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

(DS427)

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE PANEL'S QUESTIONS TO THE PARTIES

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TABLE OF CONTENTS

TABLE OF REPORTS iii

TABLE OF ABBREVIATIONS v

1.1 Articles 6.1/12.1 – Notice of the Information Required and Opportunity to Present Written Evidence 3

Question 1 3

Question 2 5

Question 4 6

1.2 Articles 6.4/12.3 – Opportunities to See Information and to Prepare Presentations 7

Question 5 7

Comments on Parts (a)-(d) 7

Comments on Part (e) 9

Question 11 10

Question 12 11

Question 13 12

1.3 Article 6.9 – Essential Facts 12

Question 15 12

Question 16 13

Comment on Part (a) 14

Comment on Part (b) 14

Comment on Part (c) 16

Question 19 16

2.1 Article 2.2.1.1 – Cost Allocation 18

Question 24 18

Comment to Part (a) 19

Comment to Part (b) 20

Question 25 23

Question 26 23

Combined Response to Questions 25 and 26 23

Question 28 24

Question 29 25

Question 30 25

Question 31 26

2.2 Article 6.8 – Facts Available 26

Question 36 26

Comment on Part (a) 26

Comment on Part (b) 27

Question 37 28

Comment on Part (b) 28

Question 40 29

Question 41 30

3.1 Articles 3.1, 3.2 ADA/15.1, 15.2 SCMA – Underselling Analysis 30

Question 45 30

Question 46 35

3.2 Articles 3.1, 3.4 ADA/15.1, 15.4 SCMA – Impact Analysis 39

Question 48 39

TABLE OF REPORTS

SHORT FORM	FULL CITATION
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
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 – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
Mexico – Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Complaint with Respect to Rice, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
Mexico – 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 – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW

US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005

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

Exhibit 35. Keystone Memorandum (May 21, 2014)

General Comments

1. The United States appreciates this opportunity to comment on China's Responses to the Panel's Questions. The United States' comments focus principally on points that China raises that may be pertinent and have not been addressed in prior U.S. submissions. Because many of the points that China raises have already been addressed by the United States in its prior submissions or are not relevant to the claims raised by the United States and the Panel's resolution of this dispute, the United States has not addressed all of the comments presented by China. Accordingly, the absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response. In particular, the United States will not be providing any comments on China's responses to Panel Questions 14, 17, 18, 24(c)-(h), 27, 32, 37(b), 38, and 39.

2. Before proceeding to address China's specific responses, the United States addresses an overarching issue involving China's latest submission – namely, China's inclusion of 15 exhibits as part of its responses to the Panel's questions. China has provided these exhibits after failing to include them previously with its submissions or to provide and reference them as requested by the Panel at the meeting with the Parties. The United States notes two points concerning China's attempts to provide these documents at this stage of the proceedings.

3. First, these exhibits do not – because they cannot – change the analysis and findings (or lack thereof) that are reflected in MOFCOM's redetermination. As the United States will discuss below in its specific comments to China's responses, the use of these exhibits is often an attempt to vindicate the *post hoc* arguments China has made in this dispute. For example, when China claims that Tyson's "cost information was always deficient, misleading, and inconsistent," China does not cite to the redetermination to justify such a sweeping assertion.[1] Put plainly, China cannot now try to provide certain aspects of Tyson's data and ask the Panel to act as an investigating authority to determine whether the arguments it makes in this dispute are indeed plausible. MOFCOM was responsible for identifying any problems in the record before it and explaining how its actions appropriately addressed those problems. In contrast, the Panel's task is to engage in "critical and searching" scrutiny of MOFCOM's explanations to determine whether they are "reasoned and adequate."[2] If there are no explanations in MOFCOM's redetermination, then no amount of words by China proffered in this dispute can remedy that deficiency.

4. Second, the United States notes that China's provision of exhibits at this late stage raise concerns relating to procedural fairness. The Panel's working procedures state:

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1 China's Reponses to Panel Questions, paras. 139-140

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

> Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause.[3]

The United States notes that many of these exhibits would appear to contravene this rule. For example, there is no reason that the purported Pilgrim's Pride disclosure document that China has submitted with its responses to the Panel Questions should be submitted at this late stage. Indeed, it appears China is in fact reversing its position made earlier in the dispute. For example, China's submissions asserted it was not obliged to disclose to Pilgrim's Pride its margin data and calculations in the original investigation, but rather only those for the reinvestigation.[4] Now, China asserts it did in fact provide such information.[5] Although the United States will demonstrate below why that is not the case, the Panel is not obliged to sort through China's conflicting accounts and its late proffers of supposed evidence. It is China that needs to show good cause for why this new evidence should be considered now. Considering the reinvestigation was a proceeding designed to specifically address WTO inconsistencies found in the original dispute; that China had two submissions and its oral statement to provide this evidence; and that China was specifically requested by the Panel at the Panel meeting to proffer it then and there, there is no good cause.

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[3] Panel's Working Procedures, para. 8.

[4] *See e.g.*, China, Second Written Submission (SWS), paras. 104-106.

[5] China, Response to Panel Questions, paras. 26-40.

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)?

Comment on China's Responses to the Parent Question and Parts (a) and (b):

5. The United States addresses three aspects of China's response. First, China asserts that the term "notice as used in Article 6.1 is not expressly defined."[6] This argument is unconvincing – the vast majority of the terms used in the WTO Agreement, or in most any treaty, are not expressly defined. It is for this very reason that the customary rules of interpretation of public international law[7] provide that a treaty shall 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 the light of its object and purpose."[8] Put another way, the absence of an express definition certainly does not mean that the interpreter may adopt a meaning that would render a term inutile, nor provide a Member license to interpret a term without regard to the applicable rules of treaty interpretation. As explained by the United States, under customary rules of interpretation, notice entails provision of information in a manner that allows a party to be heard on a matter.[9] To be heard on a matter requires that a Party become aware – *i.e.*, receive notice – in advance of the matter becoming settled. Indeed, other aspects of China's response to this question demonstrate why the U.S. position is correct.

6. Specifically, China asserts in its response that the purpose of Article 6.1 "is not to provide parties 'with 'indefinite' rights so as to enable {the submission of} relevant evidence,

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6 China's Reponses to Panel Questions, para. 1.

7 DSU Art. 3.2.

8 *See US – Gasoline (AB)*, p. 17 quoting Vienna Convention Law of Treaties Art. 31 and noting the rules "has attained the status of a rule of customary or general international law."

9 United States Response to Panel Questions, paras. 1-8.

attend hearings, or participate in the inquiry as and when they choose…'"[10] The United States is not arguing, however, that parties are entitled to "indefinite rights". The United States is not arguing, however, that parties are entitled to "indefinite rights". China's argument fails to correspond to the context of the AD Agreement, namely, under the relevant context – that is, the procedural provisions of the AD Agreement – a right to submit evidence, attend hearings, and participate does indeed exist. In this dispute, the issue is not whether MOFCOM provided interested parties multiple opportunities, but that there was no opportunity whatsoever because of the absence of any "notice" concerning the information that MOFCOM required from Chinese domestic producers during the reinvestigation.

7. Second, China asserts that the U.S. interpretation would impose a burden on investigating authorities[11] and is "unworkable."[12] This argument likewise ignores the context provided by the procedural provisions of the AD and SCM Agreements. These agreements impose discipline on the use of antidumping and countervailing duty measures, including providing detailed rules on procedural fairness, and thus of course entail burdens on investigating authorities. The issue is not whether providing "notice" is a burden in the abstract, but whether it is required under the proper interpretation of the agreements. As explained in prior U.S. submissions, Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement would mandate notice to all interested parties of the pricing data MOFCOM required from Chinese domestic producers.[13] Moreover, the United States notes that China has failed to explain why this purported "burden" is in any way onerous or unreasonable. Indeed, simply sharing the precise information requests to solicit information from the Chinese domestic industry – requests that had to be prepared anyway – with the other interested parties would involve hardly any burden at all.[14]

8. Third, China argues that the use of the term "notified" in Article 12 of the AD Agreement and the term "sufficient advance notice" in paragraph 5 of Annex I of the AD Agreement support its interpretation. China does not explain how though.[15] Indeed, the usage and specific

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[10] China's Reponses to Panel Questions, para. 1, quoting *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.120.

[11] China's Responses to Panel Questions, paras. 5-6.

[12] China's Responses to Panel Questions, para. 3.

[13] *See e.g.*, United States, First Written Submission (FWS), para. 40; United States, Opening Oral Statement, paras. 53-54.

[14] The United States notes that China has not argued that the information requests contain confidential information, as recognized under AD Agreement Article 6.5 and SCM Agreement 12.4, as a basis for withholding them from other interested parties.

