Public Version

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)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
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China – Rare Earths (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CVD	Countervailing duties
DSB	World Trade Organization, Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
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
Pilgrim's	Pilgrim's Pride Corporation (U.S. Respondent)
POI	Period of investigation
RID	Reinvestigation Injury Disclosure
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)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USAPEEC	USA Poultry & Egg Export Council
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF EXHIBITS

Exhibit USA-24	Tyson Response to MOFOM Reinvestigation Questionnaire for Implementation of Dumping Part of AD and CVD Measures against Broiler Products (January 27, 2014)
Exhibit USA-25	Tyson Response to MOFCOM Letter on Supplemental Questionnaire for Implementation of Dumping Part of AD and CVD Measures against Broiler Products (March 3, 2014)
Exhibit USA-26	Tyson Response to MOFCOM Letter on 2nd Supplemental Questionnaire for Implementation of Dumping Part of AD and CVD Measures against Broiler Products (March 17, 2014)
Exhibit USA-27	Comments of Pilgrim's Pride Corporation on "Disclosure of the Basic Facts of the Ad Valorem Subsidy Rate and the Dumping Margin of Pilgrim's Pride Corporation for Re-investigation of the Anti-dumping and Countervailing Measures related to DS427 Broiler Chicken Products" (May 28, 2014)
Exhibit USA-28	Memorandum of the Investigation Authorities on Appointment of Attorney of Pilgrim's Pride Corporation Concerning Disclosure of Opinion of Comment of the Ruling of Re-investigation of the "Anti-dumping and Countervailing" Measures of DS427 Broiler Chicken (regarding June 13, 2014 meeting between MOFCOM and Pilgrim's Pride)
Exhibit USA-29	Memorandum to MOFOM on "Antidumping and Countervailing Duty Investigation of *Certain Broiler Products from the United States:* Service of Keystone-Specific Disclosure Documents (May 20, 2014)
Exhibit USA-30	MOFCOM Response Regarding Keystone-Specific Re-investigation Disclosure Authorization (May 22, 2014)
Exhibit USA-31	Shorter Oxford Dictionary, entry for "to put on notice"
Exhibit USA-32	Initial Reinvestigation Dumping Questionnaire From Sent by MOFCOM to Tyson

I. INTRODUCTION

1. The aggressive rhetoric found in China's rebuttal does not address – no less refute – the many flaws in MOFCOM's reinvestigation and redeterminations explained in the U.S. First Written Submission. Instead of addressing the legal issues in this dispute, China's rebuttal often focuses on irrelevant or extraneous matters. For example, China urges the Panel to consider what the United States has not challenged, instead of the claims that are at issue in this dispute.[1] China also brings *six* terms of references challenges, even though each one of the challenged claims is clearly delineated in the U.S. Panel request. These types of arguments do not engage with the main task in this proceeding – namely, to determine whether China has brought its measures into compliance with the recommendations of the Dispute Settlement Body (DSB). In this second submission, the United States will continue to focus on demonstrating – through reference to record evidence – that MOFCOM failed to abide by China's WTO obligations. To that end, the United States has structured its submission as follows.

2. In Section II, the United States will address why China cannot defend MOFCOM's procedural failings during the reinvestigation.

- Section A (AD Agreement[2] Article 6.1 and SCM Agreement[3] Article 12.1 addresses the documents referenced in China's rebuttal – the notice of the reinvestigation, the General Verification Letter, and the Chinese producers' summaries of their data – and explains why none of them actually notified U.S. interested parties of the precise information MOFCOM was soliciting from Chinese producers, thus denying U.S. interested parties an opportunity to present evidence. This section will show that the content of these documents does not indicate the information that MOFCOM required, and that in some cases, there is no indication that MOFCOM even communicated their existence.

- Section B (Articles 6.1.2 of the AD Agreement and SCM Agreement Article 12.1.2) explains that China fails to show that MOFCOM promptly made

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[1] *See e.g.*, China, First Written Submission (FWS), paras. 10, 12, 96, 130, 133, 369. The fact that a complainant has chosen not to bring a claim does not mean – as China asserts -- that is has been conceded that the defending Member's measure is consistent with a potential claim; it simply means the complainant has chosen not to bring the claim. At a time when the resources of dispute settlement system are under strain, it is more than reasonable that Members choose to limit their claims to those they deem particularly important. The United States expressly made this point in its First Written Submission. United States, First Written Submission (FWS), para. 11.

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

[3] Agreement on Subsidies and Countervailing Measures.

available to U.S. interested parties the information it solicited from Chinese domestic producers;

– Section C (AD Agreement Article 6.4 and SCM Agreement Article 12.3) explains that China cannot rebut that MOFCOM failed to provide timely opportunities for interested parties to see all information relevant to the presentation of their cases – including the information requests issued by MOFCOM, the identity of the surveyed Chinese producers, and the content of the pricing information provided by Chinese producers.

– Section D (AD Agreement Article 6.9) explains that China fails to show that MOFCOM disclosed Pilgrim's margin calculations and data for the original investigation or Keystone's following the reinvestigation, thereby depriving those parties of the essential facts needed for the defense of their cases.

3. In Section III, the United States will address why China cannot defend MOFCOM's antidumping determinations in the redeterminations.

– Section A (AD Agreement Article 2.2.1.1, with respect to Tyson Foods (Tyson)) explains that MOFCOM's determination does not justify its decision to allocate Tyson's production costs of non-subject merchandise to subject merchandise thereby inflating normal value;

– Section B (AD Agreement Article 2.2.1.1, with respect to Pilgrim's Pride) (Pilgrim's)) establishes that it is undisputed that MOFCOM took no action to consider whether its allocation of Pilgrim's costs was proper or to address that MOFCOM had engaged in a straight allocation of total processing costs to all products. The fact that MOFCOM was found to have provided a reason to reject Pilgrim's costs under the first sentence of Article 2.2.1.1 did not absolve MOFCOM from addressing the Panel's findings with respect to the second sentence of Article 2.2.1.1;

– Section C (AD Agreement Article 9.4) explains that China cannot dispute that MOFCOM applied the highest of the individual margins determined for a mandatory respondent as the rate to be used for "all-others," which is in excess of the ceiling set by Article 9.4.

– Section D (AD Agreement Article 6.8 and Annex II) explains that China cannot dispute that MOFCOM applied facts available to Tyson even though Tyson did not refuse access to, fail to provide, or otherwise impede MOFCOM's ability to obtain the information it requested.

4. In Section IV, the United States will address how China cannot defend MOFCOM's injury findings in its redeterminations:

- Section A (AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2) shows that China has not rebutted that MOFCOM did not control for product mix thereby rendering its price underselling and suppression findings unsupported and therefore untenable;
- Section B (AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4) explains that China has not rebutted that MOFCOM's impact analysis failed to examine the evidence with respect to numerous factors that indicated the health of the Chinese domestic industry was improving;
- Section C (AD Agreement Articles 3.1, 3.5, 12.2 and 12.2.2 and SCM Agreement Articles 15.1, 15.5, 22.3, and 22.5) addresses that:
  - China has not rebutted that MOFCOM's causation analysis was limited to those portions of the period of investigation in which the industry's performance weakened while ignoring those portions coinciding with most of the increase in subject imports; and
  - That MOFCOM's analysis ignored USAPEEC's argument that any increase in market-share by U.S. exporters came at the expense of other exporters and not the Chinese domestic industry.

5. In Section V, the United States will address China's terms of reference arguments. In particular, the United States will show that many of the arguments that China makes – e.g., that China should be excused because it failed to take any action during the compliance proceeding or that it was confused because the United States did not sufficiently preview its *arguments* in this dispute – are without merit.

6. In Section VI, the United States will note that because it has demonstrated that MOFCOM's conduct is inconsistent with the foregoing provisions of the AD and SCM Agreements, China has acted inconsistently with AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994.

7. Finally, in Section VII, the United States concludes its submission and requests that the Panel find that China has not complied with the recommendations of the DSB and that its measures are inconsistent with China's obligations under the AD Agreement and SCM Agreement.

II. CHINA CANNOT DEFEND MOFCOM'S PROCEDURAL FAILINGS DURING THE INVESTIGATION

A. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement through MOFCOM's Failure to Provide Notice to All Interested Parties of the Pricing Information It Required from Domestic Producers

8. As reflected in the U.S. First Written Submission, the United States' claims under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement are straightforward. MOFCOM sought and obtained pricing data from domestic firms, which it then used to underpin its findings for its pricing analysis in its injury redetermination.[4] In this process, MOFCOM failed to provide known interested parties, such as U.S. respondents, with any notice as to what specific data it required the domestic industry to produce.[5] Without notice of what MOFCOM was requiring, U.S. respondents were not in a position to address effectively the significance of the pricing information – and therefore were denied the "ample opportunity to present evidence" the AD and SCM Agreements afford them.[6] Thus, MOFCOM breached China's obligations under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because it failed to provide affirmatively to U.S. interested parties both (1) notice of the information it required from Chinese firms and (2) concomitantly, opportunity to present in writing all evidence that U.S. interested parties might consider relevant.[7]

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[4] MOFCOM wrote the following in its redetermination:

> 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.

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

[5] United States, FWS, paras. 42-43.

[6] AD Agreement Article 6.1 and SCM Agreement Article 12.1.

[7] *EC – Fasteners (AB)*, para. 609 ("Article 6.1 thus requires an investigating authority to give interested parties: (i) notice of the information the authority requires; and (ii) "ample opportunity" to present their evidence in writing.")

9. In considering these claims, the United States begins by restating the text of the relevant provisions:

> All interested parties in an anti-dumping [countervailing duty] 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.[8]

As explained in the U.S. First Written Submission, these provisions require an investigating authority to provide notice of what information it requires from any party to "*all*" interested parties in the investigation.[9] China agrees that the language of the provisions compels an investigating authority to provide notice to all interested parties, and does not appear to dispute that U.S. respondents are interested parties entitled to obtain notice.[10]

10. Instead, China's rebuttal stresses that the "precise manner" the obligation is to be implemented is left to WTO Members.[11] To that end, China asserts that the particular manner employed by MOFCOM to fulfill its obligations are: (1) Notice 88, the initiation notice for the reinvestigation,[12] (2) the General Verification Letter, addressed to Chinese producers, that purportedly could be found in the MOFCOM reading room,[13] and (3) summaries of the sales data provided by Chinese producers (dubbed by China as verification exhibits), which also could purportedly be found in MOFCOM's reading room. As demonstrated below, none of what China cites provide any *notice* as to the pricing information MOFCOM required from the Chinese domestic producers, nor can any of them be construed as somehow providing *opportunity* for U.S. respondents to defend their interests.

1. Notice 88

11. Notice 88 is simply the notice of initiation for the reinvestigation. Like most notices of initiation, it simply is a public announcement that an investigating authority is conducting an AD or CVD investigation. It does not provide any details as to the specifics of the information that the investigating authority will be requesting, nor does it explain in detail the conduct of the

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[8] Emphases added. Language in braces appears in the SCM Agreement.

[9] United States FWS, para. 40-41.

[10] China, FWS, para. 52 ("…as long as the information is provided not only to those foreign producers referred to in a petition of investigation but also to all exporters and foreign producers.")

[11] China, FWS, para. 52.

[12] Exhibit USA-1.

[13] MOFCOM General Verification Letter of 19 February 2014 (General Verification Letter) (Exhibit CHN-2).

investigation, including any opportunities for interested parties to present evidence. As demonstrated below, MOFCOM cannot show that Notice 88 provides both notice of the sales data it requested from Chinese producers and an opportunity to address the questions and data.

a. *Notice 88 does not provide notice of the information MOFCOM required*

12. China asserts that Notice 88 satisfied its obligations to provide notice under AD Agreement Article 6.1 and SCM Agreement Article 12.1. The pertinent text in Notice 88 that MOFCOM invokes is the following:

> The Ministry of Commerce will reexamine the evidence and information obtained in the original antidumping and countervailing investigations, and carry out reinvestigations through questionnaires, hearings, and other measures. For relevant investigation procedures, the Regulations of the People's Republic of China on Antidumping and Countervailing Regulation of the People's Republic of China, and regulations including relevant departmental rules and regulations of the Ministry of Commerce will apply mutatis mutandis.[14]

None of this language provides any indicia, let alone notice, as to what *pricing data* MOFCOM solicited from China domestic firms.

13. Indeed, China's logic would suggest that AD Agreement Article 6.1 and SCM Agreement Article 12.1 are essentially superfluous. Article 12.1 of the AD Agreement and Article 22.1 of the SCM Agreement already *require* notice when an investigation is initiated:

> When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 [Article 11], the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.[15]

Per China's logic, any time an investigating authority issues a notice initiating an AD or CVD investigation, it has simultaneously absolves itself of any further notice obligations under AD Agreement Article 6.1 or SCM Agreement Article 12.1.

14. China's reliance on the reference in Notice 88 to the WTO proceeding is likewise misplaced.[16] As an initial matter, nowhere in the 168-page Panel Report does the Panel specify

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[14] China, FWS, para. 54, citing MOFCOM, Announcement No. 88 of 2013 (Exhibit USA-1).

[15] Language in braces appears in the SCM Agreement provision.

[16] China, FWS, para. 55.

what data or evidence MOFCOM would or should collect from Chinese domestic producers. More fundamentally, China's argument remains misplaced because the obligations in AD Agreement Article 6.1 and SCM Agreement Article 12.1 do not concern what broad issues an antidumping (AD) or countervailing duty (CVD) investigation might concern – such as ensuring product mix does not preclude price comparability. Rather, the obligations ensure due process is provided by guaranteeing that all interested parties are aware, through proper *notice*, of the *specific information* the investigating authority requires in order to make findings on those issues.[17]

b. *Notice 88 Does Not Provide Opportunity*

15. As Notice 88 does not specify the information MOFCOM required from the Chinese domestic firms, MOFCOM left U.S. producers unaware of the information necessary to defend their interests. Without knowledge of MOFCOM's requirements, there can be no basis to present evidence that the requirements may have been flawed or erroneous or that the evidence submitted in response is deficient. On that basis alone, Notice 88 cannot rebut U.S. claims.

16. Furthermore, China has no basis for its assertion that through Notice 88, "MOFCOM provided ample opportunities – indeed unlimited opportunities – to all relevant parties to present in writing evidence."[18] The basis for that assertion is that Notice 88 provides:

> Any interested parties may refer to the public evidence and information via Trade Remedy Public Information Room of the Ministry of Commerce.

There are two problems with China's assertion that this statement means "unlimited opportunities" to present evidence.

17. First, the statement does not change the fact that the questions or requests made to the China domestic industry remain unknown – and that interested parties cannot address what they do not know. To the extent the data requests made to Chinese producers are indeed "public evidence and information," then they remain hidden to this day, apparently in contravention of the language in the notice. It bears emphasis that, particularly as to issues concerning injury, the questions and requests posed by the investigating authority are significant in and of themselves. For example, if the request is limited to a certain period of time, fails to capture the nuances of the products at issue, or fails to account for relevant producers, the data before the investigating authority may itself be flawed – and susceptible to leading to flawed conclusions. Here, the pertinent issue is with respect to the sales price data ostensibly collected to allow MOFCOM to address the issue of product mix. With respect to that issue, it is necessary to understand

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[17] *See EC – Fasteners (AB)*, para. 609 ("Along with Article 6.2 of the Anti-Dumping Agreement, the Appellate Body has found that the language in Article 6.1 provides for the "fundamental due process rights" of interested parties in an anti-dumping investigation." quoting *US – OCTG Sunset Reviews (AB)*, para. 241.

[18] China, FWS, para. 55.

whether the questions posed by MOFCOM would generate domestic producer sales prices on particular products that could, in fact, be compared to import prices for the same or similar products to ensure the price comparisons are appropriate – or conversely to determine whether the data could lead to skewed comparisons. MOFCOM's failure to provide its data requests, therefore, denied U.S. interested parties the opportunity to present the evidence they were entitled to under AD Agreement Article 6.1 and SCM Agreement Article 12.1.

18. Without any citation to the text in Notice 88 or to MOFCOM's administrative record, China asserts: "any interested party was free to decide what information to submit to MOFCOM without limitations on the time or form to do so."[19] Yet even if interested parties could submit information, MOFCOM's failure to disclose what information it was requiring from domestic producers deprived interested parties of the opportunity to address the request with their own evidence. Moreover, the administrative record does not support MOFCOM's contention that parties could submit information at any time. As noted in a letter from the United States to MOFCOM, the questionnaires submitted by MOFCOM to U.S. respondents noted the following:

> Subject to the time limit of investigation and considering the workload of this case, the investigating authority only accepts information submitted in the response and in the supplemental response. The investigating authority will not accept new information or new evidence submitted beyond the time limit for response and supplemental responses, and the investigating authority will not accept any request for hearings or meetings for statement of opinions later than April 15, 2014.[20]

In other words, the language in the questionnaire on its face limits interested parties to presenting evidence that MOFCOM requests. The U.S. letter quoted this language, noted that it "appears MOFCOM is limiting the scope of the evidence in the reinvestigation that may be submitted to only information that is directly responsive to MOFCOM's specific questionnaire requests" and that it is unclear why it is necessary to circumscribe respondents' rights."[21] If the U.S. impression was wrong, MOFCOM did not correct it. Thus, China's assertion that it provided "unlimited opportunities" to present evidence is not supported by MOFCOM's recorded conduct in the reinvestigation.

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[19] China, FWS, para. 55.

[20] Letter from C. Conroy to MOFCOM (January 13, 2013), Exhibit USA-2; see also Exhibit USA-32 (Initial Reinvestigation Dumping Questionnaire From MOFCOM to Tyson)

[21] *Id.*

2. The General Verification Letter

19. Besides Notice 88, China also asserts that a General Verification Letter[22] satisfies its notice and opportunity requirements under AD Agreement Article 6.1 and SCM Agreement Article 12.1. MOFCOM asserts that the General Verification Letter was placed in its public reading room on February 19, 2014. In China's view, the placing of this letter, which was addressed to Chinese domestic producers, in the public reading room – and nothing else – satisfied its notice obligations. Because the verifications did not take place until early May, China also asserts that MOFCOM satisfied its obligations to provide opportunity to U.S. interested parties.[23] As demonstrated below, MOFCOM is wrong.

a. *The General Verification Letter does not provide notice of the information MOFCOM required*

20. The General Verification Letter[24] is deficient in both form and substance as to MOFCOM's obligations to provide notice. With respect to form, MOFCOM did not *notify* U.S. interested parties of the General Verification Letter. Although it appears the letter is made out as "To Whom it May Concern," China's rebuttal clarifies that the letter is addressed to Chinese domestic producers.[25] Accordingly, the interested parties MOFCOM put on notice – i.e., to "alert or warn" – were Chinese domestic producers.[26] MOFCOM cannot claim that simply placing a letter in a room, without notification of any sort of its existence, can constitute notice.

21. Substantively, China fares no better. This letter, as with the Initiation Notice, fails to provide the necessary notice to interested parties of what information it *required*. The language China invokes in the General Verification letter is as follows: "'prepare all the materials and produce relevant evidence in view of the Panel Report.'"[27] Not one word in that sentence provides notice as to what sales data MOFCOM would be collecting from Chinese producers – or even that sales data would be an issue. An investigating authority's notation that it intends to conduct "on spot verifications," without any specifics regarding the precise information it requires from participating parties, falls far short of the requirements to provide notice to interested parties of information *required* by MOFCOM in its reinvestigation. Indeed,

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[22] Exhibit CHN-2.

[23] China's FWS, para. 55-56.

[24] Exhibit CHN-2.

[25] Exhibit CHN-2; China, FWS, para. 56 ("This letter, addressed to domestic producers, specified that Investigating Authority would be conducting on-spot verifications.")

[26] Shorter Oxford Dictionary, p. 1946. (Exhibit USA-31).

[27] China, FWS, para. 56.

MOFCOM's logic undercuts the due process protections of AD Agreement Article 6.1 and SCM Agreement Article 12.1 to provide notice. If MOFCOM's position were correct, an investigating authority would have every incentive to make the most general pronouncements possible about the conduct of the investigation to satisfy its obligations.

22. Moreover, it bears noting that the nature of the proceeding MOFCOM invokes is an on-spot verification. The main purpose of a verification "is to verify information provided or to obtain further details" about the previously submitted information.[28] The United States does not dispute that in a verification, an interested party may provide details to clarify ministerial errors or that the investigating authority may seek to better understand responses to its questionnaires and verify their accuracy. Verifications, however, are not ordinarily proceedings whereby investigating authorities solicit and collect new data. No reasonable individual would have any expectation that MOFCOM would have used a verification to collect *new* information.

23. In sum, because the General Verification Letter was never notified to U.S. interested parties – as it was sent only to Chinese producers – and because its content in any event does not disclose the information that MOFCOM required, China cannot invoke it to defend against the U.S. claims brought under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement.

b. *The General Verification Letter Does Not Provide Opportunity*

24. China's assertion that interested parties possessed opportunity to present evidence because the verifications took place after MOFCOM placed the General Verification Letter in its reading room also fails.[29] As noted *supra*, MOFCOM did not provide notice of the General Verification Letter to U.S. interested parties, and in any event, the content of the General Verification Letter does not communicate the information that MOFCOM required. Nor does it indicate that U.S. interested parties would have been in a position to comment on how MOFCOM should conduct the on-spot verification, or what information would or should be verified. Thus, even had U.S. interested parties obtained a copy of the General Verification Letter, they would not have had an opportunity to present evidence. Accordingly, it is of no moment when China asserts that the General Verification Letter was issued prior to the on-spot verifications because the document itself does not provide the necessary information that could create opportunity. Thus, the General Verification Letter fails to rebut the U.S. claims.

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[28] AD Agreement, Art. 6.7 & Annex I, para. 7. The United States agrees that while these provisions are applicable to verifications conducted of foreign interested parties, the basic premise – that verifications are about verifying information – is generally accepted. *See e.g.*, *EC – Tube or Pipe Fittings*, para. 7.191 ("we view verification as an essentially "documentary" exercise that may be supplemented by an actual on-site visit.").

[29] *See* China, FWS, para. 57.

3. Chinese Producers' Summaries

25. Finally, China invokes "public versions of verification exhibits and supplemental information submitted by four domestic producers" as satisfying its WTO obligations.[30] These documents, which were prepared by Chinese domestic producers, state that they were *submitted* on May 20, 2014 – and appear to be offered as non-confidential summaries for the data that MOFCOM required. On May 21, 2014, one day after these summaries were purportedly submitted, MOFCOM issued its Reinvestigation Injury Disclosure (RID) and allowed one week for interested parties to submit comments on the RID.[31] As demonstrated below, these documents also fail to demonstrate that MOFCOM provided notice of the information it required from Chinese domestic producers and did not provide U.S. interested parties an opportunity to present evidence on their behalf.

a. *The summaries prepared by Chinese producers do not provide notice of the information MOFCOM required*

26. The Chinese producer summaries do not provide notice of the information MOFCOM required. Specifically, these summaries suffer from two significant deficiencies, each of which preclude China establishing that it provided notice consistent with AD Agreement Article 6.1 and SCM Agreement Article 12.1: (1) China did not provide interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform interested parties of the information MOFCOM required.

