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)

FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA

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US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

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ABBREVIATION	FULL FORM
AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BIII	Ministry of Commerce of the People's Republic of China, Bureau of Industry Injury Investigation
CAAA	China Animal Agriculture Association
CVD	Countervailing duties
DSB	World Trade Organization, Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Keystone	Keystone Foods, LLC (U.S. Respondent)
MOFCOM	Ministry of Commerce of the People's Republic of China
Petitioner	China Animal Agriculture Association
Pilgrim's	Pilgrim's Pride Corporation (U.S. Respondent)
POI	Period of investigation
Tyson	Tyson Foods, Inc. (U.S. Respondent)
Tyson Disclosure	MOFCOM, Basic Facts of Determination of Dumping Margin and Subsidy Rate for Tyson Foods, Inc in Reinvestigation of Implementation of Antidumping and Countervailing Measures of Broiler Chicken Case DS427 (May 16, 2014)
Sanderson	Sanderson Farms, Inc. (U.S. Respondent)
SCM Agreement	Agreement on Subsidies and Countervailing Measures

USAPEEC	USA Poultry & Egg Export Council
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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I. INTRODUCTION

1. DSU[1] Articles 7 and 11 charge a WTO panel with making those findings that will assist the DSB in making the recommendations provided for in the covered agreements – namely, the recommendation to bring a measure found to be inconsistent with a covered agreement into conformity with the Member's WTO obligations under that agreement (DSU Art. 19.1). And that is precisely what the Panel did in this dispute, finding that China's antidumping and countervailing duty determinations were inconsistent with numerous basic obligations under the AD Agreement[2] and the SCM Agreement.[3] Unfortunately, China did not take those findings and recommendations as an opportunity to comply and, thus, to bring about a positive solution to the dispute (DSU Art. 3.7). As explained in this submission, China's repetition of conduct consistently recognized as inconsistent with its WTO obligations is a central feature of this dispute.

2. In the original proceedings, the United States contended that "China's anti-dumping and countervailing duty measures on broiler products from the United States are the result of a flawed process yielding flawed results."[4] The Panel, after considering extensive briefing from the United States, China and third parties, found that China's Ministry of Commerce (MOFCOM) had indeed breached key substantive and procedural provisions in the AD and SCM Agreements in imposing and maintaining these measures. As reflected in the arguments below, MOFCOM's procedural and substantive errors are not isolated. Panels and the Appellate Body in other disputes concerning China's trade remedy measures have also found many of these same provisions to have been breached on remarkably similar grounds to those identified by the Panel in this dispute.

3. Regrettably, MOFCOM has not taken any of these findings – in this dispute and others – into account. Following the adoption of the panel report, MOFCOM conducted a reinvestigation and issued a redetermination that continues to maintain antidumping and countervailing duties on U.S. broiler products in a manner inconsistent with China's WTO obligations. In particular, the United States addresses the following failings by MOFCOM in this submission.

4. *First*, the United States will address in Section VI how MOFCOM's conduct in the reinvestigation is inconsistent with the procedural protections in the AD and SCM Agreements. As explained, MOFCOM acted inconsistently with:

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1 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). Articles in the AD Agreement will also be referred to as "ADA" in this submissions – for example, ADA Article 2.2.1.1.

3 Agreement on Subsidies and Countervailing Measures (SCM Agreement)

4 United States, First Written Submission in Original Dispute (OFWS), para. 1.

- Article 6.1 of the AD Agreement and 12.1 of the SCM Agreement: Having failed to ensure that China's domestic industry provide non-confidential summaries of the information it submitted to MOFCOM in the original investigations, MOFCOM decided in the reinvestigations *not to even provide notice to interested parties that it was issuing questionnaires to selected domestic firms to solicit new pricing data* to sustain its injury findings;

- Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement:

  - MOFCOM declined to allow a U.S. respondent – Pilgrim's Pride – the ability to participate in the antidumping reinvestigation, but nonetheless *increased* its antidumping rate by over 20 points to address a purported calculation error, *without bothering to provide Pilgrim's the original calculations and data that contained the error*; and

  - *Refused to release the calculations and data* for a respondent that declined to participate in the reinvestigation but which was issued a new antidumping margin; and

- Articles 6.4 and 6.5 of the AD Agreement and Articles 12.3 and 12.4 of the SCM Agreement:

  - MOFCOM *declined to identify the precise domestic firms from which it solicited new injury data* until its redetermination was final; and

  - MOFCOM *did not provide the questionnaires* it issued to the selected domestic firms to obtain new pricing data.

5. *Second*, the United States will address in Section VII how MOFCOM's antidumping findings in its redetermination are deficient with respect to its WTO obligations. In particular, MOFCOM acted inconsistently with:

- Article 2.2.1.1 of the AD Agreement: MOFCOM continued to calculate the cost of production for a U.S. respondent – Tyson – *applying a biased weight-based methodology* that deliberately *failed to allocate costs to all of the products for which Tyson earned revenue*; and

- Article 6.8 and Annex II of the AD Agreement: MOFCOM wrongly *resorted and applied facts available to Tyson, even though it was demonstrably cooperative* with MOFCOM's onerous requests.

6. *Third*, the United States will address in Section VIII how MOFCOM's findings of material injury in the redetermination are deficient, including by failing to be objective and based on positive evidence. In particular, MOFCOM acted inconsistently with:

- Article 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement: MOFCOM claimed, without any explanation, that *data solicited from only four enterprises* remedied any deficiencies with respect to its price effects analyses when, during this dispute, China claimed the domestic industry was comprised of millions of firms; and

- Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement: MOFCOM maintained the same flawed causation finding that ignored the fact that increases in subject imports came at the expense of other exporters rather than China's domestic industry, and that many subject imports could not have been found to have been injurious;

- Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement: MOFCOM failed to address why it *rejected key arguments* made by interested parties as to why subject imports could not cause material injury;

- Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement: MOFCOM *maintained its finding* that forms its impact analysis that alleged dumped and subsidized imports had an adverse impact on its domestic industry, *without bothering to address the evidence attesting to the overall health of its domestic industry*.

7. In short, both the conduct of the reinvestigation and the findings in the redetermination confirm that MOFCOM adheres – without justification – to problematic practices or reasoning – and even moves in precisely the wrong direction: toward less transparency, less due process, and less objectivity. Accordingly, the United States respectfully requests that the Panel find that China has failed to implement the recommendations of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements.

II. PROCEDURAL BACKGROUND

8. On July 15, 2014, the United States and China informed the DSB that the two parties had concluded Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding ("Agreed Procedures").[5] Paragraph 1 of the Agreed

[5] WT/DS427/9.

Procedures provides that, "[s]hould the United States consider that the situation described in Article 21.5 of the DSU exists, the United States will request that China enter into consultations with the United States."

9. On May 10, 2016, the United States requested consultations pursuant to Article 21.5 of the DSU concerning China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States. Pursuant to this request, the United States and China held consultations on May 24, 2016. Unfortunately, those consultations failed to resolve the dispute.

10. On May 27, 2016, the United States filed a panel request requesting recourse to Article 21.5 of the DSU. At the June 22, 2016 meeting of the DSB, the DSB agreed to refer to the original panel, if possible, the matter raised by the United States. Brazil, Ecuador, the European Union, and Japan reserved their third party rights. On July 18, 2016, the compliance panel was composed with the members from the original panel.

III. FACTUAL BACKGROUND

A. The Panel's Findings

11. The United States reiterates some of the key findings made by the Panel in the original dispute that are relevant to understanding why China remains out of compliance with the DSB's recommendations and rulings. The United States notes that its decision not to bring a challenge with respect to certain provisions that the Panel found China to have breached does not indicate that the United States agrees that China has brought itself into compliance with respect to those findings. Rather, the United States in the interest of economy and efficiency has focused in this dispute on China's failures with respect to particularly important procedural and substantive WTO obligations.

1. China Acted Inconsistently with Article 6.9 of the AD Agreement by not Disclosing Facts Pertaining to its Determination of the Existence and Margins of Dumping to the Three Relevant Interested Parties: Pilgrim's Pride, Tyson, and Keystone

12. The Panel found that MOFCOM breached ADA Article 6.9 by failing to disclose margin calculations and data used to determine the existence of dumping. The Panel's finding explained that an investigating authority's obligation to disclose essential facts extended to the data and calculation used in determining an antidumping margin:

> 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.[6]

In light of the analysis, the Panel found that "China acted inconsistently with Article 6.9 of the {AD} Agreement as MOFCOM did not disclose all of the essential facts" for Pilgrim's Pride, Tyson, and Keystone.[7]

13. First, as to Pilgrim's Pride, the Panel found MOFCOM acted inconsistent with ADA Article 6.9 by failing to disclose the essential facts underlying its dumping determination:

> Without the information as to what sales prices were being used to calculate normal value, Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests. Likewise, without the formulas used to calculate normal value, export price, and the weighted-average dumping margins Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations. Therefore, the Panel finds that MOFCOM did not disclose all of the essential facts underlying the determination that dumping exists, to Pilgrim's Pride and thus acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.[8]

14. The Panel found that due to MOFCOM's failure to disclose the formulas used in its below cost test, "Pilgrim's Pride would be unable to determine whether MOFCOM had correctly conducted the test."[9] Moreover, MOFCOM "did not disclose the formulas used to calculate normal value, export price, the 'dumping margins for each model, or the

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6 *China – Broiler Products*, para. 7.91 (emphasis added).

7 *China – Broiler Products*, para. 7.107.

8 *China – Broiler Products*, para. 7.100.

9 *China – Broiler Products*, para. 7.99.

final total weighted-average dumping margin{,}'" which rendered Pilgrim's Pride unable to "ascertain the accuracy of MOFCOM's calculations."[10]

15. Second, as to Keystone, the Panel found that although MOFCOM indicated that it "used production costs plus reasonable expenses and 5% profit[,]" it "does not indicate what data was used to determine the production cost nor what data was used for the reasonable expenses."[11] The Panel noted that "[w]ithout the knowledge of how the elements of the cost of production were derived, Keystone would be unable to correct any perceived errors in MOFCOM's calculation of normal values and, as a consequence, would be unable to defend its interests."[12] Similar to Pilgrim's Pride, the Panel found that the "sales under consideration and the normal value of those sales used to calculate aggregate normal value are essential facts[,]" and "[w]ithout the information as to what sales prices were being used to calculate normal value" as well as the "formulas used to calculate normal value, export price, the dumping margins for each model, or the final total weighted-average dumping margin[,]" it is clear that "Keystone would not be able to ascertain the accuracy of MOFCOM's calculations and thus would not be able to defend its interests."[13]

2. China Acted Inconsistently with the Second Sentence of Article 2.2.1.1 because 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

16. The United States contended in the original dispute that MOFCOM breached the second sentence of Article 2.2.1.1,[14] because, *inter alia*, MOFCOM allocated Tyson's production costs of non-subject merchandise – including blood, feathers, and organs – to subject merchandise, thereby inflating normal value.[15] In considering this claim, the Panel stated that:

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10 *China – Broiler Products*, para. 7.99-7.100.

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

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

13 *China – Broiler Products*, para. 7.106.

14 Article 2.2.1.1 states that authorities "shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs."

15 *See e.g.*, United States, OFWS, para. 113.

> the issue is not whether weight-based methodologies are appropriate for joint products in the abstract, but whether the particular application of the weight-based methodology that MOFCOM devised is consistent with Article 2.2.1.1.[16]

The Panel considered the evidence presented by the United States regarding the products produced by Tyson and China's materials and found that the United States had established a breach of Article 2.2.1.1.

> The "non-subject" products which Tyson argues are also produced from the live chicken are not listed in this breakdown. On its face, Exhibit CHN-64 does not indicate that the per pound costs assigned to each product were derived from total cost minus the costs associated with the production of the products derived from a chicken that are not in the list. The United States has made a prima facie case, not rebutted by China, that MOFCOM improperly allocated costs from certain products derived from a chicken to other products derived from a chicken … Therefore, with respect to this specific aspect of the allocation of Tyson's costs, we find that China has acted inconsistently with the second sentence of Article 2.2.1.1.[17]

3. China Acted Inconsistently with the Second Sentence of Article 2.2.1.1 because MOFCOM Failed to Consider Alternative Methodologies and Reasonably Consider the Costs Associated with Production and Sale of the Product under Consideration.

17. Additionally, the Panel found that China breached its obligations under the second sentence of Article 2.2.1.1 because "there was insufficient evidence of consideration {by MOFCOM} of alternative allocation methodologies presented by the respondents."[18] As the Panel found:

> Given the explanations and alternative cost methodologies proposed to MOFCOM by the respondents, there was "compelling evidence" that more than one allocation methodology potentially may be appropriate. Therefore, MOFCOM was required to reflect on and weigh the merits of the various allocation methodologies.[19]

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16 *China – Broiler Products*, para. 7.196.

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

18 *China – Broiler Products*, paras. 7.193, 7.198.

19 *China – Broiler Products*, para. 7.193.

18. Moreover, the Panel found that one particular aspect of MOFCOM's methodology was inherently unreasonable:

> MOFCOM's straight allocation of total processing costs to all products necessarily means that it included costs solely associated with processing certain products in its calculation of costs to all subject broiler products. This is not a reasonable reflection of the costs associated with production and sale of the product under consideration.[20]

Notably, the United States recalls that the Panel found that China was not in breach of the first sentence of Article 2.2.1.1 with respect to Pilgrim's Pride because MOFCOM did provide an explanation as to why it rejected the costs kept in its books and records. The Panel, however, did not limit its findings under the *second sentence* of Article 2.2.1.1 to particular U.S. respondents.[21]

4. China Acted Inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and with Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's Findings of Price Undercutting Rest on a Flawed Comparison of Subject Import and Domestic Average Unit Values

19. The Panel found that MOFCOM's price effects analysis in its injury determination was inconsistent with China's WTO obligations because it failed to account for differences in the product mix between subject imports and domestic products. As the Panel noted:

> Nonetheless, Articles 3.2 and 15.2 require the investigating authority to consider "whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member." There 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, which may then be relied upon in assessing causality between subject imports and the injury to the domestic industry.
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> The authority's discretion is also circumscribed by the overarching obligation under Articles 3.1 and 15.1 that the determinations of injury "be based on positive evidence and involve an objective examination." A comparison of prices that are not comparable would not, in our view,

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20 *China – Broiler Products*, para. 7.196.

21 *China – Broiler Products*, para. 7.174.

> satisfy the requirement for the investigating authority to conduct an "objective examination" of "positive evidence."[22]

In light of these findings, the Panel found that:

> MOFCOM could not in our view have assumed on the face of evidence such as the relatively small sample of invoices produced before the Panel or even well-known market realities that price differences between different chicken parts would favour US producers/exporters and underestimate the extent of price undercutting. Rather, such evidence should in our view have alerted MOFCOM to the fact that the outcome of its price comparison would be affected by the composition of each of the product "baskets". It would by consequence have required MOFCOM to take necessary steps to ensure price comparability.[23]

As the Panel correctly stated, MOFCOM in order to be in compliance with its WTO obligations, needs to take the requisite action to ensure that the price comparisons it made were between comparable sets of products.

20. The Panel also noted that MOFCOM's finding of price suppression is "at least partly dependent" on its finding of price undercutting – and that "MOFCOM's Determinations do not separately or independently discuss the impact of the volume and increased market share of subject imports on the ability of domestic producers to sell at prices that would cover their costs of production."[24] Accordingly, the Panel found that China's finding of price suppression was also inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Article 15.1 and 15.2 of the SCM Agreement.[25]

5. The Panel Took Judicial Economy on U.S. Claims under Articles 3.1, 3.4, and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.4, and 15.5 of the SCM Agreement because MOFCOM Would Need to Revisit its Impact and Causation Findings in Order to Address its Flawed Price Effects Analysis.

21. The Panel also asserted judicial economy on the United States' claim concerning MOFCOM's flawed impact and causation analyses. The Panel noted:

> MOFCOM's examination of the situation of the domestic industry is inextricably linked to its earlier analysis of the price effects of subject

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22 *China – Broiler Products*, para. 7.475-7.476.

23 *Id*. at para. 7.493.

24 *Id*. at para. 7.511.

25 *Id*. at para. 7.513.

> imports. Implementing the Panel's findings with respect to MOFCOM's price effects analysis will require China to re-examine MOFCOM's Determination concerning the impact of subject imports on the domestic industry. This being the case, we are of the view that making additional findings with respect to MOFCOM's analysis of the impact of the subject imports on the domestic industry would not assist in the resolution of the dispute between the parties.[26]
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> Having concluded that MOFCOM's findings on price effects are inconsistent with the relevant obligations and in the light of the relationship between the analysis envisioned under Articles 3.2 and 15.2 and the causation analysis under Articles 3.5 and 15.5, we would not be in a position to find that MOFCOM properly concluded to the existence of a causal link between the subject imports and the injury to the domestic industry. Furthermore, China's implementation of our findings concerning MOFCOM's findings of price effects will necessarily require that it reconsider MOFCOM's findings of causation.[27]

Thus, while the Panel exercised judicial economy on the United States' claims concerning impact and causation, it also explicitly recognized that MOFCOM would need to revisit such analysis as part of any efforts to achieve implementation.

B. The Reinvestigation

22. The United States and China agreed that the reasonable period of time to implement the DSB's recommendations and rulings was nine (9) months and fourteen (14) days from the adoption of the panel report, thus expiring on July 9, 2014.[28] On December 25, 2013, MOFCOM issued an announcement that it would conduct a reinvestigation "in accordance with the rulings and suggestions in above relevant reports of WTO."[29]

23. On Friday, January 7, 2014, China issued antidumping questionnaires to Keystone and Tyson and CVD questionnaires to Tyson and Pilgrim's.[30] MOFCOM set a deadline

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26 *Id*. at para. 7.555.

27 *Id*. at para. 7.584.

28 WT/DS427/7.

29 MOFCOM, Announcement No. 88 of 2013 (December 25, 2013) (Exhibit USA-1).

30 To be clear, no antidumping questionnaire was issued to Pilgrim's.

of January 21, 2014 for all of the questionnaires. Tyson and Pilgrim's requested extensions to provide their responses. On January 16, 2016, the United States submitted a letter in support of the extensions, and raising other concerns with respect to the reinvestigation, including that MOFCOM ensure U.S. interested parties have the "opportunity to see the essential facts that form the basis for MOFCOM's decision and have an opportunity thereafter to defend their interests.[31] MOFCOM extended the deadlines for the questionnaires to January 24, 2014, which was far less than what the U.S. interested parties requested.[32] On January 24, 2014, Tyson and Pilgrim's provided responses to their respective questionnaires. MOFCOM issued subsequent questionnaires during the reinvestigation per the chart below.

Questionnaire	Date Issued	Initial Due Date	Extension Requested	Final Due Date
Pilgrim's Supplemental CVD Questionnaire	Feb. 21, 2014	Feb. 27, 2013	Y	March 3, 2014
Tyson Supplemental CVD Questionnaire	Feb. 21, 2014	Feb. 27, 2013	Y	March 3, 2014
Tyson Supplemental AD Questionnaire	Feb. 21, 2014	Feb. 27, 2014	Y	March 3, 2014
Tyson Second Supplemental AD Questionnaire	March 7, 2014	March 12, 2013	Y	March 17, 2014
Tyson Third Supplemental AD Questionnaire	March 18, 2014	March 20, 2014	Y	March 21, 2014

24. On May 16, 2014, MOFCOM issued disclosures to Tyson,[33] Pilgrim's, and the United States concerning the antidumping and anti-subsidy findings made by

[31] Letter from C. Conroy to MOFCOM (January 16, 2013) (Exhibit USA-2).

[32] For example, Pilgrim's with respect to the CVD questionnaire requested until February 11, 2016 to provide its response. Moreover, the questions posed in the questionnaire appear to request materials that would not be reasonably anticipated in connection with the reinvestigation. Pilgrim's CVD questionnaire, for example, requested "all the monthly or quarterly financial statements of the year 2008 and 2009, including balance sheets, profit and loss statements and cash flow statements." Letter from Pilgrim's Counsel to MOFCOM (January 13, 2014) (Exhibit USA-3).

[33] MOFCOM, Basic Facts of Determination of Dumping Margin and Subsidy Rate for Tyson Foods, Inc in Reinvestigation of Implementation of Antidumping and Countervailing Measures of Broiler Chicken Case DS427 (May 16, 2016) (Tyson Disclosure) (Exhibit USA-4).