[15] China's Responses to Panel Questions, para. 3.

obligation would appear to run contrary to China's position. For example, AD Agreement Article 12.1 (and SCM Agreement 22.1) provide that interested parties are to be "notified" of an investigation's initiation. The usage of the term "notified" in those provisions comports with what the United States explained in its response to this question – that the term "notified" could be construed to cover even something that has occurred in the past[16] – in that instance of the investigating authority's determination that there was sufficient information to initiate an investigation. In contrast, AD Agreement Article 6.1 and SCM Agreement Article 12.1 use the term "notice." "Notice" must be construed in the context of procedural fairness; notice facilitating the "opportunity" referenced in the latter part of the provisions.[17]

9. China fares no better with respect to its invocation of paragraph 5 of Annex I. The text of this provision concerns affording "sufficient advance notice" to the particular firms that are subject to an on spot visit (verification) made by the investigating authority. The contextual usage of "notice" in that provision – planning for a verification – is clarified by the addition of the terms "sufficient advance." These additional words make crystal clear the investigating authority cannot simply give a few minutes notice to the firm before it undertakes the visit. The clarification in this provision does not suggest that the term "notice" in AD Agreement Article 6.1 and SCM Agreement Article 12.1 should be interpreted any differently than the United States has demonstrated under customary rules of interpretation. As the United States has explained, the usage of "notice" in AD Agreement Article 6.1 and SCM Agreement Article 12.1 concerns procedural fairness and is ascertained as sufficient with respect to whether it provides the "opportunity" the latter part of the provision requires. In short, China has still provided no basis for an interpretation of AD Agreement Article 6.1 and SCM Agreement Article 12.1 that excuses MOFCOM's failure to alert U.S. interested parties of the information it required from Chinese domestic producers.

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):

10. China asserts in its response that the "evidence contemplated in the second obligation may be broader than the first obligation related to notice" and that as a consequence, "{t}here is

[16] United States, Response to Panel Questions, para. 7 ("In contrast, "notification" typically connotes the specific effectuation of providing some type of information – e.g., "the action or an act of notifying something." Thus, a notification could be as simple, as for example, a message that some event has occurred in the past.")

[17] United States, Response to Panel Questions, para. 2.

no direct or exclusive linkage" between the obligations.[18] China thus presents a Kafkaesque interpretation, whereby it is acceptable for a party to be tried unaware of the charges against it provided the party can still submit a brief. The text of the provisions do not support this absurd result.

11. The error in China's assertion begins with its failure to recognize that the term "evidence" in the provision is part of an "opportunity to present evidence." The United States agrees that the notion of evidence is broad – it is whatever the interested parties "consider relevant."[19] And, the "opportunity to present evidence" is necessarily impeded when an interested party does not have notice as to what information the investigating authority requires. Even if the interested party sees the information at issue, the interested party still requires notice in order to ensure its opportunity to present evidence is vindicated. For example, absent notice, the interested party lacks the ability to understand the scope of the information that the investigating authority considers to be significant (and what evidence might rebut it) or whether the investigating authority's request for information itself might be flawed, in which case AD Agreement Article 6.1 and SCM Agreement Article 12.1 provide a venue to demonstrate the limitations of the information requested and the evidence supplied in response to those requests. Thus, China's interpretation lacks any support in both text and logic.

Question 4: What is the textual basis in Article 6.1 for China's proposition that the obligation to give notice differs between the interested party from whom information is required and the other interested parties from whom information is not required?

Response:

12. China asserts that the term "notice" may be both a noun or a verb implying some sort of flexibility in its meaning.[20] As an initial matter, China fails to explain why such a distinction would mean that the notice should vary between the party from whom information is requested and other interested parties. In any event, the premise of China's statement is incorrect. In the context of these provisions, the term "notice" is clearly a noun. The text does not provide that "interested parties notice information the investigating authorities require," but rather that "interested parties are given notice."[21] The text of the provisions do not permit any distinction in notice between the parties from which information is required or any other party.

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18 China, Response to Panel Questions, para. 6.

19 AD Agreement Article 6.1 and SCM Agreement Article 12.1.

20 China, Responses to Panel Questions, para. 10.

21 AD Agreement Article 6.1 and SCM Agreement Article 12.1.

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

Question 5: According to China, MOFCOM solicited and collected additional pricing information from four domestic Chinese producers during the reinvestigation.

a. When did MOFCOM decide what additional information was required?

b. When did MOFCOM decide that the required information would be collected during "verification" visits at the beginning of May 2014?

c. What information exactly did MOFCOM require of the domestic Chinese producers?

d. When did MOFCOM require that information of them?

e. In the light of the above, what is the earliest point at which US interested parties could learn through MOFCOM:

i. that MOFCOM required additional information from the domestic Chinese producers; and

ii. an understanding of what information MOFCOM required from the domestic Chinese producers?

Comments on Parts (a)-(d):

13. China's responses to these questions reveal that MOFCOM could have provided the U.S. respondent interested parties with timely notice of the information it would require of domestic producers, but instead declined to do so. Specifically, China states that MOFCOM decided that data on the volume and value of specific broilers products would be collected through verification visits to four of the 21 domestic producers "prior to release of the General Verification letter on February 19, 2014."[22] MOFCOM was therefore in a position to provide notice to "all interested parties" of the information it would require, and the four domestic producers selected for verification, prior to February 19, 2014, which was two and a half months before the first verification took place, on May 7, 2014.[23] China has failed to explain why notice could not have been provided around that time.

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[22] China, Responses to Questions, paras. 12-13.

[23] China, Responses to Questions, para. 15.

14. Instead, China asserts in response to question 5(c) that the only documents released by MOFCOM relating to the exact information MOFCOM required were what China dubs the "verification reports" – or more accurately, the attempts to summarize the pricing data MOFCOM solicited to justify its price effects findings. These reports were allegedly placed in the public reading room on May 20, 2014.[24] By China's own admission, MOFCOM never placed anything in the reading room concerning its intended methodology, the selected producers, or the questions and information it was seeking from these producers. As the United States has explained – even putting aside the issues concerning the availability and lack of opportunity to comment on the after-the-fact verification exhibits – these exhibits did not, and could not, constitute timely notice of the information MOFCOM would require.[25] Nor did the exhibits even provide notice of the exact information MOFCOM sought from the four domestic producers, as the precise requests themselves were not discernible from the public summaries.[26]

15. Furthermore, by the time the summary of the verification exhibits was allegedly placed in the reading room, one day before MOFCOM's issuance of the injury disclosure, it was too late for U.S. respondents to "present in writing all evidence which they consider relevant in respect of the investigation in question" – even if they had somehow become aware of them.[27]

16. Assuming *arguendo* that U.S. respondents found such summaries, it was too late for U.S. respondents to present evidence that MOFCOM was not collecting pricing data that was representative or responsive to the Panel's findings and conclusions.[28] U.S. respondents would have needed to present such evidence well in advance of MOFCOM's collection of product-specific pricing data, beginning on May 7, to have any chance of influencing MOFCOM's methodology. By May 20, 2014, when the purported summaries of the verification exhibits were allegedly placed in the public reading room, MOFCOM had already collected the data and

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[24] China, Responses to Questions, para. 14.

[25] United States, SWS, paras. 33-34.

[26] *See* United States, SWS, paras. 26-31.

[27] United States, SWS, para. 27.

[28] The United States notes that there was no warning of when the injury disclosure would be issued – and that MOFCOM's representations concerning its release were inconsistent. *See* United States, Comments of the U.S. Government on the Disclosure of the Determination Regarding Dumping and Subsidy (May 28, 2014), p. 3. ("Last week, on Wednesday, May 21, 2014, the United States inquired about the release of the injury disclosure so it could plan appropriately, including with respect to submitting a request for a hearing. In response to that inquiry, a MOFCOM representative said there would be no injury disclosure. That same day, MOFCOM then did, in fact, release an injury disclosure, with comments due June 3 – to which the United States promptly requested an extension.") (Exhibit USA-7).

completed, as the injury disclosure document for release the very next day, a draft redetermination relying on the data..[29] By failing to provide U.S. respondents with timely notice of the information it would require, MOFCOM deprived U.S. respondents of any meaningful opportunity to present evidence relevant to the required information, contrary to AD Agreement Article 6.1 and SCM Agreement Article 12.1.

Comments on Part (e):

17. In response to this question, China reiterates the theoretic possibility that U.S. respondents might have been able to "learn through MOFCOM" that MOFCOM "required additional information from domestic Chinese producers" by visiting the public reading room on or after February 19, 2014, and reading the General Verification Letter.[30] As the United States has pointed out, however, MOFCOM provided the letter only to Chinese producers, and never notified U.S. respondents of the letter's existence.[31] This by itself is contrary to the dictates of AD Agreement Article 3.1 and SCM Agreement Article 15.1 that the investigating authorities conduct an unbiased investigation, without treating one group of interested parties less favorably than another.

18. And even if U.S. respondents had obtained the General Verification Letter in the public reading room, they could have gleaned no understanding of the information MOFCOM required from the letter, contrary to China's response to the second part of this question. The General Verification Letter did not disclose how MOFCOM intended to address the issue of "product mix" through the collection of additional information, much less provide any understanding of the specific information MOFCOM required. The letter simply stated that domestic producers were to "prepare all the materials and produce relevant evidence in view of the Panel Report,"[32] disclosing nothing about the specific information MOFCOM required. China argues that U.S. respondents should have surmised that the "relevant evidence" referenced by the letter concerned "product mix" because product mix was an issue in the Panel Report.

19. Based on what is in the verification summaries, however, there is no way to discern how "product mix" was the information MOFCOM required from the domestic Chinese producers, since those summaries do not reflect the collection of data that would address the comparability

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29 MOFCOM, Injury Disclosure (Exhibit USA-8).

