CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

(DS427)

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TABLE OF CONTENTS

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Argentina – Poultry	Panel Report, *Argentina -- Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 2003, adopted 19 May 2003.
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, circulated 15 June 2012.
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001.
EC – DRAMs	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005.
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr. 1, adopted 28 July 2011.
EU – Footwear	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, 2011, adopted 22 February 2012.
EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1.
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 2003, adopted as modified by Appellate Body 18 August 2003.
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, 2003, adopted 18 August 2003.
Egypt – Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October

	2002
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, 2000, adopted 17 November 2000. DSR 2000:XI, 5295.
Mexico – Beef & Rice (Panel)	Panel Report, *Mexico — Definitive Anti-Dumping Measures on Beef and Rice — Complaint with Respect to Rice*, WT/DS295/R, 2005, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R.
Mexico – Beef & Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005.
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, 2008, adopted 21 October 2008.
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 2001, adopted 5 April 2001.
US – AD/CVD (Panel)	Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, 2010, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R.
US – AD/CVD (AB)	Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 2011, adopted 25 March 2011.
US – Clove Cigarettes (AB)	*United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012.
US – Countervailing Measures on Certain EC Products (AB)	*United States – Countervailing Measures Concerning Certain Products from the European Communities*, Report of the Appellate Body, WT/DS212/AB/R, adopted 8 January 2003.
US – DRAMs (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as

	modified by Appellate Body Report WT/DS296/AB/R.
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 2001, adopted 23 August 2001.
US – Lead Bars (AB)	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, 1999, adopted 7 June 2000 as upheld by Appellate Body Report WT/DS138/AB/R.
US – OCTG Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004.
US – OCTG Sunset Reviews (Article 21.5)	Panel Report, *United States – Sunset Reviews of Anti-Dumping measures on Oil Country Tubular Goods from Argentina* - Recourse to Article 21.5 of the DSU by Argentina, WT/DS268/RW.
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 2004, adopted 17 February 2004.
US – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report WT/DS264/AB/R.
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004.
US – Softwood Lumber V (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006.
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(Article 21.5 – Canada) (AB)	WT/DS277/AB/RW, adopted 9 May 2006.
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US – Wheat Gluten (AB)	Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, adopted 19 January 2001.

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
BIII	Ministry of Commerce of the People's Republic of China, Bureau of Industry Injury Investigation
CAAA	China Animal Agriculture Association
CVD	Countervailing duties
DSB	World Trade Organization, Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Keystone	Keystone Foods, LLC (U.S. Respondent)
MOFCOM	Ministry of Commerce of the People's Republic of China
Petitioner	China Animal Agriculture Association
Pilgrim's	Pilgrim's Pride Corporation (U.S. Respondent)
POI	Period of investigation
Tyson	Tyson Foods, Inc. (U.S. Respondent)
Sanderson	Sanderson Farms, Inc. (U.S. Respondent)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USAPEEC	USA Poultry & Egg Export Council
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF EXHIBITS

USA-13 MOFCOM, Letter to Pilgrim's Pride Corporation Regarding the Disclosure of Basic Facts On Which The Dumping Margins Are Based in The Final Determination Of the Broiler Products and Chicken Products Antidumping Case, No. 136 [2010] (July 16, 2010) ("Pilgrim's Final AD Disclosure")

USA-14 MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon For The Purpose of Dumping Margin Calculation in the Antidumping Final Determination Against Broiler Products ("Keystone Final AD Disclosure"), No. 138 [2010]

USA-15 MOFCOM, Letter to Tyson Regarding Basic Facts Relied Upon For The Purpose Regarding the Basis of Basic Factual Disclosure Document of Ad Valorem Subsidy Rate Determination in the Preliminary Ruling of Countervailing Investigation of Broiler Products ("Tyson Prelim. CVD Disclosure"), No. 86 [2010] (April 28, 2010)

USA-16 MOFCOM, Letter to Pilgrim's Pride Corporation Regarding the Basis of Basic Factual Disclosure Document of Ad Valorem Subsidy Rate Determination in the Preliminary Ruling of Countervailing Investigation of Broiler Products ("Pilgrim's Prelim. CVD Disclosure"), No. 85 [2010] (April 28, 2010)

USA-17 MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon For The Purpose of Ad Valorem Subsidy Rate Calculation in the CVD Preliminary Determination Against Broiler Products and Chicken Products ("Keystone Prelim. CVD Disclosure"), No. 87 [2010] (April 28, 2010)

USA-18 MOFCOM, Letter to Tyson Regarding Basic Facts Relied Upon For The Purpose of Ad Valorem Subsidy Rate Calculation in the CVD Final Determination Against Broiler Products and Chicken Products ("Tyson Final CVD Disclosure"), No. 144 [2010] (July 16, 2010)

USA-19 MOFCOM, Letter to Pilgrim's Pride Corp. Regarding the Basis of Basic Factual Disclosure Document of Relied Upon For The Purpose of Ad Valorem Subsidy Rate Calculation in the CVD Final Determination Against Broiler Products and Chicken Products ("Pilgrim's Final CVD Disclosure"), No. 143 [2010] (July 16, 2010)

USA-20 MOFCOM, Letter to Keystone Food LLC Regarding Basic Facts Relied Upon For The Purpose of Ad Valorem Subsidy Rate Calculation in the CVD Final Determination Against Broiler Products and Chicken Products ("Keystone Final CVD Disclosure"), No. 145 [2010] (July 16, 2010)

USA-21 USAPEEC, Opinions Regarding Industry Injury in the Antidumping and Countervailing Duty Investigations of Broiler Products and Chicken Products from the United States, Public Version(January 7, 2010)

USA-22 United States, Letter from L. Wang to G. Peng & L. Weiping Re: Antidumping and Countervailing Duty Investigations on Imported Broiler Productions or Chicken Products Originating in the United States/Request for Public Hearing ("Hearing Request Letter") (July 12, 2010)

USA-23 MOFTEC, Provisional Rules on the Conduct of Public Hearings in Antidumping Duty Investigations, Order No. 3 ("Provisional Rules") (Jan. 16, 2002)

USA-24 MOFCOM, Reply of MOFCOM to Request of the U.S. Government for a Public Hearing in the Antidumping and Countervailing Duty Investigations of Broiler and Chicken Products from the United States [2010] No.131 (July 14, 2010)

USA-25 Tyson, Comments on the Preliminary AD Determination (February 20, 2010)

USA-26 Tyson, Further Comments on Preliminary AD Determination (April 9, 2010)

USA-27 Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010).

USA-28 Pilgrim's Pride, Supplemental Questionnaire Response (December 18, 2009)

USA-29 Keystone, Comments on the AD Final Disclosure (July 26, 2010)

USA-30 Keystone, Comments on the Preliminary AD Determination (April 9, 2010)

USA-31 USAPEEC, Further Comments on the Preliminary Determination (July 16, 2010)

USA-32 Pilgrim's Pride, Investigation Questionnaire Response (December 3, 2009)

USA-33 Intentionally Omitted

USA-34 Keystone, Investigation Questionnaire Response (December 3, 2009)

USA-35 Keystone, Supplemental Questionnaire Response, (December 18, 2009)

USA-36 Tyson Investigation Questionnaire Response (December 3, 2009)

USA-37 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure, [2010] No. 170 (August 13, 2010)

USA-38 MOFCOM, Second Supplemental CVD Questionnaire (January 29, 2010)

USA-39 MOFCOM, Notice on Registration for Participating in Industrial Injury Investigation in the Antidumping Investigation of Broiler Products and Chicken Products, [2009] No. 277 (September 27, 2009); MOFCOM, Notice on Registration for Participating in Industrial Injury Investigation in the Countervailing Duty Investigation of Broiler Products and Chicken Products, [2009] No. 278 (September 27, 2009)

USA-40 Tyson, Comments on Final AD Disclosure (July 26, 2010)

USA-41 United States, Comments on the Final Disclosure Documents (August 2, 2010)

USA-42 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure, [2010] No. 170 (August 13, 2010)

USA-43 Pilgrim's Pride, Comments on the Preliminary CVD Determination (May 18, 2010)

USA-44 Tyson, Comments on the Preliminary CVD Determination (May 18, 2010)

USA-45 Pilgrim's Pride, Comments on Basic Facts Relied Upon for the Subsidy Rate Calculation (July 24, 2010)

USA-46 USAPEEC, USAPEEC's Comments on Preliminary Injury Determination (February 24, 2010)

USA-47 MOFTEC, Rules on Public Hearings with Regard to Investigations of Injury to Industry (2002)

USA-48 Tyson, Comments Regarding the Disclosure of the Basic Facts for the Final CVD Determination (July 26, 2010)

USA-49 MOFCOM, Letter to U.S. Commercial Service Regarding the Disclosure of the Basic Facts On Which The Determination of the Ad Valorem Subsidy Rates Are Based in The Final Determination of the Broiler Products and Chicken Products Countervailing Duty Case, No. 142 [2010] (July 16, 2010) ("USG CVD Basic Facts")

USA-50 New Shorter Oxford English Dictionary (Clarendon Press, 1993)

USA-51 Concise Oxford English Dictionary (2009)

USA-52 United States, Letter from S. Sindelar to L. Yu, J. Chengsen, Y. Lijun, and L. Chunsheng Re: Countervailing Duty Investigation on Imported Broiler Products or Chicken Products Originating in the United States / Certain Subsidy Calculation Error ("Subsidy Calculation Letter") (August 4, 2010)

I. INTRODUCTION

1. China's anti-dumping and countervailing duty measures on broiler products from the United States are the result of a flawed process yielding flawed results. In this submission, the United States will demonstrate how China's investigating authority, the Ministry of Commerce of the People's Republic of China ("MOFCOM"), failed to comport with China's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. With respect to MOFCOM's procedural failings during the investigations, the United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Article 6.2 of the AD Agreement by denying a request by the United States for a hearing to present its concerns about the investigation. Instead, China summarily decided that a full hearing was unnecessary since it had decided that the issues the United States wished to discuss did not directly relate to other parties in the investigation.

- *Second*, MOFCOM acted inconsistently with Article 6.9 of the AD Agreement by withholding essential facts from U.S. respondents. Specifically, MOFCOM did not allow U.S. respondents to see the calculations for their respective dumping margins. As a result, U.S. respondents could not know what treatment MOFCOM gave to their data and thus were denied an opportunity to present relevant arguments.

- *Third*, MOFCOM, acted inconsistently with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by allowing the Petitioner (the China Animal Agriculture Association or "CAAA") to put confidential information on the record without providing non-confidential summaries.

3. Not surprisingly, a flawed investigative process was accompanied by a series of flawed conclusions that are also inconsistent with China's WTO obligations. With respect to MOFCOM's reasoning and conclusions for its AD determinations, the United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Article 2.2.1.1 of the AD Agreement by deciding to reject, without any explanation, the costs kept in the books and records of U.S. producers to calculate the normal values for U.S. respondents, even though those costs were in accordance with

generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with the production and sale of the products subject to the investigation.

- *Second*, MOFCOM acted inconsistently with Article 2.4 of the AD Agreement by failing to conduct a fair comparison of normal value and export price for Keystone, a U.S. respondent. Specifically, it appears (the United States uses the term "appears" because MOFCOM did not provide the dumping calculations for U.S. respondents) that MOFCOM applied certain freezer storage fees in a manner that artificially inflated the dumping margin for Keystone.

- *Third*, MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II of the AD Agreement by imposing an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact.

4. With respect to MOFCOM's reasoning and conclusions for its CVD determinations, the United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Articles 12.7, 12.8, 22.3, 22.4, and 22.5 of the SCM Agreement by imposing an adverse "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the subsidy investigation. Moreover, MOFCOM failed to inform the United States and other interested parties of the essential facts under consideration that formed the basis of this calculation, and failed to disclose in sufficient detail the findings and conclusions reached on all issues of fact, or all relevant information on matters of fact.

- *Second*, MOFCOM acted inconsistently Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by failing to properly allocate the alleged subsidy in relation to subject merchandise. Specifically, MOFCOM found a subsidy to allegedly benefit U.S. respondents' chickens, but failed to allocate the benefit to both the subject

merchandise (raw chicken) and non-subject merchandise (cooked chicken) that the U.S. respondents make from these chickens.

- *Third*, MOFCOM acted inconsistently with Articles 22.4 and 22.5 of the SCM Agreement by failing to provide a sufficiently detailed explanation for its rejection of the facts and law raised by the United States and U.S. respondents in the Preliminary and Final Determinations.

5. With respect to MOFCOM's reasoning and conclusions for its injury determinations, the United States will demonstrate that China acted inconsistently with its WTO obligations in the following respects:

- *First*, MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement by defining the domestic industry to include only those firms that supported the AD and CVD investigations.

- *Second*, MOFCOM acted inconsistently with Articles 3.1, 3.2, 6.4, and 12.2 of the AD Agreement and Articles 15.1, 15.2, 12.3, and 22.3 of the SCM Agreement because its price effects analysis was based upon flawed price comparisons, failed to address conflicting evidence that the domestic industry was gaining market-share, and did not disclose MOFCOM's methodology for adjusting subject import price data with respect to different levels of trade.

- *Third*, MOFCOM acted inconsistently with Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5., 22.3, and 22.5 of the SCM Agreement because its causation analysis relied exclusively on findings relating to volume and price but ignored data that contradicted those findings such as data indicating that any increase in subject import volume came wholly at the expense of other exporters and not domestic producers. Moreover, MOFCOM failed to explain in its final determination why it rejected the arguments put forward by U.S. respondents.

- *Fourth*, MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement because its finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry" as it cannot be reconciled with all the evidence attesting to the overall health of the domestic industry.

II. PROCEDURAL BACKGROUND

6. On September 20, 2011, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the GATT 1994, Article 30 of the SCM Agreement (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the AD Agreement with respect to China's measures imposing anti-dumping duties and countervailing duties on broiler products from the United States.[1] Pursuant to this request, the United States and China held consultations on October 28, 2011. Unfortunately, those consultations failed to resolve the dispute.

7. On December 8, 2011, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement.[2] The Dispute Settlement Body ("DSB") considered this request at its meeting on December 19, 2011, at which time China objected to the establishment of a panel.

8. The United States renewed its request for the establishment of a panel at the January 20, 2011 meeting of the DSB. At that meeting, a panel was established with the following terms of reference:

> [t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS427/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[3]

III. FACTUAL BACKGROUND

A. The Measures

9. China's measures imposing anti-dumping and countervailing duties on broiler products from the United States are set forth in MOFCOM Notice No. 8 [2010],[4] Notice

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1 WT/DS427/1.

2 WT/DS427/2.

3 WT/DS427/3, para. 2.

4 MOFCOM, Preliminary AD Determination (USA-2).

No. 26 [2010],[5] Notice No. 51 [2010],[6] and Notice No. 52 [2010],[7] including any and all annexes.

10. Under these measures, China has levied the following antidumping and countervailing duty rates on imports of broiler products from U.S. producers and exporters.

I. **Antidumping Duty Rates**	
Pilgrim's	53.4%
Tyson	50.3%
Keystone	50.3%
Firms that registered for the investigation but were not selected as mandatory respondents	51.8%
"All others"	105.4%

Countervailing Duty Rates	
Pilgrim's	5.1%
Tyson	12.5%
Keystone	4.0%

[5] MOFCOM, Preliminary CVD Determination (USA-3).

[6] MOFCOM, Final AD Determination (USA-4).

[7] MOFCOM, Final CVD Determination (USA-5).

Firms that registered for the investigation but were not selected as mandatory respondents	7.4%
"All others"	30.3%

B. The Products Subject to Investigation

11. As described by MOFCOM in the Final AD Determination, the products subject to the investigation are as follows:

> Name of the Subject Products in English: White-Feather Broiler Products.
>
> Detailed descriptions of the Subject Products: chicken products produced by slaughtering and processing live white-feather broilers, including chickens not cut in pieces, cuts and offal of chickens, and broiler byproducts, whether fresh, chilled or frozen. Live chickens, broiler products packed or preserved in cans and similar means, chicken sausages and similar products, and ready-to-eat broiler products are not included in the scope of imported products under the current investigations.
>
> Main applications: in the domestic market, white-feather broiler products are essentially for human consumption, and normally they are directly or indirectly sold to consumers through wholesaling or retailing channels like an agricultural fair or a supermarket, or through catering outlets.[8]

C. The Petition, Initiation of the Investigations, and Questionnaires

12. On August 14, 2009, the CAAA ("Petitioner") filed a Petition with MOFCOM.[9] According to the Petition, all of the following are tenets and responsibilities of the Petitioner:

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[8] MOFCOM, Final AD Determination, Sec. 2.1, p.12 (USA-4). This same description is included in the Final CVD Determination, p. 15 (USA-5). Both determinations indicated that the broiler products at issue are classified under the Import and Export Tariff Schedule of the People's Republic of China as the following customs tariff numbers: 02071100, 02071200, 02071311, 02071319, 02071321, 02071329, 02071411, 02071419, 02071421, 02071422, 02071429 and 05040021.

[9] Petitioner, Petition for Anti-dumping and Anti-subsidy Investigation of Broiler Products (August 14, 2009) (Exhibit USA-1).

- "actively implement the policies of the Party and the State"
- "integrate industrial resources"
- "safeguard industrial interest"
- "standardize industrial behaviors"
- "establish a market early-warning mechanism"
- "take part in the coordination work of the industrial injury investigation and action response of antidumping, anti-subsidy and other foreign trade disputes in relation to this industry, and protect the security of the industry."
- "macro management of the industry"[10]

13. The Petition alleged that the "American broiler or chicken industry" had benefited from subsidies, engaged in dumping, and created a "serious impact" on China's broiler industry.[11] The Petition identified six U.S. producers of broiler products: (1) Pilgrim's, (2) Tyson, (3) Perdue Farms, (4) Sanderson, (5) Wayne Farms LLC, and (6) Mountaire Farms.[12]

14. On September 27, 2009, MOFCOM initiated the AD and CVD investigations against broiler products from the United States.[13] The scope of the investigations covered imported broiler products solely from the United States.[14]

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[10] Petitioner, Petition for Anti-dumping and Anti-subsidy Investigation of Broiler Products, (August 14, 2009), Sec. I.(I)1 (USA-1).

[11] *Id.* at 1-2 (USA-1).

[12] *Id.* at 11-12 (USA-1).

[13] MOFCOM, Notice of Initiation of AD Investigation, Notice No. 74 [2009] (USA-6); MOFCOM, Notice of Initiation of CVD Investigation, Notice No. 75 [2009] (September 27, 2009) (USA-7).

[14] MOFCOM, Notice of Initiation of AD Investigation, Notice No. 74 [2009], p. 2 (USA-6); MOFCOM, Notice of Initiation of CVD Investigation, Notice No. 75 [2009] (September 27, 2009), p. 2 (USA-7).

15. MOFCOM set the period of investigation ("POI") of the AD investigation and the CVD investigation from July 1, 2008 to June 30, 2009, and the POI for injury (in both investigations) to the domestic industry from January 1, 2006 to June 30, 2009.[15]

16. MOFCOM notified the producers identified in the Petition of the investigations' initiation and requested that the U.S. Embassy notify any other exporters and producers. MOFCOM required any U.S. exporter that wished to participate in the investigations to register by Monday, October 19, 2009, 16 business days from the initiation of the investigations.

17. On October 13, 2009, the Petitioner filed a petition alleging additional subsidy programs.[16] On November 5, 2009, MOFCOM announced that it would investigate these additional programs in the CVD investigation initiated on September 27, 2009.[17]

18. On October 20, 2009, or one day after the deadline by which U.S. producers had to register for the investigations, MOFCOM issued AD questionnaires to Tyson, Keystone, and Pilgrim's, companies selected as mandatory respondents, as well as to Sanderson, a company selected as an alternate respondent.[18] MOFCOM indicated that it had resorted to sampling in light of the number of companies that registered and had selected the mandatory respondents and alternate company based on export quantity and value.[19] MOFCOM later issued several supplemental AD questionnaires to the mandatory respondents and alternate company.

19. On October 20, 2009, MOFCOM issued CVD questionnaires to the United States government, as well as to Tyson, Keystone, Pilgrim's (again selected as mandatory respondents) and Sanderson (again selected as an alternate respondent).[20] As it had in the dumping investigation, MOFCOM relied on sampling of the companies that registered and selected the mandatory respondents and alternate company based on export quantity

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15 MOFCOM, Notice of Initiation of AD Investigation, Notice No. 74 [2009], p. 2 (USA-6); MOFCOM, Notice of Initiation of CVD Investigation, Notice No. 75 [2009] (September 27, 2009), p. 2 (USA-7).

16 MOFCOM, Final CVD Determination, Sec. 2.2.2.4, p. 5 (USA-5).

17 MOFCOM, Final CVD Determination, Sec. 2.2.2.4, p. 5 (USA-5).

18 MOFCOM, Final AD Determination, Secs. 1.2.1.2 & 1.2.1.3, pp. 3-4 (USA-4).

19 MOFCOM, Preliminary AD Determination, Sec. 1.2.3, p. 3 (USA–2).

20 MOFCOM, Final CVD Determination, Sec. 2.2.2.3, p. 4 (USA-5).

and export value.[21] MOFCOM also issued several subsequent CVD questionnaires to the U.S. government, the mandatory respondents, and the alternate company.

D. Preliminary Determinations

1. *Preliminary AD Determination*

20. On February 5, 2010, MOFCOM published its Preliminary AD Determination finding that dumping had occurred with regard to broiler products from the United States during the POI and that these products had caused material injury to the domestic industry. [22]

21. MOFCOM assigned the three mandatory respondents the following preliminary AD margins: Pilgrim's (80.5 percent), Tyson (43.1 percent) and Keystone (44.0 percent).[23] MOFCOM applied the weighted-average dumping margin of the three investigated companies, 64.5 percent, to the U.S. companies that filed registrations with MOFCOM, but were not investigated.[24] Notably, MOFCOM applied the weighted average dumping margin of the three investigated companies to Sanderson, the alternative respondent, even though it filed the same detailed questionnaire responses as the three companies that received individual margins.

22. With regard to other U.S. companies that neither filed a registration nor submitted a questionnaire response, MOFCOM indicated that it decided to "make determinations related to the dumping and dumping margin using facts that have been obtained and the best information that can be obtained."[25] Significantly, these were companies that were

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21 MOFCOM, Preliminary CVD Determination, Sec. 2.2.3 (USA–3).

22 MOFCOM, Preliminary AD Determination, Sec. 7 (USA-2).

23 *Id.* at Appendix II (USA-2).

24 MOFCOM, Preliminary AD Determination, Sec. 4.3 and Appendix II (USA-2). These companies included Lamex Foods Inc., Mountaire Farms, Wayne Farms LLC, Koch Foods, LLC, O.K. Foods, Inc., Interra International, Inc., Mar-Jac Poultry, Inc., Peco Foods, Inc., House of Raeford Farms, Inc., Foster Poultry Farms, Fieldale Farms Corporation, Water Valley Poultry, LLC, Kralis Brothers Food, Inc., Case Farm, LLC, Perdue Farms, Inc., Butterfield Foods Company, Inc., Amick Farms, LLC, Claxton Poultry Farms, Gold'n Plump Farms Limited Partnership, Allen Family Foods, Inc., Metafoods, LLC, B&B Poultry Co., Inc., Harrison Poultry, Inc., Simmons Prepared Foods, Tip Top Poultry, Inc., Boston Agrex, Inc., Townsends, Inc., George's Inc., Gerber Poultry, Inc., Export Packers Co., Ltd., Petaluma Acquisition, LLC, and USAPEEC.

25 MOFCOM, Preliminary AD Determination, Sec. 4.1 E (USA-2).

not contacted by MOFCOM or otherwise provided notice of the investigation. MOFCOM calculated a dumping margin of 105.4 percent for these companies.[26]

23. With regard to MOFCOM's injury determination included in the Preliminary AD Determination, MOFCOM defined the domestic industry as limited to "the domestic enterprises . . . supporting this antidumping investigation . . . ."[27] MOFCOM's principal injury findings included that: (i) dumped and subsidized imports had undersold the domestic like product and suppressed prices for the domestic like product; (ii) allegedly dumped and subsidized imports had an adverse impact on the domestic industry; and (iii) there was a causal link between subject imports and the alleged injury to the domestic industry.

2. *Preliminary CVD Determination*

24. On April 28, 2010, MOFCOM published its Preliminary CVD Determination, which found that imported broiler products from the United States were subsidized and had caused material injury to the Chinese domestic broiler industry.[28]

25. MOFCOM assigned the three mandatory respondents the following countervailing duty rates: Pilgrim's (4.9 percent), Tyson (11.2 percent) and Keystone (3.8 percent).[29] As it did in the Preliminary AD Determination, MOFCOM applied the weighted average subsidy rate of the three investigated companies, 6.1 percent, to the U.S. companies that filed registrations with MOFCOM, but were not investigated.[30] Also as it did in the Preliminary AD Determination, MOFCOM applied this same weighted-average margin to Sanderson, the alternate respondent (again, even though Sanderson was required by MOFCOM to file the same detailed questionnaire responses as the three investigated companies that received individual dumping margins).

26. MOFCOM assigned an "all others" subsidy rate of 31.4 percent.[31] As it did in the AD investigation, MOFCOM considered "all others" to include "all other companies in the U.S. which failed to make an entry for appearance or failed to submit its

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[26] MOFCOM, Preliminary AD Determination, Appendix II (USA-2).

[27] MOFCOM, Preliminary AD Determination, Sec. 3.2 (USA-2).

[28] MOFCOM, Preliminary CVD Determination, Sec. 8 (USA-3).

[29] MOFCOM, Preliminary CVD Determination, Sec. 5.3 C and Appendix II (USA-3).

[30] MOFCOM, Preliminary CVD Determination, Sec. 5.3 C and Appendix II (USA-3). These companies are the same companies that registered for the dumping investigation.

[31] MOFCOM, Preliminary CVD Determination, Appendix II (USA-3).

questionnaire responses."[32] Again, these were companies that were not contacted by MOFCOM or otherwise provided notice of the investigation. The Preliminary CVD Determination indicates that MOFCOM decided to "determine an *ad valorem* subsidy margin . . . on the basis of the already obtained facts and the obtainable best information."[33]

27. MOFCOM's injury findings in the Preliminary CVD Determination, including its definition of the domestic industry as comprised solely of the domestic enterprises supporting the investigation, is identical to its injury findings in the Preliminary AD Determination.

E. Verification

28. In regard to the AD investigation, MOFCOM conducted on-site verifications of Pilgrim's, Tyson, and Keystone from June 3, 2010 to June 15, 2010.[34] In regard to the CVD investigation, MOFCOM conducted on-site verification of the U.S. Department of Agriculture, U.S. Customs and Border Protection, and the U.S. Federal Reserve, as well as the three respondent companies, from May 25, 2010 to June 17, 2010.[35]

F. Disclosure Documents

29. MOFCOM disclosed to the U.S. government and U.S. respondents the so-called "Basic Facts" relied upon for the dumping margin calculation in the Preliminary AD Determination and the subsidy calculation in the Preliminary CVD investigation, on February 10, 2010 and April 28, 2010, respectively.[36]

30. On July 16, 2010, MOFCOM disclosed the "Basic Facts" relied upon for the dumping margin calculation in the Final AD Determination and for the subsidy calculation in the Final CVD investigation.[37]

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[32] *Id.* at Sec. 5.3 C (USA-3).

[33] *Id.* at Sec. 5.3 C (USA-3).

[34] MOFCOM, Final AD Determination, Sec. 1.4.1.3 (USA-4).

[35] MOFCOM, Final CVD Determination, Sec. 2.2.4.2 (USA-5).

[36] MOFCOM, Tyson Prelim. AD Disclosure (USA-8); MOFCOM, Pilgrim's Prelim. AD Disclosure (USA-9); MOFCOM, Keystone Prelim. AD Disclosure (USA-10); MOFCOM, Tyson Prelim. CVD Disclosure (**Error! Reference source not found.**); MOFCOM, Pilgrim's Prelim. CVD Disclosure (USA-16); MOFCOM, Keystone Prelim. CVD Disclosure (USA-17).

[37] MOFCOM, Tyson Final AD Disclosure (USA-12), MOFCOM, Pilgrim's Final AD Disclosure (USA-13); MOFCOM, Keystone Final AD Disclosure (USA-14); *see also* MOFCOM,

G. Final Determinations

1. *Final AD Determination*

31. On September 26, 2010, MOFCOM published its Final AD Determination. As with the Preliminary AD Determination, MOFCOM again found dumping and injury.[38] MOFCOM assigned the three mandatory respondents the following AD margins: Pilgrim's (53.4 percent), Tyson (50.3 percent), and Keystone (50.3 percent).[39] As it had in the Preliminary AD Determination, MOFCOM again applied the weighted average dumping margin of the three investigated companies, 51.8 percent, to Sanderson (the alternative respondent) and each of the companies that filed registrations, but were not investigated.[40] As it did in the Preliminary AD Determination, MOFOM assigned the same "all others" dumping margin of 105.4 percent to any U.S. company that did not register with MOFCOM.[41]

32. In its Final AD Determination, MOFCOM found that the allegedly dumped imports had caused material injury to the domestic industry. MOFCOM's definition of the domestic industry was again limited to the domestic enterprises supporting the antidumping investigation, and the key injury findings were generally the same as those in the Preliminary AD and CVD Determinations.