MOFCOM.[34] On May 28, 2014, Tyson, Pilgrim's, and the United States provided comments on the disclosures.[35] The comments raised concerns with respect to MOFCOM's conduct of the reinvestigation:

- MOFCOM has provided neither adequate information to which to respond through comments or a sufficient amount of time in which to make them.[36]

- Regarding the original questionnaire of the re-investigation, there are 14 days for Tyson to prepare the response. After two times extension request, Tyson only got 21 days to prepare the response in total. As for the first supplemental questionnaire, there are only 7 days for Tyson to prepare the response. After two times extension request, Tyson only got 10 days to prepare the supplemental response. This is the same for the second supplemental questionnaire. As for the third supplemental questionnaire, Tyson only has two days to prepare the response. After two times extension request, Tyson only has 3 days to prepare. However, as Tyson mentioned in the extension request on March 13, 2014, due to a number of processes and thousands of products involved, the workload far exceeds the original investigation. Tyson also mentioned in the extension request submitted on March 19, 2014, due to 16 production processes and thousands of products involved, the workload far exceeds the original investigation. However, there are only two days to prepare the supplemental response;[37]

- [O]n 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

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34 MOFCOM, Letter on Disclosure of the Determination Regarding Dumping and Subsidy in the DS427 Broiler and Chicken Anti-dumping and Anti-subsidy Measure Reinvestigation (May 16, 2014) (Exhibit USA-5).

35 Tyson, Comments Of Tyson Foods, Inc. Regarding The Disclosure For The Reinvestigation Of Implementation Of Antidumping And Countervailing Measures Of Broiler Chicken Case DS427 (May 28, 2014) (Tyson Disclosure Comments) (Exhibit USA-6); United States, Comments of the United States Government on the Disclosure of the Determination Regarding Dumping and Subsidy in the DS427 Broiler and Chicken Anti-dumping and Anti-subsidy Measure Reinvestigation (May 28, 2014) (U.S. Disclosure Comments) (Exhibit USA-7).

36 U.S. Disclosure Comments, p. 2 (Exhibit USA-7).

37 Tyson Disclosure Comments, footnote 19 (Exhibit USA-6).

> disclosure. That same day, MOFCOM then did, in fact, release an injury disclosure, with comments due June 3…;[38]
>
> - In the absence of any notice and the denial of opportunity for Pilgrim's to participate, it was arbitrary and unreasonable for MOFCOM to conduct a reinvestigation limited only to issues of MOFCOM's choosing, which happen to coincidentally raise Pilgrim's dumping margin;[39]

25. The comments also raised substantive concerns with the findings in the anti-dumping /anti-subsidy disclosures. For example,

- MOFCOM's methodology also assigns significantly more costs to subject merchandise because it does not account for the weight of non-subject merchandise such as blood, feathers, etc;[40]
- To the extent MOFCOM relies on a weight-based allocation it must fully account for the total cost incurred to raise and deliver the live birds to the processing plants by dividing the total cost of the live birds by their total weight;[41]
- To the extent MOFCOM is arguing weight based costs are rational because respondents are trying to obtain the same weighted measure of chicken heads, paws, and breast meat, there is no evidence to support that. Indeed, it runs contrary to the common understanding of the broiler industry, which is to maximize yield of breast meat. Indeed, broiler chickens are explicitly marketed in the United States with reference to their breast meat yield in comparison to feed.[42]

The United States requested a hearing to present its concerns regarding the findings in the anti-dumping / anti-subsidy disclosures. The request was denied purportedly because the Petitioner would not attend, MOFCOM's workload, and the limited time for the reinvestigation (which had more than 6 weeks left).[43]

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38 U.S. Disclosure Comments, p. 2. (Exhibit USA-7).

39 U.S. Disclosure Comments, p. 3. (Exhibit USA-7).

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

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

42 U.S. Disclosure Comments, p. 10 (Exhibit USA-7).

43 MOFCOM, Determination of the Ministry of Commerce of the People's Republic of China for Reinvestigation of Antidumping and Countervailing Measures Concerning Imported

26. On May 21, 2014, MOFCOM issued its disclosure to interested parties concerning its material injury findings.[44] On that same day, the U.S. government requested a hearing. On May 30, MOFCOM held a hearing where the United States delivered remarks, that were subsequently provided in writing on June 3. The statement noted, *inter alia*:

- 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.[45]

- MOFCOM continues to ignore evidence that (i) the increase in subject import volume and market share during the period of investigation did not come at the expense of the domestic industry, which increased its market share by more than subject imports; (ii) that most of the increase in subject import volume, which occurred between 2006 and 2008, coincided with a dramatic strengthening of the domestic industry's performance by almost every measure; and (iii) that the domestic industry's declining rate of capacity utilization resulted from the industry's own capacity expansion, and the industry's inventories remained small as a share of domestic industry production and shipments.[46]

- MOFCOM yet again fails to consider USAPEEC's argument from the original investigation that the substantial proportion of subject imports consisting of chicken paws could not have adversely impacted the domestic industry because

Broiler or Chicken Products Originating From the United States (July 9, 2016) (Redetermination), section I.(III)4, pp. 6-7 (Exhibit USA-9).

[44] MOFCOM, Letter on Disclosure of the Determination Regarding Injury in the DS427 Broiler and Chicken Anti-dumping and Anti-subsidy Measure Reinvestigation (May 21, 2014) (RID) (Exhibit USA-8).

[45] United States, U.S. Government Statement for MOFCOM's Injury Hearing for the Reinvestigation of Broiler Products or Chicken Products from the United States (delivered May 30, 2014) (U.S. Reinvestigation Injury Statement), p. 5-6 (Exhibit USA-10).

[46] U.S. Injury Statement, p. 6 (Exhibit USA-10).

> domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to uneconomic levels.[47]

27. On July 10, 2014, MOFCOM issued its final redetermination.[48] The margins set for U.S. respondents,[49] in comparison those set at the conclusion of the original investigation are set forth in the chart below.

Company	AD (old)	AD (new)	CVD (old)	CVD (new)
Tyson	50.3	49.5	12.5	4.2
Pilgrim's Pride	53.4	73.8	5.1	4.1
Keystone	50.3	46.6	4	4
Other responding companies	51.8	60.7	7.4	4.1
All Others	105.4	73.8	30.3	4.2

IV. SCOPE OF AN ARTICLE 21.5 PROCEEDING

28. Article 21.5 of the DSU provides in relevant part that:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement proceedings, including whenever possible resort to the original panel.

29. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding. The Appellate Body has explained that Article 21.5 applies to "measures

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47 U.S. Injury Statement, p.7 (Exhibit USA-10).

48 Exhibit USA-9.

49 See Redetermination Annex 2 (Exhibit USA-11) & Redetermination Annex 3 (Exhibit USA-12).

which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."[50]

30. The Appellate Body's analysis on the scope of measures subject to an Article 21.5 proceeding is instructive:

> While the DSB's recommendations and rulings are a relevant starting point for identifying the "measures taken to comply" in an Article 21.5 proceeding, they are not dispositive as to the scope of such measures. Where alternative means of implementation are available, a WTO Member enjoys some discretion in deciding what measures to take to comply with the DSB's recommendations and rulings. A WTO Member may choose to take measures that are broader than strictly required to comply with the DSB's recommendations and rulings. The identification of the "measure taken to comply" is determined by reference to what a Member has actually done, and not to what a Member might have done, to ensure compliance with the DSB's recommendations and rulings. Therefore, when the measures actually "taken" by the implementing Member are broader than the DSB's recommendations and rulings, we do not see why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the "measures taken to comply" for purposes of the Article 21.5 proceedings.[51]

31. Thus, in reviewing the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB, the Appellate Body has found that "this task cannot be done in abstraction from the measure that was the subject of the original proceedings."[52] Regarding a re-determination of duties, to assess compliance with DSB recommendations and rulings, "the original determination and original panel proceedings, as well as the re-determination…form part of a continuum of events."[53]

32. The Appellate Body has also noted that in examining the measure taken to comply, a panel is not constrained to simply accept the respondent's characterization of whether an action was taken to comply:

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50 *Canada – Aircraft (Article 21.5) (AB)*, para. 36.

51 *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202.

52 *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 102.

53 *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 121.

> [A] panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply". Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one "taken to comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.[54]

33. In other words, the scope of measures that may fall within an Article 21.5 proceeding is not limited to only what needed to be done or what the implementing Member says it had done to comply, but what actually was done. In the present dispute, China undertook a reinvestigation and issued a new redetermination in order to assert compliance. Accordingly, the Panel is entitled to examine all aspects of both in this proceeding. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel should reach the same conclusions as the original panel:

> Doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record and explanations given by the investigating authority in a re-determination.[55]

V. STANDARD OF REVIEW

34. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not

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[54] *US – Softwood Lumber IV (Article 21.5 — Canada) (AB)*, para. 77.

[55] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 285 (citing *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 103.

changed from the original determination, then an Article 21.5 panel would normally reach the same conclusions as the original panel:

> Doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record and explanations given by the investigating authority in a re-determination.[56]

35. Moreover, in this dispute, a critical and common question is whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence."[57] The Appellate Body has explained that in make this assessment, a

> panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report.
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> ***
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> The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence.[58]

Accordingly, investigating authorities in antidumping and countervailing duty investigations may have to consider conflicting arguments and evidence and will need to exercise discretion. However, it does not entitle an investigating authority to automatic deference regarding the exercise of that discretion. To the contrary, the investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered:

> [I]t is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data

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56 *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 285 (citing *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 103.

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

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

> from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation.[59]

VI. MOFCOM'S REINVESTIGATION BREACHED THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

36. MOFCOM's reinvestigation breached key procedural protections contained within the AD and SCM Agreements. Specifically, the United States will demonstrate that China breached the AD Agreement and SCM Agreement because MOFCOM:

(i) failed to notify interested parties to whom it issued questionnaires, which included the U.S. respondents, of information sought by MOFCOM from four Chinese domestic firms as part of its reinvestigation, which impeded the ability of the U.S. respondents to defend their interests, in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1;

(ii) failed to promptly provide this information to U.S. respondents, in breach of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2;

(iii) failed to provide timely opportunities for interested parties to see all non-confidential information relevant to the presentation of their cases, in breach of AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3; and

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59 *Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (footnote omitted).

(iv) failed to disclose the margin calculations and data it relied upon to determine the existence of dumping and to calculate dumping margins, in breach of AD Agreement Article 6.9.

As noted in a number of previous reports, adherence to these provisions is essential to protect the procedural rights of interested parties in antidumping and countervailing duty investigations.[60] MOFCOM's failure – as demonstrated below –denied interested parties the ability to fairly and fully participate in the reinvestigation.

A. Factual Background

37. As the Panel is well familiar, the Panel found that China's price effects analysis was deficient because it failed to control for differences in product mixes between subject import and domestic average unit values.[61] In its Reinvestigation Injury Disclosure (RID), MOFCOM noted the following:

> In early May 2014, the investigating authority reinvestigated the petitioner enterprises including Beijing Huadu Broiler Company, Shandong Minhe Animal Husbandry Co., Ltd., Shandong Spring Snow Food Co., Ltd. and Great Wanda (Tianjin) Co., Ltd. The investigating authority conducted an investigation on relevant maters of this case and collected and looked up relevant evidentiary materials.[62]

Critically, before the RID, U.S. interested parties received no notice as to which Chinese firms were being specifically investigated; why they were chosen; what questions and information requested were posed to these firms; and what data and information the Chinese firms provided in response.

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60 *See e.g., US – OCTG Sunset Reviews*, paras. 241-242 ("These provisions set out the fundamental due process rights to which interested parties are entitled in antidumping investigations and reviews. Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be 'ample' and 'full', respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests."); *China – HSST (AB)*, para. 5.73 ("In addition to laying down evidentiary rules that apply *throughout* the course of an anti-dumping investigation, Article 6 speaks to the due process rights that are enjoyed by interested parties during the investigation.") (emphasis in original); *Mexico – Beef & Rice (AB)*, para. 292 ("we are of the view that, like Article 6 of the Anti-Dumping Agreement, Article 12 of the SCM Agreement as a whole "set[s] out evidentiary rules that apply throughout the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* … an investigation".) (brackets and emphasis original) *(quoting EC – Tube or Pipe Fittings (AB)*, para. 138).

61 *See e.g., China – Broiler Products*, paras. 7.494, 8.1(xv).

62 RID, Section II, p. 6-7. (Exhibit USA-1).

38. The description in the RID that MOFCOM's investigation of these firms was "relevant" and collected "relevant evidentiary materials" is not sufficient or helpful in understanding MOFCOM's objectives, let alone the character and nature of the evidence. The United States – and any interested party – is left to infer that the information potentially concerns pricing data that MOFCOM utilized for its price-effects analysis. Specifically, further into the RID in the causation section, MOFCOM references four domestic producers and states:

> As regards the issue of different product mix, the investigating authority conducted spot verification on 4 domestic producers during the course of reinvestigation, collected sales data of different product mix, and verified these data. The investigating authority compared and analyzed these sales data and made them map the customs' import data about the subject merchandise and the export data provided by exporters in the injury questionnaire responses. Therefore, the investigating authority is of the opinion that the different product mix reflected in these evidences is representative for the sales prices in the domestic market.
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> The investigating authority found that the main product mix exported from the United States to China, i.e. chilled chicken cuts with bone (generally drumstick, HS code 02071411), chicken wing (HS code 02071421), chicken feet (HS code 02071422), and chicken gizzard (HS code 05040021), are not "chicken products being of the lowest value" in the domestic market. For example, the specification of the subject merchandise with the highest export volume is chilled chicken cuts and feet with bone, accounting for 40% - 47% and 29% - 39% of the import volume respectively during the period of investigation. In the first half of 2006-2009, the average price of chicken drumstick sold by domestic producers in the domestic market was RMB 9,676, … According to the data as above, on the contrary, the product specifications sold by the domestic industry similar to the imported subject merchandise were priced at a higher level. Therefore, the basic facts supporting the relevant claim of the US parties were not consistent with the actual situation.
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> ***
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> … The investigating authority is of the opinion that, the different product mix as referred to by the US parties does not distort the price undercutting reflected in average price comparison, so the price undercutting reflected in the average price difference is not caused by different product mix.[63]

MOFCOM, notably, does not identify the four enterprises in this discussion. Yet considering that MOFCOM, at the outset of the RID, notes that it engaged in verification

63 RID, Section VII(ii)(2) p. 18-19 (Exhibit USA-8).

of Beijing Huadu Broiler Company, Shandong Minhe Animal Husbandry Co., Ltd., Shandong Spring Snow Food Co., Ltd. and Great Wanda (Tianjin) Co., Ltd., one could surmise that these companies represent the four enterprises noted above. The information provided by MOFCOM is indicative that the data concerns pricing of certain product – but nothing else. There is no indication as to how the firms sourced their data, what timeframe it pertained to, the basis for the ranges, the volume of sales it concerned with respect to the domestic market, why it should be deemed reliable, or anything else concerning the probative nature of the solicited information.

39. In short, it appears, based on the explanation in the RID, that the data at issue is related generally to pricing – and that apparently it is so consequential to MOFCOM that it justifies MOFCOM's findings concerning price undercutting. But the critical questions of (i) what information was specifically required by MOFCOM from these firms and (ii) what they provided remain entirely unanswered.[64]

B. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because MOFCOM Denied Interested Parties Notice or Knowledge of the Information MOFCOM Required in its Reinvestigation.

40. MOFCOM's failure to provide interested parties with notice and knowledge of the information it required from Chinese producers during the reinvestigation is inconsistent with AD Agreement Article 6.1 and SCM Agreement Article 12.1 – the "basic obligation concerning the evidence gathering process for the investigating authorities to indicate to the interested parties the information they require for their determination."[65] Both Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement provide that interested parties are entitled (i) to notice of information required by the investigation authority and (ii) ample opportunity to respond:

> [SCM: Interested Members and all interested parties] [AD: All interested parties] in [SCM: a countervailing duty investigation] [AD: an anti-dumping investigation] shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.[66]

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[64] MOFCOM subsequently restated this analysis unchanged in its final redetermination. China's Final Redetermination, Section VII(ii)(2) p. 78. (Exhibit USA-9).

[65] *See Argentina – Ceramic Tiles*, para. 6.54.

[66] *See EC – Fasteners (AB)*, para. 609; *see also US – AD/CVD (Panel)*, para. 15.23 (noting same requirements in SCM Agreement).

Notably, the text of the provision does not oblige an investigating authority only to provide notice to the precise interested party from which the information is required.[67] As the plain language makes clear, *interested parties* – not simply the party a request is directed to – "shall be given notice of" the information that the investigating authority requires.[68] Indeed, if the contrary was the case, then these articles would be superfluous, since an investigating authority would necessarily have to inform a party of what information it was requiring that party to disclose in order to actually obtain that information.[69]

41. In applying these provisions, the Appellate Body has found that both "Articles 6.1 and 6.2 {of the AD Agreement] require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be 'ample' and 'full,'" which supports the interpretation that the provisions are construed to provide "liberal opportunities for respondents to defend their interests."[70]

42. Here, it is clear from the RID that MOFCOM *required* pricing information from four domestic Chinese companies in order to revise its price effects analysis. Specifically, these four companies provided MOFCOM with sales data concerning chicken feet, chilled chicken cuts with bone, chicken wings, and gizzards, which MOFCOM then purportedly used to compare against prices for subject imports, and ultimately reach its finding of price undercutting.[71]

43. It is also clear that interested parties, such as U.S. respondents and the United States, did not have notice that MOFCOM required this information. Notably, MOFCOM's solicitation and consideration of this particular pricing information only

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67 *See Mexico –Beef & Rice* (*AB*), para. 280; *see also* ADA Article 6.11(defining "interested party" for purposes of the ADA Agreement).

68 The interested parties to be provided information by the competent authority under ADA Article 6.1 and SCM Article 12.1 include not only those parties identified in the Agreements, see AD Agreement Article 6.11 & SCM Agreement Article 12.9, but also parties referred to in the anti-dumping duty petition and all interested parties that made themselves known to the competent authority. *See Mexico – Beef & Rice* (*AB*), para. 280.

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

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

71 Redetermination at sec. VII(ii)(2) (Exhibit USA-9); *see also* RID (Exhibit USA-8) at 18-19.

became apparent after MOFCOM made new findings in the RID.[72] In and of itself, that is problematic. MOFCOM reached findings first and only then did interested parties become aware of the issue. But even the RID itself is so vague that it only alerts interested parties to the problem – not to what information was actually required. In the absence of this knowledge, it cannot be contested that interested parties received no opportunity, let alone an ample one, to defend their interests.

44. For these reasons, China breached AD Agreement Article 6.1 and SCM Agreement Article 12.1 because MOFCOM failed to provide interested parties notice and knowledge of the information it required for the reinvestigation.

C. China Breached Articles 6.1.2, 6.2, and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying Interested Parties of Evidence Presented by the Other Interested Parties Participating in the Reinvestigation

45. As explained above, China breached its WTO obligations because MOFCOM failed to alert interested parties as to what it required from China's domestic industry. China also breached its WTO obligations under Articles 6.1.2, 6.2, and 6.4 of the AD Agreement as well as Articles 12.1.2 and 12.3 of the SCM Agreement because MOFCOM failed to make available what it obtained from the domestic industry.

1. China Breached AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 by Failing to Present Written Evidence Promptly in Writing to the Interested Parties Participating in the Investigation

46. Article 6.1.2 of the AD Agreement and SCM Agreement Article 12.1.2 provide:

> Subject to the requirement to protect confidential information, evidence presented in writing by one {interested Member or} interested party *shall be made available promptly to other interested parties* participating in the investigation.[73]

47. It is undisputed that the four Chinese domestic companies that received requests for information from MOFCOM during the reinvestigation are "producers of the like product in the Importing Member." It is therefore not disputable that they fall into a category explicitly identified as "interested parties" for the purpose of the AD and SCM

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[72] *See* RID, Section II, p. 4 (noting that, in making those findings, MOFCOM referenced four domestic Chinese domestic enterprises that had been subject to "on spot verifications" and had been requested to provide "relevant evidentiary materials.") (Exhibit USA-8).

[73] The SCM Agreement provision contains the language in braces as well.

