Business Confidential Information Redacted on Pages 27-28

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

(DS427)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS TO THE PARTIES

Public Version

May 15, 2017

TABLE OF CONTENTS

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
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, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – HP-SSST (AB)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
EC – Bed Linen (Article 21.5 – India) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (Article 21.5 – China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW

EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EC – Selected Custom Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007
Mexico – Beef & Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – AD/CVD	Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
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, adopted 23 August 2001
US – 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, and Corr.1
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.

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
CVD	Countervailing duties
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FWS	First Written Submission
Keystone	Keystone Foods, LLC (U.S. Respondent)
MOFCOM	Ministry of Commerce of the People's Republic of China
Pilgrim's Pride	Pilgrim's Pride Corporation (U.S. Respondent)
POI	Period of investigation
RID	Reinvestigation Injury Disclosure
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SWS	Second Written Submission
Tyson	Tyson Foods, Inc. (U.S. Respondent)

TABLE OF EXHIBITS

1.1 Articles 6.1/12.1 – Notice of the Information Required and Opportunity to Present Written Evidence

Question 1: Article 6.1 AD Agreement and Article 12.1 SCM Agreement refer to "notice" of information required. What is the meaning of "notice"?

a. Is there a difference between a requirement for a "notice" and a requirement for a "notification"?

b. If so, does the difference relate to the sequence in which a notice and a notification occur in respect of an event (before or after an event)?

Combined Response to Chapeau and Parts (a) and (b):

1. In the context of AD Agreement Article 6.1 and SCM Agreement 12.1, the term "notice" means to call to the attention of interested parties, or make them aware of, the *specific, precise* information that the investigating authority requires for its investigation or reinvestigation – and to do so *in advance*, such that interested parties are afforded the opportunity to defend their interests.

2. As discussed in paragraph 41 of the U.S. First Written Submission, the Appellate Body in multiple reports has emphasized that Article 6.1 of the AD Agreement, requires that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample' and "full," which supports the interpretation that the provisions are construed to provide "liberal opportunities for respondents to defend their interests."[1] This is consistent with Article 6.2, which provides that "{t}hroughout the anti-dumping investigation all interested parties shall have a *full opportunity for the defence of their interests*," to ensure that those parties' due process protections are preserved. This necessarily means that an investigating authority must provide notice to the parties sufficiently in advance to ensure those parties have an 'ample' and 'full' opportunity to present evidence and defend their interests.

3. The scope of the content subject to this obligation extends both to the specific information solicited by the investigating authority as well as the specific questions and requests posed by that authority to the entities from which it solicited information. Interested parties need to know the specific questions posed by an investigating authority in order to evaluate effectively whether the authority's information requests were flawed, whether the information sought was accurate or responsive to the request, etc. This is consistent with the text of Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement, which require investigating authorities to provide "notice of the *information which the authorities require*." As noted in the U.S. opening statement at the panel meeting, the obligation is not limited to simply ensuring notice of whether the investigating authority is requesting information generally, but also includes notice

[1] *U.S. – OCTG Sunset Reviews (AB)*, para. 241; *see also EC – Fasteners (AB)*, para. 609; *US – AD/CVD*, para. 15.23; *see also Mexico – Beef & Rice* (*AB*), para. 292.

of "the" information being requested itself. Knowledge of the precise parameters of an investigating authority's request for information is necessary to understanding the significance of and potential errors in the responses – and thus falls within the scope of the articles.

4. Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement do not mandate the specific means that investigating authorities must follow to provide sufficient advance notice. There may be multiple methods to provide notice, and whether that notice was sufficiently in advance such that it satisfies an investigating authority's obligations under the articles will depend on the specific factual circumstances. We stress that "notice" is distinct from merely making information available without calling that information to the attention of interested parties in an investigation. For example, an investigating authority's mere general pronouncement that information would be made available in an information room – without any action by the authority to call to the attention of interested parties when new information is made available – cannot satisfy the "notice" obligations under the articles. As the United States stressed in its opening statement, there is a difference between merely having a desk drawer that parties can access upon visiting a certain government building and providing *notice* to interested parties that the drawer contains new, relevant material that the parties should schedule a visit to review. Only with notice can parties take advantage of the former situation. Further, as noted in paragraph 27 of the U.S. Second Written Submission, that investigating authorities maintain procedures to keep track of documents does not mean that they thereby provide the notice that Articles 6.1 and SCM Agreement Article 12.1 require – i.e., notice that actually places a party in position to be aware of a pertinent circumstance.[2]

5. Moreover, as the United States notes in paragraphs 40 through 44 of the U.S. First Written Submission, Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement provide that interested parties are entitled (i) to notice of information required by the investigation authority *and* (ii) ample opportunity to respond. The dual obligations of these articles must be understood as operating in unison: the only way an interested party will have "ample opportunity to respond" is if the investigating authority affords that party *advance notice* of the information it requires for its investigation. Conversely, it is possible for an investigating authority to provide advance notice sufficient to satisfy the first obligation, yet still fail to satisfy the second obligation because it did not afford sufficient opportunity to comment on and respond to the information notified by the investigating authority. For instance, if the authority purported to afford interested parties the opportunity to respond to that information during a scheduled oral

---

[2] *US – OCTG Sunset Reviews (AB)*, para. 241 ("These provisions {AD Agreement Article 6.1 and 6.2} set out the fundamental due process rights to which interested parties are entitled in antidumping investigations and reviews."); see *Japan – Apples (AB)*, para. 126 ("By referring to the Panel's alleged failure to comply with Article 11 of the DSU only in the context of Article 2.2, Japan did not enable the United States to 'know the case {it had} to meet' as to the Article 11 claim related to Article 5.1 of the SPS Agreement. The Appellate Body has consistently emphasized that due process requires that a Notice of Appeal place an appellee on notice of the issues raised on appeal.)

hearing, yet during the hearing changed course and did not permit a meaningful opportunity for interested parties to provide comments, then the investigating authority would be in breach of the second obligation under the articles.

6. Finally, the scope of this notice requirement under the articles is not limited to the precise interested party from whom the information is requested. If that were the case, these articles would be superfluous because an investigating authority would necessarily have to inform a party of what information it was requiring that party to disclose in order to actually obtain that information.[3] This interpretation is further supported by paragraph 1 of Annex II to the AD Agreement, which provides a separate protection for parties becoming subject to facts available because they were unaware of the information sought from them. As noted by the Appellate Body, the "interested parties" to be provided information under these articles include not only those parties identified in the Agreements, see AD Agreement Article 6.11 and SCM Agreement Article 12.9, but also parties referred to in the antidumping duty petition and all interested parties that made themselves known to the competent authority.[4]

7. With regard to the difference between "notice" and "notification": yes, the ordinary meaning of the terms is different. "Notice" generally entails the provision of specific types of substantive information. And in a legal context, "notice" is considered one of the two basic elements of procedural fairness – namely, notice and an opportunity to be heard with respect to the matter. Accordingly, to effectuate procedural fairness, the notice must be provided in advance, so that an interested party has an opportunity to comment. In contrast, "notification" typically connotes the specific effectuation of providing some type of information – e.g., "the action or an act of notifying something."[5] Thus, a notification could be as simple, as for example, a message that some event has occurred in the past. Accordingly, the use of the term "notice" instead of "notification" in the relevant provisions is significant.

8. Putting this difference of ordinary meaning within the applicable interpretive framework, the United States recalls that under the customary rules of interpretation of public international law, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. As just noted, the ordinary meaning of the term "notice" confirms the interpretation the United States

---

[3] Moreover, this interpretation is supported by paragraph 1 of Annex II to the AD Agreement, which provides "As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response." In other words, there is a separate protection for parties becoming subject to facts available because they were unaware of the information sought from them.

[4] *See Mexico – Beef & Rice* (*AB*), para. 280.

[5] Shorter Oxford Dictionary, notification, p. 1946 (Exhibit USA-33).

has explained in its submissions.[6] As this question highlights, the contrast with the possible use of the term notification further supports this interpretation.

Question 2: What is the relationship between the first and the second obligations set out in Article 6.1 AD Agreement and Article 12.1 SCM Agreement?

a. Does a violation of the first sentence of Article 6.1 necessarily result in the violation of the second sentence of Article 6.1?

Combined Response to Parent Question and Subpart (a):

9. The United States references the pertinent sections of its opening statement at the Panel Meeting where it discussed this precise issue.[7] To recap briefly, when a Member breaches the obligation for interested parties to be "given notice of the information" the investigating authority requires, it also breaches the obligation to ensure that that the interested parties are given "ample opportunity to present in writing all evidence which they consider relevant…."[8]

10. The reason for this relationship is that an interested party is not afforded opportunity to present evidence when the information upon which it would be commenting is never presented at all, or is presented in such a way as to obstruct the interested party from obtaining an understanding of what information the investigating authority is seeking. Simply obtaining knowledge that information has been requested, without knowing the specific content of the information request, denies the interested party "ample opportunity." For example, the interested party would lack an understanding whether the information submitted is responsive to the investigating authority's requirements, and whether the methodology or assumptions employed by the investigating authority in its question with respect to its information requirements is correct. As the obligation for "ample opportunity to present evidence" is with respect to what the interested party deems "relevant," this obligation turns on that party's belief that the evidence is relevant, irrespective of the investigating authority's belief.

---

6 *See e.g.*, United States, FWS, para. 41; United States, SWS, para. 20; U.S. Opening Oral Statement, para. 45.

7 United States, Opening Oral Statement, paras. 45-48.

8 AD Agreement, Article 6.1 and SCM Agreement, Article 12.1.

Question 3: The United States does not dispute that notice of the information required could be given through a notice of initiation.[9] Is it correct, therefore, that the United States agrees that to comply with the first obligation in Article 6.1 AD Agreement/Article 12.1 SCM Agreement, notice can be given through instruments such as a notice of initiation?

Response:

11. Yes, the United States agrees that notice can be given through an instrument such as a notice of initiation. Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement do not specify the mechanism by which notice must be given, only that notice in fact is given. Thus, an investigating authority is not precluded from utilizing any instruments *a priori*, provided the chosen instrument is actually capable of conveying notice and the content does convey notice of what information the investigating authority requires.

12. The United States would emphasize, however, that that the relevant notice-of-initiation provisions (AD Agreement 12.1.1 and SCM Agreement Article 22.2) of course do not require an authority to provide notice of the authority's information requests. Accordingly, if an authority wishes for a notice-of-initiation to serve the additional purpose of compliance with AD Agreement 6.1 and SCM Agreement 12.1, the authority must ensure that the notice explicitly meets the notice requirements regarding required information.

13. Here, MOFCOM's Notice of Initiation for the reinvestigation did not provide notice to the interested parties of the pricing information that MOFCOM would require from Chinese domestic producers. The substantive content of the notice, other than the contact information, consisted of the following:

> On August 29, 2010 and September 26, 2010, the Ministry of Commerce respectively released annual announcement No. 52 and No. 51, deciding to impose countervailing and antidumping duties on imports of white feather broiler chicken products originated in the U.S.
>
> On September 25, 2013, WTO dispute settlement body passed the panel report on the dispute case of "China's antidumping and countervailing measures against white-feather broiler chicken products originated in the U.S.".
>
> According to the Regulations of the People's Republic of China on Antidumping and Countervailing Regulation of the People's Republic of China, and the Interim Rules for Implementing the World Trade Organization Rulings on Trade Remedy Disputes issued by the Ministry of Commerce, the Ministry of Commerce decides to reinvestigate this case in accordance with the rulings and suggestions in above relevant reports of WTO upon the date of issuance.

[9] United States, First Written Submission (FWS), paras. 11-14.

> The Ministry of Commerce will reexamine the evidence and information obtained in the original antidumping and countervailing investigations, and carry out reinvestigations through questionnaires, hearings, and other measures. For relevant investigation procedures, the Regulations of the People's Republic of China on Antidumping and Countervailing Regulation of the People's Republic of China, and regulations including relevant departmental rules and regulations of the Ministry of Commerce will apply mutatis mutandis.
>
> Any interested parties may refer to the public evidence and information via Trade Remedy Public Information Room of the Ministry of Commerce. The Ministry of Commerce will guarantee the legal rights of interested parties though such procedures as disclosing information and providing chances for statement of opinions and comments.[10]

14. Even if one undertakes a "careful reading" of this text as China urges the Panel to undertake, nowhere can one see the procedures MOFCOM intended to undertake to address price effects in the reinvestigation, let alone the actual questions reflecting the pricing information MOFCOM required from Chinese domestic producers in order to address the Panel's findings concerning product mix.[11]

15. The text of Notice 88 provides MOFCOM might carry out the reinvestigating through "questionnaires, hearings, or other measures," not the content of such instruments, which is what the notice obligation in these provisions require.

16. In sum, if an investigating authority chooses to use a notice of initiation to meet its AD Agreement 6.1 and SCM Agreement 12.1 obligations, then that notice must include "notice of *the information which the authorities require*" – not simply notice that the investigating authority may require information, of some sort. China did not do so in its notice of initiation issued in the context of this dispute.