2. *Final Subsidy Determination*

33. On August 30, 2010, MOFCOM published its Final CVD Determination finding that imported broiler products from the United States were subsidized and had caused injury to the Chinese domestic broiler industry.[42] MOFCOM assigned the three mandatory respondents the following countervailing duty rates: Pilgrim's (5.1 percent), Tyson (12.5 percent) and Keystone (4.0 percent).[43] MOFCOM applied the weighted

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Final AD Determination, Sec. 1.4.1.7, p.10 (USA-4); MOFCOM, Tyson Final CVD Disclosure (**Error! Reference source not found.**); MOFCOM, Pilgrim's Final AD Disclosure (USA-19); MOFCOM, Keystone Final CVD Disclosure (USA-20); *see also* MOFCOM, Final CVD Determination, Sec. 2.2.4.8, p.10 (USA-5).

38 MOFCOM, Final AD Determination, Sec. 7 (USA-4).

39 MOFCOM, Final AD Determination, Appendix II (USA-4).

40 MOFCOM, Final AD Determination, Appendix II.

41 MOFCOM, Final AD Determination, Appendix II.

42 MOFCOM, Final CVD Determination, Sec. 8 (USA-5).

43 *Id.* at Appendix II (USA-5).

average of the three investigated companies, 7.4 percent, to Sanderson and each of the companies that filed registrations, but were not investigated.[44] MOFCOM assigned an "all others" subsidy rate of 30.3 percent to "all others" that did not register with MOFCOM.[45]

34. MOFCOM's injury findings in the Final CVD Determination are the same as the injury findings in the Final AD Determination.

IV. STANDARD OF REVIEW

35. The applicable standard of review in this dispute is that stated in Article 11 of the DSU and Article 17.6 of the AD Agreement. Article 11 provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

36. Article 17.6 of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

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[44] MOFCOM, Final CVD Determination, Appendix II, p. 106 (USA-5).

[45] *Id.* (USA-5).

37. Per these standards, the Panel must examine whether MOFCOM's conclusions are "reasoned and adequate" in "light of the evidence."[46] In order to do so, the

> panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report.
>
> ***
>
> The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence.[47]

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

> [I]t is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the

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[46] *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[47] *Id.*

> panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[48]

V. MOFCOM'S PROCEDURAL FAILINGS

A. China Breached Article 6.2 of the AD Agreement by Denying the U.S. Request for a Hearing.

39. On July 12, 2010, the United States requested, in writing, that MOFCOM's Bureau of Industry Injury Investigation ("BIII") conduct a "public hearing" to address various procedural and substantive concerns relating to the conduct of the AD and CVD investigations. In particular, the United States sought a hearing to address (i) MOFCOM's procedures, including the time allowed for comments on the preliminary determination and the lack of transparency by MOFCOM in explaining legal conclusions, (ii) MOFCOM's domestic industry definition, (iii) MOFCOM's analysis of the price effects of subject imports, and (iv) MOFCOM's causal link analysis.

40. MOFCOM summarily rejected the U.S. request for a public hearing. Instead, MOFCOM, without any further inquiry, decided that the U.S. request was of no concern to any other interested party, and offered only a closed forum where the United States could present its views to MOFCOM and MOFCOM alone. In so doing, MOFCOM acted inconsistently with Article 6.2 of the AD Agreement.

1. *MOFCOM Denied the U.S. Request for a Hearing.*

41. As an initial matter, there appears to be some disagreement between the United States and MOFCOM as to whether MOFCOM granted the U.S. request for a hearing. Section 1.4.1.6 of MOFCOM's Final AD Determination states in pertinent part that:

> On July 12 of 2010, the Investigating Authority received an application for hearing session from the Commercial Service Section of the US Embassy in Beijing. The Investigating Authority accepted the application.[49]

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[48] *Id.* at para. 157 (footnote omitted).

[49] MOFCOM, Final AD Determination, Sec. 1.4.1.6, p. 9 (USA-4).

If "accept[ing] the application" is understood as meaning that the U.S. request was granted, any such assertion is contradicted by two underlying documents from the investigation.

42. First, there is the U.S. request for the hearing (the "July 12 letter"), which sets forth what the United States sought.[50] Specifically, the United States requested that MOFCOM grant its request for a *public hearing.* A *public hearing*, by MOFCOM's own rules, is one in which other interested parties in the investigation are invited to participate.[51] The United States in its request sought a hearing to address the following issues:

1. The procedures followed by MOFCOM in these investigations, including the time allowed for comments on MOFCOM's preliminary determination and the lack of transparency in explaining legal conclusions;

2. MOFCOM's domestic industry definition;

3. MOFCOM's analysis of the price effects of subject imports; and

4. MOFCOM's analysis of the causal link between the subject imports and any injury to the domestic industry.[52]

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[50] United States, Letter from L. Wang to G. Peng & L. Weiping Re: Antidumping and Countervailing Duty Investigations on Imported Broiler Productions or Chicken Products Originating in the United States/Request for Public Hearing (July 12, 2010) (USA-22).

[51] MOFTEC, Rules on Public Hearings with Regard to Investigations of Injury to Industry (2002) ("Injury Hearing Rules"), Arts. 7 & 9 ([Art. 7] "SETC shall organize a public hearing in respect of investigations of injury to industry, and shall notify relevant interested parties of information in that regard such as the decision to hold a public hearing, the subjects to be heard, the time and place of the hearing, and relevant requirements, by means of a public notice or written notices 20 days before commencement of the hearing." [Art.9] "The parties with respect to the public hearing are those who have registered with SETC for participating in the public hearing, including the petitioners for anti-dumping, countervailing duty or safeguard investigations, the defendants, and any other interested parties.") (USA-47); *see also* MOFTEC, Provisional Rules on the Conduct of Public Hearings in Antidumping Duty Investigations, No. 3 ("Provisional Rules for AD Hearings) (2002) at Art. 6 ("Where BOFT decides to hold a public hearing on its own initiative, it shall notify interested parties in advance, and relevant provisions of these Rules are applied. (USA-23).

[52] United States, Letter from L. Wang to G. Peng & L. Weiping, dated July 12, 2010, p. 1 (USA-22).

In short, the United States in the July 12 letter requested an opportunity to present concerns, through a public hearing, regarding MOFCOM's process and findings.

43. Second, there is the MOFCOM response (the "July 14 letter") to the U.S. request.[53] MOFCOM issued this response without any further inquiry or clarification from the United States about what procedures, what key documents, what lack of transparency, or what lack of evidence prompted the request. The body of the July 14 letter, which leaves no doubt that the request in the July 12 letter was denied, states *in toto*:

> On July 12, we received a hearing request from the USG on the Broiler AD and CVD investigations.
>
> The investigating authority has undertaken the investigations in a public, just and transparent manner in accordance with Chinese laws and regulations by providing the USG and respondents sufficient time to submit responses (supplemental responses) and comments. All the public versions of the submissions are accessible in the public reading room. In addition, after the preliminary determination and verification, the investigating authority disclosed the sufficient and timely information to the interested parties, including the USG.
>
> *Since the issues mentioned in the hearing request by the USG are not relevant to the interested parties directly, the investigating authority decides to hear the USG's opinions by a way of opinion presentation meeting. The opinion presentation meeting is expected to be held on July 20. Please provide an attendant list by July 16.*[54]

As is evident from the text of this response, MOFCOM summarily dismissed U.S. concerns that the issues referenced in the U.S. request merited a hearing in which other interested parties could participate. Rather, MOFCOM decided, *ab initio*, that these issues – including issues that went to the very heart of the injury evaluation – had no relevance whatsoever for any of the parties to the investigation. MOFCOM attempted to sidestep the U.S. request by proffering instead the so-called opinion presentation meeting, whereby the United States could present its views alone to MOFCOM.

44. Besides these two documents, MOFCOM's own rules are probative in confirming that the "opinion presentation meeting" was not simply a "hearing" by another name. Specifically, MOFCOM did not bother with any of its institutionalized rules regarding hearing when it came to the U.S. request. For example, Article 7 of the Injury Hearing

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[53] MOFCOM, Letter to USG [2010] No.131 (July 14, 2010) (USA-24).

[54] *Id.* (emphasis added).

Rules provides for a "public notice" to interested parties of the decision to hold a hearing and the subject to be heard. This public notice is to be provided "20 days before the commencement of the hearing."[55] No such notice was issued in respect to the opinion presentation meeting and MOFCOM certainly did not wait 20 days to commence the opinion presentation meeting. Pursuant to Article 8 of the Injury Hearing Rules, MOFCOM is to grant interested parties 15 days, after the notice for a hearing is issued, to register for hearing and submit a summary of their presentation and relevant supporting materials.[56] MOFCOM did not do that either. It did not because it was clear to all that what MOFCOM offered to the United States did not constitute a hearing even as defined under MOFCOM's own rules.

2. *An Opinion Presentation Meeting in Lieu of a Hearing Does Not Satisfy Article 6.2.*

45. Article 6.2 of the AD Agreement provides interested parties the right to a hearing that includes the opportunity to meet with adverse parties and exchange views. What MOFCOM offered in lieu of a hearing falls short of Article 6.2 because it began with the premise that there was no need for any other party to hear what the United States had to say.

46. As the Appellate Body has explained, Article 6.2 is one of the provisions in the AD Agreement that "set[s] out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews."[57] The precise due process issue here is whether China's offer of an opinion presentation meeting, in lieu of the hearing sought by the United States, satisfied Article 6.2's obligation for investigating authorities to allow interested parties to meet those with adverse interests. Article 6.2 provides that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunityfor the defence of their interests" [58] and that:

> To this end, the authorities [1] *shall, on request, provide opportunities for* [2] *all interested parties* [3] *to meet those parties with adverse interests, so that* [4] *opposing views may be presented and rebuttal arguments*

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55 MOFTEC, Injury Hearing Rule (USA-47); *see also* MOFTEC, Provisional Rules, Art. 12 (MOFCOM "shall determine the time and location of the public hearing and establish a hearing agenda, within 20 days of the final date of registration for the public hearing as specified in the notice of decision . . . .") (USA-23).

56 MOFTEC, Injury Hearing Rule (USA-47).

57 *US – OCTG Sunset Reviews (AB)*, para. 241.

58 *Id.* (noting the use of terms such as "full" in Article 6.2 "suggest there should be liberal opportunities for respondents to defend their interests ").

> *offered*. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any *party to attend a meeting*, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.[59]

47. The language in this provision sets forth four elements or requirements. First, any interested party may request a hearing. As noted above, the United States made a request for a hearing through its July 12 letter. Once a request is made, the authorities "shall" provide the opportunities provided for in the provision.[60] The qualification on the obligation is expressed in the following sentence of Article 6.2, which notes that "provision of such opportunities must take account of the need to preserve confidentiality" or "convenience to the parties."[61] Accordingly, the provision recognizes that a hearing may need to be conducted with those considerations in mind. But here, MOFCOM went beyond addressing the conduct of the hearing and instead denied it on grounds that have no basis in the provision. Instead, the only reasons offered by MOFCOM was that the issues were not relevant to other interested parties (even though MOFCOM did not attempt to inquire further about what precisely the issues entailed) and that it has already decided that its investigations were being carried out in a "in a public, just and transparent manner."[62]

48. To the extent China claims that the assertions in the July 14 letter should be taken as an assessment by MOFCOM that the issues identified by the United States were irrelevant to the defense of any interested party's interests – and thus somehow outside the scope of Article 6.2 – that assertion fails as the issues identified by the United States, on their face, relate to procedural failings in how MOFCOM reached its findings.

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[59] (Emphases and numbered bracketing added).

[60] The term "shall" signifies a sense of legal duty, compulsion, obligation, and that something "must" be done "according to command or instruction." *See, e.g.*, NEW SHORTER OXFORD ENGLISH DICTIONARY, p. 2808 (1993); MIRIAM-WEBSTER DICTIONARY Shall, 2b ("used in laws, regulations, or directives to express what is mandatory <it shall be unlawful to carry firearms>"); The definitions for "require" include "specify as compulsory." CONCISE OXFORD ENGLISH DICTIONARY, p. 1222 (2009).

[61] *Compare US – OCTG Sunset Reviews (AB)*, para. 242 ("Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion of the sunset review, a respondent will have reached the limit of the 'ample' and 'full' opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.")

[62] (USA-24).

petitioners and respondents both have an interest in the investigating authority conducting a fair and open investigation. For example, the lack of transparency and sufficient time for responses could result in an interested party being denied the opportunity to bring salient points to MOFCOM's attention. As China successfully demonstrated in the recent *EC – Fasteners* case, investigating authorities that allow such procedural failings can be found to have acted inconsistently with Article 6.2.[63] Moreover, it is difficult to understand how MOFCOM could characterize as irrelevant to other parties issues critical to an injury determination such as the domestic industry definition, the price effects analysis, and the evaluation of causation.

49. With respect to the second element, the provision states that the opportunity extends to "all interested parties." In the July 14 letter, MOFCOM appears to make a distinction between the United States and interested parties by suggesting the latter have no interest in the concerns identified by the United States. To the extent MOFCOM may be implying that the United States was not an interested party, that is incorrect. Article 6.11(ii) of the AD Agreement provides that "interested parties" under the agreement includes "the government of the exporting Member," which in this case is the United States. To the extent MOFCOM may be implying that other interested parties would not have an interest in being present at a meeting, that is not a decision for MOFCOM. Under Article 6.2, if an interested party requests a meeting, the investigating authorities are obligated to provide one. The United States as an interested party, as defined by Article 6.11(ii), requested a meeting.

50. The third element provides that the opportunity is to "meet those parties with adverse interests." The definition for the term "meet" includes "arrange or happen to come in the presence or company of."[64] The meaning of the term "meet" is further informed by the use of the word "meeting" in the fourth sentence of the provision: ". . . . no obligation on any party to attend a meeting . . . ." The definition for the term "meeting" includes "an assembly of people for a purpose, especially for formal discussion."[65] Accordingly, the United States was entitled upon request to a meeting where it could be concurrently present with other parties that had adverse interests. In assessing this right, it is critical to remember that the point is not whether those with

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63 *EC – Fasteners (AB)*, para. 507 ("The Panel properly found that 'the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings' and that, therefore, 'the European Union acted inconsistently with Article 6.2' of the *Anti-Dumping Agreement*.")

64 CONCISE OXFORD DICTIONARY, pg. 888 (2009).

65 *Id.*

adverse positions would have ultimately chosen to meet with the United States, but that MOFCOM decided *ab initio* that no such gathering would occur.

51. Finally, Article 6.2 provides that the meeting should allow for opposing views and rebuttals to be offered. The opinion presentation meeting that MOFCOM substituted for a meeting makes no such provision. Accordingly, by allowing the United States – and only the United States – to present its opinions to MOFCOM, without presentations of views of the Petitioner, any opportunity for comment, and rebuttal by other interested parties, MOFCOM denied the exchange of views that the AD Agreement requires as a part of due process. Moreover, it is important to recognize why affording an opportunity to meet with adverse parties was needed. As the U.S. letter notes, "[t]he purpose of the requested hearing is to *address* issues raised in these investigations . . . ."[66] In order for MOFCOM to fairly adjudicate the issue, it was critical that the presentation not be *ex parte*. Unless those with adverse interests were provided an opportunity to share their views, the legitimacy of any change in decision by MOFCOM would be called into question. Moreover, in order for the United States to proffer the most effective arguments, it needed to understand what points parties adverse to its position were articulating.

52. For these reasons, China acted inconsistently with Article 6.2 of the AD Agreement by summarily denying the U.S. request for a hearing.

B. China Breached Article 6.9 of the AD Agreement by Failing to Disclose the Calculations and Data Used to Determine the Existence of Dumping and Calculate Dumping Margins.

53. China breached Article 6.9 of the AD Agreement by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties by failing to make available the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.

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[66] United States, Letter from L. Wang to G. Peng & L. Weiping, dated July 12, 2010, at 1 (emphasis added) (USA-22).

1. *Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins.*

54. 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 decision to apply anti-dumping duties:

> 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.

55. The obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of "facts". A "fact" is defined to mean "[a] thing known for certain to have occurred or to be true; a datum of experience" and "[e]vents or circumstances as distinct from their legal interpretation."[67] The use of the adjective "essential", which modifies "facts," indicates that this obligation does not encompass "any and all" facts, but rather is concerned only with the "essential facts". The ordinary meaning of "essential" includes "of or pertaining to a thing's essence" and "absolutely indispensible or necessary."[68]

56. Moreover, the obligation to disclose "essential facts" encompasses those essential facts "under consideration which form the basis for the decision whether to apply definitive measures." The term "consideration" has been defined, *inter alia*, as "the action of taking into account."[69] Thus, for purposes of the investigating authority's dumping determination, the essential facts under Article 6.9 are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping.[70]

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[67] New Shorter Oxford English Dictionary (Clarendon Press, 1993); *see also, EC – Salmon* para. 7.805 ("In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact.") (citing these same definitions).

[68] New Shorter Oxford English Dictionary (Clarendon Press 1993).

[69] New Shorter Oxford English Dictionary (Clarendon Press 1993).

[70] The Panel *in EC – Salmon* indicated that essential facts included not only those facts supporting a determination, but encompassed "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority." *EC – Salmon*, para. 7.796.

57. In order to determine whether definitive measures are warranted, an investigating authority must compare a respondent's normal value to its export price. An affirmative dumping determination is made only if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. This comparison, however, represents merely the final stages of a dumping determination. The investigating authority must first calculate the normal value and the export price.

58. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9.

59. The data underlying the investigating authority's calculations consist of various production costs and sales data submitted by the interested parties and adjusted, where appropriate, by the investigating authority. These data are "facts" because they are things "known for certain to have occurred." For example, the existence of a particular sales transaction at a given price during the period of investigation is an actual "event or circumstance" known to have occurred. The investigating authority aggregates, disaggregates or otherwise mathematically manipulates this adjusted data to calculate the normal value and export price. These calculations similarly are "facts" because they also represent things known to have occurred, as distinct from the investigating authority's reasoning or legal interpretation of that data.

60. Moreover, the calculations and underlying data are facts that are "absolutely indispensible" to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed.

61. Article 6.9 requires that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination of dumping. As Article 6.9 expressly provides, the aim of the requirement is "to permit parties to defend their interests." The panel in *EC – Salmon* stated:

> We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[71]

[71] *EC – Salmon*, para 7.805.

62. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests. If, for example, an interested party is not provided the calculations used by the investigating authority to determine the existence and magnitude of dumping, or the data underlying those calculations, the interested party cannot review the investigating authority's calculations to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Unless an interested party is provided with these essential facts, it cannot adequately defend its interests.

2. *MOFCOM Failed to Disclose the Calculations and Data it Used to Determine the Existence of Dumping and Arrive at the Dumping Margins.*

63. The Preliminary AD Determination and the final AD disclosures provided to the U.S. respondents only contain MOFCOM's vague reasoning and descriptions of its methodologies for determining and adjusting the normal value and export price for the respondent companies. They do not contain the actual data used in the dumping margin calculations and the calculations themselves.

64. The final AD disclosure documents provided company-specific figures relating to export volumes, export prices and normal values in a chart with the following format:[72]

Product Model	Export Quantity (Ton)	Export Price (USD)	CIF Price (USD)	Normal Value (USD)	Dumping Margin (%)
A	#	#	#	#	#
B	#	#	#	#	#
C	#	#	#	#	#
Total	#				#

[72] *See, e.g.*, Pilgrim's, Final AD Disclosure, p. 9 (USA-13); Keystone, Final AD Disclosure, p. 5 (USA-14); and Tyson, Final AD Disclosure, p. 4 (USA-12).

65. However, MOFCOM provided no disclosure of how these summary figures were derived. In other words, the summary table that allegedly shows the weighted-average dumping margin calculation only shows the final stage of a margin calculation, *i.e.*, the comparison of weighted-average export prices to weighted-average normal values and the weight-averaging of the product-specific margins into a margin for the subject merchandise as a whole. This table does not show how the product-specific export prices and normal values were determined. The bare conclusory summaries of MOFCOM's methodologies, adjustments and calculations in its Preliminary AD Determination and Final Disclosures are insufficient to satisfy the requirements of Article 6.9 of the AD Agreement and preclude the interested parties from adequately defending their interests.

66. The calculations and related information MOFCOM should have made available include, but are not limited to: (1) all calculations performed with respect to the derivation of normal value; (2) all calculations performed with respect to the derivation of export price; and (3) all calculations performed with respect to the determination of costs of production. For normal value, export price and costs of production, MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM's elimination or rejection of data provided by each respondent. Where a computer program was used, MOFCOM should have provided the actual files and spreadsheets created within the computer program, along with the formulas used to calculate normal value and export price, along with any adjustments. These facts were clearly "essential" to MOFCOM's dumping determination because they formed the basis of its decision to apply definitive measures and the determination of the dumping margins.

67. MOFCOM's failure to make available the calculation data prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. Without the actual calculations performed by the investigating authority, it is not possible to check the calculations against the methodological explanations given, to ensure the completeness and accuracy of the investigating authority's calculations.

68. Thus, MOFCOM's failure to make available the data and calculations it used to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents, is inconsistent with Article 6.9 of the AD Agreement.

C. China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement by Failing to Require the Provision of Adequate Non-Confidential Summaries.

69. Through the course of the investigations, MOFCOM allowed the Petitioner to withhold information from the other interested parties on confidentiality grounds.

Critically though, MOFCOM also allowed the Petitioner to dispense with the requirement to produce non-confidential summaries of the withheld information, even though Petitioner provided no explanation why a summary could not be created. Accordingly, China acted inconsistently with its obligations under Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement.

1. *Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Require the Preparation of Non-Confidential Summaries Absent Exceptional Circumstances.*

70. An investigating authority that accepts confidential information from an interested party must also require that interested party to provide a non-confidential summary of such information. Specifically, Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement provide:

> The authorities shall require [interested Members or] interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.[73]

In interpreting these provisions, it is critical to recognize five facets. First, the provision applies to information submitted by any interested party participating in the investigation. Plainly, Petitioner was an interested party in this investigation and therefore MOFCOM had an obligation to require Petitioner to follow the procedures set forth in Article 6.5.1 for submitting confidential information.

71. Second, the opening sentence of the provisions is expressed in the mandatory: "authorities *shall require* . . . ."[74] The obligation upon an investigating authority for the production of non-confidential summaries is not simply permissive, but obligatory in that the investigating authority must ensure that summaries are furnished.

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[73] The only difference in the text of the two provisions is that Article 12.4.1 of the SCM Agreement includes the bracketed text.

[74] *See supra* note 60.

72. Third, the use of the term "exceptional" in the third and fourth sentence qualifies the possibility for deviation from this rule.[75] As the Appellate Body has explained:

> It is not enough for a party simply to claim that providing a summary would be burdensome and costly. Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.[76]

In other words, the *only* instance when the investigating authority is excused from requiring an interested party to provide a non-confidential summary is when preparation is infeasible such as when the information cannot be summarized without revealing confidential information. Accordingly, an investigating authority's obligation to require non-confidential summaries is not excused even if the preparation of a summary is burdensome.

73. Fourth, the obligation to either provide a non-confidential summary or an explanation of why summarization is not possible falls on the interested Member or interested party – not the investigating authority. The first sentence of Article 6.5.1 of the AD Agreement and 12.4.1 of the SCM Agreement expressly requires the "interested Members or interested parties" to "furnish non-confidential summaries." The third and fourth sentences of these articles specify that if the interested Member or interested party indicates that the information is not susceptible of summary, "a statement of the reasons why summarization is not possible must be provided." In other words, the investigating authority m whether the non-confidential summary or the reasons proffered for the inability to prepare a summary are sufficient. The Appellate Body has said as much:

> For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible. As the Panel found, 'in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the potential for abuse under

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[75] The definition for "exceptional" includes "unusual; not typical." CONCISE OXFORD ENGLISH DICTIONARY, p. 496 (2009).

[76] *EC – Fasteners (AB)*, para. 543.

> Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel.'[77]

74. Accordingly, an investigating authority may not substitute itself for an interested party in justifying a claim that a non-confidential summary is infeasible. The responsibility rests with the party submitting that information.

75. Fifth, it is critical to recognize what is not in these provisions. Notably absent is any suggestion that the obligations in these provisions are contingent upon another interested party making a request for a non-confidential summary or a showing that an interested party was injured by the lack of a non-confidential summary.[78] The investigating authority's obligation exists even if no other party takes issue.

2. *MOFCOM Allowed the Petitioner to Submit Confidential Information in the Investigations Without Preparing Non-Confidential Summaries.*

76. As explained above, an investigating authority must require an interested party seeking confidential treatment for information to either provide a non-confidential summary of that information or explanation of why summarization is not possible. Moreover, the investigating authority can excuse the production of non-confidential summaries only if the relevant party establishes that "exceptional circumstances" exist. In the investigations at issue, the Petitioner did not present to MOFCOM any particular circumstances, let alone exceptional ones, that justified why the information in question was not susceptible to a non-confidential summary. The Petitioner did not submit anything more than the basis for asserting the information to be confidential: "Here the applicant's business secret is involved and disclosure of relevant data will create serious ill effect on the applicant, so confidentiality is requested."[79]

77. Nevertheless, MOFCOM failed to require the Petitioner to prepare non-confidential summaries of information it submitted where it would have been relatively straightforward to do so. The following instances from the Petition are illustrative.

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[77] *EC – Fasteners (AB)*, para. 544.

[78] *China – GOES*, para. 7.191 ("However, whether or not a respondent makes a substantive challenge regarding the subject matter that has been treated confidentially does not affect the standard for an adequate non-confidential summary under Articles 12.4.1 of the SCM Agreement or 6.5.1 of the Anti-Dumping Agreement. Indeed, without an adequate non-confidential summary, the ability of an interested party to contest the relevant issue is compromised." *Compare e.g.*, AD Agreement, Art 6.2 ("To this end, the authorities shall, *on request*, provide opportunities . . . .") (emphasis added).

[79] *See generally* Petition (USA-1).

- The Petitioner's Production Data[80]

78. The Petition redacts the total output of the subject products represented by the Petitioner and the ratio of that output to the total domestic output. MOFCOM's refusal[81] to compel a non-confidential summary of this information from the Petitioner is all the more striking since the Petitioner, by the terms of the Petition itself, was composed of twenty different entities and the Petition did not even identify the total output of the members.[82] Assuming *arguendo* that an individual firm's production figures merited confidential treatment, it is unclear why MOFCOM could not have required a non-confidential summary consisting of the aggregate production output from the various firms.

79. A simple non-confidential summary with the aggregate output of the entities represented by the Petitioner's member firms would have been very helpful for the respondents.[83] A proper understanding of this type of data is crucial to determining whether the Petition was made "by or on behalf of" the domestic industry.[84] Per Article 5.4 of the AD Agreement, no investigation may be initiated unless the investigating authority has determined that domestic producers representing more than 50 percent of the total production produced by the portion of the industry expressing either support or opposition to the Petition. Although the Petition claims as much,[85] its precise description

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80 Petitioner, Petition, Sec. I(I) 4. (p. 4) (USA-1)

81 "Refusal" is the correct word. USAPEEC raised Petitioner's failure to disclose information relevant to standing such as the names of the Petitioner's constituent members and their total output and requested relief from MOFCOM, which apparently ignored or denied the request. USAPEEC, Injury Brief, pp. 2-3 (USA-21).

82 Petitioner, Petition at I(I) 2. (pg. 2) (USA-1).

83 It is critical to note that MOFCOM does not maintain procedures whereby counsel or representatives for an interested party could examine confidential information solely for the purpose of participating in the antidumping or countervailing duty investigation. For example, the U.S. investigating authorities maintain a system whereby confidential information may be released to interested parties' counsel under an administrative protective order ("APO") allowing them access to confidential information so they can fully participate in the proceedings. Here, MOFCOM's failure to grant non-confidential summaries meant there were no other avenues by which interested parties could address the confidential information.

84 AD Agreement, Art. 5.4.

85 As the panel in *China – GOES* noted, the requirement for a non-confidential summary is not satisfied by a mere assertion regarding the issue such as one claiming that an applicant has satisfied the standing requirement for bringing an antidumping or countervailing duty case. Para. 7.205 ("Simply relying on the conclusion as the non-confidential summary does not provide

is worth noting: "the ratio of the output of the like products represented by the applicant to the total domestic output of like products in the same period exceeded 50% in 2006, 2007, *2008*, *the first half of 2008* and in the *first half of 2009*."[86] The absence of any description for the latter halves of 2008 and 2009 (and the redundant reference to 2008) raise genuine questions about whether the Petition met the requirements of Article 5.4. In light of the seriousness of the issue, MOFCOM's failure to require a non-confidential summary is not only legally untenable, but also overtly prejudicial by denying respondents the opportunity to contest whether the Petition satisfied Article 5.4. A U.S. industry association made that precise point to MOFCOM during the course of the investigation:

> The petitioner failed to disclose the specific information of the members it is representing, including . . . the total output of the members, which leads interested parties unable to analyze whether the Petitioner has satisfied the standing requirements under the *AD Initiation Rules*, and to analyze injury of the Petitioner.
>
> This failure is particularly important as the Petition ignores some of the largest poultry companies in China. Da Chan (Asia) Foods Ltd. is reported to represent over 10 percent of total Chinese chicken production, but is not mentioned by name in the Petition. Other major producers not included in the Petition include New Hope Group, Ltd., Fujian Sunner Development Co., Ltd., and Shandong Xinchang Group. The fact that these major producers are not mentioned casts doubt on whether the Petitioner in fact[] satisfies the standing requirement.[87]

Thus, on this point, MOFCOM, even with explicit notice, saw no need to revisit its policy regarding non-confidential summaries of information submitted by an interested party.

