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)

OPENING ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

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I. INTRODUCTION

1. Mr. Chairman, members of the Panel: On behalf of the U.S. delegation, I thank you for taking on the task of examining the U.S. complaint so that the DSB may make additional findings to assist the parties in finding a positive solution to this dispute. We look forward to working with you over the next two days as you carry out your work.

2. We are here today because China, notwithstanding the clear findings earlier in this dispute – and other disputes[1] – has breached the basic procedural and substantive obligations of the AD[2] and SCM[3] Agreements in maintaining antidumping and countervailing duties on U.S. broiler products.

3. To a large extent, China has not addressed the legal and factual arguments of the United States, but rather relies on rhetoric and conclusory statements. For example, China repeatedly claims that the United States has engaged in mischaracterization of the record[4] or repeatedly avers that MOFCOM's conduct and findings during the reinvestigation was reasonable and objective. But China has no basis for these assertions. Indeed, China has often not even attempted to provide cites to the record before MOFCOM.[5] Rather, China's arguments are primarily, as this Panel put it in the original proceeding, simply *post-hoc* rationalizations that are "irrelevant for the purposes of our assessment of MOFCOM's actions."[6]

4. In our statement this morning, we will focus on certain key points, particularly in response to the new arguments raised in China's second written submission. We will address each of our claims in turn, beginning with the injury claims, then the procedural claims, and finally the substantive dumping claims.

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1 *China – GOES* (DS414), *China – X-Ray Equipment* (DS425), *China – Autos* (DS440), *China – HP-SSST* (DS454/DS460).

2 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

3 *Agreement on Subsidies and Countervailing Measures*.

4 *See e.g.*, China, First Written Submission (FWS), paras. 1, 33, 194, 254, 259; China, Second Written Submission (SWS), paras. 113, 162, 214.

5 *See e.g.*, China, FWS, paras. 144, 289, 365, 366; China, SWS, para. 180, 252, 261, 267, 269, 273, 292.

6 *China – Broiler Products*, para. 7.492.

II. MOFCOM'S FLAWED INJURY REDETERMINATION BREACHES THE AD AND SCM AGREEMENTS

5. China's defense of MOFCOM's injury redetermination centers on the assertion that the United States is seeking to substitute its judgment for MOFCOM's.[7] That is both untrue, and misplaced. It is not true because our submissions do not contend that MOFCOM – or any other investigating authority – is required to adopt a specific outcome on any particular issue. It is misplaced because – as the Appellate Body and panels have recognized when rejecting similar arguments[8] – it does not speak to the pertinent question of whether the investigating authority's judgment was based on "positive evidence" and an "objective examination" of the evidence.[9] In other words, the issue is not whether MOFCOM has discretion, but whether the exercise of that discretion comports with the obligations in the AD and SCM Agreements.

6. Accordingly, when evaluating MOFCOM's injury redetermination, it is important to recall what it means to have a determination based on positive evidence and an objective examination.

- Positive Evidence: "means … that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible;"

- Objective Examination: "an injury analysis can be 'objective' only 'if it is based on data which provide an accurate and unbiased picture of what it is that one is examining….'"[10] Moreover, "the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."[11]

Thus, in our presentation today, we will focus on the precise errors that render MOFCOM's injury findings in the redetermination deficient under these obligations.

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7 *See e.g.*, China, SWS, para. 3.

8 *See e.g.*, *China – HP-SSST (AB)*, paras. 5.620-5.262; *China – GOES (AB)*, paras. 200-202.

9 AD Agreement, Article 3.1 and SCM Agreement, Art. 15.1; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 111 and 113.

10 *Mexico – Rice (AB)*, para. 181.

11 *US – Hot-Rolled Steel (AB)*, para. 193.

A. China Cannot Defend MOFCOM's Price Effects Analysis (Breach of AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2 of the SCM Agreement)

7. The first aspect of MOFCOM's injury redetermination we will address is MOFCOM's price effects analysis. An objective examination of pricing data requires that the prices the investigating authority compares must correspond to comparable products.[12] The Panel found in the original dispute that MOFCOM breached its WTO obligations because the basis for its pricing comparisons – the average unit values or AUVs – were not comparable. Specifically, MOFCOM failed to control for differences in the product mixes in the respective AUVs used for subject imports and domestic production. Absent controls or adjustments, the Panel found MOFCOM's pricing analysis to be inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Article 15.1 and 15.2 of the SCM Agreement.[13] As the Panel found, "there is a high risk that the differences in AUVs reflect these variations in product mix, rather than actual differences in pricing."[14] Tellingly, MOFCOM's price effects analysis in the redetermination continues to rely on its original flawed analysis of AUVs, rather than make any of the requisite adjustments to ensure comparability.[15]

1. MOFCOM Did Not Ensure Comparability of its AUVs

8. As an initial matter, we recall what MOFCOM did in response to address the Panel's findings. Per China,

> All MOFCOM did was confirm there was no need to change from its use of overall AUVs in this case, consistent with the findings and conclusions of the panel. . . .[16]

In other words, there is no dispute between the parties that MOFCOM did not apply controls or adjustments to the product prices it used for comparison prices. MOFCOM's approach cannot be sustained.

9. First, MOFCOM's determination does not explain why its approach of using domestic pricing data from these four particular firms would resolve the issue of product mix. The United

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12 *See e.g.*, *China – X-Ray Equipment*, para. 7.68.

13 *China – Broiler Products*, paras. 7.475-7.476.

14 *China – Broiler Products*, para. 7.490.

15 China, SWS, paras. 270-272.

16 China, FWS, para. 284

States thus disagrees with China that it is an "inescapable conclusion" that subject imports are dominated by high value products.[17] Specifically, there is no indication in the redetermination what precisely in this data assures MOFCOM that any price differential is due to price undercutting as opposed to the differences in product mix.[18] MOFCOM's precise explanation for its methodology is that the sales data it solicited affirms its original analysis that product mix is not an issue.[19] As is evident, we have no understanding how this data was applied to ensure that product mix is not an issue. There is nothing to suggest this methodology was objective or based on positive evidence.

10. Indeed, the approach appears simply to be a variant of the one that China presented in the original dispute – and which was properly rejected. Specifically, China cited a sampling of invoices it had collected from domestic producers as well as purportedly known market conditions to suggest the AUVs would favor U.S. producers and serve as a conservative estimate for price undercutting.[20] As the Panel found, such evidence only highlights that there are differences in the product baskets and that control needs to be applied.[21] Simply adding slightly more information from certain producers does not address the problem.