---

[10] MOFCOM Announcement 88, Exhibit USA-1.

[11] China, First Written Submission (FWS), para. 49.

1.2 Articles 6.4/12.3 – Opportunities to See Information and to Prepare Presentations

Question 6: With respect to the pricing information, the United States claims that MOFCOM has not claimed that this information is confidential.[12]

a. Do you disagree with China's assertion that non-confidential summaries of the pricing information provided by the Chinese producers were made available in MOFCOM's trade remedy public information room[13]?

b. At paragraph 59 of the US opening statement, the United States indicates that MOFCOM was required to disclose the "full data". At paragraph 56 of its second written submission, the United States argues that the release of non-confidential summaries does not fulfil the obligation under Article 6.4.

i. Is the US claiming that MOFCOM was under an obligation to provide opportunities to US interested parties to see the Chinese domestic producers' confidential data? If so, is this claim made under Article 6.4?

ii. If the United States does not claim that US interested parties had a right to see the confidential data provided by the Chinese producers, could the United States explain whether the AD Agreement/SCM Agreement requires an investigating authority to expressly assert the confidentiality of the information in question? Could the United States refer to the provision of the AD Agreement/SCM Agreement that enshrines such a requirement?

Response to Part (a):

17. For two reasons, the United States does not agree that these summaries were made available.

18. First, MOFCOM has failed to provide any concrete evidence that the summaries it provided as exhibits to its First Written Submission were actually available in the reading room immediately after May 20, 2014 – the day immediately before MOFCOM issued its "Letter on Disclosure of the Determination Regarding Injury in the DS427 Broiler and Chicken Anti-dumping and Anti-subsidy Measure Reinvestigation." (Reinvestigation Injury Disclosure) (RID). Notably, the RID itself – the mechanism by which MOFCOM allowed interested parties to

[12] United States, FWS, para. 57.

[13] China, FWS, para. 90

provide comments on its injury findings – makes no mention as to the existence of these summaries.[14] China also cites Exhibit CHN-14, a screenshot of an online index, as its evidence that the summaries were made available in the public information room. Yet as noted in the U.S. Second Written Submission at paragraph 27, that screenshot is dated December 19, 2016. Therefore, this post-dated document cannot serve as evidence that the non-confidential summaries were made available more than a year and a half earlier, *i.e.*, on May 20, 2014. The United States notes that China has not provided any evidence regarding the operation of MOFCOM's online index, including in particular how often it is updated.

19. Indeed, the lack of evidentiary support for China's claim about placing these summaries in the reading room is also highlighted by the fact that such a claim is incongruent with how MOFCOM handled other non-confidential summaries produced in the reinvestigation. Specifically, as the Panel recalls, the United States in the original dispute challenged MOFCOM's failure to require non-confidential summaries with respect to information redacted in the Petition.[15] During the course of the reinvestigation, MOFCOM actually notified the United States through a telephone call that summaries had been prepared with respect to the Petition and were available for review *and comment* by interested parties. The United States in fact filed a request during the reinvestigation to allow further time for the United States to review these summaries in order to determine whether to prepare comments.[16] No such notice or procedure was afforded with respect to the summaries of pricing data obtained from Chinese producers during the course of the reinvestigation. China has not explained why MOFCOM would have avoided notifying interested parties likewise with respect to the summaries of the pricing data obtained in the reinvestigation – or why they would have any expectation the procedure for notice and comment would be different.

20. Second, the "availability" of a document is contingent on a party being aware that the document exists and is accessible. But here, China has produced no evidence to suggest that any interested party would have had any opportunity, let alone a "timely one," to know that these summaries existed – and that they could be found in the reading room. Indeed, by the timeline China now proffers, an interested party could have visited MOFCOM's reading room every day prior to the issuance of the RID,[17] and yet never have become aware of their existence.[18] Further, it is striking that the United States' statement on the RID explicitly complained about the lack of

---

[14] Exhibit USA-8. (the references to the information collected from Chinese domestic producers is on pages 7 & 18-19). None of these pages reference the existence of any summaries.

[15] *See China – Broiler Products*, section 7.2.2.

[16] Letter from C. Conroy to Y. Lijun (May 13, 2014) (Exhibit USA-34).

[17] Exhibit USA-8.

[18] China does not note what time these summaries were filed. An interested party that came in at 4:30 p.m. the day before the RID would have missed them if they were filed at 4:59 p.m.

transparency concerning the information solicited from Chinese producers – and yet there is nothing in the record to suggest that MOFCOM corrected this supposed misapprehension by alerting the United States and other interested parties to the non-confidential summaries. The U.S. statement noted the following:

> …{I}t is unclear what type of information MOFCOM solicited from Petitioner or collected from other sources during the reinvestigation. The disclosure simply provides:
>
> > 'In early May 2014, the investigating authority reinvestigated the petitioner enterprises including Beijing Huadu Broiler Company, Shandong Minhe Animal Husbandry Co., Ltd., Shandong Spring Snow Food Co., Ltd. and Great Wanda (Tianjin) Co., Ltd. The investigating authority conducted an investigation on relevant matters of this case and collected and looked up relevant evidentiary materials.'
>
> The disclosure provides no explanation or indication of precisely what these other "relevant matters" and "relevant evidentiary materials" are. To the extent MOFCOM reopened the record and solicited new evidence, interested parties have a right to know both of the record's reopening and of the type and nature of evidence MOFCOM obtained and relies on to support its injury determinations. Such knowledge is necessary so that interested parties would have an opportunity to address and rebut it if need be.[19]

As this statement shows, the United States complained that it had no understanding of what evidence was collected to sustain MOFCOM's injury findings. Yet there is nothing on the record to suggest that MOFCOM responded to the United States – or to any other interested party – by informing them that they could consult the reading room to obtain non-confidential summaries.[20]

Response to Part (b)(i):

21. The United States respects the importance of preventing the unauthorized disclosure of confidential information, and appreciates this opportunity to provide further clarity on its positions. In response to part (b)(i) of this question: no, the United States is not asserting that Article 6.4 of the AD Agreement imposed an obligation on MOFCOM to provide interested parties with the opportunity to see Chinese domestic producers' confidential data. As the United

[19] Exhibit USA-10, pp. 5-6

[20] Although the United States did not reference the data obtained from Chinese producers in its comments on MOFCOM's AD/CVD disclosure, the United States did explicitly note the confusion concerning the issuance of the RID and reminded MOFCOM of its obligations under Article 6.4 of the AD Agreement. Exhibit USA-7, pp. 2-3.

States clarified at the panel meeting, the statement in paragraph 59 of the U.S. opening statement was intended to apply only to non-confidential data. The issue is that there appears to have been non-confidential data that was withheld, such as MOFCOM's questions or forms issued to Chinese producers to obtain the pricing data and aggregate data reflecting the information received from the four producers. The problem of course is that MOFCOM's lack of transparency during the reinvestigation necessarily impedes anyone from knowing the full scope of what non-confidential information is missing.

22. In this respect, the United States recalls that in paragraph 56 of the U.S. Second Written Submission, the United States noted that the obligations incurred under AD Agreement Articles 6.2 and 6.4 and SCM Agreement Article 12.3 cannot *necessarily* be satisfied by the mere release of public summaries. With regard to the claims raised in this dispute under these articles, the United States' claims are grounded in MOFCOM's failure in the first instance to even inform the respondent interested parties of what pricing information they would be seeking for purposes of the redetermination, let alone who they would be seeking that information from, or how it would go about requesting the information. Had MOFCOM made this information available to the U.S. respondents and given them an opportunity to prepare presentations on the basis of this information in a timely fashion, *i.e.*, before it committed to asking the undisclosed questions to the undisclosed producers through an undisclosed means, then the United States would have been in a position to identify what other public information should have been provided – or ideally, persuaded MOFCOM to meet its obligations with respect to AD Agreement Article 6.4 and SCM Agreement 12.3.

23. In addition to breaching its obligations under those Articles by failing to provide the non-confidential information such as the information requests to Chinese producers, the United States notes again that MOFCOM further breached these obligations by failing to give the U.S. respondent interested parties a *timely opportunity* to see and prepare presentations on the basis of more precise information concerning the actual responses. Briefly, the United States summarizes the three reasons why even if one accepts, *arguendo*, that MOFCOM placed these summaries in the reading room, China would still be in breach of its obligations.

- First, even assuming MOFCOM placed the public summaries of these responses in the reading room on the day China says it did – the day before issuance of the Factual Disclosure – the mere placement without more is insufficient on its face. This is so because, having had no notice that MOFCOM was even surveying certain domestic producers, respondents would have no way of knowing that they should be on the lookout for those producers' questionnaire responses.

- Second, even if U.S. interested parties happened upon the summaries of these responses at the last minute – and there is nothing to suggest they did – they still would not have an opportunity to make timely presentations based on these summaries before MOFCOM issued its RID – a report which is essentially equivalent to a draft opinion.

- Third, as addressed in the U.S. second submission,[21] the content of these summaries omitted certain critical relevant information that does not, on its face, appear to be data that is "by nature confidential," such as: the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample. With respect to the actual raw data (rather than indexes), even if the individual company information was confidential, MOFCOM's record provides no explanation of why it could not have provided the actual aggregate data compiled from the raw data from the four producers.

Response to Part (b)(ii):

24. As the United States explained in its Second Written Submission, there must be some indication in the public record that these producers requested or expected confidential treatment for all data they submitted to MOFCOM based on good cause.[22] Thus, in response to the Panel's question as to whether the investigating authority must assert that the information is confidential, the answer is no; rather, it is generally the submitting party that asserts particular information is confidential.

25. To the extent that China relies on the non-confidential summaries of pricing data provided by China, that reliance fails to address the U.S. concerns regarding the questionnaire and verification questions themselves, as well as the aggregate data. Those summaries include, requests, in identical language by each producer, for confidential treatment for their individual "quantity, value and average unit price of the sales of the domestic product," and product coding, sales ledgers, and sales invoices.[23] Nowhere, however, does the record show that these firms requested confidential treatment for the verification questions, nor did MOFCOM indicate or explain why aggregate data for the four producers could not be made public.

26. Moreover, any argument by China that it was not bound to follow the requirements of Article 6.5 because claims under that article are outside the terms of reference in this proceeding is erroneous. As recognized by this Panel in its Preliminary Ruling dated March 22, 2017, the United States has presented a claim under Article 6.4, whose text incorporates a claim under Article 6.5. As noted by the Panel, the United States' Panel Request raised the following claim:

---

21 United States, SWS, paras. 57-58

22 United States, SWS, para. 46.

23 Exhibits CHN 4-7 (EN) at 5.

> *Articles 6.4 and 6.5* of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all *non-confidential* information that was relevant to their case and that was used by the investigating authority, and *MOFCOM treated information as confidential absent good cause*.[24]

27. In its Preliminary Ruling, the Panel found that the United States' Article 6.4 claims are within the terms of reference.[25] Although the Panel did not specifically address Article 6.5, the United States' panel request incorporates a claim that China failed to treat information as confidential based on good cause under Article 6.5. Moreover, the WTO has recognized that Article 6.4 requires investigating authorities to "provide timely opportunities for all interested parties to see and prepare presentations on the basis of 'all information' that meets" the requirements, which includes that the "information is *not confidential as defined in paragraph 5*."[26] This is made plain in the text of Article 6.5, which explicitly references that information subject to Article 6.4 is "not confidential as defined in paragraph 5."[27] As noted by *EC – Fasteners*:

> {T}he reference in Article 6.4 to information "that is not confidential as defined in paragraph 5" is properly to be as excluding from the scope of Article 6.4 information that has been accorded confidential treatment *in accordance with Article 6.5* – i.e., information for which good cause has been shown by the submitting party for confidential treatment, as determined pursuant to an objective assessment by the investigating authority. Conversely, if information has been accorded confidential treatment under Article 6.5 in a manner that does not conform to the requirements of {Article 6.5}, there is no legal basis for according confidential treatment and such information would, for the purposes of Article 6.4, be considered as information "that is not confidential as defined in paragraph 5.[28]

---

[24] *China – Broiler Products*, Preliminary Ruling, para. 2.22 (citing Original Panel Request, para. 4).

[25] *China – Broiler Products*, Preliminary Ruling, para. 2.26.

[26] *See, e.g*, *EC – Tube or Pipe Fittings (AB)*, para. 142; *see also EC – Fasteners*, para. 5.97; *EU – Footwear*, para. 7.601;

[27] *See Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82

[28] *EC – Fasteners (Article 21.5 – China)*, para. 5.101 (emphasis in original).

Question 7: With reference to paragraph 53 of the United States' first written submission, does the United States claim that pursuant to Article 6.4 interested parties should see the specific questionnaire or information request through which MOFCOM solicited information?