- The Petitioner's Economic Position

80. While the Petition provided the import prices of the subject merchandise for 2006, 2007, 2008, the first half of 2008,[88] and the first half of 2009, it claimed confidential

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interested parties with a means to challenge whether the confidential information in fact provides a basis for the conclusion drawn.")

86 *Id.* at Sec. I(I) 4. (pg. 5) (emphasis added) (USA-1).

87 USAPEEC, Injury Brief (USA-21).

88 The Petition's tables demarcate 2008 and the first half of 2008 as separate entries. It is unclear whether the Petitioner intended to demarcate them separately or the reference to 2008 refers to something else.

treatment for the corresponding domestic sales prices.[89] The Petition also claimed confidential treatment for the Petitioner's production capacity,[90] domestic inventory levels,[91] cash flow,[92] wages and employment,[93] and labor productivity.[94] Yet, MOFCOM itself, in its preliminary and final determinations, was somehow able to provide summaries of these precise types of data.[95]

81. The failure here is thus not merely abstract. While it is clear that MOFCOM failed to try to even comply with the procedures dictated by the relevant WTO provisions, it is also equally clear that had MOFCOM complied with those procedures, non-confidential summaries of the allegedly confidential information could have been prepared by the Petitioner. Accordingly there can be no dispute that MOFCOM acted inconsistently with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

VI. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATIONS

A. China Breached Article 2.2.1.1 of the AD Agreement by Summarily Rejecting U.S. Producers' Costs of Production

82. MOFCOM determined the normal values for U.S. producers in part by deciding upon costs of production for subject products. However, MOFCOM, in determining the costs of production for the various subject products did not take the specific costs kept in the books and records of U.S. producers for the various subject products. Instead, it manipulated those costs by averaging them according to weight. In other words, MOFCOM took products as diverse as breast meat and chicken paws and decided the cost to produce a pound of each was the same – even though the producers' historical books and records showed the contrary. And it did so without addressing all the evidence on the record that explained why MOFCOM's approach was so wrong. In so doing, MOFCOM breached Article 2.2.1.1 of the AD Agreement.

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89 Petitioner, Petition at Sec. III (II)(2) (pgs. 24-25) & Sec. VI (b) 2.1 (2) (pp. 61, 63).

90 *Id.* at Sec. VI (b) 3.2, p. 69 (USA-1).

91 *Id.* at Sec. VI (b) 3.4, p. 72 (USA-1).

92 *Id.* at Sec. VI (b) 3.9, pp. 80-81 (USA-1).

93 *Id.* at Sec. VI (b) 3.10, p. 82 (USA-1).

94 *Id.* at Sec. VI (b) 3.11, pp. 82-83 (USA-1).

95 MOFCOM, Final AD Determination at Sec. s 5.2.2-5.2.15 (USA-4)

83. When calculating the cost of production for subject merchandise as part of the determination of whether dumping is occurring, Article 2.2.1.1 states in pertinent part that:

> costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such 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.

In this case, U.S. producers presented to MOFCOM costs of production for the various subject products. These costs, kept by the exporters and producers in their books and records, were in accordance with generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with production. Nonetheless, MOFCOM failed to use those costs and applied its own weight-based methodology to determine the costs of production. Notably, MOFCOM did not explain why its methodology was necessary, or even preferable, to using the costs kept by U.S. producers.

84. As explained in greater detail below, the subject products consisted of several types of chicken products such as leg quarters, chicken paws, and breast meat. And a producer cannot grow just a leg quarter or just a chicken paw. In these circumstances, GAAP recognizes that producers of agricultural products can allocate their costs to particular products and that doing so is perfectly reasonable. Here, U.S. producers had historically allocated their costs in respect to subject products and thus were in a position to provide MOFCOM with the figures it was requesting.

85. The United States is asking the Panel to answer a basic, but fundamental question: can an investigating authority substitute its preferred calculation methodology over a methodology expressly specified by the AD Agreement without any basis for doing so? The United States believes the answer is clear in the text of the AD Agreement: an investigating authority may not do so.

86. In considering the question before MOFCOM, it is essential to recognize two points that are not in dispute. First, there is no dispute that the costs in U.S. producers' books and records are consistent with GAAP of the United States *and China*. Second, there is no dispute that U.S. producers explained why the costs in their books and records were reasonable: that they allocated the costs of production based on the value of the various types of subject merchandise. Thus, higher costs were allocated to the types which derive a greater value in the market place, such as cuts of breast meat, while lower costs were attributed to types that demand a lesser price, such as leg quarters.

87. MOFCOM refused to use the U.S. respondents' allocated costs of production, despite the fact that those costs were GAAP-consistent and historically utilized by the U.S. producers and audited by external accountants. MOFCOM asserted in its

Preliminary and Final AD Determinations, without providing any reasoning or analysis, that it did not believe that the reported costs reasonably reflected the actual costs of production. Instead, it stated the view that U.S. producers had an affirmative responsibility to convince it otherwise, and implied that for some unspecified reason MOFCOM disagreed with the producers' cost allocations.

88. After MOFCOM asserted that the reported allocated costs were deficient, it then developed an alternative methodology to calculate the costs of production. Specifically, MOFCOM took the various overall reported costs to produce chickens, averaged them, then allocated those costs to chicken parts by weight. In other words, MOFCOM, despite recognizing that different parts of a chicken hold different values in the market place, rejected records that reflected distinct prices for different parts, and instead employed a methodology that, for example, valued the cost to produce a pound of boneless breast meat the same as the cost to produce a pound of leg quarters. MOFCOM implemented this new allocation methodology while failing to explain why such an approach was preferable to the allocation methodology reported by the U.S. respondents, let alone permissible under the AD Agreement.

1. *Article 2.2.1.1 of the AD Agreement Requires Investigating Authorities to Calculate Costs on the Basis of Records Kept by the Exporter or Producer When the Costs are in Accordance with GAAP and Reasonably Reflect Costs Associated with Production and Sale.*

89. The central issue in considering a claim of dumping is determining whether, and by what extent, the subject product's price in its home market (*i.e.*, its normal value) exceeds the price of that same product in the export market (*i.e.*, its export price).[96] Per the AD Agreement, the preference for obtaining normal value is to examine sales of the like product in the domestic market of the exporting country. In certain circumstances, the AD Agreement permits other methods to derive normal value.[97] Article 2.2 of the AD Agreement states:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, *or with*

[96] AD Agreement, Art. 2.1.

[97] AD Agreement, Art. 2.2.

> *the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*.[98]

90. In constructing the cost of production, MOFCOM had specific obligations under the AD Agreement regarding how it calculated the cost components of the U.S. producers' constructed values. Article 2.2.1.1 of the AD Agreement provides, in pertinent part:

> [First Sentence] For the purpose of paragraph 2 [Article 2.2], costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such 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.
>
> [Second Sentence] Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

91. The first sentence of this provision establishes the obligation of the investigating authority to "normally" calculate costs on the basis of records kept by the exporter or producer so long as certain conditions – conditions plainly met in this case – are present. The use of the term "shall" in the sentence signifies a sense of legal duty and the definitions for the term "normally" include "in the usual way" or "as a rule."[99] Accordingly, the investigating authority must calculate costs on the basis of records kept by the exporter or producer *as a rule* whenever (1) the records are consistent with GAAP of the exporting country and (2) reasonably[100] reflect the costs associated with the production and sale of the subject merchandise.[101]

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98 Emphases added. Citation omitted.

99 CONCISE OXFORD DICTIONARY, p. 975 (2009); *see also US – Clove Cigarettes (AB)*, para. 273 ("We observe that the ordinary meaning of the term 'normally' is defined as 'under normal or ordinary conditions; as a rule'.)

100 Notably absent in the text of the provision is a suggestion that the producer's methodology be the "most" or "only" reasonable approach. Article 2.2.1.1 simply requires that it be reasonable.

101 *Egypt – Rebar*, para. 7.393.

92. The second part of the first sentence contains an exception to how costs should "normally" be calculated. In considering the question of this exception, it is important to consider their relationship to the overall rule. Specifically, it is the investigating authority that must comply with the rule of "normally" using a producer's costs. If the investigating authority deviates from that rule, then it is the investigating authority's obligation to demonstrate why the exception should apply. Here, as explained in greater detail below, the reported costs were those kept in the books and records of U.S. producers, were consistent with GAAP, and reasonably reflected the costs of production, and MOFCOM provided no basis for departing from the reported costs.

93. The second sentence of the provision provides important context in construing the obligation set out in the first. In particular, the second sentence addresses the circumstance when the costs in the producer's books need adjustment because of the scope of the investigation. This language reinforces the prior obligation by precluding an investigating authority from simply manipulating reported costs whenever the costs do not precisely line up with subject merchandise or the scope of the investigation. It does so by providing that the evidence an investigating authority must consider *includes* that made available by a producer that has been "historically utilized" by that producer. Accordingly, the investigating authority cannot simply discount or ignore a producer's GAAP-consistent prior practice in favor of its own preferences.

94. The Appellate Body has also explained that when it comes to a decision regarding allocating costs, the investigating authority must examine the overall evidence to ensure that costs are allocated if necessary, and that any such allocation is done properly in light of the evidence:

> In the context of the second sentence of Article 2.2.1.1, we read the term "consider" to mean that an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on and to 'weigh the merits of" "all available evidence on the proper allocation of costs". As we stated above, the requirement to "consider" evidence would not be satisfied by simply "receiving evidence" or merely "tak[ing] notice of evidence".[102]

In short, the second sentence in Article 2.2.1.1 precludes an investigating authority from simply manipulating figures from a producer's records in whatever fashion it fancies. Instead, it must accept the GAAP-consistent allocation methodology historically used by a producer in its books and records, or, in the alternative, explain in detail the reason the allocated costs are not reasonable as the burden lies with the investigating authority to accept such figures unless the exception applies. As such, if the investigating authority decides to reject those reported costs, and use an alternative allocation, it must

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[102] *US – Softwood Lumber V (AB)*, para 133.

affirmatively demonstrate with relevant evidence that the allocation it is implementing is "proper."[103]

95. In sum, Article 2.2.1.1 provides certain obligations for an investigating authority that must be addressed in every case including this one. First, *the investigating authority must accept* the costs kept by the exporter or producer in its books and records if those costs of production are GAAP consistent and reasonably reflect the costs associated with the production and sale of subject products. With respect to the allocation of costs in particular, Article 2.2.1.1 requires that the *investigating authority* consider all available evidence placed on the record by the exporter or producer with respect to the allocation of costs historically used by the exporter or producer.[104] Here, there was overwhelming evidence put on the record by the producers that their historically allocated costs were GAAP-consistent and reasonable. MOFCOM failed to address any of it in claiming that the U.S. producers' costs were unreasonable. MOFCOM was therefore not entitled to reject the costs reported by U.S. producers. Finally, if the investigating authority establishes that the costs are not reasonable or not consistent with GAAP, then *the investigating authority* bears the additional burden of demonstrating that it considered the relevant evidence made available by the exporter or producer to ensure that its alternative allocation is proper. Again, the record clearly demonstrates that MOFCOM failed to consider key evidence regarding why its allocation was improper and thus was in no position to adopt its methodology even if it had established that the costs reported by U.S. producers were in fact unreasonable.

2. *MOFCOM Acted Inconsistently with Article 2.2.1.1 by Failing to Explain why the Costs did not Reasonably Reflect the Costs of Production.*

96. U.S. producers kept costs in their books and records that could be used to arrive at the particular costs of production for the subject products. The U.S. producers put before MOFCOM evidence that these costs were consistent with U.S. GAAP, had been historically utilized – and indeed audited – and that they were reasonably associated with the production and sale of the subject products. MOFCOM found these costs

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[103] *United States – Softwood Lumber V (AB)*, para. 134 ("The word '*proper*', in our view, supports our reading of the word 'consider', because it suggests some degree of deliberation on the part of the investigating authority in 'consider[ing] all available evidence', so as to ensure that there is a proper allocation of costs.") (alteration in original).

[104] *Egypt – Rebar*, para. 7.393. ("We note that both of these provisions [Article 2.2.1.1 & Article 2.2.2] emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration.").

unreasonable but did not explain why or what evidence it reviewed in reaching such a finding.

a. *The U.S. Producers Explained to MOFCOM that their Costs of Production were GAAP Consistent and Reasonably Reflected the Costs of Production.*

97. During the antidumping investigation, each of the three U.S. producers reported that chickens are converted in numerous products, with the values of the respective products varying according to factors such as the market the specific product is sold in and the ultimate customers of a particular product. In regards to production costs for these various products, the producers explained that their records allocated higher production costs for more valuable chicken products, such as breast meat.

(i) Tyson

98. Tyson submitted to MOFCOM that its books and records recorded the costs of production for subject merchandise by "allocat[ing] joint costs incurred up to the split-off point to the various joint products that are separated at the split off point."[105] In other words, Tyson explained that chicken breasts, leg quarters, wings, and paws are joint products because they are produced simultaneously (by raising a live bird) since Tyson "cannot choose to produce just a chicken breast or wing or paw."[106] However, Tyson could and did specify costs for the various products according to their respective value, *i.e.*, the "relative sales value approach,"[107] and that doing so "is in accordance with U.S. GAAP," U.S. and Chinese accounting texts, and international accounting standards.[108] Indeed, Tyson noted that Chinese poultry producers record costs similarly.[109]

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105 Tyson, Comments on the Preliminary AD Determination, p. 4 (USA-25).

106 *Id.*

107 Tyson, Further Comments on Preliminary AD Determination, p. 6, n.5 (explaining that such a methodology is appropriate when products are "produced in groups" and citing to Exhibit 3, *GAAP-Handbook of Policies and Procedures*, Joel G. Singer, Prentice Hall, 2010, 3.31) (USA-26).

108 *Id.* at 8 (citing International Accounting Standards No. 2 – Inventories (IASB Revised Dec. 2003) at para. 14, which acknowledges that "the relative sales value of each product" is an appropriate means of allocation "at the stage in the production process when the products become separately identifiable"); Exhibit 4 (letter listing various accounting texts discussing value-based allocations for joint products); and Exhibits 5 & 6 (providing excerpts from Chinese accounting textbooks describing value-based allocation methodologies) (USA-26).

109 Tyson, Comments on the Preliminary AD Determination, p. 4 (USA-25).

(ii) Pilgrim's

99. Like Tyson, Pilgrim's explained how its books and records captured costs of production for the various models according to their respective values.[110] Specifically, Pilgrim's reported that following the split-off of breasts from the rest of the chicken, it assigned meat costs "to the prime value product, chicken breast, with the other pieces of chicken receiving costs based upon their relative values in the market place."[111] It further explained that this allocation methodology is consistent with United States GAAP and described in standard, widely-referenced accounting textbooks.[112] Indeed, the authorities cited by Pilgrim's explained that its accounting practices were not merely acceptable or reasonable, but preferable:

> A major limitation of the method of {allocating costs by physical-unit} is that there is no direct relation between the allocated cost with the method and the product's ability to gain profits. Also, there is a distortion in the gross profit computation any time the sales prices per unit of quantity is not the same for different joint products.
>
> The relative sales value method allocates joint costs on the basis of the products' relative sales value at the split-off point. This method is considered as the *best allocation method*, since the costs are allocated in proportion to the relative revenue-generating power of the individual products.[113]

(iii) Keystone

100. During the course of the investigation, Keystone reported to MOFCOM two different sets of costs. First, Keystone provided the historically recorded costs in its books and records, which assigned production costs to [[ ]], and then assigned a value to the rest of the chicken (including the like product in this case) based on the production costs for those by-products incurred after the split-off of those byproducts from the rest of the chicken.[114] Keystone explained to MOFCOM

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110 Pilgrim's, Comments on the Preliminary AD Determination, p. 10 (USA-27).

111 Pilgrim's, Supplemental Questionnaire Response, Answer 44 (USA-28).

112 Pilgrim's, Comments on the Preliminary AD Determination, pp. 6-8 (citing to *Barron's Accounting Handbook* 103 (3rd ed. 2000) by J. Siegel & J. Shim) (USA-27).

113 *Id.* at 7, quoting *Barron's Accounting Handbook* 103 (3rd ed. 2000) by J. Siegel & J. Shim (USA-27) (emphasis added).

114 Keystone, Comments on the AD Final Disclosure, pp. 21-23 (USA-29).

that its [[

]][115] After MOFCOM rejected those costs in the Preliminary Determination, Keystone offered an alternative set of costs that reflected costs for all chicken parts based on the relative sales value of each product.[116] Keystone explained in great detail that these are the "two widely used cost methods which are recognized as acceptable under U.S. GAAP and International Accounting Standards."[117] Keystone further provided numerous United States and Chinese accounting textbook excerpts which "consistently demonstrate that value-based cost allocation methods such as joint product and by-product costing are in accordance with GAAP and are widely-accepted as fair and accurate."[118]

101. Beyond the value of the finished product, Keystone also submitted to MOFCOM other compelling reasons for its accounting treatment:

- [[

]].

- [[

]].

- [[

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115 Keystone, Comments on the Preliminary AD Determination, p. 3 (USA-30).

116 Keystone, Comments on the Preliminary AD Determination, (Feb. 25, 2010), pp. 8-10 (USA-30).

117 Keystone, Comments on the AD Final Disclosure, p. 21, n. 19 (citing to Statement 6 of Chapter 4, "Inventory Pricing," of Accounting Research Bulletin No. 43. Financial Accounting Standards Board and Accounting Standards Codification Code 905 360 30 p. 5, Financial Accounting Standards Board, as well as International Accounting Standards 2, Inventories at para. 14 (EC staff consolidated version as of 16 September 2009) (USA-29).

118 *Id.* at pp. 21-22, n. 19.

]].[119]

(iv) USAPEEC

102. Besides the three investigated U.S. producers, MOFCOM accepted submissions from a U.S. industry association, USAPEEC, regarding how the poultry sector records costs. Particularly instructive, USAPEEC provided to MOFCOM various U.S. and Chinese accounting texts that explained why recording costs according to the value of the final product, as the U.S. producers did, was appropriate. For example:

- The sales value method has following advantages: (1) easy to calculate; and (2) allocating costs based on the revenue from each product. The sales value method is better than the physical measure method, for the reason that it allocates joint products' costs based on each product's absorption of costs.[120]

- The relative sales value based allocation method is based on the theory that the joint products with higher sales price should proportionately bear a higher portion of the joint costs, aimed at obtaining a uniform gross profit margin for the joint products. Apparently, this method makes up the drawback of the simple average unit cost method, as it establishes a correlation between the allocation of joint costs and the final sales value of the joint products, and allocates the joint costs of the joint products prior to the separation based on the proportion of the sales value of each joint products.[121]

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[119] Keystone, Comments on the Preliminary AD Determination (Feb. 25, 2010), pp. 3-4 (USA-30).

[120] USAPEEC, Further Comments on the Preliminary Determination, p. 7, quoting Edward J. Blocher, et. al., Cost Management: Product Costing and Financial Reporting at Chapter 3 (Huaxia Publishing House 2002) (USA-31).

[121] USAPEEC, Further Comments on the Preliminary Determination, p. 6, quoting Xu Zhengdan, et. al., Cost Accounting at Chapter 13 (Shanghai Sanlian Bookstore 1994) (USA-31).

- Which method of allocating joint costs should be used? The sales value at split-off method is preferable when selling-price data exists at split-off (even if further processing is done).[122]

Accordingly, U.S. producers, besides confirming their costs were GAAP-consistent, gave MOFCOM a compelling rationale for why their figures for the various models reasonably reflected the costs of production: they were based on a relationship with the final value of the product types and the actual costs incurred in producing the products.[123] U.S. producers fully substantiated their positions by provide ample objective evidence that value-based allocations are GAAP-consistent and reasonable.

b. ***MOFCOM Did Not Explain Why U.S. Producers' Costs Were Unreasonable.***

103. U.S. producers thus put on the record evidence that historically-recorded costs for the various models were in accordance with GAAP[124] and provided detailed explanations that those allocated costs reasonably reflected the U.S. producer's costs of production.[125] MOFCOM did not dispute that the reported costs were GAAP consistent or were historically kept in the books and records of U.S. producers. Nor did MOFCOM address the evidence that such cost allocations were reasonable. Instead, MOFCOM summarily asserted that the costs did not reasonably reflect the costs of production. Critically though, MOFCOM gave no explanation to support this conclusion. MOFCOM's determinations with respect to Tyson are illustrative.

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122 USAPEEC, Further Comments on the Preliminary Determination, p. 6, quoting Charles T. Horngren, et al., Cost Accounting: A Managerial Emphasis at 5581 (Prentice Hall 2009) (USA-31).

123 *See EC – Salmon*, para. 7.483 ("[w]hether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production *and sale'* of the like product.") (emphasis added)

124 Pilgrim's Pride, Investigation Questionnaire Response (December 3, 2009), Sec. VI, Cost of Production and Relative Expenses, at 48-64 (USA-32); Pilgrim's Pride, Supplemental Questionnaire Response (December 18, 2009), answer to question 44 at p. 21 (USA-33); Keystone, Investigation Questionnaire Response, Sec. VI, Production Costs and Relative Expenses, at 64-92 (USA-34); Keystone, Supplemental Questionnaire Response, answer to question 27, at 19-28 (USA-35); Tyson's Investigation Questionnaire Response, dated December 3, 2009, Sec. VI, Cost of Production and Relative Expenses, at 47-60 (USA-36).

125 Pilgrim's Pride, Comments on Preliminary AD Determination, pp. 6-10 (USA-27); Keystone, Comments on Preliminary AD Determination at 1-7 (USA-30); Tyson, Comments on Preliminary AD Determination at 1- 5 (USA-25).

Preliminary Determination

> The Investigating Authority reviewed the production cost data submitted by the company. After the review, the Investigating Authority *believes that the type-specific cost claimed by the company has not reasonably reflected the production cost related to the Subject Products*. The Investigating Authority decides to temporarily take the weighted average production cost of various types as the production cost of the Subject Products and the like products.[126]

Final Determination

> After the preliminary determination, the company submitted the comments on the methods used by the Investigating Authority, *but could not provide enough reasons to prove the rationality of the different costs for different parts of the subject product*. After the review and on-site verification, the Investigating Authority maintains the preliminary determination because the facts ascertained in the preliminary determination did not change.[127]

Tyson Final AD Disclosure

> After the preliminary determination, the company made comments on the investigation authority's method, *but the company did not provide sufficient reason to prove the reasonableness of different parts of the subject merchandise having different production cost*. Through review and on-spot verification, the investigation authority finds that the facts determined in the preliminary determination did not change, and thus determines to maintain its preliminary determination.[128]

These are the complete explanations provided by MOFCOM of its rationale for disregarding Tyson's reported costs. The "explanations" provided for disregarding the other producers' costs are equally spare and conclusory. MOFCOM thus rejected the use of Tyson's costs without any explanation other than that MOFCOM was not satisfied with the reported costs. Moreover, as the final determination and disclosure makes clear, MOFCOM placed the burden on *the producer* to convince it otherwise.

104. As explained above, the obligation is on the *investigating authority* to rely upon a producer's figures and to demonstrate why one or both of the conditions do not apply.

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126 MOFCOM, Preliminary AD Determination , pp. 17-18 (USA-2).

127 MOFCOM, Final AD Determination, pp. 29-30 (USA-4) (emphases added).

128 MOFCOM, Final AD Disclosure for Tyson, p. 2 (USA-12).

As the WTO panel in *US – Softwood Lumber V* explained, Article 2.2.1.1 imposes "positive obligations" on "investigating authorities." It "requires that costs be calculated on the basis of the exporter or producer's records, in so far as those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration."[129]

105. A contrary interpretation – that an investigating authority can choose without explanation, to rely on costs other than those calculated on the basis of the producer or exporter's records – would both be inconsistent with the text of the Agreement – which provides that reported costs shall normally be used – and would eviscerate the protections of the provision. At the investigation level, a producer or exporter would have no way of knowing why its costs based on its records were rejected and what evidence and arguments would be needed to convince an investigating authority to change its position. For example, Tyson had provided MOFCOM letters from two partners at a prominent accounting firm, one based in the United States and the other in China, noting that its reported costs were "reasonable."[130] MOFCOM did not address that evidence or any other evidence submitted by Tyson. Tyson was thus in the dark as to what more needed to be provided.

106. At the WTO level, allowing the contrary interpretation would mean that a panel would be unable to assess whether or not the investigating authority had complied with Article 2.2.1.1. Consider the panel's evaluation of an Article 2.2.1.1 claim in *U.S. – DRAMs*:

> the DOC stated that its review of LGS cost data for the second half of 1996 "indicates that there are serious questions whether the reported costs were understated due to significant changes in LGS' depreciation schedule and write-offs of foreign exchange losses." These "serious questions" were then described in greater detail by the DOC in the Final Results Third Review. However, Korea has failed to challenge the DOC's finding of "serious questions", and has failed to identify anything in the record to indicate that, in light of such "serious questions", an unbiased and objective investigating authority could not properly have considered that the LGS cost data for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs.[131]

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129 *US – Softwood Lumber V*, para. 7.237.

130 Tyson, Comments on Final AD Disclosure, p. 4 (USA-40).

131 *US – DRAMS*, para. 6.73

The panel in order to evaluate the claim had to thus consider the deficiency outlined by the investigating authority and what record evidence rebutted the cited deficiency. MOFCOM's approach precludes such an evaluation since there is no explanation as why one of the conditions was not met.

107. Moreover, the contrary interpretation puts the proverbial cart before the horse. Reported costs are not simply unreasonable because an investigating authority believes them too low or does not understand them. If such was the case, an investigating authority could reject costs simply on the basis that they do not generate sufficient dumping margins. Instead, the investigating authority must first have an understanding of what conditions are necessary in order for the costs to be considered reasonable. Absent such an understanding, an investigating authority is no position to evaluate the data submitted by a producer or exporter.

108. In sum, U.S. producers provided MOFCOM with their costs of production for the various models of subject merchandise and explained that those costs were kept in their books and records, were consistent with GAAP, were consistent with the practice of the poultry industry, including in China, and that there were rational reasons for why that reasonably reflected the cost of production. The only point MOFCOM apparently took issue with is that the costs did not reasonably reflect the costs of production, but even there, MOFCOM failed to explain why. Accordingly, MOFCOM, by failing to explain why the costs reported by U.S. producers did not reasonably reflect the costs of production, acted inconsistently with Article 2.2.1.1.

3. *MOFCOM Acted Inconsistently with Article 2.2.1.1 by Failing to Consider the Relevant Evidence to Ensure its Allocation was Proper*

109. As noted above, MOFCOM recognized that there were several different types of subject products and U.S. producers as part of their historical books and records, allocated costs to those various types on the basis of the value of those models in the market place. Accordingly, this is not a case where the costs kept in U.S. producers' records were insufficiently detailed, warranting further analysis in order to determine the costs of production. For example, if U.S. producers had recorded costs only for whole chickens, then MOFCOM may have needed to determine a methodology for how to reasonably allocate costs to each of the different models.

110. Instead, MOFCOM rejected those type-specific costs, and determined the costs of production for the various models by averaging the overall production costs across the various types by weight. In other words, MOFCOM took products as diverse as breast meat, leg quarters, and chicken paws and came up with a common average cost for them, then, without any reasoning, attributed costs based on the weight of the products, not the value of the products. The following table illustrates the methodology MOFCOM arrived at.

Product by Weight	**Cost of Production as Reflected in Books**	**Normal Value Utilizing Costs in Books (assuming expenses are nominal)**	**Normal Value Utilizing MOFCOM's Weighted Avg. Methodology**	**Export Price**
1 unit of Breast Meat	$18	$18	$10	$18
1 unit of Wingtips	$ 9	$ 9	$10	$9
1 unit of leg quarters	$ 3	$ 3	$10	$5
Total	$30			
Average Cost By Weight Unit	$10			

111. In essence, MOFCOM took the reported costs for each of the subject product types and came up with a value based on a common measure of weight. The table above illustrates MOFCOM's actions. MOFCOM, which found the reported costs deficient when applied to specific subject products, asserted that they could be made usable by taking their sum and dividing them according to weight, which in the above table is reflected as a value of $10 per pound.

112. The importance of the decision to apply the methodology MOFCOM arrived at cannot be overstated. Its application was potentially dispositive in determining the existence of dumping. Suppose the export price for 1 unit of chicken paws is $5. If MOFCOM utilizes the reported costs of production (and assuming other expenses and profit are nominal), there is no dumping because the normal value at $3 is below the export price. If MOFCOM utilizes its weight-based methodology, which would have the normal value at $10, then the dumping margin is nearly 100 percent. Considering the immense significance of this issue, one would expect MOFCOM to provide a reasoned, thorough analysis of the reason this methodology is reasonable and superior to the U.S. producers' reported own cost allocation methodology. Instead, as noted above,

MOFCOM made no mention as to the merits of its methodology and simply stated that U.S. producers had not convinced it why it should accept their reported costs.[132]

113. MOFCOM's rejection is all the more striking because U.S. producers explained to MOFCOM that its methodology contained serious flaws. The following excerpts from the U.S. producers' submissions in the investigation highlight only a few of the concerns with MOFCOM's methodology.