Agreements.[74] MOFCOM was thus required to "promptly" make available to U.S. respondents the information provided by interested parties in response to MOFCOM's requests during the reinvestigation.

48. The United States further notes that there is no evidence on the record that the information provided by the four Chinese companies – and relied upon by MOFCOM – is confidential. The record contains no assertions by Chinese companies that such data were confidential, nor does the record contain any non-confidential summaries as would be required if confidential data were on the record. Therefore, because no information or data has been accorded confidential treatment per Article 6.5,[75] the exclusion of confidential information from the scope of Article 6.1.2 is not applicable in these circumstances.

49. In sum, because MOFCOM failed to make this information available *at all* to respondents, China is in breach of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2. China breached these Articles, along with AD Agreement Article 6.1 and SCM Article 12.1, by failing to provide interested parties with notice and knowledge of the information required by MOFCOM in its reinvestigation.

2. China Breached Articles 6.4 and 6.2 and SCM Agreement Article 12.3 because it Failed to Permit Access to Evidence that would have Enabled the Interested Parties to Prepare their Cases

50. MOFCOM's failure to permit interested parties access to the information relied on by MOFCOM and to enable those parties, through review of that information, to prepare their cases is also inconsistent with Articles 6.4 of the AD Agreement and 6.2 and SCM Agreement Article 12.3.

51. AD Agreement Article 6.4 and SCM Agreement Article 12.3 state in pertinent part that:

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74 *See* ADA Art. 6.11(iii), SCM Agreement Art. 12.9(ii).

75 If China were to argue in its written submissions that certain information provided by interested parties is in fact confidential, and therefore subject to Article 6.1.2's exemption, China would be in breach of ADA Article 6.5 and SCM Article 12.4, which state that competent authorities must treat confidential information as such, and protect against unauthorized disclosure by (1) requiring interested parties to issue non-confidential summaries and (2) evaluating interested parties' claims that confidentiality is not warranted. China has not taken any steps to protect the confidentiality of information relied on in its reinvestigation or required interested parties to issue non-confidential summaries. The original panel found that China breached ADA Article 6.5.1 and SCM Article 12.4.1[75] because MOFCOM failed to require the petitioner to provide non-confidential summaries of information contained within the Petition.

> The authorities shall whenever *practicable provide timely opportunities* for all interested parties to see [1] *all* information that is [2] *relevant* to the presentation of their cases, [3] that is not confidential … [4] and that is *used* by the authorities in an … investigation, and to prepare presentations on the basis of this information.

52. These provisions provide that interested parties have both timely opportunities (i) to see "all information" that is relevant, non-confidential, and used by competent authorities and (ii) timely opportunities to prepare their presentations "on the basis of" that information.[76] These obligations are integral to the right of interested parties "to a 'full opportunity' to defend their interests" during an investigation.[77]

a. *The Right to See Information*

53. MOFCOM failed, per AD Agreement Article 6.4 and SCM Agreement Article 12.3, to provide interested parties timely opportunities to see information that is relevant, non-confidential, and used by the authorities. In the reinvestigation, the information subject to this obligation includes:

- the pricing information provided by the four Chinese domestic enterprises to MOFCOM during the reinvestigation;
- the precise identity of those Chinese enterprises; and
- the specific questionnaires and information requests issued by MOFCOM to those Chinese companies.

All of the foregoing constitute "information" of the type within the scope of AD Agreement Article 6.4 and SCM Agreement Article 12.3, for the reasons explained below.

54. First, the information is "relevant to the presentation of the interested parties" cases. "Relevance" is determined from the perspective of "all" interested parties, and not from the perspective of the competent authority. Thus, what matters is not whether competent authorities found the information relevant to their findings, but rather, whether interested parties would consider the information relevant to the "presentation of the[ir] cases."[78] The Appellate Body has recognized that information pertaining to any of the injury factors listed in Article 3.4 – which by its very essence is "deemed to be relevant in every investigation" – is "necessarily relevant to the presentation of the interested parties'

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[76] *EU – Footwear*, para. 7.601.

[77] *EU – Footwear*, para. 7.603.

[78] *EC – Tube or Pipe Fittings (AB)*, para. 145 (emphasis omitted).

cases and is, therefore, 'relevant' for the purposes of Article 6.4."[79] Moreover, "relevant" information includes both information submitted by interested parties and information collected by the investigating authority of its own volition.[80]

55. In these circumstances, MOFCOM failed to disclose information "relevant" to the interested parties' presentation of their cases. The *information* requested by MOFCOM from the four Chinese domestic enterprises during the reinvestigation constitutes product-specific pricing data that MOFCOM sought and that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis.[81] As such, this information, along with the identity of the Chinese domestic enterprises that proffered the information, falls within the scope of AD Agreement Article 6.4 and SCM Agreement Article 12.3 and is "relevant" to the interested parties' presentation of their cases. Knowledge of how questions were framed by MOFCOM to these Chinese domestic enterprises and what information MOFCOM sought to solicit from them is "relevant" because it would have facilitated the ability of interested parties to address the objectivity and adequacy of MOFCOM's reinvestigation, and whether it satisfied the requirements of the AD Agreement and the SCM Agreement.

56. The relevance and importance of pricing information is evident, but it is especially significant here because it forms the basis – albeit a flawed basis – on which MOFCOM rests its price effects findings. As to the issue of identity, the United States, as noted above, believes an inference to the identity of the Chinese domestic enterprises can be made from the RID. However, both the timing of when that information was made available as well as the lack of clarity – which led to the very need to make the inference – reflect that the information was not provided in a manner consistent with China's WTO obligations. With respect to the questionnaires and information requests, these are of course a type of relevant information – as they constitute knowledge of what the investigating authority believes is necessary for its determinations. The provision of questionnaires provides interested parties with information that they can use to address any methodological or other flaws in the investigating authority's assessment.

57. Second, as noted previously, MOFCOM has *not* claimed that any of this information is confidential. MOFCOM did not prepare non-confidential summaries or make requests for confidential treatment for any of this information, and it has an obligation to do so for any confidential information under AD Agreement Article 6.5.

58. Third, the information was "used" by MOFCOM in the reinvestigation because it is the explicit basis by which MOFCOM maintains its price effects findings. AD Agreement Article 6.4 and SCM Agreement Article 12.3 reflect that information within

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79 *EC – Tube or Pipe Fittings (AB)*, para. 146.

80 *See Korea – Certain Paper*, para. 6.82.

81 Redetermination at sec. VII(ii)(2) (Exhibit USA-9); *see also* RID at 19 (Exhibit USA-8).

its scope must be "used" by a competent authority in their investigation.[82] There is no question that the information at issue was "used" by MOFCOM within the meaning of AD Agreement Article 6.4 and SCM Agreement Article 12.3, as MOFCOM relied on that information in reaching its price effects findings. Specifically, as part of its reinvestigation, MOFCOM collected product-specific pricing data from only four of the 21 Chinese domestic producers included in the domestic industry to support its findings of purported price undercutting. Thus, the precise identity of the firms, the questionnaires MOFCOM utilized, and the information it obtained in response are all relevant. MOFCOM *considered* this information during the course of its reinvestigation, and therefore that information falls within the scope of the articles.[83]

59. In evaluating this issue, the Appellate Body's prior analysis is instructive. The Appellate has found that this inquiry does not depend on whether the authority *specifically relied* on that information; rather, the information must be related to a "required step in the anti-dumping investigation."[84] Accordingly, the scope of information covered by Article 6.4 includes "issues which the investigating authority is required to consider under the [Anti-Dumping Agreement], or which it does, in fact, consider in the exercise of its discretion, during the course of an anti-dumping investigation."[85]

60. Moreover, the notion of information is extensive. Article 6.4 of the AD Agreement "applies to a broad range of information that is used by an investigating authority for purposes of carrying out a required step" in its investigation.[86] This includes everything from raw data submitted by interested parties to information that has

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82 *EU – Footwear*, para. 7.601.

83 As explained below and in our substantive discussion of MOFCOM's price effects analysis, the information at issue was not only considered by MOFCOM, but in fact was heavily relied upon by MOFCOM in support of its findings of purported price undercutting in the reinvestigation.

84 *EC – Tube or Pipe Fittings (AB)*, para. 147; *see also EC – Salmon*, para. 7.769 ("If the investigating authority evaluates a question of fact or an issue of law in the course of an anti-dumping investigation, then, in our view, all information relevant to that question nor issue that is before the investigating authority must necessarily be considered by the investigating authority, in order to make an objective and unbiased decision. Consequently, it seems clear to us that whether information is 'used' by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination.") (citing *EC – Tube or Pipe Fittings (AB)*, para. 147).

85 *EC – Salmon (Norway)*, para. 7.769 (emphasis omitted).

86 *EC – Fasteners (AB)*, para. 480.

been processed, organized, or summarized by the competent authority.[87] The same considerations would extend to the substantively identical SCM Agreement Article 12.3. "All information" within the scope of AD Agreement Article 6.4 and SCM Agreement Article 12.3 is not to limited information *from* any particular source; there is no requirement that the information be of the type generated by interested parties, rather than the investigation authority.[88]

61. For all of these reasons, MOFCOM breached its first obligation to ensure interested parties have a timely opportunity to see information consistent with AD Agreement Article 6.4 and SCM Agreement Article 12.3.

b. *The Right to Prepare Presentations*

62. In addition, China breached the obligation under AD Agreement Article 6.4 and SCM Agreement Article 12.3 "to provide timely opportunities" for interested parties "to *prepare presentations* on the basis of this information" because MOFCOM did not permit interested parties to see the information. MOFCOM's obligation to ensure interested parties can "prepare presentations" is a direct corollary of its obligation to ensure access to that information, and a breach of the first obligation necessarily results in a breach of the second obligation.[89] If a party is denied access to information, then it follows that the party was also denied an *opportunity* to prepare a presentation on the basis of the information that it never saw.

63. MOFCOM's failure to comply with the requirements of AD Agreement Article 6.4 additionally supports a finding that MOFCOM breached Article 6.2. As noted in the previous section, the first sentence of Article 6.2 provides that "{t}hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests." The Appellate Body, in interpreting this provision, has stressed that "the 'presentations' referred to in Article 6.4 . . . logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests" within the meaning of Article 6.2.[90] In finding such, the Appellate Body upheld the panel's finding that that the Chinese exporter interested parties in that case "could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the

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87 *EC – Fasteners (AB)*, para. 483.

88 *See Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82

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

90 *EC – Tube or Pipe Fittings (AB)*, para 149; *EC – Fasteners (AB)*, para. 507.

normal value at a very late stage of the proceedings{,}" inconsistent with AD Agreement Article 6.2.[91]

64. In other words, a competent authority's failure to provide information it already possesses to interested parties *until it is too late* for the party to prepare presentations to defend their interests can also constitute a breach of Article 6.2 of the AD Agreement. Here, MOFCOM did not just fail to provide information until too late; it failed to provide information *at all* – which clearly denied interested parties the "a full opportunity for defence of their interests" that they are entitled to receive under Article 6.2.

65. As a result, China breached Articles 6.2 and 6.4 of the AD Agreement, and Article 12.3 of the SCM Agreement, because MOFCOM failed to provide non-confidential information relied on by MOFCOM in its price effects analysis, and relevant to the interested parties' presentation of their cases – thereby preventing parties from preparing presentations on the basis of that information and to defend their interests.

D. China, Once Again, has Breached Article 6.9 of the AD Agreement by Failing to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.

66. As explained below, China remains in breach of AD Agreement Article 6.9 because MOFCOM has failed to disclose the margin calculations and data it relied upon to determine the existence of dumping by respondents.

67. Despite the original Panel's finding that China breached Article 6.9 of the AD Agreement by failing to disclose essential facts related to the dumping margins for Pilgrim's Pride, Tyson, and Keystone, MOFCOM has, once again, failed to disclose dumping margin calculations and underlying data for two of these respondents – Pilgrim's Pride and Keystone, albeit in different respects. With respect to Pilgrim's Pride, it was denied access to the data calculations from the original investigation even though MOFCOM used a purported error in the data and calculations to increase the margin of Pilgrim's Pride by 20 points. Similarly, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation.

68. The original Panel previously found that China had breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties. Specifically, the Panel found that MOFCOM failed to make available the calculations it performed, as well as the underlying data supporting those calculations, that were relied upon by MOFCOM to calculate dumping margins — including the calculation of the normal value and export price for the respondents. As recognized by the Panel, Article 6.9's disclosure requirements serve a critical due process function, because if interested parties are not

[91] *EC – Tube or Pipe Fittings (AB)*, para 149; *EC – Fasteners (AB)*, para. 507.

provided with these essential facts on a timely basis, they cannot adequately defend their interests.[92]

69. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's determinations on anti-dumping and countervailing-duty rates.

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

70. The Panel recognized that Article 6.9 requires the *complete* disclosure of margin calculations and underlying data. Specifically, the Panel found:

> 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.[93]

Based on these findings, the Panel determined that "China acted inconsistently with Article 6.9 of the [AD] Agreement as MOFCOM did not disclose all of the essential facts" for Pilgrim's Pride, Tyson, and Keystone.[94]

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92 *See China – Broiler Products*, para. 7.69.

93 *China – Broiler Products*, para. 7.91 (emphasis added).

94 *China – Broiler Products*, para. 7.107.

71. The reasoning of the original Panel has subsequently been endorsed by the Appellate Body in another dispute. In *China – HSST*, the Appellate Body found the following in the context of Article 6.9 of the AD Agreement:

> Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, inter alia, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping. The mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts. Thus, while Article 6.9 does not prescribe a particular form for the disclosure of the essential facts, it does require in all cases that the investigating authority disclose those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping.[95]

72. Under Article 6.9, an investigating authority owes interested parties the data and calculations that go to their dumping margins. Yet here, despite having the opportunity to revise its approach in favor of transparency consistent with the obligations of the AD Agreement, MOFCOM declined to do so, as explained below.

1. MOFCOM's Failure to Disclose Underlying Data and Margin Calculations for Pilgrim's Pride

73. MOFCOM did not allow Pilgrim's Pride to participate in the antidumping reinvestigation. Per MOFCOM, the Panel Report did not impact the dumping findings for Pilgrim's Pride.[96] Nonetheless, MOFCOM proceeded in the Redetermination to modify Pilgrim's antidumping duty rate by raising it to 73.8 percent from 53.4 percent – that is, *by more than 20 percentage points*. MOFCOM provided its new calculations and data for this new higher rate but did not *provide the original calculations and data from the original investigation.* The failure to provide this information precluded effective

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95 *China – HSST*, para. 5.131 (footnotes omitted).

96 Redetermination, p. 55 ("As the dispute settlement report does not affect the investigating authority's identification of export price, price adjustment items and CIF of the company, the investigating authority decided to maintain the identification of the company's export price, price adjustment items and CIF in the original investigation when conducting the reinvestigation."). The United States disagrees.

identification of what precisely had changed between the original investigation and the revised rate and, consequently, denied Pilgrim's the opportunity to defend its interests.

74. In considering this matter, the United States recalls the Panel's finding as to why MOFCOM's disclosure in the original investigation was inadequate under Article 6.9:

> Without the information as to what sales prices were being used to calculate normal value, Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests. Likewise, without the formulas used to calculate normal value, export price, and the weighted-average dumping margins Pilgrim's Pride would not be able to ascertain the accuracy of MOFCOM's calculations. Therefore, the Panel finds that MOFCOM did not disclose all of the essential facts underlying the determination that dumping exists, to Pilgrim's Pride and thus acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.[97]

Here, the lack of the original calculations denied Pilgrim's Pride the ability to ascertain the accuracy of the new rate by examining and understanding what, if anything, had changed.

75. The opacity of MOFCOM's change is underscored by the redetermination's recognition of the precise problem that necessitated the revised antidumping margin:

> When re-disclosing the dumping margin of the company in the original investigation, the investigating authority discovered that the calculation of the company's dumping margin is wrong. In order to execute panel's proposal on disclosure of basic facts supporting the determination of dumping margin, the investigating authority decided to correct relevant calculation errors in reinvestigation.[98]

In other words, MOFCOM says it found there was an error, of some sort. As to the means employed by MOFCOM to remedy this "error," MOFCOM's redetermination sheds no additional light on the data or calculation "corrections":

> Moreover, the investigating authority maintained its identification of the company's normal value, export price, price adjustment items and CIF. According to the Disclose of Basic Facts, the investigating authority modified the dumping margin just because the investigating authority discovered errors in calculation of the dumping margin when performing its obligation of disclosure to Pilgrim's Pride. After discovering the errors,

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97 *China – Broiler Products*, para. 7.100.

98 MOFCOM, Redetermination at 56.

> the investigating authority corrected relevant data in time. Such practice in itself is fair and equitable, fully ensuring the rights and interests of interested parties.[99]

MOFCOM's fair and equitable practice raised the margin for Pilgrim's Pride by nearly twenty points, but its conduct deprived Pilgrim's Pride access to the original calculations so that it could assess and understand the changes MOFCOM had made. When Pilgrim's Pride met with MOFCOM to discuss why its dumping margin had been increased, MOFCOM did not provide *any* of the precise mathematical calculations underlying that dumping margin to Pilgrim's Pride at or prior to that meeting. Thus, while China may assert that MOFCOM allowed Pilgrim's Pride to meet with it to discuss its dumping margin,[100] Pilgrim's Pride lacked the requisite information to make that exchange meaningful.[101]

76. Specifically, only *after* the exchange and Pilgrim's submitted comments complaining of the change did MOFCOM – on June 17, 2014 – when its decision was final provide a narrative description of the error explaining the new calculations and a table with the figures for the new calculations.[102] The new table contained the following columns with data listed in various rows below:

Model	Export Quantity	Export Price	CIF Price	Export Price After Adjustment	Normal Value	Margin of Various Models	Weighing

Although the new calculations were informative, Pilgrim's was entitled to see the corresponding data from the *original* calculations – and to see them *before* MOFCOM's decision was final. MOFCOM's failure to do so means that China could not reasonably maintain that it had ensured the rights and interests of Pilgrim's Pride were protected.

77. The original Panel emphasized that Article 6.9 of the AD Agreement requires the "disclosure of 'the body of facts essential to any determination that are being considered

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99 MOFCOM, Redetermination at 56.

100 Redetermination at 5 (Exhibit USA-9).

101 When Pilgrim's Pride met with MOFCOM to discuss why its dumping margin had been increased, MOFCOM did not provide any of the calculations underlying that dumping margin to Pilgrim's Pride at or prior to that meeting.

102 MOFCOM, A Letter of Written Reply to the Disclosure of Opinions of Comments of Pilgrim's Pride Corporation Concerning Re-investigation of the Anti-dumping and Countervailing Measures of DS427 Broiler Chicken No. 70 (June 17, 2014).

in the process of analysis and decision-making by the investigating authority.'"[103] In its redetermination, MOFCOM asserted that it made an error in the *original* calculation, and that correcting the error would require upward revision of Pilgrim Pride's dumping margin.[104] The information related to the original calculation is essential to understanding what adjustments MOFCOM made in its calculation of Pilgrim's Pride dumping margins in the reinvestigation. The Panel recognized that without this information, Pilgrim's Pride "would not be able to ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests."[105] The same concerns certainly apply in the reinvestigation, where MOFCOM's analysis focused exclusively on a purported error in the *original* calculation. It is not possible to understand the facts that went into MOFCOM's decision-making in the reinvestigation absent the data underlying the calculations in the original investigation. Thus, China breaches Article 6.9, for precisely the same reasons found by the original Panel – the failure of MOFCOM to provide the data and calculations for its original antidumping margin that now drives the margin determined in the redetermination.[106]

2. MOFCOM's Failure to Disclose Underlying Data and Margin Calculations for Keystone

78. Like Pilgrim's Pride, Keystone was denied the margin calculations and data from the original investigation, despite the Panel having previously found that the failure to disclose those calculations was in breach of Article 6.9.[107] Although Keystone did not participate in the reinvestigation, and MOFCOM applied facts available to it, Keystone was an "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the antidumping duties. Therefore, MOFCOM's failure to release this information following its reinvestigation constitutes a breach of Article 6.9, just as with Pilgrim's Pride.

79. As an initial matter, there is no doubt that, within the meaning of Article 6.9 of the AD Agreement, Keystone is an "interested party" and that the facts and calculations underlying MOFCOM's decision to maintain the antidumping duties on Keystone constitute "essential facts." Those data and calculations provided the basis for the continued imposition of antidumping duties on Keystone. The fact that MOFCOM imposed facts available on Keystone does not change this fact, or somehow inhibit the Article 6.9 protections that are provided to Keystone as an interested party in this

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

104 *See* Redetermination at pp.55-57 (Exhibit USA-9).