Response:

28. Yes, the United States understands that, pursuant to China's obligations under Article 6.4, MOFCOM needed to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and "that is used by the authorities in an anti-dumping investigation and to prepare presentations on the basis of this information." The information requests made by MOFCOM – whether through formal questionnaires or by other means – constitute information "relevant to the presentation of … {the interested parties'} cases." As noted in paragraphs 55 and 56 of the U.S. First Written Submission, knowledge of how questions were framed by MOFCOM to the Chinese domestic producers and what information MOFCOM sought to solicit from them is "relevant" because it would have facilitated the ability of interested parties to address the objectivity and adequacy of MOFCOM's reinvestigation, and whether it satisfied the requirements of the AD Agreement and the SCM Agreement. MOFCOM's information requests constitute knowledge of what the investigating authority believes is necessary for its determinations – and thus provide interested parties with information essential for them to address any methodological or other flaws in the investigating authority's assessment, and therefore are necessary to enable interested parties to defend their interests.[29]

29. As explained below in response to Panel question 8, these information requests were "used" by MOFCOM as that term is understood within the text of Article 6.4. Moreover, as noted in paragraph 57 of the U.S. First Written Submission and in the response to Panel question 6.b(ii) above, MOFCOM has *not* claimed that any of the information in its information requests is confidential under Article 6.5, such that it is outside the scope of "all information" under Article 6.4. Moreover, China has not – because it cannot – argue that the *questions* and *information requests* posed by MOFCOM contain confidential information. Because MOFCOM failed to provide interested parties with "timely opportunities" to see "all non-confidential information," it follows that MOFCOM deprived interested parties of the ability to "prepare presentations on the basis of this information." As noted in paragraph 62 of the U.S. First Written Submission, an investigating authority's obligation to ensure interested parties can

[29] *See* United States, SWS, para. 52 (As the Appellate Body has indicated, "the 'presentations' referred to in Article 6.4 . . . logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests" within the meaning of Article 6.2) (citing *EC – Tube or Pipe Fittings (AB)*, para 149; *EC – Fasteners (AB)*, para. 507).

"prepare presentations" is a direct corollary of its obligation to ensure access to that information, and a breach of the first obligation necessarily results in a breach of the second obligation.[30]

Question 8: Concerning the US claim of violation of Article 6.4 because interested parties did not have an opportunity to see the questions that MOFCOM put to the four domestic producers and the basis and methodology for selecting Chinese producers for collecting pricing data,[31] could the United States explain in what way these items of information were "used" by MOFCOM in the sense of Article 6.4?

Response:

30. This information (the questions and the basis and methodology for selecting Chinese producers for the collection of pricing data) was used because it was applied by MOFCOM to generate new injury findings. The fact that the information was used to obtain further information does not change the fact that it was used or that it was information; it only confirms its use. In this respect, it is important to recognize that the methodology for obtaining information is a type of information itself – and provides insights with respect to the utility and reliability of the data generated. Just as essential "facts" under Article 6.9 include not only the underlying data used to calculate dumping margins, but the calculations themselves,[32] information – which is a broader concept than facts – encompasses not only the submission of data, but the requisite requests and circumstances that caused it to be produced.

31. As the Appellate Body's analysis found in *EC-Pipe and Tube Fittings*, information is considered "used" within the meaning of AD Agreement Article 6.4 if it is related to a "required step" in an antidumping (or countervailing duty) investigation.[33] There can be no dispute that MOFCOM's information requests to Chinese producers constituted a "required step in the anti-dumping investigation." An investigating authority makes specific requests for information in order to obtain information that is responsive to its needs as part of its reinvestigation. Here, MOFCOM made specific requests for product-specific pricing data in response to the Panel's finding that MOFCOM's original analysis of price undercutting was deficient. Had MOFCOM not made such requests, it would have not been able to pursue its reinvestigation. It is logically inconsistent and erroneous to maintain that the information submitted by exporters and producers to the investigating authority satisfy the "use" requirement, and yet the underlying requests by

---

30 *See EC – Tube or Pipe Fittings (AB)*, para 149 (noting that the "'presentations' referred to in Article 6.4, whether written or oral, logically are the principle mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests.").

31 United States, FWS, paras. 53, 56, 150.

32 *China – HP-SSST (AB)*, para. 5.135.

33 *EC – Tube or Pipe Fittings (AB)*, para. 147.

the authority that obtained that information did not fall within a "required step in the anti-dumping investigation."

32. The same logic extends to the basis and methodology for selecting Chinese domestic producers for the collection of pricing data. As part of its anti-dumping investigation, MOFCOM needed to select producers from which it would seek information in the reinvestigation. This is a required step in the anti-dumping investigation, because had MOFCOM not made a decision as to what producers it would question and verify, the reinvestigation would have been unable to move forward. MOFCOM considered, as part of its reinvestigation, the information that informed its decision on selecting Chinese domestic producers – just as it considered the specific requests for information that it issued to those producers, in order to obtain the information relevant to its reinvestigation. Whether information is "used" under Article 6.4 does not depend on whether the authority *explicitly relied* on that information; rather, the scope includes "issues which the investigating authority is required to consider under the {Anti-Dumping Agreement}, or which it does, in fact, consider in the exercise of its discretion, during the course of an anti-dumping investigation."[34]

33. Here, as the United States explained in its First Written Submission, MOFCOM collected product-specific pricing data from only four of the twenty-one Chinese domestic producers included in the domestic industry to support its findings of purported price undercutting. Thus, the logic for selecting these particular firms, as well as the questionnaires MOFCOM utilized or the questions it asked are critical pieces of information that factored into MOFCOM's justification for maintaining its original findings of purported price undercutting, and thus critical for understanding whether that justification was the result of an objective examination based on positive evidence.

---

[34] *EC – Salmon*, para. 7.769 (emphasis omitted) (citing *EC – Tube or Pipe Fittings (AB)*, para. 147) ("Finally, the question of whether information is "used" by the investigating authority cannot be assessed from the perspective of whether the information is specifically referred to or relied upon by the investigating authority in its determination; if the investigating authority evaluates a question of fact or an issue of law in the course of an investigation then all information relevant to that question or issue that is before the investigating authority must necessarily be considered by the investigating authority, in order to make an objective and unbiased decision; consequently, whether information is "used" by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination.")

Question 9: Is the United States claiming a violation of Article 6.4 because of lack of timely opportunity to see information? If yes, please indicate where you have developed this claim in your submissions.

Response:

34. Yes, the United States claims that MOFCOM failed to provide "timely opportunities" for interested parties to see "all information" under Article 6.4. The U.S. First Written Submission develops this claim at paragraphs 51-53 and 62-65. For example, in paragraph 52, the United States addresses that the obligation concerns the right of interested parties "to a 'full opportunity' to defend their interests" during an investigation. If investigating authorities provide information in an untimely manner, then it logically follows that interested parties are deprived of the opportunity to defend their interests during the reinvestigation proceedings. The last sentence of paragraph 62 of its First Written Submission is particularly illustrative:

> In addition, China breached the obligation under AD Agreement Article 6.4 and SCM Agreement Article 12.3 "to provide timely opportunities" for interested parties "to *prepare presentations* on the basis of this information" because MOFCOM did not permit interested parties to see the information. MOFCOM's obligation to ensure interested parties can "prepare presentations" is a direct corollary of its obligation to ensure access to that information, and a breach of the first obligation necessarily results in a breach of the second obligation. If a party is denied access to information, then it follows that the party was also denied an *opportunity* to prepare a presentation on the basis of the information that it never saw.[35]

As is evident, the United States specifically highlighted the lack of an opportunity. The U.S. position is that no opportunity whatsoever of course means there was no timely opportunity as well.

35. The United States similarly notes that paragraphs 52 through 60 of its Second Written Submission make repeated reference to the "timely" obligations under Article 6.4. For instance, in paragraph 54, the United States argues that the "information sought by MOFCOM" from the Chinese domestic producers during the reinvestigation constitutes product-specific pricing data that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis" – and that because this information forms the basis for MOFCOM's price effects findings, the "timely" disclosure of information is necessary to allow U.S. interested parties to defend their interests. Moreover, in paragraph 55 of our Second Written Submission, the United States argues that, regardless of whether or not MOFCOM actually released information to its public reading room the day before it issued the RID, MOFCOM's failure to

[35] Emphasis original.

explain how it "notified" the U.S. interested parties of the release of this information "hardly reflects a "timely" effort by China to enable interested parties to review information relevant to the presentation of their cases – as required by AD Agreement Article 6.4 and SCM Agreement Article 12.3."[36] Further, as shown by the discussion in paragraphs 60-61 of the U.S. Second Written Submission, the issue of "timely opportunities" is one that the United States raised during the reinvestigation itself. For example, despite requests by the United States for transparency and advance notice of how the redeterminations would be conducted,[37] the respondent interested parties were given only one opportunity to address the injury investigation; and that opportunity was too late in the re-investigation to afford respondents a meaningful opportunity to comment.

Question 10: With regard to paragraph 59 of the US opening statement, does Article 6.4, as opposed to Article 6.1, require a notice of the interested parties? What is the basis for such a notice requirement in Article 6.4?

Response:

36. There is a notice component to Article 6.4, although it is different from the notice that is explicitly identified in the text of AD Agreement Article 6.1 and SCM Agreement Article 12.1. AD Agreement Article 6.1 and SCM Article 12.1 explicitly require "notice of the information which the authorities require." The requirement is thus explicit in substance and in scope. There must be notice of all information that the investigating authority requires.

37. In contrast, the notice requirement in AD Article 6.4 and SCM Agreement Article 12.3 is implicit and arises as a consequence of the obligation in these provisions for investigating authorities to provide "timely opportunities to see information" and "prepare presentations." Obviously, no opportunity whatsoever to see relevant information cannot constitute a "timely opportunity." Thus, there must be a point by which one can establish whether the opportunity was timely or not. That point is determined by reference to the moment the interested party should have had the notice that it needed to take advantage of the "opportunity to see information" that it is *relevant* and "prepare presentations on the basis of that information." As noted, if such a point cannot be established, then of course there was no opportunity, let alone a timely one. Thus, unlike the notice specified in AD Agreement Article 6.1 and SCM Agreement Article 12.1, the scope and character of the notice under AD Agreement Article 6.4 and SCM Agreement Article 12.3 is more flexible because it exists only to the extent necessary to permit the opportunity for the interested party to see relevant information. Here, because there is no

[36] *See also* United States, Opening Oral Statement at 58-59.

[37] See e.g., Exhibit USA-10, p. 5 ("MOFCOM's failure to conduct the reinvestigation in a transparent and fair manner has deprived respondents of a full opportunity for the defense of their interests. … By doing so, MOFCOM reduced the already insufficient time available for respondents to draft written comments and precluded respondents from addressing at the hearing any written comments submitted by petitioners.")

indicia as to when, or rather if, an interested party would know it could see information relevant to the presentation of its case – *i.e.* a lack of notice altogether – then there was correspondingly no opportunity, thereby resulting in a breach of AD Agreement Article 6.4 and SCM Agreement Article 12.3.

1.3 Article 6.9 – Essential Facts

Question 20: **In paragraph 67 of its oral statement and paragraph 87 of its second written submission, the United States refers to a "power of attorney". Is Exhibit CHN-10 the power of attorney on behalf of Keystone that the United States refers to?**

Response:

38. Yes, Exhibit CHN-10 is the document to which the United States refers when it references a "power of attorney" in paragraph 67 of its oral statement.

Question 21: MOFCOM indicated in its letter to the US embassy that the memorandum in Exhibit CHN-10 was not sufficient as a power of attorney. Did Keystone react to this letter?

Response:

39. To our knowledge, Keystone did not respond to MOFCOM's letter. However, the United States notes that Exhibit CHN-10 requests that MOFCOM contact Keystone's U.S. lawyer if it had any questions – and provides the name and contact information for this lawyer. Our understanding is that MOFCOM did not contact this lawyer with its purported concerns.

Question 22: What are the alleged essential facts the United States claims MOFCOM should have but did not disclose to Keystone?

Response:

40. The United States asserts that Keystone was denied access to the data and calculations utilized for determining its AD/CVD margins – including cost of production, normal value, export price, and any adjustments.[38] The "essential facts" that MOFCOM was required to disclose to Keystone under its Article 6.9 obligations include the specific data and calculations used by MOFCOM both in its original investigation and its reinvestigation. These "essential facts" include the data and calculations supporting its cost of production, normal value, export price, and dumping margin determinations for Keystone.

41. The Panel in the original dispute previously found that China acted inconsistently with its WTO obligations by failing to disclose this information from the original investigation. Specifically, the Panel found that, despite Keystone's submission of cost data in the original

[38] *See* United States, FWS, para. 68.

investigation, MOFCOM failed to indicate the data and calculations supporting its cost of production, normal value, export price, and dumping margin determinations for Keystone, because it deprived Keystone of any ability to "correct any perceived errors in MOFCOM's calculation of normal values" such that it could "defend its interests."[39]

42. Despite this finding from the Panel, MOFCOM has once again failed to disclose this information to Keystone, in contravention of Article 6.9. The United States emphasized, in paragraph 84 of its Second Written Submission, that Article 6.9 is a positive obligation that cannot be reduced depending on an interested party's level of cooperation. Article 6.9 requires MOFCOM to "inform interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[40] Even a party subject to facts available treatment is entitled to review the essential facts for its antidumping rate – even if the engagement is limited to seeking the correction of ministerial errors.[41] And the scope of these "essential facts" necessarily includes the data and calculations supporting its cost of production, normal value, export price, and dumping margin determinations for Keystone.