- Keystone: "Use of an average cost, as adopted by BOFT, is legally and logically indefensible because it results unavoidably in a consistent finding that a significant portion of the value of the chicken is sold outside of the ordinary course of trade due to prices far below the (average) cost of production, while the primary products are sold a falsely astronomic profit."[133] Further, MOFCOM's methodology attributed "costs to almost entirely bone-in products sold to China which absolutely are not applicable to the production and sale of (boneless) products, e.g., the cost of de-boning to create a boneless product."[134]

- Pilgrim's: "When using average cost method in joint product sectors such as poultry sector, the difference of relative values of joint products can distort the calculation of profits for different joint products."[135]

- Keystone: MOFCOM's analysis completely "disregarded the fact that costs other than meat costs are incurred after the split-off point and are model specific and cannot be allocated across the board to all products."[136]

Perhaps most compelling, a U.S. producer explained that MOFCOM's methodology was not even a proper allocation because it assigned the cost of producing an entire chicken to only certain final products. In other words, MOFCOM's so-called allocation was anything but a proper allocation. At verification, Tyson presented evidence demonstrating that there are several products derived from the chicken that generate

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132 MOFCOM, Preliminary AD Determination, Sec. 4.1.C.1 (USA-2).

133 Keystone, Comments on Final AD Disclosure, p. 24 (USA-29).

134 Keystone, Comments on Final AD Disclosure, p. 25 (USA-30).

135 Pilgrim's Pride, Comments on Preliminary Determination, p. 7 (USA-27).

136 Keystone, Comments on Preliminary AD Determination, p. 7 (USA-30).

revenue, but that were not assigned costs under MOFCOM's calculations. Specifically, Tyson explained that "products such as blood, feathers and organs generate revenue" and therefore following MOFCOM's allocation methodology, "should absorb a proportionate share of product costs, just as breasts, legs and paws absorb them."[137] Tyson explained that it uses "feathers and blood to produce meal that is fed to its chickens, and heads and organs to produce pet food."[138] Indeed, Tyson's analysis suggested that "BOFT's methodology unfairly assigns **all** of the costs incurred in producing chickens to only 26% of products derived from those chickens (e.g., breasts, wings, and paws)."[139] In short, MOFCOM's allocation did not even assign costs to all products that result from the production process.[140]

114. MOFCOM did not address any of these concerns. During the course of the investigation, the United States government also wrote to MOFCOM asking it to accept U.S. producers' reported costs pursuant to Article 2.2.1.1.[141] MOFCOM's response, *in toto*, was as follows:

> [T]he investigating authority believes that Article 2.2.1.1 requests the investigating authority to consider all available evidence about cost amortization, and (MOFCOM) did so in the investigation. When calculating the weighted average cost of the subject merchandise, (MOFCOM) used the data provided in the questionnaire response, i.e. records the responding companies kept. This practice [is] consist[ent] with the provision of Article 2.2.1.1. Article 2.2.1.1 also provides that the record should "Reasonably reflect relevant cost of production and sale of the subject merchandise."
>
> According to the respondents, the basis of distinguishing different broiler

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137 Tyson, Comments on Final AD Disclosure, p. 5-6.

138 *Id.*

139 *Id.*

140 MOFCOM's failure to properly allocate the costs by taking into account all products is in itself a breach of Article 2.2.1.1 because it results in the inclusion of costs for products not subject to the investigation. *See EC – Salmon*, para. 7.491 ("We agree with 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.") Here, MOFCOM was fully aware of this error (Tyson, Comments on Final AD Disclosure dated July 26, 2010, at 5-6 (USA-40)) yet still implemented an allocation methodology that included such costs.

141 United States, Comments on the Final Disclosure Documents, p. 4 (USA-41).

> products is the physical cutting of the product. However, the investigating authority does not think that method accurately reflects differences of costs of the subject merchandise. Therefore, the investigating authority adopted the weighted average method to calculate the production cost.[142]

MOFCOM asserted that Article 2.2.1.1 only "requests" an investigating authority to consider the figures kept in the producers' books and make adjustments if necessary in respect to amortization, i.e., adjustments for costs over time.[143] Notably, MOFCOM did not assert or accept that it was required to evaluate the evidence submitted by U.S. producers and the merits of its own methodology, or that it might need to make adjustments with respect to product scope. Moreover, MOFCOM claims that the respondents only proffered "physical cutting" as a basis for having specific costs for the various subject products. That assertion is clearly belied by the record documents referenced above which explained that the basis for the different values included, *inter alia*, the relative final value of the product and the relative processing costs for the various subject products.

115. MOFCOM's position is thus not only contrary to the record, but also directly at odds with the jurisprudence of prior WTO panels as well as the Appellate Body. As referenced above, the Appellate Body in *U.S. – Softwood Lumber* found that an investigating authority is required, per the second sentence of Article 2.2.1.1, to "'weigh the merits of' all available evidence on the proper allocation of costs'" and that "simply 'receiving evidence'" does not satisfy the obligation.[144] The Appellate Body went on to explain that:

> the second sentence of Article 2.2.1.1 requires the consideration of 'all available evidence on the *proper* allocation of costs'. (emphasis added) The word "proper", in our view, supports our reading of the word "consider", because it suggests some degree of deliberation on the part of the investigating authority in "consider[ing] all available evidence", so as to ensure that there is a proper allocation of costs. The nature of this deliberative process will depend on the facts of a particular case before the investigating authority.[145]

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142 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure, pp. 4-5 (USA-42).

143 Investopedia, Amortization, definition 2: "The deduction of capital expenses over a specific period of time (usually over the asset's life). More specifically, this method measures the consumption of the value of intangible assets, such as a patent or a copyright."

144 *US – Softwood Lumber V (AB)*, para. 133.

145 *Id.* at para. 134.

116. Here, the question is not about the quality or sufficiency of MOFCOM's deliberative process, but MOFCOM's failure to engage in one altogether. MOFCOM made no claim that it was required to engage in a deliberative process and its determinations, which omit any discussion of the arguments presented by U.S. producers and the U.S. government regarding the defects in its weighted average methodology, do not suggest otherwise. Moreover, MOFCOM cannot claim now that it considered the various arguments, but simply did not lay out its reasoning in its determinations. As the panel in *EC – Salmon* noted, when an investigating authority rejects an allocation methodology proffered by an exporter, "it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate the relevant [costs]" in the manner the investigating authority required, and that "[a]bsent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1."[146]

117. In sum, U.S. producers and the U.S. government had put forward arguments and evidence about the problems with MOFCOM's weighted average methodology. MOFCOM, as confirmed by its determinations, did not consider those arguments and evidence and indeed rejected that it had any obligation to do so. Accordingly, MOFCOM acted inconsistently with the requirement of Article 2.2.1.1 to consider all evidence in ensuring its allocation was proper.

B. China Breached Article 2.4 of the AD Agreement By Failing To Conduct a Fair Comparison Between Keystone's Constructed Normal Value And Export Price

118. MOFCOM acted inconsistently with Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. Specifically, MOFCOM improperly adjusted Keystone's export price to account for certain freezer storage expenses.

1. *Keystone's Reported Freezer Storage Expenses to MOFCOM*

119. During the POI, Keystone incurred costs for freezer storage expenses on all of its broiler products, including those products that were destined for consumption in the United States and those that were exported, including to China. Keystone does not own or operate a warehouse. Rather, Keystone's products are stored in an unaffiliated company's freezer prior to shipment. The cost associated with storing Keystone's broiler products is the same regardless of the ultimate destination of the product, *i.e.*, whether sold to China or domestically.

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146 *EC – Salmon*, para. 7.509.

120. Keystone reported these costs to MOFCOM in response to MOFCOM's AD Questionnaire:

- In Form 6-7, "List of Allocation of Sales Expenses", under the column, "Details of sales expenses (by type)", **Keystone reported an expense of [[ ]] for "Storage"**. This expense is the sum of the "Storage" expenses for each of Keystone's three production facilities: Albany [[ ]]; Camilla [[ ]]; and Eufaula [[ ]]. Form 6-7 also indicates that the "Total amount in POI" of sales expenses reported was [[ ]].

- In Form 6-5, **Keystone reported a "Total sale cost" of [[ ]] for]], which included a reported [[ ]] in [[ ]] corresponding to the [[storage expenses]] reported on Form 6-7.** Form 6-5 indicates that these storage expenses were incurred on [[sales of products]] in the domestic market [[($8,045,208]], sales to China during the POI [[ ]], and on sales to third countries [[ ]] during the POI. As was the case under Form 6-7, the total figure for these expenses was equal to the sum of the [[ ]] reported for each of Keystone's three plants during the POI: Albany [[ ]]; Camilla [[ ]]; and Eufaula [[ ]]. **These plant-specific figures for "Other expenses" correspond to the plant-specific figures for "storage"** included in Form 6-7. Form 6-5 also indicates that **the "Total selling expenses" reported, which included the [[ )]], was [[ ]]**.

- In Form 6-3, **Keystone reported a total "[[ ]]" of [[ ]]**, which corresponds to the "Total Selling Expense" included in 6-5 and 6-7, and **which includes the storage expenses** incurred on domestic sales and sales to China.

- In Form 6-6, List of Allocation of [[ ]], Keystone reported under "[[ ]] (in departments)" a figure of [[ ]] for "Sales". Again, **this figure corresponds to the total [[ ]] included in Forms 6-3, 6-5 and 6-7, and which includes the [[ ]]** incurred on domestic sales and sales to China.

121. In the Preliminary AD Determination, MOFCOM constructed a normal value for Keystone by summing Keystone's reported costs of production, expenses, and an amount

for reasonable profits.[147] In constructing this normal value, the Preliminary AD Determination indicates that MOFCOM used Keystone's reported cost in constructing the normal value for Keystone's subject merchandise. To determine Keystone's export price, MOFCOM used the sale price between Keystone and unaffiliated trading companies.[148] The Preliminary AD Determination indicates that, "for fair and reasonable comparison," the investigating authority examined items that may affect the comparability between the normal value and export price.[149] In this regard, MOFCOM made adjustments to export price, as suggested by Keystone, including adjustments relating to credit expenses, inland freight, and export inspection.[150] Given that freezer fees were included both in the cost-of-production-based normal value, and were incurred on export sales, MOFCOM properly made no adjustment to the export price regarding freezer fees.

122. After the Preliminary Determination, MOFCOM verified the fact that all of the costs on Keystone's financial reports (which included freezer storage fees) had been properly reported to MOFCOM:

> The verification team of Bureau of Fair Trade for Imports and Exports ("BOFT") of MOFCOM (the "Verification Team") has conducted an on-site verification on your company between June 2, 2010 and June 4, 2010. The Verification Team has verified the completeness, accuracy, and truthfulness of Keystone's general situation, sales to the Mainland China, domestic sales in America, and allocation of costs and charges of the like product of the subject product. Keystone has been fully cooperative during the verification process, and answered the relevant questions pursuant to the requirements, and also submitted the relevant information and materials.[151]

123. Keystone's AD Verification Report also indicates that "Keystone has submitted the storage expenses of refrigerator during the investigation."[152] In particular, Keystone's Antidumping Verification Exhibit 38 ("The freezer fees during POI") and Exhibit 44 ("A set of documents for cost verification") confirm that Keystone's freezer storage expenses,

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147 MOFCOM, Preliminary AD Determination, Sec. 4.1.C, p. 19 (USA-2).

148 MOFCOM, Preliminary AD Determination, Sec. 4.1.C, p. 20 (USA-2).

149 MOFCOM, Preliminary AD Determination, Sec. 4.1.C, p. 20 (USA-2).

150 MOFCOM, Preliminary AD Determination, Sec. 4.1.C, p. 20 (USA-2).

151 Keystone, AD Verification Report, p. 1.

152 Keystone, AD Verification Report, p. 3.

including those incurred on domestic sales and sales to China, were included in Keystone's reported costs of production.[153]

124. In the Final AD Determination, MOFCOM calculated the normal value and export price in the same manner as it had in the Preliminary Investigation: it constructed the normal value based on the costs of production, expenses and profit, and used the sale price to non-affiliated trading companies to derive the export price.[154]

125. However, in the Final AD Determination, for the first time, MOFCOM announced that it had deducted Keystone's freezer storage fees from its export price.[155] In Keystone's Final AD Disclosure, MOFCOM indicated the following:

> C. Adjusted Items
>
> In accordance with the Section 6 of Antidumping Regulations of People's Republic of China, for the purpose of fair and reasonable comparison, the investigation authorities have looked through the adjusted items that might influence price comparison.
>
> …
>
> 2. export price
>
> In the prelim, with respect to the adjusted items for the export transaction you have claimed, the investigation authorities have, upon examination, decided to temporarily accept claims for credit expenses, inland transportation fees, export inspection fees and other items that need to be adjusted, and accept the data you proposed to adjust. After verification, the authority decides to uphold such determination in the prelim. During verification, the authority found that your company did not report freezer storage expenses. The authority added such adjustment according to data collected during verification, according to materials collected during verification, the total freezer storage expenses during the POI are [[ ]] According to Form 1-4, your company exported [[ ]] of subject products (frozen) to China and [[ ]] of like products (frozen) to third countries and [[ ]] of like products

153 Keystone Verification Exhibit 38.

154 MOFCOM, Final AD Determination, pp.31-32 (USA-4).

155 MOFCOM, Final AD Determination, p. 32 (USA-4).

> (frozen) in the domestic market. The authority allocated total freezer storage expenses on the basis of the quantities above and export to China is allocated with [[ ]] of freezer storage expenses. The authority further allocated the same expenses to each of the models that are exported to China: 2-4-2 is allocated with [[ ]]; 2-5-2 is allocated with [[ ]]; 3-6-2 is allocated with [[ ]]; 2-7-2 is allocated with [[ ]].[156]

126. In Keystone's Final AD Disclosure Document, MOFCOM asserts that Keystone did not report [[ ]] in freezer storage expenses during the POI and therefore MOFCOM was adjusting Keystone's export price to account for the freezer storage data it collected during verification. The AD Disclosure indicates that MOFCOM allocated these expenses to Keystone's sales, including Keystone's sales to China on a model-specific basis, resulting in a reduction of Keystone's export price for each model.

127. MOFCOM's assertion is that Keystone did not report [[ ]] in freezer storage expenses, and that this information was only obtained by MOFCOM during verification, is clearly contradicted by Keystone's response to MOFCOM's AD questionnaire, as outlined above. This information had already been provided to MOFCOM and included in MOFCOM's calculation of Keystone's normal value and export price.

2. Article 2.4 of the AD Agreement Requires Allowances for Differences in Normal Value and Export Price Affecting Price Comparability

128. For purposes of conducting a fair comparison between the export price and normal value, Article 2.4 of the AD Agreement requires due allowances to be made for differences affecting price comparability – it does not authorize allowances where no differences exist (let alone those affecting price comparability).

129. Dumping margins are essentially a function of determining whether, and by what magnitude, a good's price in its home market (*i.e.*, its normal value) exceeds the price of that same good in the export market (*i.e.*, its export price). Article 2.4 of the AD Agreement provides, in pertinent part, that:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its

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156 Keystone, Final AD Disclosure Document, p. 4 (USA-14).

> merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

130. The first sentence of Article 2.4 sets forth the overarching obligation of an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin.[157] As the Appellate Body explained, the term "fair" "connote[s] impartiality, even-handedness, or lack of bias."[158]

131. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market (or, under certain conditions, sales to an appropriate third country or a "constructed" normal value). This comparison being undertaken has a particular purpose: to determine if a transaction involves dumping. Thus, Article 2.4 ensures that, when an export price transaction is compared to a normal value, any price differences should reflect the presence or absence of dumping, as opposed to the effects of other variables.

132. The text which follows the first sentence of Article 2.4 expressly recognizes adjustments that affect price comparability. Specifically, it states that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price.[159]

133. The Appellate Body has stated that the *a contrario* application of this directive prohibits allowances or adjustments for differences that do not affect price comparability:

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[157] The Appellate Body has stated that the obligation to make a fair comparison under Article 2.4 is a "general obligation" that "informs all of Article 2". *EC – Bed Linen (AB)*, para. 59.

[158] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138 (The Appellate Body reviewed several dictionary definitions and noted: "[t]he relevant dictionary meaning of 'fair' is 'just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards', and 'offering an equal chance of success').

[159] *EC – Tube or Pipe Fittings*, para. 7.157. The panel in *Egypt – Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).

> We begin our analysis with the question whether the third sentence of Article 2.4 implies that due allowance should not be made for differences that do not affect price comparability. In our view, if allowances could be made for differences not affecting price comparability, the purpose of the requirement of the third sentence of Article 2.4 would be undermined. Therefore, we are of the view that the third sentence of Article 2.4 also applies *a contrario*: this sentence implies that allowances should not be made for differences that do not affect price comparability.[160]

134. Moreover, if the allowances to be made pursuant to Article 2.4 are limited to differences affecting price comparability, it is clear that no allowance could be made where no difference exists at all (let alone a difference affecting price comparability).

3. MOFCOM's Treatment of Keystone's Freezer Storage Fees Precluded MOFCOM from Conducting a Fair Comparison.

135. MOFCOM's adjustment to Keystone's export price in the Final AD Determination was inconsistent with Article 2.4 because it was not made with respect to a difference in the normal value and export price transactions affecting price comparability. By making this undue adjustment, MOFCOM was precluded from making a fair comparison, and thus breached Article 2.4 of the AD Agreement.

136. MOFCOM constructed Keystone's normal value using Keystone's reported costs of production, which included freezer storage expenses. The export price to which this normal value is compared must be calculated on the same basis to ensure a fair comparison. The unadjusted export sales data necessarily reflected the freezer storage fees because all frozen broiler products, regardless of the destination, incur the same freezer storage fee. In the Final AD Determination, however, MOFCOM deducted Keystone's freezer storage fees from the export price, asserting incorrectly that these fees had not already been reported.

137. MOFCOM's adjustment was undue because, prior to MOFCOM's adjustment, there was no difference between the normal value and export price transactions affecting price comparability. MOFCOM's adjustment, instead, created a difference by comparing a normal value including an amount for freezer storage to an export price that did not include an amount for freezer storage. This comparison was therefore clearly inconsistent with MOFCOM's obligations under Article 2.4.

138. The adjustment to the dumping margin calculated by MOFCOM for Keystone did not reflect the presence or absence of dumping. Rather, the margin of dumping derived from comparing Keystone's normal value to its export price reflected the fact that the

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160 *US – Zeroing (AB)*, para. 156.

same freezer storage fees were added to the cost of production, while subtracted from the export price. By conducting such a comparison, which overstates the difference between the normal value and export price attributable to this expense, MOFCOM acted inconsistently with Article 2.4 by failing to conduct a fair comparison.

C. China Breached Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2 and Annex II of the AD Agreement by Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin, and Failing to Explain its Determination in the Anti-Dumping Investigation.

139. The Petition identified six U.S. producers of broiler products. When MOFCOM initiated the AD and CVD investigations on September 27, 2009, MOFCOM notified the six U.S. producers identified in the Petition of the investigations' initiations and requested that the U.S. Embassy notify any other exporters or producers. MOFCOM required any U.S. exporter that wished to participate in the investigation to register by October 19, 2009.

140. MOFCOM investigated three companies and, in the Preliminary AD Determination, these companies received the following AD margins: Pilgrim's (80.5 percent), Tyson (43.1percent) and Keystone (44.0 percent).[161] MOFCOM applied the weighted-average dumping margin of the three investigated companies, 64.5 percent, to the U.S. companies that registered with MOFCOM, but were not investigated.[162] MOFCOM applied this same weighted-average margin to a fourth company, Sanderson, which had been selected by MOFCOM as an alternative company (despite the fact that Sanderson had filed the same detailed questionnaire responses as the three companies that received individual margins).

141. MOFCOM assigned an "all others" dumping margin of 105.4 percent to "U.S. companies that neither filed registration nor submitted response."[163] The Preliminary AD Determination indicates that, with respect to these companies, MOFCOM decided to "use the facts available and the best information available to make determinations in connection with dumping and dumping margin."[164] No other explanation of the "all others" dumping margin was provided in the Preliminary AD Determination.

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161 MOFCOM, Preliminary AD Determination, Appendix II (USA-2).

162 MOFCOM, Preliminary AD Determination, Sec. 4.1.D and Appendix II (USA-2).

163 MOFCOM, Preliminary AD Determination, Sec. 4.1.E and Appendix II (USA-2).

164 MOFCOM, Preliminary AD Determination, Sec. 4.1.E (USA-2).

142. In the Final AD Determination, MOFCOM published the following individual dumping margins for the three investigated companies: Pilgrim's (53.4 percent), Tyson (50.3 percent), and Keystone (50.3 percent).[165] Again, MOFCOM applied the weighted average dumping margin of the three investigated companies, 51.8 percent, to Sanderson and to the companies that had filed registered with MOFCOM, but not investigated.[166] As it did in the Preliminary AD Determination, MOFOM assigned an "all others" dumping margin of 105.4 percent to any U.S. company that did not register with MOFCOM.

Respondents	**Preliminary AD Determination**	**Final AD Determination**
Pilgrim's	80.5	53.4
Tyson	43.1	50.3
Keystone	44.0	50.3
Registered companies, not investigated Sanderson	64.5	51.8
"All Others"	105.4	105.4

143. In both the Preliminary AD Determination and Final AD Determination, the "all others" dumping margin is substantially higher than the highest margin of any investigated company. Indeed, in the Final AD Determination, the "all others" dumping margin is more than twice the weighted-average dumping margin of the investigated companies. In neither determination does MOFCOM explain how or why it arrived at this figure of 105.4 percent. These documents merely refer to Article 21 of China's AD regulations and indicate that MOFCOM relied on "facts available" to determine the "all others" dumping margin.[167]

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165 MOFCOM, Final AD Determination, Appendix II (USA-4).

166 MOFCOM, Final AD Determination, Sec. 4.1.D and Appendix II (USA-4).

167 MOFCOM, Preliminary AD Determination, Sec. 4.1.E (USA-2); MOFCOM, Final AD Determination, Sec. 4.1.E (USA-4).

144. The only hint MOFCOM provided to its reasoning is a single sentence of the AD disclosure document it provided to the United States:

> For other American companies which didn't respond to the investigation and didn't submit an answer sheet, according to Article 21 of the *Antidumping Regulations*, the Authority decides to use the normal value and export price of a model from the sampled companies to determine their dumping margins.[168]

That sentence represents the entirety of MOFCOM's available reasoning and methodology on this issue. To date, MOFCOM has never explained the so-called "model" that it considered: why that particular model (as opposed to all available facts) was appropriate to determine the "all others" dumping margin; and why that model results in an "all others" of 105.4 percent in both the Preliminary and Final Determinations, despite the fact that the dumping margins for the investigated companies changed and the weighted-average dumping margin decreased between these determinations. Finally, there is no explanation of why the "all others" dumping margin is substantially higher than the weighted-average dumping margin or the dumping margins of the investigated companies.

145. MOFCOM's application of the "all others" dumping margin to U.S. producers that MOFCOM neither identified nor notified of the investigations is inconsistent with the obligations set forth in Articles 6.8, 6.9, 12.2, 12.2.2 and Annex II of the AD Agreement.

1. *MOFCOM's Determination of the "All Others" Rate in the Final Antidumping Duty Determination is Inconsistent with Article 6.8 and Annex II of the AD Agreement.*

146. China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II because MOFCOM applied facts available apparently adverse to the interests of producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation.

147. Article 6.1 of the AD Agreement provides:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

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168 MOFCOM, U.S.G. AD Disclosure, p. 12 (USA-11).

148. Article 6.8 of the AD Agreement provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

149. Article 6.8 thus limits the circumstances in which investigating authorities may resort to the use of facts available: where an interested party (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation.

150. Moreover, Article 6.8 must be read together with paragraph 1 of Annex II, which provides:

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

Article 6.8 and Annex II, paragraph 1 together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.[169] Correspondingly, an investigating authority that calculates dumping margins adverse to the interests of a party on the basis of facts available for exporters or producers that the authorities did not give notice, will be in breach of Article 6.8.[170]

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[169] *Argentina – Floor Tiles*, para. 6.55. (the inclusion in Annex II, paragraph 1, of a requirement to specify in detail the information required "strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.)

[170] *Mexico – Beef & Rice (AB)*, paras. 258-264; *see also Argentina – Floor Tiles*, para. 6.54 ("an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.)

151. As explained by the Appellate Body in *Mexico – Beef and Rice*, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests.[171] An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. Accordingly, the Appellate Body found that the Mexican authorities breached Article 6.8 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate and did not give notice of the information required by the investigating authority.[172] Similarly, the panel in *Mexico – Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[173]

152. The panel in *China – GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's failure to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement.[174]

153. Here, MOFCOM notified only the six U.S. producers identified in the petition and provided only 20 days for any other U.S. producer to come forward and register with MOFCOM. MOFCOM did not notify "all other" U.S. producers or exporters. Under such circumstances, it is clear that MOFCOM's resort to facts available for any U.S. producer or exporter that did not register with MOFCOM is premature as those producers and exporters lacked sufficient notice of the "necessary information" required of them. Accordingly, it cannot be said that they refused access to or failed to provide the information.

154. Although MOFCOM does not give any explanation of its reasoning, MOFCOM appears to have determined that by failing to register as respondents, "all other" producers failed to provide MOFCOM with necessary information and thereby triggered the use of facts available adverse to their interests. However, in the absence of being notified of the "necessary information" in the context of a particular investigation, unregistered exporters cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation.

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171 *Mexico – Beef & Rice (AB)*, paras. 258-264.

172 *Mexico – Beef & Rice (AB)*, paras. 258-264.

173 *Mexico – Beef & Rice*, footnote 211.

174 *China – GOES*, para. 7.393.

155. By applying facts available adverse to the interests of the companies that were not notified of the information required of them, were never sent copies of the antidumping questionnaire or otherwise provided the notice that the AD Agreement requires, MOFCOM breached Article 6.8 of the AD Agreement and paragraph 1 of Annex II.

2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Dumping Margin*.

156. In its Final Determination, MOFCOM established an "all others" dumping rate of 105.4 percent. MOFCOM's failure to inform the United States and other interested parties "of the essential facts under consideration" that formed the basis for this calculation in time for the United States and other interested parties to defend their interestsis inconsistent with Article 6.9 of the AD Agreement.

157. Article 6.9 of the AD Agreement provides:

> 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.

158. The obligation under Article 6.9 of the AD Agreement requires investigating authorities to disclose those facts underlying the final findings and conclusions in respect of the essential elements that must exist for the application of definitive antidumping duties.[175] This obligation applies to: (1) essential facts, as opposed to reasoning, that (2) form the basis for the decision to apply definitive measures.[176] In short, Article 6.9 provides interested parties the information the investigating authority is relying upon when imposing definitive measures.[177]

159. At no time in the dumping investigation did MOFCOM ever identify the essential facts that formed the basis for its imposition of the 105.4 percent "all others" dumping margin. In the Preliminary AD Determination, MOFCOM explained its determination as follows: "As to other U.S. companies that neither filed registration nor submitted response, according to Article 21 of the AD Regulation, the investigation authority decides to use the facts available and the best information available to make

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[175] See *Mexico – Olive Oil*, para. 7.110 (Panel examines analogous provision under SCM agreement.)

[176] See *Argentina – Poultry*, para. 7.223.

[177] See *Guatemala – Cement II*, para. 8.229.

determinations in connection with dumping and dumping margin."[178] However, MOFCOM provided no further explanation of its calculation of the all others dumping rate, and did not disclose the information forming the basis for the calculation of this rate.

160. The necessity for disclosing the essential facts for how MOFCOM calculated the "all others" dumping margin became apparent with the Final AD Determination. Again, the "all others" dumping margin was 105.4 percent. This time, however, the dumping rate for the selected respondents was quantifiably different from the calculation in the preliminary determination and, in all cases, substantially lower than 105.4 percent. Because MOFCOM had failed to inform all of the parties of the essential facts under consideration which formed the basis for its decision, no party could adequately challenge MOFCOM's calculations. As a result, rather than explain why the "all others" rate remained unchanged in the Final AD Determination, MOFCOM simply noted that pursuant to Article 21 of its Antidumping Regulation, it was turning to "facts available and the best information available to construct the normal value and export price" for "all other" U.S. companies.[179]

161. As described above, the AD disclosure document MOFCOM provided to the United States provided only a single sentence on this topic and, even then, that sentence merely noted that the margin was the result of using the normal value and export price of "a model from the investigated companies" to determine the "all others" dumping margin.[180] Absent from this disclosure are the following types of facts that would form the basis for MOFCOM's decision:

- The particular "model" from the investigated companies used to determine the dumping margin, and the facts that led MOFCOM to conclude that use of this single, unidentified model was appropriate.

- The facts underpinning the calculation of the 105.4 percent rate, which was significantly greater than the highest margin assigned to an investigated company, and the details of the calculation itself.

162. These facts are essential because they form the basis for an investigating authority's determination to apply a facts available dumping rate. Pursuant to Article 6.8 of the AD Agreement, facts available may be used if an interested Member or interested Party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time, or significantly impedes the investigation. Therefore,

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178 MOFCOM, Preliminary AD Determination, p. [14] (USA-2).

179 MOFCOM, Final AD Determination, p. [29] (USA-4).

180 MOFCOM, U.S.G. AD Disclosure, p. 12 (USA-11).

MOFCOM must have relied upon a factual determination that the actions of the companies covered by the "all others" rate met the requirements of Article 6.8, either through refusal of access to, or failure to provide, information, or through significantly impeding the proceeding. It must also have had a factual basis for its determination that the 105.4 percent rate was an appropriate rate for these "all other companies." However, it did not disclose the facts leading to these conclusions.