11. Rather than systematically analyzing the influence of product mix on the AUV of subject imports, MOFCOM simply noted the AUV range of each product sold by the four domestic producers and concluded, "the product specifications sold by the domestic industry similar to the imported subject merchandise were priced at a higher level."[22]

12. China's reliance on certain WTO reports applying AD Agreement Article 3.2 and SCM Agreement Article 15.2 are misplaced. In fact, those reports confirm that the comparison methodology applied by an authority must be objective and based on positive evidence.[23] The fact that the AD and SCM Agreements do not specify a particular calculation methodology does not give license to use a biased or unsupported one. Yet, that is precisely the type of discretion that China claims MOFCOM is entitled to.

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17 China, SWS, para. 264.

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

19 Redetermination, Section VII.(ii)(2) (Exhibit USA-9).

20 *China – Broiler Products*, para. 7.493.

21 *Id*.

22 Redetermination, Section VII(ii)(2)((Exhibit USA-9).

23 China, SWS, paras. 258-260 citing *EC – Pipe Fittings*, para. 7.281.

13. Second, there is nothing in the redetermination about why or how these firms were selected. Nor does the record indicate the coverage of their product-specific data. Even the *post hoc* rationalization offered by China in its submissions suggests the only reason these firms were chosen was that it was convenient for MOFCOM since it was already familiar with these four firms and decided it lacked the time and resources to examine all 17 firms.[24]

14. In other words, MOFCOM reached out to these firms simply because MOFCOM already knew something about them. But an objective examination based on positive evidence requires an investigating authority to try and discern the best possible information regarding price comparisons and product mixes, and not to select data from firms based on convenience.

15. It is important to keep in mind that the data from these four firms is a sample of a sample. As the Panel may recall, in defending against the U.S. challenge on how MOFCOM defined its domestic industry in the original proceeding, China stressed the large number of firms that comprised its domestic industry. Specifically, China provided the following table to highlight how there were – in China's words – "hundreds of large producers, thousands of medium-sized producers, and millions of smaller producers."[25]

Annual Slaughter (Birds)	**Number of Farms**
1-1,999	27,127,006
2,000-9,999	358,688
10,000-49,999	136,833
50,000-99,999	12,405
100,000-499,000	2,623
500,000-999,999	344
1,000,000 and above	147
Total	27,638,046

Yet, MOFCOM believed that seeking data from just four producers instead of from the seventeen producers within the industry it defined to be sufficient. Particularly, in the absence of any explanation as to the methodology employed by MOFCOM to select these firms, it is clear that MOFCOM's attempt to remedy the AUV deficiency is not an "objective examination" based on "positive evidence."

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24 China, FWS, para. 295.

25 China, First Written Submission in Original Dispute, para. 238.

16. Third, as our submissions explain, the record demonstrated that the product mix of subject imports was dynamic in that it changed over time. China's attempted response is that MOFCOM's "spot check" confirmed that this was not an issue.[26] China's argument, which lacks any citation to the record or the determinations, is a *non-sequitur*. It ignores that a "spot check" cannot, by definition, examine a changing market situation. Rather, this is a flawed analytic approach that uses flawed data, and is thus not a basis on which to draw any conclusions.

17. Fourth, China fails to address that MOFCOM did not even attempt to examine the product mix pricing for imports. 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."[27] 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.[28] In light of this, MOFCOM could not objectively conclude that the product mix sold by the domestic industry was comparable to that of the imported subject merchandise.

18. In sum, MOFCOM's sample of domestic producer pricing data in no way ensured that its AUV comparisons were not distorted by the dramatic product mix differences between subject imports and domestic industry sales. Accordingly, MOFCOM did not conduct an "objective examination" of "positive evidence" on this issue and thus China acted inconsistently with AD Agreement Article 3.1 and SCM Agreement Article 15.1. As a consequence, MOFCOM also failed to establish that there was significant subject import price undercutting in a manner that was consistent with AD Agreement Article 3.2 and SCM Agreement Article 15.2.

2. MOFCOM's Price Suppression Finding Remains Flawed

19. China's defense of MOFCOM's price suppression finding appears to rest on two points. First, China appears to argue that a price suppression finding does not need to be well explained under the relevant obligations. This position has no legal basis. Indeed, and contrary to China's arguments, the Appellate Body's analysis in *China – GOES* reinforces the weakness in China's arguments.[29] As the Appellate Body's finding made clear, the difference between Articles 3.2/15.2 and 3.5/15.5 do not lie in the rigor of the explanation, but rather in the substantive scope of what is being explained. Per the Appellate Body, "[t]he examination under Articles 3.5 and 15.5, by definition, covers a broader scope than the scope of the elements considered in relation

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26 China, SWS, para. 269.

27 China, SWS, paras. 265-66.

28 China, SWS, para. 265.

29 *China – GOES (AB)*, para. 152.

to price depression and suppression under Articles 3.2 and 15.2."[30] An investigating authority could not use a finding that subject imports suppressed domestic prices to a significant degree as a "basis for the overall causation analysis," as the Appellate Body explained, if the finding did not establish a causal relationship between subject imports and significant price suppression.[31] Thus, China's attempt to suggest that MOFCOM's determination can be assessed in a more permissive manner fails.

20. Second, China asserts that the United States is misreading the record.[32] But the relevant portions of the record are clear, and the United States has accurately described MOFCOM's reasoning: MOFCOM predicated its finding that subject imports significantly suppressed prices for the domestic like product on its deficient underselling analysis.[33]

21. In addition, MOFCOM failed to address record evidence that prices for the domestic like product were not, in fact, suppressed during the 2006-2008 period.[34] In particular, even as subject imports allegedly undersold the domestic like product, the Chinese domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008.[35] China argues that MOFCOM's price suppression finding was WTO-consistent because MOFCOM based the finding on increasing subject import volume, alleged subject import underselling, and the domestic industry's financial losses throughout the period of investigation.[36] As the United States has demonstrated, however, MOFCOM's reliance on these broad factors did not establish that subject imports suppressed domestic prices to a significant degree because other evidence and trends ignored by MOFCOM showed the opposite.[37] The failure by China to point to where in the redeterminations MOFCOM confronted and deliberated on these types of issues amounted to a failure by China to conduct an objective examination based on positive evidence.

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30 *China – GOES (AB)*, para. 147.

31 *China—GOES (AB)*, para. 149; *see* United States, SWS, para. 157.

32 China, SWS, para. 279.

33 United States, FWS, paras. 152-57.

34 United States, FWS, paras. 158-59.

35 Redetermination at section VII(ii)(2) (Exhibit USA-9).

36 China, SWS, paras. 280-82.

37 *See* United States, SWS, paras. 159, 162-63.

