it concerns only the *essential* facts, as opposed to any and all facts; and (3) it is limited to those essential facts that *form the basis of the decision to apply definitive measures*.

2. China's Interpretation of Article 6.9 of the AD Agreement is Incorrect and Does Not Excuse MOFCOM's Failure to Disclose the Essential Facts Forming the Basis of Its Decision to Apply Definitive Measures

13. China offers an erroneous interpretation of Article 6.9 that would relieve it of its obligation to disclose the actual facts forming the basis of the determination to impose definitive duties. China asserts incorrectly that an investigating authority can satisfy the obligations of Article 6.9, so long as it disclosed sufficient information to assist the interested parties in surmising, on their own initiative, the essential facts relied on by the investigating authority.

14. China's responses to the Panel's questions concerning the exclusion of below-cost sales illustrate its flawed interpretation of Article 6.9. Rather than disclose the actual sales that were excluded, China indicated the investigating authority could take the following approach:

> [A]n authority may disclose the benchmark by which below-cost sales were determined and excluded, but not provide the excluded sales themselves. With this information a respondent may both identify within its reported sales those sales that were excluded and more clearly understand the basis for the exclusion.[12]

> [I]n this dispute, with respect to both excluded sales and the elements of constructed value, China met its obligations under Article 6.9 by providing the factual elements necessary to understand the scope of disregarded or excluded sales and the elements of constructed value.[13]

China provided similar statements concerning the lack of disclosure of excluded sales for each company:

> In addition, for other models, MOFCOM excluded those sales that failed the below-cost test. Applying this information to its own reported sales, Pilgrims' could identify the universe of disregarded sales.[14]

> Keystone could readily identify from its own submitted data both the sales involved and test whether the 5% test had been applied appropriately to the various product models.[15]

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[12] China, Response to the Panel's First Set of Questions, para. 23.

[13] China, Response to the Panel's First Set of Questions, para. 24. *See also*, China, Response to the Panel's First Set of Questions, paras. 18-20 ("A list of sales that were disregarded because they were determined not to have been made in the ordinary course of trade or excluded because they were below cost did not constitute "essential facts" in the underlying investigation as *MOFCOM provided other factual elements that would allow the respondents to understand the universe of such sales*." (emphasis added)).

[14] China, Response to the Panel's First Set of Questions, para. 19.

15. China's assertion that the obligation of Article 6.9 can be met through the disclosure of information the investigating authority considers sufficient to assist the interested parties in surmising or deriving what those essential facts may have been, is inconsistent with the text of the Article itself, logically flawed, and would deprive the interested parties of the ability to adequately defend their interests. China suggests that because the interested parties could, theoretically, surmise all of the essential facts and perform their own calculations, they were not prejudiced by MOFCOM's failure to provide the actual calculations that it performed. However, even presuming that a party could derive every essential fact from the scant information provided by MOFCOM, without access to the actual calculations performed, and the actual data used, the interested parties could not, for example, check MOFCOM's methodology and math for errors or confirm that MOFCOM did what it purported to do. Similarly, without access to the actual calculations performed for the normal value and the weighted average dumping margin, the interested parties could not "comment on the completeness and correctness of the facts being considered… provide information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts", consistent with the disclosure described by the panel report in *EC – Salmon*.[16]

16. To enable interested parties to defend their interests, the actual data and calculations must be disclosed because even a clerical or mathematical mistake, or a mistake in a conversion of units, could result in a serious distortion of the dumping margin. Any number of inadvertent errors could occur, including, for example: (i) errors in currency or other conversions (such as mistakenly treating the unit of measurement of data in pounds, although the data were reported in kilograms or mistakenly neglect to convert various expenses incurred in different markets to a common currency before deducting or adding those expenses in calculating normal value or export price); or (ii) the omission of a sale from the calculations; (iii) not deducting an expense that was intended to be deducted; or (iv) simply misplacing a decimal point. Any such mistakes would not be apparent from the information provided by MOFCOM to the interested parties in this case.

17. Moreover, contrary to China's suggestion in its first written submission, MOFCOM did not disclose sufficient information to allow the U.S. exporters to replicate the authority's calculations. China created three tables for this dispute that purportedly would allow the respondents to replicate MOFCOM's calculations. These documents, which were not provided to the interested parties during the investigation, simply combine into one document various vague references to adjustments that were scattered throughout the record and that do not allow the interested parties to replicate the calculations. The disclosures provided only summary

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[15] China, Response to the Panel's First Set of Questions, para. 20.

[16] *EC – Salmon*, para 7.805 ("We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.").

figures and do not provide the actual data and underlying calculations performed by MOFCOM. At most, this hodgepodge of vague references allowed the interested parties to guess at or approximate the calculations. Even under China's flawed interpretation of Article 6.9, MOFCOM's disclosures still fall short because MOFCOM simply did not provide sufficient information from which U.S. exporters could replicate MOFCOM's calculations.

18. China attempts to support its erroneous interpretation of Article 6.9 by mischaracterizing the scope of the disclosure as limited to information the investigating authority considers necessary for the interested parties to defend their interests. China focuses on the second sentence of Article 6.9, while ignoring that "essential facts," in the first sentence, is followed by "under consideration which form the basis for the decision whether to apply definitive measures." Consider the following example:

> The criteria for distinguishing essential facts from regular facts must be derived from the context of Article 6.9, which clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests with respect to an authority's decision whether to apply definitive measures.[17]

19. The United States certainly agrees that the ability of the interested parties to defend their interests in the second sentence of Article 6.9 is important context in interpreting "essential facts" in the first sentence of that article. The second sentence helps inform the meaning of the first sentence since the second sentence indicates that one value of disclosure is to permit "parties to defend their interests." However, the second sentence is not, as China suggests, some sort of limitation on the first sentence. Rather, under accepted principles of treaty interpretation, these two provisions must be read together. China attempts to rely on its flawed "limitation" interpretation to try to justify MOFCOM's failure to provide the respondents with the data and calculations performed by MOFCOM. This argument fails for two reasons. First, it does not comply with the first sentence of Article 6.9, when read in context of the second sentence. By conflating the second sentence with the scope of disclosure required by the first, China ignores that the essential facts to be disclosed are those facts that are "under consideration which form the basis for the decision whether to apply definitive measures." Second, it does not, in fact, allow the interested parties to defend their interests. Unless an interested party is provided the actual facts forming the basis of the investigating authority's decision, it cannot adequately defend its interests.

20. MOFCOM's failure to make available the calculations and the data underlying those calculations to the interest parties deprived the interested parties of their ability to defend their interests. The U.S. exporters were left unaware by MOFCOM as to the data actually used in MOFCOM's antidumping calculations, and despite MOFCOM's claims to the contrary, the U.S.

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[17] China, Response to the Panel's First Set of Questions, para. 28. *See also*, China, First Opening Statement, para. 4 ("Article 6.9 clearly links the disclosure of 'essential facts' to the ability of the parties to defend their interests. The term 'essential' therefore refers to the 'fundamental' facts under consideration, not the intermediate details of 'consideration' as that term is used under Article 6.9.").

respondents did not have enough information from MOFCOM to derive those facts on their own. MOFCOM's failure to provide the essential facts to the interested parties was therefore inconsistent with Article 6.9 of the AD Agreement.

C. China Breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement Through MOFCOM's Failure to Require Non-Confidential Summaries.

21. As explained in the first written submission, China failed to require adequate non-confidential summaries in the Petition, breaching Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement. China responds by asserting, *inter alia*, that the "critical issue" was easily derived from the body of the petition and subsequent "non-confidential analysis." As explained below, whether the parties could derive an interpretation – from text that was never referenced as serving as the non-confidential summary – does not address whether China satisfied its obligations under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

1. China Misinterprets Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement

22. Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement obligate Members to require interested parties participating in the investigation to furnish adequate non-confidential summaries that allow for a reasonable understanding of the substance of the confidential information, so that interested parties can defend their interests. Adequate non-confidential summaries are required in the absence of "exceptional circumstances." In the case of "exceptional circumstances," however, the interested party must provide an explanation as to why summarization is not possible.

23. Accordingly, China is mistaken when it asserts that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation was satisfied through purported summaries in its own determinations, because these summaries provide some indication of the confidential information submitted by the interested party. China, for instance, claims that "the non-confidential summaries provided in the petition itself were later supplemented by non-confidential analysis provided by MOFCOM in its preliminary and final determinations."[18] China's statements are erroneous, and reflect a fundamental misunderstanding of the obligations contained in the SCM and AD Agreements.

24. Specifically, China's position is inconsistent with the text of Articles 6.5.1 and 12.4.1. Per these provisions, interested parties must have a "reasonable understanding of the substance of the information submitted in confidence," and thus be able to defend their interests.[19] China

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[18] China, First Written Submission, para. 44.

[19] Because MOFCOM does not maintain procedures whereby counsel or representatives for interested parties could access confidential information, as do the U.S. investigating authorities under

attempts to distinguish the facts of this case from *China-GOES*,[20] but there is nothing to distinguish. In *China-GOES*, the panel recognized that in order to adequately defend their interests, interested parties must have access to adequate non-confidential summaries *during* the course of the investigation prepared by the interested parties, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once a determination is made, the parties' ability to defend their interests has been compromised.[21]

25. Moreover, in several instances, China appears to argue that the purported non-confidential summaries contained in the application provide a reasonable understanding of the substance of the confidential information, in light of the various factors cited in Article 3.4 of the AD Agreement.[22] In doing so, China appears to be arguing that its obligation to provide adequate non-confidential summaries should be assessed in the context of Article 3.4 of the AD Agreement. The text of the Agreement does not support China's argument. For example, Article 3.4 of the AD Agreement, provides no cross-reference to Article 6.5.1 of the AD Agreement, nor vice-versa.[23] The obligation to provide adequate non-confidential summaries is an independent obligation, separate from any consideration that may be relevant to other provisions of the AD or SCM Agreements.

2. The Purported Non-confidential summaries are Inadequate

26. Assuming *arguendo* that China's *post hoc* summaries should be considered, the purported summaries remain inadequate. As the following discussion demonstrates, for each category of confidential information, the application was inadequate as it contained no summary at all, or contained unlabeled graphs, or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded more detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. As a result, China breached Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

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administrative protective order ("APO") procedures, interested parties have no other avenue for addressing confidential information.

[20] China, First Written Submission, para. 44.

[21] *China – GOES (Panel)*, para. 7.190.

[22] *See e.g.*, China First Written Submission, paras. 50, 52, 53, 55.

[23] By contrast, see Article 3.5 of the AD Agreement, which cross-references Article 3.4. of the AD Agreement.

a. Production

27. The United States challenges the lack of a non-confidential summary for a category of confidential information regarding the output of applicants. Significantly, at no point does China assert that its purported non-confidential summary is adequate, including by providing a understanding of the confidential information's substance. Instead, China asserts either that "the specific details of this information are not necessary" or that "one may infer" the total production of the applicants.[24]

28. China is committing the same mistake as it did in *China-GOES*. Simply stating that information may "not be necessary" or that it is the respondents' responsibility to "infer" the necessary details is insufficient. The panel in *China-GOES* rejected such assertions as inadequate.[25] Accordingly, China's offer of a conclusory statement rather than an actual non-confidential summary must be rejected.

b. Production Capacity

29. Regarding production capacity, China's arguments fail for several reasons. First, China asserts that the information was adequately summarized by graphs, as well as year-over-year percentage changes. But the graphs are unlabeled, as the scales are missing.[26] Accordingly, interested parties could not discern anything meaningful from them. In particular, it is impossible to discern either whether there were any specific trends, or the magnitudes of any such trends.[27] And the year-over-year percentage changes purporting to supplement the graphs do not reveal the significance in the absolute changes. Reporting aggregate figures would have been helpful. No reason, however, is given for the failure to report aggregate figures, despite the fact that reporting these figures would not have implicated any confidentiality concerns.

30. Also, China claims that by matching the unlabeled graphs with total production figures from different sections of the application, and in light of prior statements made 50 or so pages before in the application, "one may deduce both minimum and maximum capacity figures."[28] But this is simply not true. The graphs and year-over-year percentage changes do not include cross-references directing the interested reader to these sections now cited by China. The panel in *China-GOES* dismissed a nearly identical argument, where China proposed allowing

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[24] China, First Written Submission, paras. 47-48.

[25] *China – GOES (Panel)*, para. 7.205.

[26] Petition of Broiler Chicken Industry in the People's Republic of China to Implement Anti-Dumping and Countervailing Investigation (August 14, 2009) ("Petition), p. 71-72 (CHN-2).

[27] United States, First Oral Statement, para. 23.

[28] China, First Written Submission, para. 50.

interested parties to engage in a guessing game about where the confidential information was summarized.[29]

c. Domestic Inventory Levels

31. In respect to the failure to provide a non-confidential summary for domestic inventory levels, China cites percentage changes in inventory. Year-over-year percentage changes do not reveal the significance in the absolute changes though. Thus, the year-over-year percentage changes that were provided did not give the respondents enough information to defend their interests. As noted above, an increase in inventory, for example, from 1 to 2 is a 100 percent increase, and an increase from 100 to 200 is also a 100 percent increase. The latter increase, however, is far more significant. Reporting aggregate figures would have been helpful. No reason, however, is given for the failure to report aggregate figures, despite the fact that reporting these figures would not have implicated any confidentiality concerns.

d. Cash Flow

32. Regarding cash flow, China again relies on unlabeled graphs, as well as narrative contained in the application. The scales are missing for the unlabeled graphs.[30] The only scale is "zero," which is meaningless for providing context for respondents to discern specific trends. The applicants also indicate that "the like products in China had net cash outflow in 2006 and 2007, and net cash inflow in 2008. However, the like products in China had to bear net cash outflow again in the first half of 2009, up to [ ], since the selling price and sales quantity of like products dropped to different degrees."[31] Although this information is obviously redacted. China insists that the "critical issue" is whether applicants could generate positive cash flow and that "non confidential explanation" suffices.[32] These sentences, however, do nothing to shed light on the content of the redacted information – they indicate nothing about cash flow during the years in question, not even inadequate percentage changes.

e. Wages and Employment

33. With respect to confidential wage and employment data, China cites percentage changes as a substitute. Year-over-year percentage changes do not reveal the significance in the absolute changes. Thus, the year-over-year percentage changes that were provided did not give the respondents enough information to defend their interests. As noted above, an increase, for

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29 *See China – GOES (Panel)*, para. 7.202 (Making clear that, under Articles 12.4.1 and 6.5.1, interested parties do not have "to infer, derive and piece together a possible summary of confidential information.")

30 Petition, p. 82 (CHN-2).

31 Petition, p. 83 (CHN-2).

32 China, First Written Submission, para. 53.

example, from 1 to 2 is a 100 percent increase, and an increase from 100 to 200 is also a 100 percent increase. The significance of this 100 percent increase could, however, vastly differ in each of these contexts. Moreover, no explanation is provided why the provision of aggregate figures would have implicated any confidentiality concerns.

f. Labor Productivity

34. For this category, the information is simply redacted.[33] The application provides that "since 2006, the employment figures related to like products in China have been fluctuated dramatically, but the labor productivity has remained stable as whole."[34] China appears to again rely on "non confidential explanation" to justify the deficient non confidential summary.[35] But the single sentence contained in the application and quoted by China does nothing to shed light on the contents of the redacted information. As in *China-GOES*, the respondents were left confused and unaware of the contents of the information, undermining the due process objectives of Articles 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement.[36]

III. CHINA CANNOT DEFEND ITS ANTI-DUMPING AND CVD DETERMINATIONS

A. China Did Not – And Still Cannot – Justify MOFCOM's Cost Allocation Determinations

35. China has not cited anything in MOFCOM's determinations to show analysis beyond what the United States has already referenced. And what has been referenced does not show that MOFCOM gave any consideration to the proper allocation of respondents' costs. Faced with this deficiency, China has misrepresented both law and fact: (i) the obligations imposed by Article 2.2.1.1 and (ii) MOFCOM's analysis of the costs kept by U.S. respondents as well as with the weight-based methodology MOFCOM adopted. The United States will proceed by demonstrating that the *post hoc* arguments advanced by China in these proceedings are impermissible *ab initio*. The United States will then address why these arguments, even if they had been made during the investigations, remain untenable.

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33 Petition, p. 84 (CHN-2).

34 Petition, p. 84 (CHN-2).

35 China First Written Submission, para. 58.

36 *China – GOES (Panel)*, para. 7.213 ("the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested.").

1. China's *Post-hoc* Arguments Cannot Be Considered

36. The fundamental problem with every single argument proffered by China thus far is that they are *post hoc* rationalizations.[37] The United States in its first written submission explained that China's determinations were silent as to why U.S. respondents' costs were purportedly unreasonable. Through the course of its own submission, the panel meeting, and in its responses to the Panel's questions, China has not been able to draw upon any additional language in any of MOFCOM's determinations that suggests anything but the summary rejection of U.S. respondents' reported costs. As the United States has noted in its various submissions, *post hoc* arguments do not suffice as justifications in WTO dispute settlement.[38] Accordingly, China's failure to tie its arguments to findings made by MOFCOM compels the rejection of these arguments from consideration[39] and in turn mandates – as China has no other arguments – a finding that China acted inconsistently with Article 2.2.1.1.

37. The exclusion of China's arguments is not mere technicality; it is a requirement central to the dispute settlement process. The Appellate Body has defined the task of panels reviewing anti-dumping determinations as follows:

> panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*.[40]

Consideration of *post hoc* arguments is incompatible with this task.[41] First, a Panel cannot consider whether the "establishment" of facts is "*proper*" if the determination does not set forth its explanation. "Establishment" suggests an action to "place beyond dispute; ascertain,

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[37] *See e.g.*, *Argentina – Poultry*, paras. 7.48-7.49 ("Argentina has presented arguments before us in support of the investigating authorities' decisions which we could not find on the record of the investigation before us. This raises the question of whether ex post rationalization should be taken into account in order to assess Argentina's compliance with the provisions of the AD Agreement. …. [W]e do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority.") (quotation omitted).

[38] United States, First Opening Statement, paras. 1-2, 36-38, 41; United States, Closing Statement, paras. 2-3; United States, Response to the Panel's First Set of Questions, para. 67.

[39] United States, Response to the Panel's First Set of Questions, para. 67; United States, First Written Submission, para. 38.

[40] *US – Hot Rolled Steel (AB)*, para. 56 (italics original) (underlining added).

[41] *See* United States, Closing Statement, paras. 2-3.

demonstrate, prove."[42] Accordingly, United States understands the Appellate Body as finding that the reasoning must be explicitly set forth, otherwise it cannot be demonstrated or placed beyond dispute.[43] Second, a *post hoc* argument is intrinsically subjective; its sole existence and formulation is driven by the need to avoid a negative outcome in litigation. Finally, a *post hoc* argument is one that escapes the scrutiny and development of the investigative process, including the process of the consideration of comments submitted by the interested parties. Rather than review and assemble facts to derive a conclusion, a *post hoc* argument begins with the proposition and proceeds to cherry pick whatever facts are available to support it. The incomplete, or rather undeveloped, record thus frustrates a panel from determining whether the establishment was truly "proper."

38. China has attempted to sidestep the prohibition against *post hoc* arguments by presenting two claims. First, China asserts its reasoning for rejecting respondents' kept costs is "self-evident" and thus did not need to be elucidated in its determinations. Second, China appears to assert that rather than look to whether the determination objectively sets forth the reasoning – which is what the Appellate Body and every panel that has considered this issue has concluded – the panel must instead try to consider what the respondents should have understood at the time to be MOFCOM's unwritten concerns and conclusions..[44]

39. The same compelling testament refutes both claims: the complete absence of any discussion by MOFCOM or the interested parties regarding whether the costs were appropriate for the Chinese market. Respondents and the Petitioner had every incentive to address positions adopted by MOFCOM that could have impacted their interests. Yet when one looks to the record, one sees that while the respondents submitted voluminous evidence on why their costs were reasonable, there is conspicuous silence regarding the notion that prices of paws in China would be used as a basis to make a dramatic upward adjustment in normal value by replacing the cost allocations used in respondents books with a methodology chosen by MOFCOM. The reason for the silence is unmistakable: no one knew that MOFCOM considered the demands of the Chinese market to be a concern for purposes of calculating normal value or such an adjustment to be a possibility.

40. The reason no one was aware that MOFCOM thought Chinese prices were relevant to determining normal value is two-fold. First, because MOFCOM never made any indication on the record that this point was relevant. MOFCOM's arguments are therefore, at best, unsubstantiated, and at worst, developed solely for purposes of this dispute. The other is that

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[42] The New Shorter Oxford English Dictionary (Clarendon Press, 1993), Vol. I, p. 852-853 (USA 70) (see definition of "to establish").

[43] *Argentina – Poultry*, para. 7.49 ("we do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority.").

[44] China, Closing Statement, para. 3 ("the respondents understood the whole process … and the issues of concern.").

China's position creates an artificial increase in normal value because the products receive relatively high value in China. Usually, a low price in the import market compared to the home market constitutes dumping. Here, China is arguing that because the product has a high price in China, the normal value derived from the costs of production (which is a surrogate for home market prices) must be inflated, and dumping must be found. If one accepts China's position, then it means MOFCOM essentially flipped the common sense interpretation of dumping around. Ultimately though, the end result was that respondents had no opportunity to respond to this claim and to defend their interests.

41. Even in China's translation of MOFCOM's final determination, the typical discussion as to the supposed unreasonableness of a U.S. respondent's costs is perfunctory:

> The Investigating Authority had determined in the preliminary determination that, the cost calculation methodology by product types as claimed by the company did not fully and objectively reflect the actual production cost of the product concerned and the like product, and decided to use the weighted average production cost of all product types as the production cost of the product concerned and the like product.
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> After the preliminary determination, the company presented comments on the methodology adopted by the Investigating Authority, but could not provide enough reasons to prove the reasonableness of the different costs for different parts of the product concerned.. [sic] Through examination and verification, the Investigating Authority found that the facts determined in the preliminary determination had not changed, and decided to maintain the determination in the preliminary determination.[45]

Nothing in this discussion or any other in MOFCOM's determinations would suggest to anyone that the reason the respondent's costs are being rejected is the reason proffered by China in these proceedings: that they are unreasonable from the perspective of the Chinese market. Moreover, respondents had submitted arguments to MOFCOM regarding their interpretation of Article 2.2.1.1 and why the provision necessitated the acceptance of their costs.[46] If MOFCOM felt the respondents were laboring under an erroneous interpretation of Article 2.2.1.1, it certainly did not try and apprise them differently.

42. To the extent China maintains that it was not obligated by the AD Agreement to provide its reasoning because it is "self-evident" that the costs were unreasonable in light of prices in China, then the United States notes that no WTO Member that has opined on this issue in the

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[45] AD Final Determination, p. 30 (CHN-3).

