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

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS427/R.

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**ANNEX A**

INTEGRATED SUMMARIES OF THE PARTIES' FIRST AND SECOND WRITTEN SUBMISSIONS,  
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**ANNEX A-1****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE UNITED STATES***First Integrated Executive Summary by the United States***I. OVERVIEW**

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. This is confirmed by the *post-hoc* rationalizations offered by China during the course of these proceedings; they demonstrate that China's investigating authority, the Ministry of Commerce for the People's Republic of China (MOFCOM), simply ignored and discounted evidence and arguments that it found problematic throughout the underlying investigations.

2. The United States is alleging that the flawed process and results are inconsistent 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"). These obligations include:

- AD Agreement Article 6.2: MOFCOM's failure to grant the United States' request for a hearing;
- AD Agreement Article 6.9: MOFCOM's failure to allow U.S. respondents to see the calculations for their respective dumping margins;
- AD Agreement Article 6.5.1 and SCM Agreement Article 12.4.1: MOFCOM allowing the Petitioner to include confidential information in the Petition without providing non-confidential summaries;
- AD Agreement Article 2.2.1.1: MOFCOM's rejection – made without any explanation – of 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 and replacement of those costs with an unreasonable allocation methodology;
- AD Agreement Article 2.4: MOFCOM's failure to conduct a fair comparison of normal value and export price for Keystone, a U.S. respondent, by applying certain freezer storage fees in a manner that inflated Keystone's dumping margin;
- AD Agreement Articles 6.8, 6.9, 12.2, 12.2.1, 12.2.2, and Annex II and SCM Agreement Articles 12.7, 12.8, 22.3, 22.4, and 22.5: MOFCOM's imposition of 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 or why it rejected facts and law raised by the United States and U.S. respondents in the Preliminary and Final Determinations;
- SCM Agreement Article 19.4 and Article VI:3 of the GATT 1994: MOFCOM's failure to properly allocate the alleged subsidy in relation to subject merchandise;

- AD Agreement Articles 3.1 and 4.1 and SCM Agreement Articles 15.1 and 16.1: MOFCOM wrongly defined the domestic industry to include only those firms that supported the AD and CVD investigations;
- AD Agreement Articles 3.1, 3.2, 6.4 and 12.2 and SCM Agreement Articles 15.1, 15.2, 12.3, and 22.3: MOFCOM's 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.
- AD Agreement Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Agreement Articles: 15.1, 15.5, 22.3, and 22.5: MOFCOM's 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; and
- AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4: 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" as it cannot be reconciled with all the evidence attesting to the overall health of the domestic industry.

## II. PROCEDURAL AND FACTUAL BACKGROUND

3. 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], Notice No. 26 [2010], Notice No. 51 [2010], and Notice No. 52 [2010], including any and all annexes.

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

Firm	Antidumping Duty Rates	Countervailing Duty Rates
Pilgrim's	53.4%	5.1%
Tyson	50.3%	12.5%
Keystone	50.3%	4.0%
Firms that registered for the investigation but were not selected as mandatory respondents	51.8%	7.4%
"All others"	105.4%	30.3%

5. On September 20, 2011, the United States requested consultations with China with respect to these measures. The United States and China held consultations on October 28, 2011. As these consultations did not resolve the dispute, the United States requested, on December 8, 2011, the establishment of a panel. 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. The United States renewed its request for the establishment of a panel at the January 20, 2011 meeting of the DSB, at which time a panel was established.

## III. STANDARD OF REVIEW

6. 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. 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.

7. A WTO panel, per its standard of review, assesses whether a Member has abided by its obligations by looking at the contemporaneous explanations provided by the investigating authority. In short, because it is the task of a panel to assess the reasoning of an investigating authority, there is a concomitant duty on the investigating authority to set forth its reasoning in light of the obligation at issue because a defect in the reasoning, such as a failure to properly justify a position or address arguments means that the authority will be held to have acted inconsistently with the relevant provision. Therefore, *post-hoc* arguments offered by a defending Member cannot be taken into account.

#### **IV. MOFCOM'S PROCEDURAL FAILINGS**

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

8. 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. 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.

9. Article 6.2 of the AD Agreement sets forth four requirements on investigating authorities. First, it must allow any interested party to request a hearing. 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. 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." Here, MOFCOM did not claim the request was denied because prior opportunities had been provided or the United States had missed a reasonable deadline to request a hearing. MOFCOM denied the request on grounds that have no basis in Article 6.2: 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 public, just and transparent manner."

10. Second, the provision states that the opportunity extends to "all interested parties." In its letter denying the U.S. request, 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. That is incorrect as 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.

11. Third, Article 6.2 provides that the opportunity is to "meet those parties with adverse interests. 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 adverse positions would have ultimately chosen to meet with the United States, but that MOFCOM decided *ab initio* that no such gathering would occur.

12. Finally, Article 6.2 provides that the meeting should allow for opposing views and rebuttals to be offered. The opinion presentation meeting that MOFCOM offered as a substitute makes no such provision. MOFCOM's option needs to be considered in the context of Article 6.3 of the AD Agreement, which provides that the oral information provided in a hearing shall only be taken into account if it is reproduced in writing and made available to other interested parties. For a party such as the Petitioner, who would be adverse to the issues raised in the proposed hearing, MOFCOM's procedure of substituting a closed meeting as soon as a petitioner declines to meet, allows a petitioner an easy way to avoid a hearing and limit the record of arguments it finds objectionable.

13. In respect to how the obligations in Article 6.2 may be satisfied, the United States considers that an investigating authority could satisfy its obligations in multiple ways. One simple method

would be for an investigating authority to adopt a practice of routinely holding hearings in all its investigations. Alternatively, it could follow procedures similar to those MOFCOM provides in its own rules for hearings – and which were denied to the United States. These procedures include (1) a procedure whereby an interested party can initiate a hearing; (2) a procedure by which the investigating authority can announce the logistics for the hearing and allow all interested parties the opportunity to participate, perhaps through a registration process; and (3) procedures whereby the hearing is conducted so the parties can have a full opportunity to make their own presentations and then have an opportunity to comment on the presentations made by other interested parties. Here, MOFCOM by allowing 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, 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.**

14. China breached Article 6.9 of the AD Agreement by failing to disclose to the interested parties the “essential facts” forming the basis of MOFCOM’s decision to apply anti-dumping duties. In particular, MOFCOM failed to disclose the data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and the export price for the respondents.

**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**

15. 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 obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of “facts”, which is defined to mean “[a] thing known for certain to have occurred or to be true.” The use of the adjective “essential” to modify “facts” indicates that this obligation does not encompass “any and all” facts, but rather is concerned only with those facts that are “absolutely indispensable or necessary.” For purposes of the investigating authority’s dumping determination, the essential facts under Article 6.9 are the “indispensable 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. China presents a classic straw man argument by purporting to paraphrase the U.S. argument in an extreme manner, and then argues against it. The United States, however, relies fully and appropriately on the text of Article 6.9 of the AD Agreement.

16. 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. They are “facts” because they are things “known for certain to have occurred”, and they are “essential” because they are absolutely indispensable 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. Moreover, unless the interested parties are provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

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

17. MOFCOM failed to make available the calculations and data it used to determine the existence and margin of dumping and thereby prevented the respondents from knowing basic information about how the dumping margins to which they would be subject had been determined. The essential facts 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.

18. China asserts that it met its disclosure obligation because the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping. Disclosure of summary figures does not meet China's obligations under Article 6.9 of the AD Agreement because these summary figures represent merely the final stage of a margin calculation and at no point does MOFCOM disclose the data or calculations used to derive them. At most, these disclosures merely allowed the exporters to guess at or approximate the calculations. China provides exhibits that purportedly could direct the respondents to the information relied on by MOFCOM and allow them to reconstruct the calculations performed by MOFCOM. These tables were not provided to the interested parties during the investigation. However, even if they had been provided, they merely refer the respondents to the scattered and vague statements in the Final AD Determination and disclosure documents concerning adjustments purportedly made by MOFCOM. They do not provide the data and calculations used by MOFCOM to determine the existence and magnitude of dumping.

19. Without knowing the facts of the actual data used by MOFCOM, the respondents were not in a position to defend their interests in the investigation. In order to defend their interests, the respondents needed to be able to review and comment on the calculation performed by MOFCOM. Without access to the actual calculations performed, the respondents could not re-construct the exact calculations, contrary to China's suggestion, and certainly could not review the data and calculations used by MOFCOM to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do.

**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.**

20. The United States is challenging MOFCOM's failure to require the Petitioner to prepare non-confidential summaries in six instances in the Petition as breaches of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement. There are five facets to these provisions that are critical to their interpretation. First, the provisions apply to information submitted by any interested party participating in the investigation. The Petitioner was an interested party. Second, 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. Third, the use of the term "exceptional" in the provisions qualifies the possibilities for deviation. 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. 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. Fifth, the obligations in these provisions are not 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.

21. China attempts to sidestep its failure to require the Petitioner to provide non-confidential summaries by noting the United States is not challenging the underlying claims of confidentiality. That argument, however, fails to sequence the issues properly because the provisions require the investigating authority to assess the confidentiality claim. As the Appellate Body recognized in *EC – Fasteners*, the summary is critical because interested parties cannot defend their interests – including challenging the confidentiality claim – without an understanding of the information in question.

22. China's post-hoc attempt to cobble non-confidential summaries additionally fails because there is no indicia that would let an interested party know that the information China cites now as serving as a non-confidential summary was intended to serve as such and because they entail conclusions that an interested party must summarily accept rather than any summarization of the actual information. The panel in *China – GOES* was clear that the provisions "require the interested



party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information" and that a mere conclusion "does not provide an interested party with a basis to challenge whether the confidential information provides a basis for the conclusion drawn."

23. In short, the Petitioner did not provide any statement regarding why summarization was not possible, and MOFCOM saw no need for it to do so. Accordingly, China breached Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

#### **IV. 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**

24. During the investigation, U.S. producers presented to MOFCOM the costs of production they kept in their books and records for the various subject products. The producers explained that their records allocated higher production costs for more valuable chicken products, such as breast meat. U.S. producers put evidence on the record explaining why their costs were GAAP consistent and reasonably reflected the costs associated with the production and sale of the products. This evidence includes U.S. and Chinese accounting treatises, letters from auditors, precedents from other investigating authorities, Chinese GAAP, and International Accounting Standards. 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, MOFCOM stated that U.S. producers had an affirmative responsibility to convince it otherwise.

25. Article 2.2.1.1 of the AD Agreement imposes positive obligations on an investigating authority. 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. The use of the term "normally" in the provision confirms that the obligation in the first sentence of Article 2.2.1.1 is for the investigating authority, as a rule, to calculate costs on the basis of a producer or exporter's records. The dependent clause of the provision indicates two circumstances [provisos] under which it would be possible to derogate from this rule: such records are not in accordance with [1] the generally accepted accounting principles of the exporting country and [2] do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the obligation is on the investigating authority to rely upon a producer's figures unless it demonstrates why one or both of the conditions do not apply.

26. In respect to these two provisos, Article 2.2.1.1. states the provision is "[f]or the purposes of paragraph 2," i.e. Article 2.2. Article 2.2 in turn states that when sales in the ordinary course of trade in the domestic market cannot be used, two other methods can, including cost of production method: the method specified in 2.2.1.1. Article 2.2 states the margin of dumping shall be determined by comparison "with the cost of production in the country of origin." Accordingly, the two provisos must be considered with respect to their objective of calculating the cost of production in the country of origin.

27. MOFCOM in rejecting these costs as unreasonable has an obligation to explain why they were so. The obligation stems from (1) the general requirement that an investigating authority's actions are subject to review by WTO panels; (2) because Article 2.2.1.1 is a "positive" obligation upon the investigating authority; and (3) because the second sentence of the provision requires an investigating authority to "consider" available evidence, which here was substantial. Critically, MOFCOM put nothing forward on the record as to why U.S. producers' costs were unreasonable. MOFCOM's *post-hoc* explanation that the costs were unreasonable because of conditions in the Chinese market cannot be accepted by virtue of the fact that they are post-hoc. In any event, that basis to declare costs as unreasonable runs afoul of the AD Agreement.

28. 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 all available evidence, including historically utilized allocations made available by the exporter or producer to ensure that its alternative allocation is proper. A "proper" allocation is an

allocation that captures the costs of production in the country of origin and one that can be accurately used to ensure that the anti-dumping duty is not greater than dumping as to the particular product. MOFCOM did not assert or accept that it was required to evaluate the evidence submitted by U.S. producers or the merits of its own methodology, or that it might need to make adjustments with respect to product scope. Not surprisingly, MOFCOM's application of a weight-based allocation here is not proper.

29. When there are joint products that are non-homogenous, the use of a unit based allocation such as weight eliminates any relationship with the cost of production in the country of origin. It results in the same amount of costs being assigned to low and high value products. The resulting antidumping duty margin would accordingly be distorted. MOFCOM's decision to adopt such a methodology seems to suggest the deliberative process ignored key concerns:

- Why is it reasonable to take costs that are in fact already associated with sale and remove that characteristic from them by averaging them according to weight?
- Why is it reasonable to take the specific processing costs incurred post-split and average them across all products, even though it is clear that some of those products did not incur those costs?
- Why is this methodology reasonable when producers cannot adopt it in the course of their normal records thus vitiating the principle that costs should reflect the costs of production in the country of origin? If they did, they would be allocating costs to low value products far in excess of the fair market value of such products. As a result, the producer's inventory, based on MOFCOM's methodology, would be in violation of the lower of cost or market [LCM] rules of accounting standards.

30. In short, MOFCOM's methodology is anything but "proper," particularly when compared to using the costs kept in the producers' books and records.

**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.**

31. China breached 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***

41. Keystone incurred freezer storage expenses on all home market sales that would be comparable to the sales of product in China – all frozen product incurred the same freezer storage expenses, regardless of whether they were sold in the United States or exported to China. Those freezer storage expenses were reported to MOFCOM in response to MOFCOM's AD Questionnaire. 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. 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. In the Final AD Determination, however, MOFCOM deducted Keystone's freezer storage fees from its export price.

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

42. 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. 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. 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**

43. MOFCOM made an undue adjustment to exclude freezer storage expenses from Keystone's export price and therefore compared a normal value that included at least some portion of those expenses, as China admits, to an export price that did not. The adjustment to the dumping margin calculated by MOFCOM for Keystone did not reflect merely 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 same freezer storage expenses 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.

44. China asserts that the adjustment was warranted because all of Keystone's exports to China were of frozen product, and therefore incurred freezer storage expenses, but only a fraction of Keystone's domestic sales incurred freezer storage expenses because not all of those products were frozen. However, China admits that its adjustment resulted in a mismatch. China relies on the *post-hoc* characterization of Keystone as failing to provide accurate or timely responses to MOFCOM's request to justify this result. However, China's assertion is contrary to the record which indicates that MOFCOM verified that all of the costs of Keystone's financial reports, which included freezer storage expenses, had been properly reported to MOFCOM.

**4. The U.S. Claim Regarding Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference**

45. The United States' claim under Article 2.4 of the AD Agreement concerning MOFCOM's failure to conduct a fair comparison between Keystone's constructed normal value and its export price is properly within the panel's terms of reference. Contrary to China's assertion, the legal basis for the United States' claim clearly evolved from the legal basis that formed the subject of consultations and is therefore properly within the scope of the panel's terms of reference. Moreover, Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request.

46. The United States is pursuing several claims regarding MOFCOM's treatment of the respondents' reported costs and MOFCOM's failures to disclose certain essential facts, information and reasoning associated with calculating the respondents' normal values and export prices. At the time of the United States' request for consultations, it was apparent that there was some discrepancy in MOFCOM's treatment of Keystone's reported costs in constructing Keystone's normal value, including MOFCOM's treatment of Keystone's reported costs for freezer storage expenses. Given MOFCOM's flawed disclosures, it was unclear precisely how MOFCOM had treated those costs. It was not until consultations that it became apparent that MOFCOM had made an undue adjustment to Keystone's export price. This is not unlike the situation discussed in the Appellate Body report for *Mexico—Beef and Rice*, where a complaining party learns of additional information during consultations that warrants revising the list of treaty provisions with which the measure is alleged to be inconsistent.

**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.**

47. When MOFCOM initiated the AD and CVD investigations, it notified the six U.S. producers identified in the Petition of the investigation and requested the U.S. Embassy to notify any other exporters or producers. MOFCOM required any U.S. exporter that wished to participate in the investigation to register with MOFCOM. Three companies were investigated and MOFCOM assigned those companies individual margins of dumping in the Preliminary and Final AD Determinations. MOFCOM applied a weighted-average margin to other companies that registered with MOFCOM, but were not investigated. However, with regard to companies that MOFCOM did not notify, or

even identify, MOFCOM assigned an “all others” dumping margin substantially higher than the highest margin assigned to any investigated company.

48. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the AD questionnaires, and were not otherwise provided the notice required by the AD Agreement, MOFCOM breached Article 6.8 and Annex II of the AD Agreement. MOFCOM also breached Article 6.9 of the AD Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the “all others” dumping margin and Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement by failing to adequately explain the “all others” determinations.

**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.**

49. 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.

50. Article 6.8 of the AD Agreement limits the circumstances in which investigating authorities may resort to the use of facts available to 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. Together with Annex II, paragraph 1 of the AD Agreement, Article 6.8 ensures that an exporter or producer has an opportunity to provide information required by an investigating authority before the investigating authority resorts to the use of facts available. 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 authority did not give notice, will be in breach of Article 6.8.

51. MOFCOM did not notify “all other” U.S. producers or exporters. In the absence of being notified of the necessary information required by MOFCOM, those unregistered exporters or producers cannot be said to have refused access to or failed to provide necessary information or otherwise impeded the investigation. 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 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.**

52. MOFCOM's failure to inform interested parties “of the essential facts under consideration” that formed the basis for its calculation of the “all others” dumping margin in time for the interested parties to defend their interests is inconsistent with Article 6.9 of the AD Agreement. At no time in the dumping investigation did MOFCOM identify the essential facts that formed the basis for its imposition of the 105.4 percent “all others” dumping margin. 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. 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. In short, the interested parties could not defend their interests.

**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.**

53. 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” in regard to the “all others” dumping margin. MOFCOM breached Article 12.2 of the AD Agreement because it failed to provide in sufficient detail the

findings and conclusions that led to the application of facts available. MOFCOM breached Article 12.2.1 of the AD Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 12.2.2 of the AD Agreement because it failed to 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" dumping margin. The single conclusory sentence that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to establish the dumping margin for "all other" respondents and, thus, fails to satisfy China's obligations.

**D. China Breached Article 1 of the AD Agreement.**

54. Because of MOFCOM's conduct of the anti-dumping investigation, China breached Article 1 of the AD Agreement.

**V. 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.**

55. As it did in the antidumping investigation, MOFCOM assigned an "all others" subsidy rate to companies that MOFCOM did not notify, or even identify, that was substantially higher than the highest subsidy rate assigned to any investigated company. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the CVD questionnaires, and were not otherwise provided the notice required by the SCM Agreement, MOFCOM breached Article 12.7 of the SCM Agreement. MOFCOM also breached Article 12.8 of the SCM Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" subsidy rate and Articles 22.3, 22.4 and 22.5 of the SCM Agreement by failing to adequately explain the "all others" determinations.

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

56. China acted inconsistently with Article 12.7 of the SCM Agreement because MOFCOM applied facts available to producers that MOFCOM did not notify of the information required of them. 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. 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. Moreover, 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.

**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.**

57. 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" subsidy rate calculation is inconsistent with Article 12.8 of the SCM Agreement. 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. 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. Without disclosure of the factual information MOFCOM used to calculate the 30.3 percent all others rate, the United States and interested U.S. companies were not able to argue that this rate was inappropriate. With these essential facts, the interested parties could not defend their interests.

**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.**

58. 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" in regard to the "all others" subsidy rate. MOFCOM breached Article 22.3 of the SCM Agreement because it failed to provide in sufficient detail the findings and conclusions that led to the application of facts available. MOFCOM breached Article 22.4 of the SCM Agreement because MOFCOM failed to provide in its public notice of the imposition of provisional measures sufficiently detailed explanations for the preliminary determination or refer to the matters of fact and law leading to arguments being accepted or rejected. MOFCOM breached Article 22.5 of the SCM Agreement because it failed to 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" subsidy rate. 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 China's obligations.

**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.**

59. 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. 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. 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.

60. Here, 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.

32. 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.

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

[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.

61. 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. MOFCOM did not do so.

62. In respect to the arguments proffered by China regarding questionnaire and data responses, the United States has two preliminary points. First, it seems China's logic is that respondents somehow both knew what the data requested of them was to be used for and that they still knowingly obstructed the questions in a manner that would increase their margins. Not surprisingly, the record does not lend credence to that supposition. Second, what is the bearing of these questions on the ultimate inquiry: was MOFCOM apprised of the fault – that the numerator and denominator did not line up – and did it have a method by which to correct it? To that point, China's answer says nothing.

63. 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**

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

## **VI. MOFCOM'S FLAWED INJURY DETERMINATIONS**

### **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.**

65. MOFCOM limited its definition of the domestic industry to domestic producers that voluntarily returned domestic producers' questionnaire responses. 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. Instead, MOFCOM only provided blank questionnaires to the 20 producers listed in the petition, which were all members of CAAA and therefore petitioners. MOFCOM did so, even though respondents had identified other large domestic producers not included in the definition of the domestic industry and notified MOFCOM as to their existence.

66. MOFCOM also failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the domestic industry. According to MOFCOM, such producers could have received blank questionnaire to complete and return either by registering for participation in the investigations or by downloading a blank questionnaire off of MOFCOM's website. MOFCOM's notices mentioned none of this. Moreover, by inviting other domestic producers to volunteer for inclusion in the domestic industry by completing a questionnaire response, MOFCOM also imposed a self-selection process among the domestic producers that introduced a material risk of distortion. Only producers posting the weakest performance would have had any incentive to come forward.

67. By so proceeding, MOFCOM increased the likelihood that petitioners 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. By contrast, MOFCOM's approach to identifying domestic producers other than "known domestic producers" listed in the petition was calculated to elicit no response.