30 China, Responses to Questions, para. 16.

31 United States, SWS, para. 20.

32 China, FWS, para. 56.

of all representative domestic sales with representative importer sales.[33] Nor, as China claims,[34] would the verification exhibits have provided U.S. respondents with an understanding of the information MOFCOM required, either before or after collection of the requested information. So even now, towards the end of this Panel proceeding, we are still in the dark as to what questions MOFCOM asked of the four selected producers.

20. Indeed, as the United States has discussed above, neither the verification letter nor the verification summaries provide notice of the exact information MOFCOM required. MOFCOM's failure to provide U.S. respondents with timely notice and opportunity to respond to this basic relevant information concerning MOFCOM's questions to the domestic Chinese producers constituted a breach of AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3.

21. If MOFCOM truly had attempted to address the issue of "product mix" by requesting information from domestic Chinese producers, it could have done so in any number of transparent and objective ways, such as by collecting pricing data from all domestic producers on their sales of legs and paws, for comparison to subject import prices for sales of legs and paws.

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

Question 11: When and how were interested parties to know that the items of information at issue had been deposited in the reading room and were available for the interested parties to see?

22. China asserts that any party practicing before MOFCOM should be aware of the "practices associated with the deposit of public information in the reading room."[35] Why? China can point to no rule, guidance, pronouncement, or other document explicating such practices. Moreover, the relevant rules that China notified to the WTO concerning the access of non-confidential information, including through the reading room, do not provide any explication about how interested parties would know that materials had been deposited in the reading room.[36]

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33 China, Responses to Questions, para. 17.

34 China, Responses to Questions, para. 17.

35 China's Response to Panel Questions, para. 19.

36 *See* Provisional Rules on Access to Non-Confidential Information of Antidumping Investigations, G/ADP/N/1/CHN/2/Suppl.1 (18 February 2003).

23. China asserts that the initiation notice put interested parties "on notice" that they should regularly check the public reading room for information.[37] As the United States has explained though, interested parties could have checked every single day – including May 20, 2014 – and yet never known that these documents had been deposited in the reading room.[38] For example, an interested party could have conceivably visited the reading room on May 20, 2014 at 4:55 p.m. and still missed these documents if they were released at 5:00 p.m. China has yet to identify any piece of evidence that would have alerted interested parties or other put them on notice that these verification summaries had been placed in the reading room.

24. China's response also asserts, without citation, that when it receives a document, it will number that document, and immediately update the online index. Putting aside for the moment that China has pointed to no evidence to suggest why any interested party should be consulting this online index, China presents no evidence here, including any online records or timestamps, to indicate when the online index was actually updated. China asserts that Exhibit CHN-44, which China provides in response to this question, is essentially a receipt indicating that MOFCOM received these materials on May 20, 2014. The receipt by MOFCOM does not confirm though that the documents were actually placed in the reading room or that the online index was updated that same day. Indeed, the receipt itself does not appear to signify that MOFCOM acknowledged receiving the documents on May 20, 2014. The United States notes that it appears that while there is a signature on the receipt by the submitter, a Mr. Dong Jing, there is no signature by a MOFCOM official in the requisite signature line *acknowledging receipt*. In short, neither China's narrative response to this question nor Exhibit CHN-44 demonstrate that interested parties would have known that the information at issue had been deposited in the reading room and were available to see.

Question 12: Is there any reference in the disclosure document to the non-confidential summaries?

25. China asserts that while there is no reference in the disclosure document to these summaries, the fact that the summaries mentioned verifications should have allowed interested parties to reasonably infer the existence of such summaries.[39] China has not rebutted the pertinent points made by the United States in its Statement at the Injury Opinion Meeting. Indeed, China's assertion continues to be undermined by the contradictions discussed by the United States in its Statement, in which the United States noted the following:

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37 China's Response to Panel Questions, para. 19.

38 United States, Response to Panel Questions, para. 20.

39 China's Response to Panel Questions, para. 22.

> Second, it is unclear what type of information MOFCOM solicited from Petitioner or collected from other sources during the reinvestigation. … 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.[40]

To the extent these summaries have the significance China now affords them, why did MOFCOM not simply disclose their existence in the Injury Disclosure or otherwise address the concern? MOFCOM's failure to do so confirms that China's argument is simply *post hoc* rationalization.

Question 13: In its oral statement, China referred to an online index, a screenshot of which China provided as Exhibit CHN-14. Please explain how this online index functioned during the reinvestigation and what information it conveyed.

26. Neither exhibits CHN-42 or CHN-43 demonstrate how the online index functioned, including with respect to how frequently it was updated. Indeed, it is notable that China asserts that while the index was updated sometime on May 20, 2014 to reflect these summaries, China cannot identify what time, nor explain why a timestamp is not available.

1.3 Article 6.9 – Essential Facts

Question 15: **The Panel in its original report found that MOFCOM had failed to disclose the essential facts to Pilgrim's Pride. Were the data that were subject to this finding of the Panel in its original report disclosed during the reinvestigation? In your answer, please refer to the record of the reinvestigation.**

27. China's assertion of "yes" is contradicted by the following statement: "Pilgrim's Pride did not submit any new data in the redetermination investigation, so by definition the same data from the original investigation were disclosed in the redetermination." China's position is essentially the same it maintained in the original dispute. Specifically, China's position is that since MOFCOM's margins are based on data provided by the respondents, it can fulfill its obligations without disclosing the precise underling data and calculation as used by MOFCOM, provided it makes some reference to assist the interested party in tracing through its data.[41]

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[40] Exhibit USA-10, p.1-2 (English version of statement).

[41] *China – Broiler Products*, para. 7.77.

28. The Panel appropriately rejected that argument. The Panel's finding in the original report was as follows:

> in the context of the determination of dumping, 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.[42]

As China's submissions in this dispute confirm though, China rejects that finding and asserts any obligation for disclosure cannot apply to the original calculations and data.[43]

Question 16: China asserts that Exhibit CHN-8 conveyed certain information, in particular data related to Pilgrim's Pride from the original investigation. This is in response to the US argument that without the original data, Pilgrim's Pride was not able to understand the nature of the alleged "error" in the calculations and the basis for the increase in its margin of dumping.

a. The document contains empty tables and no reference to either Pilgrim's Pride or its data from the <u>original</u> investigation in any of the headings. Could China explain on what basis the Panel may make a finding of fact in respect of this exhibit given that it does not have the data that it allegedly contains?

b. If China provides additional information in respect of this exhibit, please explain how this will allow the Panel to assess whether the data from the original investigation were provided to Pilgrim's Pride on 16 May 2014, as China alleges.

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42 *China – Broiler Products*, para. 7.91.

43 China, SWS, paras. 99-100.

c. At paragraphs 97, 103 and 109 of its first written submission, China asserts that this exhibit contained all the data and calculations from the original investigation. At paragraph 106 of its second written submission, China argues that it contained a subset of the data and calculations from the original investigation, namely in respect of those that changed as a result of the corrections during the reinvestigation. In response to the questions of the Panel at the substantive meeting, China appeared to argue that the data contained the results of calculations from the original data, but not necessarily the original data. Please reconcile these statements and explain in detail what data the exhibit allegedly contains.

Comment on Part (a):

29. The United States notes three points on China's response to this question. First, China's contentions that BCI issues preclude it from addressing this matter are without merit. Under the Panel's Working Procedures, China does not need an authorizing letter "in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceeding proceedings,"[44] which Pilgrim's Pride did.

30. Second, while the United States is not in a position to comment on what underlying data might be in Exhibit CHN-45 were it not redacted, the United States notes that on its face it does not appear to be the unmodified spreadsheet from the original investigation; it appears to be the spreadsheet *for the reinvestigation*. China has not explained how this table would allow Pilgrim's to reconstruct its original rate of 53.4 percent – *and what has changed since*. Indeed, even China while making the sweeping claim that "{t}he spreadsheet provided everything that Pilgrim's Pride would need to know about its dumping margin" does not assert that spreadsheet would allow Pilgrim's Pride to determine its original margin and the subsequent changes.

31. Finally, the United States notes the issue is not as complicated as China has made it out to be in this dispute. If MOFCOM had simply provided the original data and calculation and then identified the specific changes (different formula, figure, etc), then the problem would have been avoided. China's attempt to make this issue so convoluted does not change the basic truth that MOFCOM did not disclose Pilgrim's Pride's essential facts.

Comment on Part (b):

32. The United States submits two points on China's response to this question. First, China avoids answering the Panel's question, claiming instead that the United States has failed to meet its burden of proof. This is incorrect, the United States has met its burden by explaining that the documentary evidence shows that Pilgrim's did not receive its calculations and data. It is China that has attempted to rebut the U.S. *prima facie* case by relying on Exhibits CHN-8 or CHN-45.

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[44] Additional Working Procedures of the Panel Concerning Business Confidential Information, para. 3.

China, however, has failed to explain how these documents demonstrate that data from the original investigation was provided to Pilgrim's Pride.