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

106 *China – Broiler Products*, para. 7.100.

107 *China – Broiler Products*, para. 7.106.

proceeding. The application of facts available and the right to the disclosure of data and calculations are not mutually exclusive. In fact, this Panel specifically recognized in the original proceedings that AD Agreement Article 6.9 must be interpreted in light of AD Agreement Article 6.8 and Annex II, and in doing so:

> the "essential facts" that MOFCOM was expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information; it was essential for the interested parties to know whether the authority's application of facts available conformed to the requirements of Article 6.8 and to properly defend their interests in this regard.[108]

As further support, the fact that an interested party may be subject to facts available does not inhibit that interested party's ability to seek, for example, correction of ministerial errors, and to do so requires the disclosure of the data and calculations underlying dumping margin determinations by an investigating authority. This only underscores why Keystone's calculations and data constitute "essential facts" within the meaning of AD Agreement Article 6.9.

80. In the original investigation, as noted by the Panel, MOFCOM applied constructed normal value to all sales because all "domestic sales quantities were less than 5% of the quantities of sales to China."[109] Although MOFCOM indicates that it "used production costs plus reasonable expenses and 5% profit[,]" it "does not indicate what data was used to determine the production cost nor what data was used for the reasonable expenses" – despite Keystone's submission of "one set of cost data according to its normal books and records (i.e, using value-based allocations) and two alternative versions of costs with different weight-based methodologies."[110]

81. As the Panel stressed, "[w]ithout the knowledge of how the elements of the cost of production were derived, Keystone would be unable to correct any perceived errors in MOFCOM's calculation of normal values and thus would be unable to defend its interests."[111] More broadly, the Panel recognized that the "sales under consideration and the normal value of those sales used to calculate aggregate normal value are essential facts[,]" and "[w]ithout the information as to what sales prices were being used to calculate normal value" as well as the "formulas used to calculate normal value, export price, the dumping margins for each model, or the final total weighted-average dumping

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108 *China – Broiler Products*, para. 7.137.

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

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

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

margin[,]" it is clear that "Keystone would not be able to ascertain the accuracy of MOFCOM's calculations and thus would not be able to defend its interests."[112] Therefore, because MOFCOM failed to "disclose all of the essential facts underlying the determination that dumping exists," China breached Article 6.9 of the AD Agreement.

82. In in the interests of completeness, the United States notes that the context with Keystone is distinct from that of Pilgrim's Pride. While Pilgrim's Pride sought to participate in the reinvestigation and was denied, Keystone *declined* to participate in the reinvestigation.[113] Moreover, MOFCOM applied 'facts available' treatment to Keystone.[114] But ultimately, these distinctions are of no consequence.

83. Article 6.9 of the AD Agreement requires disclosure of the essential facts, period. The data and calculations for establishing dumping margins are essential facts. The text of Article 6.9 does not provide that an investigating authority's obligation to disclose essential facts can be reduced depending on an interested party's participation. Rather, Article 6.9 is a positive obligation, requiring investigating authorities to "inform interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." Indeed, an interested party may not be in a position to determine the extent or logic of its participation until it receives such facts. Even a party subject to facts available treatment is entitled to review the essential facts for its antidumping rate – and could still have some degree of engagement to protect its interest, such as bringing ministerial errors to the investigating authority's attention.

84. For all of these reasons, China breaches Article 6.9 of the AD Agreement because MOFCOM failed to disclose essential facts related to the dumping margins for Pilgrim's Pride and Keystone.

VII. MOFCOM'S ANTIDUMPING DUTY FINDINGS ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 9.4, AND 6.8 AND ANNEX II OF THE AD AGREEMENT

85. In this section, the United States will address three of MOFCOM's antidumping findings that are inconsistent with the AD Agreement and result in erroneous and excessive antidumping duties.

86. First, the United States explains that China, again, breaches the second sentence of Article 2.2.1.1 because MOFCOM has, once again, failed to ensure its allocation is

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112 *China – Broiler Products*, para. 7.106.

113 *See* Redetermination at p.3, Section I(III) (Exhibit USA-9).

114 *See* MOFCOM, Redetermination at pp. 55-59, Section IV(I); *see also* MOFCOM "Disclosure of Basic Facts Supporting the Determination of Dumping and Subsidy in the DS427 Broiler and Chicken Anti-dumping and Anti-subsidy Measures Reinvestigation" (May 29, 2014) at 4.

"*proper*" with respect to Tyson. As explained in the original panel proceeding. MOFCOM's methodology assigns significantly more costs to subject merchandise, exaggerating any "dumping" margin, because it does not account for the weight of non-subject merchandise, such as blood, feathers, etc., from which Tyson derived revenue.

87. Second, because Tyson's antidumping rate is incorrectly calculated, and inflated, its use by MOFCOM in setting the "all others" rate means that the all others rate is not consistent with China's WTO obligations under Article 9.4.

88. Third, MOFCOM's determination on the basis of facts available with respect to Tyson is inconsistent with Article 6.8 and Annex II of the AD Agreement. As explained below, MOFCOM did not present any evidence that Tyson failed to provide or impeded MOFCOM's ability to obtain the requested information, and Tyson took appropriate steps to use the data available in its records to satisfy MOFCOM's request for information to the best of its ability.

A. China Breached the Second Sentence of Article 2.2.1.1 of the AD Agreement

1. MOFCOM Applied to Tyson a Biased Weight-Based Methodology that Improperly Allocated Costs Not Associated with the Production and Sale of the Product Under Consideration

89. A key issue in the original panel proceeding was whether MOFCOM improperly rejected the costs kept in Tyson's books and records for various chicken products when it constructed normal value, instead using a weight-based methodology that purported to take the aggregate cost of a chicken and to split the costs proportionately across various chicken products on the basis of weight. The original Panel found that in the redetermination, MOFCOM continued to employ a flawed and distortive weight-based allocation methodology. China thus breaches the second sentence of Article 2.2.1.1 because MOFCOM did not "consider all available evidence on the proper allocation of costs." As discussed below, MOFCOM's allocation methodology incorrectly fails to account for certain products that should absorb certain costs according to their respective weight.

90. The second sentence of Article 2.2.1.1 provides:

> Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

One of the Panel's findings was that MOFCOM breached the obligation in the second sentence of the Article as to Tyson because "MOFCOM improperly allocated costs from certain products derived from a chicken to other products derived from a chicken."[115] In particular, the Panel agreed that the United States made its *prima facie* case that, with respect to Tyson, there are various products derived from a chicken, *e.g.*, blood, feathers, and organs, that generate revenue and should absorb a proportionate share of production costs, but were not assigned costs under MOFCOM's methodology.

91. The essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology. 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.[116]

MOFCOM's redetermination echoes that logic 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 more apportioned chicken cost, while other products get almost no apportioned chicken cost.[117]

In other words, the position advocated by China through its prior WTO submissions and in MOFCOM's redetermination is that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products.[118] But, under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them. As aptly put by Tyson:

> If MOFCOM is correct (which it is not) that on a per pound basis every part of a chicken shares the same feed cost, then that logic must be applied

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

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

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

118 Such logic is incorrect. As the United States noted in its submission, broiler chickens in the United States are marketed with reference to their ability to produce breast meat, and there is, in fact, a breast meat feed conversion ratio. *See* U.S. Disclosure Comments, p. 10 ("If chickens are being kept alive and fed specifically to maximize production of breast meat -- i.e. additional pounds of feed are going to increase breasts not feet -- then that seems to be a very good "reason to provide the rationality" for why breast meat might bear a higher percentage of costs.") (Exhibit USA-7)

> to all products that are produced from the birds, including the blood and feathers and all other products that are produced from the live birds.[119]

Thus, products that might earn little revenue, particularly in respect to their weight, such as blood, organs, feathers, etc., still would need to have costs distributed to them, rather than leave the costs focused on the remaining products – which artificially inflates normal value. MOFCOM did not do that apportionment in its original determination, and it has not done so now in its redetermination.[120] This failure by MOFCOM is just as much a breach of the second sentence of Article 2.2.1.1 now as it was in the original dispute.

92. In its report, the original Panel made the following finding:

> In terms of whether MOFCOM's weight-based methodology was a proper allocation of costs, the issue is not whether weight-based methodologies are appropriate for joint products in the abstract, but whether the particular application of the weight-based methodology that MOFCOM devised is consistent with Article 2.2.1.1.[121]

93. During the redetermination, Tyson argued that MOFCOM should accept the value-based accounting reflected in its books and records.[122] However, Tyson also argued that "in the event that MOFCOM incorrectly continues to rely on a weight-based allocation, it must fully account for all products that are produced from the live birds that

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[119] Tyson's Disclosure Comments on MOFCOM Disclosure of Reinvestigation (May 28, 2014) at 5.

[120] The consequence of doing so highlight the problematic nature of weight-based allocations for the poultry industry generally – and the sensibility of value based allocations. Accounting for agricultural joint products becomes divorced from their sales value and, thus, provides no basis to engage in management decisions. As the United States noted in the original dispute, the logic of assigning costs by weight would be as if a mining company seeking gold had to assert that most of its costs were incurred in obtaining incidental lead (which weighs more) than the gold. United States, Original Second Written Submission (OSWS), para. 69, citing Charles T. Horngren, Srikant M. Datar, & George Foster, Cost Accounting: A Managerial Emphasis (11th Edition 2003), p. 560-561. MOFCOM seems to want it both ways – disregard value based accounting because they indicate no dumping for the various products, but reject assigning costs to minor products on weight because that too would reduce, if not eliminate, a dumping finding.

[121] *China – Broiler Products*, para. 7.196.

[122] *See* Tyson's Disclosure Comments on MOFCOM Disclosure of Reinvestigation (May 28, 2014) at 2.("These are the allocations that are used in Tyson's accounting system to prepare its audited financial statements and they are the basis for management reports that are used to operate its business. MOFCOM, however, rejects the value-based meat allocations based on incorrect assumptions and irrelevant considerations.")

are processed into both subject and non-subject merchandise."[123] To that end, Tyson made a straightforward request: if MOFCOM erroneously resorts to allocating costs by weight rather than as reflected in Tyson's books and records, then MOFCOM (per its own logic) would need to "divid[e] the total cost of the live birds by their total weight" – and not simply omit products it finds inconvenient from the calculation.[124] A supposed weight-based methodology that fails to actually account for the weight contributed by all the products derived from the bird is internally incoherent and therefore cannot be a "proper allocation of costs" consistent with Article 2.2.1.1.

94. The reasons proffered by MOFCOM for rejecting Tyson's position – and the consistency of MOFCOM's own position – are not reasoned or adequate. The United States addresses each of the reasons proffered by MOFCOM in turn.

95. MOFCOM, in rejecting Tyson's position, first asserts as follows:

> Firstly, the investigation authority found that, there was weight loss of live birds from the processing plants to plants by truck; weight loss before slaughter after delivering to the plants; loss that are not fit for the production of subject merchandise. There is no transportation expense for live birds. The weight-based allocation method claimed by your company didn't consider the above loss;[125]

In other words, MOFCOM seems to be suggesting that it does not apportion costs across all products because some chickens died *en route* to the processing plant or were otherwise not processed. But that assertion does not speak to the point at hand, which is that costs must be allocated across all products that are produced. In any event, as noted above, Tyson was not asking MOFCOM to factor in dead birds, but explicitly stated that MOFCOM should take the "total cost of live birds." Moreover, the data provided by Tyson explicitly made proper allowance for "costs of any birds that are not processed because they die at the farm or are condemned at the plant. . . ."[126]

96. The second reason proffered by MOFCOM for rejecting Tyson's position appears to be focused on its belief that Tyson confirmed that the costs to produce subject merchandise were exclusive, and, moreover, that Tyson affirmed so in the original investigation and the reinvestigation.

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123 Tyson's Disclosure Comments at 4 (Exhibit USA-6).

124 Tyson's Disclosure Comments at 5 (Exhibit USA-6).

125 Tyson Disclosure 20 (Exhibit USA-4); *see also* Redetermination at Section IV(1) (Exhibit USA-9)

126 Tyson Disclosure Comments at 4 (Exhibit USA-6).

> Secondly, in re-investigation, your company confirmed that the production cost of the subject merchandise reported in original response and re-investigation response didn't include other production cost. Therefore, the investigation authority calculates the meat cost and processing cost based on the total cost of the subject merchandise reported by your company, which will not include the cost of non-subject merchandise into the cost of subject merchandise;[127]

That position cannot be reconciled with either the data submitted by Tyson referenced above, or Tyson's explicit argument seeking for costs to reflect all products.

97. MOFCOM's position seems to be the same as the position it maintained in the original dispute, *i.e.*, that Tyson's methodology was to take "total reports costs for the production of subject merchandise and allocate those costs over total report weight of subject merchandise product."[128] The Panel rejected that argument after examining China's evidence.[129] Thus, if MOFCOM is still adhering to its claim that the originally submitted evidence supports its position, then that position has been rejected by the Panel and China remains in breach of Article 2.2.1.1.

98. The third reason offered by MOFCOM for rejecting Tyson's position is telling and highlights the results-oriented nature of its decision to reject value-based allocations kept in Tyson's books and records.

> Thirdly, according to the re-investigation response, all products derived from the live birds were allocated by meat cost. Both subject merchandise and non-subject merchandise are derived from live birds. The investigation authority only determined that, the cost allocation method of subject merchandise claimed by your company can't reasonably reflect the cost related to subject merchandise. The investigation authority *didn't determine* that the cost allocation method *of other products* derived from live birds is *not reasonable* [italics added].[130]

In other words, China is claiming that Tyson's value based cost allocation methodology is perfectly reasonable *when it comes to products that are not subject to the investigation*. MOFCOM provides no reason for why a value-based methodology becomes unreasonable only in the context of antidumping proceedings. More critically though,

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

128 *China – Broiler Products*, para. 7.1850

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

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

this reason, again, does not address the point that all costs need to be accounted for. Even if MOFCOM thinks that weight based methodologies are appropriate for subject merchandise and that value-based methodologies are appropriate for non-subject merchandise, it does not change the fact that the *application* of the weight based methodology remains skewed until all costs are fully accounted. MOFCOM cannot simply wall off the products it finds inconvenient, particularly if they interfere in establishing dumping margins.

99. The last reason offered by MOFCOM similarly lacks any reasoned or adequate basis:

> Finally, according to your response, the total cost for live birds is used for the production of subject merchandise, further processing products and cooked products. During the POI, the monthly cost for live birds is different. Your company didn't specify which is used for subject merchandise and which is used for non subject merchandise. Therefore, the investigation authority believes that, the weight-based allocation method claimed by your company can't reflect the production cost related to the subject merchandise and the investigation authority decides not to accept your claim in re-investigation.[131]

As an initial matter, MOFCOM seems to concede that live birds are used for non-subject products. If so, this would be at odds with MOFCOM's second reason that reported costs are limited to subject merchandise. In any event, the reason highlights precisely why an appropriate allocation that reflects non-subject merchandise is necessary. MOFCOM's claim that the monthly costs for live birds changes and that Tyson does not specify which are used for subject merchandise and non-subject merchandise is misplaced as well. Whether costs change from month to month – as one might expect for an agricultural commodity – does not obviate the need to ensure costs are properly allocated across all products. Tyson's remedy, as noted above, is simple and would address this purported problem: divide the total costs of live birds by their total weight. This calculation would, by MOFCOM's logic, ensure that costs are proportional across all products, subject or not. In that manner, the production costs allocated to subject merchandise would not be artificially inflated.

100. In sum, MOFCOM maintains the same distorted weight-based methodology with respect to Tyson that the Panel found to be inconsistent with China's obligations in the original dispute. The reasons proffered by MOFCOM in the redetermination for adhering to this methodology are not reasoned or adequate and remain unsupported by the record. Accordingly, China is in breach of AD Agreement Article 2.2.1.1 of the AD Agreement

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131 Tyson Disclosure at 21 (Exhibit USA-4); *see also* Redetermination at Section IV(1) (Exhibit USA-9).

because its application of a biased weight-based methodology cannot be considered to represent "a *proper* allocation of costs."

2. MOFCOM has not Addressed the Article 2.2.1.1 Findings with respect to Pilgrim's Pride

101. The Panel found that China breached its obligations under the second sentence of Article 2.2.1.1 because "there was insufficient evidence of consideration [by MOFCOM] of alternative allocation methodologies presented by the respondents" and MOFCOM "improperly allocated all processing costs to all products."[132] The Panel also found that China was not in breach of the first sentence of Article 2.2.1.1 with respect to Pilgrim's Pride because MOFCOM did provide an explanation as to why it rejected the costs kept in Pilgrim's books and records.[133] But the fact that China was not held in breach of the first sentence of Article 2.2.1.1 with respect to Pilgrim's Pride does not obviate the findings of breach under the second sentence.

102. Despite these findings, MOFCOM's redetermination refused to consider any alternative allocation methodologies for Pilgrim's Pride. MOFCOM stated that the Panel's report "contains no determination of and proposal on the company's dumping margin of the original investigation, which means the panel report does not require MOFCOM to conduct any reinvestigation of the company's dumping margin."[134] Instead, MOFCOM only investigated and modified the dumping margin for Pilgrim's Pride on the basis of the purported errors in calculation.[135]

103. Therefore, because China's redetermination does not contain any additional "evidence of consideration" of alternative methodologies, China's redetermination remains in breach of Article 2.2.1.1 of the AD Agreement for the same reasons as in the original investigation.

B. China Breached Article 9.4 of the AD Agreement through the "All Others" Rate Set by MOFCOM

104. MOFCOM set the "all others" rate at 73.8 percent – the rate assigned to Pilgrim's following the recalculation during the redetermination. Article 9.4 of the AD Agreement provides in pertinent part that:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to

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

133 *China – Broiler Products*, para. 7.174.

134 Redetermination at 56 (Exhibit USA-9).

135 Redetermination at 56 (Exhibit USA-9).

> imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined, provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

Here, the margin adopted by MOFCOM is not the weighted average margin of dumping. Rather, as explained in the redetermination, MOFCOM simply chose, without reasoning, that the rate would be that assigned to Pilgrim's Pride:

> In the reinvestigation, after examination, the investigating authority believes that the information in the questionnaire responses submitted by the three sampled respondents are facts already obtained and best information available to the investigating authority, so the investigating authority decided to use the evidences and materials submitted by Pilgrim's Pride Corporation to identify the normal value, export price, adjustment items and CIF of other American companies.[136]

MOFCOM's arbitrary selection of the highest rate found is not consistent with the disciplines of Article 9.4 of the AD Agreement, which establishes that the all others' rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers."

C. China's Resort to and Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.

105. MOFCOM's use of facts available in lieu of the Tyson's reported costs is inconsistent with Article 6.8 and Annex II of the AD Agreement. MOFCOM has not presented any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information – such that MOFCOM could justify the application of facts available under Article 6.8. As explained below, because the information requested by MOFCOM did not exist, Tyson took appropriate steps to use the data available in its records to satisfy MOFCOM's request for

136 Redetermination at 58-69 (Exhibit USA-9).

information to the fullest extent that it could. Moreover, MOFCOM's justifications for rejecting Tyson's reported costs are factually erroneous and inconsistent with Annex II.

106. Article 6.8 of the AD Agreement states that the administering 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." The scope of "necessary information" under this Article covers "essential knowledge or facts, which cannot be done without" that are "not provided to the investigating authority by an interested party."[137]

107. Paragraph 3 of Annex II to the AD Agreement further states that:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.…

Moreover, paragraph 5 of Annex II provides:

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

Annex II has been interpreted to mean that "all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities, and in case secondary source information is to be used, the authorities should do so with special circumspection."[138] Moreover, Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both the Article and Annex II establish the expectation that competent authorities will use that information to the extent that it can be used.[139]

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[137] *U.S. – Steel Plate (India)* (DS206), para. 7.53. The WTO has supported the decision of investigating authorities to employ facts available where, for instance, a respondent party failed to appear in an investigation. *See Mexico – Beef & Rice* (DS295), para. 7.239. It has likewise supported application of facts available where a respondent provided questionnaire responses that were substantially incomplete by, for instance, not including underlying documentation and reconciliations for audited financial statements that the investigating authority identified as required for its investigation. *See Egypt – Steel Rebar (Turkey)* (DS211), paras. 2.247-2.248.