68. An investigating authority must independently collect information relevant to its definition of the domestic industry. An investigating authority cannot define the domestic industry consistently

with Articles 3.1 and 4.1 of the ADA or Articles 15.1 and 16.1 of the SCM Agreement without making active, independent efforts to identify the universe of domestic producers of the like product. 121. The Appellate Body has explained that “authorities charged with conducting an inquiry or a study – to use the treaty language, an ‘investigation’ – must actively seek out pertinent information” and may not “remain{} passive in the face of possible shortcomings in the evidence submitted.”

69. Accordingly, 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. 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. This is the same type of biased analysis the Appellate Body found inconsistent in *EC – Fasteners*. 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 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.

70. Thus, 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. 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.”

71. MOFCOM’s definition of the domestic industry was also 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.

**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.**

72. MOFCOM’s price effects analysis is inconsistent with China’s WTO obligations in three key respects: first, MOFCOM’s finding that subject imports undersold the domestic like product to a significant degree was based on fundamentally flawed price comparisons; second, MOFCOM’s only basis for finding that subject imports suppressed domestic like product prices is its flawed finding that subject imports undersold the domestic like product to a significant degree; and third, MOFCOM failed to disclose the methodology it purportedly used to adjust the pricing data to reflect their different level of trade.

**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.**

73. Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement require the investigating authority to base its injury determination on “positive evidence” and conduct an



“objective examination.” 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. By failing to control for obvious differences in level of trade and product mix and, therefore, MOFCOM’s 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.

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

74. MOFCOM compared the value of subject imports with the value of the domestic like product at different levels of trade. Specifically, MOFCOM used the pricing data in the Petition to compare subject import prices based on official import statistics – on a CIF basis – to the domestic producers’ sales prices to their first arm’s-length customers. 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.

75. China confirmed in its first written submission that MOFCOM failed to adjust the CIF prices to account for the fact that they were at a different level of trade than the domestic producers’ sales. By making the comparison of prices at different levels of trade, MOFCOM made a finding of price undercutting by the subject imports nearly inevitable. China also asserts that it was proper to compare these pricing data, notwithstanding the different levels of trade, because both were “ready to enter further sales channels”. This assertion does not address the inherent problem that by comparing this data, without adjustment, MOFCOM ignored the series of additional costs normally incurred before the imported goods can reach the point of actually competing on the market with domestic like products. In short, the prices were at different levels of trade and not comparable. Thus, MOFCOM’s price analysis cannot constitute an objective examination of price effects, and is inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

**b. *MOFCOM Compared Subject Import Prices and Domestic Industry Sale Prices Influenced by Obvious Differences in Product Mix.***

76. MOFCOM’s price analysis also failed to control for obvious and significant differences in the mix of products among subject import shipments and domestic industry shipments reflected by the record evidence. 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. 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 AD Agreement and Article 15.1 of the SCM Agreement. China fails to refute the fact that by comparing the average unit value of subject imports to the average unit value of the domestic like products, despite record evidence that significant differences existed between the relative mix of products, MOFCOM failed to conduct a pricing analysis based on positive evidence and an objective examination.

**2. *MOFCOM’s Adverse Price Effects Findings Were Predicated Entirely on Its Defective Underselling Analysis, and Therefore Inconsistent with WTO Requirements.***

77. MOFCOM’s finding that subject imports suppressed domestic like product prices is predicated entirely on its flawed underselling analysis and, therefore, that finding is not based 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.

78. China's suggestion that MOFCOM's underselling analysis was only one component of that finding is not reflected by the determinations, which focus exclusively on MOFCOM's price undercutting analysis. 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. The United States does not disagree that an authority can make a finding of significant price effects without finding that there has been "significant" price undercutting during the period of investigation. In this case, however, MOFCOM based its price suppression analysis entirely on its flawed undercutting analysis. MOFCOM made no finding that subject import volume and market share alone could have suppressed domestic like product prices to a significant degree, and the record would not have supported such a finding. Notwithstanding the theoretical possibility of an investigating authority finding price suppression in the absence of underselling, the United States emphasizes that here, MOFCOM explicitly predicated its finding that subject imports suppressed domestic like product prices on its finding that subject imports undersold the domestic like product to a significant degree.

79. MOFCOM's finding of price suppression is also inconsistent with the requirement to "consider whether there has been a 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 by those articles.

**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.***

80. 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. Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement require the investigating authority to provide interested parties with "all non-confidential information relevant to the presentation of their cases and used by the investigating authority." The methodology MOFCOM purported to use to adjust the pricing data is clearly information relevant to the presentation of the interested parties' cases and used by the investigating authority, and therefore MOFCOM's failure to disclose that information is inconsistent with those requirements.

81. MOFCOM's purported methodology for adjusting import prices 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. That 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. MOFCOM's failure to disclose this methodology is also inconsistent with those articles as well. Additionally, 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, and MOFCOM's failure to disclose this information is inconsistent with those provisions as well.

82. China has now apparently conceded that MOFCOM made no adjustment to subject import prices to account for their different level of trade relative to domestic like product prices. If that is the case, then the United States recognizes that MOFCOM would have had no methodology for making such an adjustment to disclose to the parties in accordance with Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement. But if MOFCOM did actually reject the U.S. argument concerning the need for proper price comparisons, MOFCOM would be in breach of ADA Article 12.2.2 and SCM Article 22.5 for failure to provide in its determinations the reasons for rejection of this very relevant argument that goes to the heart of the pricing analysis relied on by MOFCOM.

**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**

83. 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.

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

84. MOFCOM's finding that the domestic industry's low level of capacity utilization resulted from subject import competition does not reflect an "objective examination" because it was contradicted by record evidence that the decline in capacity utilization was driven by the domestic industry's expansion of its capacity far in excess of demand growth. An objective examination would have considered the minor increase in capacity utilization in context with the domestic industry's expansion of its capacity and the increase in apparent consumption. 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. Rather, the record showed that the domestic industry's capacity utilization trend resulted entirely from the industry's capacity expansion. 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 AD Agreement and Article 15.1 of the SCM Agreement.

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

85. MOFCOM's finding that the increase in the domestic industry's end-of-period inventories was caused by subject imports cannot be the result of an "objective examination" because the record established that neither the level of end-of-period inventories nor the increase in end-of-period inventories were significant relative to domestic industry output and shipments. MOFCOM's finding that the increase in domestic industry inventories was significant was therefore not based on an "objective examination" of "positive evidence" and inconsistent with Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement. MOFCOM relied on this factor, together with its flawed consideration of capacity utilization, to find that the domestic industry was adversely impacted, despite the record evidence that its performance otherwise improved.

**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.**

86. MOFCOM's finding that subject imports had an adverse impact on the domestic industry over the entire period of investigation rested entirely on its flawed findings regarding capacity utilization and end-of-period inventories. MOFCOM failed to reconcile its impact analysis with evidence that the domestic industry's performance strengthened substantially during the bulk of the increase in subject import volume between 2006 and 2008. Given MOFCOM's dependence on those flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted 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.**

87. 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 during the bulk of the increase in subject import volume between 2006 and 2008. These flaws confirm that MOFCOM's

analysis is not based on an objective examination of positive evidence, in breach of China's obligations under Article 3.1 of the AD Agreement 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 means that MOFCOM 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.

**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.**

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

88. 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. However, the record evidence clearly contradicts this finding and it indicates that subject import volume and market share did not increase at the expense of the domestic industry. The increase in subject import volume and market share did not negatively impact the domestic industry because the record indicated that the domestic industry gained even more market share than subject imports during the same period.

89. China asserts that subject imports gained market share at the expense of Chinese producers that did not complete questionnaire responses and were therefore not included within MOFCOM's definition of the domestic industry. China's new market share data was not considered by MOFCOM and does not provide an answer to the question of how subject imports could have caused injury to the domestic industry defined by MOFCOM, if subject imports did not gain market share at the expense of that industry.. MOFCOM could not have examined the impact of subject imports on domestic producers not included within the domestic industry definition because it lacked data on the performance of such producers -- – and China offers no other argument to rebut the U.S. argument.

90. MOFCOM 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, because it neglected to factor this evidence into its causal link analysis. 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.

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

91. MOFCOM's finding of causation is also inconsistent with the AD and SCM agreements because it was premised on MOFCOM's price underselling analysis. 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. 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. 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.

**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.**

92. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the bulk of the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance between 2006 and 2008. 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 AD Agreement 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.

**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.***

93. MOFCOM also failed to address key causation arguments raised by the respondents during the investigation. The obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their determinations that include “all relevant information on the matters of fact and law” material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

94. The 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, they argued that there could be no causal link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports. MOFCOM responded that it was under no obligation under Chinese domestic law to consider market share data. Second, USAPEEC 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 the Chinese domestic industry was incapable of supplying in adequate quantities. MOFCOM purported to address this argument in its preliminary determination, but was clearly under the misapprehension that the respondents’ argument concerned whether chicken paws were within the scope of the investigation.

95. MOFCOM’s failure to provide a “sufficiently detailed explanation” of why it rejected the U.S. respondents’ arguments is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. As these issues were material to MOFCOM’s causal link analysis, MOFCOM’s failure to address them was also inconsistent with Article 12.2 of the AD Agreement and Article 22.3 of the SCM Agreement.

## **VII. CONCLUSION**

96. China in these proceedings has chosen to defend its interests by discussing arguments and data that were nowhere on the record. That raises, however, a corresponding thought: if China cannot defend its investigations without having to resort to information and arguments not on the record, what hope was there that the respondents, who never saw that information or those arguments during the investigation, could have defended their interests?

97. The United States respectfully requests the Panel to find that China’s measures 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.

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*Second Integrated Executive Summary by the United States***I. OVERVIEW**

1. Lacking evidentiary support for the findings and conclusions made by the Ministry of Commerce for the People's Republic of China (MOFCOM) with respect to the anti-dumping and countervailing duties at issue in this dispute, China instead offers *post hoc* rationalizations to defend MOFCOM's actions. But such rationalizations are not permissible in WTO dispute settlement proceedings. Moreover, they serve only to prove the United States' point: that MOFCOM's process and findings were flawed and there is nothing from the investigations that justifies anti-dumping and countervailing duty measures on U.S. broiler products.

**II. MOFCOM'S PROCEDURAL FAILINGS****A. China Cannot Defend MOFCOM's Denial of the U.S. Hearing Request.**

2. It is undisputed that the United States made a request for a hearing. It is also undisputed that MOFCOM did not grant a hearing, since China does not claim that its opinion presentation meeting is the type of meeting envisioned under Article 6.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Thus, the only question is whether MOFCOM presented a justification to refuse the U.S. hearing request that is permissible under ADA Article 6.2.

3. China's argument that MOFCOM contacted the Petitioner (and later all the various parties referenced in a Panel question), and that the Petitioner (and these other parties) did not believe a hearing was necessary, is not documented in the record. Indeed, it strains credulity for China to imply that MOFCOM somehow contacted 47 parties within one business day by telephone and that all of these parties had an immediate answer regarding the hearing request.

4. The evidence that is on the record in fact contradicts China's claim. The MOFCOM letter to the United States makes no mention of such contact and proffers very different reasons for denying the request: that MOFCOM had conducted the investigations in a "public, just, and transparent manner in accordance with Chinese laws" and that the issues "are not relevant to the interested parties directly." MOFCOM's own rules regarding injury hearings, which were notified to the WTO, further undermine China's claim, as they make no mention of the informal type of contact that China now claims MOFCOM undertook.

5. With respect to China's assertions regarding the U.S. demand for a public hearing, such assertions are simply misdirection. The United States has noted it requested a *public* hearing to confirm it sought the procedure outlined in MOFCOM's rules, which are labeled as Rules for a *Public* Hearing as opposed to an opinion presentation meeting. MOFCOM's determinations gave the impression that the U.S. request was granted when in fact it was not.

**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.**

6. The United States demonstrated that MOFCOM acted inconsistently with Article 6.9 by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties, including by failing to make available the data and calculations it performed to determine the existence and margins of dumping. China claims that MOFCOM was under no obligation to provide the actual data and calculations that formed the basis of its dumping determination because the U.S. respondents, based on the limited information disclosed by MOFCOM, could have replicated MOFCOM's calculations. However, the limited data disclosed by MOFCOM was too scant to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

**1. *The Disclosure Obligation Under Article 6.9 Includes the Data and Calculations Performed by an Investigating Authority to Determine the Existence and Margin of Dumping***

7. 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. The calculations and data are “essential facts” because they are the “indispensable 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. Without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed.

**2. *China’s Interpretation of Article 6.9 of the AD Agreement is Incorrect and Does Not Excuse MOFCOM’s Failure to Disclose the Essential Facts Forming the Basis of Its Decision to Apply Definitive Measures***

8. China asserts that an investigating authority can satisfy the obligation of Article 6.9 through the disclosure of information the investigating authority considers sufficient to assist the interested parties in surmising or deriving what the essential facts may have been. However, without access to the actual calculations performed, and the actual data used, the interested parties could not, for example, check MOFCOM’s methodology and math for errors or confirm that MOFCOM did what it purported to do. Similarly, the interested parties could not “comment on the completeness and correctness of the facts being considered... provide information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts,” consistent with the disclosure described by the panel report in *EC – Salmon*.

9. To enable interested parties to defend their interests, the actual data and calculations must be disclosed because a clerical or mathematical mistake, or a mistake in a conversion of units, could result in a serious distortion of the dumping margin. In this case, any number of inadvertent errors, such as (1) an error in currency conversions; (ii) the omission of a sale from the calculations; (iii) the failure to deduct certain expenses; or (iv) the misplacement of a decimal point would not be apparent from the information MOFCOM provided to the interested parties.

10. In any event, MOFCOM did not disclose sufficient information to allow the U.S. exporters to replicate the authority’s calculations. China created three tables for this dispute that purportedly would allow the respondents to replicate MOFCOM’s calculations, but those tables merely combine into one document various vague references to adjustments that were scattered throughout the record. At most, those references would have allowed the interested parties to guess at or approximate the calculations.

11. China also relies on an erroneous interpretation of Article 6.9 to assert that an investigating authority’s disclosure obligation is limited to information the investigating authority considers necessary for the interested parties to defend their interests. China conflates the second sentence of Article 6.9 with the scope of disclosure required by the first. Although the second sentence informs the meaning of the first sentence by indicating that one value of disclosure is to permit “parties to defend their interests,” it is not a limitation on the first sentence.

**C. *China Breached Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement Through MOFCOM’s Failure to Require Non-Confidential Summaries.***

12. China is mistaken when it asserts that its obligation to ensure that the interested parties furnish adequate non-confidential summaries during the course of the investigation was satisfied through purported summaries in its own determinations or can be inferred from excerpts in the Petition, because these purported summaries provide some understanding of the confidential information submitted by the interested party. Specifically, China’s position is inconsistent with the text of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). Per these provisions, interested parties must have a “reasonable understanding of the substance of the information submitted in confidence,” and thus be able to defend their interests.

13. In *China-GOES*, the panel recognized that in order to adequately defend their interests, interested parties must have access to adequate non-confidential summaries *during* the course of the investigation prepared by the interested parties, not after the investigating authority has drawn conclusions based on the submitted information. *Ex post facto* "non-confidential analysis" is beside the point. Once a determination is made, the parties' ability to defend their interests has been compromised.

14. In several instances, China appears to argue that the purported non-confidential summaries contained in the Petition provide a reasonable understanding of the substance of the confidential information, in light of the various factors cited in Article 3.4 of the AD Agreement. In doing so, China appears to be arguing that its obligation to provide adequate non-confidential summaries should be assessed in the context of ADA Article 3.4. The text of the Agreement does not support China's argument. For example, ADA Article 3.4 provides no cross-reference to ADA Article 6.5.1 or vice-versa. The obligation to provide adequate non-confidential summaries is an independent obligation, separate from any consideration that may be relevant to other provisions of the AD Agreement.

15. China's reliance on the panel's report in *Mexico – Pipe and Tubes* is similarly misplaced. China argues that panel report found that there is no explicit method by which an investigating authority must decide whether to accept information as confidential. China further asserts, erroneously, that in that investigation Mexico's authority accepted "a general claim similar to that accepted by China." China neglects to mention that when the *Pipe and Tubes* panel found that there is no mandatory method by which Members must evaluate such a claim, it did not mean that evaluation could be foregone altogether. To the contrary, the panel specifically cited the fact that the interested party in that case "explained why, in its opinion, it was impossible to summarize certain information," something that is missing in the record here.

16. Assuming *arguendo* that China's *post hoc* summaries should be considered, the purported summaries remain inadequate. For each category of confidential information, the application contained no summary at all, or contained unlabeled graphs or year-over-year percentage changes without the necessary context of absolute values and without any justification from the applicants why there were exceptional circumstances that precluded detailed summarization. Because of these errors, the interested parties were unaware of the content of such information and consequently were unable to submit meaningful comments or evidence in response to such information. As a result, China breached SCM Article 12.4.1 and AD Article 6.5.1.

### **III. CHINA CANNOT DEFEND ITS ANTI-DUMPING AND CVD DETERMINATIONS**

#### **A. China Did Not – And Still Cannot – Justify MOFCOM's Cost Allocation Determinations**

17. China has not cited anything in MOFCOM's determinations to show analysis beyond what the United States has already referenced, and what has been referenced does not show that MOFCOM gave any consideration to the proper allocation of respondents' costs. In other words, China's arguments in these proceedings are simply *post hoc* rationalizations and accordingly impermissible *ab initio*. Even if these arguments had been made in the investigations, they would still reflect a misunderstanding of the relevant law and facts, and thus remain untenable.

##### **1. China's Post Hoc Arguments Cannot Be Considered**

18. The fundamental problem with every argument proffered by China is that they are *post hoc* rationalizations. Through the course of its own submission, the panel meeting, and in its responses to the Panel's questions, China has not been able to draw upon any additional language in any of MOFCOM's determinations that suggests anything but the summary rejection of U.S. respondents' reported costs. The arguments presented by China in this dispute stand in stark contrast to the MOFCOM determinations themselves.



### China's *Post Hoc* Arguments

- The very distinct markets for broiler products in the United States and China and how the respondents' cost methodologies were reported – over allocating costs to breasts popular in the United States and under allocating costs to paws and other parts popular in China – became important considerations for MOFCOM in evaluating whether respondents' reported product-specific costs reasonably reflected the cost of production of the subject merchandise for purposes of the antidumping investigation.
  - *China's arguments do not address that MOFCOM's determinations contain no explanations or analysis regarding purported Chinese or U.S. markets.*
- In the antidumping context, recorded costs based on such a methodology cannot reasonably reflect the actual costs of production for a given product. Moreover, the extreme bias resulting from this methodology given product preferences in China could not be justified.
  - *The determinations though do not even reference any bias given product preferences in China or note what preferences Chinese consumers have.*
- This distortion is even more severe when using costs based on U.S. market values to determine the reasonableness of prices being charged in China.
  - *The determinations do not reference a distortion, severe or otherwise. There is nothing on the record to suggest that MOFCOM's issue was interested in determining what market values the respondents' utilized. Indeed, MOFCOM did not even solicit such information from the respondents.*
- The respondents' real and/or practical treatment of the status of paws and other products under their cost allocation methodology was a point of initial concern for MOFCOM, given the relatively high sales value of such products.
  - *The determinations do not reflect any concerns about the treatment of paws. Indeed, it is notable that the determinations for Keystone and Tyson are nearly identical, yet in these proceedings, China focuses primarily on how Keystone purportedly treated paws.*
- Tyson claimed to treat all products as joint products, but its treatment of products like paws in the allocation process did not really resemble standard joint product treatment. Rather, its allocation reflected a by-product approach.
  - *There is nothing in the determinations about joint products or by products or why one is acceptable and the other not. In fact, the determinations do not even call into question how Tyson characterized its accounting treatment of the products.*
- China's point is that in a value-based allocation one must take into account the circumstances of all sales to properly allocate costs to all production.
  - *There is nothing in the determinations even touching upon value-based allocations, let alone anything regarding what MOFCOM thought a value-based allocation must include.*

19. As noted, *post hoc* arguments do not suffice as justifications in WTO dispute settlement. Accordingly, China's failure to tie its arguments to findings made by MOFCOM compels the rejection of these arguments from consideration and in turn mandates – as China has no other arguments – a finding that China acted inconsistently with ADA Article 2.2.1.1.

20. China has attempted to sidestep the prohibition against *post hoc* arguments by presenting two claims. First, China asserts its reasoning for rejecting respondents' kept costs is "self-evident"

and thus did not need to be elucidated in its determinations. Second, China appears to assert that rather than look to whether the determination objectively sets forth the reasoning – which is what the Appellate Body and every panel that has considered this issue has concluded – the panel must instead try to consider what the respondents should have understood at the time to be MOFCOM's unwritten concerns and conclusions.

21. The same compelling testament refutes both claims: the complete absence of any discussion by MOFCOM or the interested parties regarding whether the costs were appropriate for the Chinese market. Respondents and the Petitioner had every incentive to address positions adopted by MOFCOM that could have impacted their interests. Yet when one looks to the record, one sees that while the respondents submitted voluminous evidence on why their costs were reasonable, there is conspicuous silence regarding the notion that prices of paws in China would be used as a basis to make a dramatic upward adjustment in normal value by replacing the cost allocations used in respondents books with a methodology chosen by MOFCOM. The reason for the silence is unmistakable: no one knew that MOFCOM considered the demands of the Chinese market to be relevant to calculating normal value.

22. The reason no one was aware that MOFCOM thought Chinese prices were relevant to determining normal value is two-fold. First, because MOFCOM never made any indication on the record that this point was relevant. MOFCOM's arguments are therefore, at best, unsubstantiated, and at worst, developed solely for purposes of this dispute. Second, China's position creates an artificial increase in normal value because the products receive relatively high value in China. Usually, a low price in the import market compared to the home market constitutes dumping. Here, China is arguing that because the product has a high price in China, the normal value derived from the costs of production (which is a surrogate for home market prices) must be inflated, and dumping must be found. If one accepts China's position, then it means MOFCOM essentially flipped the definition of dumping around. Ultimately though, the end result was that respondents had no opportunity to respond to this claim and to defend their interests.