33. Second, China asserts that the United States has failed to make its case because it presented supposedly unsupported allegations. Again, China is incorrect. As the United States demonstrated in its First Written Submission, the redetermination highlights that MOFCOM claimed there was an error but failed to disclose the essential facts so Pilgrim's Pride could ascertain this error, which apparently was substantial enough to raise its margin by over 20 points.[45] As the Panel recognized in an analogous situation in its preliminary ruling, it would not make sense for a complainant that is alleging an omission with respect to transparency to know what the precise problem is:

> Where, as in this case, claims are based on alleged omissions by the investigating authority, the investigating authority is in possession of information that it allegedly did not give notice of as required under Articles 6.1 and 12.1, and did not provide ample opportunities to see under Articles 6.4 and 12.3. The complaining Member, of course, does not know what the relevant information is, or in what form it was required or received – or indeed, whether it exists – but does believe that information was requested and submitted to the investigating authorities. In these circumstances, it is difficult to see how the complainant could be expected to pin-point with any precision in a panel request information (including its format – in the form of a questionnaire or otherwise) it does not have and might not even know about.[46]

Here, the United States has shown that data and calculations necessary to understand Pilgrim's Pride's margins were never provided – and provided reasons for why that failure in transparency results in a breach of China's WTO obligations.

34. China has not refuted this claim. Indeed, it is striking that in response to this question, China simply states in a conclusory fashion that Exhibit CHN-45 and the narrative explanation in CHN-46 are sufficient to meet China's disclosure obligations.[47] The fact that China has to broadly reference the documents without identifying the precise language or figures in those documents that constitute the changes between the margin calculated in the original investigation and in the reinvestigation demonstrate that China's assertion rings hollow.

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45 United States, FWS, paras. 74-75.

46 Preliminary Ruling, para. 2.26(b)(ii).

47 China, Response to Panel Questions, para. 34.

Comment on Part (c):

35. The critical point in China's response is its statement that Exhibit "CHN-45 summarizes in a public format all of the data and calculations from the original investigation."[48] Even assuming *arguendo* that is correct, China's disclosure obligations are not satisfied through a summary, but the provision of the actual underlying data and calculations.

36. China also invokes Exhibit CHN-47 as providing greater detail about the alleged error. Although China fails to identify what portions of this exhibit the Panel should assess, the fundamental problem *ab initio* is that this document is *after* Pilgrim's Pride had any opportunity to correct the error. AD Agreement Article 6.9 requires the disclosure to "take place in sufficient time for the parties to defend their interests." The fact that MOFCOM gave its purported "maximum possible disclosure"[49] *after* Pilgrim's Pride had any opportunity to contest the margin is only relevant in showing the insufficiency of MOFCOM's prior disclosures. In any event, the assertions it makes about figures having changed requires having the original data and calculations so Pilgrim's Pride could verify that those are indeed the precise changes that results in the significant increase in its dumping margin.

Question 19: In paragraph 111 of its first written submission, China states that "MOFCOM … issued a questionnaire to Keystone." At the oral hearing, China explained that the questionnaire was sent to the Chinese law firm that represented Keystone during the original investigation.

a. Based on the record of the reinvestigation, please describe the correspondence between MOFCOM and this Chinese law firm.

b. Did the Chinese law firm confirm that they continued to represent Keystone? If so, why did MOFCOM not disclose to the Chinese law firm?

c. If the Chinese law firm told MOFCOM that it did not represent Keystone:

i. Did MOFCOM take any steps to contact Keystone to ensure it had received the questionnaire addressed to it?

ii. How could MOFCOM conclude that failing to respond to the questionnaire would result in identifying Keystone as "non-cooperating" for the purposes of Article 6.9?

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48 China, Responses to Panel Questions, para. 35.

49 China, Response to Panel Questions, para. 38.

Combined Response:

37. The United States raises two points concerning China's response to this question. First, China has not provided documentation for any of its other assertions about engagement with Keystone – including to confirm that JT&N withdrew representation.[50] Although this question requests China to provide a response "{b}ased on the record of the reinvestigation," China simply provided its characterization of its engagement without any reference to record evidence.

38. Second, the United States has reason to believe that the statements proffered by China are not completely accurate. As part of confirming China's account in its response to this question, the United States has learned that Keystone provided an authorization signed by Keystone's Vice President of Finance that explicitly authorized MOFCOM to "serve any and all disclosure documents in this matter to Steptoe & Johnson, LLP and Jincheng Tongda & Neal" and provided the contact information for both. This authorization was dated May 21, 2014. Based on conversations with Keystone's U.S. counsel, the United States understands this authorization was faxed to MOFCOM at the attention of Yang Lijun – one of the investigators during the reinvestigation – on May 29, 2014.

39. The United States notes that China's arguments in this dispute concerning its failure to disclose essential facts to Keystone have centered on the lack of authorization from Keystone directly. This passage from China's Second Written Submission is indicative:

> Any document appointing counsel should be signed by a representative of the company. The Memorandum is signed by a partner of Steptoe & Johnson and not by anyone at Keystone. No other evidence was submitted that Keystone in fact actually authorized Steptoe & Johnson to act on its behalf, and neither Keystone nor the firm took any additional steps nor filed any additional information or explanation.[51]

Yet it appears this argument is misplaced. After the United States transmitted the authorization from Keystone's U.S. counsel,[52] it appears separately that Keystone attempted to resolve

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[50] If JT&N did withdraw, then the application of facts available to Keystone of course is problematic since it never received notice of the information that MOFCOM required. Notably, CHN-50 seems to suggest that the law firms did explicitly sign a registration acknowledging the reinvestigation. China has not provided any documentation to suggest that this registration was ever withdrawn.

[51] China, SWS, para. 114.

[52] Exhibit CHN-10. The United States noticed that the fax header on Exhibit CHN-10 indicates that it is one of nine pages. The United States has tried to ascertain what other pages might follow without

MOFCOM's purported concern by providing MOFCOM the documentation it requested. There is nothing further the United States has located to suggest that MOFCOM responded to this documentation, including providing any additional reasons for why it could not provide Keystone's disclosure.

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.[53]

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

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

success to date. Considering the timing of the fax, the United States acknowledges these pages may potentially be unrelated documents such as the U.S. request for a hearing.

[53] China, SWS, para. 175.

clarification, and divided it by the weight of the subject products (a whole broiler less the weight of feathers, blood and "non-subject" viscera).

Comment to Part (a):

40. Throughout its submissions, during the hearing, and again in its responses to the questions from the Panel, China has sought to create the impression that Tyson, by reporting a pool of costs for subject merchandise, thereby accepted or agreed to MOFCOM's allocation of only that pool of costs based on the weight of the subject products. MOFCOM's position is not supported by the record of the reinvestigation.

41. As an initial matter, MOFCOM is wrong in asserting that Tyson accepted MOFCOM's product definitions – including that non-subject products were waste rather than co-products, or that non-subject products should not absorb costs on the same consistent basis as the subject products (whether that basis is value or weight). Rather, Tyson followed MOFCOM's instruction to report in its cost database the costs recorded in the ordinary course of business, but only for the subject merchandise, which excluded products not sold for human consumption, such as blood and feathers. The fact that MOFCOM made such instruction, and Tyson responded, in no way reflects that Tyson expressly or implicitly agreed MOFCOM could take only that pool of costs and the related production quantities for subject merchandise into consideration in calculating unit product costs.

42. As reflected in the U.S. response to Panel Question 24, Tyson also reported to MOFCOM 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. Had MOFCOM used that data, the misallocation of costs caused by its approach would not have occurred. It further bears noting that none of these arguments and issues are new. Tyson has been emphasizing these points since the preliminary determination in the original investigation, and in its questionnaires in the reinvestigation. For example:

> Tyson continues to assert that MOFCOM should have used Tyson's reported costs because they are GAAP consistent and reasonable. However, Tyson noted that if MOFCOM were to continue to rely on a form of weight-based allocation, MOFCOM should allocate the total cost of the live birds to their total weight. Specifically, the raw material cost for subject merchandise should be calculated by dividing the total cost of the slaughtered chickens (i.e., $[[****]] by the total weight received including the weight of blood, feather, etc. (i.e., [[****]] pounds). The resulting per unit cost [[****]] USD/lb. should be used as [[**********]]. MOFCOM should then use the [[part-specific processing costs because these costs are not allocated based on value and there is no reason why MOFCOM should average these specific costs across different products]].[54]

43. Moreover, as explained in the United States' response to Panel Question 24, all products – including inedible products, such as feathers, blood, etc. – generated revenue, as shown in Tyson's accounting records and admitted by MOFCOM. The products are treated as co-products, and not as "waste," in the accounting system in the ordinary course of business. If the products were considered "waste," their costs would be reflected/incorporated in the costs of other products, such as chicken parts. That is not how they are accounted for.

44. Finally, MOFCOM's distinction between edible and inedible products is undermined when the specific example of chicken paws is considered. Chicken paws are considered inedible in the U.S. market, yet they are consumed in China and account for a significant volume of Tyson's products exported during the period of investigation. As explained in our responses to the Panel's questions, MOFCOM's distinctions between edible/inedible and subject/nonsubject are artificial and cannot serve as a valid basis for determining whether products should absorb their proportionate share of costs (on either a value or weight basis).

Comment to Part (b):

45. As explained in our prior submissions, Tyson's filings before MOFCOM explain repeatedly that Tyson, in the ordinary course of business, allocated costs across all products derived from a chicken. As an example, Tyson stated in its supplemental questionnaire response:

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[54] *See* Tyson, Response to Reinvestigation Questionnaire, p.12, Response to Question III(5).12 (Exhibit USA-24).