[138] *Mexico – Rice* (DS295), 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.

[139] *U.S. – Zeroing (AB) (EC)*, para. 459.

108. Competent authorities can only make a preliminary or final determination on the basis of facts available if one of two conditions is satisfied: "(a) an interested party must refuse access to or fail to provide necessary information within a reasonable period of time, or (b) an interested party significantly impedes the investigation."[140] Neither of these conditions is satisfied where an interested party has provided the 'necessary information' for a competent authority to make its determination. Moreover, as recognized by one Panel, an "[i]nvestigating authority must provide evaluation of the facts on the record that formed the basis for its decision to disregard information."[141]

109. 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.[142] MOFCOM made this request *despite* Tyson's submissions on the record indicating that the accounting system used by Tyson during part of the period of investigation – the so-called fully absorbed cost system – did not record the actual costs incurred according to MOFCOM's parameters.[143]

110. As reported by Tyson during the original investigation as well as the re-investigation, "over the POI Tyson transitioned from a fully-absorbed cost system to a standard cost system."[144] Thus, over the period of investigation, Tyson recorded, as part of its accounting practice, only the aggregate actual costs incurred and the "standard costs," the latter of which reflect Tyson's expectation as to what was incurred at a particular segment.[145] Because this data constitutes the only contemporaneous data maintained by Tyson, it had to rely on this data in order to create a methodology that would satisfy MOFCOM's request.

111. Specifically, to satisfy MOFCOM's request for information, Tyson used the standard costs to create allocation percentages, which it then applied to the aggregate actual cost to generate the specific costs MOFCOM requested. In other words, to comply with MOFCOM's request, Tyson disaggregated the total actual production costs it incurred into various components by using estimates – that already existed in its books

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140 *EC – Footwear from China* (DS405), para. 7.186.

141 *Argentina – Floor Tiles (Italy)* (DS189), paras. 6.24-6.28.

142 Tyson's Disclosure Comments at 6 (Exhibit USA-6). Poultry plants are referred to as "cost centers" in Tyson's records. *See id.* at 4.

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

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

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

and records – for the particular components.[146] Tyson needed to take this approach to satisfy MOFCOM's request, because it did not track the data requested by MOFCOM as part of its standard business and accounting practice. Tyson was forthcoming with MOFCOM on why and how it was proceeding in this manner, and, significantly, this process was subject to verification by MOFCOM in the original investigation.[147]

112. Moreover, as explained further below, Tyson specifically explained to MOFCOM during the reinvestigation, through its submitted comments, that MOFCOM was incorrect in its belief that Tyson's reported costs do not tie to the costs submitted in the original investigation. Tyson further explained to MOFCOM that it, in fact "unquestionably reported the total actual costs incurred during the {period of investigation,}" which were "verified by MOFCOM."[148] Additionally, Tyson explained that because of its shift from a fully absorbed cost system to a standard cost system, Tyson took the only reasonable approach it could: "develop a methodology to report its costs in the format MOFCOM requested because it was not available from its accounting records." [149] Tyson did so by taking the "actual standard costs that are still available from the {period of investigation} to determine the allocation percentages for pure meat costs and processing costs by each production step{,}" which it then applied to the "actual costs reported in the original investigation."[150] As noted by Tyson, MOFCOM "has not explained, nor can it, why that approach is not reasonable."[151]

113. Despite Tyson's cooperative efforts to provide all necessary information to permit MOFCOM to evaluate the accuracy of its reported costs, MOFCOM completely disregarded what Tyson proffered and, instead, used what it characterized as the "best information available."[152] MOFCOM claimed that use of the "best information available" was justified based on the following three claims:

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146 *See* Letter on Third Supplemental Questionnaire for Dumping Part of Reinvestigation (March 18, 2014), Response to Question 3 (Exhibit USA-13); *see also* Tyson Second Supplemental Response, Exhibit SS-1 (Exhibit USA-14).

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

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

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

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

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

152 Tyson Disclosure at 19 (Exhibit USA-4).

> {Claim 1} Tyson's costs as reflected in the reinvestigation do not tie to those provided in the original investigation.[153]
>
> {Claim 2} Tyson "calculated the allocated meat cost and processing cost of all products based on the meat cost and processing cost data of some products recorded in the standard cost system."[154]
>
> {Claim 3} Tyson "only used the cost data in the in the first half of 2009 to calculate the production cost . . . during the POI. It is obvious that this method can't reasonably reflect the actual cost for producing the product during the POI."[155]

114. As a threshold matter, MOFCOM's decision to entirely disregard Tyson's reported costs is inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II to the AD Agreement. As noted by the Panel in *EC – Salmon*, Annex II "directs investigating authorities to take all submitted information into account for the purposes of its determinations when it is (i) 'verifiable'; (ii) "appropriately submitted so that it can be used in the investigation without undue difficulties';[156] (iii) 'supplied in a timely fashion'; and, where applicable, (iv) 'supplied in a medium or computer language requested by the authorities.'"[157] So long as "*all* of the conditions are satisfied, an investigating authority will not be entitled to reject information submitted when making determinations."[158] The Appellate Body has reiterated that paragraph 3 to Annex II only permits investigating authorities to reject submitted information if those conditions are not satisfied.[159]

115. MOFCOM did not present any evidence or explanation that the costs reported by Tyson were not "supplied in a timely fashion" and in the "requested medium" or "appropriately submitted so that {they} can be used in the investigation without undue difficulties." Tyson appropriately formatted and timely submitted its reported costs to

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153 Tyson Disclosure at 14 (Exhibit USA-4) (citing Second supplemental response, Exhibit SS-5) (Exhibit USA-15).

154 Tyson Disclosure at 16 (Exhibit USA-4). .

155 Tyson Disclosure at 17 (Exhibit USA-4). .

156 The Panel in *US – Steel Plate* interpreted the term "undue difficulties" as including difficulties "beyond what is otherwise the norm in an anti-dumping investigation{,}" and as requiring the investigating authority to make this showing. *US – Steel Plate*, paras. 7.72, 7.74.

157 *EC – Salmon*, para. 7.355.

158 *EC – Salmon*, para. 7.355.

159 *US – Hot Rolled Steel (Japan) (AB)*, paras. 80-81.

MOFCOM, and they reflect Tyson's efforts to respond to MOFCOM's request to the best of its ability.

116. Moreover, MOFCOM has not shown that Tyson's reported costs are not "verifiable." The Panel in *US – Steel Plate* recognized that information is "verifiable" when its "accuracy and reliability . . . can be assessed by an objective process of examination."[160] The claims cited by MOFCOM for rejecting Tyson's reported costs do not indicate any efforts by MOFCOM to undertake an "objective process of examination" and to attempt to verify their accuracy and reliability – whether via an on-the-spot investigation or through other means.

117. In *EC – Salmon*, the respondent had submitted a letter concerning its filleting costs following the investigating authority's on-the-spot verification of its questionnaire response, and the investigating authority rejected that information. The Panel found that the investigating authority acted inconsistently with Annex II because it "at no stage explored whether the accuracy and reliability of the information contained in the letter . . . could be objectively assessed by any means other than an on-the-spot investigation" – for instance, by making "further requests, of a specific or general nature, for any additional information relating to . . . filleting costs."[161] Thus, the Panel concluded that the investigating authority acted inconsistently with Annex II due to its failure to explore whether the information was "verifiable"; because of such "inaction{,}" the investigating authority had an "insufficient factual basis to conclude that the information . . . was not 'verifiable.'"[162]

118. Likewise, here, MOFCOM did not take the steps necessary to evaluate whether Tyson's reported costs were "verifiable" under Annex II. We stress that these same actual aggregate costs and standards costs at issue were submitted by Tyson in the *original* verification, where MOFCOM, notably, had an opportunity to verify the figures. Nevertheless, MOFCOM did not indicate in the original investigation that it had any problems with Tyson's information. The costs proffered by Tyson, which were reliable and subject to verification in the initial investigation, did not become any less reliable during the reinvestigation. In these circumstances, China breaches Article 6.8 and Annex II because it did not demonstrate that the conditions for rejecting Tyson's submitted information were met.

119. Moreover, not only do the factual assertions cited by MOFCOM to justify its rejection of Tyson's reported costs not speak to their "accuracy and reliability" based on

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160 *US – Steel Plate*, para 7.71.

161 *EC – Salmon*, para. 7.362.

162 *EC – Salmon*, para. 7.363.

an "objective process of examination{,}" but also they are flatly contradicted by the record information provided by Tyson.

120. Regarding MOFCOM's first claim, Tyson highlighted in its submitted comments that MOFCOM's assertion that Tyson's costs reported in the reinvestigation do not tie to those in the original investigation is contradicted by the very exhibit relied upon MOFCOM. As explained by Tyson, the cost totals in Exhibit SS-5, in fact, tie exactly to Tyson's reported costs from the original investigation 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."[163]

121. Moreover, Tyson had over 1,000 product-brand code combinations, and contrary to MOFCOM's assertion that Tyson only reported costs for "some" of these combinations, Tyson in fact reported costs for each of the combinations.[164] Although MOFCOM in the Second Supplemental Questionnaire instructed Tyson to provide for each product-brand code "detailed supporting materials" as well as "detailed sources[,]" this request was entirely unrealistic and unreasonable to meet for over 1,000 product-brand codes. Instead, Tyson chose three representative products – a boneless skinless breast product, a leg quarter, and a paw – and provided detailed information for those products and a highly detailed explanation of that information.[165]

122. As to the second claim, MOFCOM erroneously asserts that Tyson failed to report actual meat and processing costs incurred during the period of investigation. In addition to showing how total costs reported in the reinvestigation tie to those in the original investigation, Tyson "reported the pure meat cost separately from the processing costs in Exhibit SS-1" and "reported the processing costs by processing step{,}" as requested by MOFCOM.[166]

123. MOFCOM erroneously suggests that Tyson failed to report actual costs because it relied on *allocation percentages* to segregate meat and processing costs and to identify processing costs by production steps. As explained above, because Tyson "transitioned from a fully-absorbed cost system to a standard cost system" during the period of investigation, and considering that Tyson "did not segregate meat and processing costs

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

164 *See* Letter on Second Supplemental Questionnaire for Dumping Part of Reinvestigation (March 7, 2014) at 7, questions 8-9 (Exhibit USA-16)

165 *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).

166 Tyson Disclosure Comments at 6 (Exhibit USA-6) (citing Second Supplemental Response, Exhibit SS-5) (Exhibit USA-15).

for each production step" while operating under the fully absorbed cost system, Tyson needed to "develop a methodology to report the costs in the format that MOFCOM requested because it was not available from its accounting records."[167] As such, and as noted previously, "Tyson took its actual standard costs that are still available from the POI to determine the allocation percentages for pure meat costs and processing costs by production step" and then "applied these percentages (which are its actual standard costs) to the actual costs reported in the original investigation."[168]

124. Regarding MOFCOM's third claim, Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation. Standard costs from early in the period of investigation were purged from Tyson's systems in the ordinary course of business after 118 weeks.[169] Yet MOFCOM's suggestion that these facts undermined the accuracy of the product specific costs is not factually supported. As noted above, standard costs were used only to disaggregate the actual, product-brand costs incurred during the period of investigation and verified by MOFCOM, and there was no evidence indicating that the standard costs for the first half of 2009 were not valid during the second half of 2008.

125. Finally, an additional argument in the redetermination on the submitted data is demonstrably incorrect. MOFCOM's redetermination asserts that Tyson's proffered data was insufficiently supported.[170] However, MOFCOM did *not* request any information concerning the reliability of Tyson's data. As noted by the Panel in *Argentina – Ceramic Tiles*, it is incumbent on the investigating authority to make clear what information it is requesting before resorting to facts available:

> We conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation.[171]

126. In sum, for all of the reasons explained above, MOFCOM's resort and application of facts available is inconsistent with AD Agreement Article 6.8 and Annex II. There is no evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information. Rather, Tyson supplied all

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167 Tyson Disclosure Comments at 6 (Exhibit USA-6) at 6.

168 Tyson Disclosure Comments at 6 (Exhibit USA-6) at 6.

169 *See* Letter on Second Supplemental Questionnaire at 22, question 26 (Exhibit USA-16).

170 *See* Redetermination at sec. IV(1) (Exhibit USA-9)

171 *Argentina – Ceramic Tiles*, para. 6.58.

information requested, and that information met the conditions of Annex II for use. Moreover, MOFCOM's justifications for rejecting the reported costs that Tyson was able to provide are factually erroneous and inconsistent with Annex II. Because MOFOM did not have grounds under Article 6.8 and Annex II for rejecting Tyson's reported data and using facts available, China breaches Article 6.8 and Annex II of the AD Agreement.

VIII. MOFCOM'S FINDINGS IN ITS INJURY REDETERMINATION REMAIN INCONSISTENT WITH THE AD AND SCM AGREEMENTS

127. MOFCOM in its redetermination continued to find that China's chicken broiler industry was materially injured by reason of dumped and subsidized chicken broilers imported from the United States ("subject imports"). These findings remain untenable for precisely the same reasons the United States explained in the original panel proceeding.

128. First, MOFCOM continues to rely on a price effects analysis that does not properly take into account differences in product mix. As explained in the original proceeding, record evidence indicated that that over 97 percent of subject imports consisted of lower value chicken products, including paws, chicken cuts with bones, mid-joint wings, and other offal, which would have reduced the average unit value of subject imports relative to the sales price of the domestic like product.[172] The Panel's findings recognize that MOFCOM had "to take necessary steps to ensure price comparability."[173] MOFCOM has not done so. Instead, MOFCOM solicited pricing data from just four domestic firms. China's redetermination does not explain how or why this limited data is sufficient to ensure that price comparability has been achieved. Accordingly, MOFCOM's price effects analysis, including its finding of price suppression, remain WTO inconsistent.

129. Second, MOFCOM's finding that subject imports had an adverse impact on the Chinese domestic industry remains flawed. MOFCOM's analysis selectively focuses on the assertion that subject imports depressed the domestic industry's capacity utilization and increased its end-of-period inventories. MOFCOM's analysis simply ignored evidence that the domestic industry's performance improved according to almost every other measure during the period of investigation. That MOFCOM ignored these other factors also highlights its failure to recognize that the assertion that subject imports depressed capacity utilization was unfounded. The domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth.

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172 USAPEEC, Injury Brief at 19.

173 *China – Broiler Products*, para. 7.493

130. Third, MOFCOM continues to find a causal link between subject imports and the alleged material injury being suffered by the domestic industry. MOFCOM's finding failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share came at the expense of non-subject imports and not the domestic industry, which also gained market share during the period of investigation.

131. Finally, MOFCOM's redetermination continues to ignore USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws.[174] As USAPEEC explained, chicken paws imported from the United States could not have injured the domestic industry because domestic producers were incapable of producing chicken paws in quantities sufficient to satisfy domestic demand without also increasing production of other chicken parts to unsustainable levels.

132. In short, as demonstrated below, MOFCOM clings to a finding of material injury that fails to consider contrary evidence or arguments and thus fails to respond to the findings of the Panel and to comply with its WTO obligations.

A. China's Biased Price Effects Analysis Breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

133. In the original final determination, MOFCOM found that subject imports undersold the domestic like product, based on a comparison of the average unit value of subject imports on a CIF basis to the average unit value of domestic producer sales to first arms-length customers. The Panel found that China acted inconsistently with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2 because MOFCOM based its underselling analysis on a comparison of subject import and domestic like product average unit values that did not control for clear differences in product mix that affected price comparability.[175] As the Panel explained, the product mix varied considerably between the two sets of data, with U.S. imports limited to certain chicken parts, including a high proportion of paws, wings, and legs, while domestic producer sales included all other parts of the chicken, including breast meat.[176] The Panel also found that China acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM's finding that

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174 USAPEEC's Injury Brief at 18, 29 (Exhibit USA-18).

175 *China – Broiler Products*, para. 7.494.

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

subject imports suppressed domestic prices was based in part on its deficient underselling analysis.[177]

134. During the re-determination proceedings, MOFCOM collected product-specific pricing data from only four domestic producers. In its view, these data validated its original pricing analysis.[178] According to MOFCOM, these data show that the average unit values of domestic producer sales of drumsticks, paws, and gizzards – the products accounting for most subject imports during the period of investigation – were higher than the average unit values of domestic producer sales of all products, indicating that subject imports consisted primarily of higher-value products, not lower-value products as respondents alleged. Based on this evidence, MOFCOM claimed that its underselling methodology, comparing the average unit value of all subject imports to the average unit value of all domestic producer sales, was conservative and supported a finding of significant subject import underselling. MOFCOM also claimed that product-specific data show that subject imports of drumsticks, feet, wings, and gizzards undersold comparable domestically-produced broiler products throughout the period of investigation, providing additional support for its finding of significant subject import underselling. As in the original determinations, MOFCOM concluded that "[t]he low price strategy of the subject merchandise also makes a significant inhibition on the sales price of the domestic like product,"[179] meaning that subject import underselling had the effect of suppressing domestic prices to a significant degree.

135. MOFCOM's price effects analysis continues to be inconsistent with China's obligations under Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement. As an initial matter, MOFCOM's determination contains no reasoning nor evidence to establish that the sample of product-specific domestic producer sales prices was sufficiently representative of the domestic industry so as to permit an unbiased analysis of underselling. Rather, MOFCOM failed to disclose how it went about collecting product-specific pricing data, why it collected pricing data from only four of the 17 domestic producers included in the domestic industry, why these four firms were chosen, and the proportion of total domestic industry sales covered by the product-specific pricing data. Second, MOFCOM failed to explain how the alleged subject import underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects between 2006 and 2008. Third, MOFCOM also ignored evidence that prices for domestically produced products that competed with subject imports declined far less than prices for other domestic products in the first half of 2009, indicating that factors other than subject imports drove domestic price trends during the period. As further discussed below, these deficiencies render

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177 *China – Broiler Products*, para. 7.511.

178 Redetermination at sec. VII(ii)(2) (Exhibit USA-9).

179 Redetermination at sec. VI(II)(3) (Exhibit USA-9).

MOFCOM's redetermination inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

1. MOFCOM Failed to Establish that the Product-Specific Pricing Data Was Sufficiently Representative of Domestic Prices to Permit Objective Price Comparisons

136. MOFCOM purported to control for the "clear differences in product mix that affected price comparability" found by the Panel by analyzing product-specific pricing data collected from only four of the 17 domestic producers included in the domestic industry. MOFCOM presumably collected these data through its "supplementary investigation on Beijing Huadu Broiler Company, Shandong Minhe Livestock Co., Ltd., Shandong Spring Snow Foods Co., Ltd. and Great Wanda (Tianjin) Co., Ltd."[180] MOFCOM did not disclose its methodology for selecting producers for inclusion in its sample of the domestic industry or for collecting product-specific pricing data from these producers, however. Nor did MOFCOM disclose the percentage of domestic industry sales covered by the product-specific data collected. Accordingly, MOFCOM failed to establish that the pricing data it collected from a sample of the domestic industry was sufficiently representative of the domestic industry to permit an objective underselling analysis, in breach of AD Agreement Article 3.1 and SCM Agreement Article 15.1.

137. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement set forth a Member's substantive obligations with respect to the determination of injury in AD and CVD investigations, respectively.[181] The provisions provide that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the {dumped or subsidized imports and the effect of} the {dumped or subsidized} imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[182]

138. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement therefore impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The Appellate Body has interpreted "positive evidence" to relate to "the quality of the evidence that authorities may rely upon in making a determination" and to mean that "the evidence must be of an affirmative, objective and verifiable character, and that it must be

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180 Redetermination at sec. IV(2) (Exhibit USA-9).

181 *See, e.g.*, *Thailand – H-Beams (AB)*, para. 106.

182 Both articles are worded identically except Article 15.1 of the SCM Agreement uses the term "subsidized imports" whereas Article 3.1 of the AD Agreement refers to "dumped imports."

credible."[183] The Appellate Body in *Mexico – Rice* described positive evidence as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[184]

139. The second requirement is that the injury determination involves an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[185] Furthermore, the requirement that the examination be "objective" mandates that "the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."[186]

140. The Appellate Body's prior analysis has also noted that the obligation in Article 3.1 of the AD Agreement to conduct an objective examination based on positive evidence is "an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect" and "informs the more detailed obligations in succeeding paragraphs," including the examination of the effect of dumped imports on prices under Article 3.2.[187]

141. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement further qualify the type of examination that authorities must conduct to determine the price effects of dumped or subsidized imports. Article 3.2 of the AD Agreement states:

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is to depress prices to a significant degree or prevent prices increases, which otherwise would have occurred, to a significant degree.