27. First, there is no indication that MOFCOM actually notified any of the interested parties that these summaries had been submitted (nor any indicia as to when the actual data itself was sent to MOFCOM). To the extent China points to Exhibit CHN-14, a webpage that lists what China deems public documents, there is no indication as to when the materials were loaded on the webpage – China's printout of Exhibit CHN-14 is dated December 19, 2016 – or that China provided any notice to interested parties that such information could be found there.[32] That investigating authorities maintain procedures to keep track of documents does not mean that they thereby provide the notice that due process requires – i.e., notice that actually places a party in

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[30] China, FWS, para. 58 (citing Exhibits CHN-4 - CHN-7, and CHN-14).

[31] See United States, FWS, para. 24.

[32] The United States notes that this record of documents appears to be incomplete. For example, CHN-14 does not refer to the United States' statement on the antidumping and countervailing measure disclosure, which was submitted to MOFCOM and for which the United States did not seek any type of confidential treatment. (Exhibit USA-7).

position to be aware of a pertinent circumstance.[33] There is no indication that MOFCOM made any effort to notify interested parties of these summaries.

28. Second, even if China had notified interested parties of these summaries, the summaries cannot be construed as notice of the *information that MOFCOM required*. They are summaries of what *information Chinese producers purportedly provided*. Indeed, none of the summaries proffered by China actually contains the precise requests posed by MOFCOM. Instead they generically note:

> "In accordance with the investigation team requirements, we hereby provide the quantity, value and unit price of the domestic like product during the investigation period per product type."

China's submission argues that this statement satisfies its obligations,[34] yet it provides no indications as to the precise requests or parameters for the data that MOFCOM required, such as the definitions of the product types for which data was requested. Knowledge of the precise parameters that MOFCOM required for this information is of course necessary to understanding the significance of and potential errors in the responses.

29. The data contained in the tables in these exhibits only further highlights the importance of understanding the precise parameters of what information MOFCOM required from Chinese domestic producers. For example, in each of the exhibits, one of the largest categories of products by quantities is described as "Others" – and the reflected unit price is typically the lowest.[35] For Da Chan Wanda,[36] and Shandon Chunxue,[37] more than half of their production appears to fall within the "Others" category. Interested Parties would necessarily seek to understand what broiler products fall within this broad category, and whether it could potentially encompass products that perhaps properly should be classified in a different manner. Similarly, the table notes the quantity of products in KG (presumably kilograms), but not the factor by

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

[34] China, FWS, para. 58.

[35] Exhibits CHN-4 – CHN-7.

[36] Exhibit CHN-7,

[37] Exhibit CHN-5

which it should be multiplied to obtain the actual amount. For example, Beijing Huadu presumably produced more than 3,112.67 kilograms of poultry products in 2007.[38] Whether it is in fact 31,000 KG or 310,000 KG or 3 million KG is undisclosed. Considering that China in its first written submission in the original dispute noted that the larger broiler producers in China – i.e., exclusive of the millions of smaller producers – produced 4000 metric tons of broiler meat – or 40 million kilograms – it would be useful to know to know whether Beijing Huadu's figures are trivial or significant in respect to overall production in China.[39]

30. Similarly with the issue of prices for particular products in the summaries, did MOFCOM request that pricing data from sales ledgers be provided in aggregate annual averages, or monthly averages, or did it require that the ledgers themselves be turned over? Depending upon the specifics of MOFCOM's request, the assessment of the information might change.

31. Indeed, the problematic nature of MOFCOM's argument becomes particularly apparent when we consider its application in other circumstances. For example, by China's logic, suppose a Panel submitted party-specific questions to Members separately and allowed them each to comment on the others' responses without seeing the actual questions themselves. Members would have no idea as to whether the response of the other party was indeed responsive, or what issue the Panel was actually seeking to resolve. The obligations in Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement prevent precisely this type of problem in AD and CVD investigations.

b. *The summaries do not provide opportunity*

32. Because the summaries are deficient with respect to providing notice of the information MOFCOM required, U.S. interested parties were denied opportunity to present evidence in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1.

33. China glosses over the fact that these May 20 documents were ***submitted one day before*** release of the RID. China asserts that this "information was publicly available well in advance of the opportunities to comment on this information."[40] That is not true on its face. Yet such submission – even if released and notified that same day (and there is no evidence to that effect) – would not provide any opportunity for interested parties to defend their interests by the time

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[38] Exhibit CHN-4.

[39] China, Original First Written Submission (OFWS), para. 238 ("…even in the largest single category there are an estimated 147 producers each raising and slaughtering over 1,000,000 birds per year, which represents those entities producing more than 2,000 metric tons of slaughtered broiler chicken products per year. In the two largest categories, there are almost 500 producers each producing more than 1,000 metric tons of slaughtered broiler chicken product per year.") (footnote omitted).

[40] China, FWS, para. 58.

comments on the RID were due, i.e., one week later.[41] As previously noted, the content of these summaries raises questions regarding what information MOFCOM sought, rather specifying it.

4. Conclusion

34. In its submission, China claims that the United States "omit[ted]" reference to the preceding "procedural steps" China now invokes as satisfying its obligations and rebutting the United States' claims.[42] This argument fails: as demonstrated above, the exhibits China proffers do not reflect China's compliance with its obligations. Indeed, if China's "procedural steps" are deemed sufficient, that would mean that the discretion of an investigating authority with respect to providing notice and opportunity extends to nullifying the protections under the relevant provisions completely. China also argues that the United States was seeking to require the notice of initiation to specify the information that MOFCOM requested from Chinese domestic producers. Again, China has no basis for its argument: nowhere does the United States demand in its First Written Submission that China follow a particular procedure. The United States only maintains that MOFCOM should have provided notice and opportunity consistent with its WTO obligations – and this it did not do.[43]

35. For these reasons and those stated in the U.S. First Written Submission, China breached AD Agreement Article 6.1 and SCM Agreement Article 12.1 because MOFCOM failed to provide interested parties notice of the information it required for the reinvestigation from Chinese domestic producers and an opportunity for U.S. interested parties to present evidence.

B. China Breached Articles 6.1.2 and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying U.S. Interested Parties the Evidence Presented by the Domestic Producers Participating in the Reinvestigation

36. In its First Written Submission, the United States established that China breached its WTO obligations under Articles 6.1.2 and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement because it failed to make available to interested parties the information it

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[41] *See EC – Fasteners (AB)*, para. 615.

[42] China, FWS, para. 60-61.

[43] With respect to this point, the United States finds China's assertion that MOFCOM's procedures "are in full compliance of its domestic legislation" puzzling. China, FWS, para. 61. The issue in a WTO dispute is not to find whether a Member acted in accord with its domestic law, but rather whether its measures are consistent with the obligations in the covered agreements.

obtained from the domestic industry.[44] China's arguments to the contrary are meritless, for the reasons explained below.

1. China's Failure to Promptly Provide Written Evidence Presented by Interested Parties to the Other Interested Parties Participating in the Reinvestigation was Inconsistent with AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2

37. The United States explained in its First Written Submission that China acted inconsistent with AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 because MOFCOM failed to *promptly* provide written evidence presented by domestic producers to the U.S. interested parties participating in the investigation.[45]

38. China responds that it satisfied the requirements of these articles, which state as follows:

> 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.[46]

39. Notably, China does not dispute that the four Chinese domestic companies that participated in MOFCOM's reinvestigation and submitted information in response to its requests constitute "interested parties" as defined in these articles. China claims that MOFCOM made evidence publicly available in the Public Information Room, although it does not say when. The only information known is these summaries were *submitted* one day before the RID, which does not equal prompt availability under any definition.[47] Consequently, MOFCOM's claims that AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 are narrower in scope than AD Agreement Article 6.1 and SCM Agreement Article 12.1 has no relevance to the facts in this dispute. Instead, the dispute concerns China's claim that it "promptly" made available to U.S. respondents the information provided by other interested parties in response to MOFCOM's requests during the reinvestigation.[48]

40. For the reasons noted in the prior section, this is not the case. China again invokes the "public versions of verification exhibits and supplemental information submitted by four

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44 United States, FWS, para. 45.

45 United States, FWS, Section VI.C.1.

46 The SCM Agreement provision contains the language in braces as well.

47 Notably, MOFCOM is silent as to when it received the actual data.

48 China, FWS, paras. 81-82.

domestic producers[,]" this time as satisfying its WTO obligations under these articles.[49] China appears to offer these documents as non-confidential summaries for the data that MOFCOM required. As such, the thrust of China's claim appears to be that because the underlying information is confidential, its release of these public summaries to the Public Information room satisfies its obligations under Articles 6.5 and 6.5.1, as well as Article 6.1.2, of the AD Agreement (and likewise under Articles 12.4, 12.4.1, as well as Article 12.1.2, of the SCM Agreement). As demonstrated below, these documents fail to show that MOFCOM provided notice of the information it required from Chinese domestic producers and did not provide U.S. interested parties an opportunity to present evidence on their behalf.

a. *There is no indication that interested parties received notice that MOFCOM had made these summaries available*

41. The Chinese producer summaries do not satisfy China's obligations as to AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 because, once again, (1) China did not provide U.S. interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform U.S. interested parties of the information MOFCOM required.

42. Even assuming these documents satisfy the requirements as non-confidential summaries under AD Agreement Article 6.5.1 and SCM Agreement Article 12.4.1,[50] that does not change the fact that the summaries do not provide *notice* of information being made available to the parties. As explained above, there is no indication that MOFCOM notified any of the interested parties that these summaries had been submitted (nor any indicia as to when the actual data itself was sent to MOFCOM). To the extent China is referring to Exhibit CHN-14, the printout is dated December 19, 2016 and provides no indication of when the information was made available. Due process requires *notice* that makes interested parties aware of the pertinent information submitted by the other interested parties, such that the former can adequately defend their interests.

43. Even assuming the notice was not deficient, the *only* information it provided to interested parties consisted of *summaries* of the pricing information.[51] The critical problem with the summaries is that they do not *convey* the context surrounding what positions were advocated by the domestic producers providing the information, and the corresponding issues that MOFCOM sought to resolve during the reinvestigation.

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[49] China, FWS, para. 81 (citing Exhibits CHN-4 - CHN-7, and CHN-14).

[50] We note that China's rebuttal does not claim that the raw data provided by interested parties, which amounts to "evidence" under the articles, is confidential such that it is protected from disclosure. *See* China, FWS, paras. 80-82. Further, there is no indication that the raw data not made available by MOFCOM had been properly accorded confidential treatment consistent with the requirements of AD Agreement Article 6.5.

[51] *See* China, FWS, para. 81.

44. This is in essence the same problem posed by MOFCOM's breaches of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Because these summaries provide no notice of the information MOFCOM required, the U.S. interested parties lacked any means to evaluate the significance of and potential errors in the responses. But even the summaries themselves fail to provide appropriate *context* such that interested parties could not adequately understand what information was provided and what positions were advocated by responding domestic producers, or how MOFOCM considered these data and arguments in its reinvestigation. They do not give any indication of what information MOFCOM required, let alone the underlying basis for the limited price and quantity data that were disclosed. As noted in the previous section, the largest category of sales quantities reported in the summary charts are described as "Others," without any clear indication of what broiler products fall into this category, and whether it could potentially encompass products that perhaps properly should be classified in a different manner. The raw data itself is ambiguous, as there is no metric to understand if the data is expressed in terms of kilograms, or a possible multiple thereof (thousands of kilograms, millions of kilograms, etc.).

45. AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 "impose[] an obligation on investigating authorities to make evidence available promptly to other interested parties participating in an investigation."[52] These articles are not simply for show, but rather serve to ensure interested parties are aware of arguments advocated by other parties based on evidence they have submitted to an investigating authority. Although these articles "must be read in the context of" AD Agreement Article 6.5 and SCM Agreement Article 12.4, and are indeed subject to a requirement that the investigating authority protect confidential information, the latter cannot be used as an end-run around the former.[53] As noted by the Panel in *Mexico – Steel Pipes and Tubes*, the "conditions set out in [AD Agreement] Article 6.5 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation[,]" and that "for precisely this reason it is paramount for an investigating authority to ensure that the conditions in the provision are fulfilled."[54]

46. There is no indication that the data submitted by the four domestic producers were collectively "by nature" confidential. Nor is there any indication that these producers requested or expected confidential treatment for all data they submitted to MOFCOM based on good cause shown, beyond the limited data provided in the public summaries. In these circumstances, China's failure to disclose these data is inconsistent with AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2. These articles, as with AD Agreement Article 6.1 and SCM Agreement Article 12.1, are intended to provide interested parties with information that enables

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[52] *See EU – Footwear*, para. 7.572.

[53] *Guatemala – Cement II*, para. 8.143.

[54] *Mexico – Steel Pipes and Tubes*, para. 7.380.

them to understand what positions domestic producers presented and the information required by MOFCOM for the reinvestigation. China has failed to do so in these circumstances.

b. *U.S. interested parties received no opportunity*

47. Because of the notice deficiencies in MOFCOM's release of the summaries, U.S. interested parties were denied opportunity to present evidence in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1.

48. Yet it is also important to stress, once again, that MOFCCOM's release of the summaries ***one day before*** release of the RID did not provide ***any*** opportunity for interested parties to defend their interests by the time comments on the RID were due one week later. Once again, the content of these summaries raises questions regarding what information MOFCOM sought, rather specifying it.

2. Conclusion

49. For these reasons, China's failure to make all *evidence* available is inconsistent with AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2. China breached these Articles, as well as AD Agreement Article 6.1 and SCM Agreement Article 12.1, by failing to provide interested parties with affirmative notice and knowledge of the information it required for its reinvestigation.

C. China Breached AD Agreement 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. China acted inconsistently with AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 because it failed to permit access to information to interested parties that would have enabled them to prepare their cases and defend their interests.[55] The United States' First Written Submission stressed that these requirements ensure interested parties are afforded the opportunity to see all information relevant to the defense of their interests.[56] China's arguments to the contrary lack merit, for the reasons discussed below.

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

[55] United States, FWS, para. 50.

[56] United States, FWS, para. 50.

> 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 articles ensure interested parties have both timely opportunities (a) to see "all information" that is relevant, non-confidential, and used by competent authorities and (b) timely opportunities to prepare their presentations "on the basis of" that information – obligations that are integral to the right of interested parties "to a 'full opportunity' to defend their interests" during an investigation.[57] Likewise, 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." As the Appellate Body has indicated, "the 'presentations' referred to in Article 6.4 . . . logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests" within the meaning of Article 6.2.[58]

1. China did not Afford Interested Parties their *Right to See Information* Relevant to the Defense of Their Cases

3. 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 authorities in their investigation. In China's reinvestigation, the information subject to this obligation included:

- 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.

53. As an initial matter, China states that it agrees with the legal analysis provided by the United States in the First Written Submission regarding the interpretation of the terms "relevant" and "use" in these articles.[59] Moreover, China acknowledges that the information at issue is "relevant to the presentation" of the interested parties' cases and was "used" by MOFCOM in its

57 *EU – Footwear*, para. 7.601, 7.603.

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

59 China, FWS, para. 88.

reinvestigation.[60] China instead challenges our assertion that MOFCOM failed to provide "timely" opportunities for interested parties to see information relevant to the defense of their cases, citing the same documents referenced in its defense under AD Agreement Article 6.1 and SCM Agreement Article 12.1.[61]

54. China's open acknowledgment of the relevance of the information at issue to the U.S. interested parties' presentation of their cases only underscores how critical it was for the interested parties to receive "timely opportunities . . . to see all information that is relevant to the presentation of their cases" and that is "used" and relied upon by MOFCOM in its reinvestigation. As noted in the United States' First Written Submission, the information sought by MOFCOM from the Chinese domestic producers during the reinvestigation "constitutes product-specific pricing data . . . that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis."[62] Because this information forms the basis of MOFCOM's price effects findings, the "timely" disclosure of this information was critical to ensure the U.S. interested parties could defend their interests. As the European Union suggests in its third-party submission, AD Agreement Article 6.4 and SCM Agreement Article 12.3 are intended to ensure respondents have a fair chance to influence the decision-making process and the assessment of information by investigating authorities – and not merely so respondents can "put their comments on record 'for the dustbin.'"[63]

55. China's brief reiterates its discussion of the documents it claims were publicly released – specifically, the Verification Letter disclosure of February 19, 2014, and the RID and verification disclosures of May 20 and 21, 2014.[64] As to all of these documents, there is no indication that China provided notice to the U.S. interested parties that these documents had been made available. As discussed extensively in the earlier portions of this brief, although China contends it made these documents available through the Public Information Room, nowhere does China discuss how it notified the U.S. interested parties of the release of this information.[65] For the same reasons previously noted, this failure hardly reflects a "timely" effort by China to enable interested parties to review information relevant to the presentation of their cases – as required by AD Agreement Article 6.4 and SCM Agreement Article 12.3.

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[60] China, FWS, para. 88; *see also* United States, FWS, paras. 54-55.

[61] China, FWS, para. 88.

[62] United States, FWS, para. 55.

[63] European Union Third-Party Submission, para. 14.

[64] China, FWS, paras. 89-91.

[65] *See* China, FWS, para. 90.

56. China then concludes, in a cursory and very telling fashion, that MOFCOM "provided all interested parties with timely opportunities to see an appropriate public summary of the information on the unit price of whole chicken, breast, leg, wing, gizzard, paw and others, all of which was relevant information used by the Investigating Authority."[66] China misconstrues its obligations under AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 as only requiring it to provide interested parties with timely opportunities to review a "public summary[,]" without citing any support. The articles' requirement that investigating authorities provide "timely opportunities . . . to see all information that is relevant to the presentation of their cases" cannot necessarily be satisfied by mere release of public summaries.

57. The scope of information covered by AD Agreement Article 6.4 and SCM Agreement Article 12.3 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."[67] The scope of these articles 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 – which includes everything from raw data submitted by interested parties to information that has been processed, organized, or summarized by the competent authority.[68] The scope further includes materials that interested parties deem relevant for the presentation of their cases – and not just what MOFCOM deems relevant for its determinations.[69] China's public release of summaries does not excuse its failure to provide the context for these data, including the specific products for which pricing data was requested, that clearly fall within the scope of the articles.

58. The same deficiencies apply to China's failure to provide the precise identity of the four Chinese domestic enterprises that provided information to MOFCOM. The lack of identity and clarity on this issue, combined with the timing of when the information was made available along with the lack of notice from MOFCOM to interested parties, reflect that the relevant information was not provided in a manner consistent with China's WTO obligations.

59. In sum, China makes only a cursory attempt in its rebuttal submission to justify its decision not to provide "timely opportunities . . . to see all information that is relevant to the presentation of their cases." China simply assumes that MOFCOM's disclosures were sufficient to meet this standard – which they are not. MOFCOM cannot substitute its judgment and disclosures in lieu of the actual evidence. Moreover, even for the summaries that China claims were publicly released, China provided no notice to interested parties that such documents had been released. This is inconsistent with AD Agreement Articles 6.1 and 6.1.2 and SCM Agreement Articles 12.1 and 12.1.2, as well as the requirement in AD Agreement Article 6.4 and

[66] China, FWS, para. 92.

[67] United States, FWS, para. 59 (citing *EC – Salmon (Norway)*, para. 7.769 (emphasis omitted)).

[68] United States, FWS, para. 59 (citing *EC – Fasteners (AB)*, para. 480-83).

[69] United States, FWS, para. 54 (citing *EC – Tube or Pipe Fittings (AB)*, para. 145).

SCM Agreement Article 12.3 to provide "timely" opportunities for interested parties to see "all information that is relevant."

2. China did not Afford U.S. Interested Parties their *Right to Prepare Presentations* in Defense of Their Cases

60. For the same reasons, China acted inconsistently with its 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. If a party is denied access to information, then it follows that the party was also denied the opportunity to prepare a presentation on the basis of the information that it never saw.

61. China reiterates the arguments previously offered, and in addition claims that it satisfied its obligation under these articles by providing interested parties the opportunity to present oral arguments before MOFCOM.[70] The argument is symptomatic of the underlying due process problems endemic in China's approach in this reinvestigation. First, the United States notes that by China's own admissions, the U.S. interested parties affirmatively petitioned MOFCOM for the right to be heard.[71] Moreover, although an oral "hearing" took place on June 13, 2014, that "hearing" in no way provided interested parties with an opportunity to prepare presentations in defense of their interests. U.S. respondents were told by MOFCOM during this meeting that the re-investigation was closed, and that no further comments could be submitted by interested parties related to MOFCOM's reinvestigation. MOFCOM subsequently included on record a self-serving memorandum that conveniently omits this information.[72]

62. In sum, China failed to afford interested parties opportunities to see "all information that is relevant to the presentation of their cases[,]" which in and of itself deprived interested parties of the opportunity to prepare presentations. Further, the "hearing" offered to U.S. interested parties itself breached AD Agreement Article 6.4 and SCM Agreement Article 12.3, as it did not provide the parties with the opportunity to meaningfully defend their interests. This Panel should find China has failed to obligations under AD Agreement Article 6.4 and SCM Agreement Article 12.3.

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[70] *See* China, FWS, para. 95.

[71] *See* China, FWS, para. 95.

[72] *See* Exhibit USA-28.

D. China's Failure to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins was Inconsistent with AD Agreement Article 6.9

63. China's failure to disclose "essential facts," i.e., the margin calculations and data it relied upon to determine the existence of dumping by U.S. respondents Pilgrim's Pride and Keystone, was inconsistent with AD Agreement Article 6.9. Pilgrim's Pride was denied access to the data calculations from the original investigation in the reinvestigation while MOFCOM used a purported error in the data and calculations from the original investigation to increase the margin of Pilgrim's Pride by 20 points. Likewise, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation.[73]

64. China argues to the contrary that it disclosed the essential facts to both U.S. respondents. As explained below, China's claims as to both Pilgrim's Pride and Keystone misrepresent the facts and are meritless.