43. China is wrong in asserting that it satisfied its obligation to disclose "essential facts" by explaining why it resorted to facts available, *i.e.*, that Keystone allegedly chose not to participate in the reinvestigation.[42] As a preliminary matter, contrary to China's assertion, Keystone was a registered "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the antidumping duties imposed on Keystone.[43] Whether a Party is subject to facts available has no bearing on China's obligations with respect to ensuring the disclosure of essential facts. MOFCOM chose to maintain antidumping duty margins on Keystone, and the only way Keystone could defend against and respond to this substantial decision by MOFCOM was if it could review the calculations and underlying data supporting those determinations. As we noted in paragraph 81 of our Second Written Submission, China has not cited anything that suggests the application of facts available and the right to the disclosure of data and calculations are somehow mutually exclusive.

---

39 *China – Broiler Products*, para. 7.105.

40 United States, FWS, para. 78-79.

41 United States, FWS, para. 83.

42 China, FWS, para. 118.

43 United States, FWS, para. 78-79.

Question 23: The United States claims that Pilgrim's Pride's data from the original investigation should have been disclosed in the reinvestigation pursuant to Article 6.9.[44] Could the United States:

a. set out its interpretation of "essential facts under consideration which form the basis for the decision whether to apply definitive measures"; and

b. explain in what way the data in question were (i) "essential facts", (ii) "under consideration" and (iii) "form[ing] the basis for the [reinvestigation's] decision whether to apply definitive measures".

Response to Part (a):

44. As the Panel's question reflects, the text of the obligation requires investigating authorities to inform interested parties of "*essential* facts" that form the basis to apply definitive measures. The terms "essential facts" is central to interpreting the substance and scope of the disclosure obligation.[45] "Essential facts are 'those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome.'"[46] As found by the Appellate Body, the figures and calculations used to derive normal value, export price, and the antidumping margins constitute essential facts in this regard:

> Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping. The mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts.[47]

---

[44] United States, FWS, paras. 73-77.

[45] By its plain meaning, an investigating authority is not obliged to disclose information that is not a fact – such as an investigating authority's reasoning[45] nor every single piece of information gathered in the course of an antidumping proceeding. *See Argentina – Poultry*, para. 7.223.

[46] *China – HP-SSST (AB)*, para. 5.130 quoting *China – GOES (AB)*, para. 240.

[47] *China – HP-SSST*, para. 5.131.

The United States notes that the *China – HP-SSST* report also addressed the extent and nature of disclosure:

> While disclosure may take various forms, we note our agreement with the United States that, "{w}ithout a full disclosure of the entirety of the essential facts under consideration underlying the dumping determination, it is difficult to see how a party would be in a position to identify whether the determination contains clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Such failure to provide this information would result in an interested party being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests."[48]

This analysis comports with the text of the obligation, which provides that the "authorities shall … *inform* all interested parties of the essential facts…"[49] It cannot be the case therefore that an investigating authority can rely on references to information that an interested party might have or provide some form of roadmap by which the interested party can obtain some understanding of the dumping determination. The interested party is entitled to be *informed* of all of the essential facts, which in this dispute means that respondents are entitled to see all of the raw data that went into the margin calculations as well as the calculation methodologies and adjustments used to arrive at the dumping margin.

45. Moreover, the United States emphasizes that the obligation must be interpreted in conjunction with the second sentence of Article 6.9, which provides that the disclosure of essential facts "should take place in sufficient time for the parties to defend their interests," informs the scope of the obligation in the first sentence. As the Appellate Body explained in *China – GOES*, "{a}n authority must disclose {essential} facts, *in a coherent way*, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures{,} which "is paramount for ensuring the ability of the parties concerned to defend their interests."[50]

Response to Part (b):

46. As explained in the United States' written submissions, the data in question that falls within the scope of Article 6.9 includes the calculations, as well as the data underlying those calculations, that were relied upon by MOFCOM to calculate the normal value and export price

---

[48] Quoting U.S. Third Party Submission, para. 36.

[49] AD Agreement, Article 6.9 (emphasis).

[50] *China – Broiler Products*, para. 7.86 (citing *China – GOES (AB)*, para. 240) (internal quotation marks omitted).

of the respondents, including Pilgrim's Pride. As noted by this Panel, this requires an investigating authority to make a complete disclosure of margins and underlying data:

> the essential facts which must be disclosed include the *underlying data for particular elements that ultimately comprise normal value* (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); *export price* (including any information used to construct export price under Article 2.3); the *sales that were used in the comparisons between normal value and export price*; and any *adjustments for differences which affect price comparability*. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data. Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made, would also have to be disclosed. In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used, but also the formula being applied to compare them.[51]

Based on these findings, the Panel determined that "China acted inconsistently with Article 6.9 of the {AD} Agreement as MOFCOM did not disclose all of the essential facts" for Pilgrim's Pride, Tyson, and Keystone.[52]

47. During the reinvestigation, MOFCOM was required to disclose the same data in question, yet failed to do so. These data from the *original* investigation constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures," because the data were both *considered and relied upon* by the authority in its decision to apply definitive measures – as made plain by MOFCOM's admission that it had made an error in the *original* calculation, and that correcting that error would require upward revision of Pilgrim's Pride's dumping margin.[53]

48. As noted in paragraph 77 of the U.S. First Written Submission, the data at issue related to the original calculation are essential to understanding what adjustments MOFCOM made in its calculation of Pilgrim's Pride dumping margins in the reinvestigation. Without the data from the original investigation, Pilgrim's Pride had no ability to ascertain the accuracy of MOFCOM's

---

[51] *China – Broiler Products*, para. 7.91 (emphasis added). As noted in paragraph 71 of our Second Written Submission, the Appellate Body in *China – HP-SSST* endorsed this Panel's reasoning in a subsequent ruling.

[52] *China – Broiler Products*, para. 7.107.

[53] *See* Redetermination at pp.55-57 (Exhibit USA-9).

calculations in the original investigation and reinvestigation, and thus could not defend its interests. It is not possible to understand the facts that went into MOFCOM's decision-making in the reinvestigation absent the calculations and data underlying those calculations from the original investigation. That is why those facts are "essential." They are essential 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."[54] Only through disclosure of such essential facts are interested parties able to *defend their interests* – a right that the Appellate Body recognized as at the core of Article 6.9.[55]

49. Moreover, those facts certainly were "under consideration," because they form the platform on which MOFCOM discovered a purported error in the *original* calculations and subsequently revised Pilgrim's Pride's dumping margin from what it would have been *based on these calculations and data from the original investigation*. Pilgrim's Pride needed to know the precise alleged error in order to defend its interests. Finally, those facts "form the basis for the decision whether to apply definitive measures" because, as recognized by the Appellate Body, they inform and are "significant in the process of reaching a decision as to whether or not to apply definitive measures."[56] This Panel recognized as much, explaining that Article 6.9 requires the "disclosure of 'the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority."[57]

50. That MOFCOM was conducting a reinvestigation does not change the circumstances, since MOFCOM's analysis focused exclusively on a purported error in the *original* calculation. MOFCOM does not deny this fact, as evidenced by its recognition of the precise problem that necessitated the revised antidumping margin.[58]

---

[54] *China – Broiler Products*, para. 7.88 (citing *EC – Salmon*, para. 7.805) (internal quotation marks omitted).

[55] *China – GOES (AB)*, para. 240.

[56] *China – GOES (AB)*, para. 240.

[57] *China – Broiler Products*, para. 7.86 (citing Panel Report, *EC – Salmon*, paras. 7.796 and 7.805).

[58] *See* MOFCOM, Redetermination at 56 (When re-disclosing the dumping margin of the company in the original investigation, the investigating authority discovered that the calculation of the company's dumping margin is wrong. In order to execute panel's proposal on disclosure of basic facts supporting the determination of dumping margin, the investigating authority decided to correct relevant calculation errors in reinvestigation).

51. The scope of Article 6.9 equally applied to *new* calculations conducted by MOFCOM as part of its reinvestigation. MOFCOM asserts that it provided new calculations and a narrative description to Pilgrim's Pride on June 17, 2014. But the time for comments to MOFCOM had already elapsed by then. Indeed, as the redetermination notes, even the opinion presentation meeting on the dumping and subsidy reinvestigation was held on May 30, 2014.[59] Thus, even if Pilgrim's Pride had not needed the *original* calculations and underlying data to understand MOFCOM's decision to apply definitive measures – which the United States vigorously disputes – the new calculations themselves came too late for Pilgrim to defend its interests.

2.1 Article 2.2.1.1 – Cost Allocation

Question 24: The Panel understands that MOFCOM's analysis in respect of the allocation of Tyson's costs consisted of the following steps. With reference to the record of the reinvestigation, please confirm or clarify each step:

a. MOFCOM requested Tyson to provide a cost allocation between subject and non-subject merchandise based on MOFCOM's "clarification" of what constitutes "non-subject".

b. Tyson provided a value-based cost allocation as between subject and non-subject merchandise.[60]

c. In its cost allocation, Tyson distinguished between edible and inedible products. This was consistent with MOFCOM's "clarification".

d. In particular, in its cost allocation, Tyson considered feathers, blood and viscera as constituting "non-subject" merchandise.

e. Tyson allocated costs to these non-subject merchandise on a value-basis using a market price index for offal.

f. For subject merchandise, Tyson allocated costs on two bases: (i) For products other than chicken feet, wing-tips and gizzards, the normal sales value of the product, and (ii) for chicken feet, wing-tips and gizzards, the same market price index as for offal

---

[59] Redetermination, p. 7 (On May 30, 2014, on the request of the U.S. Government, the investigating authority held an opinion statement meeting for dumping and subsidy reinvestigation of this case.") (Exhibit USA-9).

[60] China, SWS, para. 175.

g. MOFCOM accepted Tyson's allocation between subject and non-subject merchandise as a first step. In its cost allocation, MOFCOM used the subject cost allocation provided by Tyson.

h. MOFCOM then took the subject merchandise cost of production arrived at through Tyson's value-based methodology based on MOFCOM's clarification, and divided it by the weight of the subject products (a whole broiler less the weight of feathers, blood and "non-subject" viscera).

General Comment

52. The Panel's question is a reasonable attempt to ascertain whether these steps are reflected in the record. This question pinpoints the problem with MOFCOM's approach and further confirms what the United States has explained at the outset of this proceeding: there is no reasoned or adequate explanation for MOFCOM's allocation of Tyson's costs.[61]

53. To recall, China in its submissions has argued that MOFCOM undertook certain steps for certain reasons. However, these are *ex post* arguments. But this proceeding does not involve an *ex post facto* analysis of what China's authority might have done. Rather, it is a review of what the record shows MOFCOM actually did, and actually explained, in the record of the redetermination. And, the arguments in China's submissions – as reflected by the lack of any citation – are without any basis in the record.[62]

54. What is on the record is evidence and argumentation by Tyson explaining the flaws in China's allocation methodology. For example, Tyson's disclosure comments explain why particular figures and data lead to an incoherent weight based methodology.[63] Likewise, exhibits such as CHN-41 confirm that Tyson produces non-subject merchandise including chicken heads, viscera, feathers, etc. Thus, there are more than plausible concerns raised with respect to MOFCOM's approach to allocating costs. Yet the record of the reinvestigation does not reflect any attempt by MOFCOM to grapple with these issues. Instead, we are left with China's *post*

---

61 United States, FWS, para. 94.

62 *See e.g.*, China, FWS, para. 166, China, SWS, para. 148, China, Opening Oral Statement, para. 18.

63 *See e.g.*, Tyson Disclosure Comments, p. 4 ("However, in the event that MOFCOM incorrectly continues to rely on a weight-based allocation, it must fully account for all products that are produced from the live birds that are processed into both subject and non-subject merchandise.") (Exhibit USA-6).

hoc arguments such as MOFCOM's attempts to make some type of accounting for only edible products.[64]

55. As recognized by the Panel in its original report, investigating authorities cannot be passive or allow a WTO panel to do their work for them:

> "{d}espite these indications that there were alleged shortcomings in the evidence submitted, MOFCOM did not directly address the competing plausible explanations of the evidence."[65]
>
> ***
>
> The Panel will not conduct a *de novo* review of the evidence. China provided, in its submissions, a discussion of the questionnaire responses and of the exhibits taken during verification. This is the type of discussion that we would have expected to find on the record of the investigation. However, during the investigation MOFCOM confined itself to conclusory statements.[66]

But that is precisely what China is seeking, again. If the record cannot substantiate China's claims concerning MOFCOM's actions, then there is no reason to evaluate them, let alone accept them.