B. China Cannot Defend MOFCOM's Impact Analysis (Breach of AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4)

22. With respect to defending MOFCOM's findings concerning the impact of subject imports on its domestic industry, China posited the following question:

> Is it really fair to find China to have acted inconsistently with its WTO obligations in such a situation, simply because China did not change an aspect of its prior determination that it was under no obligation to change?[38]

It is more than fair; in fact, China has been on notice of these important claims since the United States first brought this dispute in 2011, nearly six years ago. And indeed, the Panel has answered that question in rejecting China's terms of reference argument.

23. In making this unsupportable jurisdictional argument, China has confirmed that MOFCOM's analysis on the impact of subject imports on the domestic industry in the redetermination remains *completely unchanged* from that in the original determination.[39] Accordingly, MOFCOM has taken no steps to address any of the arguments concerning why its impact analysis is deficient under the AD and SCM Agreements. We briefly recount those deficiencies, and explain why the arguments posed by China in response are without merit.

1. MOFCOM Failed to Address All Relevant Factors

24. First, MOFCOM's examination of the impact of subject imports on the domestic industry failed to consider the numerous factors attesting to the overall health of the industry.[40] Almost every metric during the period of investigation *improved*, as summarized by the following chart.

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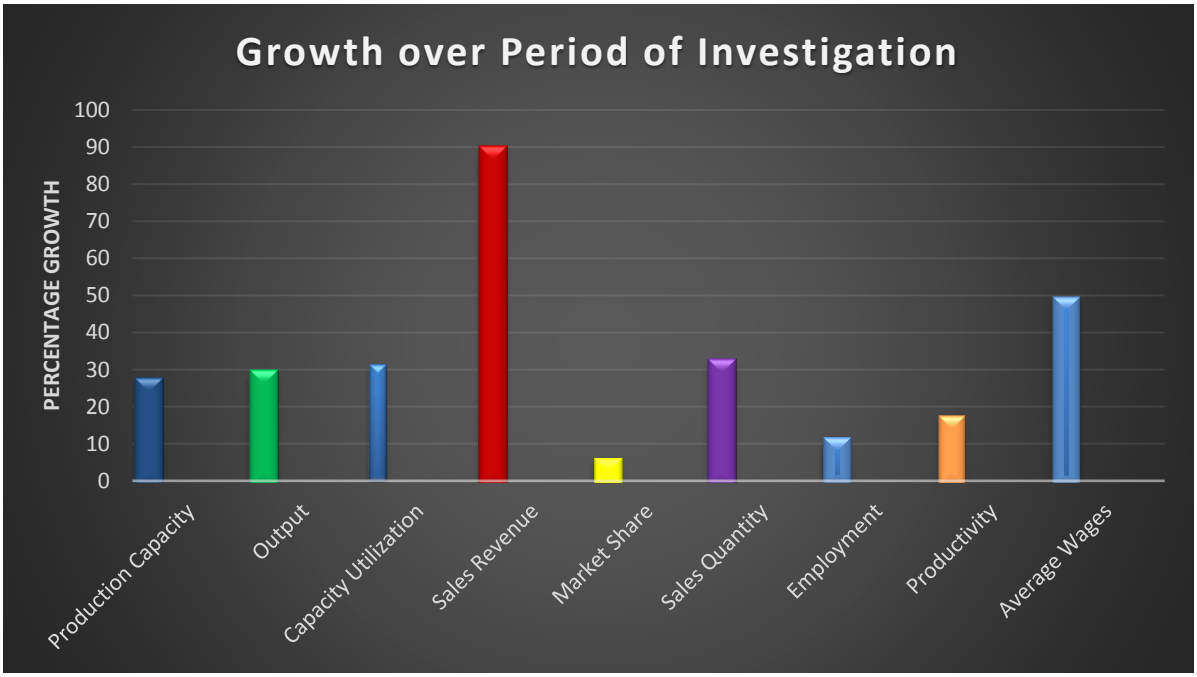
38 China, SWS, para. 295.

39 China, FWS, paras. 332–338; China, SWS, para. 289.

40 *See* Redetermination at sec. VI(III) (Exhibit USA-9); compare with MOFCOM, Final AD Determination at secs. 5.2, 6.1, 6.2.3 (USA-19); MOFCOM, Final CVD Determination at secs. 6.3, 7.1, 7.2.3 (USA-20).



25. China claims MOFCOM "systematically addressed" these factors.[41] But the text of the redetermination indicates otherwise. For example, MOFCOM's "analysis" of productivity and wages in the redetermination are instructive. MOFCOM reasoned as follows:

- During the POI, the productivity of the domestic like products appears stable. The productivity in 2006, 2007, 2008 and the first half of 2009 is 30.75 tons/labor, 34.75 tons/labor, 35.73 tons/labor and 17.24 tons/labor.[42]

- During the POI, the average wages of employees in the domestic industry increase. The average wages in 2006, 2007, 2008 and 2009 is ￥10688, ￥12573, ￥15826 and ￥7948.[43]

That is the extent of the analysis for these two factors. Rote observations such as these are not consistent with the examination required under the AD and SCM Agreements – especially where the observations *undermine the determination of injury*.

26. Only two factors in the Chinese broiler industry did not appear to improve over the period of investigation: the domestic industry's rate of capacity utilization and end-of period

41 China, SWS, para. 304.

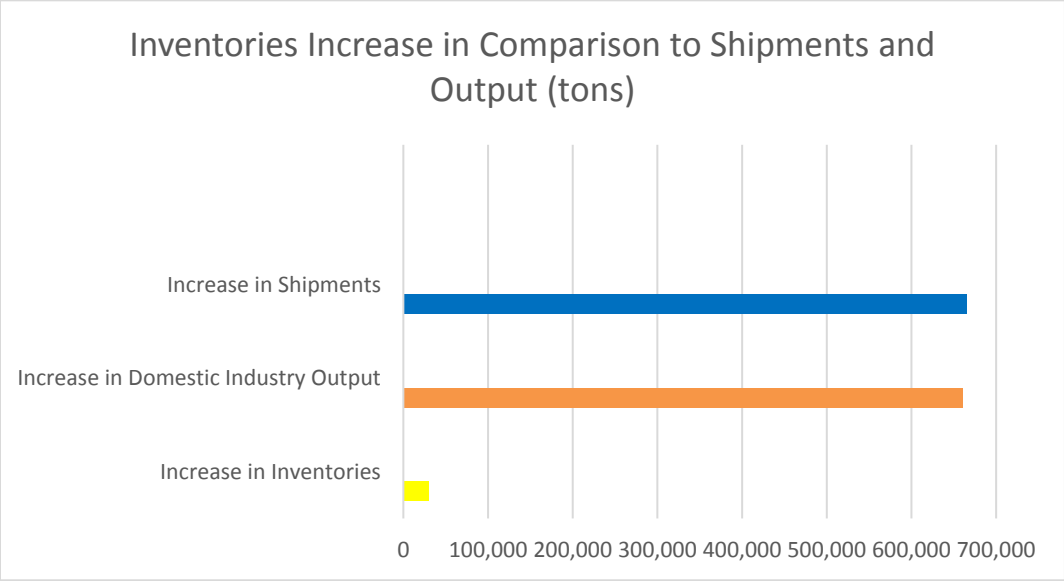
42 MOFCOM, Redetermination at secs. VI(III)(3), (5), and (14) (Exhibit USA-9).