[46] *See e.g.*, Tyson, Further Comments on the Preliminary AD Determination (Feb. 20, 2010), p. 2-13 (USA-26); Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010) (USA-27), p. 6-10; Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (USA-30).

course of this dispute has found it to be, in fact, "self-evident." To the contrary, every Member to proffer a view on Article 2.2.1.1 in this dispute has disagreed with China that whether costs are reasonably associated with production or sale entails any consideration, whatsoever, of the importing market. Accordingly, if it is not readily apparent to WTO members, it is implausible to claim that it was nevertheless evident to the respondents. In short, even if the standard was whether the parties had subjective knowledge of MOFCOM's concerns about the Chinese marketplace with respect to the use of a value-based allocation methodology – which it is not – the evidence does not substantiate China's position.

2. China Continues to Misinterpret Article 2.2.1.1

43. Article 2.2.1.1 provides in pertinent part:

> [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.
>
> [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.

China's present formula for interpreting Article 2.2.1.1 is to add words that are not there, *i.e.*, "in the anti-dumping context," and subtract words that clearly are there, such as "sale" and "associated with," as in "*associated with* the production and *sale*," and the word "proper" as in "*proper* allocation of costs," with the end result being a misconstruction of China's obligations. Specifically, China argues three untenable propositions. First, China asserts that a producer's kept costs can be rejected on the basis that they are unreasonable from the perspective of the importing market. Second, China asserts that it is the obligation of a respondent to keep its costs in a manner that is reasonable in the "anti-dumping context." Third, China does not acknowledge that the investigating authority's obligation to consider all available evidence is tied to the notion of arriving at a proper allocation.

a. The Prices in the Importing Market or the So-called "Anti-dumping Context" has no Relevance as to Whether Allocations Used in the Calculation of Normal Value are Reasonable

44. According to China, "it makes no sense to allow very low prices in Country A … to allow aggressive dumping in other markets."[47] China's argument is essentially that under the AD Agreement, a company's costs in its books and records are not reasonable if the end result is that a company's costs of production are based on its experience in its home market, and remain the same despite different price trends (arising perhaps, from market tastes and demands) in another, importing country. China appears to argue that the AD Agreement has some sort of gloss – the "anti-dumping context" as it describes it – that permits costs to be calculated in a manner that permits a finding of dumping.[48] China's position is the very circularity it criticizes.

45. First, whether dumping exists and is actionable is contingent on what the AD Agreement provides.[49] There is no notion of dumping that is actionable outside the bounds of the Agreement. The AD Agreement specifies how normal value is to be determined.[50] If the cost of production method is used to determine normal value, then the AD Agreement prescribes how costs are to be calculated.[51] Only after they are so calculated and normal value determined can it be decided whether dumping exists or not.

46. China reverses this analysis by asserting that costs used in constructing normal value are to be considered reasonable in reference to prices in the importing market. For example, China claims that chicken paws are a waste product in the United States, but highly valued in China.[52] Accordingly, China believes the Panel should find it relevant that there is a spread between the kept costs and the prices charged in the importing market.[53] But that would mean that in any instance where the producers' kept costs result in a normal value lower than the export price that

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47 *See e.g.*, China, First Written Submission, para. 124; China, First Opening Statement, para. 11 ("The most important product exported to China was broiler paws, a product to which respondents ascribed little or no value for accounting purposes but which had significant value in the Chinese market.") .

48 China, First Written Submission, paras. 61, 75-79, 111.

49 AD Agreement, Article 18.1.

50 AD Agreement, Article 2.2.

51 AD Agreement, Article 2.2.1.1.

52 China, First Written Submission, paras. 88, 93, 106, 126-127.

53 *See e.g.*, China, First Written Submission, paras. 113, 122, 127; China, Response to the Panel's First Set of Questions, para. 91 ("to appreciate the magnitude of the value received by these companies from non-boneless product, such as paws, and the huge distortion in the cost allocation, one must look at the overall profitability numbers and profitability broken down by market. ").

the costs are *per se* unreasonable and a new methodology must be derived that finds a dumping margin. No third party that has commented on this issue thus far concurs with China's position.

- "However, it is not clear to us why this is pertinent to the question of whether or not sales in the US domestic market are in the ordinary course of trade and permit a proper comparison."[54]

- "Thus, contrary to what China appears to argue, these provisions do not, in this case, direct the investigating authority to enquire into the costs of production of a chicken paw wherever in the world it might be destined for consumption; or destined for consumption in China. Rather, they expressly direct the investigating authority to enquire into the costs of production of a chicken paw destined for consumption in the United States."[55]

- "Article 2.2.1.1 does not permit the rejection of costs data and their replacement with other data simply because the authorities consider that the costs as reflected in the records are below an external benchmark or because a different allocation method could have been used."[56]

- "The fact that the method used by a foreign producer or exporter leads to the allocation of low costs to a byproducts or joint-product does not justify its rejection if the conditions of Article 2.2.1.1 are satisfied."[57]

- "En principio, México considera que la decisión de utilizar o no los costos reportados en los registros contables de los exportadores, no debe depender de si un coproducto tiene o no un valor muy pequeño en su mercado de origen y un valor alto en su mercado de exportación." US Translation: In principle, Mexico considers that the decision to use or not use the costs reported in the accounting records of exports should not depend on whether or not a co-product has a very small value in its home market and a high value in its export market.[58]

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54 European Union, Opening Statement, para. 13.

55 European Union, Response to Panel's Questions, para. 22.

56 Saudi Arabia, Third Party Submission, para. 6.

57 Saudi Arabia, Response to Panel's Questions, Response to Question 8.

58 Mexico, Response to Panel's Questions, para. 1.

Indeed, one third party described the position as "obviously irrational."[59] Such a claim is correct because the end logic of China's position is contrary to a basic tenet of international trade: countries with lower opportunity costs should take advantage of their comparative advantage and export their wares.[60]

47. The position of the other Members is not surprising. There is no text in Article 2.2.1.1, or anywhere else in the AD Agreement, that suggests prices in the importing market allow for reported costs to be deemed unreasonable.[61] The relevant text in fact disclaims the proposition China advocates. Article 2.2.1.1 begins by noting "for the purposes of paragraph 2." Paragraph 2 is Article 2.2, which in respect to the cost of production method states the comparison is to be done "with the cost of production in the *country of origin*."[62] This is consistent with the general scheme of Article 2.2, which is to use sales of the like product in the "domestic market of the exporting country" if they can be used.[63] China's position in contrast is clearly inconsistent with the text of the AD Agreement.

b. Article 2.2.1.1 is a Positive Obligation on the Investigating Authority Regarding the Calculation of the Cost of Production

48. China also argues that Article 2.2.1.1 applies equally to foreign respondents regarding how they must calculate their costs. As China puts it: "[Article 2.2.1.1] does not specify who should be doing the calculation."[64] In that light, China argues the respondent must calculate its costs on a basis that is reasonable for the investigating authority to use in the antidumping context – *i.e.* based on the prices in the Chinese market.

49. As an initial matter, as explained above, the Chinese market is irrelevant for purposes of Article 2.2.1.1. Further, the AD Agreement does not distinguish calculations specifically for the "antidumping context" from calculations used for any other purposes. China's arguments

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59 See European Union, Response to Panel Questions, para. 33.

60 *See* United States, First Opening Statement, para. 45 ("fundamentally against the notion that trade will naturally arise where relative costs and values differ."); European Union, Opening Statement, para. 22 ("Perhaps the real solution to this situation is competition rather than protection.").

61 European Union, Opening Statement, para. 21 ("the short answer to China's Complaint is: why not – or more specifically what is there in the Agreement that precludes that, or authorizes the importing Member to respond with an anti-dumping duty?")

62 AD Agreement, Article 2.2.

63 *See also* Saudi Arabia, Opening Statement, para. 10 ("As Article 2.2 of the AD Agreement governs the determination of normal value, investigating authorities must consider generally accepted accounting principles and market conditions in the exporting country – and not the importing country.").

64 China, Response to the Panel's First Set of Questions, para. 61.

presume that foreign respondents have an obligation to take their calculations based on their books and records and modify them to satisfy investigating authorities under this provision, lest they be rejected for failure to make such modifications. There is no textual support for such a claim, and in fact, such an interpretation of the obligations of respondents is at odds with the requirement of the investigating authority under Article 2.2.1.1 to rely on the books and records "historically utilized by the exporter or producer."

50. Furthermore, even if China had properly conceived of what "reasonably associated with production and sale" means, the inquiry is not as China suggests. To the contrary, the precise inquiry is not whether respondents have satisfied their obligations to the investigating authority to calculate costs that are reasonable to the authority, but whether the investigating authority has abided by its obligations to the AD Agreement to use the respondents' kept costs in light of the relevant circumstances.

51. In addition, the United States emphasizes that in arguing that their reported costs were reasonable, U.S. respondents put evidence on the record that their costs were calculated in a manner that is not only consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards, but also that there was evidence that Chinese producers of broiler products use a value-based allocation methodology as well and that Chinese accounting literature substantiated that the use of a value based allocation methodology can be reasonable.[65] Despite all of this evidence on the record as to the reasonableness of the use of a value based cost allocation methodology, China nonetheless claims that the U.S. producers did not adequately meet their so-called burden under Article 2.2.1.1 because they did not provide information that showed that their allocation methodologies reflected the prices of the Chinese market – a requirement that lacks any textual basis.[66]

52. The appropriate interpretation of Article 2.2.1.1 is that it provides that costs are to be calculated *by the investigating authority* on the basis of records "kept by the exporter or producer." Indeed, one must ask under what circumstances would a firm keep in its books and records costs tailored for the purposes of the hypothetical possibility of a future antidumping investigation that has not yet occurred, and may never occur, focused on whether prices are reasonable from the perspective of the importing market?[67] The short answer is never.

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[65] *See e.g.*, United States, First Written Submission, paras. 98, 100, 102.

[66] *See e.g.*, China, First Written Submission, paras. 86-89; China, Closing Statement, para. 9.

[67] European Union, Opening Statement, para. 17 ("The European Union does not understand on what basis firms might be expected to tailor domestic cost allocation methodologies to the circumstances pertaining in a particular export market.").

53. China bases its interpretation on the assertion that the language does not provide for the identity of the party who calculates the costs. In fact, it actually does so provide. The provision begins with the language "For the purposes of paragraph 2." Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[68]

Thus, it is clear that Article 2.2.1.1 addresses the requirements of the investigating authority, if it resorts to the method provided for in Article 2.2, to calculate the cost of production in the country of origin as part of its overall task of ascertaining the margin of dumping.

54. Accordingly, what China views as some sort of affirmative burden on respondents can only be understood in the context of an investigating authority's positive obligation. It is the investigating authority's obligation to calculate costs on the basis of the records kept by producers or exporters provided they are in accordance with GAAP and reasonably associated with production and sale. Again, this not about whether costs are reasonable in the "anti-dumping context." Rather the anti-dumping context is that the authority is to use the costs unless the investigating authority establishes that one or two of the conditions do not exist.

55. Therefore, rather than view this as an outright issue of burden on respondents as China posits, the better way to understand the issue is how the investigating authority's obligation may be contingent on what respondents provide. To take one extreme, if respondents refused to provide intelligible records, the investigating authority may determine that the records are not in accordance with GAAP or reasonable rather readily. At the other extreme are situations like the present one where respondents provided voluminous and authoritative information explaining why their costs are consistent with GAAP and reasonably associated with production and sale. At this point, the investigating authority's obligation is at the other end of the continuum and it must accept the respondents' costs or specifically describe why the conditions for using a company's costs are not satisfied before departing to another methodology. In contrast, China's position – that the investigating authority can reject costs because respondents have failed to persuade the authority that their costs are reasonable on a basis unknown and unknowable to respondents– does not comport with the notion of Article 2.2.1.1 as a positive obligation.

56. This interpretation is consistent with the obligation to "consider" in the second sentence of Article 2.2.1.1. As the Appellate Body in *Softwood Lumber V* noted:

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[68] Footnote omitted. Underlining added.

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

Accordingly, the issue in the present case is not whether respondents calculated costs as MOFCOM sought, but whether MOFCOM appropriately justified why it was entitled not to use the kept costs in calculating the cost of production.

c. An Investigating Authority Must Consider All Available Evidence in order to Arrive at a Proper Allocation

57. The United States will explain in detail below the specific failings with MOFCOM's evaluation of the evidence and its own methodology. The United States begins though by addressing a threshold point: how the parties view the investigating authority's obligation to consider all available evidence. China acknowledges that "consideration" entails "some degree of deliberation"[69]; however, China neglects the object of that deliberation: "a proper allocation of costs." China's interpretation turns the obligation to "consider all available evidence" into what the Appellate Body has specifically held as insufficient under Article 2.2.1.1: simply receiving and noting evidence.[70]

58. First, China asserts that MOFCOM engaged in consideration by including in its questionnaires queries asking for a description of the cost allocation systems maintained by respondents.[71] The definitions for "consider" include the following: "think carefully about; take into account when making a judgment, look attentively at."[72] Simply accepting or requesting information does not mean the evidence was actually examined and weighed when making a judgment.

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69 China, Response to the Panel's First Set of Questions, para. 70.

70 *US – Softwood Lumber V (AB)*, para. 133.

71 China, Response to the Panel's First Set of Questions, paras. 71-73.

72 Concise Oxford Dictionary, p. 304 (USA - 71); *US – Softwood Lumber (AB)*, para. 133 ("In the context of the second sentence of Article 2.2.1.1, we read the term "consider" to mean that an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on" and to "weigh the merits of " "all available evidence on the proper allocation of costs".).

59. MOFCOM notes its determinations to suggest the evidence was "considered," but they show no such thing.[73] The key phrase in both examples cited by MOFCOM are nearly identical:

> 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.
>
> 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.[74]

For two distinct respondents, MOFCOM summarily notes the costs claimed by them are unreasonable. There is no discussion of what actual defects, if any, existed. There is no discussion of how MOFCOM carefully thought about any evidence in light of its decision to reject respondents' costs as unreasonable. And most critically, there is no explanation of why rejection of these records leads to a more proper allocation of costs.

60. Second, China appears to assert that once MOFCOM found U.S. respondents' costs unreasonable, it was free to turn to any methodology it deemed reasonable.[75] But that is not so. The second sentence of Article 2.2.1.1 provides not only an obligation regarding the consideration of evidence in determining whether the kept costs are GAAP consistent and reasonable, but also mandates that those costs be considered in any event in determining the proper allocation of costs. In other words, as the Appellate Body has noted, compelling evidence requires reflection in order satisfy the requirement to "consider all available evidence."[76]

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[73] China, Response to the Panel's First Set of Questions, para. 74.

[74] *Id*. citing Tyson, Preliminary AD Disclosure, pp. 1-2 (USA-8) and Keystone Preliminary AD Disclosure, p. 2 (USA-10).

[75] *See e.g.*, China, First Written Submission, paras. 129-130 ("Having rejected respondents' reports that did not 'reasonably reflect' the costs of producing the broiler products at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents; distorting cost methodologies."), para. 138 (Here, the circumstances surrounding the respondent' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the markets concerned. MOFCOM considered all the evidence during the investigation concerning the allocation of costs to reach a reasonable allocation methodology.").

[76] *US – Softwood Lumber V (AB)*, para. 138.

Nothing in MOFCOM's determinations suggests that MOFCOM undertook such an exercise in determining an alternative methodology in this case.

3. China Did Not Properly Evaluate U.S. Respondents' Reported Costs or its Weight-Based Methodology

61. Throughout these proceedings, China has asserted that respondents' costs are distorted.[77] The alleged distortion is based on false premises: that costs kept by producers should reflect the prices of China's markets. The United States has explained above, and in its prior submissions, why prices in the importing market are not a basis to reject a respondent's historically utilized cost allocations. However, the United States believes it important to clarify certain representations made by China regarding the respondents' costs and to emphasize that a proper evaluation would not hold the costs unreasonable simply because they are based upon value-based accounting.

a. The Respondents' Kept Costs Are Not Zero

62. A zero cost of production in a company's books might be indicative of scrap or waste, and such products might generate miscellaneous revenue. Accordingly, the mere existence of a zero cost of production does not indicate that the kept cost is necessarily unreasonable.[78] The fact though is, as the United States has explained in its responses to the Panel's questions, that none of the respondents' reported costs for subject merchandise were zero.[79] China's contrary assertions are based on distortions of how costs are kept by one particular respondent, Keystone, and applying that distortion to the other respondents.

63. Keystone explained to MOFCOM that its production is focused on [[ ]][80] That is the business focus of this firm. Accordingly, in Keystone's normal course of business and in its normal, audited books and records, [[ ]] [81] This is not an unreasonable decision. As succinctly put by the European Union:

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77 China, First Written Submission, paras. 126-127; China, Response to the Panel's First Set of Questions, paras. 78, 91.

78 *See* European Union, Response to Panel's Questions, para. 28.

79 *See* United States, Response to Panel's First Set of Questions, paras. 80-81; USA-61, USA-62, USA-63.

80 Keystone, Comments on the Final AD Disclosure, p.21 (USA-29).

81 *Id*. (USA-29).

> If, "in the ordinary course of trade" in the domestic market, one of the two parts separated from the whole has no value, and is in fact waste, why would one allocate any costs to it at all? If anything, additional costs will probably have to be incurred to dispose of it, and these additional costs will surely be attributable to the other part of the whole, which does have value.[82]

Here, Keystone was similarly situated:

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>]][83]

Thus, in accordance with US GAAP, Keystone decided to assign specific production costs only [[ ]] Accordingly, costs [[ ]] are reflected in the costs of the by-products and the end result in this particular case is that the costs are not zero as China puts it, but rather reflect only the specific costs incurred.

64. To the extent MOFCOM found it so problematic that [[ ]], MOFCOM did not say so in its determinations. Particularly salient, MOFCOM did not address that Keystone submitted to MOFCOM product-specific costs based on the very same data previously submitted to MOFCOM, which utilized "co-product" accounting which allocated meat costs to all products based on relative sales value,[84] thereby aligning Keystone's alternative methodology closer to the accounting methodology kept by the other two mandatory respondents. Thus, China, while it makes Keystone out as a scapegoat in these proceedings because of its accounting practices, neglects to note that Keystone offered MOFCOM a detailed and thorough alternative on the record and that MOFCOM provided no consideration of that alternative in rejecting Keystone's cost allocations entirely. This detail is itself compelling evidence that MOFCOM did not consider a proper allocation of respondents' costs.

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82 European Union, Opening Statement, para. 15.

83 Keystone, Comments on the Preliminary AD Determination, p.4 (USA-30).

84 Keystone, Comments on the AD Final Disclosure, p. 23 (USA-29).

b. MOFCOM Did Not Weigh the Merits of Respondent's Kept Costs Against its Weight-Based Methodology

65. China's closing statement from the first panel meeting is telling. Specifically, China asserted that the United States had failed to address "the undeniable distortion on respondents' resort to arbitrary market values to assign costs…." MOFCOM's obligation was to accept GAAP consistent costs which were reasonably associated with the production and sale of the product under consideration. The United States has not argued in this proceeding that a cost, in order to be reasonably associated with the production and *sale* of a product, must be its market value. However, it defies common sense to claim that a cost allocation methodology that relies on market values, is the industry standard, and is consistent with the recommendations of authoritative accounting treatises is either "undeniably distortive" or "arbitrary." Under these circumstances, MOFCOM had a duty to set forth its reasoning. China cannot even support those assertions here, and MOFCOM most certainly did not do so in the administrative proceeding.

66. As the United States has explained, a principal question presented here is how can MOFCOM be entitled to remain silent about the methodology it chose over the books and records historically utilized by the respondents, particularly when the respondents placed significant evidence explaining why the costs were reasonable. A cursory review of the relative methodologies raises serious questions as to the propriety of MOFCOM's decision and refutes any assertion that resort to the methodology used by MOFCOM was self-evident.

67. First, respondents explained that the industry standard in both the United States and China is to use value-based allocations.[85] The fact that in the normal course of business, both United States and Chinese producers of chicken use a value-based allocation methodology is probative that such a methodology is reasonable.

68. Second, respondents put forward evidence, including text books and accounting authorities, that confirmed in the case of non-homogenous joint products, the use of a relative value based allocation is a reasonable method of allocating costs and the use of a weight-based value allocation is not a reasonable method of allocating costs. One of the authorities cited by China in these proceedings in defense of its weight based allocation is an accounting treatise written by Professor Horngren. China cites the treatise to note that that unit based accounting is preferred in rate setting situations and that anti-dumping is essentially rate-setting.[86] The United States does not agree with China's characterization of anti-dumping duties as a fair price rate setting mechanism, but more fundamentally notes that China misapplies the context. A firm that is subject to rate regulation, such as a provider of electricity, may not be able to identify what the actual value of its commodity is, and must thus resort to a unit based accounting system. The accounting methodology is not to be applied by the rate-setter but the participant subject to it.

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[85] United States, First Written Submission, para. 98; Tyson, Comments on Preliminary AD Determination, p. 4 (USA-25).

[86] China, First Written Submission, para. 135.

69. When it came to other industries, including specifically the poultry industry, Professor Horngren's text explains the propriety of value based costing.[87] His rationale for why such firms would find such accounting techniques reasonable is compelling:

> Consider a gold mine that extracts ore containing gold, silver, and lead. Use of a common physical measure (tons) would result in almost all costs being allocated to lead – the product weights the most but has the lowest revenue-producing power. In this case, the method of cost allocation is inconsistent with the reason for the mine owner incurring mining costs – to find gold and silver, not lead. As another example, if the joint costs of a hog were assigned to its various products on the basis of weight, center-cut pork chops would have the same cost per pound as pigs feet, lard, bacon, ham, bones and so forth – when in fact, costs are incurred for the revenue-generating benefits of the product. In a product line income statement, the pork products would have a high sales value per pound—for example, center-cut pork chops – would show a big "profit" and products that have a low sales value per pound – for example, bones – would show sizeable losses.[88]

Such accounting is thus reasonable because it reflects reality such as business motives and sales values. In contrast, a weighted average results "in a consistent finding that a significant portion of the value of the chicken is sold outside of the ordinary course of trade due to prices far below the (average) cost of production, while the primary products are sold at a falsely astronomic profit."[89]

70. The United States notes that the most recent version of Professor Horngren's text highlights chicken processing as a clear example of the type of cost allocations at issue in this case. The treatise gives examples of two firms. One firm classifies breast meat as its main product and classifies all other products as by-products. The selling prices of the by-products are used to reduce the costs allocated to the main product. The other classifies any product sold to a retail outlet as a joint product and other products as by products. Revenue from the byproducts is offset against processing costs before that cost is allocated among the joint products.[90] In short, the very methodologies at issue are being used to instruct others on how to engage in proper accounting of costs.