> To be clear: Tyson allocates all production costs incurred to produce a live chicken to all products that are derived from the live chicken. The costs are allocated to individual products on a proportional basis, in accordance with the practices discussed in Tyson's previous submissions. There are no costs incurred to produce a live chicken that are allocated to some, but not all, of the products derived from the live chicken.[55]

46. Second, with respect to certain edible offal products, in particular paws, Tyson explained that the offal market price was used as the value to allocate costs because that price represented a predominant use of the products. So called "high value edible products," such as chicken paws, are not high valued overall; rather, they are sold and used as offal. As explained by Tyson in its First Supplemental Questionnaire Response:

> As can be seen on page 2 of Exhibit S-10, the prices for feathers and blood were calculated using the feather meal price. The prices for offal & meat and bone residue were calculated using a weighted average of the prices for soybean meal ("SBM") and fat. The price of SBM was used because offal is used as a substitute protein in place of soybeans in certain feed applications; therefore, the values track one another. Offal also is sold to the fat market. The two prices were weighted based on the volume of Tyson's offal that was historically sold into each of these two markets.
>
> On page 3 of Exhibit S-10, Tyson is providing the Production Cost Summary sheet for the Clarksville plant for the week of January 24, 2009. The Clarksville plant is in the Mid-South region; therefore, the values for the Mid-South shown on page 1 of Exhibit S-10 were used for it. As can be seen, the meat value for feathers ($[[****]]) matches on pages 2 and 3 (see the column for "Part Type Code"). Likewise, the meat value for blood ($[[****]]) matches on pages 2 and 3. Finally, the meat value for "Offal & Meat" on page 2 ($[[****]]) matches the value on page 3 for the products that are sold as offal, including paws, gizzards, hearts, livers, and necks.[56]

Tyson further explained in that questionnaire:

> The offal market price worksheet shows the methodology Tyson uses to allocate the meat costs to offal products. As previously explained, Tyson calculates the offal market price for three markets: the Mid-South, Carolina, and Delmarva

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[55] Tyson, Response to Reinvestigation Supplemental Questionnaire, p. 2, Response to Question 5 (Exhibit USA-25).

[56] Tyson, Response to Reinvestigation Supplemental Questionnaire, p. 4, Response to Question 10 (Exhibit USA-25).

regions. As shown on page 4 of Exhibit 3-2.2 the third value for paws, hearts and gizzards is the same $[[****]].

As demonstrated at verification, Tyson can internally consume offal products at its rendering facilities or sell the offal to third parties. For plants that are not near Tyson rendering facilities, Tyson generally sells the offal to third parties and uses that sales price to calculate the cost of the offal. As demonstrated in the invoice to Valley Protein provided in Exhibit 3-2.2, all offal was sold at a single price to that purchaser.[57]

47. Additionally, in response to the Second Supplemental Questionnaire, Tyson further explained how products rely on offal market prices in its normal books and records:

Tyson's understanding is that MOFCOM is requesting a list of product codes that rely on the offal market price worksheet to determine the meat cost in Tyson's normal books and records. There are two groups of products that rely on the offal market price worksheet to determine the meat cost. The first group covers products that are sold/transferred directly to rendering plants. These products are listed in the offal market price worksheets provided in Exhibit 3-2.1 to the original questionnaire in this reinvestigation. The product codes are listed under the "I/C" column which is an abbreviation for "inter-company." The second group covers products that are sold for human consumption. Tyson is providing a list of those codes in Exhibit SS-13.

….

The method of valuation is determined plant-by-plant based on the rule set forth in Question 14. For plants that generally sell their offal to a third party, the meat cost is based on the sales price of that offal. For plants that generally send offal to a Tyson rendering plant, the meat cost is determined by the market price of the three proteins.

In general, offal from the following plants is sold to third party rendering plants and, therefore, the meat cost of offal at those plants is based on the sales price of the offal:

Blountsville, AL
Glen Allen, VA
Albertville, AL
Buena Vista, GA
New Holland (Fresh), PA

[57] Tyson, Response to Reinvestigation Supplemental Questionnaire, pp. 6-7, Response to Question 13 (Exhibit USA-25).

> Obion County, TN
> Vienna, GA
> Cumming, GA
>
> For the other plants, the offal is normally sent to a Tyson rendering plant; therefore, the meat cost of offal at those plants is determined by the market price of the three proteins.[58]

These explanations confirm that (1) Tyson allocated the cost of a chicken across all products and that (2) the value based accounting methodology extended to products deemed offal. The offal price is a market price.

Question 25: With reference to the record of the reinvestigation, please provide the product definition as set out in the questionnaires to the interested parties.

Question 26: Was there any disagreement between MOFCOM and interested parties over the product definition?

Combined Response to Questions 25 and 26:

48. China's claim that the issue of product definition underpins the U.S. position in this dispute is inaccurate. The United States maintained in the original proceedings that MOFCOM should adopt Tyson's value-based cost allocation methodology, because it properly reflects the poultry market and the appropriate revenue of all broiler joint products. MOFCOM rejected that argument and decided to, instead, rely on a purported weight-based approach – arguing both in the original investigation and the reinvestigation that a weight-based approach is more objective and applies costs of a chicken equally across all products.[59]

49. Yet China contradicts its own arguments and, instead, relies heavily on its framing of the scope of investigation, the product definition, and distinctions between subject/nonsubject, edible/inedible, etc., to support the cost allocation methodology it used. The United States has emphasized throughout its briefing that these distinctions do not matter. Costs need to be allocated properly and that entails ensuring that costs are distributed across all products in a coherent manner. Thus, if MOFCOM chose to rely on a weight-based allocation methodology, it needed to account for *all* products that derive revenue and then allocate cost by weight to all of them. MOFCOM's exclusion of blood, feathers, and other offal products from its weight based

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[58] Tyson, Response to Letter on Second Supplemental Questionnaire, p. 17, Response to Question 14 (Exhibit USA-16).

[59] China, Original First Written Submission (OFWS), para. 133; Redetermination at Section IV(1) (Exhibit USA-9).

allocation is improper when these products generate revenue – and by MOFCOM's logic must be allocated costs proportionate to their weight. As the United States demonstrated in response to Question 24(h) from the Panel, Tyson's accounting records indicated clearly that *all* products, including blood and feathers, generate revenue.[60] Nor can MOFCOM reasonably claim that those products were excluded from the scope of its proceedings. The Panel itself recognized that "the definition of the scope of the investigation set forth in MOFCOM's Determinations" included blood and feathers.[61]

Question 28: Why did MOFCOM clarify the product definition in the reinvestigation compared to the product definition in the original investigation?

50. As an initial matter, China's suggestion that MOFCOM always made clear that it always viewed what it terms non-subject products, such as blood and feathers, as not appropriate to include in an allocation of costs according to weight is incorrect. As the United States as noted previously,[62] China advanced the position in its prior WTO submissions during the *original* investigation as well as in MOFCOM's redetermination that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products. For example, in the original dispute, China argued:

> While there may be different costs once the whole bird has been cut into pieces, a significant portion of the total costs of production are incurred on a unitary basis for the whole bird. After all, the different parts of the live bird do not have different costs of production. It does not cost more to grow a kilogram of breast than it costs to grow a kilogram of paws.[63]

MOFCOM's redetermination echoes that position by noting that:

> The weight-based method is more objective than the value-based method reported in questionnaire responses and will not cause that part of products gets much

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60 *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).

61 *China – Broiler Products*, para. 6.61; para. 7.196 fn. 340.

62 *See e.g.*, United States, FWS, paras. 90-91.

63 China, Original First Written Submission (OFWS), para. 133.

> more apportioned chicken cost, while other products get almost no apportioned chicken cost.[64]

Per that reasoning, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them – and yet MOFCOM has failed to explain what justifies its failure to do so with respect to the products referenced by Tyson.

Question 29: MOFCOM found that the cost of production is the same regardless of the chicken product produced. If this is the case for chicken feet and chicken breasts, how are feathers and blood different? Please answer with reference to the record of the reinvestigation.

51. The United States respectfully refers the Panel to paragraphs 89-103 of our First Written Submission, paragraphs 95-120 of the U.S. Second Written Submission, and our responses to Panel Questions 24 and 33-35.

Question 30: Where in the redetermination are considerations set out pertaining to the (lack of) revenue generation as a reason to reject Tyson's alternative cost allocation methodology?

52. The United States addresses China's contention that, under Tyson's value-based cost allocation methodology, "costs are disconnected from the revenue earned from those products." There is no basis for this assertion.[65] As explained in the U.S. response to Panel Question 24(h),[66] under Tyson's cost allocation methodology, value is used to allocate costs across all of the revenue generating products. None of the products are "waste." The values used reflect the markets and uses for which the products are, in fact, normally sold. Moreover, MOFCOM's assertions regarding the values used under a value-based allocation, even if they had merit, in no way justify MOFCOM's use of a biased weight-based allocation.

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64 Redetermination at Section IV(1) (Exhibit USA-9).

65 China, Response to Panel's Questions, para. 116.

66 *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).

Question 31: Referring to paragraph 149 of China's first written submission, does China contest that in paragraphs 7.197-7.198 of the original report, the Panel interpreted the second sentence of Article 2.2.1.1 to include a substantive obligation to make a proper allocation of costs.