43 *Id.*

inventories. It is on these factors that MOFCOM based its finding that subject imports adversely impacted the domestic industry throughout the period of investigation. With respect to both factors, however, there was compelling evidence that the subject imports had no impact at all. As we will explain, MOFCOM's consideration of these two factors is not consistent with the obligations in Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

a. *Inventories*

27. With respect to inventories, MOFCOM failed to consider the increase in inventories in relation to the domestic industry's production and shipments. Over the period of investigation, the increase in end-of-period inventories (30,498 tons) at this same time was dwarfed by the absolute increase in domestic industry output (661,000 tons) and shipments (665,200 tons).[44]



Indeed, even after this increase, the industry's inventories were objectively small, equivalent to only around three percent of industry output and shipments. In any event, MOFCOM failed to provide any analysis on this issue, including why such small inventories supported its conclusion that subject imports adversely impacted the domestic industry. Therefore, MOFCOM's finding that the increase in domestic industry inventories was significant and supported its impact finding was not based on an "objective examination" of "positive evidence."

44 MOFCOM, Redetermination at secs. VI(III)) (Exhibit USA-9).

b. *Capacity Utilization*

28. Likewise, MOFCOM's findings on capacity utilization fail to address evidence indicating that the level was not due to subject imports. As our submissions explain, capacity utilization actually increased slightly during the 2006-2008 period corresponding to most of the increase in subject import volume. The only reason the industry's capacity utilization did not increase dramatically during the period was the industry's own decision to increase capacity far beyond growth in domestic demand.[45] MOFCOM's findings on capacity utilization fail to speak to any of this and are thus inconsistent with China's WTO obligations to conduct an objective examination based on positive evidence.

2. MOFCOM Failed to Consider the Entire Period of Investigation

29. The final error we wish to address concerning MOFCOM's impact findings is its failure to consider the entire period of investigation. China acknowledges that MOFCOM focused on the more recent aspects of the period of investigation, but argues it is permissible.[46] Specifically, China cites *Mexico – Rice (AB)* as endorsing a focus on recent time periods. To the contrary, the analysis in that report confirms that it is the period of investigation itself that should be recent. The report certainly does not find that an investigating authority can simply focus on the end period without putting its explanation in the context of the data for the entire period of investigation.

C. China Cannot Defend MOFCOM's Causal Link Analysis (Breach of AD Agreement Articles 3.1, 3.5, 12.2 and 12.2.2 and SCM Agreement Articles 15.1, 15.5, 22.3 and 22.5)

30. Our submissions highlight that MOFCOM's causation analysis in its redetermination remains flawed for precisely the same reasons as the original determination. Specifically, MOFCOM (1) ignored record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) relied on flawed analysis of price undercutting and suppression; and (3) failed to reconcile its analysis with evidence that the domestic industry's performance improved as subject import volume and market share increased.

1. MOFCOM Failed to Examine Evidence That Subject Import Volumes Did Not Increase at the Expense of the Domestic Industry

31. With respect to the first point, the redetermination failed to address that the increase in subject import market share during the period of investigation failed to prevent the domestic

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45 United States, FWS, paras. 172-176.

46 China, SWS, para. 305.

industry from increasing its market share by an even greater amount.[47] China asserts that the United States failed to grapple with the pertinent discussion.[48] But what discussion is China referencing? Notably, China does not quote any language in the redetermination, but simply characterizes it. When we read the actual language being referenced, any assessment of this issue is lacking. Instead, the determination contains a rote reference to a statistic. For example, we have reproduced below the passage that China says is contrary to our argument that MOFCOM did not ignore the market share issue[49]:

> During the investigation period, from 2006 to 2008, the market share of the like product of the domestic industry in the domestic market presented an increasing trend, but it presented a declining trend since 2009. In 2006, 2007, 2008 and the first half of 2009, the market share of the like product of the domestic industry in the domestic market were respectively 37.81%, 41.62%, 42.42% and 42.19%. In 2007 and 2008, they increased by 3.81 percentage point and 0.80 percentage point respectively compared to that of the previous year. In the first half of 2009, influenced by the decrease of sales volume, the market share of the like product of the domestic industry in the domestic market declined by 4.80 percentage point, compared to that in the same period of the previous year.

A quick glance confirms that is not a discussion about how market share trends affect causation, but is simply a reference to certain statistics with no analysis as to their significance.

32. China also asserts that the U.S. argument that a significant proportion of U.S. imports such as paws could not be injurious is a new substantive argument.[50] That is somewhat puzzling – the Panel Report records us making that argument in the original proceeding.[51]

33. In any event, the relevant portion of the redetermination that China now references is deficient.[52] The discussion notes that chicken feet are within the scope of the investigation and fungible. The discussion does not address the substantive issue, which is that a significant share of imported paws did not affect domestic producers because of economics. Specifically, since a

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47 Redetermination at section VII(i), (iii)(6) (Exhibit USA-9).

48 China, SWS, para. 345.

49 China, FWS, para. 383.

50 China, SWS, para. 347.

51 *China – Broiler Products*, para. 7.586.

52 China, SWS, para. 349, citing Exhibit USA-22, p. 31.

producer cannot grow only chicken paws, it would not be economically worthwhile to ramp up production of whole chickens for only that purpose.

34. China's only response to this point, contained in its second written submission, is the unsupported assertion that imported paws might divert demand from other chicken products or drive down the price.[53] As demonstrated by the lack of citation, these are *post hoc* arguments without any foundation in the record or determination. Furthermore, the fact that China resorts to *post hoc* arguments reinforces that MOFCOM's analysis failed to grapple with this issue.

35. In sum, evidence that a major proportion of subject import volume, and the increase in that volume, was non-injurious is "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.1. Yet, MOFCOM's redetermination is completely silent on the point.