71. Third, there is no explanation why a weight-based methodology is purportedly neutral. Non-homogenous joint products usually have significantly different market values, are often physically non-homogeneous, and may not be quantifiable using the same unit of measure (e.g.,

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87 Charles T. Horngren, Srikant M. Datar, & George Foster, Cost Accounting: A Managerial Emphasis (11th Edition 2003) ("Horngren's) (USA-72).

88 Horngren's, p. 560-561(USA -72).

89 Keystone, Comments on the AD Final Disclosure, p. 24 (USA-29).

90 Horngren's, p. 570 (USA-72).

gasses vs. solids). By MOFCOM's logic, what precludes an investigating authority from choosing a unit measure that yields the highest dumping margins? For example, between volume and weight, MOFCOM has not explained why one would be more acceptable than the other. In this case in particular, the methodology used by MOFCOM skewed the companies' costs away from their actual costs and the value realized by individual chicken parts. And it treated all chicken products as if they had precisely the same physical characteristics, which China itself recognizes is not the case. Such a methodology is no way "neutral."

72. Finally, rather than reject all of the companies' allocation of costs, one might ask why did MOFCOM not instead indicate its concerns to the respondents? Respondents could have explained their own concerns with MOFCOM's positions and worked with MOFCOM to address any problems MOFCOM believed might exist in the company's books and records. If the objective of Article 2.2.1.1 is to determine costs that are reasonably associated with production and sale of the merchandise, MOFCOM could have – at a minimum – simply worked with the respondents by outlining its concerns. Instead, MOFCOM's response was to go far beyond such any reasoned approach and to throw out the respondents' reported methodologies. Such a response is unreasonable and inconsistent with the requirements of Article 2.2.1.1.

73. In summary, China has presented a *post hoc* argument – conditions in the Chinese market – as the basis to reject respondents' costs. That justification is not only *post hoc*, it also has no textual basis in the AD Agreement and indeed countermands its prescriptions. China's other representations – that the respondents kept costs of zero and that value based allocations are unreasonable in anti-dumping – proceedings also has no basis in the record and is contradicted by the relevant facts. Accordingly, China cannot present any grounds in this dispute to avoid a finding of inconsistency with Article 2.2.1.1.

B. China Breached Article 2.4 of the AD Agreement by Failing to Conduct a Fair Comparison between Keystone's Constructed Normal Value and Export Price

74. The United States demonstrated in the first written submission that MOFCOM acted inconsistently with 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.[91] In particular, MOFCOM made an undue adjustment to Keystone's export price to account for certain freezer storage expenses that were already included in Keystone's constructed normal value. In response, China asserts the U.S. claim is outside the Panel's terms of reference and MOFCOM's adjustment to Keystone's export price was proper. Neither assertion is correct.

1. The United States' Claim that China Breached Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference

75. China argues that the United States claim under Article 2.4 of the AD Agreement is not within the Panel's terms of reference for this proceeding because, according to China, it does not

[91] United States, First Written Submission, paras. 118-138.

reflect a natural evolution of the legal or factual bases raised by the U.S. request for consultations.[92] China's argument rests primarily on three assertions: (i) the U.S. request does not reference Article 2.4 of the AD Agreement; (ii) it does not mention "freezer storage expenses"; and (iii) none of the provisions referenced in the request are "reasonably related" to the issue of fair comparison.[93] China's arguments are without merit. With regard to (i) and (ii), nothing in the DSU required the U.S. consultation request to include a specific mention of Article 2.4 or freezer storage fees. With respect to (iii), the issues raised in the consultation request were in fact reasonably related to Article 2.4 of the AD Agreement.

76. The fact that the United States' request for consultations does not include a specific reference to Article 2.4 of the AD Agreement or freezer storage expenses does not render the U.S. claim, as spelled out in the U.S. panel request, outside of the Panel's terms of reference. The Panel Report in *Mexico – Beef & Rice* found that there was no need for "complete identity between the scope of the request for consultations and the request for the establishment [of a panel]."[94] The Appellate Body agreed and provided the following explanation:

> [a] complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure— that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant.[95]

77. In this dispute, China's assertion that the U.S. claim under Article 2.4 of the AD Agreement is outside of the Panel's terms of reference by virtue of the fact that the U.S. request for consultations did not reference Article 2.4 or freezer storage expenses is not consistent with the foregoing. Rather, the implication of China's assertion would be the imposition of a requirement of "complete identify" between the consultation request and panel request that was rejected by the panel and Appellate Body reports in *Mexico – Beef & Rice*, as described above. China's argument here should be dismissed on those same grounds.

78. In response to the Panel's first set of questions, the United States explained how its claim regarding Article 2.4 of the AD Agreement evolved through a process not unlike that described by the Appellate Body above – as a result of consultations, the United States had a better understanding of China's treatment of Keystone's freezer storage fees, such that Article 2.4 of

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92 China, First Written Submission, para. 139.

93 China, First Written Submission, para. 142.

94 *Mexico – Beef & Rice* (Panel), para. 7.41.

95 *Mexico – Beef & Rice* (AB), para. 138.

the AD Agreement became relevant.[96] In particular, the United States described how its claim regarding Article 2.4 did, in fact, evolve from the legal basis that formed the subject of consultations, including Articles 2.2 and 2.2.1.1 of the AD Agreement.

79. China, however, asserts that a claim under Article 2.4 could not evolve from a claim under Article 2.2 or Article 2.2.1.1 because the latter two provisions "do not deal with the issue of fair comparison, which is the purpose of Article 2.4."[97] This statement simply indicates the obvious – the obligation of Article 2.4 is to conduct a fair comparison, while the obligations under Article 2.2 and 2.2.1.1 concern costs and constructed normal value. To the extent China is simply repeating its assertion that the obligation under Article 2.4 is not the same as the obligations under Article 2.2 or Article 2.2.1.1, we would of course agree. However, to the extent China is suggesting they are completely unrelated, that suggestion is belied by China's own statement in the next sentence of its submission: "[r]ather, they deal with the specific steps or rules that apply to just one variable in the comparison."[98] In other words, the constructed normal value that is determined under Article 2.2 and Article 2.2.1.1 is one of the two variables subject to the fair comparison conducted under Article 2.4, which hardly suggests they are unrelated.

80. In a similar vein, China asserts "[t]he Article 2.4 claim…involves freezer storage fees which have nothing to do with the respondents' cost records or how allocation of costs was effected."[99] Again, this statement is belied by China's own arguments. The evidence China relies on for its substantive arguments consists primarily of Keystone's reported costs, and China discusses how those costs were reported and allocated.[100] China's response would not have focused on that information to the extent it did, if Article 2.4 had "nothing to do with the respondents' cost records or how allocation of costs was effected." To the contrary, MOFCOM's treatment of Keystone's reported costs of production in constructing Keystone's normal value, including its treatment of Keystone's reported costs for freezer storage expenses, is directly related to whether MOFCOM conducted a fair comparison under Article 2.4. Thus, for the reasons described above and in prior U.S. submissions, the U.S. claim regarding Article 2.4 of the AD Agreement is properly within the Panel's terms of reference.

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96 United States, Response to Panel's First Set of Questions, paras. 96-101.

97 China, First Written Submission, para. 155.

98 China, First Written Submission, para. 155.

99 China, First Written Submission, para. 157.

100 *See, e.g.*, China, First Written Submission, paras. 160-165.

2. China's Post-Hoc Assertions Do Not Justify MOFCOM's Undue Adjustment to Keystone's Export Price

81. The United States demonstrated that MOFCOM's adjustment to Keystone's export price was inconsistent with Article 2.4 of the AD Agreement. In particular, the United States demonstrated the following: Keystone reported certain freezer storage expenses in response to MOFCOM's AD Questionnaire; MOFCOM included those costs when it constructed Keystone's normal value, and MOFCOM made an adjustment to Keystone's export price that resulted in freezer storage expenses being included both as a cost of production in Keystone's normal value and as an expense adjustment to Keystone's export price. China does not appear to contest these basic facts. [101]

82. Notwithstanding the unfair result of MOFCOM's adjustment, China's response provides two *post hoc* assertions in an attempt to justify why the adjustment was nevertheless proper: (i) MOFCOM found that Keystone had reported freezer storage fees in a manner requiring an adjustment, due to Keystone's failure to provide adequate responses to MOCFCOM's requests for information; and (ii) MOFCOM properly declined to calculate a normal value adjustment given the late stage of the investigation at which the issue was discovered and in light of Keystone's incomplete responses. The record does not support either assertion.

83. It is important to examine China's assertions in light of the explanations provided by MOFCOM during the investigation. MOFCOM made no finding that Keystone failed to provide adequate responses. Rather, MOFCOM verified that Keystone's reported costs had been properly reported:

> The Verification Team has verified the completeness, accuracy, and truthfulness of Keystone's general situation, sales to the Mainland China, domestic sales in America, and allocation of costs and charges of the like product of the subject product.[102]

84. China, in its submissions to the Panel, apparently disagrees with MOFCOM's finding in the administrative proceeding, and only now takes issue with how those costs were reported and allocated. And China now suggests that MOFCOM's adjustment was made on the basis of it finding those costs were misallocated:

> Upon further consideration of all the facts, MOFCOM determined that Keystone had reported freezer storage fees in a way that would not lead to a difference that affects price comparability if left unadjusted.[103]

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101 China, First Written Submission, para. 177.

102 MOFCOM, Verification Report for Keystone, p. 1 (USA-58).

103 China, First Written Submission, para. 165.

85. But China misrepresents the record, as no such finding or justification is reflected anywhere in the record. China appears to offer this new explanation under the theory that if it can convince the Panel that the result of MOFCOM's adjustment was somehow justified, the Panel should uphold MOFCOM's actions. The Panel, however, should examine the explanation provided by MOFCOM during the investigation, not China during this proceeding. MOFCOM did not purport to make an adjustment to Keystone's export price based on how it allocated costs. Rather, MOFCOM was under the critical misunderstanding that Keystone had not reported freezer storage expenses at all: "[d]uring verification, the authority found that your company did not report freezer storage expenses."[104] This summary statement leaves little room for interpretation.

86. If Keystone had, in fact, failed to report freezer storage expenses, MOFCOM's adjustment might have been warranted. However, given that Keystone had reported those expenses in accordance with its normal books and records, the adjustment made by MOFCOM resulted in freezer storage expenses being included both as a cost of production in Keystone's normal value and as an expense adjustment to Keystone's export price. Even if the problem concerned, as China now suggests, was how Keystone allocated freezer storage costs, the solution to the problem asserted by China would not have been the adjustment to the export price made by MOFCOM. Rather, it could have been to adjust both the export price and normal value, or perhaps adjust the normal value to reflect the proportion of freezer storage expenses incurred by products comprising the constructed normal value.

87. China also asserts that MOFCOM's failure to correct the error resulting from its adjustment was justified because it was discovered too late in the investigation. This assertion, too, is not supported by the record. Consider the following timeline:

- MOFCOM received Keystone's initial questionnaire response on December 3, 2009.[105]
- MOFCOM conducted an onsite verification of Keystone from June 2-4, 2010.[106]
- Keystone's Final AD Disclosure was issued on July 16, 2010.[107]
- MOFCOM received Keystone's comments on Final AD Disclosure on July 26, 2010.[108]

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104 Keystone Final AD Disclosure, p. 4 (USA-14).

105 Keystone, Investigation Questionnaire Response (USA-36).

106 Keystone Final AD Disclosure (USA-14).

107 Keystone Final AD Disclosure (USA-14).

108 Keystone, Comments on Final AD Disclosure (USA-29).

- MOFCOM issued its Final AD Determination on September 26, 2010.[109]

88. MOFCOM first indicated that it was adjusting Keystone's export price in regard to freezer fees in the Final AD Disclosure in mid-July 2010. Just ten days later, in its Comments on the Final AD Disclosure, Keystone explained in detail what it considered to be the problem with MOFCOM's adjustment and proposed solutions to fix the problem.[110] These comments were provided two months before MOFCOM issued its Final AD Determination, providing MOFCOM with sufficient time to correct the error that China suggests MOFCOM was aware of.[111]

89. For the reasons set out above, China has failed to rebut that China breached Article 2.4 of the AD Agreement by making an unwarranted adjustment for Keystone's freezer storage fees.

C. China Cannot Dispute That Its Countervailing Duty is in Excess of the Alleged Subsidy

90. Here, China has not argued that its countervailing duty is equal to the subsidy found to exist. Instead, China blames the respondents for any mistakes that were made because the respondents purportedly mislead MOFCOM through the provision of inaccurate questionnaire responses. In short, MOFCOM is asserting some form of procedural default: respondents provided incorrect answers and now they must suffer the consequences. Even if China's position excused its obligation – which it does not – China's position is simply *reductio ad absurdum*. Per China's logic, respondents, who had every interest in ensuring that their CVD rates were as low as possible, mislead MOFCOM in a manner that *increased* their CVD rates. More importantly, the respondents unquestionably provided all of the data needed to calculate a proper countervailing duty prior to the preliminary determination and expressly pointed out MOFCOM's error long before the final determination. The United States will demonstrate below that China acted inconsistently with its obligations under Article 19.4, procedural default does not excuse those obligations, and that in any event, the questionnaire responses MOFCOM relies upon are irrelevant in light of the accurate record evidence of the proper determination.

1. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Not Subject to Procedural Default

91. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are clear:

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109 MOFCOM, Final AD Determination (USA-4).

110 Keystone, Comments on Final AD Disclosure, pp. 27, 29 (USA-29).

111 China, First Written Submission, para. 177.

> [Art. 19.4] *No countervailing duty shall be levied* on any imported product *in excess* of the amount of subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.[112]
>
> [Art. VI:3] N*o countervailing duty shall be levied* on any product of the territory of any contracting party imported into the territory of another contracting party *in excess* of an amount equal to the estimated bounty or subsidy determined to be granted, directly, or indirectly, on the manufacture, production, or export of such product in the country of origin or exportation…."

These provisions are mandatory in nature and contain no exceptions. The language in these provisions creates a fixed ceiling regarding the imposition of a countervailing duty. Accordingly, an authority may not satisfy its obligation by merely asserting its CVD is a reasonable approximation of the subsidy; it must calculate the CVD rate based on the record evidence particular to the amount of the subsidy.[113]

92. Adding context to this obligation are Articles 10 and 21.1 of the SCM Agreement, which provide in pertinent part that:

> [Article 10] Members shall take all necessary steps to ensure that the imposition of a countervailing duty[] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement.[114]
>
> [Article 21.1] A countervailing duty shall remain in force only as long and to the extent necessary to counteract subsidization which is causing injury.

Both provisions reinforce the obligations of the SCM Agreement, including Article 19.4. Article 10, by specifying that that Members are to do what is "necessary," compels Members to take affirmative action if necessary in order to comply with their SCM Agreement obligations. Article 21.1, by providing that CVD measures can be in force "only as long as and to the extent necessary counteract subsidization which is causing injury" means that obligations such as those in Article 19.4 are continuous. They do not expire while a CVD measure is in place.

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112 (emphasis added).

113 *See also* European Union, Opening Statement, para. 35 ("Article 19.4 of the SCM Agreement is not just a *target* number that investigating WTO Members are free to establish within a certain degree of approximation, and that can occasionally be exceeded in cases where lack of cooperation from the investigated entities and the imperfect numerical data do not allow for the precise figure to be established.").

114 Footnote omitted.

93. Here, even if one gave every favorable inference to MOFCOM, China's argument is essentially that a miscalculation by an investigating authority should be excused because MOFCOM did what it could with the questionnaire responses. But that argument does not answer why the obligation is any less applicable today or any less susceptible to remediation. In order to do what is "necessary" to abide by Article 19.4, MOFCOM must fix the CVD rate.

2. The Additional Questions Referenced by MOFCOM Are Irrelevant

94. China points to a series of questionnaire queries in its first written submission to argue that MOFCOM engaged in a holistic inquiry to obtain the relevant data to ensure the subsidy was properly calculated.[115] Notably, China never referenced these questions, nor the respondents' responses, when explaining its CVD calculations during the investigation. As the United States noted previously, to the extent MOFCOM referenced any questionnaire data, it was the data in the second questionnaire.[116] Accordingly, the claim of a holistic inquiry appears to be simply more *post hoc* rationalization. Assuming *arguendo* that it is not, two critical points remain unchanged.

95. First, the existence of these questions does not change the fact that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy.[117] China may claim MOFCOM did not get the answers it wanted to the questions it now points to but China cannot claim that MOFCOM lacked the data to perform a correct calculation. Moreover, the United States also informed MOFCOM of its error and how to remedy it.[118] It is telling that throughout this entire dispute, China has not bothered to explain why these remedies cannot be implemented.

96. Second, MOFCOM's alleged difficulties did not arise from these questions nor the respondents' answers. As explained in the U.S. response to the panel's questions, it was far from obvious to Tyson and Pilgrim's that the questions, spread out over multiple documents, were aiming to calculate the proper subsidy benefit for only subject merchandise.[119] In contrast, various data put forward by the respondents should have reasonably apprised MOFCOM that Tyson and Pilgrim's produced non-subject merchandise. In light of the information before it, MOFCOM could have requested information specific to the amounts of subsidized feed that

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115 China, First Written Submission, paras. 201-223.

116 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure, [2010] No. 170 (August 13, 2010), p. 4 (USA-42).

117 Tyson, Comments Regarding the Disclosure of the Basic Facts for the Final CVD Determination (July 26, 2010) (USA-48); Pilgrim's Pride, Comments on the Basic Facts Relied Upon for the Subsidy Rate Calculation (July 24, 2010) (USA-45).

118 United States, Subsidy Calculation Letter, p. 1 (USA-52).

119 United States, Response to the Panel's First Set of Questions, paras. 113-115.

benefited production in respect to both subject and non-subject merchandise, and did not do so. Accordingly, MOFCOM failed to meet its obligations.

97. In its defense, MOFCOM claims that it is respondents that should bear the cost of not understanding the circuitous route that MOFCOM took. There is no basis in the text of the Agreement for such a claim. Moreover, MOFCOM's claims of uncertainty and confusion cannot credibly continue after the preliminary determination when the respondents unambiguously demonstrated, based on record evidence, the proper denominator.

98. In short, nothing China has argued overcomes MOFCOM's obligation to ensure the CVD rate applied is no greater than the subsidy. Because the CVD rates applied to the respondents are in excess of the amount of the subsidies found to exist, MOFCOM should correct its erroneous determination.

D. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates

99. The United States demonstrated the following with respect to China's determination of the "all others" dumping margin and subsidy rates: (1) China breached Articles 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement because MOFCOM applied "facts available" to exporters or producers it did not notify; (2) China breached Article 6.9 of the AD Agreement and Article 12.7 of the SCM Agreement because MOFCOM failed to disclose the essential facts under consideration in calculating the "all others" rates; and (3) China breached Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement because MOFCOM failed to explain its "all others" determinations in the antidumping and countervailing duty investigations. China has failed to rebut the U.S. arguments.

1. China Breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement Because MOFCOM Applied "Facts Available" Apparently Adverse to the Interests of "All Other" Exporters or Producers It Did Not Notify

a. MOFCOM Did Not Notify "All Other" Exporters or Producers

100. The United States demonstrated in its first written submission that MOFCOM applied facts available to calculate an adverse dumping margin and subsidy rate for unknown, unidentified producers or exporters that were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying available facts to such producers or exporters, MOFCOM acted inconsistent with China's obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

101. An investigating authority's recourse to facts available under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement is limited to situations where an interested

party (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation.[120] The panel report in *Mexico – Beef & Rice* explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[121] The Appellate Body in *Mexico – Beef & Rice* further explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests pursuant to Article 6.8 of the AD Agreement (the first sentence of which is almost identical to Article 12.7 of the SCM Agreement).[122]

102. Given MOFCOM's failure to notify "all other" exporters or producers, those exporters and producers cannot be said to have failed to provide necessary or requested information, or otherwise to have impeded the AD and CVD investigations. Therefore, MOFCOM's resort to facts available adverse to the interests of those exporters or producers was inconsistent with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

103. In response, China argues that MOFCOM attempted to notify all producers or exporters by (1) posting a public notice on MOFCOM's website; (2) placing a copy of the initiation notices in a reading room in Beijing; and (3) providing a copy of the initiation notices to the U.S. Embassy and requesting it to notify any other producers or exporters.[123]

104. Posting a public notice on MOFCOM's website is not likely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website.[124] China suggests in its written submission that the act of placing a notice on its website is sufficient to distinguish this case from the facts in *Mexico – Beef and Rice*, where the Appellate Body found that the Mexican investigating authority breached Article 6.8 of the AD Agreement by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate and did not give notice of the information required.[125] Specifically, China asserts the following:

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120 United States, First Written Submission, paras. 146-155, 184-190; *US – AD/CVD (panel)*, para. 16.9.

121 *Mexico – Beef & Rice (Panel)*, fn 211.

122 *Mexico – Beef & Rice (AB)*, paras. 258-264.

123 China, First Written Submission, paras. 180, 190.

124 And, perhaps, reviewing MOFCOM's website at least once every 20 days, given that MOFCOM required producers or exporters to register within 20 days from the initiation of the investigation.

125 China, First Written Submission, para. 182; *Mexico – Beef & Rice (AB)*, paras. 258-264.

> In the instant case, MOFCOM disseminated the initiation notice and registration document across the internet. It is not apparent that the same level of distribution or ready access was provided in *Mexico – Beef & Rice (AB)*, and therefore a higher level of notice was effected.[126]

To be clear, China is using the phrase "disseminated… across the internet" to characterize its placement of the notice on MOFCOM's website, as opposed to some other action, such as emailing the notice to potential exporters or producers.

105. China's argument is unavailing because "the internet" is by no means a specific locale that would, through "dissemination" of an investigation notice, confer knowledge to exporters or producers of the existence of the notice. Had MOFCOM sent a targeted communication to exporters and producers, there might be some validity to China's claims. That is, however, not the case here.

106. Second, placing a copy of the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. Unlike the reading room, however, an exporter or producer could access MOFCOM's website without too much difficulty (assuming it had a reason to check it). With the reading room, it is unreasonable to expect an exporter or producer to be provided notice of an investigation by virtue of placing the document in a room, possibly thousands of miles away, with no additional targeted communication indicating that such an action by the investigating authority has taken place.

107. Third, China suggests that giving a copy of the initiation notices to the U.S. Embassy and requesting the Embassy contact any other exporters or producers also served to notify "all other" exporters or producers.[127] However, the obligation to notify interested parties is on the investigating authority – not the Member where those exporters or producers might be located. Paragraph 1 of Annex II of the AD Agreement provides, in part:

> The authorities should also ensure that the party is aware that if information is not supplied within a reasonable period of time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

108. This provision makes clear that it is the investigating authority that must undertake the actions to attempt to notify interested parties. The United States considers that Article 6.8 of the

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126 China, First Written Submission, para. 182.