Response to Part (a):

56. No, the United States is not in a position to confirm this step. China's briefing is inconsistent – and without any citation to the record – as to what, if any, actions MOFCOM took with respect to this purported "clarification." It is clear, however, that *Tyson* clarified that its reported costs – because they were based on value – would effectively include costs for non-subject merchandise:

> MOFCOM also claims that it has not included costs associated with non-subject merchandise because it took the reported costs for subject merchandise and divided by the reported weight of subject merchandise. MOFCOM fails to recognize that those reported costs were calculated using a value-based allocation. In other words, the meat costs MOFCOM relied on were based on allocating some costs to blood, feathers, viscera, etc. Those allocations are made in the normal

---

64 *See e.g.*, China, FWS, para. 166, China, SWS, para. 148, China, Opening Oral Statement, para. 18.

65 *China – Broiler Products*, para. 7.263.

66 *China – Broiler Products*, para. 7.265.

> books and records based on value not weight. These products tend to have low values relative to their weight. For example, they accounted for [[****]] by weight ([[****]]) but only 3% ($[[****]]) by value of the live birds delivered to a processing plant.[67]

MOFCOM's redetermination does not address this point, but rather gives wholly unrelated reasons for failing to act on the problem such as the puzzling notion that chickens may die en route to the processing plant.[68]

57. Moreover, the United States notes that per China's submissions, it appears that MOFCOM was not interested in obtaining and utilizing data regarding non-subject products:

> Thus, MOFCOM properly rejected the Tyson effort to ignore the fundamental distinction between the products under consideration and those not under consideration. MOFCOM took the costs for the product under consideration as reported by Tyson in its books and records, and then "consider{ed} all available evidence" on the proper allocation of those costs "provided that such allocations have been historically utilized by the exporter or producer".[69]

If China's intention was not to use data pertaining to non-subject products, then there is an inherent miscalculation since the joint costs of the chicken are used to produce non-subject merchandise – and they are being distributed to only certain products. (See Response to Question 34 below.) As the Panel may recall, the issue of Tyson producing non-subject merchandise was also confirmed in the original dispute with respect to Tyson's CVD calculation.[70]

---

67 Tyson Disclosure Comments, p. 5 (Exhibit USA-6).

68 MOFCOM Redetermination, p. 36 ("the investigating believes that the live chicken weight-based method is not reasonable for calculating chicken cost of every product model specifically on the grounds as follows: Firstly, the investigating authority discovered that the cost of live chicken transported to processing factories may incur weight loss caused by death of live chicken in the process of transportation from truck to factory, weight loss of live chicken from arrival at factory to the time immediately before slaughtering as well as loss generated due to unsuitability of live chicken for processing of the subject merchandise, but the alternative method of the live chicken weight-based method claimed by the company gives no consideration to the losses mentioned as above.") (Exhibit USA-9).

69 China, FWS, para. 178.

70 *China – Broiler Products*, para. 7.262 ("MOFCOM was aware that the scope of the investigation specifically excludes certain broiler products such as live chickens and sausages and pre-cooked products. MOFCOM was also aware that both companies produced live chickens that were processed into products other than those included in the scope of the investigation.")

Response to Part (b):

58. The United States is not certain as to the meaning of the question – specifically the reference to "between." Tyson provided the costs it kept in its books and records, which conforms to what is generally described as a value based allocation. The record demonstrates that Tyson explicitly noted that the reported costs being allocated by MOFCOM, by virtue of being from a value-based system, would mean that MOFCOM failed to control for the fact that certain products had low values with respect to their weight – and that adjustments would have to be made if a weight based allocation was maintained.[71]

Response to Part (c):

59. No, the United States does not agree that Tyson's cost accounting system was based on a divide between edible and inedible products.[72] To the extent the Panel is enquiring about Exhibit CHN-41, the United States agrees the term "inedible" does appear in entries, but that appears to be a description of the particular poultry part. For example, [[**********
****
**********]] The reference to "inedible" relates to the character and description of the product, not the accounting methodology. The United States notes that even in the original dispute, the United States explained that products classified as "offal" were subject to value based accounting by Tyson.[73]

60. Tyson did report product-specific costs for joint products based on how those costs were kept under its value-based cost allocation methodology.[74] Separately, Tyson reported the cost for the total bird – which included the raw material for all products. Tyson reported the total cost for

---

[71] *See e.g.*, Tyson, Disclosure Comments, p. 3-5. Exhibit USA-6.

[72] Further, the United States reiterates its position that China's briefing is inconsistent, and lacking citation to the record, as to what, if any, actions MOFCOM took with respect to this purported "clarification."

[73] *See* U.S. Response to Panel Question 89(a) in original dispute, para. 39 ("Second, the evidence on the record does not suggest anything "fictional" about the values utilized by respondents. For example, China complains that Tyson used an "offal price" to value paws. Tyson, however, explained that the "offal price" was based on sales in the United States. Tyson also noted that the Urner Barry service it utilized was the oldest commodity reporting service in the United States and that it obtained its data from various buyers, sellers and brokers. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price – and that Tyson's in fact sells paws as offal.")

[74] *See* Tyson, Response to Reinvestigation Questionnaire, p. 13, response to question 2 (Exhibit USA-24).

the chicken in the event that MOFCOM rejected Tyson's value-based allocation approach, and decided instead to adopt a weight-based allocation.[75]

Response to Part (d):

61. Yes, Tyson considered feathers, blood and other viscera as constituting "non-subject" merchandise.[76] The pool of costs reported by Tyson as subject merchandise, in response to MOFCOM's reinvestigation request, reflected the value of those products relative to the value of blood, feathers, etc. that were treated as non-subject merchandise in accordance with MOFCOM's instructions.[77]

Response to Part (e):

62. Yes. The costs reported by Tyson for all products reflected their relative value in the ordinary course of business – and consistent with Tyson's value-based allocation methodology.[78]

Response to Part (f):

63. The Panel is correct as to parts (i) and (ii) of this question.

Response to Part (g):

64. Yes. MOFCOM *accepted* Tyson's reported allocation between subject and non-subject merchandise. The United States reemphasizes that this reported allocation is based on Tyson's value-based cost allocation methodology. MOFCOM "accepted" the use of Tyson's value-based cost allocations to delineate between subject and non-subject products, which presumably caused the non-subject products to absorb far fewer costs than they would based on a weight-based allocation methodology. Despite relying on a *value*-based product delineation for subject and non-subject products, MOFCOM opted to distribute costs for subject products according to

---

[75] *See* Tyson, Response to Reinvestigation Questionnaire, p. 13, response to question 4; p.16, response to question 12 (Exhibit USA-24); *see also* Tyson, Response to Reinvestigation Second Supplemental Questionnaire, p. 7, response to question 7 (Exhibit USA-26).

[76] *See* Tyson, Response to Reinvestigation Questionnaire, p.15, response to question 8 (Exhibit USA-24).

[77] *See* Tyson, Response to Reinvestigation Questionnaire, pp. 15-16, responses to questions 8-11 (Exhibit USA-24).

[78] *See* Tyson, Response to Reinvestigation Questionnaire, p. 13, response to question 4; p.16, response to question 12 (Exhibit USA-24); *see also* Tyson, Response to Reinvestigation Second Supplemental Questionnaire, p. 7, response to question 7 (Exhibit USA-26).

weight – resulting in artificially inflated normal values for those products.[79] Therein lies the fundamental problem with MOFCOM's approach. All parts of a chicken, including both those for human consumption and those that are rendered, are joint products and a consistent, reasonable methodology must be used to allocate production costs to all such products. Under China's WTO obligations, MOFCOM was required to adopt a "proper" allocation of costs, which means MOFCOM needed to maintain a coherent methodology that allocates costs across all of the products.

Response to Part (h):

65. The Panel is correct. MOFCOM accepted Tyson's value-based allocation between subject and non-subject merchandise. MOFCOM then took the subject merchandise cost of production arrived at through Tyson's value-based methodology, and divided based on the weight of the subject products.[80]

Question 33: Does a finding on the coherence of MOFCOM's weight-based approach depend on whether the excluded by-products are characterized as "waste" or as revenue-generating?

Response:

66. No, whether or not excluded products, such as blood and feathers, are ***characterized by MOFCOM*** as waste or as revenue-generating has no impact on the coherence of MOFCOM's weight-based approach taken in this reinvestigation. The United States begins its response by noting the general issue with respect to the obligation under the second sentence of Article 2.2.1.1 and then addresses the specific issue of Tyson's methodology.

67. Under the second sentence of Article 2.2.1.1, the investigating authority is obliged to consider all evidence to reach "the proper allocation of costs." Because the pertinent issue is determining whether the allocation of costs is in fact "proper," the investigating authority needs to examine the evidence for how a particular cost has or should be assigned, and needs to explain its allocation methodology. If the product deemed waste has no sales value and incurs only a cost with respect to disposal, then the investigating authority – with explicit and clear explanation – might justify assigning a low (or even zero) percentage of costs to the waste product. On the other hand, if a product described as "waste" generates revenue, then it is hard to see how an authority could support a determination that the product should not bear some appropriate percentage of costs.

68. Thus, the key point is that the subjective description of whether a particular product is deemed by a producer "waste" does not have any bearing on whether the allocated cost is proper

[79] *See* Tyson Disclosure Comments, p. 5 (Exhibit USA-6).

[80] *See* Tyson Disclosure Comments, p. 5 (Exhibit USA-6).

or not. As the Panel may recall, it was China in the original dispute that claimed value based allocations were unreasonable precisely because they treated products such as paws as waste:

> First, costs assigned to wing tips, paws, and gizzards, each with an individual market, were not based on individual market prices for those products, but on a single generic (and ostensibly U.S.) market price for offal and effectively treated as a waste item, further adjusted by freight and processing costs. [81]
>
> ***
>
> Moreover, its offal credit valued specific poultry parts with unique markets and prices using a generic offal price – essentially a waste price. Thus, while the method was value-based, it did not necessarily reflect the relative sales value of the specific products in question. Tyson's standard cost methodology had the same problem in as much as it assigned a value to certain parts (i.e., non-boneless) based on a waste or "offal" price.[82]

Per China in the original dispute, it was not appropriate to accept low costs of production assigned to what it considered waste products – and that is why it needed to adopt a weight based allocation methodology. Yet in this proceeding, China is arguing the opposite – that MOFCOM needs to be able to discount the costs of certain products from its weight-based methodology because the producer purportedly considers them waste. This inconsistency in argumentation highlights the incoherence of MOFCOM's methodology. If MOFCOM truly believes that "{t}he weight-based method is more objective than the value-based method … and will not cause that part of products gets much more apportioned chicken cost, while other products get almost no apportioned chicken cost," then it needs to ensure that all the relevant parts are apportioned costs.[83]

69. Here, Tyson's data submitted to MOFCOM and relied upon by MOFCOM indicate that the purported byproducts at issue before this Panel under Article 2.2.1.1 – blood, feathers, etc. – generated revenue, as indicated by Tyson's accounting records. As cited during the Panel hearing, the questionnaires submitted by Tyson to MOFCOM during the reinvestigation indicate that blood, feathers, etc., indeed generate revenue.[84] MOFCOM chose to use these value-based,

---

81 China, Original First Written Submission (OFWS), para. 91.

82 China, OFWS, para. 101.

83 MOFCOM, Redetermination, p. 35 (Exhibit USA-9).

84 *See* Tyson, Response to Reinvestigation Questionnaire, pp. 5-6, 12-15 (Exhibit USA-24); Tyson, Response to Reinvestigation Supplemental Questionnaire, Response to Question 11 (Exhibit USA-25); Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 11

revenue numbers for blood, feathers, etc., and then distribute costs based on weight to the other products.

70. Furthermore, the joint products at issue are *not* treated as "waste," in Tyson's accounting system in the ordinary course of business. If the products were considered "waste," their costs would be reflected and incorporated in the costs of other products, such as chicken parts. That is not how they are accounted for, as indicated in Tyson's accounting records provided to the Panel in this compliance proceeding.[85]

71. The fact that MOFCOM appears to characterize the joint products at issue as "waste," as opposed to revenue-generating, is flatly contradicted by the record evidence, and regardless has no impact on the coherence of MOFCOM's purported weight-based approach. MOFCOM opted to use the value-based numbers provided by Tyson, which attribute revenue value to those products. How MOFCOM characterizes those products does not change the inherent inconsistency in MOFCOM's pseudo weight-based approach in this reinvestigation, which purported to take the aggregate cost of a chicken and split the costs proportionately across various chicken products on the basis of weight, but in reality did not split the costs in such a manner. In fact, MOFCOM argues that a weight-based approach is preferable to a value-based approach because it applies costs of the chicken equally across *all* products.[86] Yet MOFCOM did not spread the costs across all products, and instead relied on Tyson's value based numbers for blood, feathers, and other products, and then excluded those products from its weight-based allocation among all remaining products.