2. MOFCOM's Causal Link Finding Rests on its Flawed Price Effects Analysis

36. The second reason MOFCOM's finding of causation is inconsistent with the AD and SCM agreements is because it relies on MOFCOM's price underselling analysis, which remains flawed for the reasons already discussed. With no evidence that subject imports either undersold the domestic like product or suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence and also failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury."

3. MOFCOM Failed to Examine Evidence That The Domestic Industry's Performance Improved As Subject Import Volume And Market Share Increased

37. The third flaw in MOFCOM's finding of a causal link between subject import and injury is that MOFCOM ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008.[54] China's defense is the same as its defense of the same deficiency in MOFCOM's impact analysis: the WTO Agreement somehow endorses MOFCOM's myopic focus on the first half of 2009.[55] An investigating authority, however, cannot examine "the relationship between subject imports and the state of the industry" by focusing exclusively, and

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53 China, SWS, paras. 352-353

54 *See* Redetermination at Section VII(i) (Exhibit USA-9).

55 China, FWS, at paras. 395-402.

without reasonable explanation, on a discrete portion of the period of investigation.[56] Furthermore, the domestic industry's performance still appeared to be stronger in the first half of 2009 than it had been in 2006 by many metrics, including capacity, output, sales quantity, market share, sales revenue, productivity, and average wages.

38. China asserts that our disagreement is simply about "how to assess conflicting pieces of evidence."[57] That is incorrect. Our complaint is that no assessment took place. MOFCOM is not entitled to inferences and the *post hoc* rationalizations about how that evidence might now be assessed. Instead, the task here is to examine the explanations in MOFCOM's redetermination and to see if it "took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."[58] As the redetermination demonstrates, MOFCOM did not.

4. China Failed to Address Key Causation Arguments

39. The final aspect of MOFCOM's causation analysis we will address is that MOFCOM failed to address significant arguments raised by the respondents. The obligations under Articles 12.2 and 12.2.1 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their final determinations that include "all relevant information on matters of fact and law" material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

40. As our submissions detail, there are two key arguments that MOFCOM failed to address:

- Both USAPEEC and the United States argued that there could be no link between subject imports and material injury because subject import market share increased entirely at the expense of non-subject imports, and did not take any share from the domestic industry; and

- USAPEEC also argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.[59]

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56 United States, FWS, para. 206-207.

57 China, SWS, para. 357.

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

59 United States, FWS, paras. 212-214.

41. China's position appears to be that any reference to an interested party's argument satisfies an investigating authority's obligations under these provisions. That interpretation is not consistent with the plain text of the provisions, which require investigating authorities to provide in sufficient detail its reasons for rejecting the argument. As the United States has demonstrated in its submissions, the redetermination does not provide an actual explanation, let alone one with sufficient detail as to why these key arguments were rejected.

42. By failing to provide any meaningful reason for its rejection of these arguments, MOFCOM acted inconsistently with AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5.

III. MOFCOM'S FLAWED REINVESTIGATION BREACHES THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

A. MOFCOM Failed to Provide Notice to Interested Parties of the Pricing Information it Required from Chinese Domestic Producers and Denied Them Ample Opportunity (Breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1)

43. First, we address how MOFCOM acted inconsistently with Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because MOFCOM failed to provide "notice of the information" it required from Chinese producers and "ample opportunity" to other interested parties to respond. As the Panel has noted in its Preliminary Ruling, "MOFCOM required, sought, and obtained additional information from Chinese domestic producers in the course of its reinvestigation."[60] And, because MOFCOM failed to afford both notice and opportunity to interested parties in connection with the information that it required from Chinese producers, China is in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Indeed, the United States notes that it is striking that even after two rounds of submissions, no one other than China still knows the precise requests that were actually posed to the Chinese producers.

44. Consistent with the Themes Document the Panel circulated last Thursday, we will first provide some views on the nature of the obligations at issue.

1. The Scope and Relationship of the Obligations

45. First, the scope of "notice" in AD Agreement Article 6.1 and SCM Agreement Article 12.1 requires the identification of the precise information being requested by the investigating authority, and not simply an abstract reference that the investigating authority is requesting information of some sort from a particular party. In this respect, we think it is important to note the pertinent language in the provisions provide that interested parties "shall be given notice *of*

60 *China – Broiler Products (Article 21.5 – United States)*, Ruling of March 22, 2017 ("Preliminary Ruling"), para. 2.26 b(iv).

the information which *the authorities require*." The language thus makes clear that the obligation is not simply ensuring notice of whether the investigating authority is requesting information generally, but notice of "the" information being requested itself.

46. Second, we would like to address the relationship between the two obligations in these provisions – affording interested parties (1) notice of the information the investigating authorities require and (2) "ample opportunity to present evidence." A proper interpretation recognizes that if a Member breaches the notice obligation, then that Member will have necessarily breached the opportunity provision.

47. If an interested party that does not know what evidence the decision-maker is collecting and relying upon, the party is not in a position to develop and provide rebuttal evidence, or any contrary assessment of the evidence. This reasoning is consistent with the Appellate Body's finding that Article 6.1 sets out a fundamental procedural right, including an "ample" and "full" opportunity to present evidence.[61]

48. While the breach of the notice obligation will lead to a breach of the opportunity obligation, compliance with the notice obligation does not necessarily entail compliance with the obligation to afford an ample and full opportunity. That is, an investigating authority might provide notice of the information it was seeking, but fail to provide the requisite opportunity to provide relevant evidence in writing. We further note that the opportunity extends to any evidence that the interested party considers relevant. Accordingly, an authority cannot defend a breach of the opportunity provision by arguing that certain evidence is *a priori* not relevant to the issues under investigation.

2. MOFCOM's Failure to Provide Notice

49. In its second written submission, China presents two arguments for why it should not be found in breach.

a. *China's Interpretation of "Notice" is Divorced from its Plain Meaning*

50. First, China asserts the United States is misinterpreting the relevant provision by insisting on what China calls "active notification" as opposed to the "notice" that the provisions require.[62] This argument has no merit. The actual term in the WTO agreement is, in fact, simply "notice." And because Articles 6.1/12.1 establish that interested parties "shall be given notice" of the information "which the authorities require", it is those authorities that must take some action to

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61 *US – OCTG Sunset Reviews (AB)*, paras. 241-242.

62 China, SWS, paras. 30-32, 38.

"give[] notice" of what that "require[d]" information is. While the form of notice may vary, the interested parties must actually receive notice.