127 In China's response to the Panel's questions, China indicated the following: "The communication to the United States of the initiation notice did not include a written request to notify other producers or exporters of the initiation of the investigations." China, Response to Panel's First Set of Questions, para. 9.

AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions on the use of facts available and, therefore, Annex II may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement.

109. China, in its Responses to the Panel's First Set of Questions, acknowledges that requesting a Member to notify allegedly subsidized producers may not fall within the scope of a request for information under Article 12.7 of the SCM Agreement:

> (c) Does requesting that a Member notify its allegedly subsidized producers fall within the scope of a request for information under Article 12.7 of the SCM Agreement?
>
> **ANSWER:**
>
> 56. In most cases, the answer would be no. A request for information must be a request for information to which the interested Member has access. If the foreign exporter is known, then the investigating authority can directly contact the foreign exporter. If the foreign exporter is not known, it is not reasonable to impose on either the investigating Member or the responding Member an obligation to contact producers that are unknown.[128] (emphasis added.)

110. Although the United States does not agree with the last sentence in China's statement (concerning the obligations of the investigating authority), but in the above response, China indicates that it would be unreasonable to require the responding Member to notify unknown exporters. If, as China appears to accept, a request to the responding Member to notify unknown producers does not fall within the scope of a request under Article 12.7 of the SCM Agreement, there is no basis for China's assertion that such a request constituted sufficient notice to unknown producers of broiler products in this investigation.

111. The U.S. first written submission noted that the panel in *China – GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement.[129] The panel reached a similar conclusion with regard to Article 12.7 of the SCM Agreement:

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[128] China, Response to Panel's First Set of Questions, para. 56.

[129] *China – GOES (Panel)*, para. 7.393; United States, First Written Submission, para. 152.

> [E]ven in the absence of an equivalent to Annex II [of the AD Agreement], the Panel considers that a similar conclusion to that reached under Article 6.8 of the Anti-Dumping Agreement is appropriate. In particular, in the absence of being notified of the "necessary information" in the context of a particular investigation, it is difficult to conclude that unknown exporters refused access to or failed to provide necessary information or otherwise impeded the investigation.[130]
>
> ***
>
> [t]he Panel concludes that in applying "facts available" to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, China acted inconsistently with Article 12.7 of the SCM Agreement.[131]

112. Given the similarity of the underlying facts and legal arguments in *China – GOES* and this dispute, the panel's reasoning in *China – GOES* should be considered highly persuasive here. China has offered no reason why it should not.

113. In sum, the three actions discussed above – posting a notice on MOFCOM's website, placing a copy of the initiation notice in a reading room, and notifying the U.S. embassy – were the only efforts made by MOFCOM to notify "all other" producers and exporters of broiler products. As demonstrated above, whether considered on their own or collectively, it is not reasonable to resort to the use of available facts on the basis of these efforts.

114. China's position appears to be that an investigating authority may apply, in a punitive manner, whatever facts are necessary to compel compliance.[132] As the United States explained in its statement at the first panel meeting, an incentive only works if that incentive is communicated to the other party. The flaw in China's reasoning is that it assumes companies were aware of the investigation and declined to participate. However, as demonstrated above, MOFCOM failed to notify all other exporters and producers of the initiation of the investigations and therefore those producers had no knowledge of the investigations or of the fact that MOFCOM would apply a punitive all others rate if they did not register.

115. Articles 6.10 and 9.4 of the AD Agreement provide useful context and further illustrate the WTO-inconsistency of MOFCOM's approach. The second sentence of Article 6.10 allows

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130 *China – GOES (Panel)*, para. 7.446.

131 *China – GOES (Panel)*, para. 7.448.

132 China, First Written Submission, para. 183. *See also, id.*, para. 193 ("[I]f China were to apply an "all others" rate based on the rate applied to one of the cooperating respondents or a party known to MOFCOM, there would be no incentive for unknown companies who had been given effective notice to make themselves known. These companies would not be materially worse off by not making themselves known than they would be by making themselves known and participating in the investigation.").

an investigating authority, under certain circumstances, to limit its examination to a reasonable number of interested parties. Article 9.4 places limitations on that examination, including the obligation that any anti-dumping duty that is applied to imports from exporters or producers not included in the examination must not exceed the weighted average margin of dumping established with respect to the selected exporters or producers. Such a restriction on the duty applied is logical because if the investigating authority does not select certain exporters or producers for the investigation, it cannot claim pursuant to Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement that that those exporters or producers failed to provide information or impeded the investigation, such that a resort to facts available would be warranted. Likewise, this same rationale applies where the exporters or producers have no knowledge of the investigation.

116. The United States also notes that China's "all other" rate applies, not only to companies that exported to China during the period of investigation, but did not register or were otherwise unknown to MOFCOM, but also to exporters and producers that began shipping after the MOFCOM initiated the investigations, or even after the conclusion of the investigation. Those exporters or producers could not be said to have failed to provide information or impeded MOFCOM's investigation – they might not have even existed during the investigation. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

b. MOFCOM Applied "Facts Available" in a Manner Adverse to the Interests of "All Other" Producers/Exporters

117. The WTO-inconsistency of China's approach is underscored by the manner in which it applied "facts available." The Appellate Body report in *Mexico – Beef and Rice* explained the limitations on the use of facts available under Article 12.7 of the SCM Agreement (which is nearly identical to the text of Article 6.8 of the AD Agreement): "Article 12.7 of the SCM Agreement permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization...and injury."[133] It also indicated that recourse to facts available "does not permit an investigating authority to use any information in whatever way it chooses."[134] Even if China could justify applying facts available to unknown exporters or producers it did not notify, it cannot justify the manner in which it applied those facts, which is also inconsistent with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

i. MOFCOM's application of facts available in the antidumping investigation.

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133 *Mexico – Rice (AB)*, para. 291.

134 *Mexico – Rice (AB)*, para. 294.

118. In the Final AD Determination, MOFCOM applied a dumping margin of 105.4 percent to "all other" producers or exporters of U.S. broiler products – a margin more than twice the size of any margin assigned to an investigated company or the weighted-average dumping margin assigned to companies that registered with MOFCOM, but that were not investigated.[135] During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all-others dumping margin was calculated. However, in its statement at the first panel meeting, China provided the following explanation:

> On the AD side, although MOFCOM was not able to disclose the precise nature of the facts available calculation because it was derived from confidential sources, the rate consisted of the highest calculated normal value and the lowest record export price.[136]

119. In China's reply to the panel's first set of questions, China added:

> The final disclosure specifies that the "all others" rate was based on the normal value and export price of a model from the sampled companies to determine their dumping margins. This refers to the data of the three companies, including Keystone, Tyson, and Pilgrim's. The final disclosure did not expressly state that the specific data relied upon from these companies was the highest calculated normal value and the lower record export price.[137]

120. In other words, MOFCOM apparently looked at the "facts available" to determine what normal value and what export price could be paired together to calculate the largest possible dumping margin. It remains unclear precisely how MOFCOM calculated this figure because it does not match any of the model-specific dumping margins included in the companies' AD disclosure documents. Nevertheless, based on China's explanation, what is clear is that MOFCOM did not attempt to take into account all the substantiated facts provided by interested parties or to use those facts for the limited purpose of replacing the information that had not been provided.[138] Rather, MOFCOM applied facts it specifically selected, purportedly from the record, to determine the value that was most adverse to all other producers or exporters. MOFCOM's use of facts available in this manner is inconsistent with Article 6.8 of the AD Agreement.

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135 MOFCOM, Final AD Determination, Appendix II (USA-4). In the Final AD Determination, MOFCOM applied the following dumping margins to the investigated companies: Pilgrim's (53.4 percent), Tyson (50.3 percent), and Keystone (50.3 percent). It applied the weighted average of these dumping margins, 51.8 percent, to each of the companies that filed registrations with MOFCOM, but were not investigated.

136 China, Statement at First Panel Meeting, para. 24.

137 China, Response to Panel's First Set of Questions, para. 53.

138 *Mexico – Rice (AB)*, para. 294.

ii. *MOFCOM's* application of facts available in the countervailing duty investigation.

121. In the Final CVD Determination, MOFCOM applied a subsidy rate of 30.3 percent to "all other" producers or exporters of U.S. broiler products – a margin nearly four times greater than the weighted average of the subsidy rates applied to the investigated companies.[139] During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all others subsidy rate was calculated. China's breach of the AD and SCM Agreements in regards to this failure to explain and disclose facts and information is discussed further below. However, China now offers a *post hoc* explanation of the calculation of the all others rates. This explanation should be rejected because there's no basis on which to assume this reflects MOFOCM's decision. Nevertheless, the explanation provided by China only sheds light on MOFCOM's flawed application of facts available.

122. In its response to the panel's questions, China provided the following explanation:

> As noted above, the "all others" rate included one subsidy program – the upstream subsidy (feed) program. MOFCOM calculated the *ad valorem* rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount.[140]

123. In order to understand the WTO-inconsistency of this approach, it is useful to first dissect China's explanation. China refers to two methods of calculating the alleged subsidy: the

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[139] MOFCOM, Final CVD Determination, Appendix II (USA-5). MOFCOM applied the following subsidy rates to the investigated companies: Pilgrim's (5.1 percent), Tyson (12.5 percent), and Keystone (4.0 percent).

[140] China, Response to Panel's First Set of Questions, para. 43.

"competitive-benefit" analysis and the "pass-through" analysis. In MOFCOM's competitive benefit analysis, it compared the purchase price paid for the allegedly subsidized feed to what it considered to be an unsubsidized benchmark price (in this case, the price of corn or soy in Argentina). The difference between those prices is what MOFCOM considered to be the "competitive benefit" received by U.S. broiler producers. In MOFCOM's pass-through analysis, MOFCOM attempted to calculate the amount of the actual subsidy provided to upstream suppliers of feed that would actually "pass-through" to the U.S. producers.

124. With respect to the investigated companies, in the Final CVD Determination, MOFCOM treated the pass-through benefit as the maximum amount of the subsidy. Such an approach is required by the SCM Agreement – if only a certain subsidy amount was granted and could possibly pass-through to a broiler producer, it would be entirely unreasonable to assert that the producer actually received a subsidy greater than the amount granted. As China acknowledges in the passage above, the approach it followed for the investigated companies was to use the competitive benefit amount, unless that amount exceeded the amount that could actually pass-through to the producer.

125. However, China reveals in its statement above that for "all other" producers, it did not treat the pass-through amount as a limit. In other words, in calculating the subsidy rate for those producers, it treated them as if they could receive a benefit that was actually greater than the amount that they could possibly receive in reality. This is not an application of "facts available". Rather it is a departure not only from facts that were substantiated on the record and relied on by MOFCOM calculate the subsidy rate for the investigated companies, but from facts altogether. Such an approach is a departure from the limited use of facts available, as described by the Appellate Body[141], and inconsistent with Article 12.7 of the SCM Agreement.

2. MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculation the "All Others" Dumping Margin and Subsidy Rate

126. The United States demonstrated that China breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. In response, China does not appear to deny that MOFCOM failed to disclose the data and calculations underlying MOFCOM's "all others" calculations.[142] Rather, China's position is that "[t]he only 'essential fact' regarding the 'all others rate' is the rate itself."[143]

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141 *Mexico – Rice (AB)*, para. 294.

142 *See, e.g.*, China, First Written Submission, paras. 185, 194.

143 China, Response to Panel's First Set of Questions, para. 50.

127. China's response is inconsistent with the text of Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement, which require the disclosure of essential facts "which *form the basis* for the decision to apply definitive measures." China's argument conflates the essential facts forming the basis of the decision with the decision itself. China attempts to support its distorted interpretation of these provisions by asserting that the degree of disclosure required with regard to unknown or non-participating parties is less than what is otherwise required because these parties "have no need for additional detail."[144] The disclosure obligation in Article 6.9 and Article 12.8 is clear and does not permit the investigating authority to determine that something less than disclosure of the essential facts is warranted based on its subjective assessment that certain parties do not need the information. China's assertion to the contrary should be rejected.

3. MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement, and Articles 22.3, 22.4 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations

128. The United States also demonstrated that China breached Articles 12.2, 12.2.1 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations[145], as well as Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to explain the "all others" subsidy rate in the CVD determinations.[146] China has failed to rebut the United States arguments because it cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

129. With regard to the "all others" dumping margin, China cites to the following statement contained in MOFCOM's Final AD Disclosure:

> For other American companies which didn't response to the investigations and didn't submit an answer sheet, according to Article 21 of the Antidumping Regulations, the Authority decides to use the normal value and export price of a model from the sampled companies to determine their dumping margins.[147]

130. The United States already explained why this statement fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, a full explanation of the methodology used to establish the export price and normal value used for "all other"

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144 China, Response to the Panel's First Set of Questions, para. 50.

145 United States, First Written Submission, paras. 166-173.

146 United States, First Written Submission, paras. 213-223.

147 MOFCOM, Final AD Disclosure, p. 11 (USA-11).

respondents, or all relevant information underlying its determination, as required by Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement.[148]

131. In fact, the first explanation of MOFCOM's calculation of the "all others" dumping margin was provided by China during its statement at the first panel meeting, when it indicated that the margin consisted of the "highest calculated normal value and the lowest recorded export price."[149] However, China acknowledged in response to the Panel's questions that "[t]he final disclosure did not expressly state that the specific data relied upon from these companies was the highest calculation normal value and the lower recorded export price."[150] The fact that the first explanation of this margin was not provided until China's statement, and is found nowhere in the record, evidences MOFCOM's failure to provide any such explanation during the investigation. Moreover, even if MOFCOM had taken the step of providing the extra detail explained by China, it would nevertheless fail to satisfy the requirements of Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement.

132. With regard to the "all others" subsidy rate, China cites the following statement:

> [T]he investigating authority chose a sampled company, and calculated the benefit passed through from the upstream subsidies by using the competitive benefit method, and on this basis, calculated the ad valorem subsidy rate of this company. In the final determination the investigating authority use[d] this rate for all other companies who did not come forward.[151]

148 United States, First Written Submission, paras. 166-173.

149 China, Statement at First Meeting of the Panel, para. 24.

150 China, Response to Panel's First Set of Questions, para. 53.

151 China, First Written Submission, para. 194, citing USA-49, p. 42.

133. In the United States first written submission, this same language was cited and the United States explained why it failed to satisfy the requirements of Articles 22.3, 22.4 and 22.5 of the SCM Agreement.[152] However, as it did with regard to the "all others" dumping margin, China attempted to provide an additional "explanation" of MOFCOM's calculation of the "all others" subsidy rate in its response to the panel's questions.[153] To the extent China's proffered explanation is meant to supplement the conclusory statement included in MOFCOM's Final CVD Disclosure, it cannot excuse MOFCOM's failure to provide such an explanation during the investigation. Indeed, if such an explanation had been provided, it would have allowed the interested parties, including the United States, to understand how the margin was calculated and convey to MOFCOM the errors with such an approach, as discussed above. Instead, MOFCOM provided no explanation and therefore breached Articles 22.3, 22.4 and 22.5 of the SCM Agreement.

IV. MOFCOM CANNOT DEFEND ITS INJURY DETERMINATIONS

A. China Cannot Defend MOFCOM's Definition of the Domestic Industry

134. China attempts to defend MOFCOM's approach to defining the domestic industry by arguing that defining the domestic industry in an unbiased fashion was simply not possible under the circumstances. According to China, MOFCOM reasonably provided questionnaires only to producers listed in the petition, which all belonged to petitioner CAAA, because the Chinese broiler industry was hopelessly fragmented, allegedly consisting of 27,638,046 producers. And, China argues MOFCOM's definition of the domestic industry to include only the 15 questionnaire responses completed by producers listed in the petition and two producers clearly handpicked by petitioner, all of which unsurprisingly supported the petition, should be excused, because these producers represented over 50 percent of Chinese broiler production.

135. Such *post hoc* arguments fail to rebut that MOFCOM's actual approach to defining the domestic industry necessarily resulted in a domestic industry definition biased in favor of petitioners. As discussed in our first submission and further below, the undisputed facts establish that MOFCOM's definition of the domestic industry was inconsistent with China's WTO obligations. Nor has China altered this bottom line by its unpersuasive efforts to recast MOFCOM's process for defining the domestic industry.

1. The Undisputed Facts Demonstrate that MOFCOM's Domestic Industry Definition Was Inconsistent with China's WTO Obligations

136. In its first written submission, China does not dispute the basic facts of MOFCOM's approach to defining the domestic industry, as set forth in MOFCOM's final antidumping determination. These facts alone establish that MOFCOM's definition of the domestic industry

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152 United States, First Written Submission, paras. 213-223.

153 China, Response to the Panel's First Set of Questions, para. 43.

was inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement. China does not deny that MOFCOM limited its definition of the domestic industry to those domestic producers that completed domestic producers' questionnaire responses,[154] and that MOFCOM provided domestic producers' questionnaires only to the 20 producers belonging to petitioner CAAA listed in Exhibit 2 of the petition.[155] As members of the CAAA, these 20 producers were by definition petitioners. Nor does China deny that the only affirmative actions taken by MOFCOM to identify other domestic producers was its publication, on September 27, 2009, of a "Notification on Registration of Participating in Industry Injury Investigation" with respect to both the antidumping and countervailing duty investigations,[156] and the posting of a blank domestic producers' questionnaire on its website.[157]

137. As the United States established in its first written submission, however, MOFCOM's approach to defining the domestic industry is inherently biased in favor of petitioners, and hence inconsistent with the objectivity requirement under Article 3.1 of the ADA and Article 15.1 of the SCM Agreement, in several respects. As an initial matter, MOFCOM failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the investigation. By making it a prerequisite that, to be included in the industry definition, a domestic producer needed to participate in the investigation, MOFCOM at the outset set up an unreasonable barrier for domestic producers to provide information relevant to the injury investigation. Domestic producers that might have been willing to complete a questionnaire response but did not necessarily wish to participate as parties would have been dissuaded from providing information under these circumstances.

138. Moreover, the notices did not even inform domestic producers of the steps they would need to take if they wished to be considered as part of the domestic industry. For example, the notice did not explain that to be considered part of the domestic industry, producers would need to register for participation in the injury investigation in order to receive a questionnaire and would need to complete a questionnaire.[158] Nor did the notice make any mention of the fact that

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[154] MOFCOM, Final AD Determination at sec 3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 4.2 (USA-5).

[155] China, Response to the Panel's First Set of Questions, para. 154 (". . . MOFCOM reached out to all known producers. MOFCOM knew of the 20 producers identified by the petitioner in Exhibit 2 of the Petition."); China, First Written Submission, para. 243.

[156] China, First Written Submission, paras. 241, 260.

[157] *Id*. at para. 244.

[158] *See* Notice on Registration for Participating in Industrial Injury Investigation in the Antidumping Case for Broiler Products or Chicken Products; Notice on Registration for Participating in Industrial Injury Investigation in the Countervailing Case for Broiler Products or Chicken Products (USA-39). The notices invited "interested parties," presumably but not explicitly including domestic producers, to "apply for participating in the industry injury investigation" by completing the attached "Application for Participating in Industry Injury Investigation." *Id.*

questionnaires were (allegedly) available on MOFCOM's website. Thus, there would have been no reason for domestic producers that did not necessarily wish to participate actively as parties in the investigation to respond to the notice. Even producers who may have been inclined to respond would not have known that a questionnaire was available on MOFCOM's website. By setting up obstacles to make it infeasible for domestic producers other than producers listed in the petition to complete and return questionnaire responses, MOFCOM increased the likelihood that the only domestic producers that would complete and return questionnaire responses, and thus be included within the domestic industry definition, would be the producers listed in the petition. Indeed, these producers – self-selected by Petitioner by dint of their membership or affiliation with CAAA – were the only producers to whom MOFCOM provided questionnaires.

139. As explained in the United States' first written submission,[159] by inviting other domestic producers to volunteer for inclusion in the domestic industry by either responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in violation of Article 3.1 of the ADA and Article 15.1 of the SCM Agreement.[160] 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 either by joining the petition, by responding to the notice, or by downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack the incentive to respond to the MOFCOM's notice or to otherwise participate in the investigation, thereby increasing the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

140. At bottom, MOFCOM's failure to make active, independent efforts to collect the information representative of the universe of domestic producers resulted in a breach of China's obligations under the AD and SCM Agreement. Articles 5.1 of the AD Agreement and Article 11.1 of the SCM Agreement contemplate that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged" dumping and subsidies. Similarly, Article 1 of the AD Agreement and Article 10 of the SCM Agreement provide that antidumping and countervailing measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the respective Agreements. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information"[161] and may not "remain[] passive in the face of possible shortcomings in the evidence submitted."[162] Given the

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159 United States, First Written Submission, para. 260.

160 *EC – Fasteners (AB)*, para. 427.

161 *U.S. – Wheat Gluten (AB)*, para. 53.

162 *Id.* at para. 55.

centrality of the domestic industry definition to the volume, price, impact, and causation analyses required under Articles 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, it is particularly important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a thorough and objective manner.

141. Further, by limiting the domestic industry to those domestic producers who were either members of or otherwise selected by petitioner, to the exclusion of nearly half of the industry, MOFCOM defined the domestic industry in a manner inconsistent with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Those Articles express a clear preference for investigating authorities to define the domestic industry as "the domestic producers as a whole of the like product" by listing that definition of domestic industry first. Only after an investigating authority's effort to define the domestic industry as "domestic producers as a whole of the like product" proves unsuccessful may the authority resort to the alternative, secondary definition of the domestic industry as domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products." If investigating authorities were free to define the domestic industry to include no more than producers accounting for "a major proportion of the total domestic production" at their option, the Agreements would not have included the more stringent definition of domestic industry, and would certainly not have listed the more stringent definition first.

142. Moreover, investigating authorities that do not make active efforts to collect the information necessary to define the domestic industry as producers as a whole of the like product effectively exclude domestic producers from the definition for reasons other than those authorized under Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. These articles provide only two specific exceptions to defining the domestic industry as producers as a whole of the like product – one for related producers and one for regional industries. Article 4.1 of the AD Agreement provides that:

> the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that
>
> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
>
> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets

> and the producers within each market may be regarded as a separate industry if {certain conditions are met.}[163]

As this list of exceptions is exhaustive,[164] the articles would not permit investigating authorities to exclude domestic producers from the domestic industry definition by failing to make active, independent efforts to identify the universe of domestic producers of the like product. An investigating authority whose inaction excludes domestic producers otherwise willing to cooperate with the investigation from its definition of the domestic industry would therefore be in violation of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

143. In response to the United States' argument, China argues that the two exceptions under Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement do not preclude an investigating authority from defining a domestic industry to include producers accounting for a major proportion of total domestic production.[165] China misunderstands the United States' argument. The United States is not arguing that investigating authorities must always define the domestic industry to include 100 percent of production unless one of the two exceptions is met. Rather, the United States posits that an investigating authority breaches Articles 4.1 and 16.1 when the authority's process for defining the domestic industry tends to result in the systematic exclusion of domestic producers for reasons other than the two listed exceptions.