72. MOFCOM's defense of its weight-based approach focuses on divisions between what it claims are products under and not under consideration or subject and non-subject products. As we expressed during the Panel hearing and in our written submissions, none of those distinctions are relevant because MOFCOM accepted Tyson's revenue-generating data for the products at issue.

(Exhibit USA-26); Tyson, Response to Letter on Second Supplemental Questionnaire, Responses to Questions 11, 20 (Exhibit USA-16); *see also* Tyson, Disclosure Comments, p. 3-5 (Exhibit USA-6).

[85] *See* Tyson, Response to Reinvestigation Questionnaire, pp. 5-6, 12-15 (Exhibit USA-24); Tyson, Response to Reinvestigation Supplemental Questionnaire, Response to Question 11 (Exhibit USA-25); Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 11 (Exhibit USA-26); Tyson, Response to Letter on Second Supplemental Questionnaire, Responses to Questions 11, 20 (Exhibit USA-16); *see also* Tyson, Disclosure Comments, p. 3-5 (Exhibit USA-6).

[86] *See* China, OFWS, para. 133; *see also* Redetermination at Section IV(1) (Exhibit USA-9).

Question 34: Does the United States accept that Tyson allocated data according to MOFCOM's product definition?

Response:

73. No, the United States does not accept that Tyson allocated data according to MOFCOM's product definition. Rather, Tyson allocated costs for subject data based on a *value*-based cost allocation methodology, which takes joint costs from the whole chicken and assigns costs to all products that derive from the chicken. MOFCOM used Tyson's subject product definition – determined based on value – and instead applied a weight-based allocation to that definition, creating artificially inflated and distorted normal values.

74. As noted in response to question 24, Tyson provided costs for subject merchandise, but these costs were based on an allocation of value. By definition, value based allocations are taking joint costs from the whole chicken and applying them on a differential basis to the various products.

75. The following chart is illustrative. It assumes the overall cost for a chicken is $100 and that there are 5 products that are produced by this particular company. Products in blue are considered subject merchandise by the investigating authority while those in red are considered non-subject.

Product (All are 1 KG)	Allocation on Value (A)	Allocation on Weight (B)	Taking value based costs for subject merchandise and reallocating by weight to only subject merchandise (C)
Paws	$15	$20	$26.67
Wingtips	$15	$20	$26.67
Blood and Bones	$10	$20	__
Viscera, feathers	$10	$20	__
Breast	$50	$20	$26.67

In column A, the producer is allocating the $100 among the five products on a value based system. The cost of the products vary based upon their value. Chicken breast, for example, is assigned the highest cost. In column B, the $100 is divided on a proportional weight-based

system with each product getting the same cost according to the physical unit. Column C is what China appears to be claiming is appropriate.[87]

76. Specifically, China seems to be claiming that MOFCOM took only the value based costs for subject merchandise and distributed them by weight to just subject products because value based allocations are unreasonable for subject merchandise, but not non-subject products:

> The investigation authority only determined that, the cost allocation method of subject merchandise claimed by your company can't reasonably reflect the cost related to subject merchandise. The investigation authority didn't determine that the cost allocation method of other products derived from live birds is not reasonable.[88]

That argument is not logical and it certainly is not "proper." As the table demonstrates in Column C, only taking the value based costs of subject merchandise and redistributing them result in a higher and distorted cost of production. Moreover, it incentivizes the use of distortive scope determinations in order to create artificially high normal values.

77. The United States emphasizes that Tyson also reported the cost of the entire bird, which is the raw material for both subject and non-subject products, for use in a weight based allocation.[89] Had MOFCOM used that data, it would not have resulted in the inflation of costs caused by the approach taken by MOFCOM – which resulted from MOFCOM's reliance on the classification of subject merchandise pursuant to a value-based cost allocation, and its subsequent weight-based allocation of costs among products classified by Tyson based on value. Had MOFCOM used Tyson's reported cost for the total bird, and conducted a weight-based allocation of those costs, its approach would not have resulted in distorted normal values because it would have distributed costs across *all* products according to weight.

---

[87] China, SWS, para 178 ("MOFCOM reasonably and objectively accepted the Tyson normal system for dividing the costs into the subject and non-subject buckets, and then revised the allocation of costs among that subset of products that fell within the subject bucket.") The United States notes that neither Tyson, nor any other company keeps its "normal system" for accounting into subject and non-subject products. Investigating authority make that distinction.

[88] Tyson Disclosure at 20-21 (Exhibit USA-6); see also Redetermination at Section IV(1) (Exhibit USA-9).

[89] *See* Tyson, Response to Reinvestigation Questionnaire, p. 13, response to question 4; p.16, response to question 12 (Exhibit USA-24); *see also* Tyson, Response to Reinvestigation Second Supplemental Questionnaire, p. 7, response to question 7 (Exhibit USA-26).

Question 35: Does Tyson produce more than poultry?

a. If so, does this affect the US argument in respect of the coherence of a mixed value-based/weight-based allocation of costs to subject and non-subject merchandise?

Response to 35 and 35(a):

78. Yes, Tyson produces other proteins, such as beef and pork. However, these products are not produced at the same plants as poultry, and the related production costs for these other products are not recorded in the same cost centers as those used to report data to MOFCOM for poultry.

2.2 Article 6.8 – Facts Available

Question 42: **The United States argues that there is no evidence that MOFCOM took steps to evaluate and decide on the verifiability of Tyson's data. Why does the United States consider that the steps taken by MOFCOM to clarify the data provided by Tyson and reflected in the redetermination do not amount to actions to verify the data provided?**[90]

Response:

79. The record before MOFCOM – and specifically the questionnaires exchanged between Tyson and MOFCOM – reveal that MOFCOM did not meaningfully engage with the data submitted by Tyson in response to its requests, and therefore did not take actions to verify the data provided by Tyson. Before looking to the questionnaires, it is important to understand how Tyson maintained its cost data in the ordinary course of business, and how MOFCOM fundamentally altered the data it requested from Tyson between the original investigation and reinvestigation.

80. As explained in U.S. submissions, consistent with MOFCOM's requests during the *original* investigation, Tyson reported sales and costs data by the "parts" produced during the period of investigation, and each part covered numerous "product-brand codes."[91] Notably, China accepted and verified this cost reporting methodology from Tyson in the original investigation.[92] During the reinvestigation, however, MOFCOM instructed Tyson to (i) separately report meat costs (costs incurred *before* the split-off point of the chicken) and (ii) processing costs (certain production costs *after* split off for chicken parts) at each of its poultry

---

90 Redetermination, Exhibit CHN-1 (EN), p. 37-43.

91 *See* Tyson, Response to Reinvestigation Questionnaire, pp. 2-3 (Exhibit USA-24).

92 *See* Tyson's Disclosure Comments at pp.6-7 (Exhibit USA-6).

plants, which, based on MOFCOM's request, were to be further broken out by each production step.[93] In other words, MOFCOM requested that Tyson report sales and cost data at the *product-brand code* level, rather than the *part* level.

81. MOFCOM's request was unreasonable because it knew, based on the data submitted by Tyson in the original investigation, that Tyson could *not* report sales and cost data at the product-brand code level. MOFCOM knew that Tyson during the period of investigation (POI) had transitioned from a fully-absorbed cost system to a standard cost system, and that the former did *not* record the actual costs incurred, during the first half of the POI.[94] MOFCOM fully understood that Tyson uses a "Cascading cost system where actual costs are carried forward at every stage including feed mill, hatchery, grow-out, and processing plant."[95] Moreover, because the original investigation compared the entire cost of production for each product (materials and processing combined) with U.S. sales prices, MOFCOM did not request – nor did it need – separate processing and meat costs.

82. Yet during the reinvestigation, MOFCOM repeatedly insisted that Tyson separately report "pure meat costs" and "pure processing costs" at each cost center[96] – despite knowing that Tyson did not record in its business records the actual costs incurred at each cost center by product-brand code, and that Tyson was not asked to provide such information during the original investigation. Tyson had to create a methodology to attempt to satisfy MOFCOM's request for entirely different and new data.

83. MOFCOM's questionnaires and Tyson's responses make clear that MOFCOM took no meaningful steps to clarify and verify the data provided by Tyson in responses to MOFCOM's requests during the reinvestigation. Instead, MOFCOM repeatedly rejected Tyson's data,

---

[93] United States, FWS, para. 109 (citing Tyson's Disclosure Comments at pp.6-7 (Exhibit USA-6)).

[94] United States, FWS, para. 109 (citing Tyson's Disclosure Comments at pp. 6-7 (Exhibit USA-6)).

[95] *See* Pilgrim's Pride, Comments on MOFCOM Disclosure, Section VI, Question 11 (Exhibit USA-27); *see also* Tyson, Response to Reinvestigation Supplemental Questionnaire, Response to Question 17 (Exhibit USA-25); Tyson, Response to Letter on Second Supplemental Questionnaire, Response to Question 1 (Exhibit USA-16). MOFCOM never gave any indication, through clarification requests or other methods, that it had concerns, that it did not understand how Tyson maintained its costs. *See* Tyson, Response to Reinvestigation Supplemental Questionnaire, Response to Questions 2, 17 (Exhibit USA-25). During the verification, MOFCOM thoroughly reviewed Tyson's cost accounting system, including the way in which the costs of production reported in the responses could be tied to the product-specific costs kept in the ordinary course of business. *See* Tyson's Disclosure Comments at pp.6-7 (Exhibit USA-6). It would have been impossible to perform this sort of verification exercise without seeing the "cascading" of the costs, and that all costs incurred at one cost center (material costs and processing costs) were rolled-up into the meat cost at the next cost center.

[96] *See* Exhibit USA 24, Exhibit USA 25, Exhibit USA 26.

insisting that Tyson provide separate "pure" meat and processing costs when it had no capacity to do so – and accusing Tyson of somehow deceiving MOFCOM for failing to provide data it had no ability to provide.

84. In response to Section III(5) of MOFCOM's initial questionnaire (specifically, question 13), Tyson explained how its costs were reported in the original investigation (as reflected in Table 6-3), but that in response to MOFCOM's reinvestigation request, Tyson "has revised its reporting methodology to separately report costs incurred at the production stages identified in Exhibit 3-5.13."[97] In response to question 17 of MOFCOM's first supplemental questionnaire, Tyson provided supporting documents and explained further how it had revised its reporting methodology:

> In the response in the original investigation, Tyson reported only the final product cost in accordance with MOFCOM's instructions. The reported meat costs included all processing costs that were incurred for production processes prior to the ultimate production process. For example, the cost of labor and overhead for the evisceration process was included in the meat cost for the next stage in the production process, namely the cut-up process. In Tyson's initial response for the reinvestigation, in accordance with MOFCOM's instructions, Tyson separately reported meat and processing costs at each production stage. That is, the labor and overhead costs for a production process were not embedded in the meat cost when meat was used as an input to a subsequent production process.[98]

85. Specifically, and as explained in great detail by Tyson in response to the second and third supplemental questionnaires, the only way Tyson could provide data responsive to MOFCOM's reinvestigation request was to rely on the standard costs, which were only recorded during the latter half of the POI and reflect estimates as to what occurred at the particular segments. The standard costs reflect those available to Tyson at the time it prepared its responses to MOFCOM's reinvestigation, and did not cover the full 12 months of the POI. Tyson used these standard costs, which provide estimates of meat and processing costs at cost centers, to create allocation percentages for pure meat costs and processing costs by each production step, which it then applied to the total, actual production costs maintained in Tyson's records in the ordinary course of business – thereby enabling Tyson, to the best of its ability, to generate the specific costs MOFCOM requested. There was no other way to satisfy MOFCOM's requests using the information available. MOFCOM in the Second Supplemental Questionnaire – rather than seeking to engage Tyson on the data it provided – sought to shift blame to Tyson for not providing the precise data it was now asking for:

---

97 *See* Tyson, Response to Reinvestigation Questionnaire, p. 13 (Exhibit USA-24).

98 Tyson, Response to Reinvestigation Supplemental Questionnaire, Response to Question 17 (Exhibit USA-25). In the subsequent paragraph in this exhibit, Tyson highlights an illustrative example of how its cascading cost system operates.