1. MOFCOM Breached AD Agreement Article 6.9 by Failing to Disclose Underlying Data and Margin Calculations for Pilgrim's Pride

65. The United States in its First Written Admission showed that, despite MOFCOM's refusal to allow Pilgrim's Pride to participate in the reinvestigation, and despite the fact that the Panel Report had no impact on the dumping findings for Pilgrim's Pride, MOFCOM proceeded to raise Pilgrim's antidumping duty rate *by more than 20 percentage points*, to 73.8 percent from 53.4 percent.[74] MOFCOM provided the new calculations and data behind this new, higher rate, but it failed to provide the *original* calculations and data from the original investigation. This failure was inconsistent with AD Agreement Article 6.9 for two reasons. First, without the *original* calculations and data, Pilgrim's Pride had no ability to identify precisely had changed between the original investigation and the revised rate – which entirely denied Pilgrim's the opportunity to defend its interests.[75] Second, the lack of any disclosure means that MOFCOM that MOFCOM did not abide by the obligation to ensure that a disclosure was made "in sufficient time for … [Pilgrim's] to defend … [its] interests." Moreover, the lack of <u>any</u> adequate disclosure means that there could not have been a disclosure that took place "in sufficient time for … {Pilgrim's} to defend … {its} interests."

66. China retorts that it indeed "provided Pilgrim's Pride with all of the data and calculations used in the reinvestigation, which included the data from the original investigation, but also

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

[74] *See* United States, FWS, para. 73.

[75] *See* United States, FWS, para. 73.

discussed its corrections with Pilgrim's Pride[,]" and that it made "additional adjustments to its calculations based on Pilgrim's Pride input.[76] China misrepresents the facts, as explained below.

67. The United States recalls that 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 in sufficient time for the parties to be able to defend themselves.

> 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

The Panel Report explains that Article 6.9 requires the *complete* disclosure of margin calculations and underlying data.[77] As noted by the European Union, "what is decisive" under Article 6.9 "is that interested parties ha[ve] access to all facts necessary to understand the basis for the findings of the investigating authorities (including intermediary findings) and to properly defend their interests before the adoption of the final determination."[78]

68. The United States reemphasizes that the prior findings in the original dispute recognized that MOFCOM's disclosure in the original investigation was inadequate under Article 6.9, as it failed to provide sufficient information regarding sales prices and formulas used to calculate normal value, export price, and weighted-average dumping margins that is needed for Pilgrim's Pride to ascertain the accuracy of MOFCOM's calculations.[79] In other words, the Panel found that MOFCOM's failure to disclose the original calculations denied Pilgrim's Pride the ability to ascertain the accuracy of the new rate by evaluating what has changed.[80] The Appellate Body has also made a similar finding since:

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[76] China, FWS, para. 97.

[77] *See* United States, FWS, para. 70 (citing *China – Broiler Products*, para. 7.91).

[78] European Union, Third-Party Submission, para. 23.

[79] *See* United States, FWS, para. 74 (citing *China – Broiler Products*, para. 7.100).

[80] *See China – Broiler Products*, para. 7.100.

> 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.[81]

69. Here, Pilgrim's was entitled to know the adjustments and precise calculation methodology – and that required knowing what the original calculations and data were, not a narrative that lacked such details.[82] Without such information, Pilgrim's cannot know for sure whether MOFCOM's new calculation was proper, suffers from a ministerial error, or is drawn from whole cloth. Thus, China again repeats the same mistake, withholding information from Pilgrim's Pride which continues to be inconsistent with its WTO obligations. Essentially, China claims that, during the reinvestigation, it discovered an error – of some sort – in the antidumping calculation for Pilgrim's. As a result, Pilgrim's Pride had to suffer a substantial, 20 percent increase in its antidumping duty margin without any ability to understand how or why these changes were made. Contrary to China's assertions, the United States understands that its purported reason for making this rate adjustment was due to an "error."[83] But that statement is meaningless if U.S. respondents lack the ability to understand how or why this alleged "error" exists and was purportedly corrected – which requires providing Pilgrim's Pride the opportunity to review the original calculations and data in sufficient time for it to defend its interests.

70. Nonetheless, China maintains that MOFCOM in fact "explained its calculations to Pilgrim's Pride in detail and Pilgrim's Pride had ample opportunity to make comments."[84] It claims that it "disclosed the details of its calculations" to Pilgrim's Pride and provided them with a "narrative explanation of the error and the corrections it intended to carry out" on May 16, 2014. As an initial matter, the United States stresses that this disclosure was at the tail end of the reinvestigation, just five days before MOFCOM issued the RID. Pilgrim's Pride was, in effect, blind-sided by MOFCOM with the disclosure that MOFCOM intended to modify its antidumping rate.

71. Notably, at no point earlier in the reinvestigation did MOFCOM indicate that it was going to upward adjust Pilgrim's antidumping rate in such a dramatic fashion – nor, critically,

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[81] China – HSST (AB), para. 5.131.

[82] China, FWS, para. 102.

[83] China, FWS, para. 101.

[84] China, FWS, para. 102.

did it disclose any of the original calculations and data to Pilgrim's Pride. MOFCOM claims that its May 16, 2014 disclosure letter discussing the error included an excel file containing MOFCOM's calculations, but neglects to explain that this file included no data or information regarding the original calculations. The United States acknowledges that MOFCOM provided the information regarding its revised calculation to Pilgrim's Pride on May 16, 2014. But, critically, MOFCOM failed to supply any of the *original* calculations and data which would permit it to understand the revisions or properly defend its interests. Further, this disclosure was not provided in sufficient time for Pilgrim's Pride to defend its interests

72. MOFCOM had no justification for modifying Pilgrim's antidumping duty margin based on the findings of the Panel, but even assuming that it had such justification, MOFCOM needed to provide the original calculations and data to Pilgrim's Pride and provide them with the ability to defend their interests. MOFCOM chose not to do that and, instead, raised Pilgrim's antidumping rate during the reinvestigation based on a purported error, without affording Pilgrim's Pride with any due process.

73. Not only that, but China should have disclosed the *original* calculations and data to Pilgrim's Pride early enough to enable Pilgrim's Pride and other parties to identify and brief errors that would either benefit or be adverse to Pilgrim's Pride, and provide them with adequate time to address those issues. Instead, Pilgrim's Pride never received the original calculations and obtained the revised calculations too late for it to defend its interests. MOFCOM's redetermination only underscores these deficiencies, and as noted in our opening submission, sheds no additional light on the data or corrections to its calculations.[85]

74. In fact, Pilgrim's Pride identified this problem in its comments dated May 28, 2014, stating that MOFCOM went "beyond implementation of any issues related to the WTO proceeding, and then arbitrarily and artificially limited the scope of its dumping re-investigation to changes that would be adverse to [Pilgrim's Pride], with respect to the calculation of normal value and with respect to the calculation formula for the dumping margin." In fact, Pilgrim's Pride in those comments identified a formula error of the same type that MOFCOM claimed needed correcting, yet MOFCOM refused to address that error.[86]

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[85] *See* United States, FWS, para. 75 (According to the Disclosure 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, 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).

[86] This error concerned the use of a normal value not adjusted to the same level as export price by MOFCOM during the reinvestigation. *See* Exhibit USA-27. Pilgrim's Pride, through these comments, highlighted an error in the *revised* calculation that MOFCOM subsequently corrected, as China points out in its response submission. *See* China, FWS, para. 104 (citing Exhibit CHN-9). However, this error identified by Pilgrim's Pride concerned the information provided MOFCOM as to the *revised* calculation. Because MOFCOM did not release the *original* calculations and data, Pilgrim's Pride and the other

75. MOFCOM concluded its reinvestigation without any attempt to remedy these deficiencies. As noted in the previous section and acknowledged in China's brief, MOFCOM held a meeting with counsel for Pilgrim's Pride on June 13, 2014 – at which time MOFCOM informed Pilgrim's Pride that the reinvestigation was closed and that parties could not submit any additional comments regarding the issues to be addressed by MOFCOM's redetermination.[87] Notably absent from China's brief is any mention of these facts that undermine its position that it provided Pilgrim's Pride with sufficient notice and information. Despite Pilgrim's desire to be heard, as expressed in its May 28, 2014 comments and in the June 13, 2014 "hearing," MOFCOM refused to entertain any arguments from Pilgrim's Pride prior to its redetermination.

76. Instead, four days following the oral "hearing," MOFCOM issued a disclosure that China frames as "responding to the other issues raised in their meeting."[88] In reality, China's disclosure erroneously asserted that "Pilgrim's Pride did nothing."[89] This statement is ironic, considering that neither Pilgrim's Pride – nor any interested party – was afforded an adequate opportunity to defend their interests, for all of the reasons explained above. As the United States noted in the First Written Submission, "Pilgrim's Pride lacked the requisite information to make [the June 13] exchange meaningful."[90] These facts undermine China's suggestion that Pilgrim's Pride could have submitted additional comments following this June 17 disclosure.[91]

77. In sum, China's position, in essence, is that MOFCOM reviewed the original calculation, discovered an error, corrected the error, and supplied interested parties with the *revised* calculation, without supplying the original calculations. But herein lies the problem. Without knowledge of the *original* calculations of data, Pilgrim's Pride in the redetermination – just as the Panel found in the original proceeding – lacked the ability "ascertain the accuracy of MOFCOM's calculations and thus would be unable to defend its interests."[92] The Panel should find that China remains in breach of AD Agreement Article 6.9 for failing to disclose this information to Pilgrim's Pride.

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interested parties were deprived of the ability to fully evaluate the other purported "errors" that MOFCOM believed it needed to correct – inconsistent with China's obligations under AD Agreement Article 6.9.

[87] *See* China, FWS, para. 104.

[88] China, FWS, para. 105.

[89] *See* China, FWS, para. 105.

[90] United States, FWS, para. 75.

[91] China, FWS, para. 108.

[92] *China – Broiler Products*, para. 7.91.

2. MOFCOM Breached AD Agreement Article 6.9 by Failing to Disclose Underlying Data and Margin Calculations for Keystone

78. China likewise is in breach of AD Agreement Article 6.9 for failing to make Keystone's margin calculations and data from the original investigation available to Keystone – despite the Panel previously finding that this same failure to disclose was inconsistent with China's WTO obligations. Although Keystone did not cooperate[93] 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.[94] Thus, the failure to disclose this information was as inconsistent with AD Agreement Article 6.9 as with the failure to disclose with respect to Pilgrim's Pride.

79. China argues that it did not deny Keystone access to "essential facts" under AD Agreement Article 6.9 because Keystone "chose not to participate in the reinvestigation[,]" and did not respond to the questionnaire issued to it by MOFCOM.[95] China asserts that Keystone does not constitute an "interested party" as defined in this article because it was not a participant in the investigation.[96] China construes the scope of what constitutes an "interested party" under AD Agreement Article 6.9 far too narrowly, at odds with AD Agreement Article 6.11, which states that "[f]or the purposes of this Agreement, 'interested parties' shall include

> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
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> (ii) the government of the exporting Member; and
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> (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

Article 6.11 goes on to state that "[t]his list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties."

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[93] To be precisely clear, Keystone was a mandatory respondent that registered and participated fully throughout the original investigation. In the reinvestigation, MOFCOM sent a questionnaire to Keystone, reflecting its registration, but Keystone declined to cooperate.

[94] United States, FWS, para. 78.

[95] China, FWS, para. 111.

[96] China, FWS, para. 111.

80. Nothing in this definition[97] limits the scope of "interested party" to only those parties who cooperate in an antidumping investigation. Rather, the plain text of AD Agreement Article 6.9 recognizes that exporters, their governments, and producers of the like product *shall* be deemed as "interested parties." The chapeau in Article 6.11 reflects the non-exhaustive nature of the definition, but nowhere does the provision limit "interested parties" to those who directly participate in the investigation.[98]

81. The common characteristic that defines all "interested parties" is that they "necessarily have an interest in the investigation."[99] Keystone was a registered "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the antidumping duties imposed on Keystone.[100] These protections apply regardless of the fact that MOFCOM imposed facts available on Keystone, and China cites nothing suggesting that the application of facts available and the right to the disclosure of data and calculations are somehow mutually exclusive.

82. China, rather than cite language in an article of the AD Agreement that supports its position, instead maintains that it does not have "the obligation to disclose 'essential facts' to a party that refused to participate in the proceedings through means different from those the investigating authority used to disclose such facts to other nonparticipating parties."[101] China then goes on to argue that MOFCOM, in fact, did "disclose[] the essential facts to Keystone through public notices, much like it did for all other interested parties." This argument is meritless and deficient for the same reasons noted above with respect to Pilgrim's Pride. China claims to have released the "essential facts" through public releases to the Public Information Room, but it did no such thing. It did not provide to Keystone, let alone Pilgrim's Pride, the original calculations and data relied upon to determine the revised antidumping margins.

83. The Panel faulted China as acting inconsistently with AD Agreement Article 6.9 in the original proceedings when it failed to indicate the data and calculations supporting its cost of production, normal value, export price, and dumping margin determinations for Keystone, because it deprived Keystone of any ability to "correct any perceived errors in MOFCOM's calculation of normal values" such that it could "defend its interests."[102]

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[97] *See Argentina – Poultry Anti-Dumping Duties*, para. 7.131.

[98] *See EC –Fasteners (AB)*, para. 5.148.

[99] *See Argentina – Poultry Anti-Dumping Duties*, para. 7.131.

[100] United States, FWS, para. 78-79.

[101] China, FWS, para. 114.

[102] *China – Broiler Products*, para. 7.105.

84. China has acted in the same WTO-inconsistent matter in this reinvestigation and compliance proceeding. AD Agreement Article 6.9 requires the disclosure of essential facts, period. These essential facts include the specific data and calculations used, both for the original investigation as well as the reinvestigation. Nowhere does Article 6.9 provide that an investigating authority's obligation to disclose essential facts can be reduced depending on an interested party's cooperation. Article 6.9 is a positive obligation, requiring investigating authorities to make essential facts available to interested parties – in other words, "inform interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[103] Even a party subject to facts available treatment is entitled to review the essential facts for its antidumping rate – even if the engagement is limited to seeking the correction of ministerial errors.[104]

85. China claims that it satisfied its obligation to disclose "essential facts" by explaining why it resorted to facts available, i.e., that Keystone chose not to participate in the reinvestigation.[105] China's framing of the scope of the "essential facts" it needed to disclose is far too narrow. Significantly, MOFCOM chose to maintain antidumping duty margins on Keystone, and the only way Keystone could defend against and respond to this substantial decision by MOFCOM was if it could review the calculations and underlying data supporting those determinations. The fact that Keystone did not return questionnaire answers to MOFCOM does not somehow alter MOFCOM's positive obligation to provide these "essential facts" to interested parties.

86. China claims that it disclosed the relevant facts during the redetermination.[106] We disagree, as MOFCOM has never revealed all calculations and data that it relied upon in making its determinations. But regardless, even if it had done so, the disclosure is far too late. AD Agreement Article 6.9 requires disclosure of "essential facts" sufficiently in advance to permit interested parties to prepare the defense of their cases.

87. Finally, as to its interactions with Keystone, China claims that MOFCOM contacted the U.S. Embassy and "requested its assistance in notifying keystone," and that despite receiving in response a memorandum from a U.S. law firm that represented Keystone, MOFCOM properly refused to consider this evidence as an authorization, by either the law firm or the U.S. embassy, to "act on behalf of Keystone and to receive any document on Keystone's behalf."[107] China further claims that it properly refused to provide them with Keystone's commercial information

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[103] United States, FWS, para. 78-79.

[104] United States, FWS, para. 83.

[105] China, FWS, para. 118.

[106] China, FWS, para. 120.

[107] China, FWS, para. 111.

because of the alleged authorization deficiency.[108] There is no record evidence to support any of these assertions. The only record evidence is in the form of a letter to MOFCOM from a law firm stating that, "[w]ith explicit authorization and approval from Keystone Foods, by this memorandum, Keystone Foods notifies MOFCOM that it may serve any and all disclosure documents" on the members of that law firm.[109] Despite the United States having transmitted this power of attorney to the Chinese embassy in the effort to secure the release of the calculations and data related to Keystone, MOFCOM refused to accept the document and release the calculations. In doing so, MOFCOM claimed that there was no letter indicating Keystone's delegation of authority to the law firm.[110]

88. In sum, just as with Pilgrim's Pride, the failure to disclose the "essential facts" inhibited Keystone from "ascertain[ing] the accuracy of MOFCOM's calculations" such that Keystone would be able to "defend its interests."[111] The Panel should find that China remains in breach of AD Agreement Article 6.9 for failing to disclose this information to Keystone, just as with Pilgrim's Pride.

III. CHINA CANNOT DEFEND MOFCOM'S ANTIDUMPING REDETERMINATION

A. China Has Not Rebutted U.S. Claims That MOFCOM Failed to Properly Allocate Tyson's Costs Under the Second Sentence of AD Agreement Article 2.2.1.1

89. In the original proceeding, the United States demonstrated that MOFCOM acted inconsistently with AD Agreement Article 2.2.1.1 by improperly rejecting the costs maintained in Tyson's books and records for various chicken products when it constructed normal value, and erroneously relying upon 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.[112] The Panel found that MOFCOM breached the second sentence of AD Agreement Article 2.2.1.1 by relying upon a distortive weight-based allocation methodology that did not "consider all available evidence on the proper allocation of costs."[113] The Panel recognized that, as to Tyson, MOFCOM's failure to allocate production costs across all products – including

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108 China, FWS, para. 113.

109 *See* Exhibit USA-29.

110 *See* Exhibit USA-30.

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

112 *See* United States, FWS, para. 89.

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

those derived from the chicken, such as blood, feathers, organs, and other viscera – was inconsistent with AD Agreement Article 2.2.1.1, as all products derived from chicken that generate value should absorb a proportionate share of costs.[114] This skewed weight-based allocation resulted in artificially inflated normal value for the subject products.

90. China now argues in its response that: (1) the second sentence under AD Agreement Article 2.2.1.1 only requires investigating authorities to "consider all available evidence," and does not require any analysis of the "proper" allocation of costs; (2) MOFCOM in fact met this standard in considering and rejecting the alternative cost allocation method proposed by Tyson; and (3) MOFCOM properly implemented the Panel's findings as to Pilgrim's Pride. These arguments all lack merit, for the reasons discussed below.

1. China Misconstrues the Legal Standard for Article 2.2.1.1, and its Requirement that MOFCOM Address Whether the Allocation of Costs was "Proper"

91. As to the appropriate legal standard, China first responds that AD Agreement Article 2.2.1.1 does not establish any substantive standard for evaluating the reasonableness of the choice made by the investigating authority, but, rather, only requires investigating authorities to "consider[] all available evidence."[115] China's interpretation reads out any consideration of "proper" in reference to cost allocation in AD Agreement Article 2.2.1.1, contrary to the explicit language in the article.

92. As an initial matter, China misconstrues this Panel's findings in the original proceedings. The Panel stressed the need for investigating bodies to deliberate on and consider evidence of the "proper" allocation of costs in its own right, as indicated by the Appellate Body in *US – Softwood Lumber V*.[116] This Panel similarly made note of *EC – Salmon (Norway)*, where that panel explicitly recognized that investigating authorities have a *substantive* obligation to evaluate and consider evidence regarding whether its chosen cost allocation was "proper."[117] The Appellate Body has indicated that, in the context of Article 17 of the AD Agreement, the ordinary meaning of "proper" is "accurate" or "correct."[118] That same meaning applies to the term in this context. As noted by this Panel, *EC – Salmon (Norway)* recognized that it is "incumbent on the investigating authority to at the very minimum explain why it was appropriate

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[114] *See id.*

[115] China, FWS, para. 145-161.

[116] *China – Broiler Products*, para. 7.187 (citing *US – Softwood Lumber V (AB)*, paras. 133, 134.

[117] *China – Broiler Products*, para. 7.188 (citing *EC – Salmon (Norway)*, paras. 7.491, 7.507); *see also EC – Salmon (Norway)*, paras. 7.484)

[118] *Thailand – H-Beams (AB)*, para. 116.

to allocate the relevant [costs]."[119] This Panel considered whether MOFCOM's "methodology itself was indeed 'proper,"[120] and agreed with *EC – Salmon (Norway)* that "any allocation of cost performed for the purpose of establishing cost of production must not result in the inclusion of costs not 'associated with the production and sale" of the like product during the period of investigation.'"[121]

93. China's suggestion that the obligation is limited to "consider[ing] all available evidence" without any review and evaluation of the *choice* made by the investigating authority reads out of the provision the explicit requirement to determine the "proper" allocation of costs. Article 2.2.1.1 requires investigating authorities to explain their deliberations based on evidence of the "proper" allocation of costs. This requires an investigating authority to both consider all evidence on the proper allocation of costs and to determine the proper allocation of costs based on that evidence. China in effect suggests that as long as there are no indications that China made an irrational choice on the allocation of costs, then its decision satisfies the legal requirements in the second sentence of Article 2.2.1.1.[122] The United States agrees with the European Union that to adopt China's interpretation would reduce the second sentence of Article 2.2.1.1 to a "pure procedural obligation" that "would make it meaningless, as it would mean that investigating authorities would have to consider evidence on a proper allocation but could then, on the basis of this evidence, arrive at an improper allocation."[123] The United States further notes that this Panel previously faulted China for its failure to "weigh and "reflect[] upon" the alternative allocation methodologies provided by respondents, and that "MOFCOM did not explain the reasons why its own methodology led to a *proper* allocation of costs."[124]

94. The substantive obligation in the second sentence of AD Agreement Article 2.2.1.1 demands that investigating authorities deliberate and evaluate the "proper" allocation of costs based on its consideration of the evidence presented. The Panel recognized this fact. China's suggestion to the contrary is wholly unsupported and should be rejected.

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[119] *China – Broiler Products*, para. 7.190 (citing *EC – Salmon (Norway)*, paras. 7.491, 7.509).

[120] *China – Broiler Products*, para. 7.192.

[121] *China – Broiler Products*, para. 7.192 (citing *EC – Salmon (Norway)*, paras. 7.491).

[122] China, FWS, para. 147.

[123] European Union Third-Party Submission, para. 29.

[124] *China – Broiler Products*, para. 7.195.

2. MOFCOM, in Considering and Rejecting the Alternative Cost Allocation Method Proposed by Tyson, Failed to Meet its Obligation under AD Agreement Article 2.2.1.1 to Consider the "Proper" Allocation of Costs

95. China failed to meet the requirement in the second sentence of AD Agreement Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs" because of MOFCOM's decision to adhere to a weight-based methodology while failing to allocate costs by weight to all products that derive revenue from the production of the product under consideration – including a failure to allocate costs to blood, organs, feathers, and other viscera. China does not provide an adequate explanation for why this decision to only allocate costs to certain products, which inflates their normal values, is "proper." China's failure is particularly evident in light of the evidence submitted by Tyson, as well as the inconsistent positions advocated by China in its prior WTO submissions and subsequent redetermination. China's decision on cost allocation remains inconsistent with its WTO obligations.