Article 15.2 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.2 of the AD Agreement uses the term "dumped imports."

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183 *US – Hot-Rolled Steel (AB)*, para. 192.

184 *Mexico – Beef & Rice (AB)*, paras. 164.

185 *Mexico – Beef & Rice (AB)*, para. 180.

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

187 *Thailand – H-Beams (AB)*, para. 106.

142. The AD Agreement and SCM Agreement both require that investigating authorities examine the price effects of dumped or subsidized imports on the domestic industry, rather than a subset of the industry. AD Agreement Article 3 and SCM Agreement Article 15 are both titled "Determination of Injury," with "injury" defined as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry." Accordingly, an investigating authority's injury analysis, including its analysis of the price effects of dumped or subsidized imports pursuant to ADA Article 3.2 and SCM Agreement Article 15.2, must focus on the "domestic industry," as defined by the investigating authority in accordance with ADA Article 4.1 and SCM Agreement Article 16.1.[188]

143. Further confirmation of this preference is provided by AD Agreement Article 3.5 and SCM Agreement Article 15.5, which state that "[i]t must be demonstrated that [dumped or subsidized] imports are, through the effects of [dumping or subsidies], as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." Investigating authorities could only use the price effects analysis required under AD Agreement Article 3.2 and SCM Agreement Article 15.2 to demonstrate that subject imports are causing injury, defined as "material injury to a domestic industry," by analyzing the effect of subject imports on prices for the domestic industry, not prices for a subset of the industry. Indeed, AD Agreement Article 3.6 and SCM Agreement Article 15.6 provide that "the effect of the [dumped or subsidized] imports," which would include their price effects, "shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production . . . ," meaning all domestic production by an industry, not a subset of that production.

144. As the Appellate Body explained in *EC – Fasteners,* investigating authorities may rely on samples of the domestic industry to determine injury. But, in finding that the ADA "does not prevent an authority from using samples to determine injury" the Appellate Body stressed that "a sample must be properly representative of the domestic industry."[189] Similarly, the Panel in *EC – Salmon* explained that an investigating authority's reliance on a sample that is not representative of the domestic industry would not permit an objective analysis, in breach of AD Agreement Article 3.1:

> [T] he obligation in Article 3.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the

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188 The United States argued in the original panel proceeding that MOFCOM's initial injury analysis was flawed because MOFCOM selectively limited the domestic industry to petitioners and other supporters of the petition. Although the United States continues to believe that MOFCOM should have investigated the broader domestic industry, for purposes of the claims raised in this DSU Article 21.5 proceeding, the United States sets aside MOFCOM's definition of the domestic industry and identification of the producers in that industry. Whereas MOFCOM first limited the domestic industry data to that from 17 producers it has further narrowed the investigated group to only four, in an industry that potentially consists of hundreds of producers.

189 *EC – Fasteners (AB),* para. 436.

> volume, price effects, and impact of dumped imports, limits an investigating authority's discretion both in choosing a sample to be examined in the context of injury, and in collecting and evaluating information obtained from the sampled producers. The Appellate Body stated, in *US - Hot-Rolled Steel*, that "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation." A sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement.[190]

The same considerations would apply to an investigating authority's use of sampling under the SCM Agreement because SCM Agreement Article 15.2 is practically identical to AD Agreement Article 3.1. Thus, when an investigating authority relies on a sample of the domestic industry in conducting its underselling analysis, it must ensure that the sample is representative of the domestic industry.

145. In its redetermination, MOFCOM failed to explain why sampling was even necessary, much less establish that the sample utilized was representative of the domestic industry. Particularly given that it had already limited the "domestic industry" to the 17 producers who completed and returned questionnaire responses in the original investigations, the record does not appear to indicate that MOFCOM had a need to rely on sampling for its underselling analysis.[191] As noted, MOFCOM defined the industry to include only 17 producers and had already collected extensive information from the producers pertaining to the impact factors listed under AD Agreement Article 3.4 and SCM Agreement Article 15.4. Indeed, MOFCOM limited its definition of the domestic industry to domestic producers that completed and returned questionnaire responses, meaning that all 17 producers within the industry definition had demonstrated a willingness to provide MOFCOM with requested information.[192] Accordingly, absent any explanation to the contrary, MOFCOM was in a position to collect pricing data from all members of the domestic industry, and there was no reason for MOFCOM to resort to sampling for its analysis of underselling. MOFCOM's resort to a sample without any

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190 *EC – Salmon (Panel)*, para. 7.130.

191 In *EC – Salmon*, the Panel explained that it could not conclude "that sampling in the context of injury determinations is prohibited" by the Agreements because "[s]uch a conclusion would make it impossible for investigating authorities to make injury determinations in certain cases involving more than some relatively limited number of domestic producers." *EC – Salmon (Panel)*, para. 7.129.

192 Redetermination at sec. III(II) (Exhibit USA-9).

explanation – let alone a reasonable explanation – undermines the objectivity of MOFCOM's sample.

146. Nor did MOFCOM disclose how it selected the four domestic producers in its sample or its methodology for collecting pricing data from them. In short, nothing in the redetermination demonstrates that the sample was representative of the industry. Neither the interested parties, nor the United States, nor the Panel has any way to assess the representativeness of the sample or of knowing whether MOFCOM selected the sample in an objective fashion. For example, selecting domestic producers with the highest average unit value of net sales for the sample would have resulted in relatively higher product-specific average unit values, and thus larger product-specific underselling margins.[193] Inviting producers to volunteer for inclusion in the sample would have created a selection bias in favor of domestic producers with higher prices, skewing underselling margins upwards.[194]

147. MOFCOM's methodology for collecting product-specific pricing data could also have influenced the representativeness of its sample. Collecting pricing data on the basis of a handful of invoices presented during verification instead of on the basis of all sales during the period of investigation would likely have yielded pricing data covering too small a share of total domestic industry sales to be representative of domestic industry prices. During the Panel proceeding, for example, the Panel noted that the 63 invoices presented by China as evidence of product-specific domestic price levels represented "a very small fraction" of industry sales.[195]

148. Moreover, MOFCOM also failed to disclose the coverage of its product-specific pricing data, which is the percentage of total domestic industry sales covered by the data. Pricing data covering an insignificant share of industry sales would not be representative of domestic industry prices, and would therefore not permit an objective analysis of underselling.

149. For all these reasons, MOFCOM failed to establish that the pricing data it collected from a subset of the already narrowly-defined domestic industry was representative of the domestic industry. MOFCOM thus failed to ensure that its new

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193 If certain domestic producers reported a higher average unit value of net sales, this would have reflected higher product-specific prices rather than a favorable product mix. All domestic producers would have possessed a similar product mix because all sold broiler products made from the slaughter of whole chickens.

194 In *EC – Fasteners*, the Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion."[194] MOFCOM would have introduced a similar risk of distortion had it invited producers to volunteer for inclusion in its sample for purposes of collecting product-specific pricing data.

195 *China – Broiler Products*, para. 7.493 n.743.

underselling analysis was based on an objective examination of positive evidence, in breach of AD Agreement Article 3.1 and SCM Agreement Article 15.1.

150. The above facts also confirm that MOFCOM has also breached China's obligations under Article 6.4 of the AD and Article 12.3 of the SCM Agreement. Article 6.4 of the AD Agreement states that:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an antidumping investigation, and to prepare presentations on the basis of this information.

Article 12.3 of the SCM Agreement is worded almost identically, except that it uses the term "countervailing duty investigation" whereas Article 6.4 of the AD Agreement refers to "antidumping investigation." The Appellate Body has found that Article 6.4 of the AD Agreement, and by extension Article 12.3 of the SCM Agreement, requires investigating authorities to provide interested parties with "*all* non-confidential information relevant to the presentation of their cases and used by the investigating authority," including "information that has been processed, organized, or summarized by the authority."[196] MOFCOM's failure to disclose its basis for selecting producers for the sample and its methodology for collecting pricing data from them also deprived the parties of "information relevant to the presentation of their cases," in breach of AD Agreement Article 6.4 and SCM Agreement Article 12.3.

2. MOFCOM Failed to Establish that Subject Import Prices Had the Effect of Suppressing Domestic Like Product Prices in Breach of AD Agreement Article 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

151. Both as a consequence of its flawed underselling analysis and by failing to show a connection between those underselling findings and the price movements for domestic products, MOFCOM also failed to demonstrate that subject import alleged underselling suppressed domestic prices in the first half of 2009. As in the original investigations, MOFCOM relied on its underselling analysis as the sole basis for its finding that subject imports suppressed domestic prices. Accordingly, MOFCOM's failure to ensure that its product-specific pricing data from a sample of the domestic industry was representative of the domestic industry rendered not just its underselling analysis inconsistent with the Agreements, but also the price suppression finding predicated on its underselling analysis. Further, MOFCOM's new underselling analysis and product-specific pricing data did not support its finding that subject imports suppressed domestic prices in the first

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196 *EC – Fasteners (AB)*, at para. 480 (emphasis added). The Appellate Body also has found that "it is the interested parties, rather than the authority, who determine whether the information is in fact 'relevant' for the purposes of Article 6.4." *Id.* para. 479.

half of 2009. For these reasons, MOFCOM's finding that subject imports suppressed domestic prices was inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

a. *MOFCOM's Price Suppression Finding Relied on Its Deficient Underselling Analysis*

152. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement require investigating authorities to consider whether any significant suppression (or depression) of domestic prices is "the effect" of subject imports. In turn, an investigating authority can rely on price suppression or price depression to support a finding of injury only if the authority establishes that price suppression or price depression was linked to subject imports. As the panel and Appellate Body found in *China – GOES*, "*merely showing* the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2."[197] Consistent with this reasoning, MOFCOM was obligated in this reinvestigation, as it was in the GOES investigation, to demonstrate that any significant suppression of domestic prices was caused by subject imports.

153. In its redetermination, as in the original determination, MOFCOM relied on subject import underselling to establish that price suppression resulted from subject import competition. In the original Panel proceeding, the Panel found that "MOFCOM's finding of price suppression was *partly based* on its finding of price undercutting," highlighting MOFCOM's finding that "[i]n particular, since 2008 the like product of the domestic industry was in a loss because the further price undercutting of the product concerned."[198] Using language similar if not identical to that in the original investigations, MOFCOM also based its finding of price suppression on underselling in the redeterminations:

> The low price strategy of the Subject merchandise also makes a significant inhibition on the sales price of the domestic like products. According to the evidence, during the POI except 2007, the sales price and the sales cost of the domestic like products is upside down, while the gross sales profit rate of the domestic products in 2007 is in a low level. The domestic like products industry is at a loss during a long period. Especially the Subject

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

198 *China – Broiler Products*, para. 7.507.

> merchandise has cut down the price since 2008 and results in a serious loss in the domestic like products.[199]

154. MOFCOM's reliance on its flawed underselling analysis as the underpinning for its price suppression finding is explicitly reinforced at multiple points in the redetermination. As before, the very title of the sections of the redetermination in which MOFCOM addresses price, "Impact of the Import Price of the Subject Merchandise to the Price of the Domestic Like Products," makes clear that MOFCOM's analysis in those sections addresses the impact of subject import prices on domestic prices, not the impact of subject import volume or market share.[200] MOFCOM concluded its price effects section by explaining that:

> the low price sale of the subject merchandise has a cut-down effect on the price of the domestic like products, and also leads to the reduction of the capability of making profit of the domestic like products…[201]

In other words, MOFCOM referred again to its view that low subject import prices caused price suppression. Significantly, MOFCOM revised the concluding paragraph of its price section in the redetermination to eliminate the references to subject import volume and market share found in the corresponding paragraphs of the original determinations, clarifying its view that price suppression resulted from subject import underselling, not subject import volume.[202]

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[199] Redetermination at section VI(II)(3) (emphasis added) (Exhibit USA-9); *compare* Panel Report at para. 7.505 (quoting China's translation) ("'The low-priced sales of the product concerned also suppressed the selling price of the like product of the domestic industry. The investigation evidence indicates that, during the investigation period, except for the year 2007, the selling price of the like product of the domestic industry remained below the sales cost for a long time. In 2007, the gross profit margin of sales of the like product of the domestic industry was at a low level, the like product of the domestic industry were in a state of loss for a long time. In particular, since 2008 the like product of the domestic industry was in a loss because the further price undercutting of the product concerned.'").

[200] Redetermination at section VI(II)(3) (Exhibit USA-9); *compare* MOFCOM, Final AD Determination at sec. 5.2.3 (USA-19); MOFCOM, Final CVD Determination at sec. 6.2.3 (USA-20).

[201] Redetermination at section VI(II)(3) (Exhibit USA-9).

[202] *Id.*; *compare* MOFCOM, Final AD Determination at sec. 5.2.3 (USA-19) ("To sum up, the continual expansion of the market shares of the Subject Products in China is closely related to the continual export to China *in a large amount* at a low price, and selling of the Subject Products *in a large amount* at a low price across China not only has a cut-down effect on price of the domestic like products, but also leads to reduced profitability of the domestic like products.") (italics added); MOFCOM, Final CVD Determination at sec. 6.2.3 (USA-20) ("In summary, an increasing market share of the Subject Products in China is closely linked with continuous export

155. In responding to various arguments raised by USAPEEC, MOFCOM likewise resorted to the notion that subject import underselling necessarily means that those imports suppressed domestic prices. For example, in addressing USAPEEC's argument that subject imports could not have adversely affected domestic prices in the first half of 2009, MOFCOM again stated that subject imports suppressed domestic prices by underselling the like product:

> [T]here are data showing the price of the imported Subject Products was lower than that of the domestic like products, showing obvious price under-cutting effect on the domestic like products. With this effect, the domestic like products were forced to cut prices by a large margin in order to maintain the market share . . . . Thus the Investigating Authority therefore finds that import price decreasing of the Subject Products caused substantial depression and suppression on the sale price of the domestic like products and injured the operation of the domestic industry.[203]

MOFCOM offered a similar response to another USAPEEC argument concerning the domestic industry's robust performance during the 2006-2008 period, claiming that "[b]ecause the domestic like products price was seriously under-cut and depressed, except for 2007, the domestic like product price generally dropped far away from its cost of goods sold."[204] Thus, MOFCOM's repeatedly relied solely on its underselling findings as support for the conclusion that subject imports suppressed domestic prices to a significant degree.

156. Given MOFCOM's reliance on its new underselling analysis for its price suppression finding, the deficiencies of that underselling analysis, discussed above, render MOFCOM's price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

157. This deficient underselling analysis is also the foundation for MOFCOM's finding of price suppression. In other words, MOFCOM relies on an underselling analysis that is not consistent with the requirements in the AD and SCM Agreements, including because it is not the result of an objective examination, and then uses it to justify its findings of

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of the Subject Products to China at a low price and *in a great volume*; the sales of the Subject Products at the Chinese market at a low price and *in a great volume* not only resulted in obvious price cuts for the domestic like products but also a declining profitability of the domestic like product.") (italics added).

[203] Redetermination at section VII(ii)(2) (Exhibit USA-9); *compare* MOFCOM, AD Final Determination at sec. 6.2.2 (USA-19); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-20) (emphasis added).

[204] Redetermination at VII(ii)(3) (Exhibit USA-9); *compare* MOFCOM, AD Final Determination at sec. 6.2.3 (USA-19); MOFCOM, Final CVD Determination at sec. 7.2.3 (USA-20).

price suppression, which of course is required to be the result of an objective examination and based on positive evidence. Thus, as the only basis cited by MOFCOM linking subject imports to price suppression was its deficient underselling analysis, MOFCOM failed to establish that the price suppression was the effect of subject imports, in breach of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. In the original Panel proceeding, the Panel found that MOFCOM's price suppression finding breached AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2 because that finding "was *partly based* on its finding of price undercutting" and "MOFCOM's findings of price undercutting [were] inconsistent with Articles 3.1 and 15.1 and 3.2 and 15.2."[205] In its redetermination, MOFCOM has clarified that subject import underselling is the principal basis of its price suppression finding. MOFCOM could not have established that subject imports suppressed domestic prices to a significant degree in accordance with AD Agreement Article 3.2 and SCM Agreement Article 15.2, or with the "objective examination" requirement under AD Agreement Article 3.1 and SCM Agreement Article 15.1, when MOFCOM's sole ground for the finding was its defective underselling analysis. Accordingly, the deficiencies in MOFCOM's new underselling analysis render its price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

b. *MOFCOM's New Underselling Analysis and Product-Specific Pricing Data Cannot Support Its Finding that Subject Imports Suppressed Domestic Prices*

158. MOFCOM's reliance on underselling to support its price suppression finding was also unsupported by the evidence because the record showed no correlation between underselling and price suppression. According to MOFCOM, subject imports undersold the domestic like product throughout the period of investigation, by margins ranging from 9.51 to 24.74 percent for chicken feet, 36.40 to 43.33 percent for chilled chicken cuts with bone (primarily drumsticks), 31.11 to 45.34 percent for chicken wings, and 39.56 to 41.40 percent for chicken gizzards.[206] Yet, these alleged margins of underselling did not prevent the domestic industry from increasing its prices by more than the increase in its total costs between 2006 and 2008. Specifically, the record shows that the industry's net loss narrowed from 7.9 percent of sales income in 2006 to 4.7 percent of net income in 2008, reflecting a reduction in the industry's ratio of cost of goods sold to net sales. A reduction in this ratio means that the industry's prices increased faster than its costs, which runs contrary to a finding of price suppression. In other words, subject import underselling did not coincide with the suppression of domestic prices between 2006 and 2008. MOFCOM failed to explain or investigate how subject import underselling could have significantly suppressed domestic prices in the first half of 2009

205 *China – Broiler Products*, paras. 7.507, 7.511.

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

when the same underselling had no "significant"[207] price suppressive effects between 2006 and 2008. Thus, there is no evidence to support MOFCOM's price suppression finding. Consequently, MOFCOM failed to establish that any significant price suppression experienced by the domestic industry was the effect of subject imports, in breach of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. By failing to recognize or consider that the domestic industry's prices increased faster than its costs between 2006 and 2008, MOFCOM also therefore failed to base its analysis of price suppression on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

159. MOFCOM also disregarded evidence that the price suppression experienced by the domestic industry in the first half of 2009 was driven by factors other than subject imports. Specifically, MOFCOM's product-specific pricing data showed that prices for domestically-produced products that competed directly with most subject imports – namely chicken drumsticks, feet, and gizzards – declined far less than prices for other domestically-produced products. The record showed that the average unit value of all products sold by the domestic industry was 20.65 percent lower in the first half of 2009 than in the first half of 2008.[208] By contrast, over the same period, domestic prices were down only 13.0 percent with respect to drumsticks and 12.3 percent with respect to gizzards.[209] Domestic prices were stable with respect to chicken feet, down only 0.9 percent, even though chicken feet accounted for 29 to 39 percent of subject import volume.[210] These data indicate that the 20.65 percent decline in the average unit value of all domestic industry sales in the first half of 2009 was driven primarily by an even greater decline in the average unit value of domestic sales of products *other than* chicken drumsticks, gizzards, and feet – that is, declines in values of products that did not compete directly with most subject imports.[211] Given that such products would have accounted for a substantial majority of domestic industry shipments, the steep decline in their prices, in excess of 20.65 percent, would have accounted for most of the adverse

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[207] Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement provide that investigating authorities are required to consider whether there was "significant" price suppression on account of subject imports. The pertinent language provides: "With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

[208] *Id.* at section VI(II)(2) (Exhibit USA-9).

[209] *Id.* at section VII(ii)(2) (Exhibit USA-9).

[210] *Id.* at section VII(ii)(2) (Exhibit USA-9).

[211] MOFCOM found that 69 to 86 percent of subject imports consisted of drumsticks and chicken feet. Redetermination at sec. VII(ii)(2) (Exhibit USA-9).

price effects experienced by the industry in the first half of 2009. By ignoring evidence that factors other than subject imports drove domestic price trends in the first half of 2009, MOFCOM failed to properly establish that price suppression was "the effect" of subject imports, in breach of AD Agreement Article 3.2 and SCM Agreement Article 15.2. By ignoring such evidence, MOFCOM also failed to base its price analysis on an objective examination of positive evidence, in breach of AD Agreement Article 3.1 and SCM Agreement Article 15.1.