23. To the extent China maintains that it was not obligated by the AD Agreement to provide its reasoning because it is "self-evident" that the costs were unreasonable in light of prices in China, then the United States notes that no WTO Member that has opined on this issue in the course of this dispute has found it to be, in fact, "self-evident." To the contrary, every Member to proffer a view on this issue has disagreed with China that whether costs are reasonably associated with production or sale entails any consideration, whatsoever, of the importing market. Accordingly, if it is not readily apparent to WTO members, it is implausible to claim that it was nevertheless "self-evident" to the respondents. In short, even if the standard was whether the parties had subjective knowledge of MOFCOM's concerns about the Chinese marketplace with respect to the use of a value-based allocation methodology – which it is not – the evidence does not substantiate China's position.

## **2. China's Post Hoc Arguments Misinterpret Article 2.2.1.1**

24. China's present formula for interpreting Article 2.2.1.1 is to add words that are not there, *i.e.*, "in the anti-dumping context," and subtract words that clearly are there, such as "sale" and "associated with," as in "*associated with* the production and *sale*," and the word "proper" as in "*proper* allocation of costs," with the end result being a misconstruction of China's obligations. Specifically, China argues three untenable propositions. First, China asserts that a producer's kept costs can be rejected on the basis that they are unreasonable from the perspective of the importing market. Second, China asserts that it is the obligation of a respondent to keep its costs in a manner that is reasonable in the "anti-dumping context." Third, China does not acknowledge that the investigating authority's obligation to consider all available evidence with the object of arriving at a proper allocation.

### **a. The Prices in the Importing Market or China's So-called "Anti-dumping Context" is Irrelevant to Calculating Normal Value**

25. China argues that a company's costs in its books and records are not reasonable if the end result is that a company's costs of production are based on its experience in its home market, and remain the same despite different price trends (arising perhaps, from market tastes and demands) in another, importing country. But that would mean that in any instance where the producers' kept

costs result in a normal value lower than the export price that the costs are *per se* unreasonable and a new methodology must be derived that finds a dumping margin. China appears to argue that the AD Agreement has some sort of gloss – the “anti-dumping context” – that permits costs to be calculated in a manner that permits a finding of dumping.

26. China’s position – which is opposed by every third party that has commented on this issue – is inconsistent with the AD Agreement. Whether dumping exists and is actionable is contingent on what the AD Agreement provides. There is no notion of dumping that is actionable outside the bounds of the Agreement. The AD Agreement specifies how normal value is to be determined. If the cost of production method is used to determine normal value, then the AD Agreement prescribes how costs are to be calculated. Only after they are so calculated and normal value determined can it be decided whether dumping exists or not.

27. Moreover, the relevant text in fact disclaims the proposition China advocates. Article 2.2.1.1 begins by noting “for the purposes of paragraph 2.” Paragraph 2 is Article 2.2, which in respect to the cost of production method states the comparison is to be done “with the cost of production in the *country of origin*.” As can be confirmed by the plain text and drafting history, the objective when calculating normal value under the cost of production test is to develop a surrogate home market price. This is consistent with the general scheme of Article 2.2, which is to use sales of the like product in the “domestic market of the exporting country” if they can be used. China’s position is therefore inconsistent with the text of the AD Agreement.

**b. Article 2.2.1.1 is a Positive Obligation on the Investigating Authority Regarding the Calculation of the Cost of Production**

28. China argues the respondent must calculate its costs on a basis that is reasonable for the investigating authority to use in the antidumping context – *i.e.* based on the prices in the Chinese market. As explained above, the Chinese market is irrelevant for purposes of Article 2.2.1.1. Further, the AD Agreement does not distinguish calculations specifically for the “antidumping context” from calculations used for any other purposes. China’s arguments presume that foreign respondents have an obligation to take their calculations based on their books and records and modify them to satisfy investigating authorities under this provision, lest they be rejected for failure to make such modifications. There is no textual support for such a claim, and in fact, such an interpretation of the obligations of respondents is at odds with the requirement of the investigating authority under Article 2.2.1.1 to rely on the books and records “historically utilized by the exporter or producer.”

29. China defends its interpretation by asserting that Article 2.2.1.1 does not provide for the identity of the party who calculate costs. In fact, the AD Agreement does so provide. Article 2.2.1.1 by referencing Article 2.2 makes clear it is referencing the investigating authority. Therefore, the appropriate interpretation of Article 2.2.1.1 is that it provides that costs are to be calculated *by the investigating authority* on the basis of records “kept by the exporter or producer.” Indeed, one must ask under what circumstances would a firm keep in its books and records costs tailored for the purposes of the hypothetical possibility of a future antidumping investigation that has not yet occurred, and may never occur, and focused on whether prices are reasonable from the perspective of the importing market? The short answer is never. Thus, the relevant inquiry is not whether respondents have satisfied their obligations to the investigating authority to calculate costs that are reasonable to the authority, but whether the investigating authority has abided by its obligations to the AD Agreement to use the respondents’ kept costs in light of the relevant circumstances.

30. U.S. respondents put evidence on the record that their costs were calculated in a manner that is consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards. Evidence on the record also showed that Chinese producers of broiler products use a value-based allocation methodology as well and that Chinese accounting literature substantiated that the use of a value based allocation methodology can be reasonable. Despite all of this evidence on the record as to the reasonableness of the use of a value based cost allocation methodology, China nonetheless claims that the U.S. producers did not adequately meet their so-called burden under Article 2.2.1.1 because they did not provide information that showed that their allocation methodologies reflected the prices of the Chinese market – and that MOFCOM could remain silent in the face of this evidence. China’s position lacks any textual support.

**c. *An Investigating Authority Must Consider All Available Evidence in Order to Arrive at a Proper Allocation***

31. China acknowledges that “consideration” under Article 2.2.1.1 entails “some degree of deliberation”; however, China neglects the object of that deliberation: “a proper allocation of costs.” China’s interpretation turns the obligation to “consider all available evidence” into what the Appellate Body has specifically held as insufficient under Article 2.2.1.1: simply receiving and noting evidence. Here, MOFCOM failed to engage in consideration with respect to both its decision to reject U.S. respondents’ kept costs and in adopting its weight-based methodology.

32. With respect to its weight-based methodology, China asserts that once MOFCOM found U.S. respondents’ costs unreasonable, it was free to turn to any methodology it deemed reasonable. But that is not so. The second sentence of Article 2.2.1.1 provides not only an obligation regarding the consideration of evidence in determining whether the kept costs are GAAP consistent and reasonable, but also mandates that those costs be considered in any event in determining the proper allocation of costs. In other words, as the Appellate Body has noted, compelling evidence requires reflection in order satisfy the requirement to “consider all available evidence.” Nothing in MOFCOM’s determinations suggests that MOFCOM undertook such an exercise in determining an alternative methodology in this case.

**3. *MOFCOM Did Not Properly Evaluate U.S. Respondents’ Reported Costs or its Weight-Based Methodology***

33. The United States addresses certain representations made by China regarding the respondents’ costs and to emphasize that a proper evaluation would not hold the costs unreasonable simply because they are based upon value-based accounting.

**a. *MOFCOM’s Determinations Do Not Reflect “Consideration”***

34. With respect to U.S. producer’s kept records, China asserts that MOFCOM’s consideration is established through its (i) questionnaire requests asking for a description of the cost allocation systems maintained by respondents and (ii) its determinations for Tyson and Keystone. The definitions for “consider” include the following: “think carefully about; take into account when making a judgment, look attentively at.” The most a questionnaire response could achieve though it simply accepting or noting evidence though. China fares no better when it cites MOFCOM’s determinations, which summarily claim the respondents’ costs are unreasonable without addressing the specifics of their costs or evidence. Comparing these determinations against the U.S. *prima facie* case demonstrates that MOFCOM failed to engage in consideration.

35. Tyson’s evidence, for example, explained its cost system, why that cost system was reasonable, and that MOFCOM’s methodology, besides being generally inappropriate, had a serious calculation error. The MOFCOM determinations referenced by China in these proceedings are completely silent with respect to those three points as well as what rationales supported MOFCOM’s application of a weight-based methodology (a methodology that Tyson demonstrated suffered from a serious calculation error). Indeed, even if one scrutinized the record outside what China specifically referenced, one still finds nothing by MOFCOM addressing or examining these issues.

36. Similarly, Keystone presented evidence explaining its cost system and why that system was reasonable. Additionally, Keystone, after having its methodology rejected in the preliminary determination, also proffered alternative methodologies – methodologies still based on the initial data submitted. But neither the MOFCOM determinations referenced by China nor anything else from the investigation indicates that MOFCOM considered this evidence, including the alternative methodologies proffered by MOFCOM.

37. Likewise, Pilgrim’s submitted evidence explaining its costs and why they were reasonable. China does not even bother to argue MOFCOM’s determinations reflect consideration of Pilgrim’s evidence. Instead, China asserts that MOFCOM applied “Facts Available.” However, at no time did MOFCOM ever issue a warning to Pilgrim’s that Facts Available would be applied if requested information was not provided – or what the missing information was. China’s assertions that such notice is provided for in *AD Final Disclosure* is simply untenable. In short, China has not explained

why MOFCOM was entitled to afford Pilgrim's such treatment and why the records and evidence Pilgrim's submitted – months before the AD disclosure – had to be ignored. China's claim that MOFCOM applied Facts Available is simply an admission that MOFCOM failed to consider Pilgrim's evidence.

**b. *China Misrepresents the Factual Record***

38. China has made various factual misrepresentations regarding the respondents' kept costs in these proceedings. These misrepresentations include that (i) respondents assigned zero costs to paws; (ii) that respondents treated subject merchandise as by-products as opposed to joint products; and (iii) that MOFCOM was concerned with Tyson's use of an offal market price in valuing paws.

39. A zero cost of production in a company's books might be indicative of scrap or waste, and such products might generate miscellaneous revenue. Accordingly, the mere existence of a zero cost of production does not indicate that the kept cost is necessarily unreasonable. However, as the United States has explained, none of the respondents' reported costs for subject merchandise were actually zero. China's contrary assertions are based on distortions of how costs are kept by one particular respondent, Keystone, and applying that distortion to the other respondents.

40. As demonstrated by U.S. data, including Exhibit USA-60, Keystone allocated costs to paws. In response, China can only muster that those U.S. submissions "do not really contradict" Keystone's statements. The fact that China cannot draw upon anything in MOFCOM's determinations, as well the fact that Keystone prepared alternative allocations – which also received no analysis in the determination – establishes that MOFCOM was simply not concerned with this issue during the investigation and that MOFCOM did not consider a proper allocation of respondents' costs. In other words, the so-called "zero" cost issue is simply *post hoc* rationalization.

41. In its second written submission, China now proffers that another reason to discount the respondents' records was that they did not treat paws as "true" joint products and actually treated them as by-products. As an initial matter, there is nothing in Article 2.2.1.1 that suggests kept costs for by-products are unacceptable while those for joint products may be. Factually though, there is nothing in the determinations regarding any finding by MOFCOM regarding joint products, co-products, or by-products. The silence is particularly striking in light of the evidentiary record. For example, Tyson, in its supplemental questionnaire and in its Further Comments on the Preliminary AD Determination explicitly noted that it did "not classify any products produced from the live birds as by-products [and it] ... treats all products that are produced from the live birds as co-products. Tyson assigns production costs to all of these products and records the revenue generated from sales of these products as sales revenue."

42. China also takes offense – although it is not clear why – that Tyson valued paws per an offal market price. However, China cannot point to where in the record there is any indication that MOFCOM thought an offal price problematic or why offal cannot be a joint product and, in particular, a co-product. In fact, Tyson explained that the "offal price" was based on sales in the United States. Tyson thus explained that what China pejoratively emphasizes as the "offal price" was in fact a market price. Accordingly, China has not adduced any record evidence in support of its finding.

**c. *MOFCOM Did Not Weigh the Merits of Respondent's Kept Costs Against its Weight-Based Methodology***

43. MOFCOM's obligation was to accept GAAP consistent costs which were reasonably associated with the production and sale of the product under consideration. The United States has not argued that costs, in order to be reasonably associated with the production and *sale* of a product, must be its market value. However, it defies common sense to claim that a cost allocation methodology that relies on market values, is the industry standard, and is consistent with the recommendations of authoritative accounting treatises is either "undeniably distortive" or "arbitrary" as China claims. Under these circumstances, MOFCOM had a duty to set forth its reasoning. China cannot even support those assertions here, and MOFCOM most certainly did not do so in the administrative proceeding.

44. As the United States has explained, a principal question presented is how could MOFCOM remain silent about the methodology it chose over the books and records historically utilized by the respondents, particularly when the respondents placed significant evidence explaining why their respective costs were reasonable? MOFCOM's failure must also be considered in light of a key point: the present case concerns *non-homogeneous joint products*. Breasts, wingtips, leg quarters, and paws are different products. A value-based allocation is not inherently unreasonable; different products can reasonably be expected to have different costs allocated to them. Indeed, the use of a value-based allocation is often reasonable because it can account for differences in physical characteristics (e.g., breast meat compared to paws) based on how the market values those differences. A value-based allocation also reasonably permits the seller to try to maximize their profitability on all products based on their relative ability to generate revenue. U.S. producers put evidence on the record to that effect, such as the accounting treatises cited by both China and the United States during this dispute. A cursory review raises serious questions as to the propriety of MOFCOM's decision and refutes any assertion that it was self-evident to resort to MOFCOM's methodology.

45. First, respondents explained that the industry standard in both the United States and China is to use value-based allocations. The fact that in the normal course of business, both United States and Chinese producers of chicken use a value-based allocation methodology is probative that such a methodology is reasonable.

46. Second, respondents put forward evidence, including text books and accounting authorities, that confirmed in the case of non-homogenous joint products, the use of a relative value based allocation is a reasonable method of allocating costs and the use of a weight-based value allocation is not a reasonable method of allocating costs. China cites a treatise by Professor Horngren to note that that unit based accounting is preferred in rate setting situations and then China alleges that anti-dumping is essentially rate-setting. The United States rejects China's characterization of anti-dumping proceedings as exercises in rate regulation and has noted that China has not even bothered to try and define what a rate regulation proceeding is or what text in the AD Agreement supports such a supposition. Fundamentally though, China misapplies the context. A firm that is subject to rate regulation, such as a provider of electricity, may not be able to identify what the actual value of its commodity is, and must thus resort to a unit based accounting system. The accounting methodology is not to be applied by the rate-setter but the participant subject to it. When it came to other industries, including specifically the poultry industry, Professor Horngren's text explains the propriety of relative value based costing.

47. Third, there is no explanation why a weight-based methodology is purportedly neutral. Non-homogenous joint products usually have significantly different market values, are often physically non-homogeneous, and may not be quantifiable using the same unit of measure (e.g., gasses vs. solids). MOFCOM's logic does not precludes an investigating authority from choosing a unit measure that yields the highest dumping margins. For example, between volume and weight, MOFCOM has not explained why one would be more acceptable than the other. In this case in particular, the methodology used by MOFCOM skewed the companies' costs away from their actual costs and the value realized by individual chicken parts. Instead, it treated all chicken products as if they had precisely the same physical characteristics, which China itself recognizes is not the case. Such a methodology is no way "neutral."

48. Fourth, China's own *post hoc* position on what constitutes reasonableness is, itself, unreasonable. China asserts that reasonableness must be focused on the cost of production and not on sales, and it quotes *EC – Salmon* for the proposition that there is no explicit description of "cost of production" in the AD Agreement. What China neglects is that Article 2.2.1.1 provides that the "reasonably reflect" requirement in that Article is for "costs associated with the production and sale of the product under consideration." Not surprisingly, the panel in *EC – Salmon* later stated "that the test for determining whether 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.'" Even setting aside China's selective quotation, it remains unclear how a weight-based allocation better addresses the cost of production that allegedly concern MOFCOM. China's methodology ensures that certain products will always be valued at below cost because the cost of production is completely divorced from market forces. Specifically, high and low value products are simply averaged together as if they were the same. An allocation methodology that could result in certain products always being sold at a loss is not reasonable. Furthermore, products with different values frequently have different processing costs, which was the case for many of the joint products in this case, yet

MOFCOM's approach largely ignored or minimized those costs, despite the actual costs employed in the respondents' records.

49. Finally, rather than reject all of the companies' allocation of costs, MOFCOM could have – at a minimum – simply worked with the respondents by outlining its concerns. Instead, MOFCOM's response was to go far beyond such any reasoned approach and to throw out the respondents' reported methodologies. Such a response is unreasonable and inconsistent with the requirements of Article 2.2.1.1.

**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**

50. MOFCOM breached 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. MOFCOM made an undue adjustment to Keystone's export price to account for certain freezer storage expenses that were already included in Keystone's constructed normal value.

**1. The United States' Claim that China Breached Article 2.4 of the AD Agreement is Within the Panel's Terms of Reference**

51. China's argument that the United States claim under Article 2.4 is not within the Panel's terms of reference rests on three assertions: (i) the U.S. request does not reference Article 2.4; (ii) it does not mention "freezer storage expenses"; and (iii) none of the provisions referenced in the request are "reasonably related" to the issue of fair comparison. With regard to (i) and (ii), nothing in the DSU required the U.S. consultation request to include a specific mention of Article 2.4 or freezer storage fees. With respect to (iii), the issues raised in the consultation request were in fact reasonably related to Article 2.4 of the AD Agreement.

52. The fact that the United States' request for consultations does not include a specific reference to Article 2.4 or freezer storage expenses does not render the U.S. claim, as spelled out in the U.S. panel request, outside of the Panel's terms of reference. The Panel Report in *Mexico – Beef & Rice* found that there was no need for "complete identity between the scope of the request for consultations and the request for the establishment [of a panel]." The Appellate Body agreed. The implication of China's assertion that the U.S. claim is outside the Panel's terms of reference merely because the U.S. request for consultations did not reference Article 2.4 or freezer storage expenses would be the imposition of a requirement of "complete identify" that was rejected by the panel and Appellate Body reports in *Mexico – Beef & Rice*.

53. The United States explained that its Article 2.4 claim evolved from the legal basis that formed the subject of consultations through a process not unlike that described by the Appellate Body in *Mexico – Beef & Rice*: as a result of consultations, the United States had a better understanding of China's treatment of Keystone's freezer storage fees, such that Article 2.4 became relevant. China's assertion that a claim under Article 2.4 could not evolve from a claim under Article 2.2 or Article 2.2.1.1 because these articles are "completely unrelated" is incorrect. The constructed normal value that is determined under Article 2.2 and Article 2.2.1.1 is one of the two variables subject to the fair comparison conducted under Article 2.4. China also asserts that the Article 2.4 claim is unrelated to the respondents' cost records or how allocation of costs was effected. China's assertion is belied by the evidence China relies on for its substantive arguments, namely Keystone's reported costs, and China's discussion of how those costs were reported and allocated.

**2. China's Post Hoc Assertions Do Not Justify MOFCOM's Undue Adjustment to Keystone's Export Price**

54. MOFCOM's adjustment to Keystone's export price was inconsistent with Article 2.4 of the AD Agreement. The United States demonstrated the following basic facts, with which China does not appear to disagree: Keystone reported certain freezer storage expenses in response to MOFCOM's AD Questionnaire; MOFCOM included those costs when it constructed Keystone's normal value, and MOFCOM made an adjustment to Keystone's export price that resulted in freezer storage expenses being included both as a cost of production in Keystone's normal value and as an expense adjustment to Keystone's export price.

55. China responds with two *post hoc* assertions in an attempt to justify why the adjustment was nevertheless proper, despite the unfair result. First, China asserts that MOFCOM found that Keystone had reported freezer storage fees in a manner requiring an adjustment, due to Keystone's failure to provide adequate responses to MOFCOM's requests for information. This assertion is incorrect because MOFCOM verified that Keystone's reported costs had been properly reported. MOFCOM did not purport to make an adjustment to Keystone's export price based on how it allocated costs. China's assertion to the contrary misrepresents the record, as no such finding or justification is reflected anywhere in the record. Even if the problem concerned, as China now suggests, was how Keystone allocated freezer storage costs, the solution to the problem asserted by China would not have been the adjustment to the export price made by MOFCOM.

56. China's second *post hoc* assertion is that MOFCOM properly declined to calculate a normal value adjustment given the late stage of the investigation at which the issue was discovered and in light of Keystone's incomplete responses. This assertion is also not supported by the record. MOFCOM first indicated that it was adjusting Keystone's export price in regard to freezer fees in the Final AD Disclosure in mid-July 2010. Just ten days later, in its Comments on the Final AD Disclosure, Keystone explained in detail what it considered to be the problem with MOFCOM's adjustment and proposed solutions to fix the problem. These comments were provided two months before MOFCOM issued its Final AD Determination, providing MOFCOM with sufficient time to correct the error that China suggests MOFCOM was aware of.

### **C. China Cannot Dispute That Its Countervailing Duty is in Excess of the Alleged Subsidy**

57. China blames the respondents for any mistakes that were made because the respondents purportedly misled MOFCOM through the provision of inaccurate questionnaire responses. In short, MOFCOM is asserting some form of procedural default: respondents provided incorrect answers and now they must suffer the consequences. Even if China's position excused its obligation – which it does not – China's position is simply *reductio ad absurdum*. Per China's logic, respondents, who had every interest in ensuring that their CVD rates were as low as possible, misled MOFCOM in a manner that *increased* their CVD rates. More importantly, the respondents unquestionably provided all of the data needed to calculate a proper countervailing duty prior to the preliminary determination and expressly pointed out MOFCOM's error long before the final determination.

#### **1. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Not Subject to Procedural Default**

58. SCM Article 19.4 and Article VI:3 of the GATT 1994 are mandatory in nature and contain no exceptions. The language in these provisions creates a fixed ceiling regarding the imposition of a countervailing duty. Accordingly, an authority may not satisfy its obligation by merely asserting its CVD is a reasonable approximation of the subsidy; it must calculate the CVD rate based on the record evidence particular to the amount of the subsidy.