> MOFCOM finds out that, both in the supplemental questionnaire and 2nd supplemental questionnaire of original investigation, MOFCOM has required your company to explain the content and reporting method of Table 6-3 and Table 6-4 in detail. In the meanwhile, Table 6-3 and Table 6-4 respectively requires your company to provide the material cost and manufacturing cost while your company has never indicated that part of processing cost was included in meat cost in Table 6-3. You didn't make such explanation in your comments. . . . Please reconfirm the detailed content of meat cost and processing cost filled in Table 6-3 of original investigation. In case that Table 6-3 of original investigation fails to reflect the meat cost (pure chicken cost) consumed and processing cost incurred in the production of each model of subject merchandise, please explain the detailed reason for your misrepresentation.[99]

In other words, MOFCOM claimed that it was misled by Tyson as to how Tyson's cascading cost system operates – in essence suggesting that it did not understand that Tyson's cost system does not separate meat and processing costs. MOFCOM's claim is not supported by the facts, which, as explained above, show that Tyson explained in the *original* investigation how its cascading cost system worked – and indeed MOFCOM *verified* its cost system. In response to MOFCOM's Second Supplemental Questionnaire, Tyson explained in detail how its cascading cost system works in the ordinary course of business – noting that it had provided such explanation in response to question 3 of the original questionnaire in the original investigation. Tyson also noted that MOFCOM verified this approach, citing MOFCOM's verification report.[100]

86. Moreover, in response to question 8 of the Second Supplemental Questionnaire, Tyson provided extensive detail and explanation on how it reported "detailed cost{s} broken out into each cost center" to satisfy MOFCOM's request in the reinvestigation.[101] Tyson explained that Table 6-3, as submitted in the original investigation, was "based on costs incurred at the last step of the production process{,}" and Tyson explained how "it used its standard cost records to allocate the costs to the various production steps{,}" as well as how it "determined the allocation percentage of the other (not meat) costs to each production step."[102] Tyson further stressed that

---

99 Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 1 (Exhibit USA-26).

100 Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 1 (Exhibit USA-26).

101 Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 8 (Exhibit USA-26).

102 Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 8 (Exhibit USA-26).

the "total costs that are being allocated using those percentages are the total costs that were reported in Table 6-3 and verified by MOFCOM."[103] Tyson cited and provided exhibits showing how the data was used in this manner – and how the total reported costs from the *original* investigation tie to the costs provided in the reinvestigation.

87. What is notably missing from MOFCOM's follow-up questions in the reinvestigation questionnaires is any attempt to 'clarify' and 'verify' the data provided by Tyson. Instead, MOFCOM continues to insist that Tyson needed to provide separate "pure" meat and processing cost data, without any attempt to clarify and verify what information Tyson had provided. This failure by MOFCOM is highlighted by Question 1 in MOFCOM's Third Supplemental Questionnaire in the reinvestigation, where MOFCOM again asks for the same separation of pure meat and pure processing costs, without addressing the comprehensive explanation provided by Tyson in response to the Second Supplemental Questionnaire.

> Question 8 of the second supplemental questionnaire required your company to explain the reason for adjustment of meat cost and processing cost for each code of product, as well as the detailed adjustment method in accordance with the coding sequence of product in Exhibit 3-5.13 of original response . . . . However, your company didn't provide the information based on requirement. This information is very important for the investigation authority to determine the complete production cost of the subject merchandise. Moreover, in the second supplemental questionnaire, the investigation authority has given your company enough time to prepare the response to this question. Considering that the response to this question will affect the determination of the production cost of your company, the investigation authority decides to give your company this chance to answer this question again.[104]

88. Despite MOFCOM's unwillingness to engage with the data provided by Tyson in the reinvestigation, Tyson nevertheless provided an even more thorough explanation in response to the question.[105] In particular, Tyson further reiterated how it reported pure meat costs in Exhibits SS-15 and SS-16 and processing costs by production step in Exhibit SS-17, and that it provided the raw data showing how it calculated and applied the allocation percentages.[106] Regardless of

---

[103] Tyson, Response to Reinvestigation Second Supplemental Questionnaire, Response to Question 8 (Exhibit USA-26).

[104] Tyson, Response to Letter on Third Supplemental Questionnaire, Response to Question 1 (Exhibit USA-13).

[105] *See* Tyson, Response to Letter on Third Supplemental Questionnaire, Response to Question 1 (Exhibit USA-13).

[106] *See* Tyson, Response to Letter on Third Supplemental Questionnaire, Response to Question 2 (Exhibit USA-13).

those efforts, it became apparent that MOFCOM would never be satisfied that Tyson did not keep cost data that separate pure meat and processing costs. Rather than (1) attempt to understand how Tyson's cost system operated in the ordinary course of business, (2) engage with that data, and (3) seek to clarify and verify where it had questions or concerns with Tyson's data, MOFCOM opted instead to reject Tyson's extensive efforts outright because they did not reflect the precise form of data that MOFCOM was now requesting in the reinvestigation – a request that was fundamentally different from what MOFCOM sought and Tyson provided in the original investigation. MOFCOM never provided an adequate explanation, either in the questionnaires or the redetermination, for why Tyson's extensive efforts to provide the data requested in the reinvestigation were not satisfactory, nor does it justify the application of facts available pursuant to the standards of Article 6.8.

Question 43: At paragraph 79 of its opening statement and paragraph 105 of its first written submission, the United States argues that:

> **China has failed to present any evidence that Tyson refused access to, failed to provide, or otherwise impeded MOFCOM's ability to obtain requested information – such that it could justify the application of facts available**

Is the United States arguing that MOFCOM acted inconsistently with Article 6.8 because the provision is not even applicable in this instance? If so, what is the basis for this statement?

Response:

89. The United States is not contending that Article 6.8 is "inapplicable", to the contrary, the Article 6.8 is directly applicable. In particular, a Member breaches Article 6.8 when it resorts to facts available without meeting the predicate set forth in that provision and Annex II.[107] The panel's analysis in *Argentina – Ceramic Tiles* is instructive:

> It is clear to us, and both parties agree, that an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the AD Agreement. Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.[108]

Here, MOFCOM's decision to apply fact available to Tyson is inconsistent with Article 6.8 because MOFCOM has not established that Tyson, as an interested party "refuse{d} access to, or

---

[107] In particular, the United States notes paragraph 3 of Annex II, which is cited in its Panel Request.

[108] *Argentina – Ceramic Tiles*, para. 6.20.

otherwise d{id} not provide, necessary information within a reasonable period or significantly impede{d} the investigation." Only when such conditions are present, as explicitly noted in Article 6.8, can an investigating authority make a determination on the basis of facts available. We apologize for any confusion in our opening statement and First Written Submission.

2.3 Article 9.4(i) – "All Others" Rate

Question 44: What, in the view of the United States, is the relationship between Article 9.4 and Article 6.8? In particular, does Article 9.4 provide for a cap that applies to an "all others" rate that is based on facts available?

Response:

90. The relationship between the provisions is that they should not apply concurrently to any particular producer or exporter where there are calculated rates for mandatory respondents that are not *de minimis* or zero. The text of Article 9.4 provides that it concerns the "anti-dumping duty applied to imports from exporters or producers not included in the examination…". Article 9.4 applies whenever the investigating authority has limited its examination in accordance with the second sentence of Article 6.10:

> … where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

As the Appellate Body has recognized, "Article 9.4 seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."[109]

91. The provisions of Article 6.8, however, concern the treatment of an interested party who has been asked to cooperate but chooses to "refuses access" or does "not provide, necessary information" or "significantly impedes the investigation." In contrast, the predicate for Article 9.4 is that the producer or exporter has not been examined because the investigating authority limited the examination in accordance with Article 6.10.[110]

---

[109] *US – Hot Rolled Steel (AB)*, para. 123.

[110] The United States notes there is a third category of producer and exporter, and again, the discipline that applies to it should not apply concurrently with Articles 9.4 and 6.8. These are unaffiliated producers and exporters who did not ship during the period of investigation, *i.e.*, new shippers. For those

92. With respect to whether Article 9.4 imposes a cap on a rate based on facts available, the answer is yes where there are calculated rates for mandatory respondents that are not *de minimis* or zero. The text of Article 9.4 provides that investigating authorities are capped at using a rate based on a weighted average margin of dumping provided "that the authorities shall disregard … any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6." Here, MOFCOM's determination did not suggest that it could not apply a rate consistent with Article 9.4(i). Thus, utilizing only a facts available rate, as MOFCOM has here, for producers and exporters that were not examined in the reinvestigation would not be consistent with Article 9.4.

3.2 Articles 3.1, 3.4 ADA/15.1, 15.4 SCMA – Impact Analysis

General Comment:

93. Before responding to the questions in this section, the United States reiterates a point made in its Opening Oral Statement that is applicable to the Panel's questions in this section: the United States is not suggesting – as China argues – that investigating authorities do not have discretion or that a complaining Party or a WTO Panel can substitute its judgment for that of the investigating authority.[111] Rather, as the United States has explained in its submissions, investigating authorities must base all aspects of their injury determinations on "positive evidence" and an "objective examination."[112] Further, under AD Agreement Articles 3.4 and 3.5 and SCM Agreement Articles 15.4 and 15.5, investigating authorities must objectively evaluate "*all* relevant economic factors and indices having a bearing on the state of the industry" and examine "all relevant evidence before the authorities," *including factors and evidence that reasonably detract from an affirmative determination*. As the panel explained in *EC – Tube and Pipe Fittings*:

> {w}here the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. [113]

producers, they are subject to the protections of Article 9.5 and can seek an expedited review to obtain their dumping margin.

[111] U.S. Opening Oral Statement, para. 5.

[112] AD Agreement Article 3.1 & SCM Agreement Article 15.1; *see e.g. EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 111 and 113; *Mexico – Rice (AB)*, para. 181; *US – Hot-Rolled Steel (AB)*, para. 193.

[113] *EC – Tube and Piper Fittings*, paras. 7.313-7.314.`

Thus, objective investigating authorities cannot ignore evidence that contradicts or undermines a finding of injury and causal link; rather, the determination must demonstrate through its explanatory force that the investigating authority considered all relevant economic factors and evidence and reached its conclusions notwithstanding conflicting evidence.[114] The U.S. responses to Panel Questions 47 and 48 highlight that MOFCOM failed to base its impact findings on an objective examination of positive evidence in that the facts do not support its analysis of the factors it relied on. MOFCOM also failed to show that it considered all relevant economic factors and evidence, by neglecting to explain how it considered and accounted for the relevant evidence that was inconsistent with its findings of injury and causation.

Question 47: We understand that the United States argues that MOFCOM relied exclusively (United States' first written submission, para. 170) or primarily (United States' first written submission, para. 182) on a flawed analysis of the decrease in capacity utilization and an increase in end-of-year inventories. How do you suggest that MOFCOM should have proceeded in weighing the various factors under consideration?

Response:

94. The United States is not suggesting that MOFCOM needed to ascribe particular weight to any specific factor, but that it needed to engage in some evaluation exercise whereby it explained why it found certain factors to be more persuasive in establishing the impact of subject imports than other factors that indicated otherwise. Such an exercise is necessary for MOFCOM to have acted consistently with China's obligations under AD Agreement Article 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4. Here, as reflected in the absence of MOFCOM's reasoning and explanations concerning "all relevant economic factors," no such exercise took place.

MOFCOM Ignored Factors Demonstrating Improvement in the Domestic Industry

95. First, MOFCOM based its impact finding on a highly selective analysis of the measures of industry performance, ignoring the many factors that improved dramatically during 2006-2008 in favor of those that worsened in the first half of 2009. Second, even with respect to the two factors that MOFCOM did rely on, its evaluation was flawed. Specifically, MOFCOM predicated its finding that subject imports adversely impacted the domestic industry throughout the period of investigation primarily, if not exclusively, on the domestic industry's "relative low level" of capacity utilization and the "upward trend" in industry inventory between 2006 and 2008.[115] As the United States has pointed out, however, the domestic industry's capacity

---

[114] *See China-HP-SSST (AB)*, paras.5.258, 5.263, 5.265, 5.271, 5.276; *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97.

[115] *See* United States, FWS, paras. 165-69; *see also* Redetermination at sections VI(III) ("The evidence above shows that, during the POI, in order to meet the requirement of the increase demand of the domestic market, the capacity, output and sales quantity go up and market shares, employment, average wages and productivity rise as well from 2006 to 2008. However, during the POI, the capacity

utilization would have increased substantially had the industry not expanded its capacity well in excess of demand growth during the period.[116] The industry's inventories remained low and stable as a percentage of production and shipments.[117] Third, MOFCOM acted inconsistently with the AD Agreement and SCM Agreement by basing its impact finding on a selective analysis of the domestic industry's financial performance, focusing on the first half of 2009, when the industry's losses increased, to the exclusion of the trend from 2006 to 2008, when the industry's losses narrowed.[118] Also missing from MOFCOM's analysis was any recognition that most measures of the domestic industry's performance improved dramatically during the bulk of the increase in subject import volume and market share, between 2006 and 2008.[119] Having failed to either evaluate "all relevant economic factors" or take into account all relevant evidence concerning the factors it did rely on, MOFCOM acted inconsistently with AD Agreement Articles 3.1, 3.4, and 3.5 and SCM Agreement Articles 15.1,15.4 and 15.5.

96. To have acted in accordance with its obligations, MOFCOM's determination should have demonstrated an evaluation of "all relevant economic factors." While it was within MOFCOM's discretion to weigh the various factors under consideration, had MOFCOM truly conducted an objective examination of all relevant economic factors and evidence, it would have addressed that the bulk of the increase in subject import volume, 90 percent of the total increase, and hence most of the alleged underselling, coincided with a dramatic improvement in the domestic industry's performance according to almost every measure between 2006 and 2008. An objective investigating authority would have considered this overwhelming evidence, and explained how it rationally arrived at its injury finding in the face of such evidence.