163. Without the disclosure of the types of essential facts described above, the United States and other interested parties were not able to understand, much less evaluate and, if necessary, rebut, MOFCOM's calculation of the all others dumping rate. For example, interested U.S. companies had no opportunity to argue whether MOFCOM's decision to rely on the facts available was inappropriate, because MOFCOM never disclosed the factual basis for that decision. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests concerning MOFCOM's calculation of the "all others" dumping rate.

164. Likewise, without disclosure of the factual information MOFCOM used to calculate the 105.4 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. Merely stating that it was resorting to facts available does not meet the disclosure requirements of Article 6.9 of the AD Agreement. MOFCOM provided no indication of what specific information was used, and, without knowing this, there was no way for the United States and interested U.S. companies to determine whether the information was a reasonable surrogate for an "all others" rate. Given the significant disparity between the "all others" rate and the rates calculated for the known exporters – the "all others" was more than twice as high as the margin for any of the investigated companies – a more detailed disclosure of the "essential facts" under consideration leading to an "all others" rate was required to allow the United States and interested companies to defend their interests.

165. For these reasons, China acted inconsistently with Article 6.9 of the AD Agreement through its failure to disclose the essential facts under consideration which formed the basis for its determination of the "all others" dumping rate.

3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by Failing to Explain its Determination.*

166. China acted inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact."

Article 12.2 of the AD Agreement provides, in part:

> Public notice shall be given of any preliminary or final determination. . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

167. Article 12.2.1 of the AD Agreement provides, in part:

> A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
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> . . .
>
> (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2.

168. Article 12.2.2 of the AD Agreement provides:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

169. In the Preliminary Determination, the AD Disclosure Document, and Final Determination, MOFCOM failed to disclose the rationale for its decision to apply facts available in calculating the "all others" dumping margin. The factual and legal bases for MOFCOM's resort to facts available constitute material issues of fact and law considered. Moreover, the decision to resort to facts available to determine the existence and the margin of dumping in relation to "all other" exporters is a significant step in the process leading to the imposition of a final measure. These issues are essential to the determination of what dumping margin to apply to these "all other" companies.

170. Consequently, Article 12.2 of the AD Agreement required that MOFCOM provide in sufficient detail the findings and conclusions that led to application of facts available. As indicated above, MOFCOM at no point made such an explanation. The only reference to this issue, a single conclusory sentence noting that that MOFCOM is resorting to the use of facts available, does not satisfy this requirement.

171. Article 12.2.1 of the AD Agreement required that MOFCOM provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination and refer to the matters of fact and law leading to arguments being accepted or rejected, including a fully explanation of the methodology used in the establishment and comparison of the export price and normal value. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the export price and normal value for "all other" respondents and, thus, fails to satisfy this requirement.

172. Similarly, Article 12.2.2 of the AD Agreement, required, among other things, that MOFCOM provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculation of the "all others" rate. MOFCOM did not satisfy this obligation. The Final Determination does not contain any facts supporting the finding that "all other" U.S. producers or exporters refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation, as required by the AD Agreement. The single sentence in the Final Determination, simply stating that the "all others" rate was calculated on the basis of facts available, is insufficient to satisfy the requirements of Article 12.2.2.

173. Thus, MOFCOM's Final Determination lacks any meaningful description of the facts upon which it based its decision to apply "facts available" to these producers and, accordingly, China's determination is inconsistent with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement.

D. China Breached Article 1 of the AD Agreement.

174. Article 1 of the AD Agreement provides that "[a]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". Because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the AD Agreement.

VII. MOFCOM'S FLAWED CVD DETERMINATIONS

A. China Breached Articles 12.7, 12.8, 22.3, 22.4 and 22.5 Of The SCM Agreement By Applying "Facts Available" Apparently Adverse to the Interests of Exporters or Producers It Did Not Notify, Failing to Inform

Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate, and Failing to Explain its Determination in the Countervailing Duty Investigation

175. When MOFCOM initiated the CVD investigation on September 27, 2009, it notified the six producers identified in the petition and the U.S. Embassy of the initiation of the investigation and requested that the U.S. Embassy notify the relevant exporters and producers.[181]

176. MOFCOM chose to investigate three companies in the CVD investigation and, in the Preliminary CVD Determination, these companies were assigned the following subsidy rates: Pilgrim's (4.9 percent), Tyson (11.2 percent) and Keystone (3.8 percent).[182] MOFCOM applied the weighted average subsidy rate of the three investigated companies, 6.1 percent, to the U.S. companies that filed registrations with MOFCOM, but were not investigated.[183] As it did in the AD investigation, MOFCOM applied this same weighted-average margin to Sanderson, the alternate respondent, even though Sanderson filed the same detailed questionnaire responses as the three investigated companies that received individual dumping margins.

177. MOFCOM assigned an "all others" subsidy rate of 31.4 percent.[184] As it did in the AD investigation, MOFCOM considered "all others" to include "other American companies that have not registered and submitted questionnaire[s]".[185] The Preliminary CVD Determination indicates that MOFCOM decided to "adopt available facts and make a determination on ad valorem subsidy rate."[186] No other explanation was provided in the Preliminary CVD Determination.

178. In the Final CVD Determination, MOFCOM published the following subsidy rates for the three investigated companies: Pilgrim's (5.1 percent), Tyson (12.5 percent), and Keystone (4.0 percent).[187] Again, MOFCOM applied the weighted-average subsidy rate of the three investigated companies, 7.4 percent, to Sanderson and the companies that

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181 MOFCOM, Preliminary CVD Determination, Sec. 2.2.1 and Appendix II (USA-3).

182 MOFCOM, Preliminary CVD Determination, p.62 and Appendix II (USA-3).

183 MOFCOM, Preliminary CVD Determination, p.62 and Appendix II (USA-3).

184 MOFCOM, Preliminary CVD Determination, Appendix II (USA-3).

185 MOFCOM, Preliminary CVD Determination, p.62 (USA-3).

186 MOFCOM, Preliminary CVD Determination, p.62 (USA-3).

187 MOFCOM, Final CVD Determination, Appendix II (USA-5).

filed registrations, but MOFCOM chose not to investigate.[188] MOFCOM assigned an "all others" subsidy rate of 30.3 percent in the Final CVD Determination to any U.S. companies that did not register with MOFCOM.[189]

Respondents	**Preliminary CVD Determination**	**Final CVD Determination**
Pilgrim's Tyson Keystone	4.9 11.2 3.8	5.1 12.5 4.0
Registered companies, not investigated Sanderson	6.1	7.4
"All Others"	31.4	30.3

179. In the Preliminary and Final CVD Determinations, the subsidy rate applied to "all others" is substantially higher than the highest subsidy rate for any investigated company. Indeed, in the Final CVD Determination, the "all others" subsidy rate is over four times greater than the weighted-average subsidy rate of the investigated companies.

180. In neither the Preliminary CVD Determination nor Final CVD Determination did MOFCOM provide any explanation as to how or why it arrived at the "all others" figure of 30.3 percent, aside from merely referring to Article 21 of its regulations and indicating that MOFCOM relied on available facts to determine the "all others" subsidy rate.[190]

181. The only hint MOFCOM provided to its reasoning is the following passage from the USG CVD Basic Facts document:

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188 MOFCOM, Final CVD Determination, pp.77-78 and Appendix II (USA-5).

189 MOFCOM, Final CVD Determination, p.72 and Appendix II (USA-5).

190 MOFCOM, Preliminary AD Determination, p.62; MOFCOM, Final AD Determination, p.78.

> According to Article 21 of the CVD Regulations, with respect to other American companies which have not registered and submitted answer sheets, the investigation authority determines to adopt facts available to make a determination on ad valorem subsidy rate.
>
> The Authority chooses a sampled company and uses competitive benefit method to calculate the benefit passed-through from upstream subsidy and received by the company, and obtains the company's ad valorem subsidy rate on this basis. In the final determination, the Authority uses this tax rate as other responding companies' ad valorem subsidy rate.[191]

182. This passage represents the entirety of MOFCOM's available reasoning and methodology on this issue. At no point did MOFCOM disclose the facts that led it to conclude that the use of facts available was appropriate for all other U.S. companies, the facts that led it to conclude that 30.3 percent (in the Final CVD Determination) was an appropriate rate, or the calculations performed to determine this rate. The explanation provided in the CVD Disclosure Document, although opaque, implies that MOFCOM used the subsidy rate calculated for one of the investigated companies to determine the all others subsidy rate. That implication does not appear to be correct, however, given that the "all others" subsidy rate is significantly higher than any of the rates for the investigated companies.

183. In so applying this subsidy rate based on "facts available" to exporters or producers that had not been notified of the information required of them, failing to inform interested parties of the essential facts under consideration in calculating the "all others" subsidy rate, and in failing to explain its determination, China breached the obligations set forth in Articles 12.7, 12.8, 22.3, 22.4 and 22.5 of the SCM Agreement.

1. *MOFCOM's Determination of the "All Others" CVD Rate was Inconsistent with Article 12.7 of the SCM Agreement.*

184. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFOCM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation. China also acted inconsistently with Article 12.7 by ignoring substantiated facts on the record, namely that certain programs included in the petition did not confer countervailable subsidies.

185. Article 12.1 of the SCM Agreement provides:

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191 MOFCOM, USG CVD Basic Facts, p.42 (USA-49).

> Interested Members and all interested parties in a 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.

186. Article 12.7 of the SCM Agreement provides:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

187. In *US – AD/CVD*, the panel noted that Article 12.7 of the SCM Agreement permits recourse to facts available only when an interested party (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation.[192]

188. Given the obligation under Article 12.1 to give an interested party notice of what information is required of them, the use of facts available is further conditioned on the investigating authority specifying to that interested party in sufficient detail the information required, and making the interested party aware that failure to supply such information will result in a determination based on facts available.

189. As discussed above, in *Mexico – Beef & Rice*, which involved Article 6.8 of the AD Agreement (the first sentence of which is almost identical to Article 12.7 of the SCM Agreement), the Appellate Body explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests.[193] An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an opportunity to provide it. Accordingly, the Appellate Body found that the Mexican authorities breached Article 6.8 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not give notice of the information required by the investigating authority.[194] Similarly, the panel in

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192 *US – AD/CVD*, para. 16.9.

193 *Mexico – Beef & Rice (AB)*, paras. 258-264.

194 *Mexico-Beef & Rice (AB)*, paras. 258-264.

Mexico – Beef & Rice noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[195]

190. Thus, Article 12.7 of the CVD Agreement, read in light of Article 12.1, establishes that an investigating authority may only apply a subsidy rate based on the "facts available" that can be adverse to a company's interests for failing to provide information if the authority has first specifically asked the party to provide the information and has been refused.

a. ***MOFCOM Failed to Identify and Notify Other Exporters/Producers of Broiler Products of the Pending Investigation and the Information Required of Them.***

191. In applying facts available to exporters that were not notified of the information required of them, and that therefore did not refuse to provide necessary information or otherwise impede the investigation, China acted inconsistently with Article 12.7 of the SCM Agreement.

192. MOFCOM notified only the six U.S. producers identified in the petition. Without notice of the information required of interested parties subject to the investigation, no other, unidentified U.S. producers or exporters can be said to have refused access to the required information, or otherwise failed to provide access to the information within a reasonable period. Neither can other, unidentified U.S. producers or exporters be said to have significantly impeded an investigation for which they received no information requests. Indeed, in its Final CVD Determination, China did not justify its resort to facts available based on any of these justifications.

193. As set forth in detail above, pursuant to Article 12.7, recourse to facts available that can be adverse to a company's interests is limited to situations where an interested party refuses access to necessary information within a reasonable period of time, otherwise fails to provide access to the necessary information within a reasonable period, or significantly impedes the investigation. Moreover, such recourse to facts available pursuant to Article 12.7 is conditioned on an investigating authority, pursuant to Article 12.1, having notified an interested party of the information required and providing the party ample opportunity to present the relevant information.

194. Although MOFCOM does not give any explanation of its reasoning, MOFCOM appears to have determined that by failing to register as respondents, "all other" producers or exporters failed to provide MOFCOM with necessary information and thereby triggered the use of facts available. However, in the absence of being notified of the "necessary information" in the context of a particular investigation, unregistered

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[195] *Mexico – Beef & Rice (AB)*, footnote 211.

producers or exporters cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation. In so doing, MOFCOM acted inconsistently with its obligations under Article 12.7 by using facts available adverse to a company's interests to calculate subsidy rates for producers or exporters that the authorities did not investigate.

b. *MOFCOM Applied Facts Available in a Manner Adverse to the Interests of "All Other" Exporters/Producers*.

195. In applying the facts available to "all other" U.S. producers of broiler products, MOFCOM did so in a manner that was adverse to the interests of such producers. The highest subsidy rate for any company was 11.2 percent in the Preliminary CVD Determination, and 12.5 percent in the Final CVD Determination. However, the "all others" rates in these determinations were 31.4 percent and 30.3 percent respectively.

196. Neither in the Preliminary CVD Determination nor the Final CVD Determination is there any explanation as to how or why MOFCOM arrived at a figure of 30.3 percent for "all others." While the Preliminary and Final Determinations refer to Article 21 of China's regulations, which authorizes the use of facts available, MOFCOM provided no explanation as to why Article 21 of its regulations was applicable or why recourse to facts available was warranted.

197. The only explanation offered by MOFCOM appears in the following two sentences of MOFCOM's CVD Disclosure Document:

> The Authority chooses a sampled company and uses competitive benefit method to calculate the benefit passed-through from upstream subsidy and received by the company, and obtains the company's ad valorem subsidy rate on this basis. In the final determination, the Authority uses this tax rate as other responding companies' ad valorem subsidy rate.[196]

198. The meaning of this explanation, however, is unclear and inconsistent with the subsidy rates calculated for the investigated companies. This explanation appears to indicate that the subsidy rate for "all others" is based on the subsidy rate calculated for one of the investigated companies. However, as indicated above, the highest subsidy rate calculated for an investigated company in the final determination was 12.5 percent.

199. The only way in which a facts available rate of 30.3 percent could be obtained would be by inclusion of additional programs alleged in the petition that were specifically found by MOFCOM not to be countervailable or terminated prior to the period of investigation. Specifically, in the Final Determination, MOFCOM made the

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196 MOFCOM, CVD Disclosure Document, p.42 (USA-49).

determination that the "Agricultural Trade Adjustment Assistance Program" and "Provision of Feed Crop to the Chicken Industry for Less Than Adequate Remuneration" were not countervailable.[197] The Final Determination also found that one program that had been terminated.[198] To the extent that such non-countervailable programs are factored into MOFCOM's calculation of the all others rate, MOFCOM ignored substantiated facts already on the record of the investigation.

200. In light of the legal and factual considerations set forth above, China's application of facts available to calculate an apparently adverse subsidy rate with respect to other producers of broiler products failed to satisfy the requirements of Article 12.7 of the SCM Agreement.

201. Having made no independent attempt to notify other producers of the information that would be required of them in the investigation, or the fact that failure to participate and provide certain information in that investigation would result in a determination based on facts available, China's application of facts available to calculate an adverse subsidy rate with respect to other producers of broiler products failed to satisfy the requirements of Article 12.7 of the SCM Agreement.

2. *MOFCOM Acted Inconsistently with Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculating the "All Others" Subsidy Rate*.

202. MOFCOM's failure to inform the United States and other interested parties "of the essential facts under consideration" that formed the basis for the "all others" rate calculation is inconsistent with Article 12.8 of the SCM Agreement.

203. Article 12.8 of the SCM Agreement provides:

> The authorities shall, before a final determination is made, inform all interested Members and 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.

204. Thus, Article 12.8 of the SCM Agreement requires the disclosure of the essential facts under consideration "which form the basis of the decision whether to apply definitive measures." In *Mexico* – Olive *Oil*, the panel stated that the "essential facts" referenced in Article 12.8 are not just any facts on the record. Rather, they are "the specific facts that underlie the investigating authority's final findings and conclusions in

197 MOFCOM, Final CVD Determination, p.78 (USA-5).

198 MOFCOM, Final CVD Determination, p.78 (USA-5).

respect of the three essential elements – subsidization, injury and causation – that must be present for the application of definitive measures."[199]

205. At no time in the CVD investigation did MOFCOM identify the essential facts that formed the basis for its imposition of a 30.3 percent all others subsidy rate. MOFCOM's finding of subsidization must have been based upon a number of factual findings by MOFCOM, including those leading to the conclusion that application of "facts available" was warranted. MOFCOM should have disclosed what it considered to be the facts leading to this conclusion in order to allow interested parties to defend their interests. In addition, given that an investigation must be terminated and countervailing duties cannot be imposed where the amount of subsidization is *de minimis*, the rate of subsidization also forms the basis of the decision whether to apply definitive measures. Therefore, the essential facts underlying an investigating authority's conclusions regarding the amount of subsidization should also be disclosed under Article 12.8.

206. As described above, MOFCOM's CVD disclosure consisted of two opaque sentences:

> "The Authority chooses a sampled company and uses competitive benefit method to calculate the benefit passed-through from upstream subsidy and received by the company, and obtains the company's ad valorem subsidy rate on this basis. In the final determination, the Authority uses this tax rate as other responding companies' ad valorem subsidy rate."[200]

207. These sentences imply that MOFCOM used the subsidy rate calculated for one of the investigated companies to determine the "all others" subsidy rate. That implication does not appear to be correct, however, given that the "all others" subsidy rate is significantly higher than any of the rates for the investigated companies.

208. Noticeably absent from this disclosure are the following types of facts that would be the basis for MOFCOM's decision.

- The facts that led MOFCOM to conclude that resorting to the use of facts available adverse to a company's interests was appropriate. These facts would include the particular circumstances involving

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[199] *Mexico – Olive Oil*, para. 7.110. The panel also noted that a preliminary determination may be one means of making the required disclosure of essential facts, but that "if new 'essential facts', i.e., facts that bring about a change in the authority's findings relating to subsidization, injury or causation, are incorporated into the record after the issuance of the preliminary determination, than that determination by definition could not satisfy the disclosure obligation in 12.8."

[200] MOFCOM, USG CVD Basic Facts, p.42 (USA-49).

all other companies (who were not notified by MOFCOM of the need to participate in the investigation) that caused MOFCOM to conclude that the use of facts available was justified.

- The facts that led MOFCOM to conclude that a 30.3 percent subsidy rate was an appropriate rate applicable to all other companies, especially in light of the fact that the subsidy rates for the investigated companies were substantially lower than 30.3 percent.

- The facts underpinning the calculation of the 30.3 percent subsidy rate, and the details of the calculation itself.

209. These facts are essential because they form the basis for any investigating authority's determination to apply a facts available subsidy rate. Pursuant to Article 12.7 of the SCM Agreement, facts available adverse to a company's interests may be used if an interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time, or significantly impedes the investigation. Therefore, MOFCOM must have relied upon a factual determination that the companies covered by the "all others" rate met the requirements of Article 12.7, either through refusal of access to, or failure to provide, information, or through significantly impeding the proceeding. It must also have had a factual basis for its determination that 30.3 percent was an appropriate rate for these "all other" companies. However, it did not disclose the facts leading to these conclusions.

210. Without the required disclosure of the types of essential facts described above, the United States and interested U.S. companies were not able to understand, must less evaluate and, if necessary, rebut MOFCOM's calculation of the all others subsidy rate. For example, the United States and interested U.S. companies had no opportunity to argue why MOFCOM's decision to rely on facts available was inappropriate, because MOFCOM never disclosed the factual basis for this decision. Without any disclosure of the facts underlying MOFCOM's decision to apply facts available, the United States and interested U.S. companies were unaware of the factual basis for MOFCOM's determination and therefore could not adequately defend their interests.

211. Likewise, without disclosure of the factual information MOFCOM used to calculate the 30.3 percent all others subsidy rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. Merely stating that it was resorting to facts available does not meet the disclosure requirements of Article 12.8 of the SCM Agreement. MOFCOM provided no indication of what specific information was used, and, without knowing this, there was no way for the United States and interested U.S. companies to determine whether the information was a reasonable surrogate for an all others rate. Given the significant disparity between the "all others" rate and the rates calculated for the known exporters, a more detailed disclosure of the

"essential facts" under consideration leading to an "all others" rate of 30.3 percent was required to allow the United States to defend its interests.

212. For these reasons, China acted inconsistently with Article 12.8 of the SCM Agreement through MOFCOM's failure to disclose the essential facts under consideration which formed the basis for its determination of the all others subsidy rate.

3. *MOFCOM Acted Inconsistently with Article 22.3, 22.4 and 22.5 of the SCM Agreement by Failing to Explain its Determination of the "All Others" Subsidy Rate.*

213. China acted inconsistently with Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact".

214. Article 22.3 of the SCM Agreement provides:

> Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

215. Article 22.4 of the SCM Agreement provides, in part:

> A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected.

216. Article 22.5 of the SCM Agreement provides:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the

> requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

217. In the Preliminary CVD Determination, the CVD Disclosure Document, and Final CVD Determination, MOFCOM failed to disclose the rationale for its decision to apply facts available in calculating the "all others" subsidy rate. The factual and legal bases for MOFCOM's resort to facts available constitute material issues of fact and law considered. Moreover, the decision to resort to facts available to determine the existence and the rate of subsidy in relation to "all other" exporters is a significant step in the process leading to the imposition of a final measure. These issues go to the very heart of their determination of what subsidy rate to apply to these "all other" companies.

218. Consequently, Article 22.3 of the SCM Agreement required that MOFCOM provide in the Preliminary and Final CVD Determinations in sufficient detail the findings and conclusions that led to application of facts available pursuant to Article 21 of its regulations. As indicated above, MOFCOM provided no explanation regarding MOFCOM's decision to apply facts available to "all other" U.S. producers or exporters, except to state in the CVD Disclosure document that the U.S. companies subject to the "all others" rate had failed to register with MOFCOM.[201] This does not satisfy the requirements of Article 22.3 of the SCM Agreement.

219. Article 22.4 of the SCM Agreement required that MOFCOM provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination and refer to the matters of fact and law leading to arguments being accepted or rejected. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the subsidy rate for "all other" respondents and, thus, fails to satisfy this requirement.

220. Similarly, Article 22.5 of the SCM Agreement, required, among other things, that MOFCOM provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available adverse to a company's interests was warranted in the calculation of the "all others" rate. MOFCOM did not satisfy this obligation. The Final Determination does not contain any facts supporting the finding that "all other" U.S. producers or exporters refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation, as required by the SCM Agreement. The single sentence in the Final Determination, simply stating that the "all others" rate was calculated on the basis of facts available, is insufficient to satisfy the requirements of Article 22.5.

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[201] MOFCOM, USG CVD Basic Facts, p. 42 (USA-49).

221. Further, the final determination did not include information on the facts and reasons that led MOFCOM to conclude that a 30.3 percent subsidy rate was an appropriate "all others" rate, an explanation which was particularly necessary given that the subsidy rates for the three respondent companies were substantially lower. MOFOCM also did not reveal the facts underpinning the calculation of the 30.3 percent rate and the details of the calculation itself.

222. Although the Final CVD Determination states that the "all others" subsidy rate was based on facts available, it appears that MOFCOM may have included information on programs that MOFCOM had found not to constitute countervailable subsidies. However, there was no indication of this in the final determination and it was not clear from the determination what relevant facts led to an "all others" rate that was substantially higher than the subsidy rate calculated for the three respondent companies.

223. Thus, MOFCOM's Final Determination lacks any meaningful description of the facts upon which it based its decision to apply facts available to these producers and, accordingly, China's determination is inconsistent with Articles 22.3, 22.4 and 22.5 of the SCM Agreement.

B. China Breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by Failing Properly to Allocate the Alleged Subsidy in Relation to Subject Products.

224. The basic formula for calculating a CVD rate is to take the total subsidy (the numerator) and divide it by the total volume of products that benefited from the subsidy (the denominator). In the CVD investigation at issue here, MOFCOM determined that U.S. respondents received an indirect benefit from subsidies purportedly provided to U.S. corn and soybean producers. Specifically, MOFCOM found that the respondents purchased the corn and soybean meal used to feed and raise chickens on preferential terms. MOFCOM attempted to quantify the amount of the subsidy and factored it into the aggregate numerators when calculating the CVD rates for U.S. producers. Putting aside whether MOFCOM's subsidy theory is correct, MOFCOM's approach ignores a critical point: "all chickens" are not the products subject to the investigation; certain "broiler products" are.

225. Although one U.S. respondent, Keystone, used chickens to produce only subject products, the other two respondents, Tyson and Pilgrim's, used chickens to produce a significant quantity of non-subject merchandise. MOFCOM, however, made no adjustments for these two producers and instead incorrectly allocated the entire amount of the purported subsidy solely to the production of subject merchandise.

226. MOFCOM therefore failed to match the respective numerators and denominators for Tyson and Pilgrim's: their numerators include a purported subsidy that benefited the production of non-subject merchandise while their denominators reflect only the

production of subject merchandise. In short, this mismatch means that the CVD rates for Tyson and Pilgrim's are, on their face, greater than the alleged subsidies that Tyson and Pilgrim's received for the production of subject merchandise.

1. *Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Require an Investigating Authority to Allocate Any Subsidies Only to Subject Merchandise.*

227. Investigating authorities, when calculating CVD rates, must ensure that the amount of subsidy received by a producer or exporter is properly allocated to the producer's or exporter's products under investigation. Put another way, the numerator of the calculation should reflect a subsidy and the denominator should reflect the total quantity of merchandise that benefitted from that subsidy. The result of this calculation is a per-unit, countervailing duty rate that can be applied to the producer's or exporters' sales of subject merchandise.

228. The legal basis for ensuring that CVD calculations conform to these principles is contained in Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Article 19.4 of the SCM Agreement provides that:

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

As the panel in *US – Lead Bars* explained, this text, per its ordinary meaning, means that "no countervailing duty may be imposed on an imported product if no (countervailable) subsidy is found to exist *with respect to that imported product* …."[202] "Article 19.4 of the SCM Agreement [thus] establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."[203]

229. Likewise, Article VI:3 of the GATT 1994 imposes discipline on how countervailing duties are calculated:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin

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[202] *US – Lead Bars*, paras. 6.51-6.52 (emphases added) (parentheses original); *see also US – AD/CVD (AB)*, para. 556 ("Article 19.4 makes clear that the amount that could be 'appropriate' cannot be more than the amount of the subsidy.")

[203] *Id.* at para. 6.52 (parentheses original).

> or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

As the Appellate Body explained in *US – Countervailing Measures on Certain EC Products*, "under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, *must ascertain the precise amount of a subsidy attributed to the imported products under investigation*."[204]

230. In *US – Softwood Lumber IV (AB)*, the Appellate Body clarified even further that "the correct calculation of the countervailing duty rate would depend on *matching* the elements taken into account in the numerator with the elements taken into account in the denominator."[205] The Appellate Body provided an indicative hypothetical:

> For example, assuming that the numerator would represent the total amount of subsidy determined on the basis of logs entering sawmills, this numerator would have to be spread over a denominator consisting of the total amount of products processed from those logs in order to accurately calculate a country-wide *ad valorem* countervailing duty rate to be imposed on lumber imports.[206]

231. Thus, an investigating authority, at a minimum, must ensure that any countervailing duty reflects only the subsidies provided to the subject products and not to any other products. As demonstrated below though, the structure of MOFCOM's CVD calculations capture subsidies to non-subject merchandise and are thus inconsistent with the obligations set forth in Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

2. *MOFCOM Made No Adjustment Even Though Tyson's and Pilgrim's Numerators Included Alleged Subsidies for Non-Subject Merchandise*.

232. As an initial matter, it is important to recall how MOFCOM defined subject merchandise in the investigations: "chicken products produced by slaughtering and processing live chickens, including chicken products not cut in pieces, cuts, and

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204 Para. 139 (emphasis added).

205 *US – Softwood Lumber IV (AB)*, para. 164, n. 196 (emphasis added).

206 *Id.*

byproducts of chicken product, whether fresh, chilled or frozen."[207] MOFCOM also specified that certain products *did not* fall within the scope of subject merchandise:

- live chickens;
- broiler products packed or preserved in cans or similar means;
- chicken sausage and similar products; and
- ready to eat broiler products.[208]

Accordingly, per the terms of the CVD investigation itself, subject merchandise did not encompass any and all chicken products.

233. MOFCOM's subsidy theory, however, is focused on the benefit received by the U.S. industry with respect to the raising of chickens. MOFCOM describes the U.S. broiler products industry as follows:

> American producers of the Subject Goods usually have a complete set of production facilities including hatcheries, feed stock factories, slaughterhouses[,] and deep processing factories[.] [T]hey purchase corn, soybean meal, and other raw materials to process broiler feed, then entrust farmers to raise live broiler [chickens] through a contractual production method and lastly process the mature broiler [chicken] into subject goods.[209]

234. In short, MOFCOM asserts that U.S. producers are vertically integrated in that they manufacture the particular inputs (chickens) that are eventually processed into subject merchandise, as well as other products. And it is with respect to these inputs that MOFCOM alleged a benefit.

235. Specifically, MOFCOM found that absent U.S. government corn and soybean programs, U.S. producers would have paid a higher price for the corn and soybean meal used to feed the chickens that they raise and eventually process into subject merchandise and other products. For both Pilgrim's and Tyson, in the Final CVD Determination, MOFCOM calculated "the amount of corn and soybean meal purchased during the POI,"

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207 MOFCOM, Final CVD Determination, Sec. 3. (USA-5).