144. By China's own admission, MOFCOM failed to make active, independent efforts to identify the universe of domestic producers. Instead, MOFCOM's approach to defining the domestic industry all but guaranteed that the definition would include only petitioners and select other producers hand-picked by them, as listed in Exhibit 2 of the petition. Consequently, MOFCOM's definition of the domestic industry was inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

2. China's *Post Hoc* Rationalizations Cannot Remedy MOFCOM's Deficient Approach to Defining the Domestic Industry.

145. In defending MOFCOM's approach to defining the domestic industry, China provides a revisionist framework in an apparent effort to make MOFCOM's approach appear reasonable. The Panel's review, however, centers around those findings the authority actually made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact. As the Appellate Body explained in *Japan – DRAMs*:

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[163] Article 16.1 of the SCM Agreement is substantially identical to Article 4.1 of the AD Agreement except that the provisions of Article 4.1(ii) of the AD Agreement are not included under Article 16.1 of the SCM Agreement but in Article 16.2 of the SCM Agreement.

[164] *See EC – Salmon*, para. 7.112.

[165] China, First Written Submission, para. 268.

> In our view, it follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority's determination. It is on the basis of the rationale or explanation provided by the investigating authority that a panel must examine the consistency of the determination with a covered agreement, including whether the investigating authority has adequately explained how the facts support the determination it has made. Just as a panel must focus in its review on the rationale or explanation provided by the investigating authority in its report, so, too, is the respondent Member precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination.[166]

Similarly, in *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, the Appellate Body stressed that "[a] panel's examination of [an investigating authority's] conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report."[167] Accordingly, China's *post hoc* rationalizations are of no relevance to the Panel's examination of "whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."[168] We address below each of China's arguments in defence of MOFCOM's biased approach and explain why the Panel should reject them as both irrelevant and unpersuasive.

a. Purported Press Coverage and Allegedly Reasonable Deadlines Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations.

146. Despite the manifest deficiencies that plagued MOFCOM's notices of September 27, 2009, China argues that the Panel should find MOFCOM's investigations consistent with the WTO Agreement because the broilers investigations were covered by independent news organizations.[169] Notwithstanding that these notices failed to inform domestic producers of how

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166 *Japan – DRAMs (AB)*, para. 159. *See also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of AD Agreement); *Argentina – Ceramic Floor Tiles (Panel)*, para. 6.27 ("We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made.").

167 *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para 93.

168 *Id.*

169 China, First Written Submission, para. 242.

to participate in order to be considered part of the domestic industry, China claims that all domestic producers should have known of their ability to provide information in light of this press coverage. Contrary to China's argument, however, general reporting on the broilers investigations in the Chinese press cannot substitute for MOFCOM's obligation to investigate actively the universe of domestic producers. Even assuming that the investigations were widely publicized, as China claims, such publicity would not have provided domestic producers other than those listed in the petition with the essential information missing from MOFCOM's own notices on how to be considered part of the domestic industry.

147. Similarly, China's argument that MOFCOM gave parties a reasonable period of time to register for participation in the injury investigation and complete domestic producers' questionnaire responses is a straw-man.[170] The United States is not challenging the deadlines provided in MOFCOM's notices for registering for participation in the injury investigations or for completing and returning questionnaire responses. Rather, the United States maintains that MOFCOM did not provide domestic producers other than producers listed in the petition with information on the steps they would need to take to be considered part of the domestic industry. The United States has also demonstrated that MOFCOM's notices imposed a self-selection process among the domestic producers that introduced a material risk of distortion by inviting domestic producers to volunteer for inclusion in the domestic industry in a self-interested manner.[171] No amount of time to respond to the notices or the questionnaires could compensate for these deficiencies, which resulted in a domestic industry definition biased in favor of petitioner.

b. The Alleged Inclusion of Two Producers Other Than Petitioners and Producers Listed in the Petition Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations

148. China argues that MOFCOM's definition of the domestic industry was not biased because two of the 17 producers included in the definition were not producers listed in the petition that received questionnaires from MOFCOM, but rather producers that managed to complete domestic producers' questionnaire responses under unexplained circumstances.[172] The most plausible way in which these two producers could have received blank domestic producers' questionnaire is indicated by China's response to a Panel question. China acknowledges that "[b]oth of these producers obtained the questionnaire from some source other than MOFCOM officials" and notes that "MOFCOM never sent them the questionnaire."[173] Given this, the only

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170 *Id.* at para. 245.

171 *EC – Fasteners (AB)*, para. 427.

172 China, First Written Submission, para. 246.

173 *Id.*

apparent way these producers could have received blank domestic producers' questionnaires is if they received them from the *producers listed in the petition*, which would have been the only source of questionnaires other than MOFCOM. Thus, these two producers were no less handpicked by petitioners than were the producers listed in the petition.

149. Moreover, MOFCOM's inclusion of these two producers within its domestic industry definition would not have reduced the bias that resulted from MOFCOM's approach to defining the domestic industry. By China's own admission, the two producers only began producing the domestic like product in the first half of 2009, accounting for only 0.25 percent of domestic production during that period, and reported no data for the 2006-2008 period.[174] Thus, all the data on domestic industry performance during the 2006-2008 period and substantially all the data for the first half of 2009 would have been collected from the 15 petitioners that received questionnaires from MOFCOM. MOFCOM's domestic industry definition was therefore no less biased by the inclusion of these two producers.

c. The Alleged Fragmentation of the Chinese Broiler Industry Did Not Excuse MOFCOM's Failure to Define the Domestic Industry in Accordance with China's WTO Obligations.

150. China argues that it was reasonable for MOFCOM to provide questionnaires only to the 20 members of petitioner CAAA listed in the petition because the extreme fragmentation of the domestic industry, allegedly consisting of 27,638,046 producers, made it impractical to do otherwise.[175] As the United States observed at the first panel meeting, however, it defies logic that 17 domestic producers with 84,179 employees in 2008 could have accounted for 50.82 percent total domestic production that year, as MOFCOM found, while the other 27,638,029

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[174] China, Response to Panel's First Set of Questions, para. 152; *see also id.* at para. 170 (conceding that the inclusion of the two smaller producers "would not materially affect the analysis.").

[175] *See* China, First Written Submission, paras. 238-40. China's argument that the United States is seeking to have MOFCOM include a scientifically valid sample of the Chinese broiler industry is simply further misdirection. Rather, the United States argues that MOFCOM was obligated to make a meaningful effort to collect data representative of the industry as a whole, either by seeking data from the universe of domestic producers or from a representative sample. United States, First Written Submission, para. 266. Under either approach, given that approximately half the industry was unaccounted for by the producers listed in the Petition, MOFCOM needed to have made active efforts to identify and collect information from domestic producers beyond petitioners and producers listed in the petition. Instead, MOFCOM made no effort. By providing questionnaire responses only to petitioners and inviting other producers to come forward voluntarily, MOFCOM ensured that its definition of the domestic industry would consist solely of petitioners and petition supporters, which could not be a less representative sample of domestic producers.

producers with at least 27,638,029 employees accounted for 49.18 percent of total domestic production.[176]

151. In response to a Panel question, China concedes that these data on Chinese broiler farms include producers of yellow feather chickens,[177] which are outside the domestic industry boundaries that MOFCOM itself set.[178] It bears noting that during the investigations, MOFCOM made a deliberate decision to limit the domestic industry to the producers of white feather chicken products coextensive with the scope of imported products, rather than to define the industry more broadly to cover yellow feather chicken production as well.[179] Having affirmatively made this decision to proceed with the narrower domestic industry definition, China cannot now have it both ways by arguing that its investigatory task was overly burdensome because of the large number of producers and employees producing yellow feather chicken products. The data now relied on by China – which include yellow feather chicken production – are therefore of no use in ascertaining the degree of fragmentation of the white feather chicken industry in China.

152. What these data do indicate is that the white feather chicken industry is far smaller than the yellow feather chicken industry in China. Indeed, China explained at the first substantive meeting that the Chinese white feather industry has only existed for approximately ten years, and that the original breeder pairs introduced into China a decade ago have been methodically tracked since that time. According to China, MOFCOM's data on total domestic production was calculated by a consultant based in part on these tracking data.[180] China does not explain why MOFCOM did not use the same data, presumably available from the consultant, to identify and contact additional domestic producers, which would all possess the offspring of the original breeder pairs.

153. Even taken at face value, China's data on the 27,638,046 total Chinese chicken farms belies China's argument that MOFCOM could not have been expected to make any effort to identify domestic producers other than those listed in the petition. As the Panel pointed out at the first substantive meeting, these data from the Ministry of Agriculture indicated that only 147

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176 *Compare* MOFCOM, Final AD Determination at secs. 3.2, 5.3.11 (USA-4) *and* MOFCOM, Final CVD Determination at secs. 4.2, 6.3.11 (USA-5) *with* China, First Written Submission, para. 238.

177 China, Response to Panel's First Set of Questions, para. 160 ("[T]he Ministry of Agriculture official data did not differentiate between yellow feather and white feather chickens.").

178 MOFCOM, Final AD Determination at sec. 2.1 (USA-4); MOFCOM, Final CVD Determination at sec. 3.1 (USA-5).

179 *See* MOFCOM, Final AD Determination at sec. 3.1.6 (USA-4); MOFCOM, Final CVD Determination at sec. 4.1.6 (USA-5).

180 *See* China, Response to Panel's First Set of Questions, para. 135.

domestic producers slaughtered one million birds or more.[181] China cannot reasonably claim that it would have been infeasible for MOFCOM to have sought data from far more than 20 of these 147 producers.[182]

154. In any event, the complexity or fragmentation of a domestic industry does not excuse an investigating authority from making active, independent efforts to identify a representative subset of domestic producers for purposes of defining the domestic industry. Even if the domestic industry producing white feather poultry was as fragmented as China argues, China should have made an effort to collect information that was representative of the industry as a whole. China could have accomplished this and met its WTO obligations by any of several means, including actively seeking data from the 147 major producers, or by sampling. As the Appellate Body explained in *EC – Fasteners*, "an injury determination regarding a fragmented industry must . . . cover a large enough proportion of total domestic production to ensure that a proper injury determination can be made pursuant to Article 3.1."[183] Such a sample must also be representative of domestic producers as a whole, as explained by the Panel in *EC – Salmon*, because "{a} sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for . . . an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement."[184] Thus, an investigating authority may not cherry pick producers with the weakest performance for inclusion in the domestic industry. Such producers clearly would not constitute a representative sample of domestic producers as a whole, even if they arguably accounted for a "major proportion" of total domestic production.

155. MOFCOM had the means to define a domestic industry that was representative of Chinese white feather broiler producers. Instead, it sent questionnaires only to producers belonging to petitioner CAAA and listed in the petition, practically guaranteeing that only petitioners would complete questionnaire responses and therefore be included within the domestic industry definition. MOFCOM's failure to make any effort to identify domestic producers other than producers listed in the petition resulted in a domestic industry definition that was inconsistent with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

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181 *See* China, First Written Submission, para. 238.

182 By way of comparison, we note that, in the investigation underlying the *EC – Fasteners* dispute, the EC was able to identify and contact 318 EU fastener producers and five industry associations. *EC – Fasteners (Panel)*, para. 7.213.

183 *EC – Fasteners (AB)*, para. 416.

184 *EC – Salmon*, para. 7.130.

d. MOFCOM's Approach to Defining the Domestic Industry Was Similar to the EC's Approach in *EC – Fasteners* and Hence No Less Inconsistent with WTO Requirements

156. MOFCOM's approach to defining the domestic industry shared fundamental similarities with the EC's approach in *EC – Fasteners*. In *Fasteners*, the EC published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample.[185] The Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in violation of Article 4.1 of the AD Agreement.[186] Here, MOFCOM's approach to defining the domestic industry to include only producers who voluntarily registered for participation in the investigations or that voluntarily downloaded a questionnaire was similar to the EC's approach to defining the domestic industry in *EC – Fasteners*, and therefore imposed the a similar type of self-selection process that introduced a material risk of distortion.

157. Although China points to specific factual differences between MOFCOM's broiler parts investigation and the EC's fasteners investigation, China cannot meaningfully distinguish the legal implications of *EC – Fasteners* from those that apply here. According to China, the Appellate Body held the EC's definition of the domestic industry was inconsistent with the "major proportion" requirement only because it accounted for a "low" 27 percent of total domestic production, whereas MOFCOM's definition of the domestic industry accounted for over 50 percent of total domestic production.[187] While the Appellate Body criticized the EC for relying on information from only 45 of the 318 producers for which it had contact information, China claims, MOFCOM "did not collect data that it then ignored" but rather relied on data reported by all "known" Chinese producers.[188]

158. The Appellate Body did not, however, find the EC's approach to defining the domestic industry inconsistent with Article 4.1 of the AD Agreement because it covered too low a proportion of total domestic production, as China claims. To the contrary, the Appellate Body found that "{t}he fragmented nature of the fasteners industry . . . might have permitted such a low proportion . . . provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion."[189] The Appellate Body found the EC's process

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185 *EC – Fasteners (AB)*, para. 426.

186 *Id.* at para. 427.

187 China, First Written Submission, para. 266-67.

188 *Id.* at para. 267.

189 *EC – Fasteners (AB)*, para. 430.

for defining the domestic industry inconsistent with Article 4.1 because "by limiting the domestic industry definition to those producers willing to be part of the sample . . . the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination."[190] Just as the EC had limited its definition of the domestic industry to those producers that "'expressed a wish to be included in the sample,'" MOFCOM effectively limited its definition of the domestic producers to producers listed in the petition and producers willing to register for participation in the injury investigations or download a questionnaire. MOFCOM's process for defining the domestic industry therefore introduced the same limitation on data coverage and material risk of distortion as the EC's approach.

159. For the same reason, the Panel should reject China's argument that MOFCOM's definition of the domestic industry is consistent with Article 4.1 of the ADA and Article 16.1 of the SCM Agreement because it included producers accounting for over 50 percent of total domestic production.[191] As the United States explained in response to Panel Questions 58, 59, and 64, MOFCOM breached Articles 4.1 and 16.1 by deliberately confining its domestic industry definition to petition supporters, not by defining the industry to include an insufficient proportion of total domestic production. MOFCOM failed to make any effort to define the domestic industry as producers as a whole, as required under those articles, and excluded producers for reasons other than the two exceptions listed under the articles.

160. Equally unpersuasive is China's argument that "MOFCOM did not intentionally exclude any domestic producers from its investigation" because it did not exclude producers that provided relevant information, as the EC did in *Fasteners*.[192] MOFCOM's approach to defining the domestic industry ensured that only petitioners and petition supporters – the domestic producers likely to post the weakest performance – would complete questionnaire responses and thus be included in the domestic industry definition. MOFCOM's consideration of all data collected from such a biased subset of producers would not have mitigated the material risk of distortion created by MOFCOM's process for defining the domestic industry.

161. Furthermore, by its process for defining the domestic industry, MOFCOM did in fact intentionally exclude domestic producers from its investigation. In *EC – Fasteners*, the Appellate Body found that the EU had inappropriately "excluded producers that provided relevant information" because "the Commission contacted 318 known producers requesting certain basic information," yet included in the domestic industry only those producers that "expressed a wish to be included in the sample."[193] Unlike the EC, which at least collected basic

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190 *Id.*

191 China, First Written Submission, paras. 265-67.

192 *Id.* at para. 269.

193 *EC – Fasteners (AB)*, paras. 426-30.

information from 318 producers that it had independently identified, MOFCOM here made no effort at all to identify or contact domestic producers other than petitioners. Hence, rather than excluding "producers that provided relevant information," MOFCOM excluded from its definition of the domestic industry producers that might have been willing to provide relevant information had MOFCOM made an effort to identify them and provide them with questionnaires.

162. As the Appellate Body held in *EC – Fasteners*, an investigating authority that defines the domestic industry to include only domestic producers willing to be part of the domestic industry definition introduces "a material risk of distortion" and reduces the data coverage of the domestic industry in violation of Article 4.1 of the AD Agreement.[194] Because that is precisely the approach that MOFCOM took here in defining the domestic industry – to include only petitioners and petition supporters -- the Panel should find MOFCOM's definition inconsistent with Article 4.1 of the ADA and Article 16.1 of the SCM Agreement.

B. China Cannot Defend MOFCOM's Price Effects Analysis

163. As demonstrated in the U.S. first written submission, China breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's price effects analysis was based on fundamentally flawed price comparisons that failed to account for differences in level of trade or product mix. In response, China does not deny that MOFCOM declined to account for such differences.[195] Rather, China claims, without factual support in the record or any such explanation in the final determinations, that all goods physically situated within China are at the same level of trade. Also, based on new information not in the record or previously disclosed to the parties, China argues that it owed no obligation to respondents to make adjustments for differences in product mix because accounting for any such differences would have only demonstrated even greater underselling by subject imports. Finally, China claims that MOFCOM's finding of price suppression should be upheld even absent any demonstration by MOFCOM that any such suppression was the effect of subject imports. For the reasons demonstrated below, China's assertions are without merit and fail to rebut the United States' demonstration that China breached its WTO obligations.

1. MOFCOM Was Obligated to Ensure the Comparability of the Subject Import and Domestic Like Product Average Unit Value Data Used in Its Price Comparisons

164. As China acknowledged at the first Panel meeting, the price effects issues in this dispute echo price issues that were then pending before the Appellate Body in *China – GOES*. Since that

194 *Id.* at para. 430.

195 *See* China, Response to the Panel's First Set of Questions, paras. 181-89. According to China, MOFCOM considered the issues of product mix and levels of trade by summarizing USAPEEC's arguments and rejecting them. *Id.*

meeting, the Appellate Body in *China – GOES*, has considered an rejected China's position that "adjustments to ensure price comparability . . . are not required by Articles 3.2 and 15.2."[196] Based on the same legal analysis as adopted by the Appellate Body in *China – GOES*, the Panel here should find that MOFCOM's failure to make such adjustments in this case was inconsistent with China's WTO obligations.

165. In *China – GOES*, the Panel found MOFCOM's price effects analysis inconsistent with Articles 3.1 and 3.2 of that AD Agreement and Article 15.1 and 15.2 of the SCM Agreement in part because "MOFCOM's reliance on AUVs without any consideration of the need for adjustments to ensure price comparability," including adjustments for differences in level of trade and product mix, "[wa]s neither objective, nor based on positive evidence."[197] Agreeing with the Panel, the Appellate Body explained that:

> [A]lthough there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[198]

166. Likewise, MOFCOM's failure here 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. None of China's arguments to the contrary withstand scrutiny.

2. MOFCOM's Failure to Account for Level of Trade Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations

167. China acknowledges that a valid comparison of domestic prices and import prices must "ensure[] that domestic prices and imported prices are at a comparable stage of distribution," and asserts that MOFCOM did so by comparing the average unit value of domestic producer sales to the average unit value of subject imports on the basis of "landed" prices.[199] Contrary to China's

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196 *China – GOES (AB)*, para. 197.

197 *China – GOES (Panel)*, paras. 7.528, 7.530, 7.536, 7.554.

198 *China – GOES (AB)*, para. 200.

199 China, First Written Submission, para. 289.

assertion, however, domestic prices to first arms-length customers at the factory gate are not at the same level of trade as import prices at the port just because the prices are for merchandise physically situated, or "landed," in China.

168. China ignores that domestic prices to first arms-length customers are at a different level of trade than import prices at the port because import prices at the port would not reflect the prices that the first arms-length customers of domestic producers, including distributors and retailers, would pay for subject imports. Rather, the Cost Insurance & Freight ("CIF") import price at the port would reflect only "cost, insurance, and freight," which is the price the importer paid the U.S. exporter for the merchandise, freight from the United States, and insurance. China claims that MOFCOM added estimated duties to CIF prices, but even this does nothing to alter the level of trade of the import prices, which would still reflect only the total cost of the subject merchandise to the importer at the port.

169. The prices that the first arms-length customers of domestic producers would pay for subject imports are the prices offered by importers of subject merchandise to their first arms-length customers, which would include transportation from the port to the importers' warehouse; the importer's sales, general, and administrative expenses; and the importer's profit. Due to these extra costs, sales prices from importers to first arms-length customers, such as distributors and retailers, would be higher than CIF import prices at the port.[200] China's contention that these costs "could be absorbed by the importer to make the sale" is unsupported by record evidence

[200] China unpersuasively argues that some of MOFCOM's price comparisons may have been at the same level of trade because some importers of subject merchandise may have been distributors or end users (presumably meaning retailers). China, First Written Submission, paras. 299-300. As an initial matter, the United States would observe that China's argument in this regard is a *post hoc* rationalization found nowhere in MOFCOM's determination. The Panel should therefore ignore the argument.

In any event, China cites no evidence whatsoever to support its bald assertion that some customers of U.S. exporters might be distributors or retailers rather than importers that resell subject imports to distributors or retailers. *See* China, First Written Submission, para. 299. Question 6 of MOFCOM's injury questionnaire directed U.S. exporters to report contact information for their ten largest importers, so the information provided by U.S. exporters in Appendix 6 to USAPEEC's injury questionnaire response would presumably be limited to importers. And even if some importers of subject merchandise were distributors or end users, the flip side of China's argument is that most other importers were not, and the CIF import price data collected from these importers would therefore be at a different level of trade than domestic producer sales to first arms-length customers.