51. Turning to the record in the investigation, China invokes MOFCOM's storage of certain documents in its reading room as satisfying China's notice obligations.[63] Common sense tells us, however, that there is a difference between merely having a desk drawer that parties can access upon visiting a certain government building and providing notice to interested parties that the drawer contains new, relevant material that the parties should schedule a visit to review. The latter action – notice – permits a party to take advantage of the former situation, and is thus critical. Accordingly, if MOFCOM decides to comply with its procedural obligations by maintaining a single public file, Articles 6.1/12.1 require MOFCOM to provide notice that significant new material has been placed in the file.[64]

52. Furthermore, as our submissions explain, none of the particular documents cited by China – (1) the initiation notice, (2) the general verification letter, and (3) the summaries of sales data – from Chinese producers actually informed interested parties as to what information MOFCOM required.[65]

53. The flaw in China's interpretation is also highlighted by China's inconsistency in its own arguments regarding "notice" under AD Agreement Article 6.1 and SCM Article 12.1. On the one hand, China would require so-called "active notification" to its domestic industry, but not for the other interested parties.[66] Nothing in the text of these provisions, however, suggests that there should be this type of asymmetry in notice.

54. AD Agreement Article 6.4 and SCM Agreement Article 12.3 also reinforce why China's interpretation is incorrect. These provisions provide that investigating authorities need to provide "timely opportunities for all interested parties to *see all information* that is relevant to the presentation of their cases…"[67] These obligations concern accessibility ("opportunities … to see"), rather than being given notice of required information. Thus, China's interpretation of these provisions is not sustainable and cannot absolve MOFCOM's conduct.

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63 China, SWS, para. 34.

64 *Mexico – Rice*, para. 7.199.

65 United States, SWS, paras. 11-34.

66 China, SWS, para. 32.

67 Emphasis added.

b. *Whether MOFCOM Required Information Through Verifications Is Irrelevant*

55. The second argument raised by China is that it was entitled to undertake verifications to obtain the particular pricing information from domestic producers.[68] The argument has no merit. The purpose of verification is to verify information previously "provided" or obtain "further details", not to seek entirely new data sets. In any event, whatever procedure MOFCOM used to obtain information, MOFCOM was required to comply with China's obligations under AD Agreement Article 6.1 and SCM Agreement Article 12.1. Accordingly, even if MOFCOM had decided to seek and collect new information at verification, MOFCOM had to provide notice and an ample opportunity for all interested parties to provide relevant evidence.

3. MOFCOM's Failure to Provide Opportunity

56. With respect to China's rebuttal arguments concerning MOFCOM's failure to provide opportunity, the United States notes two points. First, instead of presenting legal arguments, China disparages U.S. interested parties: that is, China argues that U.S. poultry producers were "simply too negligent."[69] China's position is unsupportable. When an interested party is not made aware of an issue, it cannot reasonably be expected to comment on it. We further note that the United States submitted a letter to MOFCOM months before the redetermination was concluded, raising procedural concerns with MOFCOM and asking it to act "transparently and objectively to ensure that all interested parties have confidence in the process."[70] China never provided a response. Thus, although China attempts to blame the respondents, the record suggests that MOFCOM was not willing to listen.

57. Second, China's argument that the opportunity right has "limits" is without merit.[71] This is not an instance where China provided some opportunities to interested parties, but declined to offer additional opportunities. MOFCOM never informed interested parties of the information MOFCOM required for its injury redetermination, and thus U.S. interested parties had *no* opportunity whatsoever.

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68 China, SWS, paras. 39-40.

69 China, SWS, paras. 46, 54.

70 Exhibit USA-2.

71 China, SWS, para. 50.

B. MOFCOM Failed to Permit Interested Parties Timely Access to Information Such that they could Defend Their Interests (Breach of AD Agreement Article 6.4 and SCM Agreement Article 12.3)

58. China has also breached Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement, which requires investigating authorities to permit *timely* access to information to interested parties, to *enable them to prepare their cases, and defend their interests.* These obligations apply to *all* information *relevant* to the presentation of the interested parties' cases. China failed to afford those opportunities as to the data MOFCOM requests from China's domestic producers, including the identity of those producers and the specific information requests issued by MOFCOM.

59. China asserts that its supposed deposit of documents to the public information room at China's Ministry of Commerce satisfied its obligations. As discussed above, the deposit of documents in the reading room is not meaningful, absent notice to interested parties. Furthermore, the content of those documents was not sufficient to meet China's obligations under AD Agreement Article 6.4 and SCM Agreement Article 12.3. MOFCOM was required to disclose not only the public summaries, but also the full data, the relevant context for the specific products, and the identity of the Chinese domestic producers that provided information to MOFCOM – and it failed to disclose this information.

60. We also note that China is not in a position to invoke confidentiality, because that right belongs to the interested parties and is granted on the basis of good cause. If China wishes to invoke confidentiality as a defense, then it is China's burden to establish it. China's blanket treatment of product coding, sales ledgers, and sales invoice exhibits as confidential without further explanation cannot do so.

61. In sum, China's failure to permit interested parties timely access to information, such that they could present evidence and defend their interests, is in contravention of Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement.

C. China's Failure to Disclose the Anti-dumping Calculations and Data (Breach of AD Agreement Article 6.9)

62. China breached Article 6.9 of the AD Agreement because MOFCOM failed to disclose to the interested parties the "essential facts" forming the basis of its decision to apply anti-dumping duties. In particular, MOFCOM failed to disclose the data and calculations it performed – during the original investigation – to determine the existence and margin of dumping, including the calculation of the normal value and the export price of the respondents.

63. As the Panel found, Article 6.9 requires the investigating authority to disclose the essential facts, and those facts include the data and calculations used to determine the normal

value and export price.[72] Despite the Panel's findings, China failed to provide this data as to Pilgrim's Pride and Keystone.

64. In the reinvestigation, Pilgrim's Pride was denied access to the data calculations from the original investigation, even though MOFCOM cited a purported error in the data and calculations from the original determination to increase the margin of Pilgrim's Pride by 20 points. Indeed, to this day, MOFCOM has never revealed the calculation and data that led to its conclusion in the original investigation – despite the Panel finding that the failure to disclose this information was WTO-inconsistent. Pilgrim's Pride was entitled to know, and indeed needed to know, MOFCOM's precise calculation methodology – yet it never received the necessary disclosure from MOFCOM.

65. MOFCOM's argument – that the original data is not relevant to the reinvestigation – is without merit. The point of disclosing calculations and data is to allow interested parties to make their own assessment so they can defend their interests. MOFCOM's failure to disclose the original data did not afford these opportunities.