208 MOFCOM, CVD Basic Facts Disclosure (July 16, 2010), Sec. III.(I)2. (USA-49).

209 *Id*. (USA-49).

and determined the amount of the subsidy for the numerator on this basis.[210] MOFCOM then placed "all subject merchandise the company sold during the POI" in the denominator even though the corn and soybean meal was consumed by chickens that were used in the production of both subject *and non-subject merchandise*.[211] Thus, although both subject and non-subject merchandise allegedly benefitted from the corn and soybean meal subsidies, MOFCOM's calculations allocated the entirety of the subsidy benefit to only subject merchandise.

236. MOFCOM's decision not to make the appropriate adjustments was deliberate. On multiple occasions during the CVD investigation, Pilgrim's, Tyson, and the United States alerted MOFCOM to this problem.

- "During the period of investigation, the feed stock produced by Pilgrim's Pride Corporation from corn and soybean meal for live chicken to be slaughtered internally was also used for the production of products other than subject products, for, upon slaughtering of live chicken, some were processed as fresh and frozen products, and some were processed as cooked products. According to Table 1-5, the Subject Products' output only accounted for … of the total during the period of investigation, therefore, only the pass-through subsidy benefit related to the Subject Products should be allocated according to sales volumes of the Subject Products when calculating 'subsidy benefit that may actually passed through.'"[212]

- "MOFCOM calculated the subsidy amount based on Tyson's total purchases of corn and soybean meal for its poultry operations. Tyson uses these inputs to produce chicken feed that is consumed by chickens that are processed into subject merchandise and non-subject merchandise. *** MOFCOM should recalculate Tyson's margin by using the proper denominator – Tyson's total sales of all chicken products."[213]

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210 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure (August 13, 2010), p. 4 (USA-37).

211 *Id.* (USA-37).

212 Pilgrim's Pride, Comments on the Preliminary CVD Determination, p. 9. (USA-43).

213 Tyson, Comments on the Preliminary CVD Determination, p. 2-4 (USA-44).

- "[W]hen calculating 'subsidy benefit that may actually be passed through', the Bureau of Fair Trade used all corn and soybean meal purchased by the Company during the period of investigation as the basis instead of spreading the subsidy benefit over the Subject Products and others, which led to an overestimation of the Company's subsidy rate."[214]

- "Tyson's produces a significant quantity of cooked chicken products that are not subject to this case (BOFT verifiers saw these products in the freezer cases during the tour of Tyson's facilities). BOFT's calculation assumes that 100 percent of the corn and soybean meal reported was used to produce just subject merchandise. However, this quantity relates to all poultry, not just subject merchandise."[215]

- In both the preliminary and final disclosures MOFCOM "calculated the indirect benefit under the corn and soybean programs based on the companies' total purchases of corn and soybean meal during the period of investigation (POI), and then allocated that benefit only over the companies' sales of subject merchandise, rather than allocating over the companies' total sales of <u>all</u> poultry products."[216] The United States explained that the chicken feed was consumed by "all of the chickens, regardless of the products those chickens are ultimately used to produce," and that MOFCOM's calculations were flawed because they assumed that chickens "ultimately sold as subject merchandise" consumed all the chicken feed, while the "chickens that were ultimately used to produce cooked chicken products and other non-subject merchandise were fed nothing." [217]

237. Tyson, Pilgrim's, and the United States also proffered solutions to MOFCOM's error. For example, the United States explained that MOFCOM could redress this error by applying either of two possible adjustments:

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214 Pilgrim's Pride, Comments on Basic Facts Relied Upon for the Subsidy Rate Calculation (July 24, 2010), p 6 (USA-45).

215 Tyson, Comments Regarding the Disclosure of the Basic Facts for the Final CVD Determination (July 26, 2010), p. 3-5 (USA-48).

216 United States, Subsidy Calculation Letter, p. 1. (USA-52).

217 *Id.* (USA-52).

> [1] Because the numerator reflects the companies' total purchases of corn and soybean during the period of investigation, the denominator should be revised to reflect the companies' total sales of all chicken products (both subject and non-subject poultry products).
>
> [2] Alternatively, BOFT could reduce the numerator to reflect the amount of corn and soybean meal used to produce chicken feed for those chickens used to produce the subject merchandise, while maintaining the denominator reflecting the companies' sales of subject merchandise only.[218]

238. Either adjustment was technically feasible. With respect to the first option, the questionnaire responses included data regarding the volume of non-subject merchandise that was produced from chickens. In regard to the alternative option, Tyson and Pilgrim's quantified for MOFCOM the percentage of poultry sales that could be attributed to subject merchandise. Accordingly, MOFCOM could have proceeded to use that data to properly proportion the numerator.[219]

239. On August 13, 2010, MOFCOM responded to the U.S. letter. With respect to Pilgrim's, MOFCOM claimed that it had used the "amount of corn and soybean meal the company purchased during the POI *for subject merchandise production*."[220] With respect to Tyson, MOFCOM asserted that it had verified that "the amount of corn and soybean meal the company purchased during the POI matches the amount of corn and soybean meal consumed for subject merchandise production."[221] MOFCOM noted that because it "used the data the respondents reported in calculating their CVD margins" there was "no[] mis-matching of data."[222] MOFCOM's answer is misplaced. As discussed below, Tyson and Pilgrim's Pride did not report the amount of corn and soybean meal purchased for subject merchandise production only. The feed fed chickens that were processed into subject and non-subject products. In other words, MOFCOM either failed to appreciate the significance of the discrepancy or maintained somehow that Pilgrim's and Tyson fed purportedly subsidized feed to chickens processed as broiler products, but somehow

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218 *Id.* at 2.

219 Tyson, Comments on Disclosure of Final Determination of Countervailing Investigation of Chicken Products, p. 5; Pilgrim's Pride, Comments on Basic Facts Relied Upon for the Subsidy Rate Calculation, p. 7 (USA-45).

220 MOFCOM, Reply to the United States Government's Comments on the Final Disclosure (August 13, 2010) at 4 (emphasis added) (USA-42).

221 *Id.*

222 *Id.*

managed to ensure that non-subsidized feed was fed to chickens that were processed as non-subject merchandise.

240. The precise issue is thus not whether MOFCOM used the data provided in the questionnaires. The question is what data was requested and how did MOFCOM treat it. The relevant questionnaire asked the following of Tyson and Pilgrim's:

> Please provide the total quantity (in tons) of the corn and soybean (or soybean meal) purchased by your company during the period of investigation (POI), and their average price (in USD/ton).[223]

The question does not ask what proportion of the feed was used to produce subject merchandise (although Pilgrim's and Tyson did provide such numbers when explaining the error), but simply requests the total quantity of feed purchased by the respondents. Tyson even subsequently explained to MOFCOM that its response to this question was based on its understanding that "BOFT wanted Tyson to report its total purchases of corn and soybean meal because the question did not specify purchases related to the production of subject merchandise."[224] Moreover, such an interpretation is not unreasonable considering that both companies were also required to report the total number of chickens slaughtered in the period of investigation and the respective percentages of those chickens that were used to produce subject merchandise and those used to produce cooked products.

241. In short, MOFCOM mismatched the respective numerators and denominators for Tyson's and Pilgrim's subsidy calculations. MOFCOM was made aware of this error as well as acceptable options for correcting it. Nonetheless, MOFCOM refused to correct its mistake and proceeded to levy countervailing duties that are clearly in excess of any subsidy that may exist with respect to the subject merchandise. Accordingly, MOFCOM's CVD calculations for Pilgrim's and Tyson are inconsistent with Articles 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

C. China Breached Article 10 of the SCM Agreement.

242. Article 10 of the SCM Agreement provides that:

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223 MOFCOM, Second Supplemental CVD Questionnaire, Q1 (USA-38).

224 Tyson, Comments Regarding the Disclosure of the Basic Facts for the Final CVD Determination, p. 4 (USA-48).

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

243. Because MOFCOM's conduct in the subsidy investigation was inconsistent with the provisions of the SCM Agreement noted above, China also breached Article 10.

VIII. MOFCOM'S FLAWED INJURY DETERMINATIONS

244. In its final determinations in both the antidumping and countervailing duty investigations, which are virtually identical, MOFCOM determined that China's chicken broiler industry was materially injured by reason of dumped and subsidized chicken broilers imported from the United States ("subject imports"). MOFCOM's affirmative material injury determination rested on the following erroneous findings.

245. First, in its final determinations for both the antidumping and countervailing duty investigations, MOFCOM defined the domestic industry to include only "domestic enterprises which support this . . . investigation."[225] In its final antidumping determination, MOFCOM described its approach to defining the domestic industry.[226] As discussed below, this approach was biased from the outset in favor of Petitioner.

246. MOFCOM stated that it published a "Notification on Registration of Participating in Industry Injury Investigation of the Broiler Antidumping Case" on September 27, 2009.[227] "Based on the notification," MOFCOM claimed, "any interested party, including the domestic producers of like products, has the right to submit the application to the

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[225] MOFCOM, Final AD Determination at sec. 3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 4.2 (USA-5).

[226] Although MOFCOM did not explain how it defined the domestic industry in its final countervailing duty determination, it presumably followed the approach described in its final antidumping duty determination, given that MOFCOM's definition of the domestic industry was identical in both determinations. *See* MOFCOM, Final CVD Determination at sec. 4.2.

[227] MOFCOM, Final AD Determination at sec. 3.2 (USA-4); *see also* Notice on Registration for Participating in Industrial Injury Investigation in the Antidumping Case for Broiler Products or Chicken Products (USA-39).

Investigating Authority for registration of participating in the investigation."[228] Notwithstanding MOFCOM's acknowledgment of this "right," MOFCOM made no meaningful effort to include non-petitioners or producers that did not support the petition in the domestic industry definition. This is so despite MOFCOM's claim that it "issued the questionnaire publicly through the website China Trade Remedy Information" so that "{a}ny producers of like products {could} submit the response . . . and state whether to support this antidumping investigation."[229] In fact, MOFCOM's notice failed to disclose that only registered domestic producers would receive blank questionnaires. It also failed to refer producers to the blank questionnaire allegedly available on the China Trade Remedy Information website.

247. Unsurprisingly, no domestic producer responded to the notice or completed a questionnaire from the China Trade Remedy Information website.[230] Given that MOFCOM only "distributed the Questionnaire to Domestic Producers to the Petitioner and the known domestic producers" listed in the petition, it is unsurprising that all 17 producers that completed and returned domestic producers' questionnaire responses supported the petition.[231] MOFCOM limited its definition of the domestic industry to those 17 producers.[232]

248. Second, addressing the alleged price effects of subject imports on the domestic industry thus defined, MOFCOM found that the average "export price to China (CIF price)" was "always lower than the average sales price of the domestic like product."[233] Based on this underselling finding, MOFCOM found that "{t}he Subject Products have caused obvious price cuts for the domestic like products" and "suppressed sales price of the domestic like products."[234]

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228 MOFCOM, Final AD Determination at sec. 3.2 (USA-4); *see also* Notice on Registration for Participating in Industrial Injury Investigation in the Antidumping Case for Broiler Products or Chicken Products (USA-39).

229 MOFCOM, Final AD Determination at sec. 3.2.

230 *Id.*

231 *Id.*

232 *Id.*

233 MOFCOM, Final AD Determination at sec. 5.2.3; MOFCOM, Final CVD Determination, sec. 6.2.3.

234 *Id.; see also* MOFCOM, Final AD Determination at sec. 6.1 ("{A}s the Subject Products were selling across China in great volume at a low price, sales price of the domestic like products was materially suppressed."), 6.2.1; MOFCOM, Final CVD Determination at secs. 7.1, 7.2.1

249. In making this finding, however, MOFCOM ignored evidence that subject import prices on a CIF basis were lower than domestic like product prices on an average sales price basis because of differences in product mix and levels of trade. In particular, USAPEEC presented evidence that over 97 percent of subject imports consisted of lower-value chicken products, including paws, chicken cuts with bones, mid-joint wings, and other offal, which would have reduced the average unit value of subject imports relative to the sales price of the domestic like product.[235] Without contesting this evidence, MOFCOM asserted that "the investigating authority does not need to consider the corresponding relationship among different specifications of the Subject Products and to segment the market to make comparison and assessment," even where underselling margins result entirely from differences in product mix.[236] Although MOFCOM claimed that "the Investigating Authority has taken the difference in sales levels into consideration, adjusting the import price based on the Customs data accordingly," MOFCOM did not disclose or explain its methodology for doing so.[237]

250. Third, MOFCOM found that subject imports had an adverse impact on the domestic industry over the 2006-2008 period, when most of the increase in subject import volume and market share took place. According to MOFCOM, subject imports depressed the domestic industry's capacity utilization and increased its end-of-period inventories. In addressing impact, however, MOFCOM ignored evidence that the domestic industry's performance improved according to almost every other measure during the period.[238] MOFCOM also ignored evidence that the domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth, from 2,980,700 tons in 2006 to 3,525,600 tons in 2007 and 3,761,400 tons in 2008.[239] It also failed to address evidence that domestic industry

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("the import price was relatively low, which seriously undercut and inhibited the prices of domestic like products . . . {T}he import price of the Subject Products was kept at an extremely low level . . . {t}his seriously undercut and inhibited prices of the domestic like products . . . ").

[235] USAPEEC, Injury Brief at 19 (USA-21).

[236] MOFCOM, Final AD Determination at sec. 6.2.1 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

[237] MOFCOM, Final AD Determination at sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

[238] *See* MOFCOM, Final AD Determination at secs. 5.2, 6.1, 6.2.3 (USA-4); MOFCOM, Final CVD Determination at secs. 6.3, 7.1, 7.2.3 (USA-5).

[239] MOFCOM, Final AD Determination at sec. 5.3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.3.2 (USA-5).

end-of-period inventories were not significant relative to domestic industry production or shipments.

251. Fourth, MOFCOM found a causal link between subject imports and the alleged material injury being suffered by the domestic industry. In this regard, MOFCOM found a "continuous and sharp increase in import quantity of Subject Products and a continuous growth in their market share" while "during the POI, the {Renminbi} price of the Subject Products is always lower than the average sale prices of the domestic like products."[240] Yet, MOFCOM's causal link analysis is contradicted by a plethora of evidence that MOFCOM chose to ignore. For example, MOFCOM failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share came at the expense of non-subject imports and not the domestic industry, which also gained market share during the period examined.[241]

252. MOFCOM also failed to address USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws.[242] As USAPEEC explained, chicken paws imported from the United States could not have injured the domestic industry because domestic producers were incapable of producing chicken paws in quantities sufficient to satisfy domestic demand without also increasing production of other chicken parts to uneconomic levels.[243] USAPEEC did not dispute that chicken paws were subject to the investigations, but rather argued that the largest component of subject import volume, chicken paws, could not have injured the domestic industry.[244] MOFCOM did not address the issue in its final determinations.

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240 MOFCOM, Final AD Determination at sec. 6.1 (USA-4); MOFCOM, Final CVD Determination at sec. 7.1 (USA-5). MOFCOM emphasized that "as the Subject Products were selling across China in a great volume at a low price, sales price of the domestic like products were materially suppressed, and said sales price remained lower than the production cost of a long term . . . so the sector was losing money as a whole." MOFCOM, Final AD Determination at sec. 6.2.1 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.1 (USA-5).

241 MOFCOM, Final AD Determination at sec. 6.2.1 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.1 (USA-5). The evidence showed that domestic industry market share increased from 37.81 percent in 2006 to 41.62 percent in 2007 and 42.42 percent in 2008, and was 42.19 percent in the first half of 2009. MOFCOM, Final AD Determination at sec. 5.3.6; MOFCOM, Final CVD Determination at sec. 6.3.6 (USA-5).

242 *See* USAPEEC's Injury Brief at 18, 29 (USA-21).

243 *Id.* at 29-30.

244 *Id.*

A. China's Biased Definition of the Domestic Industry Breached Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

253. MOFCOM defined the domestic industry for purposes of the investigation to include only "domestic enterprises which support this . . . investigation," in both the antidumping and countervailing duty investigations.[245] In the final antidumping duty determination, MOFCOM explained that its process for defining the domestic industry included the publication of a notice inviting domestic producers to volunteer for inclusion in the domestic industry by a certain deadline, followed by the posting on the internet of a blank domestic producers' questionnaire that any domestic producer allegedly could download, complete, and return.[246] For the reasons detailed below, the United States believes that MOFCOM's process for defining the domestic industry introduced a material risk of distortion and resulted in a distorted definition of the domestic industry that unreasonably favored the Petitioner, in breach of Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement.

1. *MOFCOM's Biased Definition of the Domestic Industry in Favor of Petitioners is Inconsistent with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.*

254. Article 3.1 of the AD Agreement states that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped 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.

Article 15.1 of the SCM Agreement is worded identically, except that it uses the term "subsidized imports" where Article 3.1 of the AD Agreement refers to "dumped imports."

255. As the Appellate Body held in *United States – Hot-Rolled Steel*, Article 3.1 of the AD Agreement (and hence Article 15.1 of the SCM Agreement) requires that investigating authorities conduct their investigations "in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the

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245 MOFCOM, Final AD Determination, sec. 3.2 (USA-4); MOFCOM, Final Final Determination, sec. 4.2 (USA-5).

246 MOFCOM, Final AD Determination at sec. 3.2 (USA-4).

investigation."[247] In *Mexico – Rice*, for example, the Appellate Body found that Mexico's investigating authority had acted inconsistently with the Article 3.1 objectivity requirement by accepting the Petitioner's suggestion that it limit its injury analysis to data from the six month period in each of the three years examined when subject import penetration happened to be highest.[248]

256. Most recently, in *EC – Fasteners*, the Appellate Body considered whether an investigating authority could, consistent with the objectivity requirement, define the domestic industry by publishing a notice inviting domestic producers to volunteer for inclusion in the domestic industry definition. Notably, MOFCOM's approach to defining the domestic industry here was strikingly similar to the approach taken by the EU and found by the Appellate Body to be flawed in *EC – Fasteners*. In fact, in *Fasteners*, China challenged the same type of selective approach to defining the domestic industry that China itself employed in the instant investigation. In *Fasteners*, the EU had published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample.[249] China argued that "[b]ecause producers not willing to be included in the sample probably {did} not support the investigation, this approach made it more likely that only those companies supporting the complaint would be included in the domestic industry definition and, hence, made it more likely to find injury," in breach of Article 3.1 of the AD Agreement.[250] Agreeing with China, the Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EU's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in breach of Article 3.1 of the AD Agreement.[251]

257. China's approach to defining the domestic industry here was no less biased in favor of the Petitioner and petition supporters. MOFCOM limited its definition of the domestic industry to domestic producers that voluntarily requested and returned domestic

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247 *U.S. – Hot-Rolled Steel (AB)*, para. 193.

248 *See Mexico – Beef & Rice (AB)*, paras. 183, 187-88 (affirming the panel's finding that the Mexican investigating authority had acted inconsistently with the objectivity requirement under Article 3.1 of the AD Agreement by predicating its injury determination on data from only the first six months of each of the three years examined, which petitioners had advocated as the period in which import penetration was highest).

249 *EC – Fasteners (AB)*, para. 426.

250 *Id.* at para. 154.

251 *Id.* at para. 427.

producers' questionnaire responses.[252] China should have, but did not, independently identify the universe of domestic producers in order to provide questionnaires to either each producer or, alternatively, a representative sample of domestic producers.[253] Instead, MOFCOM only provided blank questionnaires to the Petitioner and "known domestic producers" listed in the petition.[254] By so proceeding, MOFCOM increased the likelihood that Petitioner and domestic producers hand- picked by them would return questionnaire responses and thus be included in the data set used by China to perform the analysis leading to its final determinations.

258. By contrast, MOFCOM's approach to identifying domestic producers other than Petitioner and "known domestic producers" listed in the petition was calculated to elicit no such response. MOFCOM claimed that its "Notification on Registration of Participating in Industry Injury Investigation of the Broiler Antidumping Case," published on September 27, 2009, provided that "any interested party, including the domestic producers of like products, has the right to submit the application to the Investigating Authority for registration of participating in the investigation" and receive a blank domestic producers' questionnaire.[255] MOFCOM also claims to have posted a blank domestic producers' questionnaire on the China Trade Remedy Information website that any domestic producer could download and complete.[256] Yet, MOFCOM's September 27, 2009 notices in the antidumping and countervailing duty investigations, which were substantially identical, did not notify domestic producers that they would need to register for participation in the injury investigations to receive a blank domestic producers' questionnaire.[257] Nor did the notices invite domestic producers to complete

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252 MOFCOM, Final AD Determination, sec. 3.2 (USA-4).

253 *See EC – Fasteners (AB)*, para. 436 ("{A}s long as the domestic industry is defined consistently with the *Anti-Dumping Agreement*, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample."); *EC – Salmon*, para. 7.130 ("We . . . consider that the AD Agreement establishes some general parameters for the use of sampling in the injury context . . . A sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement.").

254 MOFCOM, Final AD Determination, sec. 3.2 (USA-4).

255 *Id.*

256 *Id.*

257 *See* MOFCOM, Notice on Registration for Participating in Industrial Injury Investigation in the Antidumping Case for Broiler Products or Chicken Products; Notice on Registration for Participating in Industrial Injury Investigation in the Countervailing Case for Broiler Products or Chicken Products (USA-39). The notice invited "interested parties," presumably but not

the domestic producers' questionnaire available on the China Trade Remedy Information website. The notices did not even mention the China Trade Remedy Information website, much less provide a web address for downloading the blank domestic producers' questionnaire. Finally, the notices did not explain that only domestic producers that completed domestic producers' questionnaire responses would be included in the domestic industry for purposes of the investigation. Because domestic producers other than the Petitioner and "known domestic producers" listed in the petition had no means of receiving or completing domestic producers' questionnaires, they were effectively excluded from MOFCOM's definition of the domestic industry.

259. Indeed, no other domestic producer responded to MOFCOM's broad notices by registering for participation in the injury investigations.[258] Consequently, the 17 domestic producers that completed questionnaire responses, and were thus included in the domestic industry, consisted entirely of the Petitioner and "known domestic producers" listed in the petition. A process for defining the domestic industry that inevitably results in an examination of only producers selected or identified by the Petitioner cannot comport with the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.[259] Accordingly, MOFCOM effectively invited the Petitioner to control which producers would be included in the domestic industry themselves, in a self-interested manner.

260. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by responding to its notice or downloading and completing a questionnaire response, MOFCOM "imposed a self-selection process among the domestic producers that introduced a material risk of distortion" in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.[260] That is because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have a financial incentive to participate in the injury investigation by either joining the petition, responding to the notice, or downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack any incentive to respond to MOFCOM's notice or to otherwise participate in the investigation. Indeed, domestic producers posting the strongest performance would have

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explicitly including domestic producers, to "apply for participating in the industry injury investigation" by completing the attached "Application for Participating in Industry Injury Investigation."

258 MOFCOM, Final AD Determination, sec. 3.2 (USA-4).

259 *See EC – Fasteners (AB)*, para. 427; *Mexico – Beef & Rice (AB)* at paras. 183, 187-88; *US – Hot-Rolled Steel* (AB), para. 193.

260 *EC – Fasteners (AB)*, para. 427.

every incentive not to make themselves known. That is because withholding their performance data from the investigating authority could only increase the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

261. China's approach to defining the domestic industry created a biased domestic industry for purposes of the investigation that favored the Petitioner. In the *Fasteners* dispute that China brought against the EU measures, China argued that the EU's approach to defining the domestic industry resulted in a non-objective definition of the domestic industry in breach of Article 3.1 of the AD Agreement:

> {B}y requiring producers to come forward within 15 days and express a willingness to be included in the sample within that deadline, the EU adopted an approach that was fundamentally non-objective because producers opposing the investigation were less likely to be willing to be part of the sample. . . . Because producers not willing to be included in the sample probably did not support the investigation, this approach made it more likely that only those companies supporting the complaint would be included in the domestic industry definition and, hence, made it more likely to find injury.[261]

262. By adopting a similar "fundamentally non-objective" approach to defining the domestic industry here, MOFCOM made it "more likely that only those companies supporting the complaint would be included in the domestic industry definition," in violation of Article 3.1 of the AD Agreement, as well as Article 15.1 of the SCM Agreement. MOFCOM's domestic industry for purposes of the investigation included only Petition supporters, including the Petitioner and domestic producers handpicked by the Petitioner.

263. MOFCOM's definition of the domestic industry was also inconsistent with the objectivity requirement under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement because MOFCOM did not make active efforts to collect data on all known domestic producers. Article 5.1 of the ADA contemplates that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged dumping." Similarly, Article 11.1 of the SCM Agreement contemplates that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged subsidy." The Appellate Body noted in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*Wheat Gluten*") that the ordinary meaning of the term "investigation"

> suggests that the competent authorities should carry out a "systematic

[261] *EC – Fasteners (AB)*, paras. 151, 154.

> inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.[262]

264. The Appellate Body in *Wheat Gluten* then noted the obligation on an investigating authority to carry out a "full investigation" in order to conduct a "proper evaluation," and stressed that it is the investigating authority, and not the interested parties, that must perform this task. The "duties of investigation and evaluation preclude {the investigating authorities} from remaining passive in the face of possible shortcomings in the evidence submitted . . . ."[263] Thus, the term "investigation" in Article 5.1 of the ADA and Article 11.1 of the SCM Agreement indicates that investigating authorities must conduct an examination of the relevant issues that is active, systematic, and careful. Moreover, in order to base an injury determination on an "objective examination" of "positive evidence," as required under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, an investigating authority would have to collect the evidence necessary to conduct such an examination. In light of these obligations, an investigating authority cannot collect the information necessary to conduct an objective examination of positive evidence if it defines the domestic industry in a manner that advantages a petitioner over respondents, as MOFCOM did here. As the Appellate Body explained in *EC – Fasteners*:

> {T}he domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers. In this respect, Article 3.1 requires that an injury determination be based on "positive evidence." Pursuant to Article 3.4, such "positive evidence" includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry. Naturally, the "positive evidence" to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the

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262 *US – Wheat Gluten (AB)*, para. 53 (footnote omitted).

263 *Id.*, para. 55 (emphasis added). The Appellate Body discussed these matters in the context of interpreting Articles 3 and 4.2(a) of the *Agreement on Safeguards* (which requires investigating authorities to examine "all relevant factors" having a bearing on the state of the domestic industry). *Id.*, paras. 53 and 55. Consistent with the Appellate Body's discussion of the issue in *Wheat Gluten*, the United States observes that The New Shorter Oxford Dictionary defines an "investigation" as "the action or process of investigating; systematic examination; careful research." The New Shorter Oxford Dictionary, 1993, Volume I, p. 1410.

> state of the industry and the injury it has suffered. Thus, "a major proportion of the total domestic production" should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.[264]

265. Of course, in investigations involving fragmented industries, reliance on data from less than all producers may reasonably be warranted.[265] It does not appear from the evidence made available to the parties that the Chinese broiler industry presented such a fragmented industry, however.[266] MOFCOM's finding that the 17 domestic producers expressing support for the Petition accounted for approximately half of total domestic production quantity is not consistent with a fragmented industry consisting of innumerable small scale producers.[267] Moreover, MOFCOM was able to procure data on total domestic production from a source that was ostensibly able to collect data from substantially all domestic producers.[268]

266. But even if MOFCOM had determined that the industry was fragmented, it would have been obligated from the outset to strive to collect data from a representative sample of domestic producers. Instead, MOFCOM declined to make a meaningful effort to collect data from all domestic producers or from a representative sample of producers.[269]

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[264] *EC – Fasteners (AB)*, para. 413.

[265] *See EC – Fasteners (AB)*, para. 435 ("{W}e note that the *Anti-Dumping Agreement* is silent on the issue of whether sampling may be used for purposes of the injury determination. The Agreement thus does not prevent an authority from using samples to determine injury."); *EC – Salmon*, para. 7.129 ("{W}e are unsurprised that the specific question of sampling in this context is not addressed in the AD Agreement, and cannot conclude that this absence requires the conclusion that sampling in the context of injury determinations is prohibited. Such a conclusion would make it impossible for investigating authorities to make injury determinations in certain cases involving more than some relatively limited number of domestic producers.").

[266] The scope of the investigations encompassed "{c}hicken products produced by slaughtering and processing live white-feather broilers" but expressly excluded "live chickens." MOFCOM, Final AD Determination at sec. 2 (USA-4); MOFCOM, Final CVD Determination at sec.3 (USA-5). Consequently, the Chinese broiler industry would not have included farms on which live chickens are raised.

[267] MOFCOM, Final AD Determination at sec. 3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 4.2 (USA-5).

[268] *Id.*

[269] *See EC – Fasteners (AB)*, para. 416 ("An injury determination regarding a fragmented industry must . . . cover a large enough proportion of total domestic production to ensure that a proper injury determination can be made pursuant to Article 3.1."); Panel Report, *EC – Salmon*, para. 7.130.

MOFCOM was in a position to collect contact information for all domestic producers, which could have been used to send questionnaires to substantially all domestic producers. Data collected in this way would have represented the broad range of known domestic producers in terms of performance and positions concerning the antidumping and countervailing duty petitions. By failing to make active, systematic, and careful efforts to collect the evidence necessary to conduct an "objective examination" of "positive evidence," MOFCOM acted inconsistently with Article 3.1 of the ADA and Article 15.1 of the SCM Agreement.