Similarly unfounded is China's assertion that MOFCOM was entitled to assume that domestic prices to first arms-length customers were at the same level of trade as CIF import prices absent evidence of "systematic differences in the level of trade" as between domestic price data and import prices data. China, First Written Submission, para. 302. China has it backwards. Because as a general commercial matter CIF import prices are at a different level of trade than domestic producer sales to first arms-length customers, MOFCOM could not rely on such data for purposes of its underselling analysis absent some explanation for why the general rule did not apply in this case. MOFCOM provided no such explanation and instead compared domestic prices and import prices without accounting for level of trade differences.

and exhibits a fundamental misunderstanding of market economics.[201] Importers would have no economic incentive to import broiler products from the United States for sale at a loss, and could not do so for long without bankrupting themselves.[202]

170. Even if some importers did sell broiler products imported from the United States at a loss, this would not have altered MOFCOM's obligation to examine the effect of those sales on domestic prices by comparing subject import prices to domestic prices at the sale level of trade. Nor did MOFCOM assert or provide any explanation of why this investigation warranted a departure from a comparison of subject import and domestic like product prices at comparable levels of trade. By instead comparing domestic and subject import prices at different levels of trade, MOFCOM made a finding of underselling almost inevitable, in violation of the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. MOFCOM's comparison of domestic prices and subject import prices at different levels of trade also rendered MOFCOM's underselling analysis inconsistent with the underselling analysis contemplated by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

171. China plainly misrepresents the finding of the panel report in *Egypt – Rebar* to argue that investigating authorities may compare prices at different levels of trade is misplaced.[203] In *Egypt – Rebar*, the panel emphasized that investigating authorities must compare domestic prices and import prices at the same level of trade to conduct an objective and unbiased analysis consistent with Articles 3.1 and 3.2 of the AD Agreement. In that dispute, Turkey challenged the Egyptian investigating authority's underselling analysis on grounds that the investigating authority should have compared domestic and import prices on a delivered-to-the-customer basis.[204] Egypt responded that its authority's price comparisons were made "at the same level of trade (ex-factory for domestic goods, and ex-importer's store for the dumped imports)" and therefore consistent with Articles 3.1 and 3.2 of the AD Agreement. Rejecting Turkey's argument, the Panel held that "an objective and unbiased investigating authority could have performed an undercutting analysis on the basis used by" the Egyptian investigating authority; that is, on the basis of price comparisons made at the same level of trade.[205]

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[201] China, Response to the Panel's First Set of Questions, para. 179; *see also* China, First Written Submission, para. 296. China concedes that the USDA report on which its argument relies was not before MOFCOM. China, Response to the Panel's First Set of Questions, para. 180. The Panel should therefore ignore the argument.

[202] Indeed, the USDA report cited by China indicates that traders planned to reduce their imports of broiler products from the United States in 2009 in response to the losses suffered in 2008.

[203] China, First Written Submission, para. 311 (citing *Egypt – Rebar*, para. 7.73).

[204] *Egypt – Rebar*, para. 7.67.

[205] *Id.* at para. 7.73.

172. China quotes out of context the *Egypt–Rebar* panel's finding that there is "no requirement that the price undercutting analysis . . . be conducted in any particular way, that is, at any particular level of trade."[206] The panel did not find that investigating authorities were free to compare domestic prices and subject import prices at different levels of trade. Rather, the Panel explained that investigating authorities are not required to compare prices at any particular level of trade as long as they compared domestic prices and subject import prices at the same level of trade. The Panel found the Egyptian investigating authority's comparison of domestic and subject import prices on sales to first arms-length customers "objective and unbiased" because the prices compared were at the same level of trade, though not the level of trade that Turkey would have preferred. Here, the United States objects to MOFCOM's failure altogether to compare prices at an equivalent level of trade.

173. As an alternative to its contention that "landed" prices are at the same level of trade, China argues that the Panel should excuse MOFCOM's failure to compare domestic prices and import prices at the same level of trade because collecting import prices at the same level of trade as domestic prices would have been a "truly daunting" task.[207] Yet, MOFCOM made no effort to collect information from importers that would have made a proper comparison possible. By China's own admission, the only action taken by MOFCOM to collect information from importers was to post a copy of the importers' questionnaire on its website.[208] Because MOFCOM's published initiation notices made no mention of the availability of importer questionnaires on MOFCOM's website, however, importers would not have known of the questionnaires' availability and, unsurprisingly, no questionnaires were downloaded.

174. China's defense that it had no way of identifying importers is all the more untenable given that MOFCOM asked for this information from the U.S. exporters, who went to great lengths to provide this information. As discussed in the United States' response to panel question 69(b), USAPEEC provided over 100 listings of Chinese importers of subject merchandise with contact information and the total quantity of subject merchandise purchased by each importer during the investigation.[209] China concedes that "[a]lmost all the exporters provided the contact information of the top ten clients which are either importers or middlemen."[210] China's suggestion that USAPEEC members reported "middlemen" rather than importers is unsupported by any evidence. Question 6 of the U.S. exporters' questionnaires directed U.S. exporters to "provide the largest 10 Chinese importers . . . for the subject products during the POI" and that is precisely what they did, expending no small effort. Having collected

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206 China, First Written Submission, para. 311 (citing *Egypt – Rebar*, para. 7.73).

207 China, First Written Submission, para. 293.

208 China, Response to the Panel's First Set of Questions, para. 204.

209 *See* United States, Responses to the Panel First Set of Questions, para. 146.

210 China, Response to the Panel's First Set of Questions, para. 201.

this information from U.S. exporters, MOFCOM was in a position to, at the very least, mail blank importers' questionnaires to most all significant importers of subject merchandise from the United States. MOFCOM, however, made no such effort.

175. In addition, MOFCOM could have obtained information on importers from China Customs. At the first Panel meeting, China conceded that China Customs generally collects such information but failed to explain why MOFCOM did not seek to use such information to send questionnaires to importers. In response to a Panel question, China claims that "as a practical matter . . . MOFCOM does not have access to this information in the normal course of its investigations."[211] Given that MOFCOM was able to acquire "statistics data from the PRC customs authorities" on the CIF price of subject imports,[212] however, it stands to reason that MOFCOM could also have also acquired the names of importers of subject merchandise from the same authorities. Indeed, China gives no indication that MOFCOM made any effect to collect such information from China Customs.

176. In any event, MOFCOM's alleged inability to collect import prices at the same level of trade as domestic prices did not make its price comparisons any more objective or valid. As the United States explained in response to Panel Question 70, investigating authorities remain obligated to conduct an "objective examination" of "positive evidence," pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, even in the absence of importer questionnaire responses.[213] This is particularly true given that MOFCOM made no finding that importers actively impeded the investigation, necessitating its reliance on CIF import prices as the information available. The fact remains that MOFCOM's comparison of domestic prices and import prices at different levels of trade rendered its underselling analysis inconsistent with China's WTO obligations.

177. China also denies that MOFCOM recognized the need to adjust import prices to reflect their different level of trade and argues that such an adjustment was not technically feasible.[214] Contrary to China's argument, however, MOFCOM stated that "the Investigating authority has taken the difference in sales levels into consideration, adjusting the import prices based on Customs data accordingly."[215] China now claims that the adjustment to which MOFCOM was referring was the addition of estimated customs duties to CIF import prices.[216] But the nature of

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211 *Id.*, para. 203.

212 MOFCOM, Final AD Determination at sec. 5.2.1 (USA-4); MOFCOM, Final CVD Determination at sec. 6.2.1 (USA-5).

213 United States, Responses to the Panel First Set of Questions, para. 148.

214 China, First Written Submission, paras. 304-309.

215 MOFCOM, Final AD Determination at sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

216 China, First Written Submission, para. 304.

the alleged adjustment made by MOFCOM to import prices to account for "the difference in sales level" is unknown because MOFCOM failed to disclose its methodology in violation of Article 6.4 of the AD Agreement and Article 22.3 of the SCM Agreement. China's *post hoc* explanation of MOFCOM's actions in this regard cannot remedy MOFCOM's failure to disclose this methodology. In any event, as discussed above, the adjustment described by China has nothing to do with level of trade and would have done nothing to remedy the distortion caused by comparing domestic prices and import prices at different levels of trade.

178. Finally, China's contention that adjusting import prices to account for their different level of trade would not have been feasible is beside the point and does not excuse China of its obligations.[217] MOFCOM was obligated to insure that its price comparisons were based on domestic prices and import prices at the same level of trade.[218] How it did so was up to MOFCOM, as China correctly observes.[219] MOFCOM indicated in its determinations that it adjusted import prices to account for "the difference in sales level" but failed to disclose its methodology for doing so. China now claims that MOFCOM made no such adjustment. To the extent that adjusting import prices to account for their different level of trade is practicable, it would be one approach to insuring that domestic prices and import prices are compared at the same level of trade. Another approach would be to collect pricing data on importer sales to first arms-length customers, which is something MOFCOM made no effort to do despite requesting and collecting contact information on the largest importers of subject merchandise from U.S. exporters. What is clear in this case is that MOFCOM did nothing to account for the fact that subject import prices were at a different level of trade than domestic prices. Instead, MOFCOM predicated its underselling analysis on a comparison of domestic prices and subject import prices at different levels of trade, in violation of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

3. MOFCOM's Failure to Account for Product Mix Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations

179. China does not deny that MOFCOM's average unit value comparisons failed to account for differences in product mix between subject imports and the domestic like product.[220] Rather, China argues that MOFCOM's comparison of the average unit value of domestic producer sales with the average unit value of imports without accounting for differences in product mix was reasonable because the product mix of subject imports was, in China's view, weighted in favor

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217 *Id.*at paras. 307-9.

218 *China – GOES (AB)*, para. 200.

219 China, First Written Submission, para. 311.

220 *See* China, Response to the Panel's First Set of Questions, para. 188.

of higher value products, allegedly including chicken paws.[221] Again, China's argument is nothing more than a *post hoc* rationalization of the deficiencies in MOFCOM's analysis, found nowhere in the final determinations, and hence of no relevance to the Panel's examination of "whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it."[222]

180. In the actual determinations that are the subject of this dispute, MOFCOM asserted that it was under no obligation to consider product mix and did not contest USAPEEC's showing that 97 percent of subject imports consisted of low value products.[223] Even China's own data show that the product mix of subject imports and domestic industry sales differed dramatically, as did the unit value of different types of broiler products.[224] As discussed below, China has failed to rebut the United States' demonstration that MOFCOM's failure to account for differences in product mix rendered its price effects analysis inconsistent with China's WTO obligations.

181. Contrary to China's argument, MOFCOM did not find that comparing the average unit value of domestic producer sales with the average unit value of imports with no allowance for differences in product mix was reasonable because the product mix of subject imports was weighted in favor of higher value products. Nor did it find that chicken paws possessed a higher unit value than breast meat or that Chinese consumers much prefer chicken paws to breast meat. Indeed, none of the evidence China relies on to justify MOFCOM's failure to account for differences in product mix was cited, analyzed, or relied upon by MOFCOM in its final determinations, much less disclosed to the parties during the investigations.

182. For the purposes of this proceeding, China tries to justify MOFCOM's failures by citing to a New York Times article, a CNN blog entry, and certain China Customs data concerning the average unit value of different types of subject imported broiler products during the 2006-2008 period.[225] China also claims that confidential invoices that domestic producers, allegedly provided to MOFCOM during the verification process, show that the unit value of domestic industry sales of chicken breasts was lower than the unit value of domestic industry sales of chicken paws.[226]

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221 China, First Written Submission, paras. 323-332.

222 *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.

223 *See* MOFCOM, AD Final Determination at sec. 6.2.2 (USA-4); MOFCOM, CVD Final Determination at sec. 7.2.2 (USA-5).

224 China, First Written Submission, para. 329.

225 *See* China, First Written Submission, paras. 325, 329.

226 China, First Written Submission, para. 331; China, Response to the Panel's First Set of Questions, paras. 196-200.

183. But MOFCOM's actual findings in the final determinations make clear that it considered none of the evidence cited by China or the extent to which differences in product mix may have distorted its average unit value comparisons.[227] Contrary to China's assertion, after noting that the scope of the investigation included "paw and other specifications as well" and finding that "the competitive conditions are the same" between subject imports and the domestic like product, MOFCOM reasoned that it need not consider "the corresponding relationship among different specifications" but may conduct its injury analysis "on the basis of . . . 'a category product.'"[228] Thus, MOFCOM quite explicitly found was that it was under no obligation to take product mix into account and therefore did not do so.

184. MOFCOM's express refusal to account for the effect of product mix on its average unit value comparisons constituted a clear breach of China's WTO obligations. In this regard, the recently released Appellate Body report in *China – GOES* is particularly instructive. The Appellate Body stated that, "we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products."[229] Likewise, the Panel here should find that MOFCOM's failure to account for clear differences in product mix when comparing subject import and domestic like product average unit values was inconsistent with Article 3.1 of the AD Agreement and 15.1 of the SCM Agreement, thereby rendering its analysis of adverse price effects inconsistent with Article 3.2 of the AD Agreement and 15.2 of the SCM Agreement.

185. Even if the Panel were to accept China's request to engage in an exercise of *post hoc* rationalization, the excuses that China has developed for the purpose of this proceeding are meritless. First, China cites Customs data indicating that the average unit value of subject imported "offal, chicken paws" and "offal, mid-joint wing" were higher than the average unit value of subject imported "cut, with bones," "offal, others," and "cold frozen gizzard" to argue that chicken paws were a high value product.[230] But USAPEEC argued, and no party disputed, that 97 percent of subject imports consisted of the lowest-value chicken parts, including paws,

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[227] Moreover, if MOFCOM had actually relied on any of this information in considering the product mix issue, MOFCOM's failure to disclose the information to the interested parties during the investigations would have violated Article 6.4 of the AD Agreement, which requires authorities to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases," and the substantially identical requirement under Article 12.3 of the SCM Agreement. *See EC – Tube or Pipe Fittings (AB)*, paras. 134-50.

[228] MOFCOM, Final AD Determination at 6.2.2 (USA-4); MOFCOM, Final CVD Determination at 7.2.2 (USA-5).

[229] *China – GOES (AB)*, para. 200.

[230] China, First Written Submission, paras. 328-29.

mid-joint wings, leg quarters, and other offal.[231] Indeed, the dictionary definition of "offal" is "material that is left as waste or by-product of a process of preparation or of manufacture: as . . . the parts of a butchered animal that are removed in dressing . . . ," which hardly describes high value cuts of meat.[232] Thus, evidence that the average unit value of subject imported chicken paws was greater than the average unit value of certain other low-value chicken parts imported from the United States does not establish that chicken paws were a high value chicken part.

186. Similarly misplaced is China's *post hoc* explanation that MOFCOM's average unit value comparisons were reasonable because the average unit value of chicken paws was higher than the average unit value of breast meat.[233] China's assertion, presented for the first time in this proceeding, relies entirely on 63 invoices from three domestic producers and, at most, could show merely that these producers received higher prices on sales of chicken paws than on sales of chicken breasts.[234] MOFCOM did not make these assertions during the investigation, and China's citations to these hand-picked invoices in no way show or support China's claim that importers received higher prices on sales of chicken paws imported from the United States than domestic producers received on sales of chicken breast.

187. Furthermore, China's argument only underscores that the average unit value of chicken parts varies widely depending on the part and that the product mix of subject imports differed markedly from that of the domestic industry. Even China's own newly-introduced CIF import price data reflect that the average unit values for the five types of chicken parts imported from the United States ranged from $612 to $899 per metric ton in 2006, from $963 to $1,413 per metric ton in 2007, and from $1,161 to $1,742 per metric ton in 2008.[235] This variability indicates that the average unit value of subject imports and domestic industry shipments, respectively, would be influenced significantly by changes and differences in product mix.

188. China's new data also underscore the fact that subject imports consisted of a product mix that differed dramatically from the product mix for domestic industry shipments. Notably, China has not provided average unit values for chicken breasts or several other types of broiler products imported from the United States, because the volume of such imports was insignificant.[236] While almost all subject imports consisted of paws, mid-joint wings, leg quarters, and other offal,

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231 USAPEEC, Injury Brief, p. 19 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 5 (USA-46).

232 *Webster's Third New International Dictionary, Unabridged*, p.1566.

233 China, First Written Submission, para. 326-329, 331; China, Response to the Panel's First Set of Questions, paras. 196-200.

234 China, Response to the Panel's First Set of Questions, para. 196.

235 China, First Written Submission, para. 329.

236 *See id.*at para. 329 n.244.

domestic industry shipments would have consisted of the full range of chicken parts, including higher value parts, that result from the slaughter of live chickens. Regardless of the relative unit values of chicken breasts and chicken paws sold by domestic producers, the fact remains that MOFCOM compared subject import and domestic like product average unit values without accounting for obvious and stark differences in product mix, thereby failing "to ensure price comparability."[237]

189. For all these reasons, China has failed to rebut the United States' demonstration that MOFCOM's failure to account for differences in product mix in comparing subject import and domestic like product average unit values breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

4. MOFCOM's Price Suppression Finding Was Predicated Entirely on Its Defective Underselling Analysis

190. China argues that even if MOFCOM's underselling analysis were found inconsistent with China's WTO obligations, the Panel should still uphold MOFCOM's price suppression finding because, according to China, MOFCOM demonstrated the existence of price suppression and was under no obligation to establish that the suppression was caused by subject imports.[238] China also argues that MOFCOM demonstrated that subject imports suppressed domestic like product prices through volume effects alone.[239] Neither argument has any merit. First, to the extent MOFCOM relied on its price suppression finding, it was obligated to establish that such price suppression was the effect of subject imports. Second, in the actual determinations, MOFCOM in fact predicated its price suppression finding on its deficient underselling analysis.

191. Contrary to China's argument, Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement require investigating authorities to consider whether any significant suppression (or depression) of domestic prices is "the effect" of subject imports. In turn, an investigating authority can rely on price suppression or price depression to support a finding of injury only if the authority establishes that price suppression or price depression was linked to subject imports. As the panel and Appellate Body found in *China – GOES*, "*merely showing* the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2."[240] Consistent with this reasoning, MOFCOM

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237 *China – GOES (AB)*, para. 200.

238 China, First Written Submission, paras. 335-36.

239 *Id.* at paras. 342-44.

240 *China – GOES (AB)*, para. 159; *see also id.*, para. 142 (finding that "a consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports.").

was obligated in this investigation, as it was in the GOES investigation, to demonstrate that any significant suppression of domestic prices was caused by subject imports. Because the only evidence cited by MOFCOM linking subject imports to price suppression was its deficient underselling analysis, MOFCOM failed to establish that the price suppression was the effect of subject imports, in violation of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

192. Equally unpersuasive is China's argument that MOFCOM's price suppression was not dependent on its underselling analysis because, according to China, MOFCOM also found that subject import "volume effects" and "market share effects" suppressed domestic prices.[241] Contrary to China's argument, MOFCOM made no such finding and, in any event, the record would not support such a finding.

193. Rather, MOFCOM explicitly predicated its finding that subject imports suppressed domestic prices to a significant degree on its defective finding that subject imports undersold the domestic like product to a significant degree. The very title of the sections of the final determinations in which MOFCOM addresses price, "Impacts of Import Price of Subject Products on Price of Domestic Like Products," makes clear that MOFCOM's analysis in those sections addresses the impact of subject import prices on domestic prices, not the impact of subject import volume or market share.[242] After finding that "the RMB price of the Subject Products is always lower than average sales price of the domestic like products," based on flawed average unit value comparisons, MOFCOM concluded that "[t]he lower price of the Subject Products has also suppressed sales price of the domestic like products."[243] In responding to a USAPEEC argument that subject imports could not have adversely affected domestic prices in the first half of 2009, MOFCOM again emphasized that subject imports suppressed domestic prices through underselling:

> [T]here are data showing the price of the imported 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 . . . . Thus the Investigating Authority therefore finds that in the first half of 2009, the price cutting of the Subject Products caused substantial suppression on the sales price of the domestic like products and injured the operation of the domestic industry.[244]

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241 China, First Written Submission, paras. 342-348.

242 MOFCOM, Final AD Determination at sec. 5.2.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.2.3 (USA-5).

243 *Id.*

244 MOFCOM, AD Final Determination at sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5) (emphasis added).

194. Thus, MOFCOM could not have been clearer that its price suppression finding was predicated on its defective underselling analysis.

195. Nor did MOFCOM make any finding, as China now asserts,[245] that subject import volume and market share alone, in the absence of significant underselling, could have suppressed domestic like product prices to a significant degree. China's reliance on the concluding sentence of MOFCOM's price section is misplaced. That sentence merely sums up MOFCOM's preceding sections on volume and price: "To sum up," MOFCOM stated, "the continual expansion of the market shares of the Subject Products in China is closely related to the continual export to China in a large amount at a low price, and selling of the Subject Products in a large amount at a low price across China not only has a cut-down effect on price of the domestic like products, but also leads to a reduced profitability of the domestic like product."[246] On its face, this statement 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. It would also conflict with evidence that the increase in subject import volume and market share during the period examined did not come at the expense of the domestic industry, which gained more market share than subject imports.[247]

196. Even if the Panel were to find that MOFCOM predicated its price suppression finding on a combination of subject import price and volume effects, MOFCOM made no finding and provided no explanation as to how subject import volume effects alone were sufficient to suppress domestic like product prices to a significant degree. In *China – GOES*, as in this dispute, China argued that MOFCOM's price depression and suppression findings were based on subject import price and volume effects, and could be upheld on the basis of volume effects alone. Rejecting this argument, the Appellate Body found as follows:

> [W]hile MOFCOM's Final Determination referred to *both* the prices and volume of subject imports, there is no explanation or reasoning as to whether or how the prices and volume of subject imports interacted to produce an effect on domestic prices. . . .Without further explanation or reasoning, however, MOFCOM's Final Determination does not indicate how these two factors may have interacted, or

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[245] China, First Written Submission, para. 346.

[246] MOFCOM, Final AD Determination at sec. 5.2.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.2.3 (USA-5).

[247] *See* MOFCOM, Final AD Determination at secs. 5.1.2 and 5.3.6 (USA-4); MOFCOM, Final CVD Determination at secs. 6.1.2 and 6.3.6 (USA-5).

> whether the effect of either prices or volume alone could have sustained MOFCOM's finding of significant price depression or suppression.[248]

Accordingly, the Appellate Body agreed with the Panel that "it was 'not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.'"[249]

197. The Panel should reach the same conclusion here because MOFCOM's final determinations are similarly bereft of any explanation as to how significant price suppression could have been the effect of the increase in subject import volume alone. To the contrary, MOFCOM explicitly found that subject imports suppressed domestic like product prices by underselling domestic like product prices. Thus, contrary to China's argument, the Panel cannot uphold MOFCOM's price suppression finding on the basis of MOFCOM's analysis of subject import volume alone.

198. For all the foregoing reasons, China has failed to rebut the United States' demonstration that MOFCOM's price effects analysis was inconsistent with China's WTO obligations.

C. MOFCOM's Analysis of the Domestic Industry Factors Was Inconsistent with China's WTO Obligations

199. In its submissions, China has provided no meaningful rebuttal to the United States' challenge to MOFCOM's analysis of the impact of the subject imports on the domestic industry. China argues that by challenging MOFCOM's analysis of the domestic industry's capacity utilization and end-of-period inventories over the 2006-2008 period, the United States somehow "elevates these two factors and thus to make them 'decisive,' not giving any consideration to any other factors that were at least as important and even more important to MOFCOM's analysis."[250] But this is not in fact the basis of the U.S. showing that China breached its WTO obligations. What the United States actually demonstrated in its first written submission is that MOFCOM itself attached decisive significance to these two factors in finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period, while failing to conduct an objective examination of the other factors.[251] China fails to explain how MOFCOM could have found that subject imports had an adverse impact on the domestic industry during the period of investigation when the record showed that the domestic industry's performance improved markedly according to almost every measure during the 2006-2008

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248 *China – GOES (AB),* para. 219.