59. Adding context to this obligation are SCM Articles 10 and 21.1, which reinforce the obligations of the SCM Agreement, including Article 19.4. Article 10, by specifying that that Members are to do what is "necessary," compels Members to take affirmative action if necessary in order to comply with their SCM Agreement obligations. Article 21.1, by providing that CVD measures can be in force "only as long as and to the extent necessary counteract subsidization which is causing injury" means that obligations such as those in Article 19.4 are continuous. They do not expire while a CVD measure is in place.

60. Here, even if one gave every favorable inference to MOFCOM, China's argument is essentially that a miscalculation by an investigating authority should be excused because MOFCOM did what it could with the questionnaire responses. But that argument does not answer why the obligation is any less applicable today or any less susceptible to remediation. In order to do what is "necessary" to abide by Article 19.4, MOFCOM must fix the CVD rate.



**2. The Additional Questionnaire Requests Referenced by MOFCOM do not Change the Relevant Data**

61. China points to a series of questionnaire queries in its first written submission to argue that MOFCOM engaged in a holistic inquiry to obtain the relevant data to ensure the subsidy was properly calculated. Notably, China never referenced these questions, nor the respondents' responses, when explaining its CVD calculations during the investigation. As the United States noted previously, to the extent MOFCOM referenced any questionnaire data, it was the data in the second questionnaire. Accordingly, the claim of a holistic inquiry appears to be simply more *post hoc* rationalization. Assuming *arguendo* that it is not, two critical points remain unchanged.

62. First, the existence of these questions does not change the fact that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. China may claim MOFCOM did not get the answers it wanted to the questions it now points to but China cannot claim that MOFCOM lacked the data to recognize a problem existed and to perform a correct calculation.

63. The data provided in response to the Second Supplemental Questionnaire is for total purchases of corn and soybean, not just those purchases for subject merchandise. The respondents' exhibits, on their face, indicate they are intended to provide the ingredients in the feed consumed by chickens and the quantity and value thereof. The fact that the respondents viewed the data as total feed can be confirmed as follows. For Tyson, its response, as reflected in Exhibit CS2-I-3, reported the total "production quantity of live broiler chicken" in tons. Tyson reported the total quantity (tons) and value (USD) of each ingredient used to produce the feed that was consumed by those live chickens. With respect to Pilgrim's, it reported total purchases of corn and soybeans, as reflected in Exhibit S-II-I-2 of the Second Supplemental CVD Questionnaire Response. It can be confirmed that the figures reflect total purchases of corn and soybeans for all production by comparing the data in this response to the response to Question 9 of the First Supplemental CVD Questionnaire, which asked for the "purchases of raw materials (including soybean, corn, feed for broilers and live chickens) during the POI." The response to that question is found in Exhibit S-I-9(b) of the First Supplemental CVD Questionnaire Response (which is a restatement of the table responding to question III-3 of the original anti-subsidy questionnaire, asking for the same). Exhibit CHN-38, which was part of Pilgrim's submission, explicitly notes that some of the feed is going to pullets and breeders. Thus, while it is conceivable that U.S. respondents were confused as to the question posed by MOFCOM, MOFCOM was in a position to see what U.S. respondents interpreted.

64. The methods for correction were also provided to MOFCOM. Pilgrim's Table 1-5, attached as Exhibit USA-77, would allow MOFCOM to revise the numerator by utilizing a ratio of subject merchandise to total merchandise. Tyson addressed how relevant data could be utilized to adjust the denominator. MOFCOM did not address why either method was inappropriate or even attempt to further ascertain in light of this information what the proper subsidy would be.

65. In short, nothing China has argued overcomes MOFCOM's obligation to ensure the CVD rate applied is no greater than the subsidy. Because the CVD rates applied to the respondents are in excess of the amount of the subsidies found to exist, MOFCOM should correct its erroneous determination.

**D. China Breached its WTO Obligations in Using Facts Available to Determine All Others Rates**

66. The United States demonstrated the following with respect to China's determination of the "all others" dumping margin and subsidy rates: (1) China breached ADA Articles 6.8 and Annex II and SCM Article 12.7 because MOFCOM applied "facts available" to exporters or producers it did not notify; (2) China breached ADA Article 6.9 and SCM Article 12.7 because MOFCOM failed to disclose the essential facts under consideration in calculating the "all others" rates; and (3) China breached ADA Articles 12.2, 12.2.1 and 12.2.2 and SCM Articles 22.3, 22.4 and 22.5 because MOFCOM failed to explain its "all others" determinations in the antidumping and countervailing duty investigations. China has not rebutted these arguments.

**1. *China Breached Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement Because MOFCOM Applied "Facts Available" Apparently Adverse to the Interests of "All Other" Exporters or Producers It Did Not Notify***

**a. *MOFCOM Did Not Notify "All Other" Exporters or Producers***

67. MOFCOM applied facts available to calculate an adverse dumping margin and subsidy rate for unknown, unidentified producers or exporters that were not notified of the investigations, of the information that would be required of them in those investigations, or of the fact that failure to participate and provide certain information in those investigations would result in a determination based on facts available. By applying available facts to such producers or exporters, MOFCOM acted inconsistent with China's obligations under ADA Article 6.8 and Annex II and SCM Article 12.7.

68. An investigating authority's recourse to facts available under ADA Article 6.8 and SCM Article 12.7 is limited to situations where 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. The *Mexico – Beef & Rice* panel explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information. The Appellate Body report further 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. Given MOFCOM's failure to notify "all other" exporters or producers, those exporters and producers cannot be said to have failed to provide necessary or requested information, or otherwise to have impeded the AD and CVD investigations. Therefore, MOFCOM's resort to facts available adverse to the interests of those exporters or producers was inconsistent with ADA Article 6.8 and SCM Article 12.7.

69. China argues that MOFCOM attempted to notify all producers or exporters by: (1) posting a public notice on MOFCOM's website; (2) placing a copy of the initiation notices in a reading room in Beijing; and (3) providing a copy of the initiation notices to the U.S. Embassy and requesting it to notify any other producers or exporters. These actions were the only efforts made by MOFCOM to notify "all other" producers and exporters of broiler products. Whether considered on their own or collectively, it is not reasonable to resort to the use of available facts on the basis of these efforts. First, posting a public notice on MOFCOM's website is not likely to provide sufficient notice to an exporter or producer unless that exporter or producer was actively reviewing MOFCOM's website. Second, placing a copy of the initiation notices in a reading room is arguably even less likely to ensure an exporter or producer is notified of the investigations than placing it on MOFCOM's website. Both actions presuppose that the exporter or producer will be aware that there is a reason to check either the website or reading room with some frequency. Third, the obligation to notify interested parties is on the investigating authority – not the Member where those exporters or producers might be located.

70. The panel in *GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's attempts 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 ADA Article 6.8. The panel reached a similar conclusion with regard to SCM Article 12.7. Given the similarity of the underlying facts and legal arguments in *GOES* and this dispute, the panel's reasoning there should be considered highly persuasive here.

71. China's position appears to be that an investigating authority may apply, in a punitive manner, whatever facts are necessary to compel compliance. However, an incentive only works if that incentive is communicated to the other party. The flaw in China's reasoning is that it assumes companies were aware of the investigation and declined to participate. Given MOFCOM's failure to notify all other exporters and producers of the initiation of the investigations, those producers therefore had no knowledge of the investigations or of the fact that MOFCOM would apply a punitive all others rate if they did not register.

72. The United States also notes that China's "all other" rate applies, not only to companies that exported to China during the period of investigation, but did not register or were otherwise unknown to MOFCOM, but also to exporters and producers that began shipping after the MOFCOM initiated the investigations, or even after the conclusion of the investigation. Those exporters or producers could not be said to have failed to provide information or impeded MOFCOM's investigation – they might not have even existed during the investigation. Nonetheless, under MOFCOM's calculations, they would still be subject to an all others rate based on facts available. Such a calculation is inconsistent with the requirements of Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

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

73. The WTO-inconsistency of China's approach is underscored by the manner in which it applied "facts available." The *Mexico – Beef and Rice* Appellate Body report explained the limitations on the use of facts available under SCM Article 12.7 (which is nearly identical to the text of ADA Article 6.8) and indicated that recourse to facts available "does not permit an investigating authority to use any information in whatever way it chooses." Even if China could justify applying facts available to unknown exporters or producers it did not notify, it cannot justify the manner in which it applied those facts, which is also inconsistent with ADA Article 6.8 and SCM Article 12.7.

*i. MOFCOM's application of facts available in the antidumping investigation.*

74. In the Final AD Determination, MOFCOM applied a dumping margin of 105.4 percent to "all other" producers or exporters of U.S. broiler products – a margin more than twice the size of any margin assigned to an investigated company or the weighted-average dumping margin assigned to companies that registered with MOFCOM, but that were not investigated. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all-others dumping margin was calculated. However, China explained that MOFCOM apparently looked at the "facts available" to determine what normal value and what export price could be paired together to calculate the largest possible dumping margin. Based on China's explanation, it is apparent that MOFCOM did not attempt to take into account the substantiated facts provided by interested parties or to use those facts for the limited purpose of replacing the information that had not been provided. Rather, MOFCOM applied facts it specifically selected, purportedly from the record, to determine the value that was most adverse to all other producers or exporters, inconsistent with ADA Article 6.8.

*ii. MOFCOM's application of facts available in the countervailing duty investigation.*

75. In the Final CVD Determination, MOFCOM applied a subsidy rate of 30.3 percent to "all other" producers or exporters of U.S. broiler products – a margin nearly four times greater than the weighted average of the subsidy rates applied to the investigated companies. During the investigation, MOFCOM failed to provide a sufficient explanation as to how the all others subsidy rate was calculated. China now offers a *post hoc* explanation of the calculation of this rate, referring to two methods of calculating the alleged subsidy: the "competitive-benefit" analysis and the "pass-through" analysis. With respect to the investigated companies, in the Final CVD Determination, MOFCOM treated the pass-through benefit as the maximum amount of the subsidy. However, China reveals in its statement above that for "all other" producers, it did not treat the pass-through amount as a limit. In other words, in calculating the subsidy rate for those producers, it treated them as if they could receive a benefit that was actually greater than the amount that they could possibly receive in reality. This is not an application of "facts available." Rather it is a departure not only from facts that were substantiated on the record and relied on by MOFCOM to calculate the subsidy rate for the investigated companies, but from facts altogether. Such an approach is a departure from the limited use of facts available, as described by the Appellate Body, and inconsistent with SCM Article 12.7.

**2. *MOFCOM Acted Inconsistently with Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by Failing to Inform Interested Parties of the Essential Facts Under Consideration in Calculation the "All Others" Dumping Margin and Subsidy Rate***

76. The United States demonstrated that China breached ADA Article 6.9 and SCM Article 12.8 because MOFCOM failed to inform the interested parties of the "essential facts under consideration" that formed the basis for its calculation of the "all others" dumping margin and subsidy rate. In response, China does not appear to deny that MOFCOM failed to disclose the data and calculations underlying MOFCOM's "all others" calculations. China's response that "[t]he only 'essential fact' regarding the 'all others rate' is the rate itself" is inconsistent with the text of ADA Article 6.9 and SCM Article 12.8, which require the disclosure of essential facts "which *form the basis* for the decision to apply definitive measures." China's argument conflates the essential facts forming the basis of the decision with the decision itself. Moreover, the disclosure obligation in Article 6.9 and Article 12.8 is clear and does not permit the investigating authority to determine that something less than disclosure of the essential facts is warranted based on its subjective assessment that certain parties do not need the information.

**3. *MOFCOM Acted Inconsistently with Articles 12.2, 12.2.1 and 12.2.2 of the AD Agreement, and Articles 22.3, 22.4 and 22.5 of the SCM Agreement, by Failing to Explain its Determinations***

77. China breached ADA Articles 12.2, 12.2.1 and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as SCM Articles 22.3, 22.4 and 22.5 by failing to explain the "all others" subsidy rate in the CVD determinations. China cannot cite to any explanation contained in the record that would be sufficient to satisfy the obligations contained in those articles.

78. With regard to the "all others" dumping margin, the purported disclosure fails to provide in sufficient detail the findings and conclusions that led to the application of facts available, a full explanation of the methodology used to establish the export price and normal value used for "all other" respondents, or all relevant information underlying its determination, as required by ADA Articles 12.2, 12.2.1 and 12.2.2. In fact, the first explanation of MOFCOM's calculation of the "all others" dumping margin was provided by China during its statement at the first panel meeting, when it indicated that the margin consisted of the "highest calculated normal value and the lowest recorded export price." However, China acknowledged in response to the Panel's questions that "[t]he final disclosure did not expressly state that the specific data relied upon from these companies was the highest calculation normal value and the lower recorded export price." The fact that the first explanation of this margin was not provided until China's statement, and is found nowhere in the record, evidences MOFCOM's failure to provide any such explanation during the investigation.

79. With regard to the "all others" subsidy rate, China attempted to provide an additional "explanation" of MOFCOM's calculation of the "all others" subsidy rate in its response to the panel's questions. To the extent China's proffered explanation is meant to supplement the conclusory statement included in MOFCOM's Final CVD Disclosure, it cannot excuse MOFCOM's failure to provide such an explanation during the investigation, which breached Articles 22.3, 22.4 and 22.5 of the SCM Agreement.

**IV. MOFCOM'S FLAWED INJURY DETERMINATIONS**

**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.***

80. China attempts to defend MOFCOM's approach to defining the domestic industry by arguing that defining the domestic industry in an unbiased fashion was simply not possible under the circumstances. According to China, MOFCOM reasonably provided questionnaires only to producers listed in the petition, which all belonged to petitioner CAAA, because the Chinese broiler industry was hopelessly fragmented, allegedly consisting of 27,638,046 producers. And, China argues MOFCOM's definition of the domestic industry to include only the 15 questionnaire responses

completed by producers listed in the petition and two producers clearly handpicked by petitioner, all of which unsurprisingly supported the petition, should be excused, because these producers represented over 50 percent of Chinese broiler production.

81. Such *post hoc* arguments fail to rebut that MOFCOM's actual approach to defining the domestic industry necessarily resulted in a domestic industry definition biased in favor of petitioners. The undisputed facts establish that MOFCOM's definition of the domestic industry was inconsistent with China's WTO obligations. Nor has China altered this bottom line by its unpersuasive efforts to recast MOFCOM's process for defining the domestic industry.

**1. *The Undisputed Facts Demonstrate that MOFCOM's Domestic Industry Definition Was Inconsistent with China's WTO Obligations***

82. China does not deny that MOFCOM limited its definition of the domestic industry to those domestic producers that completed domestic producers' questionnaire responses, and that MOFCOM provided domestic producers' questionnaires only to the 20 producers belonging to petitioner CAAA listed in Exhibit 2 of the petition. As members of the CAAA, these 20 producers were by definition petitioners. Nor does China deny that the only affirmative actions taken by MOFCOM to identify other domestic producers was its publication, on September 27, 2009, of a "Notification on Registration of Participating in Industry Injury Investigation" with respect to both the antidumping and countervailing duty investigations, and the posting of a blank domestic producers' questionnaire on its website.

83. MOFCOM's approach to defining the domestic industry is thus inherently biased in favor of petitioners, and hence inconsistent with the objectivity requirement under ADA Article 3.1 and SCM Article 15.1, in several respects. As an initial matter, MOFCOM failed to provide adequate notice and opportunity for domestic producers other than producers listed in the petition to be considered part of the investigation. By making it a prerequisite that, to be included in the industry definition, a domestic producer needed to participate in the investigation, MOFCOM at the outset set up an unreasonable barrier for domestic producers to provide information relevant to the injury investigation. Domestic producers that might have been willing to complete a questionnaire response but did not necessarily wish to participate as parties would have been dissuaded from providing information under these circumstances.

84. By setting up obstacles that made it infeasible for domestic producers other than producers listed in the petition to complete and return questionnaire responses, MOFCOM increased the likelihood that the only domestic producers would respond. Indeed, these producers – self-selected by Petitioner by dint of their membership or affiliation with CAAA – were the only producers to whom MOFCOM provided questionnaires.

85. By superficially inviting other domestic producers to volunteer for inclusion in the domestic industry by either 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 violation of ADA Article 3.1 and SCM Article 15.1. That is because domestic producers posting the weakest performance would have the most to gain from the imposition of a measure, and would therefore have a financial incentive to participate in the injury investigation either by joining the petition, by responding to the notice, or by downloading and completing a questionnaire response. Conversely, domestic producers that were performing well financially would lack the incentive to respond to the MOFCOM's notice or to otherwise participate in the investigation, thereby increasing the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

86. MOFCOM's failure to make active, independent efforts to collect representative information breaches China's obligations under the AD and SCM Agreement. ADA Article 5.1 and SCM Article 11.1 contemplate that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged" dumping and subsidies. Similarly, ADA Article 1 and SCM Article 10 provide that antidumping and countervailing measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the respective Agreements. The Appellate Body has explained that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information" and may not "remain[] passive in the face of possible

shortcomings in the evidence submitted.” Given the centrality of the domestic industry definition to the volume, price, impact, and causation analyses required under ADA Articles 3.2, 3.4, and 3.5 and SCM Articles 15.2, 15.4, and 15.5, it is particularly important that investigating authorities make active efforts to collect the information necessary to define the domestic industry in a thorough and objective manner.

87. Further, by limiting the domestic industry to those domestic producers who were either members of CAAA or otherwise selected by petitioner, to the exclusion of nearly half of the industry, MOFCOM defined the domestic industry in a manner inconsistent with ADA Article 4.1 and SCM Article 16.1, which express a clear preference for investigating authorities to define the domestic industry as “the domestic producers as a whole of the like product” by listing that definition of domestic industry first. Only after active efforts to include (or in the case of sampling, represent) all producers may the authority resort to the alternative, secondary definition of the domestic industry as domestic producers “whose collective output of the products constitutes a major proportion of the total domestic production of those products.” If investigating authorities were free to define the domestic industry to include no more than producers accounting for “a major proportion of the total domestic production” at their option, the Agreements would not have included the more stringent definition of domestic industry, and would not have listed the more stringent definition first.

88. Moreover, investigating authorities that do not make active efforts to collect the information necessary to define the domestic industry as producers as a whole of the like product effectively exclude domestic producers from the definition for reasons other than those authorized under ADA Article 4.1 and SCM Article 16.1. These articles provide only two specific exceptions to defining the domestic industry as producers as a whole of the like product – one for related producers and one for regional industries. The articles do not permit investigating authorities to exclude domestic producers from the domestic industry definition by failing to make active, independent efforts to identify the universe of domestic producers of the like product. An investigating authority whose inaction excludes domestic producers otherwise willing to cooperate with the investigation from its definition of the domestic industry would therefore be in violation of ADA Article 4.1 and SCM Article 16.1.

89. In response to the United States’ argument, China argues that the two exceptions under ADA Article 4.1 and SCM Article 16.1 do not preclude an investigating authority from defining a domestic industry to include producers accounting for a major proportion of total domestic production. China misunderstands the United States’ argument. The United States is not arguing that investigating authorities must always define the domestic industry to include 100 percent of production unless one of the two exceptions is met, but that an investigating authority breaches Articles 4.1 and 16.1 when the authority’s process for defining the domestic industry tends to result in the systematic exclusion of domestic producers for reasons other than the two listed exceptions. As MOFCOM failed to make active, independent efforts to identify the universe of domestic producers, MOFCOM’s definition of the domestic industry was inconsistent with ADA Articles 3.1 and 4.1 and SCM Articles 15.1 and 16.1.

## **2. *China’s Post Hoc Rationalizations Cannot Remedy MOFCOM’s Deficient Approach to Defining the Domestic Industry.***

90. In defending MOFCOM’s approach to defining the domestic industry, China provides a revisionist framework in an apparent effort to make MOFCOM’s approach appear reasonable. The Panel’s review, however, centers around those findings the authority actually made, and not findings that the Member attempting to defend the authority’s action may choose to assert after the fact. Thus, China’s *post hoc* rationalizations are of no relevance to the Panel’s examination of “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.”

a. ***Purported Press Coverage and Allegedly Reasonable Deadlines Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations.***

91. Despite the manifest deficiencies that plagued MOFCOM's notices of September 27, 2009, China argues that the Panel should find MOFCOM's investigations WTO-consistent because the broilers investigations were covered by independent news organizations. Notwithstanding that these notices failed to inform domestic producers of how to participate to be considered part of the domestic industry, China claims that all domestic producers should have known of their ability to provide information in light of this press coverage. Contrary to China's argument, general reporting on the broilers investigations in the Chinese press cannot substitute for MOFCOM's obligation to investigate actively the universe of domestic producers. Even assuming that the investigations were widely publicized, such publicity would not have provided domestic producers other than those listed in the petition with the essential information missing from MOFCOM's own notices on how to be considered part of the domestic industry.

92. Similarly unavailing is China's argument that MOFCOM gave parties a reasonable period of time to register for participation in the injury investigation and complete domestic producers' questionnaire responses. The United States is not challenging the deadlines provided in MOFCOM's notices for registering for participation in the injury investigations or for completing and returning questionnaire responses. Rather, the United States maintains that MOFCOM did not provide domestic producers other than producers listed in the petition with information on the steps needed to be taken to be considered part of the domestic industry. No amount of time to respond to the notices or the questionnaires could compensate for the selection bias deficiencies, which resulted in a domestic industry definition biased in favor of petitioner.

b. ***The Alleged Inclusion of Two Producers Other Than Petitioners and Producers Listed in the Petition Did Not Render MOFCOM's Definition of the Domestic Industry Consistent with China's WTO Obligations***

93. China argues that MOFCOM's definition of the domestic industry was not biased because two of the 17 producers included in the definition were not producers listed in the petition, but rather producers that managed to complete domestic producers' questionnaire responses under unexplained circumstances. The most plausible way in which these two producers could have received blank domestic producers' questionnaire is if they received them from the *producers listed in the petition*, which would have been the only source of questionnaires other than MOFCOM. Thus, these two producers were no less handpicked by petitioners than were the producers listed in the petition. Moreover, MOFCOM's inclusion of these two producers within its domestic industry definition would not have reduced the bias that resulted from MOFCOM's approach to defining the domestic industry.

c. ***The Alleged Fragmentation of the Chinese Broiler Industry Did Not Excuse MOFCOM's Failure to Define the Domestic Industry in Accordance with China's WTO Obligations.***

94. In yet another *post hoc* argument, China argues that it was reasonable for MOFCOM to provide questionnaires only to the 20 members of petitioner CAAA listed in the petition because the extreme fragmentation of the domestic industry, allegedly consisting of 27,638,046 producers, made it impractical to do otherwise. It defies logic that 17 domestic producers with 84,179 employees in 2008 could have accounted for 50.82 percent total domestic production that year, as MOFCOM found, while the other 27,638,029 producers with at least 27,638,029 employees accounted for 49.18 percent of total domestic production.