53. China's interpretation of Article 2.2.1.1 and the Panel findings is unsupported. And, putting aside China's flawed legal interpretation, there is no evidence here that MOFCOM made any considered effort to reflect on and weigh the alternative allocation methodologies that Tyson presented. MOFCOM repeatedly advances the position that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products – and yet it is evident that MOFCOM did no such thing.

54. China's challenge to paragraph 7.198 of this Panel's ruling is particularly telling. China claims that the Panel was wrong in concluding that MOFCOM "allocated Tyson's costs to produce non-exported products to the normal value of the products for which MOFCOM was calculating a dumping margin[,]" because MOFCOM in fact allocated costs to blood and feathers. China misses the point entirely because MOFCOM is indeed inflating and distorting the normal value of the products for which it calculated a dumping margin. MOFCOM arbitrarily selected prices for blood, feathers, etc., from Tyson's value-based methodology – values that are premised on the goal to maximize profitability, which necessarily means that those products are assigned less value than products such as chicken breast. By taking those low prices and incorporating them with a weight-based distribution for subject products, MOFCOM is incorrectly distributing the costs of production for producing items such as blood and feathers to products such as chicken breast and paws – thereby inflating the normal value for those latter products.

2.2 Article 6.8 – Facts Available

Question 36: Paragraph 5 of Annex II provides that where information is not ideal in all respects, "this should not justify the authorities from disregarding it." Can China explain the interpretive steps for the Panel to follow to arrive at its propositions that:

a. "the authority need not accept information that 'may not be ideal in all respects'"; and

b. "an investigating authority is entitled to resort to facts available if a responding party does not act to the very best of its ability, or when the information is not of best quality".

Comment on Part (a):

55. Paragraphs 3 and 5 of Annex II, taken together, are interpreted to mean that "all the information provided by the parties, even if not ideal in all respects, should be used by the authorities, and in case secondary source information is to be used, the authorities should do so

with special circumspection."[67] China relies on paragraph 5's reference to an interested party acting to the "best of its ability" as somehow justifying an investigating authority's ability to reject information entirely if is not "ideal in all respects." The plain text of paragraph 5 of Annex II states that authorities are not justified in disregarding information presented by interested parties simply because it "may not be ideal in all respects." China's interpretation of Article 6.8 and Annex II is thus contrary to the text and would permit investigating authorities to impose facts available in every circumstance. The information provided by interested parties will never be "ideal in all respects."

56. Moreover, as the United States has explained previous submissions, China has no basis for arguing that Tyson did not respond to the best of its ability. MOFCOM was fully aware that Tyson did not keep, as part of its books and records, the precise data that MOFCOM sought in the reinvestigation – *i.e.*, pure meat and processing costs. Regardless of that fact, MOFCOM made its request for the data, and Tyson made extraordinary efforts to provide the requested data to the extent it could. China cannot rely on MOFCOM's unrealistic requests for information, and Tyson's inability to provide the exact data it requested, as somehow meaning that Tyson failed to respond to the best of its ability.

Comment on Part (b):

57. China's response recognizes that investigating authorities must be "flexible about less than ideal information," and as noted in response to Question 36(a), China has no basis for asserting that Tyson did not act to the best of its ability. To avoid this problem, China claims that an investigating authority can resort to facts available if an "interested party provides flawed or insufficient or misleading or inconsistent or contradictory information," or if the information is "less than ideal." These statements are not consistent with obligations in Article 6.8 and Annex II as reflected in the plain text of those provisions.

58. China's reference to "insufficient" reflects its view that an investigating authority can subjectively reject information and employ facts available for virtually any reason. Article 6.8 of the AD Agreement states that the investigating authority may resort to facts available only when a party "refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation." And paragraphs 3 and 5 of Annex II make clear that investigating authorities are not free to reject information because it does not reflect the exact and ideal information that the authority desires.

59. As to the facts, China conflates Tyson's ability to provide product brand code information for three representative products as somehow showing that Tyson could provide this

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[67] *Mexico – Rice*, para 7.238. The Appellate Body reinforced this point, indicating that so long as "a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any." *Mexico – Rice (AB)*, para. 288.

information for over a thousand other product brand codes. China ignores why Tyson explained that generating "detailed supporting materials" as well as "detailed sources[,]" for over a thousand product brand codes, as it requested in its Second Supplemental Questionnaire, was not feasible.[68] Further, China's repeated assertions claims that Tyson provided misleading price data has no support in the record, but in reality reflects MOFCOM's failure to address how Tyson's cascading cost system operated for meat and processing costs – which, as we showed in our submission and response to Panel question 42, was clearly disclosed and explained to MOFCOM both in the original investigation and reinvestigation.

Question 37: At paragraph 225 of its second written submission, China states that "nothing in the Anti-Dumping Agreement limits the investigating authority's right to dismiss primary sources of information and to resort to better facts available when the situations arises."

a. Please explain how China's position is consistent with paragraphs 3 and 5 of Annex II.

Comment on Part (a):

60. As the Panel's question suggests, China's position is not consistent with Annex II of the AD Agreement. Indeed, China's response to this question underscores that China takes the untenable position that an investigating authority is justified to apply facts available under Article 6.8 in virtually any circumstance where it does not find the data "ideal in all respects." That interpretation turns the Article 6.8 obligation on its head, for all of the reasons explained in our comments above.

[68] *See* United States, FWS, para. 121 (citing Letter on Second Supplemental Questionnaire for Dumping Part of Reinvestigation (March 7, 2014) at 7, questions 8-9; *see also* Second Supplemental Response, Exhibit SS-8 (Exhibit USA-17)).

Question 40: MOFCOM found that Tyson

> **only submitted the meat cost and processing cost, calculated by ratio method (calculating the relevant proportion based on the data from the standard cost system), of each product model. The meat cost and processing cost of each model of the product concerned calculated by this method are not the actual pure meat cost and processing cost of each model … [T]he Investigating Authority decides not to accept using the ratio method claimed by the Company to calculate the meat cost and processing cost of each model of the product concerned, nor to accept the meat cost and processing cost data of each model of the product concerned calculated by the ratio method.11**

What is your view on the US argument that Tyson did not have in its accounting records data for costs as actually incurred according to the parameters set by MOFCOM. If you disagree, please indicate where in the record of the reinvestigation MOFCOM determined that Tyson did in fact have the requested data for actual costs.

61. It is striking that China notes it is "unsure what view to have: should we believe what Tyson said during the original investigation or what Tyson said in the reinvestigation." Specifically, the uncertainty does not reflect any supposed misrepresentations by Tyson – as confirmed by the lack of citations to the record, but rather reflect MOFCOM's lack of consideration of this issue. Thus, as the Panel's questions notes, the key issue is where did MOFCOM make the determination that Tyson in fact had in its books and records the requested data for actual costs. In that respect, the citation offered by China is not persuasive:

> the Company states, under the fully-absorbed cost system, Tyson does not distinguish the meat cost and processing cost at each production procedure. Therefore, Tyson does not have such accounting records, but can only find a method to report the cost according to the format required by the Ministry of Commerce. The Investigating Authority notices that the Company did never inform the Investigation Authority of this situation in the original investigation and re-investigation.[69]

The reference does not reflect a determination by MOFCOM that Tyson had the requested data. Indeed, the reference itself is inherently contradictory. It asserts that Tyson failed to notify MOFCOM that Tyson's accounting records do not have data for costs as actually incurred according to the parameters set by MOFCOM. The fact that MOFCOM is discussing this contention though confirms that MOFCOM is in fact aware of this problem. In any event, as

[69] China, Response to Panel Questions, para. 156, citing Redetermination, Exhibit CHN-1, p. 41.

Tyson explained in its disclose comments, this was an issue that Tyson had in fact raised with MOFCOM in both the original investigation and the reinvestigation.[70]

Question 41: In paragraph 234 of its first written submission, China argues that:

> **The discrepancy in the reported costs was not eliminated by the explanation based on just three representative products.**

In paragraphs 235-237, China identifies the discrepancy, but does not explain why the "explanation" based on the representative product was not sufficient to "eliminate" its concerns. With reference to the record of the reinvestigation, could China explain its position?

62. The United States notes that China asserts the explanation at issue came "extremely late in the process" – March 17, 2014. But March 17, 2014 was not "extremely late." At this time, there were still more than three and a half months left in the reinvestigation. On its face, China's claim of untimeliness is unsustainable.

63. China also asserts that the examples provided by Tyson could not amount to a complete explanation. Notably though, China cannot point to where in the redetermination MOFCOM made such an assessment.

3.1 Articles 3.1, 3.2 ADA/15.1, 15.2 SCMA – Underselling Analysis

Question 45: Please indicate, with reference to the record of the reinvestigation, where in its redetermination MOFCOM set out:

a. its methodology and reasoning for selecting the four domestic producers in its price effects analysis;

b. any analysis related to the representativeness of the selected producers; and

c. how this approach ensured price comparability in the price effects analysis.

Comment on Part (a)

64. In responding to this question, China concedes that "MOFCOM did not specify within its redetermination any particular methodology and reasoning for selecting the four domestic producers it chose to verify and collect supplemental information."[71] Thus, China is acknowledging there is no explanation, let alone a reasoned and adequate one, for its "revised"

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[70] Tyson, Disclosure Comments, p. 6 (Exhibit USA-6).