B. CHINA'S IMPACT ANALYSIS IN ITS REDETERMINATION BREACHED ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.4 OF THE SCM AGREEMENT.

160. In the original Panel proceedings, the United States demonstrated that MOFCOM's injury determination was inconsistent with China's obligations under the AD and SCM Agreements on account of MOFCOM's flawed price-effects analysis. The Panel determined to exercise judicial economy with respect to the U.S. claims that the injury analysis was also inconsistent with China's WTO obligations because of flaws in its analysis of impact and causation. Specifically, the Panel found that because MOFCOM's reevaluation of its price effects analysis would also require a reexamination of its impact and causation analysis, judicial economy was appropriate.[212] Despite having the opportunity to revise its impact analysis – and as detailed below its causation analysis – MOFCOM declined to do so or otherwise address the specific errors alleged by the United States. Thus, because the impact analysis maintains the same errors the United States alleged in the original proceedings, the United States considers MOFCOM's adverse impact findings in the redetermination to remain inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Article 15.1 and 15.4 of the SCM Agreement. Specifically, MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in breach of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

161. Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement address an investigating authority's obligations in ascertaining the impact of dumped and subsidized imports on the domestic industry. Article 3.4 of the AD Agreement states:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment,

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212 *China – Broiler Products*, paras. 7.555. **Error! Main Document Only.**& 7.585.

> wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 15.4 of the SCM Agreement has virtually identical language, with references to "subsidized imports" rather than "dumped imports."[213]

162. Additionally, an authority's factual findings under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement must comply with the "objective examination" and "positive evidence" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, respectively.[214] The nature of these requirements is discussed in Section VIII.A.1 above.

163. The Appellate Body has explained that the obligation to evaluate all relevant economic factors in Article 3.4 of the AD Agreement is a further elaboration of the requirement to conduct an "objective examination" under Article 3.1.[215] With regard to Article 3.4 of the AD Agreement, the Appellate Body also noted that:

> [T]he investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an 'objective examination'. If an examination is to be 'objective', the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.[216]

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[213] Article 15.4 of the SCM Agreement does not include a reference to margins, and requires the additional evaluation in agricultural cases of "whether there has been an increased burden on government support programmes."

[214] *See EC – DRAMS*, para. 7.272. *See also*, *Argentina – Poultry*, para. 7.325 ("We consider that '[t]he examination of the impact of dumped imports' referred to in Article 3.4 is precisely the same 'objective examination of … the consequent impact of the[] imports' referred to in Article 3.1(b). Thus, to the extent that a Member failed to conduct a proper 'examination of the impact of dumped imports' for the purpose of Article 3.4, that Member also failed to conduct an 'objective examination of … the consequent impact of the[] imports' within the meaning of Article 3.1(b). Accordingly, since we have found that Argentina violated Article 3.4 of the AD Agreement, we also find that Argentina violated Article 3.1(b) thereof.").

[215] *US – Hot-Rolled Steel* (AB), para. 194 ("[a]n important aspect of the 'objective examination' required by Article 3.1 is further elaborated in Article 3.4 as an obligation to 'examin[e] the impact of the dumped imports on the domestic industry' through 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry'.")

[216] *US – Hot-Rolled Steel* (AB), paras. 196-197.

Thus, consistent with prior Appellate Body analysis:

> Article 3.4, read together with Article 3.1, instructs investigating authorities to evaluate, objectively and on the basis of positive evidence, the importance and the weight to be attached to all the relevant factors. In every investigation, this evaluation turns on the "bearing" that the relevant factors have on the state of the domestic industry.[217]

In practical terms, this obligation provides that an investigating authority cannot simply ignore factors that detract from a finding of material injury. In this regard, the panel's analysis from *EC – Tube and Pipe Fittings* is instructive:

> The focus of this part of our examination is therefore whether the treatment of the listed Article 3.4 factors in the EC investigation and determination is sufficient to satisfy the requirements of Article 3.4 concerning the "evaluation" of the listed factors having a bearing on the state of the industry.
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> ***
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> … an "evaluation" is a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors.[218]

164. For the reasons explained below, MOFCOM's finding that subject imports had an adverse impact on the domestic industry does not satisfy this requirement for an objective evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." To the contrary, the finding ignored nearly all of the economic evidence demonstrating that the health of the domestic industry was actually robust, and focused instead upon a flawed examination of production capacity and end-of-period inventories.

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217 *China – HSST (AB)*, para. 5.207

218 *EC – Tube and Piper Fittings*, paras. 7.313-7.314.

1. MOFCOM Failed to Establish that Subject Imports were Adversely Affecting the Domestic Industry, in Breach of AD Agreement Article 3.4 and SCM Agreement Article 15.4.

165. As in the flawed original determination, MOFCOM again found in the re-determination that subject imports had an adverse impact on the domestic industry over the 2006-2008 period, when most of the increase in subject import volume and market share took place. According to MOFCOM, subject imports depressed the domestic industry's capacity utilization and increased its end-of-period inventories.[219] In addressing impact, however, MOFCOM ignored evidence that the domestic industry's performance improved according to almost every other measure during the period.[220] MOFCOM also ignored evidence that the domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth, from 2,980,700 tons in 2006 to 3,525,600 tons in 2007 and to 3,761,400 tons in 2008.[221] It also failed to address evidence that domestic industry end-of-period inventories were not significant relative to domestic industry production or shipments.

166. Specifically, as MOFCOM found in the original investigation, the domestic industry's performance generally improved between 2006 and 2008, with the exception of capacity utilization and end-of-period inventories:

> The evidence above shows that, during the POI, in order to meet the requirement of the increase demand of the domestic market, the capacity, output and sales quantity go up and market shares, employment, average wages and productivity rise as well from 2006 to 2008. However, during the POI, the capacity utilization of the domestic like products is in a low level and the ending inventory continually increases.[222]

167. In its redetermination, MOFCOM simply ignored all the factors that showed improvement during in the domestic industry during the three-year POI, from 2006 to

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

220 *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).

221 Redetermination at sec. VI(III)(2) (Exhibit USA-9), compare with MOFCOM, Final AD Determination at sec. 5.3.2 (USA-19); MOFCOM, Final CVD Determination at sec. 7.3.2 (USA-20).

222 Redetermination at VI(III) (Exhibit USA-9); compare with MOFCOM, Final AD Determination at sec. 5.3 (USA-19); MOFCOM, Final CVD Determination at sec. 6.3 (USA-20).

2008. Instead, MOFCOM responded to the interested parties' points about the improvement in the industry by summarily finding that:

> Regarding the above arguments, the investigation authority holds that: 2006-2008, although the broiler products have been in great demand in the domestic market and the domestic like products did gain a certain market space, this cannot conclude that the domestic industry did not suffer injury. On the contrary, because the import the Subject Products increased considerably and the import price was low, which constituted serious depression and suppression on the sale price of the domestic like products, the domestic like products was forced to sell at prices below the production cost struggling to maintain market share. At the same time, the capacity utilization of the domestic like products remained on a relative low level, and the inventory presented upward trend.[223]

168. As in the original determination, MOFCOM again attempted to justify its causal link finding on the rationale that:

> Under the impact of the large quantity and low price of the investigated products, sale price of like products in domestic industry has been subject to serious suppression. The sale price has been below the sale cost for quite a long time, and thus the domestic industry cannot reach a reasonable profit margin, and like products suffered loss from the beginning to the end. In view that the economic interest cannot be realized, the capacity utilization of like products in domestic industry cannot be applied, and in quite a long time has been on a relative low level. In 2007, despite that like products in domestic industry became profitable, the volume of import of the investigated imports was continuously increasing, the import price has been further undercutting the price of like products in domestic industry, and thus resulted in the further price suppression to sale price of like products in domestic industry, and the situation that its sale price was below the sale cost. Therefore, the domestic industry suffered from even more serious loss instead of turning to be profitable again, and its pre-tax profit margin and the return on investment were both on a relative low level. In addition, the huge variation of the net cash flows from operating activities has also impacted the investment and financing of the domestic industry.[224]

169. Relying on the preceding analysis, MOFCOM concluded that "[t]hrough the analysis on the overall situation during the entire POI, there is an outstanding relevance between the imports of the Subject Products and the situation of the domestic industry"

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223 Redetermination at sec. VII(ii) (Exhibit USA-9).

224 Redetermination at sec. VII(i) (Exhibit USA-9).

because "[a]s the demand of the domestic market was increasing constantly, the imports of the Subject Products were increasing constantly on one hand, while on the other hand the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly."[225]

170. MOFCOM, however, could not reasonably rely on its finding that "the domestic like products cannot reach a reasonable profit margin" to support its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period because the industry's pre-tax loss situation improved, as it narrowed from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008. Thus, MOFCOM's only support for its finding that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period, was its faulty analysis of domestic industry capacity utilization and end-of-period inventories during the 2006-2008 period.

171. MOFCOM's efforts to make short shrift of the notable improvements in the industry during the POI are untenable. In fact, the record demonstrates that between 2006 and 2008, the domestic industry increased its production capacity by 26.2 percent, its output by 28.2 percent, its sales quantity by 31.2 percent, its sales revenues by 88.6 percent, its market share from 37.81 percent to 42.42 percent, and its employment by 10.3 percent. The record also demonstrated that the domestic industry's pre-tax loss narrowed from 7.9 percent of sales income in 2006 to 4.7 percent of net income in 2008. These improvements in the domestic industry's performance coincided with the bulk of *the increase in subject imports*, which increased by 47.2 percent between 2006 and 2008 but were only 6.54 percent higher in the first half of 2009 than in the first half of 2008. MOFCOM failed to address this evidence in its redetermination and, instead, predicated its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period on the only two measures of industry performance that did not appear to significantly strengthen during the period: the domestic industry's rate of capacity utilization and end-of-period inventories. As discussed below, MOFCOM's consideration of these two factors fell short of the requirements of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

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

172. MOFCOM's finding that subject import competition had an adverse impact on the domestic industry's rate of capacity utilization over the 2006-2008 period does not reflect an "objective examination" because it is clearly contradicted by the record evidence. Between 2006 and 2008, the domestic industry's rate of capacity utilization *increased* slightly from 78.72 percent in 2006, to 79.37 percent in 2007, and to 79.96 percent in

[225] Redetermination at VII(i) (Exhibit USA-9).

2008.[226] Thus, as a starting point, capacity utilization was increasing at the same time subject imports were also increasing. Critically though, an objective examination would consider this trend in conjunction with the record evidence regarding the domestic industry's own capacity expansion in excess of demand. Instead, MOFCOM ignored that facet and attributed the trend entirely to competition from subject imports.

173. Between 2006 and 2008, the domestic industry's capacity increased by 26.2 percent. This increase far outstripped the 17.0 percent increase in apparent consumption over the same period.[227] All else being equal, capacity growth in excess of demand growth will of course result in declining capacity utilization. If an industry is increasing its capacity to produce, but the apparent consumption of its product does not increase at the same rate, the company will necessarily experience a decrease in capacity utilization. Had the domestic industry's capacity remained at 2006 levels, its rate of capacity utilization would have increased dramatically over the 2006-2008 period to over 100 percent in 2008.[228] Thus, the domestic industry's "low level" of capacity utilization is objectively explained by the domestic industry's own capacity additions far in excess of demand growth, not by the competition posed by imports of subject merchandise. Indeed, MOFCOM itself acknowledged that, during the POI, domestic capacity "was not used efficiently."[229]

174. Moreover, subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports did not increase their share of apparent consumption at the expense of the domestic industry. Indeed, the domestic industry *increased* its share of apparent consumption by 4.61 percentage points during the period, from 37.81 percent in 2006 to 42.42 percent in 2008. The increase in domestic industry capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not

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226 Redetermination at sec. VI(iii)(4) (Exhibit USA-9), compare with MOFCOM, Final AD Determination at sec. 5.3.4 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 6.3.4 (Exhibit USA-20).

227 Redetermination at secs. VI(iii)(1) and (2) (Exhibit USA-9); compare with MOFCOM, Final AD Determination at sec. 5.3.1-5.3.2 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 6.3.1-6.3.2 (Exhibit USA-20).

228 Had the domestic industry's capacity remained at its 2006 level of 2,980,700 tons in 2008, the domestic industry's output, at 3,007,600 tons, would have exceeded its capacity. *See* Redetermination at secs. VI(iii)(2) and (3) (Exhibit USA-9).

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

proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period.[230]

175. Accordingly, the domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period. Had the domestic industry not expanded its capacity in excess of apparent consumption growth, the domestic industry's increase in share of apparent consumption would have translated into a higher rate of capacity utilization.

176. In sum, MOFCOM's finding that the domestic industry's "low level" of capacity utilization resulted from subject import competition was unsupported by the record and in fact directly contradicted by evidence that the domestic industry's rate of capacity utilization was dictated by the domestic industry's own capacity expansion far in excess of demand growth. Given this record evidence, and MOFCOM's failure to examine and explain it, MOFCOM's finding that subject imports had an adverse impact on the domestic industry's rate of capacity utilization was not based on an "objective examination" of "positive evidence" in breach of Article 3.1 of the AD Agreement and Article 15.1.

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

177. MOFCOM also found that the increase in the domestic industry's end-of-period inventories was caused by subject imports.[231] This finding too cannot be the result of an "objective examination". Specifically, MOFCOM focused on the purported increase in end-of-period inventories: from 68,257 tons to 98,755 tons between 2006 and 2008 (44.7 percent).[232] What MOFCOM crucially neglected to consider was the significance of that increase relative to the domestic industry's actual performance, including, specifically, how that increase related to the domestic industry's production and shipments.

178. From 2006 to 2008, domestic industry production increased from 2,346,600 tons in 2006 to 3,007,600 tons in 2008, and domestic industry shipments increased from

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230 Redetermination at secs. VI(iii)(2) and (6) (Exhibit USA-9), compare with MOFCOM, Final AD Determination at sec. 5.3.6 (USA-19); MOFCOM, Final CVD Determination at sec. 6.3.6 (USA-20).

231 Redetermination at sec. VII(i) (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 6.1 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 7.1 (Exhibit USA-20); *see also* MOFCOM, Final AD Determination at secs. 5.3, 6.2.3; MOFCOM, Final CVD Determination at secs. 6.3, 7.2.3.

232 Redetermination at sec. VI(iii)(14) (Exhibit USA-9).

2,130,800 tons in 2006 to 2,796,000 tons in 2008.[233] The absolute increase in domestic industry 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).[234]

179. End-of-period inventories as a share of domestic industry production increased only from 2.9 percent in 2006 to 3.3 percent in 2008, while end-of-period inventories as a share of domestic industry shipments increased only from 3.2 percent in 2006 to 3.5 percent in 2008.[235] These ratios remained small and did not increase significantly between 2006 and 2008.

180. Thus, the record established that neither the level of end-of-period inventories nor the increase in end-of-period inventories were significant relative to domestic industry output and shipments. MOFCOM failed to examine or explain this evidence. Therefore, MOFCOM's finding that the increase in domestic industry inventories was significant was not based on an "objective examination" of "positive evidence."

181. Indeed, in its submission before the original Panel, China simply defended the same inventories finding on the grounds that MOFCOM was under no obligation to find end-of-period inventories "significant" because, in its view, Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement only require investigating authorities to evaluate the enumerated injury factors.[236] Yet, as in the original determinations, MOFCOM once again relied, in the redetermination, on the increase in end-of-period inventories in combination with the domestic industry's capacity utilization trends, to find that subject imports adversely impacted the domestic industry "during the entire POI," including the 2006-2008 period.[237] Given that China conceded in the original Panel proceeding that the increase in domestic industry end-of-period inventories was not significant, MOFCOM's finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period is left with no evidentiary support whatsoever.

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233 Redetermination at secs. VI(iii)(3) and (5) (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 5.3.3, 5.3.5 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 6.3.3, 6.3.5 (Exhibit USA-20).

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

235 MOFCOM, Redetermination at secs. VI(III)(3), (5), and (14) (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 5.3.3, 5.3.5, 5.3.1 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 6.3.3, 6.3.5, 6.3.1 (Exhibit USA-20).

236 China, OFWS, para. 381.

237 Redetermination at sec. VII(i) (Exhibit USA-9).

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

182. MOFCOM's finding that subject imports had an adverse impact on the domestic industry from 2006 to 2008 rests primarily on its flawed findings regarding capacity utilization and end-of-period inventories, which failed to reflect an objective examination of positive evidence, as discussed above.[238] In light of MOFCOM's dependence on these flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted is unsubstantiated. Moreover, in contrast to MOFCOM's finding, the record evidence clearly indicates that the domestic industry's performance improved markedly according to almost every measure during this period, when the bulk of the increase in subject import volume and market share took place.

183. Therefore, MOFCOM's "examination of the impact of the dumped imports on the domestic industry concerned" and "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" was not based on an "objective examination" of "positive evidence" and, therefore, is inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

C. MOFCOM'S CAUSAL LINK ANALYSIS IN ITS REDETERMINATION BREACHED ARTICLES 3.1, 3.5, 12.2, AND 12.2.2 OF THE AD AGREEMENT AND ARTICLES 15.1, 15.5, 22.3, AND 22.5 OF THE SCM AGREEMENT.

184. As with its adverse impact analysis, MOFCOM's examination of causation in its redetermination repeats the same deficient analysis that plagued its original determination. MOFCOM's causation analysis in its redeterminations remains as flawed as the one it provided in its original determination because MOFCOM continues to (1) ignore record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) relies on flawed analysis of price undercutting and suppression as noted in Section VIII.A; and (3) fails to reconcile its analysis with evidence that the domestic industry's performance *improved* as subject import volume and market share increased.

185. In order to make a finding of injury to the domestic industry, MOFCOM was required to establish a causal link between subject imports and material injury. In purporting to find causation, MOFCOM relied exclusively on findings related to volume and price. In particular, MOFCOM found that:

> Under the impact of the large quantity and low price of the investigated products, sale price of like products in domestic industry has been subject

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

> to serious suppression. The sale price has been below the sale cost for quite a long time, and thus the domestic industry cannot reach a reasonable profit margin, and like products suffered loss from the beginning to the end.[239]

186. In so doing, MOFCOM failed to comply with the requirement under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement to establish that subject import volume, subject import price competition, and the impact of subject imports on the domestic industry, are what caused material injury to the domestic industry.

187. Here, MOFCOM cited no evidence that the increase in subject import volume or subject import price competition was injurious to the domestic industry. Nor could MOFCOM have done so. With respect to the effects of subject import volume, the available evidence indicated that subject import volume and market share did not increase at the expense of the domestic industry during the period of investigation. During that same period, the domestic industry increased its market share to *an even greater degree* than subject imports. With respect to the price effects of subject imports, MOFCOM relied on its flawed price comparisons and finding of price suppression, as addressed in section VIII.A above. Further, MOFCOM disregarded evidence that subject import competition was significantly attenuated because nearly half of subject import volume consisted of chicken paws, which the domestic industry could not produce in quantities sufficient to satisfy demand.[240]

188. As a result of these failings and others addressed below, MOFCOM's causation analysis is not based on an objective examination of positive evidence, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or an examination of all relevant evidence, as required by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Additionally, MOFCOM's failure to address relevant party arguments concerning deficiencies in its causal link analysis breached Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

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

189. MOFCOM found a causal link between subject imports and the alleged material injury being suffered by the domestic industry. In this regard, MOFCOM found that "the import volume of the investigated imports was continuously and considerably increasing and its market share was continuously increasing" while "[t]hroughout the entire POI, the

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239 Redetermination at sec. VII(i) (Exhibit USA-9), compare MOFCOM, Final AD Determination, sec. 6.1 (USA-19); MOFCOM, Final CVD Determination, sec. 7.1 (USA-20).

240 *See* USAPEEC's Injury Brief at 29-30 (USA-18); USAPEEC's Comments on Preliminary Injury Determination at 22 (USA-21).

RMB price of the investigated products was below the sale price of like products in domestic industry."[241] This finding, however, does not reflect an objective analysis of a causal link between subject imports and the alleged injury. Specifically, MOFCOM's findings on import volume and market share are clearly contradicted by evidence on the record. For example, MOFCOM failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share did not come at the expense of the domestic industry, which also *gained* market share during the POI.