95. In response to a Panel question, China concedes that these data on Chinese broiler farms include producers of yellow feather chickens, which are outside the domestic industry boundaries that MOFCOM itself set. It bears noting that during the investigations, MOFCOM made a deliberate decision to limit the domestic industry to the producers of white feather chicken products coextensive with the scope of imported products, rather than to define the industry more broadly to cover yellow feather chicken production as well. Having affirmatively made this decision to proceed with the narrower domestic industry definition, China cannot now have it both ways by

arguing that its investigatory task was overly burdensome because of the large number of producers and employees producing yellow feather chicken products. The data now relied on by China – which include yellow feather chicken production – are therefore of no use in ascertaining the degree of fragmentation of the white feather chicken industry in China.

96. What these data do indicate is that the white feather chicken industry is far smaller than the yellow feather chicken industry in China. According to China, MOFCOM's data on total domestic production was calculated by a consultant based in part on these tracking data. China does not explain why MOFCOM did not use the same data, presumably available from the consultant, to identify and contact additional domestic producers, which would all possess the offspring of the original breeder pairs.

97. In any event, the complexity or fragmentation of a domestic industry does not excuse an investigating authority from making active, independent efforts to identify a representative subset of domestic producers for purposes of defining the domestic industry. Even if the domestic industry producing white feather poultry was as fragmented as China argues, China should have made an effort to collect information that was representative of the industry as a whole. China could have accomplished this and met its WTO obligations by any of several means, including actively seeking data from the 147 major producers, or by sampling. As the Appellate Body explained in *EC – Fasteners*, “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.” As the *EC – Salmon* panel explained, such a sample must also be representative of domestic producers as a whole, because “{a} sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for . . . an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of [ADA] Article 3.1.”

**d. *MOFCOM's Approach to Defining the Domestic Industry Was Similar to the EC's Approach in EC – Fasteners and Hence No Less Inconsistent with WTO Requirements***

98. MOFCOM's approach to defining the domestic industry shared fundamental similarities with the EC's approach in *EC – Fasteners*. In *Fasteners*, the EC 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. The Appellate Body held that “by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion,” in violation of ADA Article 4.1.

99. China cannot meaningfully distinguish the legal implications of *EC – Fasteners* from those that apply here. According to China, the Appellate Body held the EC's definition of the domestic industry was inconsistent with the “major proportion” requirement only because it accounted for a “low” 27 percent of total domestic production, whereas MOFCOM's definition of the domestic industry accounted for over 50 percent of total domestic production. While the Appellate Body criticized the EC for relying on information from only 45 of the 318 producers for which it had contact information, China claims, MOFCOM “did not collect data that it then ignored” but rather relied on data reported by all “known” Chinese producers.

100. The Appellate Body did not, however, find the EC's approach to defining the domestic industry inconsistent with ADA Article 4.1 because it covered too low a proportion of total domestic production, as China claims. To the contrary, the Appellate Body found that “{t}he fragmented nature of the fasteners industry . . . might have permitted such a low proportion . . . provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion.” The Appellate Body found the EC's process for defining the domestic industry inconsistent with Article 4.1 because “by limiting the domestic industry definition to those producers willing to be part of the sample . . . 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.” Just as the EC had limited its definition of the domestic industry to those producers that “expressed a wish to be included in the sample,” MOFCOM effectively limited its definition of the domestic producers to producers listed in the petition and producers willing to register for participation in the injury investigations or download a questionnaire. MOFCOM's



process for defining the domestic industry introduced the same limitation on data coverage and material risk of distortion as the EC's approach.

101. China's argument that "MOFCOM did not intentionally exclude any domestic producers from its investigation" is unpersuasive. MOFCOM's approach to defining the domestic industry ensured that only petitioners and petition supporters – the domestic producers likely to post the weakest performance – would complete questionnaire responses and thus be included in the domestic industry definition. MOFCOM's consideration of all data collected from such a biased subset of producers would not have mitigated the material risk of distortion created by MOFCOM's process for defining the domestic industry.

102. As the Appellate Body held in *EC – Fasteners*, an investigating authority that defines the domestic industry to include only domestic producers willing to be part of the domestic industry definition introduces "a material risk of distortion" and reduces the data coverage of the domestic industry in breach of ADA Article 4.1. Because that is precisely the approach that MOFCOM took here in defining the domestic industry to include only petitioners and self-selected petition supporters, MOFCOM's definition is inconsistent with ADA Article 4.1 and SCM Article 16.1.

## **B. China Cannot Defend MOFCOM's Price Effects Analysis**

100. The United States demonstrated that China breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2 because MOFCOM's price effects analysis was based on fundamentally flawed price comparisons that failed to account for differences in level of trade or product mix.

### **1. MOFCOM Was Obligated to Ensure the Comparability of the Subject Import and Domestic Like Product Average Unit Value Data Used in Its Price Comparisons**

101. China acknowledged at the first Panel meeting that the price effects issues in this dispute echo price issues that were then pending before the Appellate Body in *China – GOES*. Since that meeting, the Appellate Body in *China – GOES* has considered and rejected China's position that "adjustments to ensure price comparability . . . are not required by Articles 3.2 and 15.2." The Appellate Body explained that: "[a]lthough there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products." The Panel here should find similarly that MOFCOM's failure to ensure comparability in this case is a breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

### **2. MOFCOM's Failure to Account for Level of Trade Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations**

102. By comparing domestic and subject import prices at different levels of trade, MOFCOM made a finding of underselling almost inevitable, breaching ADA Article 3.1 and SCM Article 15.1's objectivity requirement. MOFCOM's faulty comparison also rendered MOFCOM's underselling analysis inconsistent with the underselling analysis contemplated by ADA Article 3.2 and SCM Article 15.2. Contrary to China's assertions, domestic prices to first arms-length customers at the factory gate are not at the same level of trade as import prices at the port just because the prices are for merchandise physically situated, or "landed," in China. China ignores that import prices at the port would not reflect the prices that the first arms-length customers of domestic producers, including distributors and retailers, would pay for subject imports.

103. China also argues that the Panel should excuse MOFCOM's failure to compare domestic prices and import prices at the same level of trade because collecting import prices at the same level of trade as domestic prices would have been a "truly daunting" task. Yet, MOFCOM made no effort to collect information from importers that would have made a proper comparison possible. China's defense that it had no way of identifying importers is all the more untenable given that MOFCOM asked for this information from the U.S. exporters, who went to great lengths to provide it. Having collected this information, MOFCOM was in a position to, at the very least, mail blank

importers' questionnaires to the most significant importers of subject merchandise from the United States. MOFCOM made no such effort.

104. In any event, as the United States explained in response to Panel Question 70, investigating authorities remain obligated to conduct an "objective examination" of "positive evidence," pursuant to ADA Article 3.1 and SCM Article 15.1, even in the absence of importer questionnaire responses. MOFCOM stated that "the Investigating authority has taken the difference in sales levels into consideration, adjusting the import prices based on Customs data accordingly." China now claims that the adjustment to which MOFCOM was referring was the addition of estimated customs duties to CIF import prices. But such an adjustment has nothing to do with level of trade and would have done nothing to remedy the distortion caused by comparing domestic prices and import prices at different levels of trade.

105. China's contention that adjusting import prices to account for their different levels of trade would not have been feasible is beside the point and does not excuse China of its obligations. MOFCOM was obligated to insure that its price comparisons were based on domestic prices and import prices at the same level of trade. How it did so was up to MOFCOM. In this case, however, MOFCOM did nothing to account for the fact that subject import prices were at a different level of trade than domestic prices. Instead, MOFCOM predicated its underselling analysis on a comparison of domestic prices and subject import prices at different levels of trade, in breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

**3. MOFCOM's Failure to Account for Product Mix Differences Rendered Its Average Unit Value Comparisons Inconsistent with China's WTO Obligations**

106. The United States also demonstrated that China's failure to account for differences in product mix was inconsistent with China's WTO obligations. China does not deny that MOFCOM's average unit value comparisons failed to account for differences in product mix and, instead, asserts that MOFCOM's comparison was reasonable because the product mix of subject imports was, in China's view, weighted in favor of higher value products, allegedly including chicken paws. China's argument is nothing more than a *post hoc* rationalization of the deficiencies in MOFCOM's analysis, found nowhere in the final determinations.

107. In the actual determinations, MOFCOM asserted that it was under no obligation to consider product mix and did not contest USAPEEC's showing that 97 percent of subject imports consisted of low value products. Even China's own data show that the product mix of subject imports and domestic industry sales differed dramatically, as did the unit value of different types of broiler products. None of the evidence China relies on to justify MOFCOM's failure to account for differences in product mix was cited, analyzed, or relied upon by MOFCOM in its final determinations, much less disclosed to the parties during the investigations.

108. China claims that confidential invoices that domestic producers allegedly provided to MOFCOM during the verification process, show that the unit value of domestic industry sales of chicken breasts was lower than the unit value of domestic industry sales of chicken paws. But MOFCOM's actual findings in the final determinations make clear that it considered none of the evidence cited by China or the extent to which differences in product mix may have distorted its average unit value comparisons. Contrary to China's assertion, MOFCOM quite explicitly found that it was under no obligation to take product mix into account and therefore did not do so.

109. Even if the Panel were to accept China's request to engage in an exercise of *post hoc* rationalization, the excuses that China has developed for the purpose of this proceeding are meritless. First, China cites Customs data indicating that the average unit value of subject imported "offal, chicken paws" and "offal, mid-joint wing" were higher than the average unit value of subject imported "cut, with bones," "offal, others," and "cold frozen gizzard" to argue that chicken paws were a high value product. However, evidence that the average unit value of subject imported chicken paws was greater than the average unit value of certain other low-value chicken parts imported from the United States does not establish that chicken paws were a high value chicken part.

110. Similarly misplaced is China's *post hoc* explanation that MOFCOM's average unit value comparisons were reasonable because the average unit value of chicken paws was higher than the average unit value of breast meat. China's assertion relies on 63 invoices from three domestic producers and, at most, could show merely that these producers received higher prices on sales of chicken paws than on sales of chicken breasts. MOFCOM did not make these assertions during the investigation, and China's citations to these hand-picked invoices in no way show or support China's claim that importers received higher prices on sales of chicken paws imported from the United States than domestic producers received on sales of chicken breast. Moreover, China's argument only underscores that the average unit value of chicken parts varies widely depending on the part and that the product mix of subject imports differed markedly from that of the domestic industry. This variability indicates that the average unit value of subject imports and domestic industry shipments, respectively, would be influenced significantly by changes and differences in product mix.

111. China's new data also underscore the fact that subject imports consisted of a product mix that differed dramatically from the product mix for domestic industry shipments. Regardless of the relative unit values of chicken breasts and chicken paws sold by domestic producers, the fact remains that MOFCOM compared subject import and domestic like product average unit values without accounting for obvious and stark differences in product mix, thereby failing "to ensure price comparability." China has failed to rebut the United States' demonstration that MOFCOM's failure in this regard breached ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

#### **4. MOFCOM's Price Suppression Finding Was Predicated Entirely on Its Defective Underselling Analysis**

112. China has failed to rebut the U.S. demonstration that MOFCOM's flawed price suppression finding was predicated entirely on its defective underselling analysis. China argues that even if MOFCOM's underselling analysis were found inconsistent with China's WTO obligations, the Panel should still uphold MOFCOM's price suppression finding because, according to China, MOFCOM demonstrated the existence of price suppression and was under no obligation to establish that the suppression was caused by subject imports. China also argues that MOFCOM demonstrated that subject imports suppressed domestic like product prices through volume effects alone. Neither argument has any merit. First, to the extent MOFCOM relied on its price suppression finding, it was obligated to establish that such price suppression was the effect of subject imports. ADA Article 3.2 and SCM Article 15.2 require investigating authorities to consider whether any significant suppression (or depression) of domestic prices is "the effect" of subject imports. In turn, an investigating authority can rely on price suppression or price depression to support a finding of injury only if the authority establishes that price suppression or price depression was linked to subject imports. As the panel and Appellate Body found in *China – GOES*, "merely showing the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2." Consistent with this reasoning, MOFCOM was obligated in this investigation to demonstrate that any significant suppression of domestic prices was caused by subject imports. Because the only evidence cited by MOFCOM linking subject imports to price suppression was its deficient underselling analysis, MOFCOM failed to establish that the price suppression was the effect of subject imports, in violation of ADA Article 3.2 and SCM Article 15.2.

113. Second, equally unpersuasive is China's argument that MOFCOM's price suppression was not dependent on its underselling analysis because, according to China, MOFCOM also found that subject import "volume effects" and "market share effects" suppressed domestic prices. Contrary to China's argument, MOFCOM made no such finding and, in any event, the record would not support such a finding. Nor did MOFCOM make any finding, as China now asserts, that subject import volume and market share alone, in the absence of significant underselling, could have suppressed domestic like product prices to a significant degree. Indeed, such a finding would conflict with MOFCOM's preceding price analysis, which concluded that domestic like product prices were suppressed by subject import underselling. It would also conflict with evidence that the increase in subject import volume and market share during the period examined did not come at the expense of the domestic industry, which gained more market share than subject imports.

114. Even if the Panel were to find that MOFCOM predicated its price suppression finding on a combination of subject import price and volume effects, MOFCOM made no finding and provided no explanation as to how subject import volume effects alone were sufficient to suppress domestic like product prices to a significant degree. In *GOES*, as in this dispute, China argued that MOFCOM's price depression and suppression findings were based on subject import price and volume effects, and could be upheld on the basis of volume effects alone. The Appellate Body rejected this argument and agreed with the Panel that "it was 'not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.'" The Panel should reach the same conclusion here because MOFCOM's final determinations are similarly bereft of any explanation as to how significant price suppression could have been the effect of the increase in subject import volume alone.

**C. MOFCOM's Analysis of the Domestic Industry Factors Was Inconsistent with China's WTO Obligations**

115. The United States demonstrated that MOFCOM's impact analysis was inconsistent with China's obligations under ADA Articles 3.1 and 3.4 and SCM Articles 15.1 and 15.4. MOFCOM attached decisive significance to two factors – the domestic industry's capacity utilization and end-of-period inventories – in finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period, while failing to conduct an objective examination of the other factors. China fails to explain how MOFCOM could have found that subject imports had an adverse impact on the domestic industry during the period of investigation when the record showed that the domestic industry's performance improved markedly according to almost every measure during the 2006-2008 period, which coincided with the bulk of the increase in subject import volume

**1. MOFCOM Relied on Its Defective Analysis of Capacity Utilization and End-of-Period Inventories to Find that Subject Imports Adversely Impacted the Domestic Industry During the 2006-2008 Period**

116. China mischaracterizes the U.S. position, claiming that the United States would give "decisive" weight to capacity utilization and end-of-period inventory trends. To the contrary, it was MOFCOM that made these factors central to its analysis of impact. MOFCOM's only support for its finding that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period, was its defective analysis of domestic industry capacity utilization and end-of-period inventories during the 2006-2008 period. MOFCOM could not rely on its finding that "the domestic like products sector could not gain a reasonable profit margin" to support its finding that subject imports had an adverse impact on the domestic industry during the 2006-2008 period because the industry's pre-tax loss narrowed between 2006 and 2008.

**2. MOFCOM Failed to Establish that Subject Imports Adversely Impacted Domestic Industry Capacity Utilization or End-of-Period Inventories During the 2006-2008 Period**

117. Domestic industry capacity utilization and end-of-period inventory trends did not constitute "positive evidence" that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period. The domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period. Thus, the domestic industry's capacity utilization trend was entirely explained by the industry's own capacity expansion and was not affected by subject imports. MOFCOM's reliance on domestic industry capacity utilization to support its finding that subject imports had an adverse impact on the domestic industry "during the entire POI" was therefore not supported by an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1. Nor does its reliance on this factor reflect an examination of all relevant economic factors and indices, in breach of ADA Article 3.4 and SCM Article 15.4.

118. The United States has also shown that the increase in domestic industry end-of-period inventories as a share of domestic industry shipments and production was too small to be materially adverse. In response, China argues that MOFCOM was under no obligation to find

end-of-period inventories “significant” because, in its view, ADA Article 3.4 and SCM Article 15.4 only require investigating authorities to evaluate the enumerated injury factors. However, MOFCOM did in fact find the increase in end-of-period inventories significant when it relied on this increase, in combination with the domestic industry’s capacity utilization trends, to find that subject imports adversely impacted the domestic industry “during the entire POI,” including the 2006-2008 period.

**3. MOFCOM Was Obligated to Base Its Impact Analysis on an Examination of Trends over the Entire Period of Investigation**

119. MOFCOM was obligated to explain how subject imports could have adversely impacted the domestic industry in the first half of 2009 when most of the increase in subject import volume coincided with a dramatic improvement in the domestic industry’s performance during the 2006-2008 period. By failing to do so, MOFCOM failed to conduct an objective evaluation of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, and failed to consider “all relevant economic factors and indices having a bearing on the state of the industry,” in breach of ADA Article 3.4 and SCM Article 15.4.

**4. MOFCOM’s Future Projections Were Irrelevant to Its Analysis of the Impact of Subject Imports During the Period of Investigation**

120. The possibility that subject imports may increase in the future so as to adversely impact the domestic industry in the future is irrelevant to the impact analysis required under ADA Article 3.4 and SCM Article 15.4 for present material injury purposes. Investigating authorities must examine the impact of dumped imports that have already entered the domestic market, and not the possible impact of dumped imports that may later enter the market.

121. China cites to the panel’s finding in *EC – Fasteners*, but, contrary to China’s argument, the panel did not hold that investigating authorities may consider the future impact of “potential” subject imports, and nothing in ADA Article 3.4 or SCM Article 15.4 would support such an interpretation. Rather, those Articles require investigating authorities to examine “the impact of dumped [and subsidized] imports” that entered the domestic market during the period under consideration.

**D. MOFCOM’s Causal Link Analysis Was Inconsistent with China’s WTO Obligations**

122. MOFCOM’s causal link analysis did not meet China’s obligations under the WTO Agreements because MOFCOM failed to establish that subject import competition had adverse volume or price effects on the domestic industry, the performance of which improved markedly during the 2006-2008 period in which the bulk of the increase in subject import volume occurred.

**1. MOFCOM Failed to Address Market Share Trends that Contradicted Its Causal Link Analysis**

123. China does not and cannot deny that MOFCOM failed to explain how the increase in subject import volume and market share could have had an adverse impact on the domestic industry when the domestic industry gained more market share than subject imports during the period examined. In failing to address this evidence, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1, or an examination of “all relevant evidence,” in breach of AD Article 3.5 and SCM Article 15.5.

124. China attempts to proffer new evidence – not mentioned by MOFCOM in its determinations or otherwise disclosed to the parties – that, in its view, shows that the increase in subject import market share did come at the expense of the domestic industry. Even if the Panel were to examine China’s new data, these data would not serve to support MOFCOM’s causation findings. China acknowledges that its new market share data include data reflective of all domestic producers, including those “for which MOFCOM did not have questionnaire responses.” MOFCOM could not have factored the market share trends of domestic producers as a whole into its causal link analysis because the evidentiary record on the domestic industry’s performance was limited to data from the 17 domestic producers included in its domestic industry definition. A market share

loss suffered entirely by domestic producers outside the domestic industry definition would not have been reflected in the performance data collected from producers included within the domestic industry definition. MOFCOM could not find that market share lost by producers outside the definition contributed to any adverse trends reported by producers within the definition in accordance with the positive evidence and objectivity requirements under ADA Article 3.1 and SCM Article 15.1. Thus, China's new market share data is irrelevant to the Panel's assessment of whether MOFCOM's causal link analysis was consistent with China's WTO obligations.

125. China's new market share data also indicate that the increase in subject import market share between 2008 and the first half of 2009 came almost entirely at the expense of non-subject imports, while domestic industry market share remained stable. Citing its new market share data, China claims that "the overall domestic industry lost almost 2 percentage points of market share" to subject imports during the period examined, but most all of the loss occurred during the 2006-2008 period when domestic industry performance strengthened. A market share shift from domestic producers to subject imports that coincides with a strengthening of domestic industry performance does not support the finding of a causal link between subject imports and injury. In any event, MOFCOM collected no performance data from the domestic producers that lost market share to subject imports between 2006 and the first half of 2009 and therefore possessed no positive evidence with which to examine the causal relationship between subject imports and the performance of those producers.

126. MOFCOM's actual market share analysis showed that the 3.92 percent increase in subject import market share during the period of investigation did not prevent the domestic industry, as defined by MOFCOM, from increasing its market share by 4.38 percent. Thus, it is incontrovertible that the increase in subject import volume and market share during the period of investigation did not come at the expense of the domestic industry for which MOFCOM collected performance data. By failing to reconcile its causal link analysis with this evidence, MOFCOM failed to conduct an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to base its causal link analysis on an examination of "all relevant evidence," in violation of ADA Article 3.5 and SCM Article 15.5.

## **2. MOFCOM's Causal Link Analysis Relied on Its Defective Price Effects Analysis**

127. MOFCOM was obligated to ensure the comparability of its subject import and domestic like product pricing data pursuant to ADA Article 3.1 and SCM Article 15.1. By failing to account for obvious differences in level of trade and product mix, thereby making a finding of subject import underselling more likely, MOFCOM not only violated Articles 3.1 and 15.1, but also failed to conduct the underselling analysis required under ADA Article 3.2 and SCM Article 15.2. China's assertion that MOFCOM's price suppression finding was not predicated entirely on its underselling analysis is contradicted by MOFCOM's explicit findings in the final determinations that subject import underselling, not subject import volume, suppressed domestic like product prices. With no evidence that subject imports either undersold or suppressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in violation of ADA Article 3.1 and SCM Article 15.1. It also failed to demonstrate a causal link between subject import price effects and material injury, in violation of ADA Article 3.5 and SCM Article 15.5.