[71] China, Responses to Panel Questions, para. 163.

pricing analysis. On this basis alone, MOFCOM's price comparisons are substantively inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

65. China also asserts that the names of the four domestic producers were disclosed in the verification exhibits placed in the public reading room and in the injury disclosure document released the following day.[72] These exhibits, which according to China were prepared by the companies themselves, have no bearing on *MOFCOM's* findings though.[73] China appears to assert that because these exhibits were purportedly in the reading room, and identified the firms that MOFCOM solicited data from, it was the obligation of the United States and other interested parties to raise concerns with the selection and propriety of these firms.[74] Although the United States has already addressed why these purported verification exhibits are inadequate with respect to China's procedural obligations under the AD and SCM Agreement, the premise of China's argument is similarly misplaced with respect to its substantive obligations under AD Agreement Article 3.1 and 3.2 and SCM Agreement Article 15.1 and 15.2.

66. It is not the obligation of an interested party to raise a particular complaint; it is the obligation of an investigating authority to ensure its injury findings are based on an "objective examination" and based on "positive evidence" that is "reflected in relevant documentation, such as an authority's final determination."[75] Here, China asserts that MOFCOM had no obligation to disclose its methodology and reasoning for selecting the four domestic producers absent some request or argument from the U.S. respondent parties that it do so.[76] By its own statements, China has thus admitted that MOFCOM breached Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement by failing to provide a reasoned and adequate explanation for its determinations.

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[72] China, Responses to Panel Questions, para. 164.

[73] *See* Verification Exhibits (Exhibits CHN-4-7).

[74] China, Responses to Panel Questions, para. 164.

[75] *China – GOES (AB)*, para. 132; *see also Mexico – Rice (AB)*, para. 205 ("An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis The assumptions on which Economía relied in its methodology played an important role in its reasoning. In the Final Determination, Economía did not explain why these assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture of the volume and price effects of the dumped imports.")

[76] China, Responses to Panel Questions, para. 164.

67. MOFCOM's failure to disclose, at any appropriate point in the reinvestigation, its methodology and reasoning for selecting the four domestic producers also violated AD Agreement Article 3.1 and SCM Agreement Article 15.1. Absent an explanation – even in the final redetermination – of MOFCOM's methodology and reasoning for selecting these producers, the Panel has no way to assess the objectivity of the selection process. China's *post hoc* rationalization that MOFCOM selected the producers out of convenience in no way establishes that the selection process was objective, or substitutes for the explanation that MOFCOM was obligated to include in the redetermination itself. To the contrary, MOFCOM's reliance on its "convenience" defense only emphasizes the lack of reasoning and objectivity in MOFCOM's redetermination.

Comment on Part (b)

68. In responding to this Panel question, China was unable to identify anything in the redetermination that provided "any analysis related to the representativeness of the selected producers in the redetermination."[77] Indeed, China readily acknowledges that MOFCOM 's selection of these four producers had nothing to do with their representativeness. According to China, MOFCOM selected the four domestic producers invited to report product-specific pricing data because they were among the seven domestic producers for which it had already conducted verifications, and thus familiar to MOFCOM.[78] China's *post hoc* rationalization of MOFCOM's selection methodology is no substitute for the analysis of the representativeness of the selected producers that MOFCOM was required to include in the redetermination. And even if MOFCOM had included such an explanation in the redetermination, selecting a sample of domestic producers on the basis of "basic familiarity" in no way ensures that the sample is "properly representative of the domestic industry."[79]

69. China also argues that MOFCOM was under no obligation to ensure the representativeness of the selected producers because "the 'representativeness' of the selected producers {was} a question regarding price comparability of specific products, which was not the purpose of the MOFCOM verification exercise and collection of supplemental information."[80] Contrary to this argument, however, MOFCOM did utilize the product-specific pricing data collected from four domestic producers to compare subject import prices to its sample of domestic prices for specific products.[81] China acknowledges these price comparisons,

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77 *See* China, Responses to Panel Questions, paras. 165-67.

78 *See* China, FWS, para. 269, 294-95; China, Responses to Panel Questions, para. 162.

79 *EC – Fasteners (AB)*, para. 436.

80 China, Responses to Panel Questions, para. 165.

81 *See* Redetermination at sec. VII(ii)(2) (Exhibit USA-9).

and claims that they were "an added step to confirm the conservative nature of the selected analysis."[82] Having failed to ensure the representativeness of its sample of domestic industry pricing, however, MOFCOM failed to base the price comparisons utilizing these data on an objective examination of positive evidence.

70. Equally unpersuasive is China's claim that MOFCOM had no need to ensure that its sample of domestic industry pricing was representative because the sample was used "merely to establish pricing relationships across product types, whatever the absolute prices may be."[83] China claims that "the data MOFCOM collected and verified" show that "such pricing relationships would {not} be materially different from one producer to the next," but that is not the case.[84] The summary verification exhibits provided by the four domestic producers sampled by MOFCOM show that the pricing relationship across product types varied even among the domestic producers.[85] For example, Beijing Huadu generally ranked legs as second or third in terms of unit price, whereas Dachan Wanda and Shandong Chunxue generally ranked legs as fourth or fifth.[86] Shandong Chunxue generally ranked breasts as fourth in terms of unit price, while other producers ranked breasts fifth.[87] Having failed to ensure that its sample of product-specific pricing data was representative, MOFCOM could not assume that the pricing relationship across product types for the four domestic producers was representative of the pricing relationships across product types for all 21 domestic producers in the domestic industry.

71. Furthermore, as the United States has explained, there is no basis in the AD Agreement or the SCM Agreement for relaxing the requirement that samples "be properly representative of the domestic industry" for some purposes but not others.[88] Contradicting its earlier claim that MOFCOM utilized its sample pricing data for "limited purposes," China now acknowledges that MOFCOM relied exclusively on these data to address the Panel's finding that MOFCOM's AUV

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82 China, Responses to Panel Questions, para. 182.

83 China, Responses to Panel Questions, para. 166.

84 China, Responses to Panel Questions, para. 166. China also claims, without explanation, that "import data, and . . . other export data provided by USAPEEC" somehow show that the pricing relationships between products are the same for all Chinese producers. *Id*. It is unclear how import or export pricing data could shed any light on the relative prices of different products sold by Chinese producers.

85 *See* Exhibits CHN 4-7, as summarized in China, SWS, para. 265.

86 China, SWS, para. 265.

87 China, SWS, para. 265.

88 *See* United States, SWS, para. 155.

comparisons failed to account for clear differences in product mix.[89] Based solely on these data, MOFCOM decided that "no adjustments to the aggregate annual AUVs were needed,"[90] even though the data themselves underscored the dramatic "differences in the composition of the two baskets being compared."[91] Given the critical importance of the sample pricing data to MOFCOM's analysis of subject import price effects, MOFCOM could not base the analysis on an "objective examination" of "positive evidence," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, without ensuring that the sample was representative.[92] Having failed to do so, MOFCOM's reliance on these data as the justification for continued reliance on its flawed AUV comparisons was contrary to AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

72. Finally, China argues that MOFCOM was entitled to rely on the sample of product-specific pricing data without ensuring that it was representative because no U.S. interested party submitted evidence or arguments rebutting MOFCOM's conclusion that paws were a high-value product.[93] As an initial matter, the United States would stress that MOFCOM's sample of product-specific data does not support its conclusion that paws were a high-value product.[94] The limited data indicated that paws tended to be ranked 3rd or 4th in terms of price, and the sales price index for paws was little higher than the sales price index for breast meat, which China characterizes as a "lowest price product."[95]

73. More fundamentally, the United States has established that MOFCOM never provided U.S. interested parties with timely notice of its reasoning and methodology for collecting price-specific data from only four domestic producers, in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Had MOFCOM provided such notice, U.S. interested parties would have been in a position to rebut both MOFCOM's flawed methodology for collecting and analyzing product-specific pricing data and the deficient conclusions drawn from these data. For example, U.S. interested parties might have argued that MOFCOM should collect pricing data on

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89 *See* China, Responses to Panel Questions, paras. 177-83.

90 China, Responses to Panel Questions, para. 183.

91 *Compare* China, SWS, para. 265 with Exhibits CHN-4-7.

92 *EC – Fasteners (AB)*, para. 436; *see also EC – Salmon*, para. 7.130.

93 China, Responses to Panel Questions, para. 167.

94 *See* United States, Opening Statement, para. 17.

95 China, SWS, paras. 265-66.

legs and paws, which accounted from most subject imports, from all 21 domestic producers, for purposes of product-specific price comparisons.

Comment on Part (c)

74. In response to this question, China simply reiterates its position that MOFCOM was under no obligation to ensure price comparability in the price effects analysis because its sample of product-specific pricing data was not used for direct price comparisons but to establish price relationships.[96] As discussed above, however, MOFCOM did use its sample pricing data for some sort of direct price comparisons, and relied exclusively on the data to justify its continued reliance on flawed AUV comparisons. MOFCOM could not rely on its sample pricing data as the basis for its price effects analysis in the redetermination without ensuring that the sample was representative. Having failed to perform any analysis related to the representativeness of the selected producers, MOFCOM failed to base its price effects analysis on the objective examination of positive evidence required under Articles 3.1 and 15.1, and to "consider whether there has been a significant price undercutting" in a manner consistent with Articles 3.2 and 15.2.