96. As an initial matter, the United States once again wishes to highlight the inherent inconsistency in China's approach in this redetermination. On the one hand, China decided that the value-based allocation used by Tyson in the ordinary course of business to assign meat costs to specific products did not result in a reasonable allocation of production costs among the chicken parts subject to the investigation and, for that reason, disregarded the product-specific costs reported by Tyson.[125] China reasoned that this approach caused unreasonably high meat costs to be assigned to subject merchandise (such as broiler products) and unreasonably low meat costs to be assigned to non-subject merchandise (including by-products, such as blood and feathers).[126] Yet China in effect relied on the same value-based allocation to assign meat costs to categories of broiler products and chicken by-products – in the guise of what it claims to be a weight-based allocation methodology. As explained below and in the United States' First Written Submission, China needed to allocate costs across all products on the basis of weight to justify its weight-based allocation methodology. China failed to do so.

97. Nonetheless, China makes several arguments in support of its position that it satisfied its obligations under the second sentence of Article 2.2.1.1. China argues that what it frames as "Tyson's alternative cost allocation" does not constitute "evidence" under Article 2.2.1.1 that it needed to consider, because it had not been "historically utilized" by Tyson.[127] This argument misses the point entirely. Nowhere does Article 2.2.1.1 state that an investigating authority can ignore considering evidence on the "proper" allocation of costs simply because that evidence was not "historically utilized" by a respondent in the investigation. Moreover, this argument is

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[125] *See* United States, FWS, para. 98.

[126] China, FWS, para. 166.

[127] China, FWS, para. 162.

inconsistent with China's claim that it in fact "considered" Tyson's data and cost allocation methodology.

98. The United States recalls that in the original Panel proceedings, the United States did not accept that China's weight-based allocation methodology was superior to a value-based allocation.[128] In fact, the United States argued in submissions during the original proceedings that a weight-based approach is problematic. But that is not the issue that the United States has challenged in this Article 21.5 proceeding with respect to China's compliance with its obligations under the second sentence of AD Agreement Article 2.2.1.1. Rather, the issue presented is whether China, in choosing to rely on an allocation methodology based on weight, adequately considered whether the cost allocation decisions it made were "proper" under the article in light of the evidence presented. China needed to address the proper allocation of costs based on weight, and whether to allocate the costs across all products.

99. As explained in the United States' First Written Submission, China failed to account for the need for certain products – feathers, blood, organs, and other viscera – to absorb certain costs according to respective weight, in order to avoid distortions in its weight-based methodology. In the original proceeding, the Panel found that China's adherence to a weight-based approach was inconsistent with the second sentence of AD Agreement Article 2.2.1.1 because it improperly allocated the costs of producing those products to the other products derived from a chicken, rather than ensuring that the former products absorbed a proportionate share of the production costs.[129]

100. China itself recognized this problem in its prior WTO submissions and its redetermination, which explicitly noted, in support of its weight-based methodology, that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across all products.[130] To be consistent with its own logic, China would need to account for all products that derive revenue and then allocate cost by weight to all of them – even for the products that generate less revenue, such as feathers, blood, organs, and other viscera. Tyson

[128] *See* United States, FWS (original Panel proceedings), paras. 82-116.

[129] *See China – Broiler Products*, para. 7.197. The Panel faulted China for failing to provide any record evidence that "MOFCOM deliberated or explained the weight-based methodology it chose to apply[,]" and whether it was appropriate and consistent with the second sentence of AD Agreement Article 2.2.1.1. *Id.* at 7.194. As reasoned by the Panel, not only did MOFCOM not present evidence that it weighed the "merits of the alternative allocation methodologies put forward by the respondents[,], but also did not "explain the reasons why its own methodology led to a proper allocation of costs." *Id.* at 7.195. Moreover, as to Tyson, the Panel found that China "acted inconsistently with the second sentence of Article 2.2.1.1" when it "allocate[ed] production costs of non-subject merchandise to subject merchandise and thus inflated normal value." *Id.* at 7.197

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

stressed these facts in its submission to China during the reinvestigation.[131] Yet China chose to ignore these distortions and allocate costs over a more limited range of products – resulting in artificially inflated normal values for those products.

101. China attempts to flip this argument on its head, responding that its cost allocation was "proper" because Article 2.2.1.1 "specifically focuses on the product under consideration[,]" and to include "other products (product not under consideration) introduces distortion."[132] This argument is factually erroneous because, as the Panel made clear, "the definition of the scope of the investigation set forth in MOFCOM's Determinations" included "by-products of broiler products, such as blood and feathers."[133] Thus, China's suggestion that the scope only included chicken for "human consumption" is contradicted by MOFCOM's very own determinations, which expand the scope of the investigation beyond consumable broiler products.[134] All parts of a chicken, including both those for human consumption and those that are rendered, are joint products and a consistent, reasonable methodology must be used to allocate production costs to all such products. China cannot use a value-based allocation that it has determined is unreasonable for purposes of allocating meat costs to categories of joint products (i.e., subject and non-subject merchandise), and then use a different weight-based allocation that it has determined is reasonable to allocate meat costs to individual subject products.

102. Thus, China's assertion that the United States does not take issue with China's focus on this purported "product under consideration" is erroneous for all of the reasons noted above.[135] The thrust of the United States' argument focuses on China's failure to allocate costs across all products, consistent with its weight-based methodology, in order to avoid distortions.

103. Next, in support of its claim that its cost allocation was proper, China contends that there was no ambiguity that the data submitted by U.S. exporters, including Tyson, consisted only of broiler products – and did not include blood, feather, organs, and other viscera.[136] Specifically, China argues that "U.S. exporters had submitted to MOFCOM the costs for the product under consideration, and not the cost of products not under consideration like blood and feathers," and that "Tyson never denied that Exhibit CHN-64 (or the underlying information in cost table 6-3)

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

[132] *See* China, FWS, para. 170.

[133] *China – Broiler Products*, para. 6.61; para. 7.196 fn. 340.

[134] China, FWS, para. 172.

[135] China, FWS, para. 177.

[136] China, FWS, paras. 174-175.

did not include any costs for products not under consideration."[137] These arguments are factually erroneous and meritless, for several reasons.

104. As an initial matter, the United States again takes issue with China's irrelevant distinction between products under and not under consideration, in light of its decision to rely on a weight-based allocation methodology and the fact that the scope of MOFCOM's redetermination included not only broiler products but also by-products. Moreover, whether Tyson in fact confirmed or denied the content of an exhibit submitted by MOFCOM in its redetermination does not render China's cost allocation "proper." Nor is the content of that exhibit dispositive on the issue of whether China properly allocated costs across *all* products – as was necessary to avoid distortions.

105. Nevertheless, China misstates the facts. As to Tyson, MOFCOM is simply wrong in asserting that the cost data submitted by Tyson (as reflected in cost table 6-3) only included chicken for "human consumption" and did not include costs for the non-broiler products, such as blood feathers, organs, and other viscera.[138] It is telling that China, later in its response submission, recognizes that this claim is factually erroneous, asserting that "Tyson's normal books and records demonstrated that the little cost was assigned to feathers and blood because the sales revenues of these items were very low."[139] The United States does not dispute that the revenues of these chicken by-products were lower, but to the point, China's assertion reflects its implicit recognition that Tyson's books and records included costs for blood and feathers, along with organs and other viscera. Thus, MOFCOM's assertion that it "did not 'omit' any products" is factually erroneous and should be rejected by the Panel.[140] Rather, MOFCOM omitted these products from its calculations – despite having the data from Tyson.

106. The United States further stresses that, as the Panel itself recognized, the data submitted by Tyson in cost table 6-3 was not provided to the Panel.[141] Thus, the only information the Panel could look to in evaluating MOFCOM's cost allocation was the summary table provided by China, Exhibit CHN-64. That exhibit listed per-product production quantities and costs for various broiler products, but notably did not list what China frames as the "non-subject" products – blood, feathers, organs, and other viscera.[142] Accordingly, the Panel noted that because "[o]n its face, Exhibit CHN-64 does not indicate that the per pound costs assigned to each product

[137] China, FWS, para. 175.

[138] China, FWS, para. 172.

[139] China, FWS, para. 188.

[140] China, FWS, para. 181.

[141] *See China – Broiler Products*, para. 6.62.

[142] *China – Broiler Products*, para. 7.197.

were derived from total cost minus the costs associated with the production of the products derived from a chicken that are not on the list[,]" the United States established "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 (e.g. those in the summary table in Exhibit CHN-64) . . . inconsistent[] with the second sentence of Article 2.2.1.1."[143]

107. Nonetheless, even focusing solely on the content of that exhibit, China now disputes this Panel finding and alleges that there was no ambiguity that the total meat costs provided in MOFCOM's summary table only included broiler products, and excluded by-products.[144] This claim is disingenuous. The Panel correctly highlighted that the weighted-average prices included in the summary table (as calculated by MOFCOM) did not indicate that they were derived only from broiler products. Likewise, U.S. respondents such as Tyson never agreed that the costs included that exhibit excluded by-products. Specifically, in accordance with China's instructions in the original investigation, Tyson reported meat and other production costs in the way in which the costs were recorded in its accounting system in the ordinary course of business. That is, Tyson reported the meat costs of broiler products using a value-based allocation. However, Tyson also reported the meat costs of individual products within the category of broiler products using the same valued-based allocation. Tyson never agreed that it was appropriate to "cherry pick" one allocation for purposes of distinguishing the total meat costs of the categories of broiler products and by-products, and a completely separate one for purposes of allocating the total meat costs of broiler products to specific subject products.

108. Thus, the Panel properly interpreted the exhibit provided by China as reflecting an improper allocation of costs under AD Agreement Article 2.2.1.1. China's arbitrary distinction among which products to include in its price allocation also does not change the fact that its failure to allocate costs across all products distorts its weight-based methodology and is inconsistent with AD Agreement Article 2.2.1.1.

109. China places great emphasis on the first sentence of AD Agreement Article 2.2.1.1, which provides that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, proved that the records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration."[145] China misreads this provision as supporting its decision not to allocate costs across all products – when it does nothing of the sort. The product under consideration is not just "broiler products," considering that the scope of MOFCOM's redetermination included both broiler products and by

[143] *China – Broiler Products*, para. 7.197.

[144] China, FWS, paras. 174, 175.

[145] China, FWS, para. 182.

products. The United States, once again, takes issue with China's framing of the "product under consideration."

110. China additionally replies in support of various factors that it claims justified its rejection of Tyson's cost allocation.[146] We highlighted the deficiencies in these arguments in our First Written Submission, and for the reasons explained below, they remain deficient.[147]

111. First, China claims that it was justified in not allocating total meat costs to all products (both subject and non-subject products) using a consistent weight-based allocation because the calculation provided by Tyson "ignores the losses of dead birds incurred when delivering to the processing plants and certain birds otherwise unfit for the production of the product under consideration."[148] This argument is erroneous because it does not speak to the point at hand, *i.e.*, that costs must be allocated across all products that are produced. Moreover, Tyson, in advocating its allocation methodology, demonstrated that all such costs were included. Tyson responded to these assertions in its Disclosure Comments:

> MOFCOM claims that Tyson's alternative weight-based allocation does not account for certain loss (weight loss in transit to the plant, weight loss after delivery, and loss for birds that are condemned) and did not include freight for delivery of the birds to the processing plants. Those claims are inaccurate. Tyson divided the fully absorbed, cost of raising those birds by the total weight of the birds delivered to the plants. As demonstrated on page 2 and 3 of Exhibit 2 to Tyson's April 9, 2010 Cost Submission, the actual meat cost of $[[****]] for deliveries to the Clarksville Plant on the week of June 20, 2009, includes cost for birds that were **(1) dead on arrival to the plant or "DOA," (2) condemned at the farm or "FARM CONDEMN", and (3) condemned by USDA at the plant or "USDA CONDEMN"**.
>
> **Moreover, the delivered cost of the live birds includes freight. Therefore, Tyson's alternative weight-based calculation accounts for the total costs of raising live birds and delivering them to the processing plants. The costs of any birds that are not processed because they die at the farm or are condemned at the plant are included in the total Tyson used to calculate its alternative weight-based allocation. Emphasis added.**[149]

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[146] *See* China, FWS, paras. 184-190.

[147] *See* United States, FWS, paras. 95-99.

[148] China, FWS, para. 184.

[149] *See* Tyson Disclosure Comments at 4 (Exhibit USA-6).

112. Second, China reiterates its claim that Tyson's submitted costs "only included costs for the production of the product under consideration."[150] This argument is meritless for all of the reasons previously explained, and the United States will not repeat them here. China continues to tether itself to the view 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."[151] China's argument is flatly inconsistent with the data submitted by Tyson and Tyson's explicit argument, in advocating for its allocation methodology, that costs should reflect all products.[152] The Panel flatly rejected that argument after examining China's evidence, and China's continued insistence on this point only reinforces that its actions are inconsistent with AD Agreement Article 2.2.1.1.[153]

113. Third, China reiterates its position that a value-based cost allocation was not reasonable.[154] The United States disagrees with this conclusion as a factual matter for all of the reasons explained in our submissions before this Panel during the original proceedings. China does not explain why a value-based methodology is not reasonable in the context of this investigation, particularly when all of the record evidence showed that the poultry industry within China and United States use value-based cost allocations for proper accounting purposes. Regardless, this argument in no way supports China's position that, under the weight-based allocation methodology it chose, it was proper for MOFCOM to only allocate costs over a limited group of products, rather than all products deriving from chicken. China's application of the weight-based methodology remains skewed and distortive until China fully accounts for all costs.

114. Fourth, China again asserts that Tyson's "submitted costs for live chickens include[e] the cost of producing other products not under consideration[,]" yet claims that this fact is not at odds with its position that Tyson's costs are limited to broiler products.[155] The United States does not agree, for the reasons noted in its First Written Submission.[156] If anything, China's argument only highlights why a weight-based cost allocation must reflect all products.

115. For all of the reasons noted above, China, in failing to allocate costs by weight to all products in light of the evidence submitted by interested parties such as Tyson, acted inconsistent

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150 *See* China, FWS, para. 186.

151 *China – Broiler Products*, para. 7.1850.

152 United States, FWS, para. 96.

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

154 *See* China, FWS, para. 188.

155 China, FWS, para. 189.

156 *See* United States, FWS, para. 99

with the obligation to "consider all available evidence on the proper allocation of costs" under AD Agreement Article 2.2.1.1.

B. MOFCOM's Failure to Consider Any Alternative Allocation Methodologies for Pilgrim's Pride was Inconsistent with AD Agreement Article 2.2.1.1

116. As explained in the First Written Submission, the United States established that China once again failed to give any consideration of the "proper" allocation of costs with respect to Pilgrim's Pride. The Panel did not find a breach of the first sentence of Article. 2.2.1.1 with respect to Pilgrim's Pride, but it did find that China breached the second sentence of AD Agreement Article. 2.2.1.1, for all of the reasons noted above. China had an obligation to address that deficiency in its redetermination, and its failure to do so is inconsistent with China's WTO obligations.

117. China responds that it implemented the Panel's findings consistent with its WTO obligation, asserting that the Panel, in paragraph 7.198 of its decision, did not find a violation of the second sentence of AD Agreement Article. 2.2.1.1 as to Pilgrim's Pride.[157] China asserts that the lack of such a finding, coupled with its claim that the Pilgrim's Pride data was flawed, render China's decision not to evaluate Pilgrim's alternative cost methodology to be WTO-consistent, and that it would be unfair for China to second-guess this decision.[158]

118. These arguments are meritless. Paragraph 7.198 of the Panel's decision makes two findings that apply generally to all respondents in the reinvestigation – including Pilgrim's Pride. Notably, the Panel concluded that "there was insufficient evidence of its consideration of the alternative allocation methodologies presented by the respondents[,]" and separately that China "improperly allocated all processing costs to all products."[159] By contrast, the third finding made by Panel was specific to Tyson, finding that China improperly "allocated Tyson's costs to produce non-exported products to the normal value of the products for which MOFCOM was calculating a dumping margin."[160] China's suggestion that the general findings were exclusive of Pilgrim's Pride is not supported by the plain text of the Panel's decision – nor the intent expressed in the preceding paragraphs.

119. Moreover, China's suggestion that it did not need to consider Pilgrim's data at all because it believed the data to be flawed is flatly inconsistent with this Panel's finding that China failed to explain why its methodology led to a "proper" allocation of costs. The only way that China could have engaged in a neutral, fact-driven consideration of the "proper" allocation of

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[157] *See* China, FWS, paras. 136-142.

[158] *See* China, FWS, paras. 140-142.

[159] *China – Broiler Products*, para. 7.198.

[160] *China – Broiler Products*, para. 7.198.

costs, as required under the second sentence of AD Agreement Article 2.2.1.1, is if it had considered data submitted by Pilgrim's Pride – whether flawed or not. Further, the United States agrees with the European Union that even assuming for the sake of argument that the Panel's findings did not extend to Pilgrim's Pride – which the United States disputes for the reasons explained above – this Panel was still obligated to address those claims because the measures were within the scope of the Panel's compliance proceedings.[161]

120. For these reasons, the Panel should find that China's failure to consider alternative allocation methodologies with respect to Pilgrim's Pride was inconsistent with the second sentence of AD Agreement Article. 2.2.1.1.

C. China Acted Inconsistently with Article 9.4 of the AD Agreement on Account of MOFCOM's "All Others" Rate

121. The United States' First Written Submission established that MOFCOM's application of an "all others" rate at 73.8 percent, which represents the antidumping duty rate assigned to Pilgrim's Pride during the reinvestigation, is inconsistent with Article 9.4 of the AD Agreement.[162] China's assertions to the contrary lack merit.

122. Recall that Article 9.4 provides as follows:

> 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 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. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided

[161] European Union, Third-Party Submission, para. 34.

[162] *See* United States, FWS, para. 99.

> the necessary information during the course of the investigation, as provided for in subparagraph 10.2 or Article 6.

The principle dispute between the parties concerns the scope of the article, and what is meant by "exporters or producers not included in the examination." China asserts that "Article 9.4 only applies to companies not asked to cooperate in the investigation[,]" and that the Article does not apply to "[p]arties who are requested to identify themselves for purposes of this selection" yet fail to respond to that request.[163]

123. China's argument is inconsistent with the plain language of Article 9.4, 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." As noted by the Appellate Body noted in *US – Hot-Rolled Steel*:

> Article 9.4 does not prescribe any method that WTO Members must use to establish the 'all others' rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling which investigating authorities *'shall not exceed'* in establishing an 'all others' rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who *were* investigated. However, the clause beginning with 'provided that', which follows this sub-paragraph, qualifies this general rule.[164]

Thus, under Article 9.4, an authority's discretion to set the "all others" rate is "not unlimited[,]" but, rather, is subject to the ceiling of the weighted average margin, which in turn is subject to "two prohibitions: (i) The first prevents investigating authorities from calculating the 'all others' ceiling using zero or *de minimis* margins; and (ii) the second precludes investigating authorities from calculating that ceiling using 'margins established under the circumstances referred to' in Article 6.8."[165]

124. China ignored its obligation under the general rule of Article 9.4 to calculate an all-others rate that "shall not exceed . . . the weighted average margin of dumping established with respect to the selected exporters or producers" and, instead, arbitrarily applied the highest antidumping duty rate found, as a result of the reinvestigation of Pilgrim Pride's rate.[166] The panel in *US –*

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[163] China, FWS, para. 244.

[164] *US – Hot-Rolled Steel (AB)*, para. 116.

[165] *US – Hot-Rolled Steel (AB)*, para. 116. Additionally, in some cases, investigating authorities may not use zeroing in calculating an all-others rate. *US – Shrimp (Viet Nam)*, paras. 7.215-7.217, 7.226-7.227.

[166] Moreover, MOFCOM provided no reasoning justifying why Pilgrim's Rate – the highest rate and one where MOFCOM acknowledged that it did not take any action to ensure the allocation was proper

Shrimp II (Viet Nam) recognized that when the "all others" rate "exceeds by far the highest of the individual margins determined for mandatory respondents, it follows that it necessarily exceeds a weighted average of those rates, and thus the ceiling calculated pursuant to 9.4."[167] The circumstances here are no different, as China arbitrarily used as the "all others" rate the highest of the individual margins determined for mandatory respondents – an antidumping rate determined through MOFCOM's use of facts available under AD Agreement Article 6.8.

125. China claims that Article 9.4 does not apply to companies that did not register pursuant to Notice 88 and did not participate in the reinvestigation, and that MOFCOM was accordingly justified in applying the highest antidumping duty rate to them.[168] This distinction made by MOFCOM is inconsistent with the plain text of Article 9.4, which states that the "all others" rate applied to "exporters or producers not included in the examination." The margin applied to such exporters or producers shall not exceed the weighted average margin of dumping. Here, MOFCOM's investigation was limited to three companies: Tyson, Pilgrim's Pride, and Keystone. As noted by China, the Appellate Body in *US – Hot-Rolled Steel* explained that "Article 9.4 seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."[169] In the present circumstances, there were no new respondents that MOFCOM could potentially add to the investigation – nor were there any respondents who failed to cooperate.[170] Thus, the exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4.[171]

126. Contrary to China's assertion, Notice 88 cannot be construed as justifying a decision by MOFCOM to apply an antidumping rate far in excess of the all-others ceiling to exporters that

because it applied facts available – was selected in setting this rate. In the absence of any justification, the rate appears to be nothing other than punitive in nature.

[167] *US – Shrimp II (Viet Nam)*, para. 7.222

[168] China, FWS, para. 247.

[169] China, FWS, para. 243 (citing *US – Hot-Rolled Steel (AB)*, para. 123).

[170] *See EC – Salmon (Norway)*, paras. 4.429-4.433.

[171] To the extent the panel's reasoning in *EC – Salmon (Norway)* suggests otherwise, the United States requests the Panel reject is. Such logic would create an artificial distinction between exporters or producers that register with an investigating authority and who are not examined – and exporter or producers that are not simply examined. The key point, consistent with the text of Article 9.4, is that applies to producers not subject to the examination period. The United States agrees the situation would be different if a particular party was solicited information but declined to do so.

groups of exporters that did not participate in the investigation. MOFCOM's application of this rate was inconsistent with AD Agreement Article 9.4.

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

127. China's use of facts available instead of the Tyson's reported costs is inconsistent with Article 6.8 and Annex II of the AD Agreement. Contrary to China's suggestions, Tyson did not refuse access to, fail to provide, or other otherwise impede MOFCOM's ability to obtain requested information – such that MOFCOM could justify the application of facts available under Article 6.8. China's arguments to the contrary lack merit.

128. 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."[172] 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.

129. As to the legal standard, China interprets paragraph 5 of Annex II to mean that "although information may not always be 'ideal', the authority need not accept information that 'may not be ideal in all respects' unless the party submitting that information has been acting 'to the best of its ability.'"[173] China misconstrues that this provision, as recognized by the Appellate Body, "prevents an investigating authority from rejecting the information supplied by a respondent, even if incomplete, where the respondent 'acted to the best of its ability.'"[174] The language in

[172] *U.S. – Steel Plate (India)* (DS206), para. 7.53.