190. MOFCOM also failed to address USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws. As USAPEEC explained during the original investigation, and again in the redetermination proceeding, chicken paws imported from the United States could not have injured the domestic industry because domestic producers were incapable of producing chicken paws in quantities sufficient to satisfy domestic demand without also increasing production of other chicken parts to uneconomic levels. MOFCOM did not address the issue in its final determinations or in its redetermination.

191. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement specify an authority's obligation to determine whether dumped or subsidized imports are causing injury. Article 3.5 of the AD Agreement states:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

Article 15.5 of the SCM Agreement is identical, except the phrase "dumped imports" is replaced by "subsidized imports" and the term "dumping" is replaced by "subsidies."[242]

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241 Redetermination at sec. VII(i) (Exhibit USA-9).

242 Additionally, Article 15.5 of the SCM Agreement sets forth in a footnote the language

192. Both provisions require investigating authorities to conduct their causation analysis with "an examination of all relevant evidence before the authorities" in order to determine whether a causal link exists between the dumped or subsidized imports and the domestic industry's injury. Moreover, this responsibility is coupled with the obligation that an authority's factual findings comply with the "positive evidence" and "objective examination" requirements set forth in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, discussed above.[243]

193. MOFCOM's causation analysis is inconsistent with the obligations of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because the analysis disregarded evidence that subject import volume did not increase at the expense of the domestic industry.

194. In addition, MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because it was based on MOFCOM's flawed price and impact analyses.

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

195. MOFCOM's determination of a causal link between subject imports and the domestic industry's purported material injury rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry.[244] However, evidence on the record clearly contradicts this finding. Specifically, relevant record evidence indicated that the increase in subject import volume and market share, however viewed in isolation, did not negatively impact the domestic industry because the domestic industry gained market share during the same period. MOFCOM does not examine or explain why such evidence does not undermine its finding of causation.

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placed in the parenthetical clause of the first sentence of Article 3.5 of the AD Agreement.

243 *See EC – DRAMS*, para. 7.272.

244 Redetermination at sec. VII(i) ("As the demand of the domestic market was increasing constantly, the imports of the Subject Products was increasing constantly on one hand, while on the other hand the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly . . . In the first half of 2009 . . . {t}he production volume, sales volume of the domestic like products presented a reverse relationship with that of the Subject Products, the market share of the domestic like products presented a reverse relationship with that of Subject Products, the price of the domestic like products presented a reverse relationship with that of the Subject Products . . . .") (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 6.1 (USA-19); MOFCOM, Final CVD Determination at sec. 7.1 (USA-20).

196. MOFCOM found it significant that the volume of subject imports increased from 396.9 thousand tons in 2006 to 584.3 thousand tons by 2008.[245] Similarly, MOFCOM found it significant that the market share of subject imports increased by 3.92 percentage points between 2006 and the first half of 2009 (from 7.04 percent to 10.96 percent).[246] However, between 2006 and 2008, which coincided with the bulk of the increase in subject import volume, record evidence confirms that the domestic industry's share of the domestic market increased 4.61 percentage points from 37.81 percent in 2006 to 41.62 percent in 2007 and 42.42 percent in 2008.[247] Likewise, in the first half of 2009, the domestic industry's market share, 42.19 percent, remained higher than its 2006 market share. In short, the domestic industry *gained more market share* between 2006 and the first half of 2009, 4.38 percentage points, than the 3.92 percentage points gained by subject imports over the same period. Thus, the entire increase in subject import market share between 2006 and the first half of 2009 did not come at the expense of the domestic industry.

197. As in the original determinations, in the redetermination, MOFCOM provided the following response to the argument raised by the interested parties[248] that subject imports could not have caused injury to the domestic industry because subject import volume was low and stable and any increase in subject import volume came at the expense of non-subject imports:

> According to the relevant laws of PRC, when the Investigation Authority analyzes the import volume, they may either analyze 'whether increasing considerably in absolute terms,' or 'whether increasing considerably in relative terms', the laws do not require considering the absolute import volume and the relative import volume at the same time.[249]

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[245] Redetermination at sec. VII(i) (Exhibit USA-9), compare MOFCOM, Final AD Determination, sec. 6.1 (Exhibit USA-19).

[246] Redetermination at sec. VII(i) (Exhibit USA-9), compare MOFCOM, Final AD Determination, sec. 6.1 (Exhibit USA-19).

[247] Redetermination at sec. VII(iii)(6) (Exhibit USA-9); MOFCOM, Final AD Determination at sec. 5.3.6 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 6.3.6 (Exhibit USA-20).

[248] *See, e.g.*, USAPEEC, Injury Brief at p. 17 ("From 2007 to 2008, combined Brazilian and Argentinean imports decreased by 73.2 million pounds, while U.S. imports increased by only 64.1 million pounds. Similarly, from partial year 2008 to partial year 2009, combined Brazilian and Argentinean imports decreased by 83.6 million pounds, and U.S. imports increased by only 18.8 million pounds. In other words, any increases in U.S. imports simply filled the gap left by Brazil and Argentina when they effectively exited the China market") (USA-18).

[249] Redetermination at sec. VII(ii)(1) (Exhibit USA-9), compare MOFCOM, Final AD

198. In other words, MOFCOM rejected the significance of this evidence on the grounds that Chinese law allows MOFCOM to consider either the absolute volume increase or relative volume increase, but does not require MOFCOM to consider both. MOFCOM's response does not answer the question compelled by the obligations in Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement: how can an absolute volume increase of imports from the United States injure the domestic industry when any volumes being displaced could only be those of other exporters and not those of the domestic industry?

199. MOFCOM, by ignoring this critical question and the evidence that compelled it, and by neglecting to factor this evidence into its causal link analysis, failed to base its finding of a causal link between subject imports and the domestic industry's performance on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. The record evidence clearly indicated that subject import volume and market share did not increase at the expense of the domestic industry. However, MOFCOM disregarded that evidence and focused solely upon the subject import volume and market share increase in isolation.

200. For these same reasons, MOFCOM's analysis is also inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement because MOFCOM failed to examine all relevant evidence. Evidence that the increase in subject import volume and market share did not come at the expense of the domestic industry, and coincided with an even greater increase in domestic industry market share, was evidence relevant to MOFCOM's causal link analysis. Additionally, with no evidence linking the increase in subject import and market share to material injury, MOFCOM's causal link analysis also failed to demonstrate that any material injury suffered by the domestic industry was the effect of subject import volume, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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

201. The second pillar of MOFCOM's finding of a causal link between subject imports and the domestic industry's performance were its findings that subject imports undersold the domestic like product and suppressed domestic like product prices during the period examined.[250] As detailed in section VIII.A above, however, MOFCOM's finding that

Determination, sec. 6.2.1 (USA-19); MOFCOM, Final CVD Determination, sec. 7.2.1 (USA-21).

[250] *See* Redetermination at sec. VII(ii)(1) (finding that "although the broiler products have been in great demand in the domestic market and the domestic like products did gain a certain market space . . . because the import the Subject Products increased considerably and the import price was low, which constituted serious depression and suppression on the sale price of the domestic like products, the domestic like products was forced to sell at prices below the production cost struggling to maintain market share.") (Exhibit USA-9), compare Final AD Determination at 6.2.1 (USA-19); MOFCOM, Final CVD Determination at sec. 7.2.1 (USA-20).

subject imports undersold the domestic like product is untenable and fails to remedy the WTO inconsistencies found by the Panel in the original determination. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, and other evidence ignored by MOFCOM contradicts the finding, MOFCOM's price suppression finding, too, is WTO-inconsistent. Moreover, given that domestic like product prices increased over the period examined, there was no evidence of price depression.[251] With no evidence that subject imports suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement for the reasons outlined above.

202. Further, by relying on its defective pricing analysis, MOFCOM failed to base its causal link analysis on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. As discussed above, MOFCOM selectively chose the evidence that it would consider for purposes of its revised underselling analysis, thus ignoring other available relevant evidence. In turn, this deficiency in MOFCOM's pricing analysis demonstrates that MOFCOM failed to conduct the examination of all relevant evidence required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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

203. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance. Specifically, the record showed that subject import volume increased 47 percent between 2006 and 2008. However, this increase was accompanied by a dramatic strengthening of almost every measure of the domestic industry's performance during this same period, including: a 4.38 percentage point increase in market share, a 26.2 percent increase in capacity, a 28.2 percent increase in output, a 31.2 percent increase in sales quantity, an 88.6 percent increase in sales revenue, and a 10.3 percent increase in employment.[252] The domestic industry's loss as a percentage of its sales income narrowed from 7.9 percent in 2006 to 4.7 percent in 2008.[253] As discussed above, the domestic industry's rate of capacity utilization increased less dramatically due to the industry's expansion of its capacity in excess of

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251 *See* Redetermination at sec. VI(ii)(2) (Exhibit USA-9).

252 Redetermination at sec. VI(iii) (Exhibit USA-9), compare MOFCOM, Final AD Determination, sec. 5.3 (USA-19); MOFCOM, Final CVD Determination, sec. 6.3 (USA-20).

253 *Id.*

demand growth. Although MOFCOM emphasized that end-of-period inventories increased during the period, the industry's end-of-period inventories remained insignificant relative to production and shipments, as addressed in section VIII.B.1.b above.

204. Despite the lack of any positive evidence linking the *increase* in subject import volume during the 2006-2008 period to any significant *decline* in the domestic industry's performance, MOFCOM nevertheless concluded that "during the entire POI, there is an outstanding relevance between the imports of the Subject Products and the situation of the domestic industry."[254] As "the imports of the Subject Products was increasing constantly," it found, "the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly" and "the domestic like product could not gain the profit margin as it should, presenting substantial loss and being getting worse."[255] These findings are simply contradicted by the evidence cited above that the domestic industry's performance strengthened between 2006 and 2008 according to almost every measure, including a narrowing of the industry's net loss from 7.9 percent of sales income in 2006 to 4.7 percent of net income in 2008.[256]

205. Moreover, the domestic industry's performance appeared to be stronger in the first half of 2009 than it had been in 2006 according to many measures.[257] MOFCOM does not explain how subject imports could have caused any material injury to the domestic industry when the domestic industry's worst performance of the period

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254 Redetermination at sec. VII(i) (Exhibit USA-9), compare MOFCOM, Final AD Determination, sec. 6.1 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 7.1 (Exhibit USA-20).

255 *Id.*

256 *See* Redetermination at sec. VI(iii) (Exhibit USA-9).

257 The United States recognizes that comparisons between partial year data and full year data are of limited probative value, due to seasonality and other factors. Indeed, the United States is of the view that the most relevant period for purposes of MOFCOM's causal link analysis was the 2006-2008 period. Unlike partial year comparisons, calendar year data for the 2006-2008 period is contiguous and would not be distorted by seasonality. These data show that the domestic industry performance strengthened dramatically according to most measures even as subject import volume and market share increased. Given MOFCOM's reliance on partial year data, however, the United States would point out that the domestic industry's capacity, output, sales quantity, market share, sales revenue, productivity, and average wages in the first half of 2009 were all at levels well over half those achieved in 2006. *See* Redetermination at sec. VI(iii) (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 5.3 (USA-19); MOFCOM, Final CVD Determination at sec. 6.3 (USA-20. The industry's return on investment improved from -13.42 percent in 2006 to -9.10 percent in the first half of 2009. MOFCOM, Redetermination at sec. VI(iii)(10), compare Final AD Determination, sec. 5.3.10 (Exhibit USA-19); Final CVD Determination, sec. 6.3.10 (Exhibit USA-20).

examined occurred in 2006, before any increase in subject import volume and market share.

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

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

207. An investigating authority cannot be said to have examined "the relationship between subject imports and the state of the domestic industry" by focusing, without reasonable explanation, solely on a discrete portion of the period of investigation, especially where that period does not coincide with the bulk of the increase in subject import volume. Rather, an investigating authority must examine the impact of subject imports on the domestic industry over the entire period for which data was collected. MOFCOM failed to do so here.

208. Tellingly, during the original Panel proceedings, China agreed that MOFCOM's adverse impact analysis focused only on the first half of 2009 – which was the only period in which the domestic industry's performance weakened – but argued that this narrow focus was appropriate.[258] The domestic industry's lagging performance in the first half of 2009, however, could not have been the result of subject imports when the bulk of the increase in subject import volume – 90 percent of the total increase -- coincided with strengthening domestic industry performance during the 2006-2008 period.[259]

209. In light of this evidence, MOFCOM could not find that subject imports had an adverse impact on the domestic industry based on domestic industry performance in the first half of 2009 alone. Rather, MOFCOM was obligated to explain how subject imports could have adversely impacted the domestic industry in the first half of 2009 when most of the increase in subject import volume coincided with a dramatic improvement in the domestic industry's performance during the 2006-2008 period.

210. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to conduct an objective evaluation of positive evidence,

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[258] China, First Written Submission, paras. 358-60.

[259] Redetermination at sec. VI(i) (subject import volume increased 1,686,406 tons between 2006 and 2008 and 187,594 tons between the first half of 2008 and the first half of 2009) (Exhibit USA-9).

in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, and failed to consider "all relevant economic factors and indices having a bearing on the state of the industry," in breach of Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.

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

211. 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, which would include all relevant information on "issue{s} which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping {or countervailing} duty."[260] In addition, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to such issues.

212. MOFCOM had at least two compelling arguments concerning the absence of any causal link between subject imports and material injury – and it chose to ignore them completely. First, 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. In response, MOFCOM acknowledged that the domestic industry gained market share during the period.[261] But rather than meaningfully addressing the claim, MOFCOM once again merely reiterated its unfounded assertion that subject import volume significantly increased in absolute terms while subject import underselling depressed and suppressed domestic like product prices.[262] MOFCOM did not explain

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260 *EC – Footwear*, para. 7.844

261 Redetermination at sec. VII(ii)(1) (finding that "2006-2008, although the broiler products have been in great demand in the domestic market and the domestic like products did gain a certain market space, this cannot conclude that the domestic industry did not suffer injury.") (Exhibit USA-9).

262 Redetermination at sec. VII(ii)(1) (finding that "the absolute import volume of the Subject Product has been keeping increasing considerably with the market share increasing constantly, while the import price was kept low. This made serious depression and suppression effect on the price of the domestic like products incurring serious loss, and impacted and affected the domestic adversely.") (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 6.2.1 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 7.2.1 (Exhibit USA-20).

how an increase in subject import volume that did not displace domestic industry shipments could have materially injured the domestic industry.[263]

213. MOFCOM's continued failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' argument in the public notices of its final determinations breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. The issue raised by U.S. respondents – how the increase in subject import volume and market share could have been injurious when it coincided with an increase in domestic industry market share – was clearly "material" to MOFCOM's causal link analysis within the meaning of Article 12.2 of the AD Agreement and Article 22.5 of the SCM Agreement. MOFCOM necessarily had to resolve the issue before relying on the increase in subject import volume and market share to establish a causal link between subject imports and material injury. Consequently, MOFCOM was obligated under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement to provide "all relevant information" on its resolution of the issue in the public notice of its final determinations. It was also obligated to provide the reasons for its rejection of U.S. respondents' argument concerning the issue. MOFCOM's failure to explain how it resolved the issue, in light of U.S. respondents' argument, breached Articles 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

214. 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.[264] As USAPEEC explained, domestic producers sell 100 percent of their chicken paw production and cannot increase their production of paws without also increasing their production of other chicken parts to uneconomic levels.[265] For this reason, chicken paws imported from the United States do not take sales away from domestic producers, but rather serve demand for chicken paws that domestic producers are incapable of satisfying. Because nearly half of subject imports could have had no adverse impact on

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263 MOFCOM acknowledged that the "import quantity of like products from other countries and regions is on decline," but fails to cite non-subject import volume or market share data. Redetermination at sec. VII(iii)(1) (Exhibit USA-9), compare MOFCOM, Final AD Determination at sec. 6.3.1 (Exhibit USA-19); MOFCOM, Final CVD Determination at sec. 7.3.1 (Exhibit USA-20).

264 *See* USAPEEC Injury Brief at 29-30 (USA-18); USAPEEC Comments on Preliminary Injury Determination at 22 (USA-21). MOFCOM purportedly addressed USAPEEC's argument concerning chicken paws in its preliminary determination, but its response was based upon a misunderstanding of the argument. *See* MOFCOM, Preliminary AD Determination at sec. 6.1 (USA-22); MOFCOM, Preliminary CVD Determination at sec. 7.1(USA-23). MOFCOM seemed to be under the misapprehension that USAPEEC was arguing that chicken paws should not be factored into MOFCOM's analysis because they are outside the scope of the investigation. *Id.* MOFCOM never addressed the actual issue raised by USAPEEC in either determination.

265 USAPEEC Injury Brief at 30 (USA-18).

the domestic industry, USAPEEC argued, competition between subject imports and the domestic industry was substantially attenuated during the period examined.

215. The Panel found that MOFCOM failed to address USAPEEC's argument that subject imports of chicken paws could not have been injurious.[266] In response, MOFCOM simply stated in its redetermination that it considered and rejected USAPEEC's argument in the preliminary determination.[267] But, in fact, in the preliminary determination and throughout the Panel proceedings, MOFCOM addressed an argument different from the one raised by USAPEEC. MOFCOM's response to USAPEEC's argument in the preliminary determination was based on a fundamental misapprehension of the argument, as the United States and USAPEEC have repeatedly pointed out.[268] Specifically, USAPEEC argued that subject imports of chicken paws, which represented around 40 percent of subject import volume, could not have been injurious because domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to uneconomic levels.[269] In its preliminary determination, MOFCOM rejected this argument on grounds that chicken paws were covered by the scope of the investigation.[270] As USAPEEC pointed out in its comments on the preliminary determination, MOFCOM's observation that chicken paws were covered by the scope of the investigation did not address USAPEEC's argument, which was that subject import chicken paws could not have injured domestic producers.[271] In its redetermination, MOFCOM has once again failed to address the substance of USAPEEC's argument.[272] By failing to provide the reasons for its rejection of USAPEEC's argument concerning chicken paws, much less "all relevant information" on its resolution of the issue, MOFCOM breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

216. MOFCOM's misplaced response to USAPEEC's chicken paws argument also ignores evidence that the substantial proportion of subject imports consisting of chicken paws could not have been injurious because domestic producers were incapable of

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266 *China – Broiler Products*, para. 7.605.

267 Redetermination at sec. VII(ii)(3) ("[T]he investigating authority considered that, the investigating authority had made analysis and provided response to relevant allegations in the preliminary determination and would not repeat the response here.") (Exhibit USA-9).

268 *See, e.g.*, U.S. Reinvestigation Injury Statement (Exhibit USA-10).

269 USAPEEC Injury Brief at 30 (Exhibit USA-18).

270 MOFCOM, Preliminary AD Determination at section 6.1 (Exhibit USA-22); MOFCOM, Preliminary CVD Determination at section 7.1 (Exhibit USA-9).

271 USAPEEC, Comments on the Preliminary Determination at 22 (Exhibit USA-21).

272 Redetermination at sec. VII(ii)(3) (Exhibit USA-9).

producing more chicken paws without increasing production of other chicken products to uneconomic levels. Indeed, MOFCOM's own product-specific pricing data show that domestic sales prices for chicken paws increased significantly between 2006 and 2008 and remained stable at a high level in the first half of 2009, even as the AUV of all domestic producer sales declined.[273] By ignoring evidence that a substantial proportion of subject imports could not have contributed to the industry's adverse performance trends, MOFCOM failed to base its causation analysis on an objective examination of positive evidence, in breach of AD Agreement Article 3.1 and SCM Agreement Article 15.1, and an examination of all relevant evidence, in breach of AD Agreement Article 3.5 and SCM Agreement Article 15.5.

IX. CONCLUSION

217. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that the challenged measures are inconsistent with China's obligations under the SCM Agreement and AD Agreement and that China has failed to implement the recommendations of the DSB to bring its antidumping and countervailing measures on broiler chickens from the United States into conformity with those agreements.

[273] Redetermination at sec. VII(ii)(2) (Exhibit USA-9). For the four domestic producers that reported product-specific pricing data, the AUV of chicken feet was RMB 9,676 in 2006, RMB 12,142 in 2007, RMB 12,958 in 2008, and RMB 12,837 in the first half of 2009. *Id.*