128. MOFCOM also failed to reconcile its causal link analysis with evidence that subject import volume did not increase at the expense of the domestic industry, which gained more market share than subject imports during the period examined. The United States has also established that MOFCOM failed to reconcile its causal link analysis with evidence that the domestic industry's performance improved according to almost every measure during the bulk of the increase in subject import volume between 2006 and 2008. MOFCOM's failure to address this evidence rendered its causal link analysis inconsistent with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

129. In response, China proffers *post hoc* rationalizations found nowhere in the final determinations to argue that MOFCOM found subject import volume to have had both "direct" and "indirect" effects on the domestic industry. Contrary to China's "direct effects" argument, MOFCOM did not find that "but for the subject import presence in the market . . . the domestic industry could have sold more broiler products." China does not provide a citation to support this assertion

because it appears nowhere in the final determinations. Moreover, if an investigating authority relies on the increase in subject import volume to make an affirmative material injury determination, it must establish a causal link between that volume increase and material injury. If China is claiming that MOFCOM's causation finding was based on the increase in subject import volume, its failure to show that MOFCOM established a link between the increase and the domestic industry's performance is fatal under ADA Article 3.5 and SCM Article 15.5. MOFCOM also failed to base its causal link analysis on "an examination of all relevant evidence," in breach of these same articles, or to conduct an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1.

130. China also argues that subject import volume had an "indirect" effect on domestic like product prices, but neglects to mention that the analysis from which it selectively quotes was expressly limited to the 2006-2008 period, over which time the domestic industry gained 4.61 percentage points of market share. Subject imports could have had no "indirect volume effect" on domestic like product prices between 2006 and 2008 when the 1.83 percentage point increase in subject import market share during the period was accompanied by an increase in domestic industry market share over twice as large.

131. The analysis highlighted by China was deficient in other respects as well. For example, it conflicted with evidence that the domestic industry did not "maintain" its market share but rather increased it, and did not sell at prices below cost to an increasing extent but rather narrowed its loss as a share of sales income from 7.9 percent in 2006 to 4.7 percent in 2008. This passage also relies on MOFCOM's defective analysis of domestic industry capacity utilization and end-of-period inventories, as the only two factors that did not show dramatic improvement during the 2006-2008 period. Far from demonstrating that subject import volume had an impact -- indirect or otherwise -- on domestic like product prices, the analysis highlighted by China only underscores MOFCOM's failure to reconcile its causal link analysis with evidence that the bulk of the increase in subject import volume coincided with a marked improvement in the domestic industry's performance during the 2006-2008 period. Here too, China's breach of ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5 is apparent.

132. Finally, China argues that the Panel could uphold MOFCOM's finding that subject imports adversely affected domestic like product prices based solely on MOFCOM's observation that subject import prices and domestic like product prices moved in "parallel" during the period examined and declined together in the first half of 2009. As the Appellate Body explained in *GOES*, MOFCOM's reference to parallel price trends alone, without "any explanation or reasoning regarding the role such trends played in MOFCOM's price effects analysis and findings," does not support a finding that subject imports adversely affected domestic like product prices. In other words, such parallel price movements alone do not establish that changes in subject import prices caused changes in domestic like product prices.

### **3. *MOFCOM Failed to Address Domestic Industry Performance Trends that Contradicted Its Causal Link Analysis***

133. China concedes that MOFCOM predicated its causal link analysis almost entirely on trends in the first half of 2009 and asserts that such a reliance was consistent with China's WTO obligations. China fails to recognize that MOFCOM was obligated to examine the causal relationship between subject imports and domestic industry performance during the entire period of investigation, not just during a selective period. An investigating authority cannot predicate its causal link analysis on "all relevant evidence," much less an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1, without examining the relationship between subject imports and domestic industry performance over the entire investigative period for which data has been collected. An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of ADA Article 3.1 and SCM Article 15.1.

134. An investigating authority cannot selectively pick data points that appear to support its causal link analysis, while ignoring conflicting trends over the period of investigation as a whole, without breaching ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5. Doing precisely that, MOFCOM predicated its causal link analysis entirely on subject import and domestic industry performance trends in the first half of 2009, while ignoring subject import and domestic industry

performance trends over the entire period of investigation that conflicted with its analysis. Moreover, the absence of a coincidence between an increase in imports and a decline in the relevant injury factors over the entire period examined by MOFCOM contradicted MOFCOM's finding that subject imports adversely impacted the domestic industry during the period of investigation. Because MOFCOM's impact analysis relied exclusively on trends in the first half of 2009 without reconciling trends over the 2006-2008 period, the analysis was inconsistent with both the impact analysis envisioned by ADA Article 3.4 and SCM Article 15.4 and the objectivity requirement under ADA Article 3.1 and SCM Article 15.1.

135. China's only other defense of MOFCOM's failure to factor trends over the entire period of investigation into its causal link analysis is to claim that MOFCOM did, in fact, consider domestic industry financial trends over the entire period. To the contrary, MOFCOM's finding that the domestic industry experienced financial losses throughout the period of investigation sheds no light on the causal relationship between subject imports and the industry's financial performance. Such a finding says nothing about the relationship between movements in import volume and market share and the movements in injury factors over time, which are essential to the causal link analysis required under the AD and SCM Agreements. The record showed that the 47.2 percent increase in subject import volume between 2006 and 2008 was accompanied by an improvement in the domestic industry's pre-tax loss from 7.9 percent of sales income in 2006 to 4.7 percent of sales income in 2008. These trends indicate that the bulk of the increase in subject import volume, 90.9 percent of the total increase, had no adverse impact on the domestic industry's financial performance. By failing to reconcile these data with its causal link analysis, MOFCOM failed to demonstrate a causal link between subject imports and material injury in accordance with ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5.

**E. MOFCOM's Failure to Address U.S. Respondents' Arguments that Raised Material Issues Concerning Causation Was Inconsistent with China's WTO Obligations**

136. China fails to rebut the U.S. demonstration that MOFCOM's failure to address two key causation arguments violated ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

**1. MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Market Share Trends**

137. China claims that MOFCOM addressed U.S. respondents' argument that subject imports increased at the expense of non-subject imports and not the domestic industry in two respects. However, by simply providing a conclusory rejection of a respondent's argument that raises a material issue, an investigating authority has not fulfilled its obligations under ADA Article 12.2 and SCM Article 22.3. Those articles require investigating authorities to issue public determinations setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." ADA Article 12.2.2 and SCM Article 22.5 elaborate that investigating authorities must include in their final determinations "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures" including "the reasons for the acceptance or rejection of relevant arguments or claim made by the exporters and importers." To the extent that a respondent raises an issue "which must be resolved in the course of the investigation in order for the investigating authority to reach its determination," an investigating authority is required to provide "in sufficient detail the findings and conclusions reached" in accepting or rejecting the argument in resolution of the issue. An authority's response to such an argument would also be subject to the requirement that the authority conduct an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1. In light of these obligations, investigating authorities must address a party's argument that raises a material issue by resolving the issue "in sufficient detail" based on an "objective examination" of "positive evidence" in the final determination.

138. MOFCOM's response to the U.S. respondents' argument concerning non-subject imports in the final determination did not comport with these obligations. The U.S. respondents' argument to that effect therefore raised a material issue that MOFCOM was required to resolve "in sufficient detail" based on an "objective examination" of "positive evidence."



139. Instead of resolving the issue, MOFCOM evaded it. MOFCOM's finding that it was entitled to consider the absolute volume of subject imports did not address the issue because U.S. respondents were not arguing that subject import volume did not increase, but rather that the increase was not at the domestic industry's expense. MOFCOM's finding that the domestic industry's market share gains "did not imply that the domestic industry did not suffer from injury" is a conclusory statement devoid of any "objective examination" of "positive evidence." It is also contrary to logic, given that an increase in subject import market share that is accompanied by a greater increase in domestic industry market share would not ordinarily support the existence of a causal link between subject imports and material injury. Far from resolving the material issue raised by U.S. respondents in "sufficient detail," MOFCOM provided no reasoning or evidentiary support whatsoever for rejecting the argument, in breach of ADA Articles 3.1, 3.5, 12.2, and 12.2.2 and SCM Articles 15.1, 15.5, 22.3, and 22.5.

**2. MOFCOM Failed to Address the U.S. Respondents' Argument Concerning Chicken Paws**

140. With respect to the U.S. respondents' argument concerning chicken paws, China concedes that "MOFCOM did not explicitly address this specific issue in its Final Determination." China argues that the Panel should excuse this omission because MOFCOM addressed the argument in the preliminary determination and "did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of this issue." China's argument is factually incorrect.

141. In its Injury Brief, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Rejecting this argument in its preliminary determination, MOFCOM explained that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import of all the investigated products including Paw as a whole . . . ." Far from failing to provide any new information on the issue subsequent to the preliminary determinations, as China wrongly claims, USAPEEC responded to MOFCOM's clear misapprehension of the issue with a clarification in its Comments on the Preliminary Determination. In light of the USAPEEC's clarification, China cannot credibly argue that "MOFCOM did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of the issue." MOFCOM did not repeat its earlier discussion of the issue because, as USAPEEC made clear in its comments on the preliminary determination, that discussion was based on a fundamental misunderstanding of USAPEEC's argument and therefore irrelevant. Rather, MOFCOM simply ignored USAPEEC's effort to clarify its chicken paws argument and omitted any mention of the issue in the final determinations.

142. China's argument that MOFCOM was under no obligation to address USAPEEC's argument concerning chicken paws because MOFCOM did not consider the argument "material" is also unpersuasive. USAPEEC's argument that nearly half of subject imports could have had no adverse impact on the domestic industry, thereby substantially attenuating subject import competition, was clearly an issue that needed to be resolved in order for MOFCOM to reach a final determination. Consequently, MOFCOM's failure to address the issue in its final determinations breached ADA Articles 12.2 and 12.2.2 and SCM Articles 22.3 and 22.5.

143. China's *post hoc* explanation for why MOFCOM might have found USAPEEC's argument concerning chicken paws is irrelevant because China's new theories cannot remedy MOFCOM's failure to comply with its obligation to address USAPEEC's argument concerning chicken paws in the final determinations. MOFCOM did not explain why it found USAPEEC's chicken paws argument immaterial, but simply ignored the argument.

144. China's *post hoc* explanation is also unpersuasive because it is based on a mis-characterization of USAPEEC's argument. In China's view, USAPEEC's argument concerning chicken paws was irrelevant to MOFCOM's analytic framework, and hence not "material," because MOFCOM analyzed injury on an overall basis rather than on the basis of market segments. Yet, USAPEEC was not asking MOFCOM to conduct its injury analysis based on market segments. Rather, USAPEEC argued that subject imports could not have adversely impacted the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. Discussing this argument would

have entailed addressing the point that subject imports could not have been injurious given the disproportionate presence of parts that could not be supplied by domestic producers. China has failed to rebut the United States' demonstration that USAPEEC's argument concerning chicken paws raised a material issue that MOFCOM failed to address in the final determinations, much less resolve "in sufficient detail," in breach of ADA Articles 12.2 and 12.2.1 and SCM Articles 22.3 and 22.5.

**ANNEX A-2****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY CHINA**

BCI deleted, as indicated [\*\*\*]

*First Integrated Executive Summary by China***I. PROCEDURAL ISSUES****A. MOFCOM Did Not Breach Article 6.2 With Respect To The U.S. Request For A Public Hearing**

1. The United States claims that MOFCOM breached Article 6.2 of the AD Agreement by not holding a public hearing in response to a U.S. Government request. Although MOFCOM's regulations provide that it may hold such a hearing upon request, consistent with Article 6.2 of the AD Agreement nothing within MOFCOM's regulations mandates that a public hearing be held under any circumstance.

2. As part of a general obligation on investigating authorities to provide a full opportunity for parties to defend their interests, Article 6.2 of the AD Agreement establishes that investigating authorities provide the "opportunity" for "parties with adverse interests" to meet. It does not mandate a public hearing and does not require an adverse party to join any meeting requested by the opposing party, public or otherwise. In other words, there is no obligation that such a meeting *must* occur, and such a meeting would definitively not occur if opposing interests choose not to engage.

3. China views an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests as one of facilitator. In other words, the authority's purpose is to promote the conditions under which such a meeting could occur. This is consistent with the plain meaning of "provide opportunities" as used in Article 6.2. Among the definitions of the word "provide" is "take appropriate measures in view of a possible event; make adequate preparation." The word "opportunity" is defined as "a time or condition favourable for a particular action or aim." By these terms, MOFCOM meets its obligations under Article 6.2 through procedures made available to interested parties that may lead to a meeting of parties with adverse interests organized by the authority in the event those parties mutually desire such a meeting.

4. China does not view the authority's discretion under Article 6.2 as encompassing the right to "refuse" to organize and hold such a meeting of parties with adverse interests. This wrongly implies that it is the authority's decision, in the first instance, as to whether such a meeting should or must take place. Article 6.2 merely states that "authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests . . . ." Thus, where it is clear that parties with adverse interests will not meet, the question of an authority's obligation to organize a meeting of such parties under Article 6.2 becomes moot.

5. Keeping in mind the fact that the interested parties themselves determine whether a meeting of parties with adverse interests actually takes place, China wishes to clarify that in the underlying investigation MOFCOM did not reject a request by the U.S. Government to meet with the petitioner. It accepted that request, but the question of whether a meeting of interested parties with adverse interests could or should take place is an entirely separate matter.

6. In the underlying proceeding, those parties with adverse interests to the United States declined to meet, and therefore the need for the meeting envisioned under Article 6.2 of the AD Agreement was rendered moot. Nonetheless, MOFCOM afforded the U.S. Government a full opportunity to defend its interests, consistent with Article 6.2, by meeting with U.S. Government officials so that they could present their views orally, and by receiving documents from the U.S. Government after the meeting setting forth the U.S. Government position.

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**B. MOFCOM Was Not Obligated To Disclose All Aspects Of Its Dumping Calculation**

7. The United States claims Article 6.9 of the AD Agreement requires expansive disclosure, reading the “essential facts” to be disclosed under that provision as reaching any and all aspects of an investigating authority’s dumping calculation. Indeed, the U.S. argument would seemingly require disclosure of every detail that comprised part of the authority’s consideration of the matter, whether it be individual transaction data, the basic calculation methodology, any calculation worksheets, and the calculation program itself. This interpretation of Article 6.9 and a purported obligation of disclosure in a particular form is without merit.

8. The text of Article 6.9 clearly links “essential facts” to the limited purpose of allowing interested parties to defend their interests. It does not call for the expansive disclosure called for by the United States or a particular form of disclosure. This reading of the text is consistent with the findings of prior dispute settlement panels that have found Article 6.9 limited to those essential facts that form the basis of the authorities’ decision whether to apply definitive measures. Whether a disclosure is comprised of “essential facts” within the meaning of Article 6.9 is fact-specific and depends on the form of disclosure by the administering authority. What is important is that the form of disclosure provides the interested party the basis to defend its interests, consistent with the last sentence of Article 6.9.

9. The criteria for distinguishing essential facts from regular facts must be derived from the context of Article 6.9, which clearly links “essential facts” to the limited purpose of allowing interested parties to defend their interests with respect to an authority’s decision whether to apply definitive measures. As outlined by the panel in *EC – Salmon* “essential facts” may be distinguished from “regular facts” based on whether they are “necessary” to enable comments on the determination to apply definitive measures, including comments on the completeness and correctness of the facts being considered, corrections of perceived errors, and interpretative points. China’s position is that the calculation program or worksheets, for example, are not necessary to enable comments on the authority’s decision whether to apply definitive measures where the authority has made available other disclosures to the interested parties to enable such comments. Again, Article 6.9 does not specify format, only that essential facts are conveyed that allow interested parties to defend their interests.

10. With respect to the distinction between facts and reasoning in the context of Article 6.9, China believes that facts are invariable. For example, if the authority states that the price for a product is X, or that it has declined to make a requested adjustment, those are facts. They are constant and present a specific reference point. In contrast, reasoning consists of the intermediate details of consideration – the variable thought process that leads to an authority finding that the price of a product is X or concluding that a requested adjustment is unwarranted. These details are not the subject of disclosure under Article 6.9, as the panel in *U.S. – OCTG Sunset Reviews* made clear.

11. Ultimately, whether we are dealing with “reasoning” or “facts” or whether the two might merge for purposes of identifying “essential facts,” MOFCOM disclosed all the information necessary for the respondents to defend their interests, consistent with Article 6.9. The respondents were in control of their own facts, and were provided MOFCOM’s basis or description of the various aspects of its dumping calculation.

**C. The AD and CVD Petitions Contained Adequate Non-Confidential Summaries, Consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement**

12. The U.S. claim about non-confidential summaries is actually quite narrow. The United States does not challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential. Rather, the United States challenges only the sufficiency under Article 6.5.1 and Article 12.4.1 of the non-confidential summaries provided. Finally, the U.S. arguments regarding inadequate summaries focus only on the petition. Specifically, the U.S. challenge focuses on the adequacy of the non-confidential summaries for six items contained in the petition and namely the petitioners’ production data and five distinct data sets related to “economic position,” including

production capacity, domestic inventory levels, cash flow, wages and employment, and labor productivity.

13. The U.S. arguments regarding these specific pieces of information are fundamentally flawed. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary be in “sufficient detail” to permit a “reasonable understanding” of the “substance” of the information. One must therefore consider the detail provided, and whether that detail is enough to understand the information being submitted, given the purpose for which the information is being submitted. The non-confidential summaries in the public version of the petition more than met this standard.

14. For its part, the United States seeks to impute a specific labelling requirement to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement from the facts and findings involved in *China – GOES*. In that case, the panel found certain of the non-confidential summaries provided in the petition to be inadequate. But the U.S. attempt to draw parallels with the instant case fails. The facts in *China – GOES* are very different from the facts in this dispute. More specifically, unlike *China – GOES*, in this dispute there is no case of “duelling” non-confidential summaries or supplemental summaries found elsewhere in the petition to cause any confusion as to where the non-confidential summaries are provided. Nonetheless, the United States seems to claim that it is impossible to find non-confidential summaries without specific labelling, implying some self-evident requirement to label. It alternatively and erroneously claims that “China argues that the Petitioner did in fact prepare the summaries, at other sections of the Petition, even though they were not labelled as such . . . .” These claims and the purported need in this case to “cobble together” non-confidential summaries from the petition are simply another failed *China – GOES* analogy that has no bearing on whether there exists any specific labelling requirement under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

15. In sum, China would reiterate that neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary that it can readily relate to specific confidential information that has been redacted, but no more than that.

16. China was unable to respond to any specific arguments made by the United States in its first written submission as it declined to address any of the information found in the petition. At the first substantive meeting, the United States did provide two examples out of the six claims made, to which China would like to provide an immediate response. The first example addressed by the United States is production and standing. Once again, the United States has misapplied the facts from *China – GOES* in an effort to make arguments here. As distinguished from *China – GOES*, in the instant case the petitioners reported that they accounted for more than 50 percent of total domestic production and included with that assertion the data on total domestic production. This information provided more than an understanding of the simple nature of the confidential information; it provided an understanding of the substance of that confidential information, consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

17. The second example offered by the United States in its opening statement at the first substantive meeting concerns production capacity. The United States complains that the lack of published scales on graphs presented in the petition denied parties any ability “to discern whether any specific trends, and the magnitudes thereof, are actually taking place.” This statement is incorrect. First, the initial scale line in the graph is labelled zero. Second, the graph presents two data bars for each period, including a bar representing production (yield) and a bar representing production capacity. Given the points of reference provided by the zero scale and simultaneous representation of both production and capacity, both trends and the magnitude of those trends are easily seen. The U.S. claim that the graph does not provide a reasonable understanding of what the underlying information constitutes cannot be sustained.

## II. MOFCOM'S ANTIDUMPING DETERMINATIONS

### A. MOFCOM'S AD Determination Was Consistent With Article 2.2.1.1 Of The AD Agreement

18. The United States argues that MOFCOM, when determining normal values, unreasonably rejected the respondents' recorded GAAP-consistent production costs in favor of an average cost methodology based on weight. In making this argument, the United States misreads the obligation under Article 2.2.1.1 of the AD Agreement. Contrary to the U.S. argument, Article 2.2.1.1 does not reflect a blind mandate that recorded costs always be used whenever the records are in accordance with GAAP. Article 2.2.1.1 has two independent conditions, including (1) that the records be GAAP-consistent; and (2) that the records reasonably reflect the costs associated with production and sale of the product under consideration. Both of these conditions must be met. Whether or not records are GAAP-consistent, an authority must still look to the particular purposes of the AD Agreement in determining whether the costs to be used in an anti-dumping investigation reasonably reflect the costs associated with the production and sale of the specific product under consideration *in an antidumping context*.

19. China's view of the term "normally" as used in Article 2.2.1.1 also differs from that advanced by the United States. The United States reads the two exceptions to using a respondents' recorded costs expressly identified in Article 2.2.1.1 as serving to exclusively define the affirmative obligation where the circumstances described in those two exceptions do not exist. China believes that is "normally" the case, but the U.S. interpretation would seemingly reduce the term "normally" to mere surplusage. To achieve the same effect, Article 2.2.1.1 might have been drafted without resort to the term "normally" at all. It seems to China that, in order to give the term "normally" meaning consistent with fundamental rules of treaty interpretation, it must evidence the possibility of some other derogation from the "normal" rule.

20. At its core, the AD Agreement is about establishing a fair price or, more specifically, it is about measuring the degree of any unfairness in price based on differences between normal value and export price. Any cost allocations, therefore, must generate costs of production that allow an authority to use the costs in ways that make sense given the purpose AD Agreement, and that make sense given the specific circumstances of each case. This need to focus on specific circumstances is explicit in the structure of Article 2.2.1.1, which establishes (1) GAAP-consistency and (2) whether records "reasonably reflect" the cost of production as separate and distinct conditions governing the use of a producer's cost records.