249 *Id.*at para. 221 (quoting *China – GOES* at para. 7.542).

250 China, First Written Submission, paras. 370, 387.

251 *See* U.S. First Written Submission, paras. 325-26.

period, which coincided with the bulk of the increase in subject import volume.[252] For these reasons, as further explained below, China fails to rebut the United States' showing that MOFCOM's impact analysis was inconsistent with China's obligations under Articles 3.1 and 3.4 of the AD Agreement and 15.1 and 15.4 of the SCM Agreement.

1. MOFCOM Relied on Its Defective Analysis of Capacity Utilization and End-of-Period Inventories to Find that Subject Imports Adversely Impacted the Domestic Industry During the 2006-2008 Period

200. China mischaracterizes the U.S. position, claiming that the United States would give "decisive" weight to capacity utilization and end-of-period inventory trends.[253] To the contrary, it was MOFCOM in its written determinations that made these factors central to its analysis of impact. Indeed, MOFCOM recognized that the domestic industry's performance improved according to most measures during the 2006-2008 period,[254] and therefore relied on the only factors that showed no significant improvement -- capacity utilization and end-of-period inventories -- to find that subject imports had an adverse impact on the domestic industry throughout the period of investigation, including the 2006-2008 period. In concluding its analysis of impact, MOFCOM found as follows:

> The above evidences show that during the POI, for the purpose of satisfying a demand increase at the Chinese market, the domestic like products sector recorded certain growth from 2006 through 2008 in terms of output capacity, output volume, sales quantity as well as market share, number of employees, per capita payroll, labor productivity and other economic indicators. However, during the same period, capacity utilization rate of the domestic like products sector had always been fairly low, and ending inventory across the industry kept rising. As sales price of the domestic like products remained lower than their production cost for a long term, the domestic like products sector could not gain a reasonable profit

252 *See* United States, First Written Submission, para. 327. For example, between 2006 and 2008, the domestic industry increased its capacity by 26.2 percent, its output by 28.2 percent, its sales quantity by 31.2 percent, its sales revenues by 88.6 percent, its market share from 37.81 percent to 42.42 percent, and its employment by 10.3 percent. MOFCOM, Final AD Determination at sec. 5.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (USA-5). During the same period, the industry's pre-tax loss narrowed from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008. *See id.*

253 China, First Written Submission, paras. 370, 387.

254 *See* MOFCOM, Final AD Determination at sec. 5.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (USA-5).

> margin, so profit before tax for the domestic like products remained negative during the POI .[255]

201. Relying on the preceding analysis, MOFCOM concluded that "during the entire POI, there is an outstanding relevance between the change of imports of the Subject Products and the situation of operation of the domestic industry" because "the imports of the Subject Products were increasing constantly on one hand, while on the other hand the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly."[256] MOFCOM could not rely on its finding that "the domestic like products sector could not gain a reasonable profit margin" to support its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period because the industry's pre-tax loss narrowed from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008.[257] Thus, MOFCOM's only support for its finding that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period, was its defective analysis of domestic industry capacity utilization and end-of-period inventories during the 2006-2008 period.

2. MOFCOM Failed to Establish that Subject Imports Adversely Impacted Domestic Industry Capacity Utilization or End-of-Period Inventories During the 2006-2008 Period

202. Contrary to China's argument, domestic industry capacity utilization and end-of-period inventory trends did not constitute "positive evidence" that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period. China argues that the domestic industry's increase in capacity could not account for the industry's capacity utilization trends because the absolute increase in capacity, at 780,700 metric tons, was less than the absolute increase in apparent consumption, at 955,600 metric tons.[258] China ignores, however, that the increase in domestic industry capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period.[259] That is why the rate of the increase in domestic industry capacity relative to

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[255] MOFCOM, Final AD Determination at sec. 5.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (emphasis added) (USA-5).

[256] MOFCOM, Final AD Determination at sec. 6.1 (USA-4); MOFCOM, Final Determination at sec. 7.1 (USA-5); *see also* MOFCOM, Final AD Determination at sec.. 6.2.3; MOFCOM, Final CVD Determination at sec. 7.2.3.

[257] MOFCOM, Final AD Determination at secs. 5.3.8, 5.3.9 (USA-4); MOFCOM Final CVD Determination at secs. 6.3.8, 6.3.9 (USA-5).

[258] China, First Written Submission, para. 374.

[259] MOFCOM, Final AD Determination at sec. 5.3.6 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3.6 (USA-5).

apparent consumption is more relevant than the absolute increase in both factors. The domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period.

203. China does not dispute the United States' observation that the domestic industry's capacity utilization rate would have increased during the 2006-2008 period to over 100 percent in 2008 had the domestic industry not expanded its capacity. And even if domestic industry capacity had increased, for example, at the same rate as apparent consumption during the 2006-2008 period – 17.0 percent – the domestic industry's rate of capacity utilization still would have increased from 78.72 percent in 2006 to 86.3 percent in 2008. Thus, the domestic industry's capacity utilization trend was entirely explained by the industry's own capacity expansion and was not affected by subject imports. MOFCOM's reliance on domestic industry capacity utilization to support its finding that subject imports had an adverse impact on the domestic industry "during the entire POI" was therefore not supported by an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Nor does its reliance on this factor reflect an examination of all relevant economic factors and indices, in breach of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.

204. The United States has also shown, without dispute from China, that the increase in domestic industry end-of-period inventories as a share of domestic industry shipments and production was too small to be materially adverse.[260] In response, China argues that MOFCOM was under no obligation to find end-of-period inventories "significant" because, in its view, Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement only require investigating authorities to evaluate the enumerated injury factors.[261] As the United States has established, however, MOFCOM did in fact find the increase in end-of-period inventories significant when it relied on this increase, in combination with the domestic industry's capacity utilization trends, to find that subject imports adversely impacted the domestic industry "during the entire POI," including the 2006-2008 period. Now that China has conceded that the increase in domestic industry end-of-period inventories was not significant, MOFCOM's finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period is left with no evidentiary support whatsoever.

3. MOFCOM Was Obligated to Base Its Impact Analysis on an Examination of Trends over the Entire Period of Investigation

205. In a tacit admission that MOFCOM had no evidence that subject imports had an adverse impact on the domestic industry during the 2006-2008 period, China agrees that MOFCOM's

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260 *See* United States, First Written Submission, paras. 333-36; China, First Written Submission, paras. 378-384.

261 China, First Written Submission, para. 381.

adverse impact analysis focused only on the first half of 2009 – which was the only period in which the domestic industry's performance weakened – but argues that this narrow focus was appropriate.[262] As the United States observed in its first written submission, however, the domestic industry's lagging performance in the first half of 2009 could not have been the result of subject imports when the bulk of the increase in subject import volume coincided with strengthening domestic industry performance during the 2006-2008 period.[263] In light of this evidence, MOFCOM could not find that subject imports had an adverse impact on the domestic industry based on domestic industry performance in the first half of 2009 alone. Rather, MOFCOM was obligated to explain how subject imports could have adversely impacted the domestic industry in the first half of 2009 when most of the increase in subject import volume coincided with a dramatic improvement in the domestic industry's performance during the 2006-2008 period. By failing to do so, MOFCOM failed to conduct an objective evaluation of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, and failed to consider "all relevant economic factors and indices having a bearing on the state of the industry," in breach of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.

206. As the Appellate Body explained in *China – GOES*:

> Articles 3.4 and 15.4 . . . do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Article 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2.[264]

207. An investigating authority could hardly be said to have examined "the relationship between subject imports and the state of the domestic industry" by focusing, without reasonable explanation, solely on a discrete portion of the period of investigation, especially where that period does not coincide with the bulk of the increase in subject import volume. Rather, an investigating authority must examine the impact of subject imports on the domestic industry over

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262 China, First Written Submission, paras. 358-60.

263 United States, First Written Submission, para. 327.

264 *China – GOES (AB)*, para. 149.

the entire period for which data was collected.[265] MOFCOM failed to do so here. As China concedes, MOFCOM predicated its finding that subject imports adversely impacted the domestic industry on subject import and domestic industry solely on performance trends in the first half of 2009.[266] MOFCOM failed to reconcile its impact analysis with relevant evidence that the domestic industry's performance improved dramatically during the 2006 and 2008 period in which the bulk of the increase in subject import volume occurred.

4. MOFCOM's Future Projections Were Irrelevant to Its Analysis of the Impact of Subject Imports During the Period of Investigation

208. China further attempts to bolster MOFCOM's injury analysis by emphasizing the finding that "it is very possible for the U.S. broiler producers to expand their export to China and to affect the domestic industry adversely" in the future.[267] Yet, the possibility that subject imports may increase in the future so as to adversely impact the domestic industry in the future is irrelevant to the impact analysis required under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement for present material injury purposes. The text of those articles, directing investigating authorities to examine "the impact of dumped [or subsidized] imports on the domestic industry concerned," is drafted in the present tense. Accordingly, investigating authorities must examine the impact of dumped imports that have already entered the domestic market, and not the possible impact of dumped imports that may enter the domestic market in the future. As the Appellate Body stressed in *Mexico – Rice*, "[b]ecause the conditions to impose an anti-dumping duty are to be assessed with respect to the current situation, the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place."[268]

209. Finally, the United States notes that China's reliance on a statement in *EC – Fasteners* is misplaced. In particular, China cites to the panel's finding in *EC – Fasteners* that "a decline need not have occurred during the period under consideration in order for an authority to find injury." That statement, however, was referring to the Article 3.4 requirement that investigating

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[265] An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In *Mexico – Beef & Rice*, for example, the Appellate Body found that the Mexican investigating authority had violated the Article 3.1 objectivity requirement by accepting petitioners' suggestion that it limit its injury analysis to data from the first six months of each of the three years examined, when subject import penetration happened to be highest. *See Mexico – Beef & Rice (AB)*, paras. 183, 187-88.

[266] China, First Written Submission, paras. 358-61.

[267] China, First Written Submission, paras. 362-64; *see also* MOFCOM, Final AD Determination at sec. 5.4 (USA-4); MOFCOM, Final CVD Determination at sec. 6.4 (USA-5).

[268] *Mexico – Beef & Rice (AB)*, para. 165.

authorities examine "actual and potential decline[s]" in the enumerated injury factors.[269] Contrary to China's argument, the panel did not hold that investigating authorities may consider the future impact of "potential" subject imports, and nothing in Article 3.4 of the AD Agreement or Article 15.4 of the SCM Agreement would support such an interpretation. Rather, those Articles require investigating authorities to examine "the impact of dumped [and subsidized] imports" that entered the domestic market during the period under consideration.

210. For the reasons set out above, MOFCOM's consideration of potential subject import volumes and their impact in the future is irrelevant to the present material injury impact analysis required under Articles 3.4 and 15.4 and in no way remedies the defects in MOFCOM's impact analysis.

D. MOFCOM's Causal Link Analysis Was Inconsistent with China's WTO Obligations

211. As the United States has demonstrated, MOFCOM's causal link analysis, as set out in its determinations, did not meet China's obligations under the WTO Agreements. MOFCOM failed to establish that subject import competition had adverse volume or price effects on the domestic industry, the performance of which improved markedly during the 2006-2008 period in which the bulk of the increase in subject import volume occurred.[270] China has provided no valid rebuttal to the U.S. showing. In fact, China does not deny that MOFCOM failed to address evidence that subject imports did not increase at the expense of the domestic industry, which gained more market share than subject imports. Nor does China deny that MOFCOM failed to reconcile its causation analysis with evidence that the domestic industry's performance improved coincidentally with the increase in subject import volume between 2006 and 2008. Instead, China proffers new market share data found nowhere in the final determinations and not disclosed to the parties, and based on this data asserts that the Panel should uphold MOFCOM's causation analysis based on a mode of analysis (involving volume effects) never used by MOFCOM. China also contends that MOFCOM was entitled to base its causation analysis entirely on the domestic industry's condition in the first half of 2009, while ignoring the industry's performance during the 2006-2008 period. Contrary to China's arguments, however, MOFCOM was obligated to consider the absence of any correlation between subject import competition and domestic industry performance during the entire period of investigation. As discussed below, these arguments are untenable.

1. MOFCOM Failed to Address Market Share Trends that Contradicted Its Causal Link Analysis

212. China's initial response to the fact that MOFCOM failed to consider evidence that subject imports increased at the expense of nonsubject imports is to present the remarkable claim that

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269 *EC – Fasteners (Panel)*, para. 7.402.

270 *See, generally*, United States, First Written Submission, paras. 339-61.

such evidence did not exist on the record in the proceedings.[271] According to China, the record showed that subject imports gained 3.92 percentage points of market share during the period of investigation while nonsubject imports lost 1.90 percentage points of market share during the period.[272] China neglects to mention that the domestic industry's market share increased 4.38 percentage points during the same period.[273] China does not and cannot deny that MOFCOM failed to explain how the increase in subject import volume and market share could have had an adverse impact on the domestic industry when the domestic industry gained more market share than subject imports during the period examined. In failing to address this evidence, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or an examination of "all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

213. China also attempts to proffer new evidence – not mentioned by MOFCOM in its determinations or otherwise disclosed to the parties – that, in its view, shows that the increase in subject import market share did come at the expense of the domestic industry.[274] As an initial matter, the Panel should reject China's arguments because MOFCOM did not consider this evidence in conducting its causal link analysis. As emphasized by the Appellate Body, "[i]t is on the basis of the rationale or explanation provided by the investigating authority that a panel must examine the consistency of the determination with a covered agreement, including whether the investigating authority has adequately explained how the facts support the determination it has made."[275] Consequently, the Appellate Body explained, "the respondent Member [i]s precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination."[276] Thus, the Panel here should reject China's *post hoc*

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271 China, First Written Submission, para. 397.

272 *Id.* at para.398. According to China, domestic producers that did not submit questionnaire responses and thus, were excluded from MOFCOM's industry definition and consequent injury investigation, lost 6.5 percentage points of market share. *Id.* at para. 401. As further discussed below, China's assertion rebuts neither the fact that the "domestic industry" that MOFCOM examined in its injury investigation actually gained market share nor the pertinent point that MOFCOM failed to reconcile that fact with its causation analysis.

273 MOFCOM, Final AD Determination at sec. 5.3.6 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3.6 (USA-5).

274 China, First Written Submission, para. 400.

275 *Japan – DRAMs (AB)*, para. 159; *see also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of AD Agreement); *U.S. – Softwood Lumber 21.5 (AB)* at para. 93 ("A panel's examination of [an investigating authority's] conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report.").

276 *Japan – DRAMs (AB)*, para. 159; s*ee also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of AD Agreement).

rationalization of MOFCOM's deficient causal link analysis based on new evidence and focus instead on the deficiencies in MOFCOM's actual causal link analysis, as set forth in the final determinations.

214. Even if the Panel were to examine China's new data, these data would not serve to support MOFCOM's causation findings. According to China, its new market share data include data reflective of all domestic producers, including those "for which MOFCOM did not have questionnaire responses." This is different from the data MOFCOM relied on for its impact and causation analysis, which was collected (and limited to) data it collected from the subset of 17 producers within its deficient definition of the domestic industry.[277]

215. In particular, MOFCOM cited evidence that domestic industry market share increased from 37.81 percent in 2006 to 42.42 percent in 2008 to find that "the domestic like products sector recorded certain growth from 2006 through 2008 in terms of . . . market share . . . ."[278] However, China's new market share evidence show a slight decline in domestic industry market share between 2006 and 2008. Therefore this new data directly contradicts this MOFCOM finding, belying China's suggestion that MOFCOM considered this alternative set of market share data.[279] As the Appellate Body explained in *China – GOES*, "[t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision."[280] MOFCOM could not have taken China's new market share data into account when those data appear nowhere in the final determinations and directly contradict findings that do appear therein.

216. Moreover, MOFCOM could not have factored the market share trends of domestic producers as a whole into its causal link analysis because the evidentiary record on the domestic industry's performance was limited to data from the 17 domestic producers included in its domestic industry definition. A market share loss suffered entirely by domestic producers outside the domestic industry definition would not have been reflected in the performance data collected from producers included within the domestic industry definition. In other words, if ex post facto, a new set of data is examined in regards to one issue – *i.e.*, market share – MOFCOM's actual findings on a different set of data tell you nothing about injury to the group reflected by the new set of data. For this reason, MOFCOM could not find that market share lost

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[277] China, First Written Submission, para. 400; MOFCOM, Final AD Determination at secs. 1.2.2.3, 5.3 and 6.1 (USA-4); MOFCOM, CVD Final Determination at secs. 2.2.2.3, 6.3 and 7.1 (USA-5).

[278] MOFCOM, AD Final Determination at secs. 5.3 and 5.3.6 (USA-4); MOFCOM, CVD Final Determination at secs. 6.3 and 6.3.6 (USA-5).

[279] *See* China, First Written Submission, para. 402 ("[T}he complete picture presented above is quite apparent from the data discussed by MOFCOM in its Final Determinations."); China, Response to the Panel's First Set of Questions,para. 138 ("MOFCOM also implicitly reported the market share of the remaining smaller domestic producers.").

[280] *China – GOES (AB)*, para. 130.

by producers outside the definition contributed to any adverse trends reported by producers within the definition in accordance with the positive evidence and objectivity requirements under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.[281] Thus, the Panel should disregard China's new market share data as irrelevant to its assessment of whether MOFCOM's causal link analysis was consistent with China's WTO obligations. This problem highlights why the Panel should decline MOFCOM's request to engage in *post hoc* rationalizations in an attempt to justify a flawed injury analysis

217. Furthermore, China's new market share data do not support MOFCOM's causal link analysis for another reason. By China's own admission, MOFCOM based its causal link analysis entirely on the domestic industry's declining performance in the first half of 2009,[282] while failing to reconcile the industry's strengthening performance between 2006 and 2008. Yet, China's new market share data indicate that the increase in subject import market share between 2008 and the first half of 2009 came almost entirely at the expense of nonsubject imports, while domestic industry market share remained stable.[283] Citing its new market share data, China claims that "the overall domestic industry lost almost 2 percentage points of market share" to subject imports during the period examined, but most all of the loss occurred during the 2006-2008 period when domestic industry performance strengthened.[284] A market share shift from domestic producers to subject imports that coincides with a strengthening of domestic industry performance does not support the finding of a causal link between subject imports and injury. In any event, MOFCOM collected no performance data from the domestic producers that lost market share to subject imports between 2006 and the first half of 2009 and therefore possessed no positive evidence with which to examine the causal relationship between subject imports and the performance of those producers.

218. MOFCOM's actual market share analysis showed that the 3.92 percentage point increase in subject import market share during the period of investigation did not prevent the domestic industry, as defined by MOFCOM, from increasing its market share by 4.38 percentage points.[285] In light of these facts, it is incontrovertible that the increase in subject import volume and market share during the period of investigation did not come at the expense of the domestic industry for which MOFCOM collected performance data. By failing to reconcile its causal link analysis with this evidence, MOFCOM failed to conduct an objective examination of positive evidence,

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281 *See EC – Bed Linen (Panel)*, para. 6.182 (finding that "information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the industry' required under Article 3.4.").

282 *See* China, First Written Submission, paras. 414-425.

283 *Id.* at para. 400.

284 *Id.*at paras. 400-401.

285 MOFCOM, Final AD Determination at secs. 5.1.2, 5.3.6 (USA-4); MOFCOM, CVD Final Determination at secs. 6.1.2, 6.3.6 (USA-5).

in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. It also failed to base its causal link analysis on an examination of "all relevant evidence," in violation of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

2. MOFCOM's Causal Link Analysis Relied on Its Defective Price Effects Analysis

219. China attempts to defend MOFCOM's reliance on its flawed underselling analysis in establishing a causal link between subject imports and material injury on two grounds. First, China repeats its arguments that MOFCOM's underselling analysis -- comparing subject import and domestic like product average unit values without accounting for clear differences in level of trade and product mix -- was proper and not essential to its finding that subject imports suppressed domestic like product prices.[286] Second, China argues that the Panel could uphold MOFCOM's causal link analysis based on MOFCOM's analysis of subject import volume effects alone.[287] Neither argument withstands scrutiny.

220. China's defense of MOFCOM's underselling analysis is unpersuasive for the reasons addressed in section IV.B above. Contrary to China's argument that MOFCOM was under no obligation to take level of trade or product mix into account,[288] MOFCOM was obligated to ensure the comparability of its subject import and domestic like product pricing data pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.[289] By failing to account for obvious differences in level of trade and product mix, thereby making a finding of subject import underselling more likely, MOFCOM not only violated Articles 3.1 and 15.1, but also failed to conduct the underselling analysis required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

221. China's assertion that MOFCOM's price suppression finding was not predicated entirely on its underselling analysis[290] is contradicted by MOFCOM's explicit findings in the final determinations that subject import underselling, not subject import volume, suppressed domestic like product prices.[291] MOFCOM made no finding and provided no explanation as to how subject import volume alone could have suppressed domestic like product prices to a significant degree. With no evidence that subject imports either undersold or suppressed domestic like

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286 China, First Written Submission, paras. 404-06.

287 *Id.* at paras. 407-13.

288 *Id.* at para. 405.

289 *China – GOES (AB)*, para. 200; *China – GOES (Panel)*, para. 7.530.

290 China, First Written Submission, para. 406.

291 *See* MOFCOM, Final AD Determination at secs. 5.2.3. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at secs. 6.2.3, 7.2.2 (USA-5).

product prices, MOFCOM failed to predicate its causal link analysis 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. It also failed to demonstrate a causal link between subject import price effects and material injury, in violation of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

222. China's second argument, that the Panel should uphold MOFCOM's causal link analysis based on MOFCOM's analysis of subject import volume effects alone, is no more persuasive than the first. As an initial matter, China is incorrect that the United States "has not made any challenge to MOFCOM's discussion of adverse volume effects."[292] To the contrary, the United States maintains that MOFCOM failed to reconcile its causal link analysis with evidence that subject import volume did not increase at the expense of the domestic industry, which gained more market share than subject imports during the period examined.[293] The United States has also established that MOFCOM failed to reconcile its causal link analysis with evidence that the domestic industry's performance improved according to almost every measure during the bulk of the increase in subject import volume between 2006 and 2008.[294] MOFCOM's failure to address this evidence rendered its causal link analysis inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

223. However, rather than addressing these deficiencies in MOFCOM's analysis, China again proffers *post hoc* rationalizations found nowhere in the final determinations to argue that MOFCOM found subject import volume to have had both "direct" and "indirect" effects on the domestic industry.[295] Contrary to China's "direct effects" argument, MOFCOM did not find that "but for the subject import presence in the market . . . the domestic industry could have sold more broiler products."[296] China does not provide a citation to support this assertion because it appears nowhere in the final determinations.