97. Instead, MOFCOM's redetermination failed to attach any weight to the facts showing that the domestic industry's performance strengthened between 2006 and 2008 according to most measures, including a 4.6 percentage point increase in market share, a 26.2 percent increase in capacity, a 28.2 percent increase in output, a 31.2 percent increase in sales quantity, an 88.6

---

utilization of the domestic like products is in a low level and the ending inventory continually increases."), VII(i) ("Under the impact of the large quantity and low price of the investigated products, sale price of like products in domestic industry has been subject to serious suppression. The sale price has been below the sale cost for quite a long time, and thus the domestic industry cannot reach a reasonable profit margin, and like products suffered loss from the beginning to the end. In view that the economic interest cannot be realized, the capacity utilization of like products in domestic industry cannot be applied, and in quite a long time has been on a relative low level.") (Exhibit USA-9).

116 *See* United States, FWS, paras. 172-76; United States, SWS, para. 173.

117 *See* United States, FWS, paras. 177-81; United States, SWS, para. 168.

118 *See* United States, FWS, para. 170; United States, SWS, paras. 167-70.

119 *See* United States, FWS, paras. 170-71; United States, SWS, para. 168.

percent increase in sales revenue, a 10.3 percent increase in employment, a 16.2 percent increase in productivity, and a 48.1 percent increase in average wages.[120] During that same period, the domestic industry's loss as a percentage of its sales income narrowing from 7.9 percent in 2006 to 4.7 percent in 2008, its return on investment improved from -13.42 percent to -12.18 percent, and its cash flow improved from negative 218 million RMB to positive 69 million RMB.[121]

98. Each of these factors merited attention in the form of an explanation as to how MOFCOM could sustain its impact findings in light of them. They received none other than a recitation of the facts. A determination simply reflecting that MOFCOM was aware of these factors – and chose to ignore them – is not consistent with an objective examination based on positive evidence.

MOFCOM'S Limited Examination of Only Two Factors – Inventories and Capacity Utilization – was Deficient

99. Second, MOFCOM, rather than explaining any of the foregoing factors and evidence, based its impact finding on a deficient analysis of the domestic industry's capacity utilization and inventories during the 2006-2008 period. MOFCOM should have recognized that the only two factors that did not exhibit a marked improvement between 2006 and 2008 – capacity utilization and end-of-period inventories – bore no relationship to the volumes or pricing of subject imports. The slight increase in the domestic industry's rate of capacity utilization from 78.72 percent in 2006 to 79.96 percent in 2008 resulted from the industry's expansion of its capacity (by 26.2 percent) well in excess of demand growth (which was only 17.0 percent).[122] Had the industry's capacity remained constant or increased at the same rate as demand, the industry's rate of capacity utilization would have increased just as substantially as other measures of the industry's performance, driven by the industry's 31.2 percent increase in sales and 4.6 percentage point increase in market share.[123] Subject imports did not prevent the domestic industry from increasing its sales and market share during the period.

100. Similarly, MOFCOM should have addressed that the absolute increase in the domestic industry's end-of-period inventories was accompanied by a similar increase in the industry's production and shipments between 2006 and 2008, such that inventories remained low and stable as a share of the industry's production and shipments. End-of-period inventories as a share of domestic industry production increased only from 2.9 percent in 2006 to 3.3 percent in 2008, while end-of-period inventories as a share of domestic industry shipments increased only from

---

120 Redetermination at sec. VI(iii) (Exhibit USA-9).

121 Redetermination at Section VI(III) (Exhibit USA-9).

122 Redetermination at sec. VI(iii)(4) (Exhibit USA-9).

123 United States, SWS, para.202.

3.2 percent in 2006 to 3.5 percent in 2008.[124] Neither the domestic industry's rate of capacity utilization nor its end-of-period inventories suggested that subject imports had any impact on the domestic industry between 2006 and 2008.

101. Absent a demonstration of some correlation between subject imports and trends in the domestic industry's capacity utilization and end-of-period inventories, MOFCOM cannot be said to have conducted an "objective examination" of these factors based on "positive evidence." Moreover, MOFCOM failed to explain in any reasonably discernible way why these two factors were so important in this industry as to outweigh all of the other factors that strengthened during the 2006-2008 period, suggesting that subject imports had no adverse impact on the domestic industry.

MOFCOM Did Not Objectively Examine The Entire Period Of Investigation

102. Finally, an objective investigating authority would have assessed the impact of subject imports on the domestic industry over the entire period of investigation (POI). [125] The record before MOFCOM showed that the domestic industry's worst performance during the POI occurred in 2006, before any increase in subject import volume and market share.[126] As subject import volume and market share increased between 2006 and 2008, the industry's performance, including its financial performance, improved markedly. Indeed, two-thirds of the increase in subject import volume over the 2006-2008 period occurred between 2006 and 2007, when the domestic industry's net loss as a share of sales narrowed dramatically from 7.9 to 0.35 percent.[127]

103. In light of this and other evidence that subject imports had no discernable impact on the domestic industry between 2006 and 2008, an objective investigating authority could not have found, without explanation, that subject imports had an adverse impact on the domestic industry based an evaluation of trends during the entire POI. Even to the extent that MOFCOM found that the much smaller increase in subject import volume in the first half of 2009 relative to the first half of 2008 (6.5 percent) had an adverse impact on the domestic industry, it should have, but did not, explain what had changed since the 2006-2008 period, when the much larger increase in subject import volume (47.2 percent) had no impact.[128] Absent such an explanation in either the original determination or the redetermination, MOFCOM could not have established

---

124 MOFCOM, Redetermination at secs. VI(III)(3), (5), and (14) (Exhibit USA-9).

125 *See* United States, SWS, para. 167.

126 *See* United States, FWS, para. 205 n.257.

127 Redetermination at Section VI(i)(1), VI(iii)(8) and (9) (Exhibit USA-9). Similarly, the domestic industry's largest net loss as a share of sales, in the first half of 2009, coincided with the second lowest alleged subject import underselling margin. *See id.* at Sections VI(ii)(3), VI(iii)(8) and (9).

128 *See* Redetermination at Section VI(I)(1) (Exhibit USA-9).

that the domestic industry's performance in the first half of 2009 reflected the impact of subject imports in a manner consistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Article 15.1 and 15.4.

Question 48: Please provide your views on whether there is an inherent contradiction in the US position that MOFCOM impermissibly focused on the first half of 2009, while at the same time basing the US argument on an assessment of injury factors for only part of the POI (2006-2008).

Response:

104. As an initial matter, the United States notes that it is not suggesting that MOFCOM should have focused exclusively on the 2006-2008 period while ignoring the data for the first half of 2009. In discussing the trends during the 2006-2008 period, the United State is merely highlighting that MOFCOM failed to explain the positive trends during this portion of the POI in evaluating the impact of subject imports on the domestic industry, when it should have taken into account both the 2006-2008 period and the first half of 2009. Thus, there is no contradiction in the U.S. position.

105. Similarly, the United States does not argue that MOFCOM should have based its analysis of the impact of subject imports on the domestic industry on an assessment of injury factors confined to the 2006-2008 period.[129] Rather, the United States emphasizes that an investigating authority cannot conduct the objective examination of positive evidence required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, nor evaluate "all relevant economic factors and indices having a bearing on the state of the industry" as required under AD Agreement Article 3.4 and SCM Agreement Article 15.4, without considering the relationship between subject imports and the domestic industry's performance over the entire POI.[130]

106. Indeed, a critical component of MOFCOM's impact analysis was its finding that subject imports adversely impacted the domestic industry throughout the POI, including during the 2006-2008 period.[131] As the United States has explained, however, MOFCOM's finding that subject imports adversely impacted the domestic industry during the 2006-2008 period was predicated on an erroneous analysis of capacity utilization and inventories, and failed to account

---

[129] *See, e.g.,* U.S. Opening Statement, para. 29.

[130] *See* United States, SWS, para. 167; U.S. Opening Statement, para. 29; *see also China – GOES (AB)*, para. 149.

[131] *See* Redetermination at sec. VII(ii) (Exhibit USA-9) ("the investigation authority holds that: 2006-2008, 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 conclude that the domestic industry did not suffer injury").

for the industry's strengthening performance during the period, in breach of AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.[132] Because MOFCOM's deficient analysis of the 2006-2008 period was integral to its conclusion that subject imports adversely impacted the domestic industry, the Panel should find MOFCOM's impact analysis inconsistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

107. MOFCOM acted inconsistently with those same articles in another critical component of its impact analysis, which was its focus on the domestic industry's performance in the first half of 2009, and the industry's increasing net losses after 2007.[133] China argues that MOFCOM was somehow entitled to restrict its impact analysis to those portions of the POI and injury factors that appeared to support its finding that subject imports adversely impacted the domestic industry, while merely referencing, without explanation, those portions of the period and injury factors that did not.[134] In seeking to square MOFCOM's results-oriented impact analysis with these obligations, China would effectively read the term "objective examination" out of AD Agreement Article 3.1 and SCM Agreement Article 15.1 and the term "all relevant economic factors" out of AD Agreement Article 3.4 and SCM Agreement Article 15.4.

108. As the United States has explained, an investigating authority may not limit its impact analysis to time periods in which the domestic industry's performance declined, or to declining injury factors. An examination that selectively chooses those time periods in which the domestic industry's performance is worst while ignoring those time periods in which the domestic industry is performing well is neither an "objective examination" under AD Agreement Article 3.1 and SCM Agreement Article 15.1, nor an objective evaluation of "all relevant economic factors." Under AD Agreement Article 3.4 and SCM Agreement Article 15.4.[135]

---

132 *See* Response to Question 47, above; United States, FWS, paras. 160-83; United States, SWS, paras.165-74.

133 *See* Redetermination at Section VI(III) (Exhibit USA-9); *see also* China, FWS, para. 350 ("MOFCOM also reasonably focused on the adverse condition of the domestic industry at the end of the period of investigation, noting the sharp deterioration in numerous indicators of domestic industry health in the first half of 2009."); China, SWS, para. 305 ("MOFCOM permissibly focused on the most recent period of time – the changes from 2007 to 2008, and from early 2008 to early 2009 – in the context of the period of investigation as a whole.").

134 *See* China, FWS, paras. 340-43, 348-50; China, SWS, para. 305.

135 *See* United States, SWS, paras. 166-67 (quoting *China – GOES (AB)*, para. 149).

109. Accordingly, in finding that subject imports adversely impacted the domestic industry in the first half of 2009 based on trends between the first half of 2008 and the first half of 2009,[136] MOFCOM needed to explain how it reached that conclusion in light of the evidence that 90 percent of the increase in subject import volume and market share, and thus most of the alleged underselling, coincided with strengthening industry performance between 2006 and 2008. MOFCOM certainly could not have found further support for its impact finding in the domestic industry's worsening net loss between 2007 and 2008,[137] without explaining evidence that nearly all other measures of industry performance strengthened between 2007 and 2008, including capacity, output, capacity utilization, sales quantity, market share, sales price, sales revenue, employment, productivity, average wages, and cash flow.[138] MOFCOM also needed to address evidence that two-thirds of the increase in subject import volume during the 2006-2008 period coincided with a dramatic reduction in the industry's net loss between 2006 and 2007, and that the industry's worst performance of the POI occurred in 2006, before any increase in subject imports.[139]

110. Despite this conflicting evidence, MOFCOM offered no explanation at all for how subject imports could have accounted for the domestic industry's performance in the first half of 2009 when most of the increase in subject imports coincided with strengthening industry performance over most of the POI. Instead, MOFCOM simply summarized the data and stated that "during the POI, in order to meet the requirement of the increase demand of the domestic market, the capacity, output and sales quantity go up and market shares, employment, average wages and productivity rise as well from 2006 and 2008."[140]

111. That lone sentence, MOFCOM's *only* reference of the domestic industry's strengthening performance during most of the period of investigation, fails to grapple with the fundamental lack of correlation between subject imports and industry performance during the period, particularly given the deficiencies in MOFCOM's analysis of capacity utilization and inventories. Accordingly, the sentence could not possibly constitute the "objective examination" required under AD Agreement Article 3.1 and SCM Agreement Article 15.1 or the "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" required by AD Agreement Article 3.4 and SCM Agreement 15.4. Hence, MOFCOM breached China's obligations under those articles by focusing its impact analysis on the domestic

---

136 *See* China, FWS, paras. 339-42.

137 *See* China, SWS, paras. 300, 305.

138 Redetermination at sec. VI(III) (Exhibit USA-9).

139 Redetermination at sec. VI(III) (Exhibit USA-9).

140 Redetermination at Sec. VI(III) (Exhibit USA-9).

industry's performance in the first half of 2009, and the industry's increasing net losses after 2007, without discussing conflicting evidence from other time periods.