21. The key issue is what meaning should be ascribed the terms "reasonably reflect" and "cost associated with the production" as used in Article 2.2.1.1 of the AD Agreement. With respect to the term "cost associated with the production," the meaning must concern what the producer had to pay to be able to produce the items at issue as opposed to revenue gained. This distinction can be critical depending on the circumstance of a particular case. For example, in a value-based cost allocation methodology, how the revenue potential for different products is taken into account, if it is taken into account at all, will dictate whether recorded costs "reasonably reflect" the costs associated with the production and sale of the product under consideration.

22. This issue of value-based methodologies would prove critical in this AD investigation. Though the respondents in the AD investigation produced many forms of broiler products, the respondents in general measured their own performance in terms of the broiler products most popular in the U.S. market, particularly chicken breasts. This approach led to respondents treating certain broiler products subject to the investigation and shipped in substantial volumes to China at high prices as holding little or no value. Thus, important revenue-generating products such as paws absorbed much less of the total cost that had been incurred to produce the whole bird. For example, Tyson treated paws as offal, or effectively waste, and allocated costs to that product based on an offal price. This treatment was inconsistent with the true value of paws in the market and thereby over-allocated costs to other products such as breasts. Keystone adopted an even more extreme approach that grossly undervalued paws for allocation purposes. These approaches did not result in costs that reasonably reflected the cost of production.

23. China believes that respondents bear the burden in the first place of convincing the authority that its costs "reasonably reflect" the cost associated with the production and sale of the product

at issue. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must “consider” it, and that the burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

24. During the course of the investigation, the respondents failed to meet their burden. Tyson offered a series of arguments as to why its cost allocation methodology was “reasonable.” However, Tyson never addressed its *actual* recorded costs or explained, for example, why its *actual* recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products. Rather, Tyson emphasized that its methodology was reasonable because it was GAAP-consistent, and then essentially assumed that GAAP consistent automatically meant “reasonably reflects” the cost of production. In reality, however, the general arguments Tyson made about value-based approaches did not reflect its actual allocation methodologies. Like Tyson, Keystone also made considerable efforts to demonstrate why its methodology was “reasonable.” Once again, the main emphasis was on the assertion that it was GAAP-consistent, not on its actual records.

25. Pilgrim’s also sought to defend its cost methodology on the basis of reasonableness with respect to GAAP. Pilgrim never addressed its actual costs, in part because it struggled to even assemble costs that it could reconcile. Although the United States leaves the impression that Pilgrim’s submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The basis for MOFCOM’s rejection of Pilgrim’s cost data had very little to do with the allocation methodology reflected in the Pilgrim’s Pride cost records. The Pilgrim’s cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data provided by Pilgrim’s Pride after the preliminary disclosure were ruled out of time.

26. Nonetheless, MOFCOM accepted the respondents’ total costs for broiler products, although it did not accept the respondents’ reported product-specific costs. It provided a simple, clear, and concise explanation for why it did so with respect to each of the respondents under investigation, noting that the reported costs did not “reasonably reflect” the cost of production. However, China further notes that, contrary to U.S. arguments, Article 2.2.1.1 does not contain any requirement for an authority to “explain” its decision to decline to use a respondent’s recorded allocated costs. Rather, it merely provides that an authority must “consider all available evidence on the proper allocation of costs . . . .” This is a very different standard, requiring only evidence of “consideration” rather than an explanation. China submits that the record from the underlying investigation presents evidence of MOFCOM’s consideration of the allocation issue, consistent with Article 2.2.1.1.

27. Having rejected respondents’ reported costs that did not “reasonably reflect” the cost of producing the broiler parts at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents’ distorting cost methodologies. To this end, Article 2.2.1.1. imposes only two requirements on the authority. First the authority must “consider all available evidence on the proper allocation of costs.” Second, the authority must adjust costs “appropriately” if they do not properly take into account non-recurring costs or start-up expenses. In cases such as the current dispute, that do not involve non-recurring costs or start up costs, there is only one affirmative obligation: “ to consider all available evidence on the proper allocation of costs.” MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to the very different consumer perceptions in either the U.S. or Chinese markets. Thus, it was on this neutral basis that MOFCOM allocated respondents’ raw material costs.

28. MOFCOM considered this allocation based on weight to be reasonable for several reasons. First, a weight-based allocation avoided the distortions that had made the respondents’ value-based cost allocations unreasonable, including in particular the arbitrary values the respondents’ assigned to products like paws to allocate costs which reflected neither actual market conditions or even an actual price for the specific product. Even the United States own investigating authority, the Department of Commerce, has identified the “circularity” problems inherent in value-based allocation methodologies – all of which came into play here -- when a price is used to set a price. Having rejected respondents’ costs as not reasonably reflecting costs, and in the absence of any other compelling argument from respondents, MOFCOM had to find some

alternative that avoided these problems. Second, a weight-based allocation also reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts. Finally, the weight-based allocation was specifically listed as one of the reasonable alternatives in the materials cited by respondents.

29. The United States contends that MOFCOM had an obligation to explain why its approach was proper in relation to other approaches and in light of criticisms advanced by the respondents. But this obligation is not reflected in Article 2.2.1.1. Again, Article 2.2.1.1 imposes an obligation on investigating authorities to "consider" all evidence for the "proper" allocation of costs. Moreover, Article 2.2.1.1 does not specify any particular method for "consideration," and what constitutes adequate "consideration" will vary from case to case. As China demonstrates above, careful consideration of the very sources presented to MOFCOM by the respondents in this case fully justified MOFCOM's use of a weight base measure in this investigation.

30. The circumstances and evidence surrounding the respondents' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the markets concerned. MOFCOM considered all the evidence during the investigation concerning the allocation of costs to reach a reasonable allocation methodology, and this is reflected in the record. Specifically, the record reflects a sustained line of inquiry by MOFCOM regarding the respondents costs from the first questionnaire, to the supplemental questionnaire, and to the second supplemental questionnaire. In addition, the MOFCOM disclosure documents reflect more than mere receipt of evidence on the part of MOFCOM, but an active investigation of that evidence that it expressly sought from the respondents. MOFCOM "investigated" the evidence in reaching its conclusion, rather than merely taking note of the respondents' submissions. Finally, in the final AD Determination, MOFCOM again stated that neither Tyson nor Keystone provided sufficient reasons to justify their reported costs. Indeed, as discussed in the final AD determination, MOFCOM gave several opportunities for the parties to present their arguments on all issues involved in the investigation prior to the final determination, and discussed these issues orally with the parties. Ultimately, MOFCOM relied on a weight-based allocation as a compromise and a recognized approach to price regulation proceedings.

#### **B. U.S. Claims Regarding The Treatment Of Freezer Storage Fees And Fair Comparison Under Article 2.4 Of The AD Agreement Should Be Set Aside**

31. It is well-established that Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request. Nonetheless, there are limits to this fundamental rule. In the context of legal claims, a Member may not raise a new legal basis in a panel request that reflects a disconnect from the legal bases set forth in its request for consultations.

32. The U.S. claim under Article 2.4 of the AD Agreement with respect to freezer storage expenses is not referenced in any manner within the U.S. request for consultations in this dispute. On its face, the U.S. consultation request does not specify Article 2.4 of the AD Agreement within any of the thirteen specific items identified by the United States as areas in which China's measures are allegedly inconsistent with GATT 1994 or the AD Agreement. Moreover, none of the specific GATT 1994 or AD Agreement provisions referenced by the United States in its consultation request are reasonably related to the issue of fair comparison, which is the subject matter of Article 2.4 of the AD Agreement. Finally, the U.S. consultation request otherwise makes no mention of freezer storage expenses, which is the factual issue the United States seeks to address in its Article 2.4 claim. Under the circumstances, China believes that the U.S. Article 2.4 claim impermissibly expands the scope of this dispute and is therefore outside the terms of reference of this proceeding. The Panel should therefore set aside the Article 2.4 claim, consistent with Articles 4 and 6 of the Dispute Settlement Understanding (DSU).

33. But even if the panel agrees to consider the U.S. Article 2.4 claim, it is without merit. Contrary to U.S. arguments, freezer fees clearly reflected a difference between export price and normal value affecting price comparability. Throughout the course of the underlying investigation MOFCOM indicated to Keystone what information was necessary to ensure a fair comparison between normal value and export price, meeting its obligation under Article 2.4 to indicate to Keystone what information was necessary to ensure a fair comparison. Keystone, however, provided ambiguous if not misleading responses to MOFCOM regarding such fees.



34. Article 2.4 requires allowances for differences in normal value and export price affecting price comparability. The authority has the obligation to make necessary adjustments so as to effect a fair comparison in ascertaining any margin of dumping. The nature of the obligation to make allowances is a case-specific issue. The Appellate Body has recognized that, “{t}he issue of which specific ‘allowances’ should be made in any case depends very much on the facts surrounding the calculation of export price and normal value.” Thus, while an allowance may not be necessary in one investigation, it may be appropriate in another investigation depending on the information provided by the respondent parties and the facts surrounding the calculation of normal value and export price. The authority’s allowances must therefore be guided by the factual record and methodologies being applied. Moreover, the authority has discretion in how it chooses to effect a “due allowance.” As explained by the panel in *EU – Footwear (China)*, the only requirement is that it must be “fair.”

35. China believes that the provisions of the AD Agreement implicated by the facts of this case fall under Article 2.4. Keystone’s failure to properly identify or characterize its freezer storage costs led to the allocation of a majority of those costs to fresh product, thereby reducing constructed normal value for frozen product. This caused an imbalance in the dumping comparison between constructed normal value and export price given the fact that export price sales were all frozen and therefore incorporated freezer costs. This necessarily affected price comparability. Although these costs might have been accounted for differently in constructed normal value, China sees no basis in either Article 2.2.1.1 or 2.4 for a hierarchy in terms of where such costs should be accounted or adjusted. The discretion must be left to the authority. Having performed its cost allocation, MOFCOM was well within its discretion to make due allowance under Article 2.4 with respect to these costs.

36. In addition, while the obligation to ensure a “fair comparison” lies on the investigating authority, including the responsibility to “indicate to the parties in question what information is necessary to ensure a fair comparison,” respondents also have an obligation to be forthright and clear in providing such information. The role of respondents cannot be passive. For example, the panel hearing *EU – Footwear (China)* concluded that interested parties must “make substantiated requests for ‘due allowance’, whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability.” It follows that respondents are equally obligated to substantiate when allowances are not required. Thus, they have an obligation to report expenses correctly and to characterize them correctly where asked. MOFCOM asked precise and detailed questions in both the normal value section and the export prices section of its questionnaire requiring the respondent to report the expenses (including freezer fees) in a way to adjust the differences that affect price comparability. Keystone unreasonably and perhaps intentionally shaded the facts.

37. As far as how MOFCOM allocated freezer storage costs upon rejecting Keystone’s reported costs and resorting to constructed NV, China reiterates that before any re-allocation by MOFCOM Keystone had previously allocated freezer fees to products without classifying or distinguishing between frozen products and non-frozen products. Thus, MOFCOM had no basis to understand the nature of those specific costs. MOFCOM allocated Keystone’s reported total costs, including the reported “other expenses,” on a weight-averaged basis across all production. Thus, constructed NV included a weight-averaged proportion of those costs. The practical effect of this allocation, unknown to MOFCOM at the time given how Keystone reported and characterized costs, was that constructed NV for frozen product models was artificially low given that a much larger proportion of domestic sales were of fresh, not frozen product, but freezer costs were allocated over all production on a weight-averaged basis.

38. MOFCOM made an EP adjustment to account for this imbalance rather than any modification to constructed NV in light of Keystone’s failure to properly report these costs with respect to export price. Although other adjustments might have been made in pursuit of the same fair comparison under Article 2.4, the text of Article 2.4 leaves the form of the adjustment to the discretion of the investigating authority. Article 2.4 only states that in conducting the comparison between NV and EP “due allowance shall be made in each case, on its 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.” Given the distortion with respect to how freezer costs were allocated, there was a clear issue of price comparability for which due allowance was necessary.

**C. MOFCOM's Determination Of The AD "All Others" Rate**

39. The petition in the underlying investigation identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. In addition, MOFCOM received an entry of appearance from the U.S. association representing poultry exporters, that itself is comprised of about 200 member companies and organizations. Given the large number of interested parties, MOFCOM exercised the discretion afforded under Article 6.10 of the AD Agreement to limit its examination of producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

40. In its public notification of the initiation of an investigation, MOFCOM made it clear that all exporters/producers should register with the Ministry, were subject to individual investigation, and were subject to an antidumping rate based on facts available if they did not register and or fully participate in the investigation. The United States acknowledges that the initiation notice was provided to the United States and the six known producers/exporters of broiler products, as well as the fact that a request was made to the U.S Embassy to notify any other producers or exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 6.1 of the AD Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. The notice also clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

41. In its preliminary and final determinations, MOFCOM followed the rule in Article 9.4 with respect to known exporters or producers not included in the examination and assigned to those interested parties the weighted average margin of dumping established with respect to the selected exporters or producers. With respect to unknown exporters or producers, MOFCOM applied a facts available rate as provided under Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Specifically, in assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation.

42. In its preliminary and final results, MOFCOM stated that it would apply facts available. The basis for applying facts available was the lack of cooperation reflected in the failure of unknown parties to make an entry of appearance or provide a questionnaire response. MOFCOM noted that it relied on facts available, including the best information available, to determine normal value and export price. This information was not disclosed because it came from confidential sources, but consisted of the highest calculated normal value and the lowest recorded export price.

43. China believes its disclosure complied with the requirements of Articles 6.9 of the AD Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary AD and CVD determinations. This disclosure, well in advance of the final determination, was in "sufficient time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Articles 6.9 and 12.8 do not require this degree of disclosure.

44. The context provided by Article 6.5.1 of the Anti-Dumping Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, these provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 6.5.1 applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the

authority, and thus have limited contextual relevance for what the authority must do under Article 6.9 of the AD Agreement.

#### **D. MOFCOM's Obligations Under Article 1 Of The AD Agreement**

45. The United States has also raised a claim under Article 1 of the AD Agreement, which 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." To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

### **III. MOFCOM'S CVD DETERMINATIONS**

#### **A. MOFCOM's Determination of the CVD "All Others" Rate**

46. The facts surrounding the "all others" rate issued in the preliminary and final determinations of the CVD proceeding are virtually the same as those presented with respect to the AD "all others" rate. The petition identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. MOFCOM also received the entry of the U.S. trade association, USAPEEC. As in the AD case, MOFCOM exercised its discretion and limited its examination of interested parties or producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

47. As acknowledged by the United States, the initiation notice was provided to the United States and the six known producers/exporters of broiler products, and a request was made of the U.S. Embassy to notify all other known producers and exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 22.2 of the SCM Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. Again, the notice clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

48. With respect to unknown exporters or producers, MOFCOM applied a rate consistent with Article 12.7 of the SCM Agreement and in line with the considerations reflected under Annex II of the AD Agreement. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation and applied an "all others" rate based on "facts available" as provided under Article 12.7 of the SCM Agreement and paragraph 7 of Annex II of the AD Agreement.

49. The "all others" rate included one subsidy program – the upstream subsidy (feed) program. MOFCOM calculated the *ad valorem* rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount.

50. China believes its disclosure complied with the requirements of Article 12.8 of the SCM Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary CVD determination. This disclosure, well in advance of the final determination, was in "sufficient

time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Article 12.8 does not require this degree of disclosure.

51. The context provided by Article 12.4.1 of the SCM Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, these provisions require only "sufficient detail to permit a reasonable understanding," not whatever detail might be possible. Second, Article 12.4.1 applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the authority, and thus have limited contextual relevance for what the authority must do under Article 12.8 of the SCM Agreement.

### **B. MOFCOM's Subsidy Allocation With Respect To Feed Subsidies Was Proper**

52. In its first written submission, the United States claims that MOFCOM breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by misallocating the subsidy found to exist. At the outset, China does not dispute that an investigating authority has an obligation under GATT 1994 and the SCM Agreement to align the numerator and denominator in calculating the appropriate subsidy margin. China agrees that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 set forth a fundamental rule to this effect, as elaborated by the Appellate Body and various dispute settlement panels.

53. At the same time, China does dispute the United States' simplistic rendition of the facts in the underlying proceeding. In this case, MOFCOM needed to calculate the indirect benefit to the respondents from upstream subsidies conferred on corn and soybeans purchased and consumed by the respondents in the production of subject merchandise. Over a series of questions posed in the original and a series of supplemental questionnaires issued to Tyson and Pilgrim's, MOFCOM sought to collect the information necessary to engage in an appropriate calculation. Based on the responses, MOFCOM was able to make a determination on the quantity of purchased corn and soybean meal consumed in the production of the subject merchandise.

54. The United States, for its part, erroneously suggests that the entire matter may be reduced to a single question posed in MOFCOM's second supplemental questionnaire focused on total purchases of corn, soybeans, and soybean meal. In so doing, the United States ignores MOFCOM's more direct efforts to receive information from Tyson and Pilgrim's focused on purchased feed consumption related to the production of subject merchandise, and the responses received in turn. Based on the totality of the responses received, as well as the deficiencies therein, MOFCOM applied the information that respondents themselves attributed to the production of subject merchandise.

55. Specifically, the subsidy per unit of the subject products was calculated on the basis of feed purchased and consumed in the production of subject merchandise during the POI. Given likely inventory effects, MOFCOM understood that there could be differences in terms of the amount purchased and the amount consumed over the same period. Thus, as between reported purchases and consumption, it would use the lesser of the two figures. This was the basic data upon which MOFCOM would rely in its calculation. To confirm all data, MOFCOM sought detailed information on the production cost of feed, live broilers, and subject merchandise, as well as consumption of feed in the production of subject merchandise. Through this detailed information, MOFCOM could more confidently trace feed purchased and consumed in the production of subject merchandise during the POI to confirm that data was reported correctly.

56. MOFCOM ultimately received the basic information necessary to calculate the subsidy benefit in response to questions posed in the second supplemental questionnaire on purchases of feed consumed in the production of subject merchandise during the POI. In terms of other data MOFCOM requested and might have used to track and scrutinize the consumption data to ensure it had captured all actual consumption, that data was never fully provided, but did not prevent the

ability to calculate a margin. MOFCOM did not require or obtain information from elsewhere to perform the respondents' subsidy calculation. It used the information held out by the respondents as their total consumption of feed in the production of the subject merchandise during the period of investigation.

57. Based on an examination of reported purchases and consumption, MOFCOM used the feed consumption data reported in response to question I.4 of the second supplemental questionnaire for Tyson and question I.6 of the second supplemental questionnaire with respect to Pilgrim's, both of which also matched the reported purchase data. The denominator used was the sales quantity of subject merchandise. MOFCOM did consider the alternative provided by the respondents. Neither Tyson or Pilgrim provided any information to correct or clarify its submission of data on feed consumption in the production of subject merchandise, therefore, after considering the alternative provided by U.S. respondents, MOFCOM had to rely on the data used in its calculation.

58. After its preliminary results, MOFCOM received arguments by both respondents. In both instances Tyson and Pilgrim's argued that MOFCOM had over-allocated feed subsidies to subject merchandise and sought to clarify that the feed information provided encompassed more than subject merchandise. In none of these arguments, however, did either respondent actually provide a basis for MOFCOM to discard the feed information used in the calculation.

59. In terms of MOFCOM's disclosure, the disclosure documents identify both the unsubsidized benchmark price for feed materials and the subsidized purchase prices reported by the respondents for the same materials. The difference in the unsubsidized and subsidized prices was then multiplied against a total quantity of corn and a total quantity of soybean meal. These data on corn and soybean meal would reveal where in the questionnaire responses that MOFCOM derived the information, and namely from the reported purchases and consumption data of the respondents from the second supplemental questionnaire. In terms of the denominator – total sales quantity of subject merchandise – this figure was also disclosed and could also be traced by the respondents to data reported to MOFCOM in their questionnaire responses.

### **C. China's Obligations Under Article 10 of the SCM Agreement**

60. The United States has raised several claims under the SCM Agreement that China has addressed in succession. To the extent China has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

## **IV. MOFCOM'S INJURY DETERMINATION**

61. The starting point for the Panel's analysis in this dispute is a situation where: (1) increasing volumes of subject imports that gained market share and had adverse volume effects on the domestic industry, (2) a domestic industry that suffered consistent operating losses that built up over the period and worsened at the end of period, and (3) no other explanations for these operating losses and severe declines in 2009 have been presented. These circumstances are unchallenged by the United States, which casts doubt on whether it has established a *prima facie* case.

### **A. MOFCOM Properly Defined the Domestic Industry As Required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement**

62. The description by the United States of the process whereby MOFCOM determined the domestic industry seriously distorts what actually happened. MOFCOM fully complied with China's obligations under the WTO. MOFCOM's investigations were not biased, and simply reflected the realities of a highly fragmented industry for which there was no complete list of producers. MOFCOM did not exclude any cooperating producers from its investigations. To the contrary, MOFCOM's investigations included enough of the larger domestic producers to qualify as a "major proportion," and thus objectively examined the domestic industry in full compliance with the obligations under the WTO.

63. First, MOFCOM published its notice of investigation on 27 September 2009, inviting all interested parties to participate in the investigation and register with the authorities. That notice referenced "interested parties," but also made clear that the data being collected would include production – a clear reference to "domestic producers." Thus, all parties were on notice about the conduct of this case.

64. Second, MOFCOM distributed domestic producer questionnaires to every known Chinese producer of broiler chicken products. This case did not involve a few domestic producers that collectively represented only a small portion of the total domestic production of broiler products. Rather, the petition on its face identified those larger producers that collectively produced more than 50 percent of the estimated total production in China. By sending questionnaires to the "known producers," MOFCOM was thus sending questionnaires to those Chinese producers that alone represented the major proportion of the domestic industry.