[173] China, FWS, para. 196 (emphasis omitted).

[174] *Mexico – Anti-Dumping Measures on Rice*, para. 287; *see also US – Hot-Rolled Steel*, para. 100 ("[P]aragraph 5 of Annex II prohibits investigating authorities from discarding information that is 'not ideal in all respects' if the interested party that supplied the information has, nevertheless, acted 'to the best of its ability.'").

the provision stipulates that investigating authorities should not disregard information submitted by interested parties unless there is evidence that the party failed to act to the best of its ability.

130. China claims its decision to apply facts available to Tyson was justified because Tyson failed to cooperate to the best of its ability. China cites discrepancies between Tyson's statements in the original proceedings and the redetermination; that Tyson did not provide MOFCOM with the information it sought in the reinvestigation; and that it misled MOFCOM by failing to explain that its total meat cost, in the data submitted during the original investigation, covered some processing costs.[175] These arguments are meritless and premised on misstatements regarding the factual record, for all of the reasons explained below.

131. First, China's claims that Tyson made unexplained changes in its data during the redetermination proceedings are baseless.[176] Rather, all changes made by Tyson during the reinvestigation were made at the specific request of MOFCOM and because MOFCOM altered its approach compared with the original investigation. As explained in the United States' First Written Submission, during the reinvestigation, MOFCOM directed 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 Tyson broke out by each production step as MOFCOM had requested.[177]

132. Yet MOFCOM made these requests despite Tyson's submissions on the record, both during the original proceedings and the reinvestigation, that "over the POI Tyson transitioned from a fully-absorbed cost system to a standard cost system."[178] Tyson did not, in its standard business and accounting practice in its ordinary course of business, record the actual costs incurred according to MOFCOM's parameters. Rather, over the period of investigation, Tyson only recorded as part of its accounting practice 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.[179] Considering that this data represents the only contemporaneous data maintained by Tyson as part of its standard business and accounting practice, Tyson could only use this data to create a methodology that would satisfy MOFCOM's request for information during the reinvestigation.[180] Tyson developed this methodology by using the standard costs kept in its books and records during the latter part of the period of investigation to create

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[175] China, FWS, paras. 204-209.

[176] China, FWS, paras. 205, 206.

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

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

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

[180] United States, FWS, para. 111.

allocation percentages "to determine the allocation percentages for pure meat costs and processing costs by each production step[,]" which Tyson then applied to the aggregate actual cost to generate the specific costs MOFCOM requested.[181]

133. China's claim that it was unaware of the way in which Tyson had reported costs in the original investigation is false, and belied by the MOFCOM's verification findings and by its claim that Tyson has a "sophisticated accounting system," a system which China fully understood.[182] Further, these facts, contrary to China's assertion, indicate the consistency between Tyson's representations in the original proceedings and the redetermination proceedings.[183]

134. China misconstrues Tyson's questionnaire responses in arguing otherwise. During the original investigation, Tyson reported sales and cost data by "part." There were eight such parts (i.e., wing tips, 1st joint/2nd joint wings, paws, back-out thighs, leg quarters, drumsticks, gizzards, and skin). Each part covered numerous "product-brand codes." In the response in the original questionnaire, Tyson reported sales and costs for the parts that were exported to China. In response to the second supplemental questionnaire in the original investigation, Tyson expanded the reported data to cover all 50 parts produced during the period of investigation ("POI").[184]

135. Tyson did not state otherwise during the reinvestigation. Rather, China changed course and requested that Tyson report sales and cost data based at the product-brand code level, rather than at the part level. This reversal by China reflected its apparent desire to obtain different information, yet China's submission fails to recognize Tyson's inability to comply with this unreasonable request – in light of how Tyson maintained the data in its books and records, of which China was aware. Moreover, there were over 1,000 product-brand codes that corresponded to the 50 parts reported in the original investigation. Considering the fact that Tyson did not maintain data corresponding to these specific brand codes in its books and records during the period of investigation, China's about face on the information it was requesting created unrealistic expectations as to the information it expected Tyson to provide. Moreover, none of these requests from MOFCOM were aimed at addressing the Panel's findings. [185]

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[181] Tyson's Disclosure Comments at 6 (Exhibit USA-6); *see also* Letter on Third Supplemental Questionnaire for Dumping Part of Reinvestigation (March 18, 2014), Response to Question 3 (Exhibit USA-13); Tyson Second Supplemental Response, Exhibit SS-1 (Exhibit USA-14).

[182] *See* China, FWS, para. 19.

[183] China, FWS, para. 204.

[184] *See* Exhibit CHN-16; *see also* Exhibits USA-14, USA-15, USA-17.

[185] *See* Exhibit USA-27, Question 13; *see also* Exhibit USA-16, Question 7.

136. China maintains that Tyson misled MOFCOM regarding the inclusion of processing costs in its total meat cost data provided during the original investigation.[186] This argument is factually incorrect. As noted above and in the United States' first written submission, during the original investigation, Tyson reported its costs as kept in the ordinary course of business. Tyson, typical of any business that produces a product using multiple stages of production and cost centers, included the costs incurred at particular production stages and costs centers as the cost of the item in inventory. Likewise, the "processing costs" reported for a finished product were those incurred at the final cost center involved in production of the product. For instance, the cost of a carcass or other intermediate product in inventory was the direct material cost of the live chicken plus the processing costs to produce the carcass. Likewise, the cost of a chicken breast was the cost of the carcass (direct materials plus processing costs) plus the processing costs to convert a carcass into pieces of chicken. Notably, as Tyson indicated in its Supplemental Questionnaire Responses submitted to MOFCOM, meat costs at the final cost center (i.e., the value of the work-in-process) contained both the meat (direct material) costs as well as all processing costs incurred at previous cost centers (e.g., evisceration and cutout).[187]

137. Moreover, Tyson expressly explained in its original AD response that its cost accounting system was a "Cascading cost system where actual costs are carried forward at every stage including feed mill, hatchery, grow-out, and processing plant."[188] Thus, MOFCOM understood Tyson's cost accounting system during the original investigation – or it never gave any indication during the original investigation, through clarification requests or other methods, that it had concerns.[189] Further, it bears noting that the issue now raised by MOFCOM regarding the relationship between "pure" meat costs and processing costs had no impact on the calculations during the original investigation, where MOFCOM took the entire cost of production for each product and compared to U.S. sale prices, in constructing normal value.

138. Additionally, this process was subject to verification by MOFCOM in the original investigation.[190] During the verification, MOFCOM thoroughly reviewed Tyson's cost accounting system, including the way in which the costs of production reported in the responses could be tied to the product-specific costs kept in the ordinary course of business. In reviewing that information, MOFCOM necessarily reviewed documents showing how costs passed from

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[186] *See* China, FWS, para. 205.

[187] *See* Exhibit USA-25, Question 17; *see also* Exhibit USA-16, Question 1.

[188] *See* Exhibit USA-27, Section VI, Question 11.

[189] Tyson explained how it reported costs to MOFCOM per its request in the First Supplemental Questionnaire Response. *See* Exhibit USA-25, Questions 2, 17. Notably, MOFCOM's lengthy first question in the Second Supplemental Response implies that MOFCOM understood Tyson's 'cascading cost system,' yet sought to shift the blame Tyson for relying on such a cost system, as part of its normal accounting practice. *See* Exhibit USA-26, Question 1.

[190] Tyson's Disclosure Comments at 6 (Exhibit USA-6).

each cost center to the next and, in the process, that all costs incurred at one cost center (material costs and processing costs) were rolled-up into the meat cost at the next cost center. It would have been impossible to perform this sort of verification exercise without observing the "cascading" of the costs from one cost center to the next.

139. Despite this understanding, MOFCOM during the reinvestigation instructed Tyson to change its methodology by separately reporting meat costs and processing costs at each cost center. This was a second, major methodological change introduced during the reinvestigation, which was complicated by the fact that – as MOFCOM was aware – Tyson did not record actual processing costs at each cost center in all plants by product-brand code during the period of investigation.

140. Nonetheless, Tyson, in an effort to cooperate with MOFCOM to the best of its ability, used standard costs – which track meat and processing costs by cost center – to disaggregate the total actual production costs it incurred into the actual meat and actual processing costs for each product at each cost center, by using estimates. However, the only standard costs that could be used for this purpose were those available at the time the responses were prepared during the reinvestigation. Standard costs were not available for the full 12 months of the POI because costs from early in the period of investigation had been purged from Tyson's systems in the ordinary course of business (after 118 weeks). Moreover, the standard costs could only be used to break down the total actual costs for each product-brand code into the meat and processing costs at each cost center. Nonetheless, 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.[191] As the United States noted in its opening submission, Tyson took the only reasonable approach that it could and was forthcoming with MOFCOM on why and how it was proceeding in this manner.[192] In doing so, it cooperated with MOFCOM's requests to the best of its ability.

141. Moreover, contrary to China's assertions, the total production costs reported for each product in the reinvestigation were the same as those reported during the original investigation and verified by MOFCOM.[193] Tyson did not change the data maintained in its books and

[191] For this reason, China's reliance on *Egypt – Steel Rebar* is misplaced. *See* China, FWS, para. 199. As China acknowledges, the facts in that dispute involved the *refusal* of three Turkish companies to provide information requested by the investigating authority, as the companies did not argue that it would be impossible or cause severe hardship for them to provide the requested information. *See Egypt – Steel Rebar*, paras. 7.244-7.245. Tyson, by contrast, could not supply the requested information, but rather had to use the data at its disposal to create a methodology, to satisfy MOFCOM's request to the fullest extent possible given the data constraints.

[192] *See* United States, FWS, para. 111.

[193] *See* Exhibit USA-16, Question 8; *see also* Exhibit USA-13, dated March 21, 2014, Questions 1-3.

records.[194] Had MOFCOM not changed its request for reporting product-specific cost data in the reinvestigation, Tyson would have reported the same product-specific cost data that was verified by MOFCOM. China seems to acknowledge that the reported costs match, and instead maintains that Tyson misled by not disclosing this information until the redetermination proceedings.[195] This argument is meritless considering that Tyson created this methodology in response to MOFCOM's about face change during the redetermination as to the information it was requesting from Tyson. Tyson promptly responded to the fullest extent that it could, given the practical constraints on the data it could rely upon.

142. Further, China's repeated assertions that Tyson failed to provide the "pure meat cost" distinct from processing costs is erroneous and rebutted by the record.[196] Tyson indeed provided this information. Tyson disaggregated the total actual production costs reported in the original investigation into "pure meat costs" and "pure processing costs" by cost center. Because Tyson did not record actual meat and processing costs by cost center in the ordinary course of business, Tyson disaggregated the total actual production costs using the standard costs in effect during the first half of 2009. As explained above, there was no other way to satisfy MOFCOM's request using the information available. Tyson was forced to abandon the product specific costs that it kept in the ordinary course of business (as reported in the original investigation) and devise a method to allocate "pure" meat costs and processing costs to specific products. Moreover, Tyson explained repeatedly and in great detail how the calculations were made and why the reported costs were in fact "pure meat costs" and "pure processing costs."[197]

143. Finally, China claims that discrepancies in data listed in tables provided in its response submission indicate inconsistent costs reported by Tyson between the original investigation and the reinvestigation.[198] This argument fails because the reported costs were revised during the

[194] The United States refers the Panel to paragraph 120 of its First Written Submission, where the United States showed that the total reported costs 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." Tyson's Disclosure Comments at 6 (Exhibit USA-6).

[195] China, FWS, paras. 226, 227.

[196] China, FWS, para. 207.

[197] *See* Exhibit USA-13, dated March 21, 2014, Questions 1-7.

[198] *See* China, FWS, paras. 217-226. The United States notes that although China claims, as an example, that "the quantity for one model increased by 50 percent and its associated cost decreased by 7 percent[,]" it provides no citation, let alone explains the context for what it refers to. Regardless, the veracity of such a claim is undermined by the comparison between China's Exhibit CHN-15 and the

response phase of the investigation, as corrections were made to the reporting methodology, and Tyson made the revisions in accordance with MOFCOM's requests. The fact that the costs of materials and the processing costs changed in relation to one another was to be expected as the unavoidable consequence of the revisions that Tyson made to accommodate MOFCOM's request for new information during the reinvestigation. Further, the fact that the cost of products changed in relation to one another was the consequence of using standard costs to allocate the total actual costs to specific products, rather than the actual costs recorded in the ordinary course of business.

144. Many of the changes highlighted in these tables in MOFCOM's submission occurred during the *original* investigation, when the sales and costs databases were expanded to include both identical products to those exported to China (as in the original response) and similar products to those exported (not originally included due to database size). This was coupled with minor corrections made at the outset of verification. That MOFCOM understood and was untroubled by these revisions during verification was clear from the verification report. MOFCOM's attempt to use revisions made during the original investigation as a basis for rejecting data reported during the reinvestigation should accordingly be rejected. Tyson's second supplemental questionnaire response during the *reinvestigation* explained and documented the quantity differences among the responses and compared them to the data verified by MOFCOM.[199]

145. For all of these reasons, China is incorrect in asserting that Tyson failed to cooperate to the best of its ability. China's argument rests on its belief that it can make an unreasonable and unrealistic demand for data in a reinvestigation that is fundamentally at odds with its requests during the original investigation, and that the investigating authority knows will be impossible for a respondent to provide in light of its standard accounting and business practice. China's belief that the failure to meet these demands indicates that the party did not cooperate to the best of its ability is incorrect. To the contrary, Tyson made every effort that it could to comply with MOFCOM's requests for information, and cooperated to the best of its ability. 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.

IV. MOFCOM'S INJURY REDETERMINATION BREACHED THE AD AND SCM AGREEMENTS

146. MOFCOM's injury findings remain flawed in the redetermination. As China's rebuttal demonstrates, MOFCOM declined to address the arguments raised by the United States in the original proceeding – and thus MOFCOM's findings remain flawed for many of the same

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United States Exhibits USA-14 and USA-15, which indicate minimal changes and discrepancies in total quantities.

[199] *See* Exhibit USA-26, Questions 5, 8, 11; *see also* Exhibits USA-14, USA-15, USA-17 (two exhibits and a letter accompanying Tyson's responses to Second Supplemental Questionnaire).

reasons the United States originally raised. As demonstrated below, MOFCOM's findings with respect to price effects, the impact of subject imports, and causal link are inconsistent with China's WTO obligations.

A. MOFCOM's Analysis of Underselling and Price Suppression Remains Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

147. In its First Written Submission, the United States demonstrated that MOFCOM's new analysis of product-specific pricing data collected from a subset of the domestic industry failed to remedy the deficiencies in its original price analysis that the Panel identified.[200] The Panel found that MOFCOM's original analysis of underselling and price suppression was WTO-inconsistent because it relied on a comparison of subject import and domestic like product average unit values "without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments," given evidence that differences in the average unit values of subject imports and domestic industry sales reflected substantial differences in product mix rather than underselling.[201] Of particular note, there is nothing in MOFCOM's redetermination that establishes MOFCOM actually controlled "for differences in physical characteristics affecting price comparability" – a deficiency the Panel found in its report with respect to the original determination.[202] As the United States explained, MOFCOM's redetermination failed to remedy these deficiencies by continuing to rely on average unit value (AUV) comparisons without ensuring price comparability and by ignoring record evidence showing that subject imports did not suppress domestic like product prices.[203]

148. In its redetermination, MOFCOM apparently sought and collected product-specific pricing data from only four of 17 domestic producers that in its view justified its original average unit value comparisons, without ensuring that its sample of domestic industry sales prices was representative.[204] MOFCOM's redetermination fails to explain why MOFCOM chose these four producers, how it ensured their data was reliable, and how it could ensure that this limited data could be extrapolated to support MOFCOM's findings. In response, China does not dispute that these data were insufficiently representative of domestic industry pricing to yield probative price comparisons, yet claims that the data were somehow good enough to justify MOFCOM's

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[200] United States, FWS, paras. 133-59.

[201] *See China – Broiler Products*, paras. 7.493-94, 511.

[202] *China – Broiler Products*, para. 7.494.

[203] United States, FWS, paras. 133-59.

[204] United States, FWS, paras. 136-49.

original AUV comparisons.[205] Neither this argument, nor China's defense of MOFCOM's analysis of price suppression, withstands scrutiny.

1. MOFCOM's Underselling Analysis Remains WTO-Inconsistent

149. At the outset, the United States emphasizes that MOFCOM took no action that complied with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to otherwise "mak[e] necessary adjustments" to ensure that its underselling analysis was based upon reliable price comparisons.[206] In its redetermination, MOFCOM expressly recognized that the product mix of subject imports differed from that of domestic industry sales. In particular, MOFCOM found that 80 percent of subject import volume consisted of chicken feet, chicken cuts with bone, chicken wing, and chicken gizzard, whereas domestic industry sales consisted of a "different product mix."[207] Nevertheless, MOFCOM based its finding that subject import underselling was significant on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient.[208] China readily acknowledges that MOFCOM's AUV comparisons remain the sole basis for its finding that subject imports undersold the domestic like product significantly, and that MOFCOM took no steps to adjust these data or otherwise control for differences in product mix in its redetermination.[209]

150. Consequently, as in the original determinations, MOFCOM's comparisons of the average unit values of subject imports and domestic industry sales in the redetermination were influenced by differences in product mix between subject imports and domestic industry sales, and also by changes in product mix over the course of the period of investigation. In this regard, the record showed that the product mix of subject imports was far from constant during the period of investigation, changing from year to year. MOFCOM found that chilled chicken cuts accounted for 40 to 47 percent of subject imports and chicken feet accounted for 29 to 39 percent of subject imports, depending on the year. [210] Because the average unit value of subject imports differed dramatically by product, changes in the product mix of subject imports during the period of investigation would have directly influenced the average unit value of all subject imports during the period; for example, an increase in the proportion of lower-priced products from one year to

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[205] *See* China, FWS, paras. 258, 262, 283-84, 291-99.

[206] *China – Broiler Products*, para. 7.494.

[207] Redetermination at Section VII(ii)(2) (Exhibit USA-9).

[208] Redetermination at Section VI(ii)(3) (Exhibit USA-9).

[209] China, FWS, paras. 274-82.

[210] Redetermination at Section VII(ii)(2) (Exhibit USA-9).

the next would have caused the average unit value of all subject imports to decline.[211] By failing to control for changes in the product mix of subject imports, MOFCOM's underselling analysis relied on subject import underselling margins that reflected not only differences in product mix between subject imports and domestic industry sales but also changes in the product mix of subject imports over time. Indeed, in finding subject import underselling significant, MOFCOM expressly relied on the purported margin of underselling – that is the "differences of average prices" – in each year of the period of investigation.[212] China emphasizes that MOFCOM's underselling analysis relied on "the overall margin of price undercutting" and the trend in that margin during the period of investigation.[213] Yet, both the magnitude and the trend in these underselling margins would have reflected differences in product mix as between subject imports and domestic industry sales and changes in the product mix of subject imports over time, rather than apples-to-apples price comparisons. By relying on AUV comparisons without controlling for product mix, MOFCOM failed to base its underselling analysis on "an objective examination" of "positive evidence," in violation of AD Agreement Article 3.1 and SCM Agreement Article 15.1. MOFCOM also failed to establish that there was significant subject import price undercutting in a manner that was consistent with AD Agreement Article 3.2 and SCM Agreement Article 15.2.

151. China argues that MOFCOM was justified in relying on its original average unit value comparisons because the product-specific pricing data it collected from four of the 17 domestic producers comprising the domestic industry suggested that the product mix of subject imports contained a higher proportion of high-value products than the product mix of domestic producers.[214] But MOFCOM's AUV comparisons cannot be deemed objective or reliable. Specifically, both the magnitude and the trend of subject import underselling margins calculated from AUV comparisons would have reflected differences in product mix and changes in the product mix of subject imports over time.[215] In other words, MOFCOM cannot proceed to

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[211] During the original panel proceeding, China presented CIF import price data showing that the average unit values for the five types of chicken parts imported from the United States ranged from $612 to $899 per metric ton in 2006, from $963 to $1,413 per metric ton in 2007, and from $1,161 to $1,742 per metric ton in 2008. China's FWS, para. 329.

[212] Redetermination at Section VI(II)(3) ("Sales price of the subject goods in 2006, 2007, 2008 and the first half of 2009 is 569.541/tons, 54.64/tons, 515.57/ton, and 232.79 tons lower than that of the domestic like products respectively. Based on the facts, the investigating authority considers that the above differences of average prices can prove the subject merchandise caused price undercutting effect on the domestic like products." (Exhibit USA-9)

[213] China, FWS, para. 319.

[214] *See* China, FWS, paras. 267-74.

[215] *See China – X-Ray Equipment*, at para. 7.50 ("It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports 'through the effects of dumping, as set forth in paragraphs 2 and 4' are causing injury to the domestic industry, that it is

compare and draw conclusions because no controls had been applied to ensure the underlying data – which by nature was in flux – was in fact comparable.

152. Furthermore, MOFCOM's analysis of product-specific pricing data did not establish that subject imports were comprised of a higher proportion of high-value products because MOFCOM failed to ensure that its sample of domestic producer and their sales prices on specific products was representative. MOFCOM based this finding on product-specific pricing data collected from only four of the 17 domestic producers comprising the domestic industry. Although the AD Agreement and the SCM Agreement "does not prevent an authority from using samples to determine injury," the Appellate Body has explained, "a sample must be properly representative of the domestic industry."[216]

153. As the United States demonstrated in its first written submission, MOFCOM failed to ensure that its sample of product-specific sales prices was sufficiently representative of domestic industry sales prices, explain why sampling was necessary, or explain its methodology for selecting the four domestic producers invited to report pricing data.[217] Having failed to ensure that its sample of selected domestic producers and sales prices was sufficiently representative, MOFCOM's reliance on these data for purposes of its underselling analysis breached AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

154. In response, China does not claim that MOFCOM's sample of domestic industry pricing was properly representative of domestic industry pricing.[218] On the contrary, China concedes that these data were insufficiently representative to permit MOFCOM to base its underselling finding on product-specific price comparisons, although it opines that the data somehow show

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necessary to ensure the prices that are the subject of an undercutting analysis are comparable. If two products being analyzed in an undercutting analysis are not comparable, for example in the sense that they do not compete with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question.")

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

[217] United States, FWS, Section VIII.A.