224. Moreover, if an investigating authority relies on the increase in subject import volume to make an affirmative material injury determination, it must establish a causal link between that volume increase and material injury. Under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, "[i]t must be demonstrated that the dumped [and subsidized] imports are, through the effects of dumping [and subsidies], as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." With respect to subject import volume, Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement make clear that an investigating authority's assessment of the effects of dumping and subsidies, as set forth in paragraphs 2 and 4

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292 China, First Written Submission, para. 407.

293 *See* section IV.A, *supra*; U.S. First Written Submission, paras. 348-54.

294 *See* U.S. First Written Submission, para.358.

295 China, First Written Submission, paras. 407-09.

296 *Id.* at para. 408.

is to focus on "whether there has been a significant increase in dumped [or subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member" that adversely impacted the domestic industry within the meaning of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement. Furthermore, under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, an investigating authority's examination of subject import volume must be based on an "objective examination" of "positive evidence," not speculation. Thus, to establish a causal link between subject import volume and material injury, an investigating authority must demonstrate that a significant increase in subject import volume had an adverse impact on the domestic industry.

225. To the extent that China means to argue that the domestic industry would have done better but for the increase in subject import volume, the record does not support China's argument. The domestic industry's declining performance in the first half of 2009 could not have been due to any loss of market share to subject imports during the period examined because domestic industry market share was 4.38 percentage points higher in the first half of 2009 than in 2006, before any increase in subject import volume.[297] Moreover, most of the increase in subject import volume, 90.9 percent, was accompanied by a dramatic improvement in domestic industry performance between 2006 and 2008, and industry performance in the first half of 2009 remained stronger than in 2006 according to many measures.[298] MOFCOM did not explain how an increase in subject import volume that coincided with an increase in domestic industry market share and an improvement in most other measures of domestic industry performance could have had a materially adverse impact on the domestic industry. In the absence of such an explanation, MOFCOM failed to demonstrate that any injury suffered by the domestic industry was caused by subject import volume. Thus, if China is claiming that MOFCOM's causation finding was based on the increase in subject import volume, its failure to show that MOFCOM established a link between the increase and the domestic industry's performance is fatal under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. MOFCOM also failed to base its causal link analysis on "an examination of all relevant evidence," in breach of these same articles, or to conduct an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

226. China also argues that subject import volume had an "indirect" effect on domestic like product prices, quoting MOFCOM's finding that "the domestic like product, while to stabilize the market share, were forced to be sold at a price lower than the domestic production costs."[299] China neglects to mention that the analysis from which it selectively quotes was expressly limited to the 2006-2008 period, over which time the domestic industry gained 4.61 percentage points of market share:

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297 MOFCOM, AD Final Determination at sec. 5.3.6 (USA-4); MOFCOM, CVD Final Determination at sec. 6.3.6 (USA-5).

298 *See* U.S. First Written Submission, paras. 358, 360 & n.353.

299 China, First Written Submission, para. 409.

> [F]rom 2006 to 2008, although the broiler products have been in great demand in the domestic market and the domestic like products did gain a certain market space, this cannot show that the domestic industry did not suffer injury. On the contrary, because the import volume of the Subject Products increased considerably and the import price was low, which constituted serious suppression of the sale price of the domestic like products, the domestic like products were forced to be sold at prices below the production cost in order to maintain the market share. At the same time, the capacity utilization of the domestic like products remained on a relatively low level and the inventory presented an upward trend.[300]

227. Subject imports could have had no "indirect volume effect" on domestic like product prices between 2006 and 2008 when the 1.83 percentage point increase in subject import market share during the period was accompanied by an increase in domestic industry market share over twice as large. Indeed, MOFCOM itself relied on its defective underselling analysis in finding that low import prices "constituted serious suppression of the sale price of the domestic like products."[301]

228. The analysis highlighted by China was deficient in other respects as well. For example, it conflicted with evidence that the domestic industry did not "maintain" its market share but rather increased it, and did not sell at prices below cost to an increasing extent but rather narrowed its loss as a share of sales income from 7.9 percent in 2006 to 4.7 percent in 2008.[302] This passage also relies on MOFCOM's defective analysis of domestic industry capacity utilization and end-of-period inventories, as the only two factors that did not show dramatic improvement during the 2006-2008 period. Far from demonstrating that subject import volume had an impact -- indirect or otherwise -- on domestic like product prices, the analysis highlighted by China only underscores MOFCOM's failure to reconcile its causal link analysis with evidence that the bulk of the increase in subject import volume coincided with a marked improvement in the domestic industry's performance during the 2006-2008 period. Here too, China's breach of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement is apparent.

229. Finally, China argues that the Panel could uphold MOFCOM's finding that subject imports adversely affected domestic like product prices based solely on MOFCOM's observation that subject import prices and domestic like product prices moved in "parallel" during the period examined and declined together in the first half of 2009.[303] Yet, subject import prices on a CIF

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300 MOFCOM, AD Final Determination at sec. 6.2.1; MOFCOM, CVD Final Determination at sec. 7.2.1.

301 *See* MOFCOM, AD Final Determination at secs. 5.2.3, 6.2.2 (USA-4); MOFCOM, CVD Final Determination at secs. 6.2.3, 7.2.2 (USA-5).

302 MOFCOM, AD Final Determination at secs.5.3.6, 5.3.8, 5.3.9 (USA-4); MOFCOM, CVD Final Determination at secs. 6.3.6, 6.3.8, 6.3.9 (USA-5).

303 China, First Written Submission, paras. 410-12.

basis and domestic producer sales prices could be expected to move in parallel given that they were subject to the same conditions of supply and demand in the Chinese market, albeit at different levels of trade. As the Appellate Body explained in *China – GOES*, MOFCOM's reference to parallel price trends alone, without "any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings," does not support a finding that subject imports adversely affected domestic like product prices.[304] In other words, such parallel price movements alone do not establish that changes in subject import prices caused changes in domestic like product prices.

230. Moreover, as USAPEEC pointed out in its Comments on the Preliminary Determination, the 20.65 percent decline in domestic producer sale prices in the first half of 2009 was far greater than the 8.35 percent decline in subject import prices on a CIF basis, suggesting that the decline in domestic prices was caused by something other than subject import competition.[305] Responding to this argument in the final determinations, MOFCOM stressed that its analysis of adverse price effects in the first half of 2009 relied not on parallel price movements but on its defective underselling analysis:

> In the first half of 2009, . . . there are data showing the price of the imported 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 . . . Thus the Investigating Authority therefore finds that in the first half of 2009, the price cutting of the Subject Products caused substantial suppression on the sales price of the domestic like products and injured the operation of the domestic industry.[306]

231. Because MOFCOM's underselling analysis was inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, as addressed above, MOFCOM's reliance on that analysis to establish a causal link rendered its causal link analysis inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

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304 *China – GOES (AB)*, para. 210. The Appellate Body rejected China's argument that the Panel erred by failing to discuss the parallel trend in subject import prices and domestic prices over the period. *Id.* at paras. 208, 210.

305 *See* USAPEEC, Comments on the Preliminary Determination, p. 15-16 (USA-46).

306 MOFCOM, Final AD Determination at sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

3. MOFCOM Failed to Address Domestic Industry Performance Trends that Contradicted Its Causal Link Analysis

232. China does not dispute the United States' observation that MOFCOM failed to reconcile its causal link analysis with evidence that the domestic industry's performance improved dramatically during the bulk of the increase in subject import volume between 2006 and 2008. To the contrary, China concedes that MOFCOM predicated its causal link analysis almost entirely on trends in the first half of 2009 and asserts that such a reliance was consistent with China's WTO obligations. According to China, "MOFCOM . . . explicitly drew the causal link between the increasing subject imports and the declining condition of the domestic industry, particularly in the first half of 2009."[307] As support for this proposition, China cites only MOFCOM findings relating to subject import and domestic industry performance trends in the first half of 2009.[308]

233. China fails to recognize that MOFCOM was obligated to examine the causal relationship between subject imports and domestic industry performance during the entire period of investigation, not just during a selective period. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require investigating authorities to "demonstrate[] that the [subject] imports are, through the effects of [dumping and subsidies], as set forth in paragraphs 2 and 4, causing injury within the meaning of this agreement . . . based on an examination of all relevant evidence before the authorities." An investigating authority cannot predicate its causal link analysis on "all relevant evidence," much less an "objective examination" of "positive evidence" pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, without examining the relationship between subject imports and domestic industry performance over the entire investigative period for which data has been collected.

234. An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In *Mexico – Beef & Rice*, for example, the Appellate Body found that the Mexican investigating authority had violated the Article 3.1 objectivity requirement by accepting petitioners' suggestion that it limit its injury analysis to data from the first six months of each of the three years examined, when subject import penetration happened to be highest.[309]

235. Similarly, in *U.S. – Lamb Safeguards*, the Appellate Body observed, albeit in the context of an investigation conducted under the Safeguards Agreement, that an isolated evaluation of

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307 China, First Written Submission, para. 417.

308 *See id*; *see also id.* at 419-25.

309 *See Mexico – Beef & Rice (AB)*, paras. 183, 187-88.

only the most recent data could result in a "misleading" picture of the domestic industry.[310] Likewise, in *Argentina Footwear*, the panel and the Appellate Body stressed the importance of reconciling evidence that "indicators of the health of the domestic industry were declining when imports were declining" with an analysis that relies solely on the relationship between imports and the situation of the domestic industry in only the last year of the investigation.[311]

236. Although *U.S. - Lamb Safeguards* and *Argentina -- Footwear* concerned safeguard measures, which of course have different causation standards from those in the AD Agreement and SCM Agreement,[312] the underlying reasoning -- that authorities must assess industry data in the context of the entire investigative period -- makes equal sense with respect to injury investigations conducted under the AD and SCM Agreements.[313] Indeed, this reasoning is especially compelling under the AD and SCM Agreements, in light of the express requirement in those Agreements that "[t]he demonstration of a causal relationship between the [dumped or subsidized] imports and the injury to the domestic industry" be "based on an examination of all relevant evidence before the authorities."[314] Thus, an investigating authority cannot selectively pick data points that appear to support its causal link analysis, while ignoring conflicting trends over the period of investigation as a whole, without breaching Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

237. Doing precisely that, MOFCOM predicated its causal link analysis entirely on subject import and domestic industry performance trends in the first half of 2009, while ignoring subject import and domestic industry performance trends over the entire period of investigation that conflicted with its analysis. MOFCOM failed to explain how subject import volume that was 6.54 percent higher in the first half of 2009 than in the first half of 2008 could have made any contribution to the domestic industry's declining performance during the same period when the 47.2 percent increase in subject import volume between 2006 and 2008 coincided with a dramatic strengthening of the domestic industry's performance according to almost every measure. By limiting its causal link analysis to data in the first half of 2009 and ignoring conflicting trends over the 2006-2008 period, MOFCOM failed to establish a causal link between subject import and injury in accordance with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

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310 *U.S. – Lamb Safeguards (AB)*, para. 138.

311 *Argentina – Footwear*, para. 8.243; *Argentina – Footwear (AB)*, paras. 145-46.

312 *See United States – Tyres (AB)*, para. 181.

313 *See. e.g., United States – Hot-Rolled Steel (AB)*, para. 230 (finding that "[a}lthough the text of the Agreement on Safeguards on causation is by no means identical to that of the Anti-Dumping Agreement, there are considerable similarities between the two Agreements . . . .").

314 AD Agreement, Article 3.5; SCM Agreement, Article 15.5.

238. The absence of a coincidence between an increase in imports and a decline in the relevant injury factors over the entire period examined by MOFCOM contradicted MOFCOM's finding that subject imports adversely impacted the domestic industry during the period of investigation. Because MOFCOM's impact analysis relied exclusively on trends in the first half of 2009 without reconciling trends over the 2006-2008 period, the analysis was inconsistent with both the impact analysis envisioned by Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement and the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

239. China's only other defense of MOFCOM's failure to factor trends over the entire period of investigation into its causal link analysis is to claim that MOFCOM did, in fact, consider domestic industry financial trends over the entire period.[315] As support, China highlights MOFCOM's finding that "the selling price had been below the sale cost for a long period of time, and the domestic industry could not obtain a reasonable profit margin, and the like product was in losses all the time."[316]

240. Contrary to China's argument, however, MOFCOM's finding that the domestic industry experienced financial losses throughout the period of investigation sheds no light on the causal relationship between subject imports and the industry's financial performance. Such a finding says nothing about the relationship between movements in import volume and market share and the movements in injury factors over time, which are essential to the causal link analysis required under the AD and SCM Agreements.[317] The record showed that the 47.2 percent increase in subject import volume between 2006 and 2008 was accompanied by an improvement in the domestic industry's pre-tax loss from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008.[318] These trends indicate that the bulk of the increase in subject import volume, 90.9 percent of the total increase, had no adverse impact on the domestic industry's financial performance. By failing to reconcile these data with its causal link analysis, MOFCOM failed to demonstrate a causal link between subject imports and material injury in accordance with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

E. MOFCOM's Failure to Address U.S. Respondents' Arguments that Raised Material Issues Concerning Causation Was Inconsistent with China's WTO Obligations

241. As demonstrated by the United States in its first written submission, MOFCOM failed to address the U.S. respondents' arguments that there could be no causal link between subject imports and material injury because the increase in subject import volume was at the expense of

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315 China, First Written Submission, paras. 420-24.

316 *Id.* at para. 421 (quoting Final Determination at 44 (CHN-3)).

317 *Argentina – Footwear (AB)*, para. 144.

318 MOFCOM, Final AD Determination at 5.3.8, 5.3.9 (USA-4); MOFCOM, Final CVD Determination at 6.3.8, 6.3.9 (USA-5).

nonsubject imports, not the domestic industry, and nearly half of subject imports satisfied demand for chicken paws that domestic producers could not satisfy.[319] In response, China claims that MOFCOM addressed both arguments, yet quotes findings from the preliminary and final determinations that only underscore MOFCOM's failure to do so.[320] China also claims that MOFCOM was under no obligation to address U.S. respondents' argument concerning chicken paws because the argument was not material, without explaining how MOFCOM could establish a causal link without addressing the fact that nearly half of subject imports could have had no adverse impact on the domestic industry. Thus, as further discussed below, China fails to rebut the United States' demonstration that MOFCOM's failure to address these two key causation arguments violated 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.

1. MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Market Share Trends

242. China claims that MOFCOM addressed U.S. respondents' argument that subject imports increased at the expense of nonsubject imports and not the domestic industry in two respects. First, according to China, MOFCOM claimed that it was entitled to consider the absolute volume of subject imports alone, which increased over the period examined.[321] Second, MOFCOM found that while "the domestic like product also obtained some market share . . . that did not imply that the domestic industry did not suffer from injury."[322] These findings did not, however, satisfy MOFCOM's obligation to respond to the U.S. respondents' argument.

243. By simply providing a conclusory rejection of a respondent's argument that raises a material issue, an investigating authority has not fulfilled its obligations under Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement. Those articles require investigating authorities to issue public determinations setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement, which are virtually identical, elaborate that investigating authorities must include in their final determinations "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" including "the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers."

244. Panels have interpreted these articles as requiring investigating authorities to address in their final determinations those issues "which must be resolved in the course of the investigation

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319 United States, First Written Submission, paras. 362-66.

320 *See* China, First Written Submission, paras. 428-30, 432.

321 China, First Written Submission, 429.

322 *Id.* at paras. 429-30 (quoting Final AD Determination at sec. 6.2.1).

in order for the investigating authority to reach its determination."[323] Thus, to the extent that a respondent raises an issue "which must be resolved in the course of the investigation in order for the investigating authority to reach its determination," an investigating authority is required to provide "in sufficient detail the findings and conclusions reached" in accepting or rejecting the argument in resolution of the issue. An authority's response to such an argument would also be subject to the requirement that the authority conduct an "objective examination" of "positive evidence" pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In light of these obligations, investigating authorities must address a party's argument that raises a material issue by resolving the issue "in sufficient detail" based on an "objective examination" of "positive evidence" in the final determination.

245. MOFCOM's response to the U.S. respondents' argument concerning nonsubject imports in the final determination did not comport with these obligations. As is clear from the discussion in sections IV.C and IV.D above, MOFCOM could not demonstrate a causal link between subject import volume and material injury in accordance with China's WTO obligations without reconciling evidence that subject import volume did not increase at the expense of the domestic industry, which increased its market share by more than subject imports during the period of investigation. The U.S. respondents' argument to that effect therefore raised a material issue that MOFCOM was required to resolve "in sufficient detail" based on an "objective examination" of "positive evidence."

246. Instead of resolving the issue, however, MOFCOM evaded it, as is clear from the findings highlighted by China. MOFCOM's finding that it was entitled to consider the absolute volume of subject imports did not address the issue because U.S. respondents were not arguing that subject import volume did not increase, but rather that the increase was not at the domestic industry's expense. MOFCOM's finding that the domestic industry's market share gains "did not imply that the domestic industry did not suffer from injury" is a conclusary statement devoid of any "objective examination" of "positive evidence." It is also contrary to logic, given that an increase in subject import market share that is accompanied by a greater increase in domestic industry market share would not ordinarily support the existence of a causal link between subject imports and material injury. Far from resolving the material issue raised by U.S. respondents in "sufficient detail," MOFCOM provided no reasoning or evidentiary support whatsoever for rejecting the argument, in breach of 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.

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[323] *EC – Footwear*, para. 7.844; *see also EC – Tube or Pipe*, paras. 7.423-7.424 (finding "a 'material' issue" within the meaning of Article 12.2 of the AD Agreement "to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination.").

2. MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Chicken Paws

247. With respect to the U.S. respondents' argument concerning chicken paws, China concedes that "MOFCOM did not explicitly address this specific issue in its Final Determination."[324] China argues that the Panel should excuse this omission because MOFCOM addressed the argument in the preliminary determination and "did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of this issue."[325] China's argument is factually incorrect.

248. In its Injury Brief, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.[326] Rejecting this argument in its preliminary determination, MOFCOM explained that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import of all the investigated products including Paw as a whole . . . ."[327] Far from failing to provide any new information on the issue subsequent to the preliminary determinations, as China wrongly claims, USAPEEC responded to MOFCOM's clear misapprehension of the issue with the following clarification in its Comments on the Preliminary Determination:

> It appears that MOFCOM misunderstood the argument USAPEEC made in its January 10 comments regarding the effect of chicken paw imports. USAPEEC is not arguing that chicken paws are not part of the product scope/domestic like product, or that MOFCOM should not evaluate the effect of all investigated products. Rather, USAPEEC asserts that as the largest segment of the investigated products, paws cannot cause injury to the domestic industry because their import is required to supplement inadequate domestic capacity. In the Preliminary Determination, it appears that MOFCOM did not respond to this argument concerning inadequate domestic supply of chicken paws.[328]

249. In light of the preceding, China cannot credibly argue that "MOFCOM did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier

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[324] China, First Written Submission, para. 431.

[325] *Id.* at para. 432.

[326] *See* USAPEEC, Poultry Brief at 29-30 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 22 (USA-46).

[327] MOFCOM, Preliminary AD Determination at sec. 6.1 (USA-2); MOFCOM, Preliminary CVD Determination at sec. 7.1 (USA-3).

[328] USAPEEC, Comments on the Preliminary Determination at 22 (USA-21).

discussion of the issue."[329] MOFCOM did not repeat its earlier discussion of the issue because, as USAPEEC made clear in its comments on the preliminary determination, that discussion was based on a fundamental misunderstanding of USAPEEC's argument and therefore irrelevant. Rather, MOFCOM simply ignored USAPEEC's effort to clarify its chicken paws argument and omitted any mention of the issue in the final determinations.

250. China further argues, unpersuasively, that MOFCOM was under no obligation to address USAPEEC's argument concerning chicken paws because MOFCOM did not consider the argument "material."[330] As explained by the panel in *EC – Tube or Pipe Fittings*,"a 'material' issue" within the meaning of Article 12.2 is "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination."[331] USAPEEC's argument that nearly half of subject imports could have had no adverse impact on the domestic industry, thereby substantially attenuating subject import competition, was clearly an issue that needed to be resolved in order for MOFCOM to reach a final determination. Consequently, MOFCOM's failure to address the issue in its final determinations breached Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

251. China's *post hoc* explanation for why MOFCOM might have found USAPEEC's argument concerning chicken paws immaterial is both irrelevant and unpersuasive. It is irrelevant because China's new theories cannot remedy MOFCOM's failure to comply with its obligation to address USAPEEC's argument concerning chicken paws in the final determinations.[332] MOFCOM did not explain why it found USAPEEC's chicken paws argument immaterial, but simply ignored the argument.

252. China's *post hoc* explanation is also unpersuasive because it is based on a mis-characterization of USAPEEC's argument. In China's view, USAPEEC's argument concerning chicken paws was irrelevant to MOFCOM's analytic framework, and hence not "material," because MOFCOM analyzed injury on an overall basis rather than on the basis of market segments.[333] Yet, USAPEEC was not asking MOFCOM to conduct its injury analysis based on market segments.[334] Rather, USAPEEC argued that subject imports could not have adversely

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329 China, First Written Submission, para. 432.

330 *Id.* at para. 434.

331 *EC – Tube or Pipe (Panel)*, paras. 7.423-7.424; *see also EC – Footwear (Panel*) at para. 7.844.

332 *Japan – DRAMs (AB)*, para. 159. *See also U.S. – Hot Rolled Steel (AB)*, para. 55 (based on Article 17.6(i) of AD Agreement).

333 China, First Written Submission, paras. 434-435.

334 Nor is it the United States' position that MOFCOM was required to conduct an injury analysis based on market segments, as China incorrectly asserts. China, First Written Submission, para. 435.

impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.[335] Discussing this argument would have entailed addressing the point that subject imports could not have been injurious given the disproportionate presence of parts that could not be supplied by domestic producers. No party suggested that MOFCOM was required to conduct a separate injury analysis of the chicken paw segment of the Chinese market.[336] Thus, China has failed to rebut the United States' demonstration that USAPEEC's argument concerning chicken paws raised a material issue that MOFCOM failed to address in the final determinations, much less resolve "in sufficient detail," in breach of Articles 12.2 and 12.2.1 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

V. CONCLUSION

253. For the reasons set forth, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and Antidumping 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 AD Agreement, the SCM Agreement, and GATT 1994.

335 *See* USAPEEC's Poultry Brief at 29-30 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 22 (USA-46).

336 For this reason, China's assertion that MOFCOM would have found even more injurious effects had it considered market segments is also irrelevant, as well as lacking in support from the record evidence. *See* China, First Written Submission, para. 436.