66. Turning to Keystone, this respondent likewise was denied access to its margin calculations and data from the original investigation. China's principal explanation is that Keystone chose not to participate in the reinvestigation, and thus does not constitute an "interested party" under Article 6.9. China's legal argument is not persuasive. Keystone, as a foreign producer, was indeed an "interested party" as defined under Article 6.11, whether or not it chose to participate by submitting new data. Article 6.9 provides that an investigating authority shall inform all "interested parties" of the "essential facts" that form the basis for its decision to apply definitive measures. The scope of "interested parties" in that provision includes companies that did not participate, such as Keystone.

67. In addition, China's explanation concerning Keystone's supposed lack of an authorized representative is without merit. Keystone's duly appointed representative indicated through a memorandum that it was authorized to "act on behalf of Keystone and to receive any document on Keystone's behalf."[73] The United States embassy transmitted this power of attorney to the Chinese embassy. China had no basis to reject this authorization. Furthermore, China's rejection of this authorization is disingenuous: China in fact sent formal questions to Keystone during the reinvestigation. How could MOFCOM have sent such questions if MOFCOM did not recognize the representative? The answer is that MOFCOM viewed the authorization provided by Keystone's legal representation as sufficient, despite China's after the fact contentions.

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

73 China, FWS, para. 111.

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATION BREACHES THE AD AGREEMENT

A. China Cannot Point to Any Record Evidence to Support MOFCOM's Assertion that U.S. Producers' Recorded Costs Were Unreasonable (Breach of AD Agreement Article 2.2.1.1)

1. The Methodology Applied to Tyson is Not Proper

68. The Panel found in the original dispute that China breached the second sentence of AD Agreement Article 2.2.1.1 by relying upon a distortive weight-based allocation methodology for Tyson.[74] To recall, the issue was not whether or not weight-based allocation methodologies are ever appropriate for joint products, but whether MOFCOM's choice of a particular methodology complied with Article 2.2.1.1.[75] The Panel found that MOFCOM breached its obligations under the second sentence of Article 2.2.1.1, in part because, in applying a weight-based methodology, it "improperly allocated costs from certain products derived from a chicken to other products derived from a chicken…", *e.g.*, blood, feathers, organs.[76]

69. In its redetermination, MOFCOM did not address this error. Accordingly, the redetermination remains inconsistent with China's obligations under Article 2.2.1.1. In particular, MOFCOM continued to use a methodology that did not allocate Tyson's production costs across all products, thereby inflating normal value for the narrower class of subject products.

70. China's submission does not even attempt to explain why MOFCOM's allocation was actually proper. Instead, the rationales avoid this issue and only highlight MOFCOM's results-oriented process. For example, the following explanation is telling:

> The investigating authority only determined that the cost apportionment method for the subject merchandise claimed by the company can't reasonably reflect the cost related to production of the subject merchandise, but the investigating authority did not determine that the cost apportionment method for other products generated from live chicken is unreasonable.

In other words, rather than justify its approach, MOFCOM highlighted the inconsistency of its own methodology.

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74 *China – Broiler Products*, paras. 7.196-7.197.

75 *Id*.

76 *China – Broiler Products*, para. 7.197.

71. China's attempted defense is particularly ironic, and unsustainable, in light of MOFCOM's treatment of the respondents' preferred allocation methodology. For example, MOFCOM rejected the value-based cost allocation method that Tyson used in the ordinary course of business on the basis that it purportedly led to unreasonable costs of production when it came to products such as wingtips and paws.[77] Yet in reapportioning Tyson's allocation costs using an alleged weight-based methodology, China still apparently decided to rely on Tyson's value-based allocation to divide the meat costs into these two broad categories of co-products (i.e., broiler products and offal products).

72. The result of this arbitrary calculation was that China claimed that it was using a weight-based methodology, but in reality it assigned joint costs only to a certain subset of broiler products. In sum, China's attempt to manipulate a value-based allocation method to distinguish total meat costs into categories, but then rely on a separate weight-based method to allocate total meat costs for only one of those categories into specific products, is not consistent with Article 2.2.1.1. Furthermore, if China indeed wanted to use a weight-based methodology, it by necessity needed to allocate costs across all products – and not just to broiler products. To allocate costs selectively introduces substantial distortions.[78]

73. It is important to note that China itself, in its submission to this Panel during the original proceedings, recognized the problem with such distortions. It explicitly noted, in support of its weight-based methodology, that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across all products.[79] China takes an about-face stance in the reinvestigation, arguing that only subject broiler products were under consideration during the reinvestigation, and to allocate costs to other products is distortive.

74. Further, China's claim that the scope of its investigation only included chicken for "human consumption" must be rejected. China's own response submission implicitly recognizes such, in stating that "Tyson's normal books and records demonstrated that the little cost [sic] was assigned to feathers and blood because the sales revenues of these items were very low."[80] All parts of a chicken, including both those for human consumption and those that are rendered, are co-products, and a consistent, reasonable methodology must be used to allocate production costs to all co-products. In sum, China needed to account for all products that produce revenue and then allocate costs by weight to all of them. Just as in a CVD calculation, an investigating

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77 China, FWS, para. 166.

78 See *China – Broiler Products*, para. 7.197.

79 *See* United States, FWS, para. 91 (citing China, Original First Written Submission (OFWS), para. 133; Redetermination at Section IV(1) (Exhibit USA-9)).

80 China, FWS, para. 188.

authority must apportion the subsidy to reflect non-subject products that benefit from the subsidy,[81] costs for joint products need to be apportioned to cover all products that are produced.

2. The Methodology Applied to Pilgrim's Pride is Not Proper

75. China similarly failed to give any consideration of the "proper" allocation of costs with respect to Pilgrim's Pride. The Panel's decision made two findings that applied to *all* respondents – specifically, that China failed to give proper consideration to "alternative allocation methodologies presented by the respondents," and that China "improperly allocated all processing costs to all products."[82] MOFCOM failed to do any evaluation with respect to Pilgrim's Pride's costs, and for this reason alone breached Article 2.2.1.1's obligation to "consider all available evidence on the proper allocation of costs," and resulted in a failure to provide a reasoned and adequate explanation for its determination.

B. MOFCOM's "All-Others" Rate (Breach of AD Agreement Article 9.4)

76. China's decision to apply as the "all others" rate the *highest* antidumping duty rate assigned to a respondent – that assigned to Pilgrim's Pride – during the reinvestigation was inconsistent with Article 9.4 of the AD Agreement. Moreover, it bears noting that since Pilgrim's and Tyson's rates are calculated inconsistently with Article 2.2.1.1, the actual ceiling under Article 9.4 is clearly lower than the rate currently assigned. China argues that the disciplines of Article 9.4 do not apply, because it applies to those respondents that did not register with MOFCOM. It appears China's position is that Article 9.4 only applies to non-examined exporters who nonetheless register with MOFCOM. This position, however, is not consistent with the obligations set out in Article 9.4.