[218] China claims that MOFCOM selected the four domestic producers invited to report product-specific pricing data because they were among the seven domestic producers for which it had already conducted verifications, although this explanation is found nowhere in the redetermination itself. See China, FWS, para. 269, 294-95. China also claims that "[t]here simply was neither time nor investigative resources to conduct verifications at all 17 domestic firms," *id.* at para. 295, but does not explain why formal verification was necessary to collect pricing data from all 17 domestic producers. Indeed, MOFCOM relied on the questionnaire responses of all 17 domestic producers for purposes of its injury analysis, while fully verifying the questionnaire responses of only three domestic producers. *Id.* at 294. Given this, there is no reason that MOFCOM could not have collected pricing data from all 17 domestic producers, while verifying the pricing data reported by a subset of the industry.

that "price undercutting likely existed for all the product segments."[219] Indeed, as China states in its first written submission, "MOFCOM continued to use its original analysis based on overall AUVs for all 17 domestic firms, and not replace it with the alternative analysis based on product segment pricing for the four domestic firms."[220]

155. China's argument that the product-specific pricing data that MOFCOM collected were "sufficiently representative for the limited purposes to which it was applied," which was to justify MOFCOM's original AUV comparisons is untenable[221] As an initial matter, MOFCOM's reliance on the product-specific pricing data for this purpose contradicts China's assertion that "MOFCOM was not sampling to determine price effects."[222] Furthermore, there is no basis in the AD Agreement or the SCM Agreement for relaxing the requirement that samples "be properly representative of the domestic industry" for some purposes but not others. Because MOFCOM's used its sample of product-specific pricing data to examine the effect of subject imports on prices in the domestic market for like products, MOFCOM could not conduct an "objective examination" of "positive evidence" on this issue, as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, without ensuring that the sample was representative.[223] Having failed to do so, MOFCOM's reliance on these data to conclude that subject imports consisted primarily of high-value products was inconsistent with AD Agreement Articles 3.1 and 3.2 SCM Agreement Articles 15.1 and 15.2.

2. MOFCOM's Price Suppression Finding Remains WTO-Inconsistent

156. In its first written submission, the United States demonstrated that MOFCOM's price suppression finding remained inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2 for two reasons. First, MOFCOM predicated its finding that subject imports significantly suppressed prices for the domestic like product on its deficient underselling analysis.[224] Second, MOFCOM ignored record evidence that prices for the domestic like product were not, in fact, suppressed during the 2006-2008 period, which coincided with most of the alleged underselling, and that factors other than subject imports

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[219] China, FWS, para. 299. MOFCOM made no finding of "likely" underselling based on product-specific price comparisons, and such a finding would not comply with the requirement, under AD Agreement Article 3.2 and SCM Agreement Article 15.2, that investigating authorities "consider whether there has been significant price undercutting . . . ."

[220] China, FWS, para. 292.

[221] *See* China, FWS, paras. 291-99.

[222] China's FWS, para. 293.

[223] *EC – Fasteners (AB)*, para. 436; *see also EC – Salmon (Panel)*, para. 7.130.

[224] *See* United States, FWS, paras. 152-57.

accounted for price trends in the first half of 2009.[225] In response, China argues that MOFCOM was not required to demonstrate that subject imports caused the suppression of domestic like product prices, and that the record evidence highlighted by the United States somehow supports MOFCOM's analysis.[226] China's defense of MOFCOM's price suppression finding does not withstand scrutiny.

157. It is plain from the text of AD Agreement Article 3.2 and SCM Agreement Article 15.2 that investigating authorities are required to "consider whether . . . the effect" of subject imports is to "prevent price increases, which otherwise would have occurred, to a significant degree"; in other words, that subject imports caused significant price suppression. 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."[227] Rather, the Appellate Body emphasized, "an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices."[228] The Appellate Body's use of the words "explanatory force" instead of the word "caused" does not mean that investigating authorities may find significant price suppression by subject imports without "demonstrate[ing] that subject imports caused the price suppression," as China claims.[229] To the contrary, the Appellate Body emphasized that there must be a cause and effect relationship between subject imports and an investigating authority's findings of price depression or price suppression. As the Appellate Body explained in *China – GOES*, the obligation of investigating authorities to consider whether subject imports have "explanatory force" for price depression and suppression, under AD Agreement Article 3.2 and SCM Agreement Article 15.2, and "the state of the domestic industry," under AD Agreement Article 3.4 and SCM Agreement Article 15.4, is an integral part of an authority's consideration of causation under AD Agreement Article 3.5 and SCM Agreement Article 15.5:

> In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to

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225 *See* United States, FWS, paras. 158-59.

226 *See* China, FWS, paras. 313-28.

227 *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.").

228 *China—GOES (AB)*, para. 136.

229 China, FWS, paras. 313-16.

> answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 *contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5.[230]

Thus, MOFCOM was required under AD Agreement Article 3.2 and SCM Agreement Article 15.2 to establish that subject imports caused the significant suppression of domestic like product prices.

158. Because the principal basis for MOFCOM's finding that subject imports caused price suppression in the redetermination was its deficient underselling analysis, the Panel should find that MOFCOM's price suppression finding remains WTO-inconsistent. Indeed, China concedes that MOFCOM's "bases for price suppression between the original determination and MOFCOM's redetermination really did not change," including its reliance on subject import underselling.[231] Although China also claims that MOFCOM supported its price suppression finding with reference to subject import volume, MOFCOM did not find in its redetermination that subject import volume alone suppressed domestic like product prices to a significant degree.[232] On the contrary, MOFCOM emphasized in the section of its redetermination titled "Impact of the Import Price of the Subject Merchandise to the Price of the Domestic Like Products" that it was subject import underselling, not subject import volume, that suppressed domestic like product prices.[233] It was MOFCOM's reliance on its deficient underselling analysis in finding price suppression that led the original panel to find MOFCOM's price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement

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[230] *China—GOES (AB)*, para. 149.

[231] China, FWS, para. 310; see also id. at 303 ("MOFCOM cited repeatedly to the combined effects of underselling and increasing subject import volume in reaching its price suppression findings.").

[232] *See* China, FWS, paras. 303-10.

[233] *See* Redetermination at section VI(II)(3) ("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 merchandise has cut down the price since 2008 and results in a serious loss in the domestic like products. . . . 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.") (Exhibit USA-9).

Articles 15.1 and 15.2.[234] MOFCOM's continued reliance on its deficient underselling analysis in finding price suppression in the redetermination is likewise inconsistent with those articles.

159. MOFCOM also failed to establish that the alleged underselling by subject imports caused the significant suppression of domestic like product prices. The record before MOFCOM showed that the domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008, resulting in a narrowing of its net loss as a share of sales from 7.9 percent in 2006 to 4.7 percent in 2008.[235] Accordingly, most of the alleged underselling by subject imports, which occurred between 2006 and 2008, was not accompanied by the "prevent[ion of] price increases, which otherwise would have occurred, to a significant degree," contrary to MOFCOM's finding that subject imports significantly suppressed domestic like product prices. MOFCOM not only ignored this evidence that contradicted its analysis of price suppression, but also failed to explain how subject imports could have suppressed domestic like product prices in the first half of 2009 when most of the increase in subject import volume and market share, and most of the alleged subject import underselling, did not suppress domestic like product prices between 2006 and 2008. Consequently, MOFCOM's price suppression finding was not based on an "objective examination," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, and did not establish that subject imports caused significant prices suppression, as required under AD Agreement Article 3.2 and SCM Agreement Article 15.2.

160. None of China's arguments excuse MOFCOM's failure to consider evidence that most of the increase in subject import volume, and most of the alleged underselling, did not coincide with the significant suppression of domestic like product prices. China argues that MOFCOM's price suppression finding was supported by evidence of the substitutability of subject imports and the domestic like product, and their similar price movements; the alleged subject import underselling and trends in the alleged margins of underselling; and the increase in subject import volume.[236] But the record showed that even with the increase in subject import volume and market share between 2006 and 2008, and the allegedly significant subject import underselling during the period, domestic producers were able to increase their prices by more than the increase in their costs.

161. Similarly unavailing is China's argument that the domestic industry's net losses throughout the period of investigation, and its increasing net loss between 2007 and 2008, supported MOFCOM's price suppression finding. The fact that the domestic industry's unit prices were lower than its unit costs during the entire period of investigation sheds no light on

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[234] *China – Broilers Products*, para. 7.511.

[235] Redetermination at Section VI(iii)(9). When considering whether domestic like product prices have been significantly suppressed by subject imports, it is typically useful for an investigating authority to consider whether domestic producers experienced increasing costs during a period of investigation and, if so, whether they were able to pass those higher costs on to purchasers through higher prices, as would normally be the case.

[236] China, FWS, paras.317-22.

whether subject imports prevented price increases that would have otherwise occurred. To consider whether subject imports had "explanatory force" for any inability by the domestic industry to raise its prices, MOFCOM should have considered whether subject imports prevented domestic producers from increasing their prices to cover increased costs during the period of investigation. The record showed that the domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008 notwithstanding the increase in subject import volume and market share and the alleged subject import underselling during the period.

162. Contrary to China's claim that the increase in the industry's net loss between 2007 and 2008 supported MOFCOM's finding that subject imports suppressed domestic prices, the record showed that two-thirds of the increase in subject import volume over the 2006-2008 period occurred between 2006 and 2007, when the domestic industry's net loss as a share of sales narrowed dramatically from 7.9 to 0.35 percent.[237] Furthermore, MOFCOM did not consider any of this evidence in analyzing price suppression, much less explain how subject imports could have suppressed domestic prices between 2007 and 2008 when the much larger increase in subject import volume between 2006 and 2007 had no such effect and the domestic industry suffered greater net losses in 2006, before any increase in subject import volume. China's *post hoc* rationalizations for MOFCOM's deficient analysis of price suppression are no substitute for the objective examination of the issue that MOFCOM was required to perform under AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.[238]

163. Finally, the United States demonstrated in its first written submission that the product-specific pricing data on the record of the redetermination showed that subject imports did not suppress domestic like product prices in the first half of 2009 because the decline in the average unit value of domestic industry sales was driven by price declines on products not imported from the United States.[239] China does not deny that MOFCOM failed to consider this evidence, but claims that declines in the prices of domestically-produced products that did compete with

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

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

[239] *See* United States, FWS, para. 159.

subject imports were sufficient to support MOFCOM's price suppression finding.[240] Yet, as the United States pointed out, domestic prices on products that competed directly with subject imports declined by 0.9 to 13.0 percent between the first half of 2008 and the first half of 2009, which is far less than the 20.65 percent decline in the average unit value of domestic industry sales of all products over the period.[241] That means that the average unit value of domestic industry sales of products that did not compete directly with subject imports declined by more than 20.65 percent. By comparison, domestic industry sales prices on chicken feet, which accounted for 60 percent of the increase in subject imports, were not suppressed at all. Yet MOFCOM ignored this evidence, just as it ignored the evidence that subject imports did not suppress domestic like product prices during the 2006-2008 period. Having failed to consider that most of the decline in the average unit value of domestic industry sales between the first half of 2008 and the first half of 2009 resulted from factors other than subject imports, MOFCOM's finding that subject imports suppressed domestic prices to a significant degree between these periods was not based on an objective examination of positive evidence.

164. By relying on its defective underselling analysis, and ignoring evidence that subject imports did not suppress domestic like product prices, MOFCOM's finding that subject imports suppressed domestic like product prices to a significant degree was inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

B. MOFCOM's Impact Analysis Breached AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4

165. In the United States' first written submission, as in the original panel proceedings, the United States demonstrated that MOFCOM acted inconsistently with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4 by finding that subject imports had an adverse impact on the domestic industry throughout the period of investigation despite record evidence that the domestic industry's performance improved markedly according to nearly every measure between 2006 and 2008.[242] In response, China argues that MOFCOM focused its impact analysis on the domestic industry's performance in the first half of 2009, as the most recent period, and on the industry's weak financial performance throughout the period of investigation.[243] China also asserts that MOFCOM based its finding that subject imports adversely impacted the domestic industry between 2006 and 2008 on future volumes of subject imports, but not the industry's low capacity utilization and increasing inventories during the

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[240] *See* China's FWS, paras. 323-27.

[241] Redetermination at sections VI(II)(2), VII(ii)(2) (Exhibit USA-9).

[242] *See* United States, FWS, paras. 160-183.

[243] China, FWS, paras. 340-43, 348-50.

period.[244] None of the factors raised by China excuse the deficiencies in MOFCOM's impact analysis, which render that analysis inconsistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.5.

166. As an initial matter, the United States emphasizes that the obligations of AD Agreement Article 3.4 and SCM Agreement Article 15.4 are not fulfilled by an investigating authority's mere summarization of the domestic industry's performance according to each of the enumerated factors, as China contends.[245] On the contrary, AD Agreement Article 3.4 and SCM Agreement Article 15.4 require investigating authorities to "examin[e] . . . the impact of the dumped [or subsidized] imports on the domestic industry concerned" including "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry." (Emphasis added.) Thus, investigating authorities must demonstrate that they have actually examined the "impact" of subject imports on the domestic industry, rather than simply running down the list of enumerated factors in a vacuum. Accordingly, the examination required under AD Agreement Article 3.4 and SCM Agreement Article 15.4 necessarily entails a comparison of subject import trends during the period of investigation, on the one hand, and domestic industry performance trends, on the other hand, to assess the extent to which subject imports had an impact on the domestic industry. 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.[246]

Accordingly, MOFCOM was required under AD Agreement Article 3.4 and SCM Agreement Article 15.4 to not only examine the domestic industry's performance during the period of investigation but to also examine "the consequent impact" of subject imports on that performance.

167. Furthermore, an investigating authority cannot examine the impact of subject imports on the domestic industry during the period of investigation without considering the relationship between subject imports and domestic industry performance over the entire period of investigation. It would be inconsistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4 for an investigating authority to focus its analysis of the

[244] China's FWS, paras. 344-47, 351.

[245] China's FWS, para. 351.

[246] *China – GOES (AB)*, para. 149.

impact of subject imports on the domestic industry only on that portion of the period in which the industry's performance worsened. Doing so would not be an "objective examination," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, because it would ignore periods in which subject imports coincided with improving or stable domestic industry performance, thereby making an affirmative determination more likely.[247] Such an analysis would also ignore "relevant economic factors," namely the industry's improving performance over most of the period of investigation, in violation of AD Agreement Article 3.4 and SCM Agreement Article 15.4. In this case, it was particularly important that MOFCOM examine the impact of subject imports on the domestic industry over the entire period of investigation because most of the increase in subject import volume and market share occurred between 2006 and 2008.[248]

168. Yet, by China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened.[249] The United States has not "selectively picked" periods to create the "illusion" of an industry "doing passably well," as China claims.[250] Rather, the record before MOFCOM established that during the three full years of the period of investigation, which coincided with most of the increase in subject import volume and most of the alleged underselling by subject imports, the domestic industry's performance improved substantially according to most measures:

- Production Capacity: up 26.2 percent;
- Output: up 28.2 percent;
- Capacity Utilization: up 1.26 percentage points;
- Sales Quantity: up 31.2 percent;
- Sales Revenue: up 88.6 percent;
- Market Share: up 4.61 percentage points;

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247 *See U.S. – Hot-Rolled Steel (AB)*, paras. 196-197.

248 Subject import volume 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. Redetermination at Section VI(I) (Exhibit USA-9).

249 China, FWS, paras. 340-43.

250 China, FWS, para. 329.

- Employment: up 10.3 percent;
- Productivity: up 16.2 percent;
- Average wages: up 48.1 percent;
- Pre-tax loss: down from 7.9 percent of sales in 2006 to 4.7 percent of sales in 2008.
- Return Rate of Investment: up from -13.42 percent to -12.18 percent;
- Cash Flow: up from negative 218 million RMB to positive 69 million RMB.[251]

Although the domestic industry's end-of-period inventories increased by 30,500 tons, they remained insignificant relative to industry production and sales (equivalent to around 3 percent of both), as China concedes.[252] Based on the record evidence that most subject import volume and alleged underselling coincided with strengthening domestic industry performance, an objective investigating authority could only conclude that subject imports had no adverse impact on the domestic industry between 2006 and 2008.

169. Instead, 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" 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."[253] MOFCOM dismissed the improvement in most measures of industry performance between 2006 and 2008, including all measures of the industry's financial performance, and instead emphasized that "during the POI, the capacity utilization of the domestic like products is in a low level and the ending inventory continually

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[251] Redetermination at Section VI(III) (Exhibit USA-9).

[252] China argues that MOFCOM was not required to find that the increase in domestic industry inventories between 2006 and 2008 was significance, China, FWS, para. 362, and acknowledges that MOFCOM simply "noted that [inventories] had been increasing over the period." *Id.* at para. 364.

[253] Redetermination at Section VII(i) (Exhibit USA-9); *see also id.* at Section VII(ii) (finding that it "cannot conclude that the domestic industry did not suffer injury" between 2006 and 2008 "because the import [of] 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 product, 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.").

increases" and "the domestic like products can not make a reasonable profit margin."[254] MOFCOM's finding that subject imports adversely impacted the domestic industry between 2006 and 2008 was not based on the "totality" of the evidence, as China claims,[255] but on allegedly adverse trends in the industry's capacity utilization and inventories and pre-tax losses that were far worse in 2006 than in 2008. By failing to account for the bulk of the record evidence showing that subject imports had no adverse impact on the domestic industry between 2006 and 2008, MOFCOM failed to conduct an evaluation of all relevant economic factors, contrary to AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

170. None of the factors cited by China in its first written submission excuse these deficiencies in MOFCOM's impact analysis. MOFCOM was not entitled to base its impact analysis solely on the first half of 2009, as China now argues. As discussed above, the selective examination of only the time periods during which the domestic industry's performance declines is inconsistent with the obligations of AD Agreement Article 3.1 and SCM Agreement Article 15.1 to conduct an objective evaluation, and those of AD Agreement Article 3.4 and SCM Agreement Article 15.4 to evaluate "all relevant economic factors." MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire period of investigation, including those periods in which the industry's performance improved. Record evidence showing that most of the increase in subject import volume coincided with a dramatic strengthening of the domestic industry's performance between 2006 and 2008 contradicts MOFCOM's finding that the much smaller increase in subject import volume between the first half of 2008 and the first half of 2009 adversely impacted the domestic industry in the first half of 2009.

171. Nor was MOFCOM entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation," to the exclusion of other contradictory factors.[256] That the domestic industry had pre-tax losses throughout the period of investigation says nothing about the changes or trends in the industry's financial performance. Nor does it take into consideration the multiple other "relevant economic factors" enumerated in AD Agreement Article 3.4 and SCM Agreement Article 15.4. The record before MOFCOM showed that the domestic industry's worst financial performance during the 2006-2008 period occurred in 2006, before the increase in subject import volume and market share. As subject import volume and market share increased between 2006 and 2008, the industry's pre-tax loss declined from 7.9 percent of sales in 2006 to 4.7 percent of sales in 2008, its return rate of

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[254] Redetermination at Sections VI(III), VII(ii)(3) ("During the POI, due to the low price sales of the Subject Products, the domestic industry could not sufficiently utilize the production capacity. The utilization of the capacity had not reached 80% from 2006-2008 . . . while the ending inventory in 2007 and 2008 increases by 34% and 8% compared to the previous year . . . These facts present that the production and operation of the domestic industry was impacted and injured notably.") (Exhibit USA-9).

[255] China's FWS, para. 338.

[256] China, FWS, para. 350.

investment improved from -13.42 percent to -12.18 percent, and its cash flow improved from an outflow of 218 million RMB to an inflow of 69 million RMB.[257] Examined objectively, these data show that most of the increase in subject import volume and market share coincided with an improvement in the industry's financial performance, according to every measure.[258] By ignoring these trends, just as it discounted all other positive trends in the industry's performance, MOFCOM failed to objectively evaluate "all relevant economic factors," in violation of AD Agreement Article 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

172. The third factor that China cites in defense of MOFCOM's impact analysis, alleged future subject import volume, was completely irrelevant to MOFCOM's analysis of the impact of subject imports on the domestic industry during the period of investigation.[259] MOFCOM found that "U.S. producers of chicken products or broiler products are likely to expand exports to China, and cause further adverse effects to China's industry."[260] China's argument has two fundamental problems. First, this finding on likely future trends was not supported by the record. Second, future subject imports could have no impact whatsoever on the domestic industry during the period of investigation. MOFCOM's analysis of future subject import volume was irrelevant to its analysis of "the relationship between subject imports and the state of the domestic industry" during the period of investigation for purposes of MOFCOM's present material injury determination.[261]

173. Finally, China is incorrect that MOFCOM's analysis of the domestic industry's capacity utilization supported its finding that subject imports adversely impacted the domestic industry during the 2006-2008 period.[262] China argues that the domestic industry's capacity did not grow in excess of demand between 2006 and 2008 because the increase in capacity, at 780,700 MT,

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[257] Redetermination at Section VI(III) (Exhibit USA-9).

[258] The evidence belies China's claims that MOFCOM's finding that the domestic industry's pre-tax loss worsened between 2007 and 2008 somehow outweighed the improvement in the industry's pre-tax loss between 2006 and 2007. China, FWS, para. 348. The record showed that the industry's pre-tax loss as a share of net sales declined between 2006 and 2008. Redetermination at Section VI(III)(9) (Exhibit USA-9). Moreover, the dramatic 98.3 percent decline in the domestic industry's pre-tax loss between 2006 and 2007 coincided with a 31.1 percent increase in subject import volume. Id. at Sections VI(I) and (III). These comparisons, ignored by MOFCOM, demonstrate the lack of a causal relationship between subject imports and the domestic industry's performance.

[259] China's FWS, paras. 344-347.

[260] Redetermination at Section VI(IV) (Exhibit USA-9).

[261] *China – GOES (AB)* at para. 149.

[262] *See* China's FWS, paras. 353-359.

was less than the increase in demand, at 955,600 MT.[263] China might have a point if the domestic industry's market share had been 100 percent during the period. As the United States pointed out in its first written submission, however, the increase in the domestic industry's capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period.[264] Only the domestic industry's 26.2 percent increase in capacity, in excess of the 17.0 percent increase in apparent consumption, prevented the industry's capacity utilization rate from improving just as dramatically as other measures of industry performance.[265] Accordingly, MOFCOM's finding that "the capacity utilization of the domestic like products is in a low level" did not support its conclusion that subject imports had an adverse impact on the domestic industry.