Question 46: The Panel understands China to be arguing that MOFCOM verified certain data and found that the benchmark price it used was "conservative". As well, in paragraphs 280 and 281 of its first written submission, China draws certain "implicit" meanings from the findings of the Panel in its original report. In its original report, the Panel found that where an investigating authority performs a price comparison on the basis of a "basket" of products or sales transactions, it must:

i. "ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared", or

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

Can China identify the specific steps MOFCOM took, or the adjustments MOFCOM made to its analysis, to implement the Panel's findings in the original report, namely any steps or adjustments which ensure price comparability of two dissimilar baskets of goods? Where is this reflected in the redetermination?

75. In responding to this question, China concedes that MOFCOM took no steps and made no adjustments to ensure the price comparability of the two dissimilar baskets of goods that it

[96] China, Responses to Panel Questions, para. 168.

compared for purposes of its price undercutting analysis.[97] Quoting the Panel Report, China argues that MOFCOM was under no obligation to make any adjustments because its sample of product-specific pricing data allegedly showed that "the price differences resulting from a comparison at the {AUV} level were not 'merely from differences in the composition of the two baskets being compared.'"[98] In China's view, the Panel found that an investigating authority may base its price undercutting analysis on a comparison of the AUVs of dissimilar baskets of goods as long as some unspecified portion of the price difference results from price undercutting rather than differences in product mix.[99] That is not what the Panel found.

76. What the Panel found was that investigating authorities must either compare baskets that are "sufficiently similar" that price differences reasonably reflect price undercutting or else make adjustments to control for differences in product mix. As the Panel explained, "{t}here can be no question that the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of price undercutting by the dumped or subsidized imports as compared with the price of the domestic like product . . . ."[100] The Panel also found that "{a} comparison of prices that are not comparable would not, in our view, satisfy the requirement for the investigating authority to conduct an 'objective examination' of 'positive evidence.'"[101] Building on these findings, the Panel concluded as follows:

> Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are

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97 China, Responses to Panel Questions, para. 183 ("MOFCOM . . . determined that no adjustments to the aggregate annual AUVs were needed.").

98 China, Responses to Panel Questions, para. 183 ("MOFCOM . . . determined that no adjustments to the aggregate annual AUVs were needed.").

99 China, Responses to Panel Questions, para. 174.

100 *China – Broiler Products*, para. 7.475.

101 *China – Broiler Products*, para. 7.476.

> sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product.[102]

In other words, when AUVs are influenced by product mix, investigating authorities may consider price undercutting by comparing the AUV of a basket of subject imports to the AUV of a basket of domestically-produced merchandise only if the two baskets are "sufficiently similar" in terms of product mix.

77. The record before MOFCOM established that AUVs were influenced by product mix and that the product mix of subject imports differed markedly from the product mix of domestically-produced broiler products. The record showed that the AUV of all subject imports and the AUV of all domestically-produced broiler products were influenced by the mix of broiler products in each basket because different broiler products were sold at different unit prices. Based on MOFCOM's sample of product-specific pricing data, for example, the price difference between the lowest-value broiler product and the highest-value broiler product reported by each of the four domestic producers ranged from 40.8 to 92.3 percent.[103] The record also showed that subject imports consisted primarily of paws and legs ("chilled chicken cuts"),[104] whereas the domestically-produced broiler products in MOFCOM's sample were distributed across all broiler product categories, but concentrated in the breast, leg, and "others" categories.[105] Because the subject import basket was not "sufficiently similar" to the domestically-produced basket, but rather highly dissimilar, MOFCOM was obligated to either "perform its price comparison at the level of product models" or "make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product."[106] MOFCOM did neither, and instead relied on the very same AUV comparisons that the Panel found inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

78. China argues that MOFCOM somehow established that it had no need for any adjustments to account for differences in product mix, by allegedly showing that subject imports

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102 *China – Broiler Products*, para. 7.483.

103 *See* China, SWS, para. 265.

104 Redetermination at Section VII(ii)(2) (Exhibit USA-9); see also China, SWS, para. 265.

105 *See* Exhibits CHN-4-7. MOFCOM never disclosed a definition for the "others" category, which commanded the lowest unit price of any product category for reasons unknown.

106 *China – Broiler Products*, para. 7.483.

consisted largely of "high value" paws, whereas domestically-produced broiler products were dominated by the low-value "others" category.[107] China's argument does not withstand scrutiny.

79. As the United States has explained, MOFCOM did not establish that subject imports consisted of broiler products "priced at a higher level" in an objective manner. MOFCOM failed to ensure that the sample of product-specific pricing data on which it relied was representative, in breach of AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.[108] Furthermore, China's assertions that the exhibits show that paws sold by domestic producers "are high value" are not even supported the selective data collected from the four convenient domestic producers. Contrary to China's assertions, paws uniformly fell either in the middle or lower in indexed price value rankings for the five indexed products.[109] Thus, the unrepresentative sample itself indicated that paws tended to be ranked 3rd or 4th in terms of unit price, and that the sales price index for paws was only a little higher than the sales price index for breast meat, which China characterizes as a "lowest price product." How then could MOFCOM objectively have ascertained – as China now claims – that domestic producers' sale of paws should be considered sales of "high" valued products?

80. Moreover, the products ranked 1st and 2nd in terms of price, wings and gizzards, were sold by the four domestic producers, but not imported from the United States in appreciable quantities.[110] China's reference to the "others" category to defend MOFCOM's analysis is nothing more than a *post hoc* rationalization; MOFCOM made no mention of the "others" category in the redetermination.[111] Nor could MOFCOM objectively rely on a pricing category whose definition was never disclosed to the U.S. respondent interested parties, and remains a mystery. In light of the deficiencies in the selective data gathered and discrepancies even in China's *post hoc* characterizations of the indexed data, it cannot be concluded that MOFCOM objectively found that the product specifications sold by the domestic industry similar to the imported subject merchandise were priced at a higher level.

81. Furthermore, as discussed above, MOFCOM's analysis of limited product-specific pricing data failed to ensure that the product mix of subject imports was "sufficiently similar" to the product mix of domestically-produced broiler products to permit meaningful price comparisons. Because the AUV of domestically-produced broiler products was primarily determined by the sales prices of products not imported from the United States, MOFCOM's

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107 China, Responses to Panel Questions, paras. 179-81.

108 *See* United States, FWS, paras. 136-50; United States, SWS, paras. 152-55.

109 *See* Tables presented in China SWS, para. 265.

110 China, SWS, para. 265.

111 *See* Redetermination at Section VII(ii)(2) (Exhibit USA-9).

AUV comparisons resulted in price undercutting margins divorced from actual competition between comparable subject imports and domestically-produced broiler products. Indeed, the vast majority of the pricing data collected from the four domestic producers in MOFCOM's sample was for products not imported from the United States in significant quantities – products other than paws and legs.[112] Accordingly, MOFCOM's price undercutting margins reflected differences in product mix and changes in product mix over time, rather than actual price undercutting margins.

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

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).

82. Contrary to China' response to this question, the United States has never argued that MOFCOM should ignore the first half of 2009.[113] Rather, as the United States explained in response to this question, the United States maintains simply that, in order to meet the requirements for investigating authorities to conduct an "objective examination" of "all relevant economic factors," under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4, MOFCOM should have considered the relationship between subject imports and the domestic industry's performance over the entire POI, including the 2006-2008 period and the first half of 2009.[114]

83. China asserts that it agrees that an investigating authority that focuses on the first half of a POI, but not the second half would not have engaged in an objective examination.[115] China argues the converse is not true. The premise of this statement is fundamentally mistaken. An examination is not rendered objective or based on positive evidence simply because it considers information at the end of the POI as opposed to the start, but only when it considers *all* information throughout the POI, including that which might not support a finding of material injury. If an investigating authority finds that trends during a particular part of the POI are less persuasive than in others, it needs to set forth why it believes such is the case.

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[112] Well over half of the volume of sales reported was for products other than paws and legs. See Exhibits CHN-4-7.

[113] China, Responses to Panel Questions, para. 185.

[114] *See* United States, Responses to Panel Questions, paras. 104-5.

[115] China, Response to Panel Questions, para. 186.

84. Here, 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.[116] Far from "focus{ing} on the first half of 2009 . . . in the context of the totality of the facts before the authority, including the performance of the industry between 2006 and 2008," as China claims, MOFCOM dismissed the domestic industry's strengthening performance during the 2006-2008 period with a single sentence.[117] The outright neglecting of timeframes in the POI that indicates the health of industry is strong or improving in favor of only those that show the industry's health deteriorating is not an "objective examination" based on "positive evidence."

85. China seeks to excuse MOFCOM's deficient impact analysis by noting that investigating authorities have the discretion to define the POI for an investigation and to attach weight to a domestic industry's performance in the most recent period.[118] But, as even China recognizes, an investigating authority's discretion to define the POI does not give the authority license to ignore those portions of the period that conflict with an affirmative determination.[119] Yet, as established by the lack of any explanation in MOFCOM's redetermination concerning the 2006-2008 period, that is precisely what MOFCOM did in this case.

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116 *See* United States, Responses to Panel Questions, paras. 106-11.

117 *See* United States, Responses to Panel Questions, paras. 110-11.

118 China, Responses to Panel Questions, para. 186.

119 China, Responses to Panel Questions, para. 186 ("Authorities may not arbitrarily ignore certain periods of time.").