77. AD Agreement Article 9.4 is clear in requiring that, in the context of limited examinations envisaged by the second sentence of Article 6.10, any rate assigned to non-selected respondents should not exceed the maximum allowable amount provided for in that provision. This indicates that any exporter that is not selected for individual examination should be assigned an "all others" rate that does not exceed that maximum allowable amount. There is nothing in the text of Article 9.4 suggesting that authorities may condition application of the "all others" rate cap on the fulfilment of some additional requirement, such as registration.[83]

78. The plain text of Article 9.4 establishes a cap on the duty that may be applied to imports from "exporters or producers not included in the examination." Here, MOFCOM's investigation was limited to only three companies; no other exporter was examined. Article 9.4 does not allow for distinctions between classes of exporters or producers "not included in the examination".

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81 *China – Broiler Products*, paras. 7.261-7.266.

82 *China – Broiler Products*, para. 7.198.

83 *US – Shrimp (Viet Nam)*, para. 7.245.

Any exporters or producers not included in the examination are entitled to a rate consistent with AD Agreement Article 9.4.

C. China's Reliance on Facts Available for Tyson was Unsupported because Tyson Fully Cooperated to the Best of its Ability (Breach of AD Agreement Article 6.8)

79. MOFCOM's use of facts available is inconsistent with Article 6.8 and Annex II of the AD Agreement. China has failed to present any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information – such that could justify the application of facts available. Rather, MOFCOM during the reinvestigation sought information that simply did not exist, and Tyson still made every reasonable effort to use the data available in its business records to satisfy MOFCOM's request.

80. Pursuant to MOFCOM's request during the original investigation, Tyson reported sales and costs data by the "parts" produced during the period of investigation, and each part covered numerous "product-brand codes." China accepted and verified this cost reporting methodology from Tyson in the original investigation. China then changed course. During the reinvestigation, MOFCOM instructed Tyson to (i) separately report meat costs (costs incurred before the split-off point of the chicken) and (ii) processing costs (certain production costs after split off for chicken parts) at each of its poultry plants, which, based on MOFCOM's request, were to be further broken out by each production step.[84] In other words, MOFCOM requested that Tyson report sales and cost data at the product-brand code level, rather than the part level.

81. Tyson did not and could not provide this exact information to the product-brand code level because its books and records in the ordinary course of business did not contain these data. Indeed, based on MOFCOM's review of Tyson's submissions during the original investigation, MOFCOM was well aware that Tyson did not maintain cost information at the product-brand level.[85] And, MOFCOM never gave any indication, through clarification requests or other methods, that it had concerns or that it did not understand how Tyson maintained its costs.[86] As such, MOFCOM's argument that Tyson misled MOFCOM regarding the inclusion of processing costs in its total meat costs is disingenuous.

82. The best Tyson could do was rely on standard costs, which were recorded during the latter half of the period of investigation and reflect Tyson's estimates as to what occurred at the particular segments. The standard costs reflect those available to Tyson at the time it prepared its responses to MOFCOM's reinvestigation, and did not cover the full 12 months of the period of investigation. Tyson used these standard costs, which provide estimates of meat and

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84 Tyson's Disclosure Comments at 6 (Exhibit USA-6).

85 *See* Exhibit USA-25, Question 17; see also Exhibit USA-16, Question 1.

86 See Exhibit USA-25, Questions 2, 17; see also Exhibit USA-26, Question 1.

processing costs at cost centers, to create allocation percentages for pure meat costs and processing costs by each production step, which it then applied to the total, actual production costs maintained in Tyson's records – thereby enabling Tyson, to the best of its ability, to generate the specific costs MOFCOM requested. There was no other way to satisfy MOFCOM's requests using the information available.

83. Contrary to China's assertion, Tyson did not make unexplained changes to its data during the redetermination proceedings. Rather, Tyson used the standard costs data it had to breakdown these total actual costs for each product-brand code into meat and processing costs for each cost center. Tyson was forthcoming with MOFCOM on why and how it was proceeding in this manner.[87] Yet China completely rejected this information provided by Tyson in the reinvestigation, without engaging in an objective process of examining the submitted data or an effort to verify its accuracy or reliability.

84. China wrongly asserts that Tyson's costs reported in the reinvestigation do not tie to those in the original investigation. In fact, they do. The total production costs reported for each product in Exhibit USA-15 tie exactly to Tyson's reported costs from the original investigation, as verified by MOFCOM, once MOFCOM takes into account the "20 products that were produced but not sold during the POI and a minor programing error that doubled the production volume for one product that was not even exported to China."[88] Moreover, Tyson reported costs for all of its over 1,000 product-brand code combinations. What Tyson did not provide is "detailed supporting materials" for each product-brand code, as that would have been impossible; instead, Tyson provided this information for three representative products.[89]

85. We further stress that these costs are the same actual aggregate costs and standard costs submitted by Tyson in the original investigation, for which MOFCOM had the opportunity to verify and did not raise any concerns. In fact, MOFCOM in the original investigation thoroughly reviewed Tyson's cost accounting system, including how costs passed from one cost center to the next, and how processing costs were rolled into the total meat cost at the next cost center. It would have been impossible for MOFCOM to conduct the verification exercise that it did without understanding how Tyson's cascading costs system worked.

86. Finally, China's reliance on the Panel report findings, at paragraph 7.196 with regard to "pure meat" and "pure processing" costs is disingenuous. In fact, Tyson provided this information in the only way that it could. And it is obvious why the processing costs changed: those processing costs were embedded in the total meat costs during the original investigation,

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87 Tyson's Disclosure Comments at 6 (Exhibit USA-6).

88 Tyson's Disclosure Comments at 6 (Exhibit USA-6).

89 *See* 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).

and Tyson had to disaggregate those processing costs during the reinvestigation, using the data Tyson had at its disposal. Such extensive efforts by Tyson do not reflect a failure to cooperate.

V. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

87. China has asserted that the United States has failed to establish that China breached AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994 because we did not specifically include a reference to these consequential claims in our first written submission. Under the DSU, the claims that are within the scope of this dispute are delimited by the Panel Request, not the first written submission. These claims are consequential and therefore do not require any independent evidence to be established – they simply result from breaches of other provisions of the AD and SCM Agreements. Accordingly, the Panel may issue findings on these claims if it finds breaches on the foregoing claims we have discussed.

VI. CONCLUSION

88. For these reasons and those set forth in our submissions, the United States respectfully requests the compliance panel to find that China's measures taken to comply with the recommendations and rulings of the DSB are inconsistent with China's obligations under the AD Agreement, the SCM Agreement, and GATT 1994.