174. For reasons, the Panel should find that MOFCOM's impact analysis is inconsistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

C. MOFCOM's Causation Analysis Breached AD Agreement Articles 3.1, 3.5, 12.2 and 12.2.2 and SCM Agreement Articles 15.1, 15.5, 22.3 and 22.5

175. AD Agreement Article 3.5 and SCM Agreement Article 15.5 require investigating authorities to examine whether subject imports are causing injury through the effects set forth, respectively, in AD Agreement Articles 3.2 and 3.4 and SCM Agreement Articles 15.2 and 15.4.[266] We have demonstrated above that MOFCOM's application of AD Agreement Articles 3.2 and 3.4 and SCM Agreement Articles 15.2 and 15.4 was flawed. Thus MOFCOM's reliance on a flawed analysis of the effects of subject imports to demonstrate a causal link breaches the first sentence of AD Agreement Article 3.5 and SCM Agreement Article 15.5. Moreover, as the United States demonstrated in its first written submission, MOFCOM acted inconsistently with the second sentence of these articles by failing to base its causation analysis on "an examination of all relevant evidence." Indeed, MOFCOM failed to consider record evidence showing that no causal link existed between subject imports and any decline in the domestic industry's performance. Specifically, MOFCOM ignored evidence that the increase in subject import

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263 China, FWS, para. 356.

264 United States, FWS, para. 174.

265 United States, FWS, para. 175.

266 AD Agreement Article 3.5 and SCM Agreement Article 15.5 provide, in relevant part, that "[t]t 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." As the panel in Egypt – Steel Rebar explained, "Article 3.5 makes clear, through its cross-references, that Article 3.2 and 3.4 are the provisions containing the specific guidance of the AD Agreement on the examination of the volume and price effects of the dumped imports and the consequent impact of the imports on the domestic industry, respectively." *Egypt – Steel Rebar*, para. 7.102

volume and market share was not at the expense of the domestic industry, which increased its market share by an even greater amount.[267] MOFCOM ignored that 40 percent of subject imports consisted of chicken paws that could not have injured the domestic industry, which was incapable of increasing its production of chicken paws.[268] After U.S. respondents raised both issues during the investigation, MOFCOM failed to address their arguments, adding violations of AD Agreement Article 12.2.2 and SCM Agreement Article 22.5 to its offenses.[269] MOFCOM also ignored evidence that most of the increase in subject import volume and market share coincided with strengthening domestic industry performance between 2006 and 2008.[270] Besides ignoring clearly "relevant evidence," MOFCOM also predicated its causation finding on its deficient analysis of subject import underselling and price suppression, which failed to establish that subject imports had any adverse price effects.[271] None of China's attempts to rationalize these deficiencies withstand scrutiny, or otherwise render MOFCOM's causation analysis consistent with the AD Agreement and SCM Agreement.

1. MOFCOM Failed to Examine All Relevant Evidence in Breach of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Article 15.1 and 15.5

176. In defending MOFCOM's causation analysis, China emphasizes that investigating authorities need only demonstrate that subject imports contributed meaningfully to the injury suffered by a domestic industry to establish a causal link consistent with AD Agreement Article 3.5 and SCM Agreement Article 15.5.[272] What China neglects to acknowledge is that those same articles require investigating authorities to base their causal link analysis "on an examination of all relevant evidence before the authorities." An investigating authority's analysis of causation must also "be based on positive evidence and involve and objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products," consistent with AD Agreement Article 3.1 and SCM Agreement Article 15.1. These obligations prohibit investigating authorities from finding a causal link between subject imports and injury through the limitation of their analysis to selective record facts that seem to

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[267] United States, FWS, para. 195-200.

[268] United States, FWS, paras. 214-16.

[269] United States, FWS, paras. 211-16.

[270] United States, FWS, paras. 203-10.

[271] United States, FWS, paras. 201-2.

[272] China, FWS, paras. 370-71.

support such a link and the ignoring of all other evidence. Yet, MOFCOM took precisely this approach to analyzing causation here.

177. MOFCOM explicitly predicated its finding of a causal link between subject imports and injury on "the increase of the import volume" and "the large volume of dumped imports originating in the U.S.,"[273] yet ignored that the 3.92 percentage point increase in subject import market share during the period of investigation did not prevent the domestic industry from increasing its market share by an even greater 4.38 percentage points.[274] This evidence that subject imports captured no market share from the domestic industry during the period of investigation, and did not prevent the industry from growing its market share during the period, was clearly "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.5. This evidence showed that subject imports had no adverse volume effects on the domestic industry. By ignoring evidence that subject imports did not prevent the domestic industry from gaining market share, MOFCOM failed to objectively examine all relevant evidence, in violation of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5. That MOFCOM "noted" the increase in the domestic industry's market share somewhere in the redetermination does not remedy this deficiency, as China claims.[275] MOFCOM did not explain how it factored the increase into its causation analysis. [276]

178. MOFCOM's isolated reliance on the increase in subject import volume and market share in finding a causal link between subject imports and injury also ignored that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of chicken paws that could not, as a factual matter, have injured the domestic industry.[277] An uncontested fact on the record before MOFCOM, which China does not dispute, was that domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to uneconomic levels.[278] The clear implication of this irrefutable fact is that subject imports of chicken paws could not have injured the domestic industry. Chicken paws imported from the United States did not take sales away from domestic producers, but rather served demand for chicken paws that domestic producers were incapable of satisfying. In its redetermination,

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[273] Redetermination at Section VII(I) (Exhibit USA-9).

[274] Redetermination at section VII(i), (iii)(6) (Exhibit USA-9).

[275] China, FWS, paras. 384-85.

[276] Redetermination at Section VII(I) (Exhibit USA-9).

[277] USAPEEC's Injury Brief at 18, 29 (Exhibit USA-18).

[278] *See* USAPEEC Injury Brief at 29-30 (USA-18); USAPEEC Comments on Preliminary Injury Determination at 22 (USA-21)

MOFCOM confirmed that chicken paws accounted for 29 to 39 percent of subject imports during the period of investigation, and that prices for domestically-produced chicken feet, at least for the four domestic producers invited to report pricing data, increased significantly between 2006 and 2008 and remained stable at a high level in the first half of 2009.[279]

179. Clearly, evidence that 40 percent of subject import volume, and 60 percent of the increase in that volume, was non-injurious was "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.5. Indeed, the evidence demonstrated that subject import competition was significantly attenuated during the period of investigation, given that only 40 percent of the increase in subject import volume consisted of products other than chicken feet. Notwithstanding this evidence, however, the sum total of MOFCOM's analysis of chicken paws was a reference to the original preliminary determination, in which MOFCOM found that chicken feet were within the scope of the investigation. [280]

180. China asserts that MOFCOM's reference to its preliminary finding that chicken feet were within the scope of the investigation somehow satisfied its obligation to conduct an "objective evaluation" of "all relevant evidence" for purposes of its causation analysis.[281] As the United States pointed out in its first written submission, however, no party argued that chicken feet were outside the scope of the investigation.[282] MOFCOM's observation that chicken feet were within the scope was a complete *non sequitur*, having nothing to do with the impact of subject imported chicken feet on the domestic industry. By ignoring that subject imports of chicken feet could not have injured the domestic industry, MOFCOM's causation analysis relied on an increase in subject import volume and market share that was greatly inflated by the inclusion of non-injurious chicken feet.

181. Relying on its defective impact analysis, MOFCOM's finding of a causal link between subject import and injury also ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008, as discussed above.[283] China defends MOFCOM's failure to consider

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[279] Redetermination at section VII(ii)(2) (Exhibit USA-9).

[280] Redetermination at section VII(ii)(3) (Exhibit USA-9).

[281] China's FWS, para. 407-410.

[282] United States, FWS, para. 215.

[283] Rather than recognizing that most of the increase in subject import volume and market share coincided with improving domestic industry performance, MOFCOM reached precisely the opposite conclusion: "[D]uring the entire POI, there is an outstanding relevance between the imports of the Subject Products and the situation of the domestic industry." Redetermination at Section VII(i) (Exhibit USA-9). As "the imports of the Subject Products was increasing constantly," MOFCOM found, "the domestic

this evidence for purposes of causation on grounds similar to its defense of the same deficiency in MOFCOM's impact analysis, stressing that MOFCOM focused on the first half of 2009 and on the industry's weak financial performance throughout the period of investigation.[284] Yet, as emphasized above and in the United States' first written submission, an investigating authority cannot examine "the relationship between subject imports and the state of the industry" by focusing exclusively, and without reasonable explanation, on a discrete portion of the period of investigation, particularly one that excludes most of the increase in subject import volume.[285] MOFCOM failed to explain how the domestic industry's lagging performance in the first half of 2009 could 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, including strengthening financial performance. By limiting its causation analysis to those portions of the period of investigation in which the industry's performance weakened while ignoring those portions coinciding with most of the increase in subject imports, MOFCOM failed to base its causation analysis on an "objective examination," in violation of AD Agreement Article 3.1 and SCM Agreement Article 15.1, and "all relevant evidence," in violation of AD Agreement Article 3.5 and SCM Agreement Article 15.5.

182. MOFCOM breached these same articles by basing its finding of a causal link between subject imports and injury in part on its defective analysis of subject import price effects. Because MOFCOM's findings that subject imports undersold the domestic like product and suppressed domestic like product prices remain WTO-inconsistent, as discussed above, MOFCOM reliance on these findings to support its causation analysis conflicts with AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5. China's defense of its new price analysis is unpersuasive for the reasons discussed above, and its observation that MOFCOM also supported its causation analysis with reference to the adverse volume effects of subject imports is equally unavailing.[286]

183. Contrary to China's claim that the United States has made no challenge to MOFCOM's analysis of adverse volume effects,[287] the United States continues to argue, as it did before the original panel, that MOFCOM ignored evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance between 2006 and 2008, and did not prevent the domestic industry from increasing its own market share to an even

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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." *Id.*

[284] *See* China, FWS, at paras. 395-402.

[285] *See* United States, FWS, para2. 206-7.

[286] China, FWS, para. 390-92.

[287] China, FWS, para. 392.

greater degree. These deficiencies in MOFCOM's volume effects finding underscore the WTO-inconsistency of MOFCOM's causation analysis.

2. MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents Violated AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5

184. China's defense of MOFCOM's continuing refusal to address key causation arguments raised by USAPEEC cannot be sustained under the plain meaning of AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5. AD Agreement Article 12.2.2 and SCM Agreement Article 22.5 require investigating authorities to issue a public notice of final affirmative determinations, containing "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers," among other things. AD Agreement Article 12.2 and SCM Agreement Article 22.3 require investigating authorities to "set forth" in such notices "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In China's view, MOFCOM complied with these obligations by simply referencing arguments made by USAPEEC and the United States and rejecting them with statements that fail to address the substance of the arguments.[288] MOFCOM's approach manifestly failed to provide "in sufficient detail . . . the reasons for the . . . rejection of relevant arguments."

185. Specifically, China argues that MOFCOM "addressed" USAPEEC's and the United States' argument that subject imports had no adverse volume effects because they captured no market share from the domestic industry by stating that "[d]uring the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product . . . ."[289] Conspicuously absent from MOFCOM's response is any mention or consideration of market share, and specifically the record evidence highlighted by USAPEEC and the United States showing that subject imports captured no market share from the domestic industry. Having failed to address the very point raised by USAPEEC and the United States, MOFCOM cannot be said to have provided "in sufficient detail" its reasons for rejecting the argument, in violation of AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5.

186. China also argues that MOFCOM "addressed" USAPEEC's argument that the 40 percent of subject imports consisting of chicken paws could not have injured the domestic industry by referencing its finding from the preliminary determination that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import

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[288] *See* China, FWS, paras. 403-410.

[289] China, FWS, para. 405; Redetermination at Section VII(ii)(1) (Exhibit USA-9).

of all the investigated products including Paw as a whole . . . ."[290] As discussed above, the fact that paws were within the scope of the investigation has nothing to do with USAPEEC's argument, which was that subject import competition was significantly attenuated because a substantial proportion of subject imports was non-injurious. That MOFCOM included the words "chicken paws" in its response to USAPEEC's argument revealed nothing about the "reasons" why MOFCOM decided to ignore completely uncontested evidence on the record that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of non-injurious chicken paws. If China is correct that any mention and conclusory rejection of a party argument satisfies an investigating authority's obligation to provide in sufficient detail its reasons for rejecting the argument, then these transparency requirements of the AD Agreement and SCM Agreement would be rendered meaningless. By failing to provide any meaningful reason for its rejection of USAPEEC's argument concerning chicken paws, MOFCOM acted inconsistently with AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5.

V. CHINA'S TERMS OF REFERENCE ARGUMENTS ARE WITHOUT MERIT

187. The United States' Panel Request provides more information than is required under the DSU[291] to present the claims at issue in this dispute. In particular, the United States often previewed some of the specific arguments it intended to advance by providing indicative examples of how China breached its WTO obligations. Nonetheless, in its rebuttal submission, China has asserted that six U.S. claims are outside the Panel's Terms of Reference:

(1) AD Agreement Article 6.1 and SCM Agreement Article 12.1: China asserts that the United States cannot bring a claim that encompasses MOFCOM's failure to disclose the information it required from Chinese domestic producers and thus denied U.S. interested parties an opportunity to present evidence. China is wrong because the Panel Request, invoking AD Agreement Article 6.1 and SCM Article 12.1, clearly states MOFCOM failed to provide notice of the information it required from Chinese domestic firms and denied an opportunity to U.S. interested parties to present evidence.

(2) AD Agreement Articles 6.1.2 and SCM Agreement Articles 12.1.2: China asserts that the United States cannot bring a claim under these provisions. China is wrong because the basis for these claims arises from the same set of facts as its claims under AD Agreement Article 6.1 and SCM Agreement Article 12.1 and is an elaboration of its claims under those provisions – specifically the information

[290] China's FWS, para. 410; Redetermination at Section VII(ii)(3); MOFCOM, Preliminary AD Determination at sec. 6.1 (USA-2); MOFCOM, Preliminary CVD Determination at sec. 7.1 (USA-3)

[291] Understanding on Rules and Procedures Governing the Settlement of Disputes.

that MOFCOM required from Chinese domestic producers, and refused to notify U.S. interested parties regarding.

(3) AD Agreement Articles 6.4 and 6.5 and SCM Agreement Article 12.3 and 12.4: China asserts that the United States cannot challenge MOFCOM's failure to let U.S. interested parties access to information provided by Chinese producers.[292] China is wrong because the United States expressly stated in its Panel Request that MOFCOM treated information relevant to interested parties as confidential without good cause and denied them timely opportunity to see it.

(4) AD Agreement Article 2.2.1.1: China asserts that the United States cannot bring a claim that could challenge MOFCOM's failure to properly allocate Pilgrim's Pride's costs. China is wrong because the Panel Request explicitly states that "MOFCOM improperly calculated the cost of production for US *producers…* and failed to properly allocate processing costs for subject merchandise."[293]; and

(5) AD Agreement Article 3.4 and SCM Agreement Article 15.4: China asserts that the United States cannot bring a claim under these provisions because the Panel exercised judicial economy on these claims in the original dispute and MOFCOM took no action as a result.[294] China is wrong because an exercise of judicial economy does not preclude a Member from raising that claim again in a compliance proceeding. Moreover, the Panel explicitly noted in its report that it expected MOFCOM would have to revisit the analysis at issue under these claims.[295] China must bear the consequence of MOFCOM's failure to do so.

[292] China, FWS, Section III.B.1.

[293] WT/DS427/11, para. 8.

[294] China, FWS, para. 332-335

[295] *China – Broiler Products*, para. 7.555 ("MOFCOM's examination of the situation of the domestic industry is inextricably linked to its earlier analysis of the price effects of subject 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.")

(6) AD Agreement Article 3.5 and SCM Agreement Article 15.5: China asserts that the United States cannot bring a claim under these provisions that MOFCOM failed to reconcile its causation analysis with evidence of the domestic industry's improving performance during the 2006-2008 period because this claim was allegedly omitted from the panel request.[296] China is wrong because the fact that United States transparently previewed two of the arguments that it would make as to why MOFCOM's causation analysis breaches it obligations does not require it to present all of them.

China's terms of reference arguments highlight a striking asymmetry between what it considers adequate notice to protect its interests against what it believes is sufficient for U.S. interested parties that appear before MOFCOM. With respect to the latter, for example, China asserts that because MOFCOM's reinvestigation initiation notice and General Verification letter referenced the Panel Report – writ large – U.S. interested parties were put on notice that MOFCOM would require particular sales data from its domestic industry concerning the precise issue of ensuring product mix comparability.[297] But when it comes to claims made against China, China is not satisfied even though the Panel Request explicitly and precisely identifies the measures and claims at issue – and often provides an indicative example of a particular failing by MOFCOM.

188. China's attempt to avoid these claims fails because the U.S. Panel Request more than adequately satisfies the DSU requirements for pleading claims in a WTO dispute. In each of the instances China complains of, the U.S. Panel Request has clearly stated the measures and claims at issue – and is thus entitled to have the Panel consider them. China's position essentially demands that Members not only identify claims, but that must also provide in the Panel Request the precise arguments that will be presented in their submissions. The DSU does not compel this result.

189. The United States begins its refutation of China's term of references arguments by first recounting the relevant legal standard for a Panel Request under the DSU. Thereafter, the United States will address each of the six terms of reference challenges that China's references in its submission. As will be demonstrated below, each and all of China's terms of references grievances are without merit.

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[296] China, FWS, paras. 376-379.

[297] China, FWS, paras. 54 & 56 ("The initiation notice of reinvestigation referenced the original Panel Report, which made clear that one of the issues to be reconsidered was the issue of product mix. … Referring to the Panel Report in DS427, the Investigating Authority requested the parties to "prepare all the materials and produce relevant evidence in view of the Panel Report". Once again, such reference could only mean a request of information about product mix and domestic prices since these were core issues covered by the Panel.")

A. The Legal Standard for Presenting Claims in an Article 21.5 Proceeding

190. In *US – FSC (Article 21.5 – EC II) (AB)*, the Appellate Body addressed what a complaining Party must present with respect to identifying the specific measures at issue and a brief summary of the legal basis for the complaint:

> First, the complaining party must cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which, according to the complaining party, have not yet been complied with. Secondly, the complaining party must either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that no such measures have been taken by the implementing Member. Thirdly, the complaining party must provide a legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies.[298]

191. Here, there is no dispute that the United States satisfied the first prong by explicitly referencing in its Panel Request the recommendations and rulings of the DSB. With respect to the second prong, the United States has identified the measures:

> The United States considers that China has failed to bring its measures into conformity with the covered agreements. Specifically, the United States considers that China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, as set forth by China's Ministry of Commerce (MOFCOM) in Announcement No. 44 [2014], Announcement No. 56 [2013], Announcement No. 52 [2010], Announcement No. 51 [2010], Announcement No. 26 [2010], Announcement No. 8 [2010], and the annexes to the foregoing documents, are inconsistent with China's obligations under the following provisions of the AD Agreement, SCM Agreement, and the GATT 1994…"[299]

The measures at issue are those continuing to impose AD and CVD duties on U.S. broiler products.

192. With respect to the third prong, which is the principal issue for most of China's terms of reference complaints, the United States recalls the Appellate Body's analysis in *Korea Dairy* explaining that "a claim of violation must … be distinguished from the arguments adduced by a

[298] Para. 62.

[299] United States, Panel Request, WT/DS427/11, p.1.

complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[300] Thus, "Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint."[301] It imposes no obligation to set out "detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements." Indeed, "Article 6.2 of the DSU does not impose any additional requirement … that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue causes the violation of, or can violate, the relevant obligation."[302]

193. In light of this analysis, panels have appropriately recognized that identification of a particular obligation in a Panel Request – not demonstration of how its breach will be established – is the dispositive questions with respect to assessing a challenge that a claim falls outside its terms of reference. For example, in *Australia – Apples*, the complaining Member, New Zealand, after listing seventeen specific measures at issue, simply listed in a single sentence the particular articles of the covered agreement under which it was raising claims in the dispute. The panel found that the complaining Member:

> has not drawn an explicit and detailed connection between the specific measures challenged and the provisions invoked. New Zealand has only stated in general terms that "the above measures are inconsistent with the obligations of Australia under [nine provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures, (SPS Agreement)]". Having carefully considered the language used in the panel request and the specific content of the provisions of the SPS Agreement cited therein, the Panel understands that New Zealand has claimed that "every measure ... [identified] in its panel request is inconsistent with each of the [nine] provisions referred to [in the panel request]." In the Panel's view, this satisfies the requirement that the panel request lays out a connection between the various measures challenged and the specific provisions invoked.[303]

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[300] *Korea–Dairy (AB)*, para. 139.

[301] *EC – Bananas III (AB)*, para. 141.

[302] *Australia – Apples (AB)*, para. 423; *see also United States – Countervailing Measures (China) (AB)*, para. 4.26 ("[W]e note that Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, be set out in a panel request in a way that is 'sufficient to present the problem clearly.' A 'claim', for the purposes of Article 6.2, refers to an allegation 'that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'. 'Arguments', by contrast, are statements put forth by a complaining party 'to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision') (footnotes omitted) (italics original)

[303] *Australia – Apples (preliminary ruling)*, WT/DS367/7, para. 10 (footnote omitted) (brackets original)

In other words, in some instances, simply identifying the relevant legal provision of the covered agreement is sufficient to identify the legal problem. However, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[304]

194. Here, as demonstrated below, the United States' Panel Request comports with these requirements. For each of its claims, the United States has identified the relevant obligation in the covered agreement. The United States has done so not only by identifying treaty provisions, but also by providing appropriate narrative descriptions when necessary. Moreover, the United States has also provided in some instances precise examples of how it might seek to demonstrate breach. The Appellate Body's prior analysis has correctly recognized that Members may provide indicative examples of how the claim might be established. Such an examples are simply foreshadowed arguments; they do not detract from the claim itself. Instructive on this point is the Appellate Body's analysis in *EC – Selected Customs Matters*,

> We read the third paragraph of the panel request as an illustrative list of areas where the United States considers European Communities customs law is not administered in a uniform way. Thus, the substance of the third paragraph of the panel request should be viewed as an anticipation of the United States' arguments. In this paragraph, the United States explains—briefly and in general terms—why it considers that the legal instruments listed in the first paragraph of the panel request are administered in a manner that is inconsistent with the uniformity requirement in Article X:3(a).[305]

In short, the DSU requires Members to identify claims – and the United States has done that and more.

B. The United States Properly Presented Claims Under AD Agreement Article 6.1 and SCM Agreement Article 12.1

195. China asserts that the United States' claim concerning the consistency of MOFCOM's reinvestigation with AD Agreement Article 6.1 and SCM Agreement Article 12.1 are outside the Panel's terms of reference.[306] China's grievance is misplaced because China seeks to require the United States to provide its arguments in the Panel Request rather than what the DSU requires:

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[304] *China – Raw Materials*, para. 220 (referring to *Korea – Dairy (AB)*, para. 124; and *EC – Fasteners (AB)*, para. 598); *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.8.)

[305] *EC–Selected Customs Matters (AB)*, para. 153.