267. In sum, MOFCOM's approach of limiting the domestic industry data to that from the Petitioner and select other producers named by Petitioner favored the interests of the Petitioner and petition supporters and prejudiced respondents. This is directly contrary to the mandate of the AD and SCM Agreements that investigations be conducted in an objective manner. China defined the domestic industry inconsistently with Article 3.1 of the ADA and Article 15.1 of the SCM Agreement. Further, because MOFCOM's biased and flawed definition of the domestic industry would have tainted its analysis of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5 of the ADA and Articles 15.2, 15.4, and 15.5 of the SCM Agreement, respectively, China acted inconsistently with those articles as well by not conducting its analysis in relation to an appropriately defined "domestic industry." In particular, MOFCOM's erroneous definition of the domestic industry would not have permitted an objective examination of positive evidence with respect to the impact of subject imports on the domestic industry, in violation of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Indeed, the analyses set out in Articles 3.2, 3.4 and 3.5 all form part of the determination as to whether there is material injury to the *domestic industry*.[270] In *Mexico – Olive Oil*, the panel recognized the overarching importance of the domestic industry definition to various aspects of the injury determination in Article 15 of the SCM Agreement, which provisions parallel those of Article 3 of the AD Agreement.[271] Here, MOFCOM's biased domestic industry definition tainted its entire injury analysis.

2. *MOFCOM Acted Inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement When It Excluded Producers Accounting for Half of Domestic Production from the Domestic Industry.*

268. Article 4.1 of the AD Agreement states that:

> the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them

[270] *See* Footnote 9 to the AD Agreement.

[271] *See Mexico – Olive Oil*, paras. 7.197-7.201.

> whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that
>
> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
>
> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if {certain conditions are met.}

269. Article 16.1 of the SCM Agreement states that:

> . . . the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

Article 16.2 states that:

> {i}n exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if {certain conditions are met.}

270. MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the ADA because it did not include "the domestic producers as a whole of the like products or to those of them whose collective output of the {like} products constitutes a major proportion of the total domestic production of those products." In light of its knowledge of the existence of domestic producers based on the data source it relied on to establish total domestic production, as discussed above, MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by defining the domestic industry so as to effectively exclude domestic producers accounting for approximately half of Chinese broiler production.[272]

271. Article 4.1 obligates an investigating authority to define the domestic industry as "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." The Article provides only two specific exceptions to this inclusive definition – one for related producers and one for regional industries. Article 16.1 of the SCM Agreement is substantially identical, with the same two specific exceptions provided for related producers and for regional industries (in Article 16.2 of the SCM Agreement). These Articles make clear that investigating authorities are obligated to define the domestic industry to include all known domestic producers that do not fall within the two specified exceptions from inclusion in the domestic industry that are set out in subsections (i) and (ii) of Article 4.1 of the AD Agreement and in Articles 16.1 and 16.2 of the SCM Agreement. Anything less would render those two exceptions meaningless. As the panel recognized in *EC – Salmon*, "nothing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision."[273] Similarly, in *EC – Fasteners (AB)*, the Appellate Body found that an investigating authority had acted inconsistently with Article 4.1 by excluding producers from the domestic industry definition for reasons other than those set out in that Article:

> {B}y limiting the domestic industry definition to those producers willing to be part of the sample, the Commission excluded producers that provided relevant information. In so doing, the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination.[274]

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[272] *See* MOFCOM, Final AD Determination at sec. 3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 4.2 (USA-5).

[273] *EC – Salmon*, at para. 7.112 (footnote omitted).

[274] *EC – Fasteners (AB)*, at para. 430.

272. MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by intentionally excluding certain producers from the domestic industry.[275] As discussed above, MOFCOM expressly limited the domestic industry to producers that completed domestic producers' questionnaire responses. In turn, by providing blank domestic producers' questionnaires only to the Petitioner and "known producers" listed in the petition, MOFCOM insured that only petition supporters would complete questionnaire responses and be included in the domestic industry for purposes of its material injury analysis and determination. Excluded from the domestic industry were other known producers that could not complete questionnaire responses because they never received blank questionnaires. MOFCOM's failure thus extends not only to a failure to make active efforts to collect information from the broad universe of domestic producers, but also to the exclusion from consideration of producers that could account for approximately half of domestic production.[276]

273. In sum, MOFCOM acted inconsistently with Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement by intentionally excluding domestic producers from the domestic industry for reasons other than the two exceptions provided under subsections (i) and (ii) of Article 4.1 of the AD Agreement and Articles 16.1 and 16.2 of the SCM Agreement. Consequently, MOFCOM failed to define the domestic industry to include domestic producers as a whole or those accounting for a major proportion of total domestic production of the like product, breaching Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement.

B. China's Price Effects Analysis Final Determination Breached Articles 3.1, 3.2, 6.4 and 12.2 of the AD Agreement and Articles 15.1, 15.2, 12.3, and 22.3 of the SCM Agreement.

274. Underlying MOFCOM's injury determinations is the finding that the allegedly dumped and subsidized imports undersold the domestic like product by significant margins and thereby suppressed prices for the domestic like product.[277] This finding and MOFCOM's underlying price effects analysis are inconsistent with WTO requirements in several important respects.

275. First, MOFCOM's finding that subject imports undersold the domestic like product to a significant degree is based on fundamentally flawed price comparisons.

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275 MOFCOM, Final AD Determination at sec. 3.2 (USA-4); MOFCOM, Final CVD Determination at sec. 4.2 (USA-5).

276 *Id.*

277 *See* MOFCOM, Final AD Determination, sec. 5.2 (USA-4); MOFCOM, Final CVD Determination at sec. 6.2 (USA-5).

MOFCOM's underselling analysis compares the average unit value of subject imports on a CIF basis (*i.e.*, the price at the border, including customs duties, insurance, and freight) with the average unit value of domestic industry sales to first arms-length customers. These data did not permit meaningful price comparisons, however, because the average unit value of subject imports on a CIF basis is at a different level of trade from the average unit value of domestic industry sales to first arms-length customers. Indeed, MOFCOM admitted these constituted different levels of trade in the Final AD and CVD Determinations.[278] Additionally, subject imports were largely composed of lower value chicken parts that would result in a lower average unit value compared to the domestic like product, which was composed of a distribution of high and low value chicken parts.

276. MOFCOM's failure to control for such obvious differences demonstrates that MOFCOM's underselling analysis is not based on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Moreover, an investigating authority cannot "consider whether" there has been significant price undercutting by the allegedly dumped and subsidized imports, as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, without pricing data that permits probative price comparisons. In light of MOFCOM's flawed underselling analysis, MOFCOM was precluded from complying with the requirements of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

277. Second, MOFCOM's only basis for finding that subject imports suppressed domestic like product prices is its defective finding that subject imports undersold the domestic like product to a significant degree. Consequently, MOFCOM had no evidence for its finding that subject imports suppressed domestic like product prices, and this finding is thus inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

278. Third, even aside from the fact that MOFCOM did not adjust the average unit value of subject imports to reflect their different level of trade, MOFCOM also acted inconsistently with the AD Agreement by failing to disclose the methodology it employed to supposedly make such an adjustment. This failure denied U.S. respondents a timely opportunity to review and contest the methodology and is thus inconsistent with Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement. Furthermore, MOFCOM's failure to disclose this methodology in the final determinations breached Article 12.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

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[278] *See* MOFCOM, Final AD Determination, sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

1. *MOFCOM's Failure to Control for Differences in Level of Trade and Product Mix is Inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.*

279. MOFCOM's finding that subject imports undersold the domestic like product was based on a comparison of the average unit value of subject imports on a CIF basis to the average unit value of domestic producer sales to first arms-length customers. Moreover, MOFCOM's comparison did not account for different product mixes among subject imports and the domestic like product. Because MOFCOM failed to control for obvious differences in level of trade and product mix, its analysis of price effects violated Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

280. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement set forth a Member's substantive obligations with respect to the determination of injury in AD and CVD investigations, respectively.[279] The provisions provide that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the {dumped or subsidized imports and the effect of} the {dumped or subsidized} imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[280]

281. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement therefore impose two important requirements on authorities that make injury determinations. The first is that the determination be based on "positive evidence." The Appellate Body has interpreted "positive evidence" to relate to "the quality of the evidence that authorities may rely upon in making a determination" and to mean that "the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[281] The Appellate Body in *Mexico – Rice* described positive evidence as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[282]

282. The second requirement is that the injury determination involves an "objective examination" of the volume of the dumped or subsidized imports, their price effects, and

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

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

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

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

their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[283] Furthermore, the requirement that the examination be "objective" mandates that "the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."[284]

283. The Appellate Body has also explained that the obligation in Article 3.1 of the AD Agreement to conduct an objective examination based on positive evidence is "an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect" and "informs the more detailed obligations in succeeding paragraphs," including the examination of the effect of dumped imports on prices under Article 3.2.[285]

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

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

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

285. To conduct a price effects analysis consistent with the objectivity and positive evidence requirements, an investigating authority must utilize domestic and subject import pricing data that permit reasonably accurate price comparisons. As recently explained by the panel in *China –GOES*:

> In our view, a proper finding of the existence of price undercutting necessarily entails a comparison of prices, and the authority should ensure that the prices it is using for its

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

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

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

> comparison are properly comparable. As soon as price comparisons are made, price comparability arises as an issue.[286]

286. In that dispute, MOFCOM had predicated its underselling analysis on a comparison of domestic and subject import average unit value data that were at different levels of trade and that reflected different product mixes.[287] The panel found MOFCOM's price effects analysis inconsistent with Articles 3.1 and 3.2 of that AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement in part because "MOFCOM's reliance on AUVs without any consideration of the need for adjustments to ensure price comparability, is neither objective, nor based on positive evidence."[288] Because the pricing data MOFCOM relied on here suffered from similar deficiencies, MOFCOM's price effects analysis was just as inconsistent with WTO requirements, as explained below.

287. Prior panels have recognized that Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement do not require an investigating authority to use any particular type of price undercutting analysis.[289] However, the discretion afforded to investigating authorities is not unbounded. Rather, the analytical methodology an investigating authority uses must conform with the "objective examination" standard specified in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreements. MOFCOM's underselling analysis cannot constitute an "objective examination" because of the following failings.

a. ***MOFCOM's Comparison of Subject Import Prices and Domestic Like Product Prices at Different Levels of Trade is Not an Objective Examination.***

288. Levels of trade are the different market stages at which goods are traded, such as sales from manufacturer to wholesaler, from wholesaler to retailer, and from retailer to consumer. The price of a good varies depending on the level of trade at which the good is offered for sale. In order to conduct an objective examination of whether subject imports undersold the domestic like product, it is necessary for that comparison to be conducted at the same level of trade.

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286 *China – GOES*, para. 7.530 (footnotes omitted).

287 *Id.* at para. 7.528

288 *Id.* at paras. 7.530, 7.554.

289 *EC – DRAMS*, paras. 7.331-7.336; *EC – Tube or Pipe Fittings*, para. 7.277.

289. Article 2.4 of the AD Agreement recognizes in the context of the calculation of dumping margins that "{a} fair comparison . . . between the export price and the normal value . . . shall be made at the same level of trade . . . ." The same principle applies to the comparison of subject import prices to domestic like product prices in the context of the pricing analysis required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. Therefore, only a comparison that analyzes prices at the same levels of trade is relevant to establishing whether significant price undercutting has occurred within the meaning of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

290. In the Petition, the Petitioner alleged that subject imports undersold the domestic like product. The Petitioner's allegation relied on a comparison of subject import prices based on official import statistics (i.e., CIF prices) to domestic sales prices to the first arm's-length customers. MOFCOM's underselling analysis adopts this approach and the specific data cited by the Petitioner, without apparent modification, in the preliminary and final determinations.

291. The Petition's underselling allegation relies on subject import prices by year based on official import statistics (i.e., CIF prices).[290] The Petition converts these prices, denominated in U.S. dollars (USD), to RMB prices using currency conversion information obtained from a public source[291]:

II. **Period**	III. **Subject Import CIF Prices (USD)**	IV. **Subject Import CIF Prices (RMB)**
2006	$759.06	6624
2007	$1152.17	9344

[290] Petitioner, Petition, p. 23 ("Statistics of the General Administration of Customs of the People's Republic of China on import and export data of broiler products or chicken products") (USA-1).

[291] Petitioner, Petition, p.25 ("The information about currency conversion is from: http://www.oanda.com") (USA-1).

2008	$1329.89	9823
2009 (First half)	$1174.78	8601

292. No adjustment is made to these data to account for the level of trade. Rather, the Petition simply compares the subject import prices to the domestic sales prices to conclude that there was underselling.[292]

293. In the Preliminary Determination, MOFCOM relies on the *same* data submitted by the Petitioner for subject import prices based on official import statistics (i.e., CIF prices) and the domestic like-product prices based on domestic producer shipments to the first arm's length customers.[293] MOFCOM converted the CIF prices of the subject imports from dollars to RMB, deriving the same RMB import prices cited in the Petition.[294] MOFCOM then conducted its underselling analysis by simply comparing the difference between the subject import CIF prices to the RMB domestic sales prices.[295] Other than converting the CIF price from dollars to RMB, MOFCOM made no other adjustment to either the CIF price or the domestic sales price.

294. In this case, the average unit value of subject imports on a CIF basis, as collected by China Customs, is clearly at a different level of trade from the average unit value of

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[292] Petition, p.25 (USA-1).

[293] MOFCOM, Preliminary CVD Determination, p. 49 (USA-3); MOFCOM, Preliminary AD Determination, p.15 (“"According to the Customs, the import price to China (CIF price) in 2006, 2007, 2008 and the first half of 2009 is $759.06/tons, $1152.17/tons, $1329.89/tons and $1174.78/tons."); p.16 (“The average sales price of the domestic like products in 2006, 2007, 2008 and the first half of 2009 was 7193.41/tons, 9397.66/tons, 10338.69/tons and 8834.04/tons, respectively.”) (USA-2).

[294] MOFCOM, Preliminary AD Determination, p.16 (“In order to analyze the impact of the price of the subject goods to the domestic like product under the same currency, the investigation authority calculations the RMB price of the subject goods. The RMB price of the subject goods in 2006, 2007, 2008 and the first half of 2009 was 6623.90/tons, 9343.02/tons, 9823.12/tons and 8601.25/tons.”).

[295] MOFCOM, Preliminary AD Determination, sec. 5.2.3 (“During the POI, the RMB price of the subject goods is always lower than the average sales price of the domestic like products. Sales price of the subject goods in 2006, 2007, 2008, and the first half of 2009, is 569.51/tons, 54.64/tons, 515.57/tons, and 232.79/tons lower than that of the domestic like products.”).

domestic producer sales to first arms-length customers. Indeed, MOFCOM acknowledges as much.[296] Specifically, the average unit value of subject imports on a CIF basis reflects the prices that importers pay for subject imported chicken products at the border, including other additional costs of customs duties, insurance, and freight from the United States. The domestic like product, however, does not compete with CIF prices. Rather, the domestic like product competes with imports that are offered to importers' first arms-length customers. The prices from those imports with which the domestic like product competes would therefore include transportation costs from the border to the importers' warehouse and the importers' markup for sales, general and administrative expenses and profit. In turn, the average unit value of subject imports sold by importers to first arms-length customers would be at the same level of trade as the average unit value of the domestic like product sold by domestic producers to first arms-length customers. The average unit value of subject imports on a CIF basis would not be at the same level of trade because it excludes many of the additional costs.

295. The U.S. respondents raised this issue during the AD and CVD investigations and, in the final determinations, MOFCOM agreed and claimed that it took the different levels of trade into consideration:

> {W}hen comparing the import price of the Subject Products and the sales price of the domestic like products, the Investigating Authority has taken the difference of sales levels into consideration, adjusting the import price based on the Customs data accordingly.[297]

However, despite MOFCOM's unsupported assurance, an examination of the actual figures relied on by MOFCOM makes clear that it did not, in fact, take this issue into account or make an appropriate adjustment to the import price. MOFCOM used the same data in the final determination as it used in the preliminary determination.[298] These are the same figures cited by the Petitioner, which did not include any adjustment to account for the levels of trade. Moreover, MOFCOM's specific discussion of subject import prices gives no indication that such prices are based on anything other than the CIF import price to China. As it did in the preliminary determinations, MOFCOM: (i) states the CIF import prices of subject goods; (ii) calculates the RMB price of the subject goods

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[296] MOFCOM claims in its final determinations that it adjusted subject import prices to account for their different level of trade. MOFCOM Final AD Determination at sec. 6.2.2 (USA-4); MOFCOM Final CVD Determination at sec. 7.2.2 (USA-5). MOFCOM's failure to disclose its supposed methodology for doing so is addressed below.

[297] MOFCOM, Final AD Determination, sec. 6.2.2 ((USA-4); MOFCOM, Final CVD Determination, sec.7.2.2 (USA-5).

[298] *See, e.g.*, MOFCOM, Final AD Determination, sec. 5.2.1 (USA-4). MOFCOM cites the exact CIF sales figures as it cited in the preliminary determinations.

"[i]n order to analyze the impact of the price of the subject goods to the domestic like products under the same currency"; and (iii) compares the CIF prices (converted to RMB) to the domestic sales prices.[299] MOFCOM's underselling analysis contains no indication of any adjustment to the CIF prices to make them comparable to the domestic producer prices for sales to the first arm's-length customers.

296. Because the average unit value of subject imports on a CIF basis does not include transportation costs from the border to an importer's warehouse and the importer's markup, such unit values would naturally be lower than the average unit value of subject imports sold by importers to first arms-length customers. Thus, by comparing the average unit value of subject imports on a CIF basis with the average unit value of the domestic like product sold by domestic producers to first arms-length customers, MOFCOM made a finding of price undercutting almost inevitable. For this reason, the underselling margins cited by MOFCOM are not a reflection of actual price undercutting, but rather the different levels of trade at which subject import prices and domestic like product prices were collected. Thus, MOFCOM's price comparisons cannot constitute an objective examination of price effects, and is thus inconsistent with Articles 3.1 and 3.2 of the ADA and Articles 15.1 and 15.2 of the SCM Agreement.[300]

b. ***MOFCOM Compared Subject Import Prices and Domestic Industry Sale Prices Influenced by Obvious Differences in Product Mix.***

297. MOFCOM's failure to control for obvious differences in product mix between subject import shipments and domestic industry shipments also renders its price comparison defective. An accurate comparison of similar products is essential in order to ensure proper valuation. Differences in product mix can significantly influence comparisons between the average unit value of subject import shipments and the average unit value of domestic industry shipments. When the subject product comprises a heterogeneous range of models with different characteristics corresponding to different prices, the comparability of the average unit value of subject import shipments with the average unit value of domestic industry shipments will depend in significant part on ensuring the comparability of the product mix of subject import shipments with the product mix of domestic industry shipments. When each group of products being compared is relatively similar, average unit value data may serve as a reliable proxy for pricing information. The greater the difference between the product mix of subject import shipments and the product mix of domestic industry shipments, however, the

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299 MOFCOM, Final AD Determination, sec. 5.2 (USA-4).

300 In *China – GOES*, the Panel held that MOFCOM had acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement by predicating its price effects analysis on a comparison of subject import and domestic average unit values at different levels of trade, among other things. *China – GOES*, paras. 7.528, 7.536, 7.554.

greater the likelihood that differences in average unit values may reflect changes or variations in product mix, not differences in pricing.

298. Here, the record before MOFCOM established that the product mix of subject imports differed so significantly from the product mix of the domestic like product that average unit value data would not be a reliable substitute for pricing data on comparable products.

299. MOFCOM's description of the scope of the investigations makes clear that the subject merchandise is not a homogenous commodity product, but rather a heterogeneous range of subproducts comprising "{c}hicken products produced by slaughtering and processing live white-feather chickens, including chickens not cut in pieces, cuts and offal of chickens, whether fresh, chilled, or frozen."[301] Further, MOFCOM itself recognized that "because of differences in the consumption habit, American people seldom eat the chicken products other than the chicken breast," prompting U.S. producers to export "the other broiler products that are not consumed or seldom consumed" in the United States.[302]

300. Undisputed record evidence, drawn from China Customs data, indicates that the overwhelming-majority of subject imports consisted of lower-value chicken products, such as chicken paws and wing-tips.[303] In fact, during the POI, over 97 percent of U.S. imports consisted of paws, leg quarters, mid-joint wings, and "other offal," which are all among the lowest-value chicken products.[304] China Customs import data (for July 2008 to June 2009) indicated that the price per ton for chicken paws was $1,421, for chicken cuts with bones was $1,035, for mid-joint wings was $1,722, and for other offal was

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[301] MOFCOM, Final AD Determination at sec. 2 (USA-4); MOFCOM, Final CVD Determination at sec. 3 (USA-5).

[302] MOFCOM, Final AD Determination at sec. 5 (USA-4); MOFCOM, Final CVD Determination at sec. 6.4 (USA-5).

[303] *See, e.g.*, USAPEEC injury questionnaire response, p. 21, which includes China Customs import data indicating that chicken imports from the United States consisted primarily of the following four products - paws (HTS 02071422); chicken cuts with bones (generally leg quarters) (HTS 02071411); mid-joint wings (HTS 02071421); and other offal (HTS 02071429). *See also* USAPEEC Injury Brief at p.30 ("Of the 12 HTS numbers corresponding to the scope of this investigation, Chinese import statistics demonstrate that the United States exported products in only 5 of them.") (USA-21).

[304] USAPEEC, Injury Brief, p. 19 (USA-21). *See also Id.* at p. 29 and Exhibit 8 ("Chicken paws constitute the single largest chicken product exported to China. During the POI, paws accounted for over 40 percent of total imports of the subject merchandise.").

$1,147. In contrast, the price per ton of a whole chicken – which are rarely exported and rarely among the product mix for broiler products imports into China – was $5,062.[305]

301. Chinese producer shipments of chicken products to the Chinese market consist of a distribution of relatively higher value chicken products, including higher value breast meat that results from slaughtering and processing whole chickens. Consequently higher value products would constitute a much higher proportion of the product mix of Chinese producer sales than the product mix of U.S. chicken imported into China.

302. Thus, the price per ton of subject imports would be relatively lower, due to the high proportion of low value chicken parts, whereas the price per ton of domestic like product shipments would be relatively higher, reflecting a distribution of low- and high-value chicken products.[306] The so-called "underselling" cited by MOFCOM reflects differences in product mix, as well as the different levels of trade addressed above. Accordingly, MOFCOM could not, based on positive evidence and an objective examination, have found actual price undercutting consistent with Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

303. By comparing the average unit value of subject imports to the average unit value of the domestic like product despite evidence of significant differences between subject imports and the domestic like product in terms of product mix, MOFCOM failed to predicate its pricing analysis on "positive evidence" of subject import prices that were comparable to domestic like product prices, in violation of Article 3.1 of the ADA and Article 15.1 of the SCM Agreement. MOFCOM acted inconsistently with these same articles by failing to perform an "objective evaluation" of pricing data. This is because an objective examination would have ensured that the two groups of sales prices being compared were in fact comparable. MOFCOM's comparison of the average unit value of subject imports, consisting primarily of low value chicken parts, with the average unit value of domestic like product sales, consisting of a distribution of low and high value parts, made a finding of significant price undercutting more likely. Because MOFCOM based its finding of significant price undercutting on price comparisons distorted by differences in product mix, China also acted inconsistently with Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.

304. MOFCOM did not deny or refute the record evidence indicating that subject imports overwhelmingly consisted of relatively lower-value broiler products. Instead, MOFCOM simply claimed that it was under no obligation to take product mix into account in comparing the average unit value of subject imports to the average unit value of the domestic like product. Specifically, in responding to concerns raised by

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[305] USAPEEC, Injury Questionnaire Response, p. 21.

[306] *See* USAPEEC, Injury Brief at 19 (USA-21).

USAPEEC, MOFCOM stated that differences between "product models or product types due to different specifications, usages, quality, and other factors" do not preclude MOFCOM "from deeming the products of different models or types as the same category of product."[307] Noting that the scope of the investigation includes "paw and other specifications as well" and that "the competitive conditions are the same" between subject imports and the domestic like product, MOFCOM reasoned that it need not consider "the corresponding relationship among different specifications" but may conduct its injury analysis "on the basis of . . . 'a category product.'"[308]

305. Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement require investigating authorities to consider whether subject imports have undercut "the price of a like product." However, the reference to "like product" in these articles cannot reasonably be understood to permit authorities to ignore differences in product mix.[309] Where subject imports and the domestic like product differ significantly in terms of product mix and value, as here, a comparison of the average unit value of subject imports to the average unit value of the domestic like product would reflect differences in product mix rather than meaningful price comparisons, as explained above. Such price comparisons therefore could not properly allow an investigating authority to "consider whether there has been significant price undercutting," as required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, or to conduct an "objective examination" of "positive evidence" pertaining to subject import price effects, as required under Article 3.1 of the ADA and Article 15.1 of the SCM Agreement.[310]

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[307] MOFCOM, Final AD Determination, sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination, sec. 7.2.2 (USA-5).

[308] *Id.*

[309] In both its antidumping and countervailing duty determinations, MOFCOM found that "the broiler chicken products produced by the domestic industry and the subject imports are like products." *See* MOFCOM, Final AD Determination at sec. 3.1; MOFCOM, Final CVD Determination at sec. 4.1.

[310] In *China – GOES*, the panel held that MOFCOM had acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement by predicating its price effects analysis on a comparison of subject import and domestic average unit values "includ{ing} products of different grades, without any attempt . . . to adjust for differences in physical characteristics," among other things. *China – GOES*, paras. 7.528, 7.536, 7.554.

2. *MOFCOM's Adverse Price Effects Findings Were Predicated Entirely on Its Defective Underselling Analysis, and Therefore Inconsistent with WTO Requirements.*

306. Article 3.2 of the AD Agreement also requires the investigating authority to consider "whether the effect of such {dumped} imports is otherwise to depress prices to a significant degree or prevent prices increases, which otherwise would have occurred, to a significant degree." Article 15.2 of the SCM Agreement is worded identically, except that it refers to "subsidized imports" where Article 3.2 of the AD Agreement refers to "dumped imports."

307. MOFCOM's adverse price effects analysis appears to be limited to a finding that allegedly dumped imports "suppressed" prices, rather than depressed prices.[311] MOFCOM stated that "during the POI (with year 2007 as the only exception) sales price of domestic like products had been lower than their production costs for a quite long time" at the same time that subject imports allegedly undersold the domestic like product to a significant degree.[312]

308. Here, MOFCOM's *only* basis for its finding that subject imports had the effect of suppressing domestic like product prices over the interim period was its corresponding finding of significant subject import underselling,[313] which was unsupported by an objective evaluation of positive evidence, as addressed above. Specifically, MOFCOM stated that "{t}he lower price of the Subject Products has also suppressed sales price of the domestic like products" and that "selling of the Subject Products in a large amount at

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311 Record evidence clearly showed that subject import price competition did not "depress" domestic like product prices. The average sales price of the domestic like product increased 43.7 percent between 2006 and 2008, from RMB7,193.41 per ton to RMB10,338.69 per ton. MOFCOM, Final AD Determination at sec. V(ii)(2); MOFCOM, Final CVD Determination at sec. VI(B)(2). The average sales price of the domestic like product remained 22.8 percent higher in the first half of 2009, at RMB8,834.04 per ton, than in 2006. *Id.*

312 MOFCOM, Final AD Determination at sec 5.2.3; MOFCOM, Final CVD Determination, sec. 6.2.3.

313 *See* MOFCOM, Final AD Determination at secs. 5.2.3, 6.2.1 (USA-4); MOFCOM, Final CVD Determination at sec 6.2.3) ("The Subject Products have caused obvious price cuts for the domestic like products. The lower price of the Subject Products has also suppressed sales price of the domestic like products."), 7.2.1 ("{T}he import price was relatively low, which seriously undercut and inhibited the prices of domestic like products . . . The import price of the Subject Products was kept at an extremely low level. This seriously undercut and inhibited prices of the domestic like products. . . " (USA-5).was low, which constituted serious depression and suppression on the sale price of the domestic like products . . . {W}hile the import price was kept low. . . {t}his made serious depression and suppression effect on the price of the domestic like products . . . ").

a low price . . . has a cut-down effect on price of the domestic like products."[314] However, MOFCOM cited no mechanism or evidence other than this flawed finding of subject import underselling that in its view linked subject import competition with the suppression of domestic producer prices.

309. Because MOFCOM's finding that subject imports suppressed domestic like product prices is predicated entirely on its defective finding of significant underselling, MOFCOM's price suppression finding is not based on an "objective examination" of "positive evidence," in violation of Article 3.1 of the ADA and Article 15.1 of the SCM Agreement. As addressed above, MOFCOM failed to establish that subject imports undersold the domestic like product to a significant degree by basing its underselling analysis on distorted and biased average unit value comparisons. With no evidence of subject import underselling, MOFCOM lacked the necessary positive evidence to support its finding that subject import prices had the effect of suppressing domestic like product prices. Similarly, MOFCOM's evaluation failed to be the objective evaluation called for under Article 3.1 of the AD Agreement and 15.1 of the SCM Agreement.

310. Furthermore, MOFCOM's finding of price suppression is also inconsistent with the requirement to consider whether there has been significant price undercutting by the dumped or subsidized imports as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. The absence of any valid price comparisons or positive record evidence that subject imports influenced domestic like product prices made it impossible for MOFCOM to consider properly whether subject imports had the effect of depressing or suppressing domestic like product prices, as required under Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement. MOFCOM's finding that subject imports suppressed domestic like product prices is therefore inconsistent with these articles.