[306] China, FWS, Section III.A.1.

identification the pertinent measures and claims. The specific language in the Panel Request that China references[307] in its submission is the following:

> Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[308]

In particular, China notes that while it "does not object" to the first sentence, the second sentence is deficient because it does not identify "the specific measures" or "present the problem clearly."[309] Such focus is misplaced. There is no requirement that each and every statement in a Panel Request set forth the measure at issue and the legal claim. Indeed, China fails to grasp that the second sentence is wholly unnecessary – and simply a preview of what the United States might argue in its submissions. That the United States has acted in a salutary fashion by providing *more* information does not detract from the fact that it has more than adequately identified in its Panel Request (1) the measures at issue and (2) the relevant legal basis for the complaint, even absent this second sentence.

1. The United States Properly Identified the Measure

196. With respect to the measures at issue, as noted above in Section B, the United States' Panel Request clearly identifies the measures at issue in this compliance proceeding. Specifically, the Panel Request makes clear that the measures at issue in this dispute are those continuing to impose AD and CVD on imports of U.S. broiler products.[310] Indeed, the first sentence of the paragraph referenced by China provided even greater clarification by making specific reference to MOFCOM's conduct "during the reinvestigation."[311] Thus, it cannot be

[307] China, FWS, para. 42.

[308] U.S. Panel Request, WT/DS427/11, p.2, para. 5.

[309] China, FWS, para. 43.

[310] U.S. Panel Request, WT/DS427/11, pp. 1-2 ("Specifically, the United States considers that China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, as set forth by China's Ministry of Commerce (MOFCOM) in Announcement No. 44 [2014], Announcement No. 56 [2013], Announcement No. 52 [2010], Announcement No. 51 [2010], Announcement No. 26 [2010], Announcement No. 8 2010], and the annexes to the foregoing documents, are inconsistent with China's obligations under the following provisions of the AD Agreement, SCM Agreement, and the GATT 1994: …").

[311] U.S. Panel Request, WT/DS427/11, p.2, para. 5.

disputed that it is clear that on the face of the Panel Request that the measures at issue in this dispute encompass MOFCOM's reinvestigation, which is part-and-parcel of the continued imposition of AD and CVD duties on imports of U.S. broiler products.

197. China attempts to avoid this result by arguing that the United States' challenge is against the questionnaire referenced in the second sentence.[312] Such a contention would be untenable even if the second sentence is examined in isolation. The second sentence makes clear that the target is MOFCOM's conduct in the reinvestigation – i.e., the lack of disclosure. The questionnaire is not the measure at issue; the continued imposition of AD and CVD duties are, including the conduct of the reinvestigation.

198. Indeed, China's position leads to an *ad absurdum* result in two respects. First, it would compel Members to identify every single instrument that an investigating authority might use in an investigation, whether a questionnaire, verification, meeting, etc. Second, the claims here are about a lack of transparency. Under China's logic, the less transparent a Member is in an AD/CVD proceeding, the more it would benefit since the complaining Member would have no idea about what instrument to invoke in its Panel Request.[313] The DSU does not compel such a result – it requires not identifications of particular forms, but of measures. Here, the Panel Request clearly identifies that the measures at issue are those leading to the continued imposition of AD and CVD duties on U.S. broiler products – and further clarifies for China that the United States is concerned with MOFCOM's conduct during the reinvestigation. This is more than sufficient under the DSU.

2. The United States Properly Identified the Claims

199. The United States' Panel Request is clear in the first sentence of paragraph 5 that the United States' claim extends to the entirety of AD Agreement Article 6.1 and SCM Agreement Article 12.1, including MOFCOM's failure to provide notice of the information it required and opportunity for interested parties to present evidence. The U.S. first written submission confirms that this is indeed the scope of the claim by specifically challenging MOFCOM's failure to provide notice of the information it required from domestic Chinese firms and accordingly an opportunity for U.S. interested parties to present evidence on their behalf.

200. The claims presented by the United States falls squarely within the language of the first sentence of paragraph 5 of the U.S. Panel Request. With respect to the second sentence, the use of an indicative example simply sets forth additional information about how the United States might try to establish the claim set forth in the first sentence – and indeed it comports with what

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[312] China, FWS, para. 44.

[313] Indeed, it is striking that China argues for another terms of reference argument that it is prejudiced because there is a reference "to documents that do not even exist." China, FWS, para. 64. China fails to recognize the conundrum that MOFCOM has restricted notice of what documents do exist.

the United States has in fact presented in its submissions.[314] Specifically, the United States is challenging MOFCOM's failure to notify U.S. interested parties of the information it required from Chinese firms. On this point, the United States notes that China is incorrect when it analogizes that a "for example" provision is similar to those instances where a Member has tried to impermissibly expand the scope of its claims by using phrases such as "including, but not necessarily limited to" in order to keep the scope of its claims undefined.[315]

201. The panel in *India – Agricultural Products* assessed a highly analogous situation to what China has alleged. Specifically, in that dispute, India claimed that the use of a "for example" statement failed to comport with the requirements of DSU Article 6.2. Specifically, India asserted such phrases led to confusion as the claims at issue. The panel's analysis in that dispute is instructive and applicable here:

> we note that the Oxford Dictionary defines the word "example" as "a thing characteristic of its kind or illustrating a general rule". The term as it appears in the United States' panel request under its Article 2.3 claims follows a description of the claim under the first sentence of Article 2.3. Thus, we understand this example to be an "illustration" of how, according to the United States, India has breached its obligations referred to in that sentence. We are not persuaded that including the example of a violation of Article 2.3 as the United States did would serve to limit the scope of its claims under Article 2.3 to what India describes as the second obligation in Article 2.3. Rather, we regard the example as merely illustrative, and concur with the United States' view that it "merely provided additional information about the [United States'] view of the dispute".
>
> We are also of the view that "for example" is unlike the terms India cited as having been problematic in other panel requests. The terms "including but not limited to" and "especially (but not exclusively)" operate in precisely the opposite way as "for example" does. Thus, while "for example" is used to provide an illustration of a general rule, the other terms are used to expand the sense of the rule beyond a single term. Under the circumstances, we are not persuaded by India's argument that use of "for example" will leave the door open to the United States to bring in claims not contemplated in the panel request. [316]

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[314] *China – Raw Materials (AB)*, para. 220 (Although a defective panel request cannot be cured through subsequent submissions, the Parties submissions can be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.)

[315] China, FWS, para. 46.

[316] *India – Agricultural Products (preliminary ruling)*, WT/DS430/5, paras. 3.86-3.87.

> Applying this ordinary meaning, we are not persuaded that an example of a violation of Article 5.5, which follows a general brief summary of the United States' challenge thereunder, would be exhaustive and serve to limit the scope of the claim as described in the first sentence. Rather, as we have observed above in the context of the claims under Article 2.3, we consider this example to be illustrative, and concur with the United States' view that it "merely provided additional information about the [United States'] view of the dispute".[317]

202. Here, the United States' Panel Request clearly states that the United States is challenging MOFCOM's failure to provide notice of the information it required and opportunity for interested parties to present evidence.[318] The U.S. first written submission presents arguments on precisely that claim demonstrating that MOFCOM required information from Chinese domestic producers without providing notice, and thus denied U.S. interested parties an opportunity to present evidence on their behalf.[319] Under these circumstances, China's terms of references concerns on this claim are without merit.

C. The United States Properly Presented Claims Under AD Agreement Articles 6.1.2 and SCM Agreement Articles 12.1.2

203. China argues that the United States' claims under AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 are outside the Panel's terms of reference because they are not specifically identified in paragraph 5 of the Panel Request.[320] In particular, China notes that because AD Agreement Article 6 and SCM Agreement Article 12 contain multiple discrete obligations, the United States was obliged to engage in a more particularized identification.[321] China's argument is misplaced because it rests on an erroneous assumption: that the United States simply cited AD Agreement Article 6 and SCM Agreement Article 12 – and nothing more.

204. The U.S. Panel Request explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1. In other words, China's concern that the United States could implicate any aspect of AD Agreement Article 6 and SCM Agreement Article 12 is incorrect. The United States has narrowed its concerns to those that flow from AD Agreement Article 6.1 and SCM Agreement Article 12.1. The pertinent issue is whether the invocation of these provisions – not

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317 *Id*. at para. 3.102.

318 U.S. Panel Request, WT/DS427/11, p.2, para. 5.

319 United States, FWS, Section VI.B.

320 China, FWS, para. 67.

321 China, FWS, para. 68.

AD Agreement Article 6 and SCM Agreement Article 12 writ large – is sufficient with respect to the requirements of the DSU. In this particular, the United States submits so.

205. Specifically, the United States' claims under AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 are a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1. As the U.S. first written submission confirms, the U.S. claims under the subparts concern MOFCOM's failure to make information provided by Chinese domestic producers available to U.S. interested parties. Indeed, China too recognizes the subparts concern disclosure of information.[322] This is nothing less than a specific application of the denial of opportunity that AD Agreement Article 6.1 and SCM Agreement Article 12.1 require. In short, the United States has challenged a specific application of a broader obligation it clearly identified. In these circumstances, the United States cannot be deemed to have been deficient in its identification of the relevant provisions. Indeed, the Appellate Body's analysis on this issue is directly on point:

> Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They all concern the obligation of Members of the WTO not to have recourse to unilateral action. We therefore consider that, as the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference.[323]

In this respect, the Appellate Body's analysis is particularly striking as Article 23 of the DSU not only has its own subparts, but cross-references two other articles of the DSU. Here, the relationship between the subparts and the parent article is even more closely interlinked than in *US – Certain EC Products*. The U.S. Panel Request explicitly references the lack of opportunity afforded by MOFCOM in the reinvestigation thus placing clear parameters on the scope of the claim.[324] Moreover, the factual predicate for the claims is the same: MOFCOM's solicitation of information from Chinese domestic producers. Under these circumstances, the United States' identification of AD Agreement Article 6.1 and SCM Agreement Article 12.1, including the language concerning the lack of opportunity for U.S. interested parties to present evidence, is

[322] China, FWS, para. 69.

[323] *US – Certain EC Products (AB)*, para. 111.

[324] *See United States – Countervailing Measures (AB)*, para. 4.18 ("Although the number of instances that could fall within the ambit of the description provided in footnote 10 may well be quite large, it cannot be said that these instances are "unspecified.")

more than sufficient to allow the United States to bring claims under AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2.

D. The United States Properly Presented Claims Under AD Agreement Articles 6.4 & 6.5 and SCM Agreement Articles 12.3 and 12.4

206. China asserts that the United States' claims under AD Agreement Articles 6.4 and 6.5 and SCM Agreement Articles 12.3 and 12.4 are outside the Panel's terms of reference. The precise language in the Panel Request concerning these claims states:

> Articles 6.4 and 6.5 of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[325]

This language on its face makes clear that the United States has clearly identified that United States is concerned with the conduct of MOFCOM's reinvestigation with respect to the cited obligations.

207. With respect to AD Agreement Article 6.4 and SCM Agreement Article 12.3, China alleges that that United States has not identified the "specific measures" or "present[ed] the problem clearly."[326] Moreover, China takes issue with the "for example" sentence as creating confusion since it references "a document that did not exist." As noted above, the measures at issue are those that continue to lead to imposition of AD and CVD duties on U.S. broiler products. Moreover, the United States' Panel Request explicitly references the reinvestigation. Under these circumstances, China cannot sustain its argument that the measures have not been properly identified. Thus, the reference to the questionnaire in the second sentence is of no moment. In any event, the sentence actually provides greater clarity to China by foreshadowing U.S. arguments. Whether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers.

208. The legal problem is also more than adequately stated. The United States has correctly identified the legal provisions with which the measure is inconsistent. The narrative also removes any doubt as the nature of the U.S. claim by explicitly reinforcing that the claim

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325 U.S. Panel Request, WT/DS427/11, p.2, para. 4.

326 China, FWS, para. 72.

concerned MOFCOM's "timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority."[327]

209. This type of allegation is not a term of reference argument. It is an argument on the merits as to whether the United States has adduced sufficient evidence and argumentation for its claims. With respect to the merits of these claims, the United States references paragraph 48 and note 75 of its First Written Submission. As explained, that claim is contingent on whether China is asserting it afforded confidential treatment to the information at issue. In short, the United States' Panel Request is sufficient with respect to the presentation of these claims.

E. The United States Properly Presented its Claims Under AD Agreement Article 2.2.1.1

210. China asserts that the United States' claim under Article 2.2.1.1 as applied to Pilgrim's Pride is outside the terms of reference of this dispute. The U.S. Panel Request specified the claim as follows:

> Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because MOFCOM improperly calculated the cost of production for US producers, failed to calculate costs on the basis of the records kept by the US producers under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.[328]

China appears to assert that this language can encompass a claim made with respect to MOFCOM's findings with respect to Tyson, but not to Pilgrim's Pride.[329]

211. As an initial matter, the DSU requires identification of measures and claims – not particular interested parties. Accordingly, China's arguments on this point are somewhat puzzling. It appears that China is arguing that because the Panel found that MOFCOM had not breached its obligations under the first sentence of Article 2.2.1.1 with respect to Pilgrim's Pride, the United States is prohibited from bringing a claim under the second sentence of Article 2.2.1.1.[330]

212. The assessment of whether the United States can bring a claim must be examined by reference to the Panel Request. The Panel Request clearly states that the United States is bringing a claim under the second sentence of Article 2.2.1.1. Moreover, the language the

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[327] U.S. Panel Request, WT/DS427/11, p.2, para. 4.

[328] U.S. Panel Request, WT/DS427/11, p.3.

[329] China, FWS, para. 129.

[330] China, FWS, paras. 129-135.

United States uses is with respect to "producers," not simply Tyson. There is no reason from the language of the claim to believe that the United States circumscribed its claim with respect to Tyson only.

213. Rather than engage with the language in the Panel Request, China appears to suggests that the only claim made by the United States' with respect to Pilgrim's was with respect to the first sentence of Article 2.2.1.1 and thus the United States cannot invoke the second sentence with respect to Pilgrim's Pride.[331] That is not so. The Panel's findings under the second sentence include that:

> China acted inconsistently with the second sentence of Article 2.2.1.1 because: (i) there was insufficient evidence of its consideration of the alternative allocation methodologies presented by the respondents; (ii) MOFCOM improperly allocated all processing costs to all products; and (iii) 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.[332]

The while the Panel made specific findings concerning Tyson's costs, it also made broader findings that MOFCOM has failed to consider alternative allocation methodologies presented by *respondents*, and improperly allocated processing costs to all products. The Panel Report does not specify that these breaches are limited simply to Tyson. Indeed, China's logic would vitiate the second sentence of the provision. Essentially, China is arguing that because it provided an explanation as to why it rejected costs under the first sentence of Article 2.2.1.1, it was then free to adopt any cost allocation methodology without consideration of any alternatives and without need to allocate properly processing costs. Nothing in the Panel Report supports this bizarre contention. To the contrary, the Panel recognized in its report that the claims under the first and second sentence of Article 2.2.1.1 are distinct and entail different obligations.[333] The Panel's findings under the second sentence of Article 2.2.1.1 with respect to consideration of allocation methodologies and allocation of processing extended to all respondents, including Pilgrim's Pride. The Panel Report had no problem recognizing when a claim was with respect to a particular producer – such as Tyson's with respect to allocation of production costs of non-subject merchandise to subject merchandise[334] – and it declined to do so with respect to the claims that the United States now invokes with respect to the treatment of Pilgrim's Pride.

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[331] *Id.*

[332] *China – Broiler Products*, para. 8.1(v).

[333] *China – Broiler Products*, para. 8.1(iv).

[334] *China – Broiler Products*, paras. 7.197.

F. The United States Properly Presented Claims Under AD Agreement Article 3.4 and SCM Agreement Article 15.4.

214. China brings the striking claim that because it took no actions with respect to ensuring its injury determination was consistent with AD Agreement Article 3.4 and SCM Agreement Article 15.4, U.S. claims in the Article 21.5 proceeding are outside the terms of reference of this dispute.[335] China's justification for its lack of action is that the Panel exercised judicial economy on this very clam in the Panel Report – and thus it did not act. In other words, China does not take any issue with how the U.S. Panel Request states the claim, but rather invokes its own lack of any actions to ensure compliance. For China, the situation creates a "fundamental unfairness" because China will not have a chance to bring its measure into compliance if the Panel makes findings against China on this claim.

215. The United States raises four points. First, China's assertion that it was entitled to take no action is misplaced. The Panel did not find that China acted consistently with its obligations under these provisions; the Panel exercised judicial economy. The Appellate Body's prior analysis has recognized that where a Member fails to prove inconsistency on a claim, that claim may not be re-litigated in a compliance proceeding.[336] The Appellate Body has never found that the exercise of judicial economy precludes consideration of a claim in a compliance proceeding. The logic for this distinction is compelling. A Member is not entitled to a second chance to prove a claim that has been already rejected. There is no justification for rejecting a claim that *was never decided*. It is precisely because of such a distinction that China's invocation of the Appellate Body's analysis in *EC – Bed Linen (Article 21.5 – India) (AB)* is misplaced.[337] That dispute concerned claims that India could and did bring and that it failed to establish.[338] India was not permitted to re-litigate what it had already lost. The present situation is of course starkly different.

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[335] *See* China, FWS, Section V.B.1.

[336] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 ("a complainant who had failed to make out a prima facie case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings.")

[337] China, FWS, para. 335.

[338] *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 87 ("We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the same claim under Article 3.5 relating to "other factors" as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations.")

216. Second, the Panel premised its exercise of judicial economy on the view that MOFCOM would have to reexamine its impact analysis on account of other findings:

> In the specific circumstances of this dispute, we do not find it necessary to decide whether MOFCOM's treatment of capacity utilization and inventories conforms to the relevant disciplines. We recall that we have found in a preceding section that MOFCOM's findings of price undercutting and of price suppression are inconsistent with Articles 3.1/15.1 and 3.2/15.2. The United States has not alleged that MOFCOM's analysis of the impact of dumped imports on the domestic industry is inconsistent with Articles 3.1/15.1 and 3.4/15.4 as a consequence of these inconsistencies. Nonetheless, MOFCOM's examination of the situation of the domestic industry is inextricably linked to its earlier analysis of the price effects of subject 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.[339]

China's position that it is "unfair" to have this claim considered is without merit. The Panel explicitly premised it exercise of judicial economy on the basis that MOFCOM would need to undertake a reexamination of its impact analysis – and thus decide how to address the U.S. claim. MOFCOM's decision to decline to do so cannot absolve it from having its injury findings assessed. Instead, MOFCOM must defend its decision as it stands – and that decision is one, per China's admission, that is completely unchanged from the original determination.[340]

217. Third, China's argument is inconsistent with provisions of the DSU. Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Precluding consideration of claims in a compliance proceeding on the basis that judicial economy was exercised would undermine these provisions. Essentially, even though a Member may have a valid claim that a Member's measure is inconsistent, but the Member may never be able to obtain satisfactory resolution because the inconsistency can never be subject to challenge.

218. Finally, there was no barrier to China engaging in a reexamination of its impact analysis. China argues that it was in an "impossible situation" because it could not make changes to its

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339 *China – Broiler Products*, para. 7.555.

340 *China – Broiler Products*, para. 388.

impact findings without implicitly conceding that MOFCOM's finding was inconsistent.[341] That is of course demonstrably false. The Panel's exercise of judicial economy meant there were no findings.[342] MOFCOM was well aware of the deficiencies in its impact analysis that the United States demonstrated before the Panel. How MOFCOM chose to respond was of course up to MOFCOM. If MOFCOM chose to revise its determination, it could defend its new determination as WTO consistent without consideration of the former determination. MOFCOM having chosen not to make any change must now defend that decision.

G. The United States Properly Presented Claims Under AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5.

219. China asserts that that the United States cannot challenge MOFCOM's failure to "reconcile its causation analysis with improving domestic industry performance."[343] The relevant language in the U.S. Panel Request provides as following:

> Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

China agrees that the United States is entitled to challenge MOFCOM's failure to consider that subject imports did not increase at the expense of the domestic industry and that the causation analysis improperly relied on flawed price effects.[344]

220. Here, China argues that the use of the term "including" narrows the scope of the claim two only those errors specifically identified. Again, China conflates claims with arguments. The claim is that MOFCOM's continued imposition of AD/CVD measure on U.S. broiler products is inconsistent with the cited provisions. The arguments by which the United States would demonstrate such <u>include</u> the two specific examples noted in the Panel Request. In other words,

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[341] China, FWS, para. 337-338.

[342] MOFCOM's assertion that it was placed in an impossible situation is puzzling for another reason. MOFCOM saw no problem with reopening other aspects of its original determination, such as Pilgrim Pride's margin. Apparently, China feels there is no problem with MOFCOM admitting it made an error when it is to the detriment of foreign producers.

[343] China, FWS, para. 376-379.

[344] China, FWS, para. 377.

the United States foreshadowed two of the three arguments it would make. It was not under any obligation to identify any of the arguments, let alone all of them.

221. China's argument that the term "include" narrowed the scope of claims is misplaced. By its terms, include means "contain as part of a whole." The term is not exclusive. What panel and the Appellate Body have appropriately recognized is that the term's open-ended meaning cannot be used to keep claims undefined. At no time has any panel or the Appellate Body ever found that it cannot be used as part of an indication to preview some – but not all – arguments. Because China's terms of reference claim concerns an argument, and not a claim, it must be dismissed.

222. Furthermore, China is incorrect that paragraph 3 of the United States' Panel Request "did not cover" the claim that "MOFCOM did not reconcile its causation analysis with improving domestic industry performance."[345] On the contrary, in that paragraph, the United States expressly claimed that MOFCOM's causation analysis conflicted with AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1. and 15.5 in being "based on MOFCOM's flawed . . . impact analys[i]s." As the United States stated in paragraph 2 of its Panel Request, MOFCOM's impact analysis was inconsistent with AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4 because "[f]or example, MOFCOM did not address economic evidence and factors that contradicted its finding that the industry was . . . suffering material injury on account of U.S. imports." In other words, the United States explained that MOFCOM's impact analysis was flawed because MOFCOM failed to reconcile its finding that subject imports had an adverse impact on the domestic industry with evidence that the industry's performance improved during the 2006-2008 period, when most of the increase in subject import volume took place, and that this flaw also rendered MOFCOM's causation analysis WTO-inconsistent.

H. Conclusion

223. A challenge to whether a claim falls within the terms of reference is a serious challenge. It precludes consideration of the claim outright. A serious claim warrants serious consideration.[346] The terms of reference arguments presented by China, however, failing to even meet threshold requirements – and must thus be dismissed.

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

224. Because China has not rebutted the foregoing claims demonstrated by the United States, China as a consequence is also unable to rebut that it has breached AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994.

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[345] China, FWS, para. 379.

[346] *China – Rare Earths (AB)*, para. 5.228.

VII. CONCLUSION

225. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the AD Agreement, SCM Agreement, and the GATT 1994, and thus that China has failed to comply with the DSB recommendations in this dispute.