[314] MOFCOM, Final AD Determination at 5.2.3; MOFCOM, Final CVD Determination at 6.2.3.

3. *MOFCOM Failed to Disclose Its Alleged Methodology for Adjusting Subject Import Pricing Data to Reflect Its Different Level of Trade Relative to Domestic Like Product Pricing Data.*

311. In the Final AD and CVD Determinations, MOFCOM recognized that subject import pricing data was not at the same level of trade as the domestic sales data and purported to adjust the import price data accordingly.[315] However, as outlined above, no such adjustment was made because MOFCOM simply used the same data from the Petition. Nevertheless, even if MOFCOM had made such an adjustment, it would be in breach of Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement by failing to disclose its methodology for making the adjustment.

312. At the opinion presentation meeting held by MOFCOM on July 12, 2010, the United States observed that MOFCOM's pricing comparisons in the preliminary determinations were deficient in part because MOFCOM compared subject import and domestic like product prices at different levels of trade. Addressing the U.S. concern in the final determinations, MOFCOM claimed for the first time that "when comparing the import price of the Subject Products and the sales price of the domestic like products," it took "the difference of sales levels into consideration, adjusting the import price based on the Customs data accordingly."[316] MOFCOM, however, failed to disclose the methodology that it claimed to have used to adjust subject import prices to account for their different level of trade. This lack of explanation constitutes a violation of Articles 6.4 and 12.2 of the AD Agreement and Articles 12.3 and 22.5 of the SCM Agreement.

313. Article 6.4 of the AD Agreement states that:

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

314. Article 12.3 of the SCM Agreement is worded almost identically, except that it uses the term "countervailing duty investigation" whereas Article 6.4 of the AD Agreement refers to "antidumping investigation." The Appellate Body has found that Article 6.4 of the AD Agreement, and by extension Article 12.3 of the SCM Agreement, requires investigating authorities to provide interested parties with "*all* non-confidential information relevant to the presentation of their cases and used by the investigating

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315 MOFCOM, Final AD Determination, p.[42] (USA-4).

316 MOFCOM, Final AD Determination at sec. 6.2.2 (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.2 (USA-5).

authority," including "information that has been processed, organized, or summarized by the authority."[317] It also has held that "it is the interested parties, rather than the authority, who determine whether the information is in fact 'relevant' for the purposes of Article 6.4."[318]

315. Article 12.2 of the AD Agreement provides:

> Public notice shall be given of any preliminary or final determination . . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

316. Article 22.3 of the SCM Agreement has identical language. In *EC – Tube or Pipe Fittings*, the Panel found "a 'material' issue" within the meaning of Article 12.2 "to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination."[319]

317. Article 12.2.2 of the AD Agreement further provides:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirements for protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

318. The Article also provides that the notice or report shall contain the information described in Article 12.2.1, which includes "considerations relevant to the injury determination as set out in Article 3." Article 22.5 of the SCM Agreement has virtually identical language with respect to Article 22.4 of the SCM Agreement. The Panel in *EC – Footwear* found that the "relevant information on matters of fact and law" that must be included in a determination under Article 12.2.2 is the same as the information required

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317 *EC – Fasteners (AB)*, at para. 480 (emphasis added).

318 *Id.* para. 479.

319 *EC – Tube or Pipe Fittings*, paras. 7.423-7.424; *see also EU – Footwear*, para. 7.844.

to be included under the Article 12.2 chapeau; that is, information concerning "an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping {or countervailing} duty."[320]

319. In this case, MOFCOM failed to disclose the methodology that it allegedly used to adjust subject import prices to account for their different level of trade as compared to domestic industry sale prices. U.S. respondents clearly would have considered this methodology relevant to the presentation of their case given that the United States raised the issue at the opinion presentation meeting held by MOFCOM. USAPEEC's argument that subject imports had no adverse price effects was central to its case.[321] Consequently, by failing to disclose this methodology to U.S. respondents at all, much less in a timely fashion, MOFCOM violated Article 6.4 of the ADA and Article 12.3 of the SCM Agreement.

320. MOFCOM's alleged methodology for adjusting subject import prices to account for their different levels of trade also constituted "relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. This methodology was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and material injury. Consequently, MOFCOM's choice of methodology was an issue that had to be resolved before MOFCOM could render an affirmative material injury determination. MOFCOM's failure to disclose the chosen methodology in its final determinations therefore violated Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

C. China's Impact Analysis in its Final Determination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

321. MOFCOM's finding that the allegedly dumped and subsidized subject imports had an adverse impact on the domestic industry was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," in violation of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

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320 *EU – Footwear*, para. 7.844

321 *See* USAPEEC, Injury Brief at 18-20 (USA-21); USAPEEC, Comments on the Preliminary Injury Determination at 5-8 (USA-46).

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

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 15.4 of the SCM Agreement has virtually identical language, with references to "subsidized imports" rather than "dumped imports."[322]

323. Additionally, an authority's factual findings under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement must comply with the "objective examination" and "positive evidence" requirements articulated in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, respectively.[323] The nature of these requirements is discussed in Section VIII.A above.

324. The Appellate Body has explained that the obligation to evaluate all relevant economic factors in Article 3.4 of the AD Agreement is a further elaboration of the requirement to conduct an "objective examination" under Article 3.1.[324] With regard to Article 3.4 of the AD Agreement, the Appellate Body also noted that:

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[322] Additionally, Article 15.4 of the SCM Agreement does not include a reference to the margin of subsidization and provides that "in the case of agriculture, whether there has been an increased burden on government support programmes."

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

[324] *US – Hot-Rolled Steel* (AB), para. 194 ("[a]n important aspect of the 'objective examination' required by Article 3.1 is further elaborated in Article 3.4 as an obligation to

> [T]he investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an 'objective examination'. If an examination is to be 'objective', the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.[325]

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

326. MOFCOM's assessment of the relevant economic factors found that the domestic industry's performance generally improved between 2006 and 2008, with the exception of capacity utilization and end-of-period inventories:

> The above evidence show that during the POI, for purposes of satisfying a demand increase at the Chinese market, the domestic like product sector recorded certain growth from 2006 through 2008 in terms of output capacity, output volume, sales quantity as well as market share, number of employees, per capita payroll, labor productivity, and other economic indicators. However, capacity utilization rate of the domestic like products sector had always been fairly low, and ending inventory across industry kept rising.[326]

327. In fact, the record demonstrates that between 2006 and 2008, the domestic industry increased its production capacity by 26.2 percent, its output by 28.2 percent, its sales quantity by 31.2 percent, its sales revenues by 88.6 percent, its market share from 37.81 percent to 42.42 percent, and its employment by 10.3 percent.[327] The record also showed that the domestic industry's pre-tax loss narrowed from 7.9 percent of sales

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'examin[e] the impact of the dumped imports on the domestic industry' through 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry'.")

325 *US – Hot-Rolled Steel* (AB), paras. 196-197.

326 MOFCOM, Final AD Determination at sec. 5.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (USA-5).

327 *Id.*

income in 2006 to 4.7 percent of net income in 2008.[328] These improvements in the domestic industry's performance coincided with the bulk of the increase in subject imports, which increased by 47.2 percent between 2006 and 2008 but were only 6.54 percent higher in the first half of 2009 than in the first half of 2008.[329]

328. MOFCOM ignored this evidence and, instead, predicated its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period entirely on the only two measures of industry performance that did not appear to significantly strengthen during the period: the domestic industry's rate of capacity utilization and end-of-period inventories. As discussed below, MOFCOM's consideration of these two factors fell short of the requirements of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

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

329. MOFCOM's finding that subject import competition had an adverse impact on the domestic industry's rate of capacity utilization over the 2006-2008 period does not reflect an "objective examination" because it is clearly contradicted by the record evidence. Between 2006 and 2008, the domestic industry's rate of capacity utilization increased slightly from 78.72 percent in 2006, to 79.37 percent in 2007, and to 79.96 percent in 2008.[330] An objective examination would consider this trend in conjunction with the record evidence regarding the domestic industry's own capacity expansion in excess of demand. Instead, MOFCOM ignored that facet and attributed the trend entirely to competition from subject imports.

330. Between 2006 and 2008, the domestic industry's capacity increased by 26.2 percent. This increase far outstripped the 17.0 percent increase in apparent consumption over the same period.[331] All else being equal, capacity growth in excess of demand growth will result in declining capacity utilization. If an industry is increasing its capacity to produce, but the apparent consumption of its product does not increase at the same rate, the company will necessarily experience a decrease in capacity utilization.

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328 MOFCOM, Final AD Determination at sec. 5.3.8, 5.3.9 (USA-4); MOFCOM, Final CVD Determination at secs. 6.3.8, 6.3.9 (USA-5).

329 MOFCOM, Final AD Determination at sec. 5.1.1 (USA-4); MOFCOM, Final CVD Determination at sec. 6.1.1 (USA-5).

330 MOFCOM, Final AD Determination at sec. 5.3.4; MOFCOM, Final CVD Determination at sec. 6.3.4.

331 MOFCOM, Final AD Determination at sec. 5.3.1-5.3.2; MOFCOM, Final CVD Determination at sec. 6.3.1-6.3.2.

Had the domestic industry's capacity remained at 2006 levels, its rate of capacity utilization would have increased dramatically over the 2006-2008 period to over 100 percent in 2008. Thus, the domestic industry's "low level" of capacity utilization is objectively explained by the domestic industry's own capacity additions far in excess of demand growth, not by the competition posed by imports of subject merchandise.

331. Moreover, subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports increased their share of apparent consumption entirely at the expense of non-subject imports. Indeed, the domestic industry *increased* its share of apparent consumption by 4.61 percentage points during the period, from 37.81 percent in 2006 to 42.42 percent in 2008. Again, had the domestic industry not expanded its capacity in excess of apparent consumption growth, the domestic industry's increase in share of apparent consumption would have translated into a higher rate of capacity utilization.[332]

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

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

333. MOFCOM also found that the increase in the domestic industry's end-of-period inventories was caused by subject imports. This finding too cannot be the result of an "objective examination".[333] Specifically, MOFCOM focused on the purported increase in end-of-period inventories: from 68,257 tons to 98,755 tons between 2006 and 2008 (44.7 percent). What MOFCOM crucially neglected to consider was the significance of that

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[332] MOFCOM, Final AD Determination at sec. 5.3.6; MOFCOM, Final CVD Determination at sec.6.3.6.

[333] MOFCOM, Final AD Determination at sec. 6.1; MOFCOM, Final CVD Determination at sec. 7.1; *see also* MOFCOM, Final AD Determination at secs. 5.3, 6.2.3; MOFCOM, Final CVD Determination at secs. 6.3, 7.2.3.

increase relative to the domestic industry's actual performance, including, specifically, how that increase related to the domestic industry's production and shipments.[334]

334. From 2006 to 2008, domestic industry production increased from 2,346,600 tons in 2006 to 3,007,600 tons in 2008, and domestic industry shipments increased from 2,130,800 tons in 2006 to 2,796,000 tons in 2008.[335] The absolute increase in domestic industry end-of-period inventories (30,498 tons) at this same time was dwarfed by the absolute increase in domestic industry output (661,000 tons) and shipments (665,200 tons).

335. End-of-period inventories as a share of domestic industry production increased only from 2.9 percent in 2006 to 3.3 percent in 2008, while end-of-period inventories as a share of domestic industry shipments increased only from 3.2 percent in 2006 to 3.5 percent in 2008.[336] These ratios remained small and did not increase significantly between 2006 and 2008.

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

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

337. MOFCOM's finding that subject imports had an adverse impact on the domestic industry rests primarily on its flawed findings regarding capacity utilization and end-of-period inventories, which failed to reflect an objective examination of positive evidence, as discussed above. In light of MOFCOM's dependence on these flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted is unsubstantiated. Moreover, in contrast to MOFCOM's finding, the record evidence clearly indicates that the domestic industry's performance improved markedly according

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[334] MOFCOM, Final AD Determination at sec. 5.3.14; MOFCOM, Final CVD Determination at sec. 6.3.14.

[335] MOFCOM, Final AD Determination at sec. 5.3.3, 5.3.5; MOFCOM, Final CVD Determination at sec. 6.3.3, 6.3.5.

[336] MOFCOM, Final AD Determination at sec. 5.3.3, 5.3.5, 5.3.1; MOFCOM, Final CVD Determination at sec. 6.3.3, 6.3.5, 6.3.1.

to almost every measure during this period, when the bulk of the increase in subject import volume and market share took place.

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

D. China's Causal Link Analysis in its Final Determination Breached Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement.

339. MOFCOM's causation analysis is flawed because (1) MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) it relies on the flawed price undercutting analysis described above; and (3) MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance improved as subject import volume and market share increased.

340. In order to make a finding of injury to the domestic industry, MOFCOM was required to show that the cause of injury rested with imports of subject merchandise. In purporting to find causation, MOFCOM relied exclusively on findings related to volume and price. In particular, MOFCOM found that:

> During the POI, as the Subject Products were selling across China in a great volume at a low price, sales price of the domestic like products was materially suppressed, and said sales price remained lower than the production cost for a long term; as the domestic like products sector could not gain a reasonable profit margin, so the sector was losing money as a whole.[337]

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

342. Here, MOFCOM cited no evidence that the increase in subject import volume or subject import price competition was injurious to the domestic industry. Nor could MOFCOM have done so. With respect to the effects of subject import volume, the available evidence indicated that subject import volume and market share increased

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[337] MOFCOM, Final AD Determination, sec. 6.1 (USA-4); MOFCOM, Final CVD Determination, sec. 7.1 (USA-5).

entirely at the expense of nonsubject imports during the period of investigation. During that same period, the domestic industry increased its market share to *an even greater degree* than subject imports. With respect to the price effects of subject imports, MOFCOM relied on its flawed price comparisons, as addressed in section VIII.B above. Accordingly, MOFCOM could not have established any impact on pricing including undercutting, suppression, or depression. Finally, MOFCOM disregarded evidence that subject import competition was significantly attenuated because nearly half of subject import volume consisted of chicken paws, which the domestic industry could not produce in quantities sufficient to satisfy demand.[338]

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

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

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

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

[338] *See* USAPEEC's Injury Brief at 29-30 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 22 (USA-46).

345. Article 15.5 of the SCM Agreement is identical, except the phrase "dumped imports" is replaced by "subsidized imports" and the term "dumping" is replaced by "subsidies."[339]

346. Both provisions require investigating authorities to conduct their causation analysis with "an examination of all relevant evidence before the authorities" in order to determine whether a causal link exists between the dumped or subsidized imports and the domestic industry's injury. Moreover, this responsibility is coupled with the obligation that an authority's factual findings comply with the "positive evidence" and "objective examination" requirements set forth in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, discussed above.[340]

347. MOFCOM's causation analysis is inconsistent with the obligations of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because the analysis disregarded evidence that subject import volume did not increase at the expense of the domestic industry, and was based on MOFCOM's flawed price and impact analyses.

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

348. MOFCOM's determination of a causal link between subject imports and the domestic industry's purported material injury rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry.[341] However, evidence on the record clearly contradicts this finding. Specifically, relevant record evidence indicated that the increase in subject import volume and market share, however significant when considered in isolation, did not negatively impact the domestic industry because the domestic industry gained market share during the same precise period. MOFCOM makes no attempt to explain why such a compelling trend does not undermine its finding of causation.

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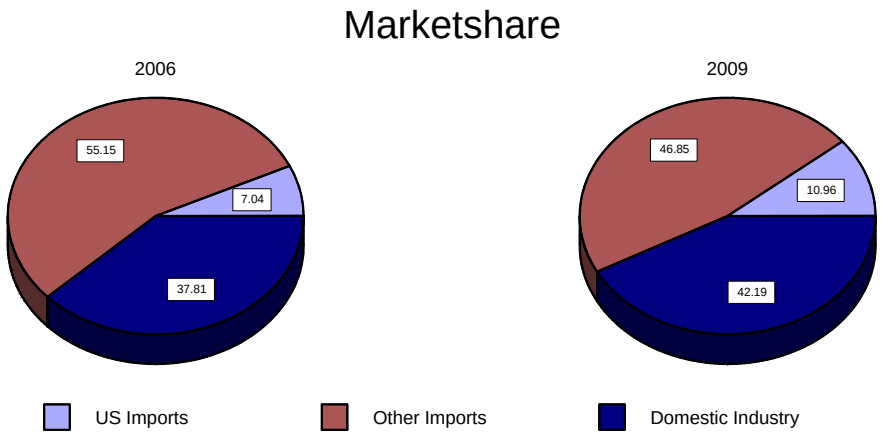
339 Additionally, Article 15.5 of the SCM Agreement sets forth in a footnote the language placed in the parenthetical clause of the first sentence of Article 3.5 of the AD Agreement.

340 *See EC – DRAMS*, para. 7.272.

341 MOFCOM, Final AD Determination at sec. 6.1 ("As the demand of the domestic market was increasing constantly, the imports of the Subject Products were increasing constantly on the one hand, while on the other hand the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly . . . In the first half of 2009. . . {t}he production volume, sales volume of the domestic like products presented a reverse relationship with that of the Subject Products; the market share of the domestic like products presented a reverse relationship with that of the Subject Products . . . .") (USA-4); MOFCOM, Final CVD Determination at sec. 7.1 (USA-5).

349. MOFCOM found it significant that the volume of subject imports increased from 396.9 thousand tons in 2006 to 584.3 thousand tons by 2008.[342] Similarly, MOFCOM found it significant that the market share of subject imports increased by 3.92 percentage points between 2006 and the first half of 2009 (from 7.04 percent to 10.96 percent).[343] However, between 2006 and 2008, which coincided with the bulk of the increase in subject import volume, record evidence confirms that the domestic industry's share of the domestic market increased 4.61 percentage points from 37.81 percent in 2006 to 41.62 percent in 2007 and 42.42 percent in 2008.[344] Likewise, in the first half of 2009, the domestic industry's market share, 42.19 percent, remained higher than its 2006 market share.



350. In short, the domestic industry gained more market share between 2006 and the first half of 2009, 4.38 percentage points, than the 3.92 percentage points gained by subject imports over the same period. Thus, the entire increase in subject import market share between 2006 and the first half of 2009 came at the expense of non-subject imports, which lost a corresponding 3.92 percentage points of market share to subject imports and lost an even greater 4.38 percentage points of market share to the domestic industry.

351. In the final determinations, MOFCOM provided the following response to the argument raised by the interested parties[345] that subject imports could not have caused

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342 MOFCOM, Final AD Determination, sec. 6.1.

343 MOFCOM, Final AD Determination, sec. 6.1.

344 MOFCOM, Final AD Determination at sec. 5.3.6; MOFCOM, Final CVD Determination at sec. 6.3.6.

345 *See, e.g.*, USAPEEC, Injury Brief at p. 17 ("From 2007 to 2008, combined Brazilian and Argentinean imports decreased by 73.2 million pounds, while U.S. imports increased by only 64.1 million pounds. Similarly, from partial year 2008 to partial year 2009, combined Brazilian

injury to the domestic industry because subject import volume was low and stable and any increase in subject import volume came at the expense of non-subject imports:

> According to the relevant laws of the China, when the Investigation Authority analyzes the volume of the dumped imports, they may either analyze 'whether increasing considerably in absolute terms,' or 'whether increasing considerably in relative terms'; the laws do not require considering the absolute import volume and the relative import volume at the same time.[346]

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

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

354. For these same reasons, MOFCOM's analysis is also inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement because MOFCOM failed to examine all relevant evidence. Evidence that the increase in subject import volume and market share came at the expense of non-subject imports, not the domestic industry, and coincided with an even greater increase in domestic industry market share was certainly evidence relevant to MOFCOM's causal link analysis. Additionally, with no evidence linking the increase in subject import and market share to material injury, MOFCOM's causal link analysis also failed to demonstrate that any material injury

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and Argentinean imports decreased by 83.6 million pounds, and U.S. imports increased by only 18.8 million pounds. In other words, any increases in U.S. imports simply filled the gap left by Brazil and Argentina when they effectively exited the China market") (USA-21).

[346] MOFCOM, Final AD Determination, sec. 6.2.1 (USA-4); MOFCOM, Final CVD Determination, sec. 7.2.1 (USA-5).

suffered by the domestic industry was the effect of subject import volume, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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

355. The second pillar of MOFCOM's finding of a causal link between subject imports and the domestic industry's performance were its findings that subject imports undersold the domestic like product and suppressed domestic like product prices during the period examined.[347] As detailed in section VIII.B above, however, MOFCOM's finding that subject imports undersold the domestic like product is based on flawed and biased average unit value comparisons, and is therefore inconsistent with WTO requirements. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, this finding, too, is inconsistent with WTO requirements. Moreover, given that domestic like product prices increased over the period examined, there was no evidence of price depression. With no evidence that subject imports either undersold the domestic like product or suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in violation of Article 3.1 of the ADA and Article 15.1 of the SCM Agreement for the reasons outlined above.

356. Furthermore, in light of MOFCOM's flawed price undercutting analysis, MOFCOM failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. These articles require investigating authorities to "demonstrate{} that the dumped {or subsidized} imports are, through the effects of dumping {or subsidies}, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement."[348] Paragraph 2 of both Article 3 of the AD Agreement and Article 15 of the SCM Agreement, in relevant part, require investigating authorities to assess "the effect of the dumped {or subsidized} imports on prices" by considering whether there has been "significant price undercutting" by subject imports and whether subject imports had depressed or suppressed domestic like product prices. By failing to establish that subject imports had any adverse effects on domestic like product prices,

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[347] *See* Final AD Determination at 6.2.1 (finding that although "domestic like products did gain a certain market space . . . because the import volume of Subject Products increased considerably and the import price was low, which constituted serious suppression on the sales price of the domestic like products, the domestic like products were forced to be sold prices below the production cost in order to maintain market share.") (USA-4); MOFCOM, Final CVD Determination at sec. 7.2.1 (USA-5).

[348] As the Appellate Body observed in *EC – Tube or Pipe Fittings*, "Article 3.5 requires that an investigating authority establish a "causal relationship" between dumped imports and the domestic industry's injury." *EC – Tube or Pipe Fittings (AB)*, para. 175.

MOFCOM failed to establish that subject import price competition caused material injury to the domestic industry, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

357. Finally, by relying on its defective pricing analysis, MOFCOM failed to base its causal link analysis on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. As discussed above, MOFCOM ignored evidence that its average unit value price comparisons were distorted by significant differences in levels of trade and product mix as between its pricing data covering subject imports and domestic industry shipments. By not correcting or otherwise addressing these deficiencies in its pricing analysis, MOFCOM failed to conduct the examination of all relevant evidence required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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

358. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance. Specifically, the record showed that subject import volume increased 47 percent between 2006 and 2008. However, this increase was accompanied by a dramatic strengthening of almost every measure of the domestic industry's performance during this same period, including: a 4.38 percentage point increase in market share, a 26.2 percent increase in capacity, a 28.2 percent increase in output, a 31.2 percent increase in sales quantity, an 88.6 percent increase in sales revenue, and a 10.3 percent increase in employment.[349] The domestic industry's loss as a percentage of its sales income narrowed from 7.9 percent in 2006 to 4.7 percent in 2008.[350] As discussed above, the domestic industry's rate of capacity utilization increased less dramatically, but was suppressed by the industry's expansion of its capacity in excess of demand growth. Although MOFCOM emphasized that end-of-period inventories increased during the period, the industry's end-of-period inventories remained insignificant relative to production and shipments, as addressed in section VIII.C above.

359. Despite the lack of any positive evidence linking the increase in subject import volume during the 2006-2008 period to any significant decline in the domestic industry's performance, MOFCOM nevertheless concluded that "during the entire POI, there is an outstanding relevance between the change of imports of the Subject Products and the

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349 MOFCOM, Final AD Determination, sec. 5.3 (USA-4); MOFCOM, Final CVD Determination, sec. 6.3 (USA-5).

350 *Id.*

situation of operation of the domestic industry."[351] As "imports of the Subject Products were increasing constantly," it found, "the domestic industry could not utilize its capacity efficiently and the inventory was increasing constantly" and "the domestic like product could not gain the profit margin as it should, presenting substantial loss, which was getting worse."[352] These findings are totally contradicted by evidence that the domestic industry's performance strengthened between 2006 and 2008 according to almost every measure, including a narrowing of the industry's net loss from 7.9 percent of sales income in 2006 to 4.7 percent of net income in 2008.

360. Moreover, the domestic industry's performance appeared to be stronger in the first half of 2009 than it had been in 2006 according to many measures.[353] MOFCOM does not explain how subject imports could have caused any material injury to the domestic industry when the domestic industry's worst performance of the period examined occurred in 2006, before any increase in subject import volume and market share.

361. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to predicate its causation analysis on an objective examination of positive evidence, in breach of Article 3.1 of the ADA and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

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[351] MOFCOM, Final AD Determination, sec. 6.1; MOFCOM, Final CVD Determination at sec. 7.1.

[352] *Id.*

[353] The United States recognizes that comparisons between partial year data and full year data are of limited probative value, due to seasonality and other factors. Indeed, the United States is of the view that the most relevant period for purposes of MOFCOM's causal link analysis was the 2006-2008 period. Unlike partial year comparisons, calendar year data for the 2006-2008 period is contiguous and would not be distorted by seasonality. These data show that the domestic industry performance strengthened dramatically according to most measures even as subject import volume and market share increased. Given MOFCOM's reliance on partial year data, however, the United States would point out that the domestic industry's capacity, output, sales quantity, market share, sales revenue, productivity, and average wages in the first half of 2009 were all at levels well over half those achieved in 2006. *See* MOFCOM, Final AD Determination at sec. 5.3 (USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (USA-5). The industry's return on investment improved from -13.42 percent in 2006 to -9.10 percent in the first half of 2009. Final AD Determination, sec. 5.3.10; Final CVD Determination, sec. 6.3.10.

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

362. The obligations under Articles 12.2 and 12.2.1 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement are discussed in section VIII.B. above. These obligations require investigating authorities to issue public notices of their final determinations that include "all relevant information on matters of fact and law" material to their determinations, which would include all relevant information on "issue{s} which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping {or countervailing} duty."[354] In addition, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to such issues.

363. U.S. respondents raised two principal arguments concerning the absence of any causal link between subject imports and material injury that went unanswered by MOFCOM. First, both USAPEEC and the United States argued that there could be no link between subject imports and material injury because subject import volume increased entirely at the expense of nonsubject imports; subject imports did not take any share from the domestic industry. In response, MOFCOM acknowledged that the domestic industry gained market share during the period. But rather than meaningfully addressing the claim, MOFCOM simply reiterated its unfounded assertion that subject import volume significantly increased in absolute terms while subject import underselling depressed and suppressed domestic like product prices.[355] MOFCOM did not explain how an increase in subject import volume that displaced nonsubject imports rather than domestic industry shipments could have materially injured the domestic industry.[356]

364. MOFCOM's failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' argument in the public notices of its final determinations violated Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. The issue raised by U.S. respondents -- how the increase in subject import volume and

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354 *EC – Footwear*, para. 7.844

355 MOFCOM, Final AD Determination at sec. 6.2.1; MOFCOM, Final CVD Determination at sec. 7.2.1.

356 MOFCOM acknowledged that the "import quantity of like products from other countries and regions is on decline," but fails to cite nonsubject import volume or market share data. MOFCOM, Final AD Determination at sec. 6.3.1; MOFCOM, Final CVD Determination at sec. 7.3.1.

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

365. USAPEEC also argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities.[357] As USAPEEC explained, domestic producers sell 100 percent of their chicken paw production and cannot increase their production of paws without also increasing their production of other chicken parts to uneconomic levels.[358] For this reason, chicken paws imported from the United States do not take sales away from domestic producers, but rather serve demand for chicken paws that domestic producers are incapable of satisfying. Because nearly half of subject imports could have had no adverse impact on the domestic industry, USAPEEC argued, competition between subject imports and the domestic industry was substantially attenuated during the period examined.

366. Here again, the issue raised by USAPEEC was clearly material to MOFCOM's causal link analysis. It was therefore a relevant argument that MOFCOM was obligated to address. Although this was an issue that necessarily had to be resolved before MOFCOM could issue affirmative material injury determinations, MOFCOM completely ignored it. By failing to provide the reasons for its rejection of USAPEEC's argument concerning chicken paws, much less "all relevant information" on its resolution of the issue, MOFCOM violated Article 12.2.2 of the AD Agreement and Article 22.5 of the

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357 *See* USAPEEC Injury Brief at 29-30 (USA-21); USAPEEC Comments on Preliminary Injury Determination at 22 (USA-46). MOFCOM purportedly addressed USAPEEC's argument concerning chicken paws in its preliminary determination, but its response was based upon a misunderstanding of the argument. *See* MOFCOM, Preliminary AD Determination at sec. 6.1 (USA-2); MOFCOM, Preliminary CVD Determination at sec. 7.1(USA-3). MOFCOM seemed to be under the misapprehension that USAPEEC was arguing that chicken paws should not be factored into MOFCOM's analysis because they are outside the scope of the investigation. *Id.* MOFCOM never addressed the actual issue raised by USAPEEC in either determination.

358 USAPEEC Injury Brief at 30 (USA-21).

SCM Agreement.

IX. CONCLUSION

367. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994, SCM Agreement, and AD Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994, SCM Agreement, and AD Agreement.