65. Third, even though MOFCOM already had identified a group of domestic producers that represented more than 50 percent of total production, MOFCOM took the additional step of placing the domestic producer questionnaire on the MOFCOM web site, again inviting any interested parties who produced broiler chicken during the period of investigation to complete the questionnaire. By doing so, MOFCOM was reasonably trying to improve an already substantial coverage of the domestic producers.

66. This process resulted in MOFCOM receiving questionnaire responses from 17 domestic producers. The total domestic producer responses thus included both members of the petitioning association and non-members of that association.

67. Under the circumstances of this investigation, MOFCOM took reasonable steps to conduct its investigation. MOFCOM started with a group of domestic producers that produced enough subject merchandise to qualify as a major proportion of the total industry. And MOFCOM then took additional steps that sought to improve the coverage. Although the efforts to expand the coverage were not as successful as MOFCOM might have hoped, MOFCOM made reasonable good faith efforts to obtain the additional data.

68. MOFCOM also had a basis in positive evidence for finding the 17 responses from domestic producers represented a major proportion of the domestic industry. Neutral and reliable estimates of total domestic production were included in the petition, as were official customs statistics on both imports into China and exports from China. MOFCOM thus had positive evidence to determine reliable estimates of both the total production in China, total apparent consumption in China, and the shares of those represented by the 17 responses.

69. Although the estimates of total domestic production were themselves neutral and reliable, MOFCOM was able to further assess and confirm the reliability of these estimates in two ways. First, MOFCOM officials reviewed worksheets during the verification, confirmed the reasonableness of the estimation and confirmed the reasonableness of the assumptions under in those worksheets. Second, this same estimation methodology has been used in other contexts for other purposes.

70. Thus, the United States is incorrect when it says MOFCOM defined the industry as only those companies supporting the petitions. That is not what MOFCOM did. MOFCOM made reasonable efforts to obtain as many questionnaire responses as it could, both contacting all known producers and using public postings on its website in an attempt to reach others. MOFCOM eventually obtained 17 timely and usable responses over the course of the entire proceeding. It so happens that all 17 of those responding domestic producers supported the petitions. But this situation is very different than limiting the investigation to only those companies that supported the petitions. MOFCOM in no way limited the companies participating in its investigation.

71. MOFCOM also contacted the Ministry of Agriculture, which collects statistical data on the number of farms, but does not have any information on specific producers. In addition, the Ministry of Agriculture collects data on all chickens, both white feather broiler chickens (subject merchandise) and yellow feather chickens (non-subject merchandise).

72. The United States identifies two separate legal theories to argue that MOFCOM acted inconsistently with its WTO obligations. But in both instances, the United States has mischaracterized the underlying facts at issue, misstated the relevant legal obligations as they applied in this case, and misread the guidance provided by the Appellate Body in *EC-Fasteners*.

73. The first U.S. argument focuses on one key phrase in Article 3.1 and 15.1 – the need for authorities to conduct an “objective examination.” The United States has not presented any arguments about the lack of “positive evidence.” The United States argues that because the process of determining the domestic industry was biased, the determination itself was not an “objective examination” of this key issue. This U.S. argument is incorrect in several respects.

74. First, the United States is factually mistaken in that the MOFCOM process was not biased. MOFCOM undertook a reasonable and unbiased process to identify and collect information from enough domestic producers to represent a “major proportion” of the domestic industry as a whole. Second, the United States is also factually mistaken in saying the Chinese industry is not fragmented. The Chinese industry includes millions of domestic producers. Third, the United States has misread the guidance in *EC – Fasteners (AB)*. That guidance in fact demonstrates why MOFCOM’s determination in this case complied with the “objective examination” requirement of Articles 3.1 and 15.1.

75. “Objective examination” under Articles 3.1 and 15.1 do not require an impractical quest for perfection. Rather, “objective examination” – particularly in an area such as deciding how much investigation is enough in the context of defining a highly fragmented domestic industry – allows flexibility. MOFCOM properly defined the domestic industry as including those producers who represented more than 50 percent of the total industry and thus satisfied the “major proportion” test.

76. This interpretation reflects the guidance about the meaning of Article 4.1 provided by the Appellate Body in *EC – Fasteners*. The Appellate Body offered what is essentially a sliding scale test: the more substantial the percentage of the total domestic industry covered, the less concerned the investigating authorities need to be about obtaining further responses. Under this sliding scale logic, the converse is equally true. The higher the proportion covered, the less sensitive the authority needs to be to obtaining further responses. When the authority already has responses representing a high proportion of the total domestic industry, that response already, in the words of the Appellate Body, appropriately “reflects the total production of the producers as a whole.”

77. Beyond the high proportion in this case, there are other facts that also limit any possible obligation on MOFCOM to have done anything more. First, this industry is highly fragmented, and the Appellate Body has specifically recognized that in such highly fragmented industries, the “major proportion” test in Article 4.1 “provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible.”

78. Second, respondents provided MOFCOM with only limited information on additional domestic producers that should be contacted that were not already known. The names of the four allegedly unknown Chinese producers provided in the U.S. FWS were in fact the names of companies that either were already known and contacted, or knew about the case and decided not to cooperate by providing responses.

79. Third, MOFCOM in fact had no other names of domestic producers to contact or questionnaire responses to use in the analysis, other than companies that had already responded or decided not to respond. This fact is critical. This case does not involve the “active exclusion of certain domestic producers” that makes an Article 4.1 determination “more susceptible” to a WTO inconsistency, and that the Appellate Body criticized in *EC - Fasteners*.

80. Fourth, since MOFCOM had questionnaire responses from all the larger producers, additional questionnaire responses from smaller producers would not materially affect the analysis. Estimates based on record evidence demonstrate that additional producers would likely have represented much less than 1 percent of total domestic production.

81. The second U.S. argument presents a more limited, but equally erroneous argument under Articles 4.1 and 16.1. The U.S. argument fundamentally misreads the obligation of these provisions. First, the United States ignores the fact that Articles 4.1 and 16.1 set forth two distinct tests that the United States tried to blur into one test. Under Articles 4.1 and 16.1, the authorities may choose to define the domestic industry as “the domestic producers as a whole.” Alternatively, the authorities can define the domestic industry as including only those domestic producers whose “collective output constitutes a major proportion of the total domestic production.”

82. Second, the United States conveniently overlooks the extent to which the phrase “major proportion” leaves the authorities with considerable discretion. This provision does not specify any numerical threshold, unlike the provisions on standing that set forth specific rules based on 25 percent and 50 percent of total domestic production. When addressing this issue, the Appellate Body noted only that this phrase should be understood as “a relatively high proportion of the total domestic production.” Nothing in the Appellate Body decision in *EC – Fasteners (AB)* imposes any different obligations.

83. Contrary to the U.S. argument, MOFCOM did not intentionally exclude any domestic producers from its investigation. The United States apparently misses the importance of a key phrase that it cites from *EC – Fasteners (AB)*, that the authorities in that case had “excluded producers that provided relevant information.” It is true that authorities have only limited discretion actually to collect information, but then to ignore it. In the anti-dumping investigation at issue in *EC Fasteners*, the investigating authorities actually had contact information for 318 known producers, but ultimately based their determination on only 45 of those 318 known producers. That situation is totally different from the present case, where MOFCOM used the available data for all known Chinese producers.

84. The U.S. argument is essentially that if MOFCOM could have theoretically done more, it had an obligation to do more. The proper application of the “major proportion” test under Articles 4.1 and 16.1 does not require the authorities to include data from unknown domestic producers, particularly not when the authority has collected and analyzed data from known producers accounting for more than 50 percent of total domestic production.

**B. MOFCOM Properly Found Adverse Price Effects As Required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement**

85. Although the United States challenges the MOFCOM findings of adverse price effects on both substantive and procedural grounds, both lines of attack fail. MOFCOM reasonably exercised its discretion as the administering authority to gather facts, consider those facts, and analyze them in its discussion of adverse price effects. The WTO Agreements do not require countries to follow any single approach or use any specific methodology. Rather, the relevant international obligations reflect very specific rules that respect the discretion of national authorities to conduct investigations in ways that are appropriate to each country, and in ways that are appropriate to each specific case.

**1. MOFCOM reasonably found multiple adverse price effects in these cases**

86. MOFCOM collected positive evidence to serve as the basis for its consideration of adverse price effects within the meaning of Articles 3.2 and 15.2. MOFCOM collected data on the average prices earned by domestic producers for their sales of all broiler chicken products. The questionnaires to the domestic producers asked for the overall sales quantity and sales value, from which MOFCOM could determine an overall average unit value (“AUV”) for each relevant period of time. MOFCOM also collected similar data on the average prices earned by U.S. exporters for their overall sales of broiler products in China, as reflected in official Chinese customs statistics. Here as well, MOFCOM was able to use sales quantities and sales values to determine overall AUVs for the relevant periods. MOFCOM then used these data to assess trends and to compare the relative price levels of domestically produced broiler products as a whole and imports of broiler products from the United States as whole.

87. MOFCOM objectively examined that positive evidence. MOFCOM’s Final Determinations confirm that MOFOM considered and discussed each of the three specific types of adverse price



effects set forth in Articles 3.2 and 15.2. Ultimately, MOFCOM focused on the price undercutting and price suppression in its discussion of adverse price effects. Although Articles 3.2 and 15.2 make clear that authorities may consider as many or as few of these enumerated price effects as may be appropriate in a particular case, MOFCOM considered all three categories before focusing its discussion on the two adverse price effects that were the most pronounced in these cases. Doing so was completely consistent with the discretion afforded authorities under Articles 3.2 and 15.2.

88. MOFCOM objectively evaluated the evidence using a methodology that focused on broader trends for the subject merchandise overall. Although there may be other methodologies that authorities could use, MOFCOM's methodology was consistent with the discretion afforded to authorities by the texts of Articles 3.2 and 15.2.

**2. MOFCOM properly found price undercutting within the meaning of Articles 3.2 and 15.2 specifically and Articles 3.1 and 15.1 more generally**

89. At the outset, China notes that Articles 3.2 and 15.2 do not specify any particular methodology for analyzing price undercutting. Authorities thus have broad discretion in choosing a methodology, provided that methodology represents an "objective examination" of the "positive evidence" before the authorities.

90. That is precisely what MOFCOM did in these injury investigations. The United States attacks MOFCOM's alleged failure to take into account different levels of trade. But MOFCOM did consider this issue. This issue was raised by the U.S. respondents, and addressed by the respondents, by the domestic producers, and by MOFCOM in its determinations. MOFCOM both summarized the comments by the parties and then addressed those comments.

91. The U.S. argument presupposes an automatic obligation to consider resale prices charged by importers rather than purchase prices paid by importers, as reflected in the official import statistics. Such an obligation simply does not exist specifically in either Articles 3.2 or 15.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. MOFCOM's use of landed prices in China allowed the authority to compare domestic prices and import prices on a comparable basis, without the more difficult – and in these particular investigations, impossible -- administrative burden of determining comparable prices at a later stage in the distribution chain. China notes that even the U.S. exporters reported uncertainty about who actually served as importers of their product into China. The existence of other theoretically possible reasonable methods does not render MOFCOM's practically realistic method to be unreasonable or otherwise not "objective."

92. The core legal issue is whether there is any obligation on MOFCOM (or any authority) to use only an average resale price from an importer, rather than an average sale price to an importer. The resale price from the importer could be higher, lower, or the same. Costs could be passed along in the resale price, or they could be absorbed by the importer to make the sale. The importer might earn of a profit or a loss on the resale. Thus in the abstract, the resale price could be higher or lower. Nor has the United States pointed to any record evidence suggesting a material difference in the levels of trade. MOFCOM's method is neutral – and an "objective examination" – to consider either the average price to the importer or the average price from the importer. Absent some evidence before the authority suggesting a distortion of some sort, either approach would be permissible under Articles 3 and 15.

93. Indeed, this dispute shows that resale prices can be lower. As discussed during the first meeting with the Panel, a survey conducted by the U.S. Department of Agriculture suggests that during 2008 the vast majority of importers in China were reselling imported broiler chicken at 20-30 percent losses. The United States argument assumes that importer resale prices must always be higher. This assumption is just wrong. It is not necessarily true. Moreover, during the investigation, the U.S. respondents provided no evidence suggesting it was true. Indeed, in light of the U.S. Department of Agriculture report, it now seems likely that no such evidence was provided to MOFCOM because in fact importers were selling at significant losses during the critical period 2008. There is no record evidence contradicting this public statement that importers were reselling at a loss. No importers responded to the importer questionnaires.

94. The United States also attacks MOFCOM's alleged failure to take into account differences in product mix. But MOFCOM also considered this issue. The U.S. argument presupposes an obligation to consider specific product segments, rather than the product as a whole, another obligation that simply does not exist specifically in either Articles 3.2 or 15.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. Authorities have discretion on such issues. Both overall averages and more specific averages are both reasonable alternatives, absent some evidence in a particular investigation indicating a material distortion. In these investigations, the U.S. respondents presented only general arguments, not specific evidence of material distortions. Indeed, the data presented by the United States before this Panel – when viewed in its entirety – demonstrates the error of the U.S. argument. By using broader averages rather than more narrow product categories, MOFCOM in fact understated the degree of price undercutting in these investigations.

95. The U.S. respondent argument was inherently flawed. This argument proceeds from a false premise that chicken breast prices were higher. The record evidence before MOFCOM – in the form of numerous domestic producer invoices, including 21 individual invoices with both chicken breast and chicken paw transactions – demonstrates that chicken breast prices were lower, not higher, than chicken paw prices. So the U.S. respondent premise of the methodology overstating the magnitude of underselling is backwards; the methodology actually understates the magnitude of underselling. Such an approach does not violate any obligation of "objective examination," since the MOFCOM methodology based on the facts of this case was in fact conservative.

96. Beyond mischaracterizing the issues of level of trade and product mix, the United States also ignored the issue of "likeness" among the various types of subject merchandise. It would not be an "objective examination" to compare the prices of different like products, but it would be "objective" to compare products that are part of the same like product. In cases where the administering authority has defined a single like product, and that finding of a single like product has not been challenged before the Panel, there is nothing in the "objective examination" requirement that forces authorities to conduct a price comparison based on product segments within the single like product. Comparisons in a particular case may or may not be objective, depending on the facts of each case.

97. Perhaps recognizing the limited scope of the obligations under Articles 3.2 and 15.2, the United States also presents a more sweeping argument under Articles 3.1 and 15.1. The United States accuses MOFCOM of "failure to control for such obvious differences." Yet, this argument rests on two fundamental errors.

98. First, this argument assumes these differences are "obvious" when they are not at all obvious, and were not demonstrated to the satisfaction of the authorities during the proceedings below. The respondents before MOFCOM and the United States before this Panel assume that the price paid by the importer is necessarily and always at a different level of trade than the price offered by domestic producers. But that is not necessarily the case at all. These investigations illustrate just how murky that issue can be in a particular case. The respondents before MOFCOM and the United States before this Panel also assume that the higher portion of chicken paws in U.S. exports to China distorted the average import price downward. But that is not only not necessarily true, but in fact is false in these investigations. In the Chinese market, chicken paws are a premium item with a higher price, and thus the higher proportion of chicken paws actually distorted the average import price upward, not downward. The more basic point is that the differences alleged by the United States are hardly obvious; they depend on specific facts in specific cases.

99. Second, this argument also incorrectly assumes that more detail always trumps less detail, and that such less detail is thus inherently not "objective." The United States is trying to use Articles 3.1 and 15.1 to impose its own vision of investigative methodologies on MOFCOM. The United States may prefer to conduct pricing analysis based on resale prices by importers, but that does not mean that all countries must use this method. The landed price in a country – as reflected in official import statistics – is another reasonable method that MOFCOM could reasonably and "objectively" decide to use in a specific case. Similarly, the United States may prefer to conduct pricing analysis on specific products, but that does not mean all countries must use this method, and that using an overall average is inherently wrong. The use of average prices is another reasonable method – and one that in this case conservatively understated the margins of underselling.

100. On both of these issues, the United States has failed to meet its burden of establishing a *prima facie* case that MOFCOM's methodologies as applied in these specific investigations were inconsistent with China's WTO obligations. The specific facts of these cases – as discussed in more detail below – fully support the WTO consistency of the choices MOFCOM made in these investigations.

**3. MOFCOM's finding of price suppression would alone be sufficient to comply with the obligations under Article 3.2 and 15.2**

101. The United States argues that MOFCOM's finding of price suppression "is predicated entirely on its defective finding of significant underselling," and therefore must fail. But this argument is incorrect both legally and factually in several respects.

102. As a legal matter, the United States is trying to read into Articles 3.2 and 15.2 obligations that do not exist in those provisions. The U.S. argument makes two key legal errors. First, the U.S. argument ignores the textual elements of Articles 3.2 and 15.2 that make explicit that price suppression is an alternative to price undercutting. In particular the term "otherwise" separates price undercutting on the one hand and price depression and price suppression on the other hand. Similarly, the disjunctive term "or" separates price depression and price suppression. The text thus makes explicit that these three analytic techniques are each distinct ways for the authority to find adverse price effects. Any one of them alone can be sufficient. In particular, the text expressly sets out price suppression as an adverse price effect that may exist even if price undercutting has not been found.

103. Second, Articles 3.2 and 15.2 require only a showing of the existence of adverse price effects. The United States is simply wrong to argue that these provisions also require a showing that subject imports caused or affected the price suppression. Rather, price suppression is the effect that an authority observes in the domestic industry. Any obligation to find such a causal nexus is found elsewhere in Articles 3 and 15, not in Articles 3.2 and 15.2.

104. As a factual matter, MOFCOM's finding of price suppression was not dependent on the existence of underselling. Price suppression is a distinct finding that has nothing to do with the relative prices of subject imports and domestic prices. Rather, price suppression – as found by MOFCOM in these investigations – generally reflects a comparison of domestic prices and domestic costs over time. There may well be other ways for authorities to discern price suppression, but this comparison of changing prices to changing costs is the most commonly used analytic technique. Domestic prices in this case were able to increase over the period, but were not able to increase enough to cover rising costs. Thus, domestic price increases to cover rising costs that would otherwise have been expected did not occur, the profit margins eroded, and the consequence was price suppression. None of this depends on any findings of price undercutting.

105. Thus, regardless of the relative price levels of domestic and imported broiler parts, the domestic prices were suppressed by the volume and market share effects of the subject imports. Subject imports were increasing their volume and market share, which triggered the domestic firm response to avoid further loss of volume. The price suppression can rest exclusively on the adverse volume effects of the subject imports, and MOFCOM expressly set price suppression as an independent and additional adverse price effect.

**4. MOFCOM properly disclosed sufficient factual information about its findings of adverse price effects as required by Articles 6 and 12 of the AD Agreement and Articles 12 and 22 of the SCM Agreement**

106. The United States incorrectly asserts that MOFCOM acknowledged the need for some adjustment to account for different levels of trade. This claim is not true. MOFCOM's Final Determinations discussed the need to adjust for the customs duties imposed on different types of broiler chicken products imported from the United States, to create a comparable landed, duty-paid basis for price comparisons, not any other adjustment.

107. This U.S. procedural argument thus rests on a cascading set of false assumptions. The United States assumes that MOFCOM made an adjustment for level of trade that MOFCOM did not make. The United States then assumes that the MOFCOM price effects discussion rests on the

finding or price undercutting, when in fact MOFCOM had two legally independent bases for its price effects discussion. MOFCOM in fact complied with all its procedural obligations.

**C. China Properly Analyzed Impact As Required by Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement**

108. The United States has seriously mischaracterized the MOFCOM determinations about material injury. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. Yet it is the United States that ignores the totality of the evidence before MOFCOM, and selectivity picks time periods to create the illusion of a domestic industry doing acceptably, when the domestic industry in fact was suffering material injury.

109. Regarding the overall argument about adverse impact, the United States makes three analytic errors. First, the United States comments only about the period 2006-2008 and says nothing at all about the sharp declines in virtually every indicator during the first half of 2009. MOFCOM discussed sixteen different economic indicators, and for each of those indicators discussed the same consistent periods of time: full years 2006, 2007, and 2008, and the change in the first half of 2009 relative to the same period during 2008.

110. Second, the United States also says nothing about the MOFCOM discussion of likely continuing U.S. exports to China. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. The United States has completely ignored this factor.

111. Third, the United States focuses on volume indicators, and ignored the weak financial indicators over the entire period. A domestic industry with net operating losses every year of the investigative period is an industry suffering material injury. The United States cannot make these financial losses go away by ignoring them. When discussing both gross profits and net profits, MOFCOM added additional discussion of 2007, putting in context the modest improvement in 2007 that contrasted with the overall performance over the period and underscored the decline in financial performance in 2008.

112. The U.S. argument about two specific injury indicators fares no better. Although Articles 3.4 and 15.4 list numerous factors to be considered, the United States raises claims about only two. MOFCOM's Final Determinations included "an evaluation of" these two factors, and thus complied with the relevant obligation. That the United States disagrees with how MOFCOM evaluated these two specific factors does not mean the MOFCOM evaluation of all the various factors was not an "objective examination." To the contrary, MOFCOM reasonably evaluated both factors and addressed U.S. arguments about these factors, and all the other factors in its Final Determinations.

**D. MOFCOM Properly Demonstrated The Causal Link Required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement**

113. At the outset, it is important to note the specific parameters of the challenge being raised by the United States relating to causation. The United States – in its request for consultations, its request for a panel, and in its first written submission -- has focused its challenge solely on the issue of causal link as specified in the first and second sentences. In other words, the United States has not included any claims about other causes, or about MOFCOM's approach to considering other causes and thus ensuring non-attribution as required by the third sentence of Articles 3.5 and 15.5.

114. Thus, the issue before this Panel is simply whether MOFCOM properly established the "causal relationship" between subject imports and the injury to the Chinese domestic industry required by the first and second sentences of Articles 3.5 and 15.5. The Appellate Body has repeatedly made clear that a causation requirement in the context of a trade remedy proceeding requires only that the imports under investigation have contributed in some meaningful way to the injury being suffered by the domestic industry. The Appellate Body in *US – Wheat Gluten* interpreted the word "cause" and the term "causal link" to reflect a relationship in which increased imports "contribute to 'bringing about', 'producing' or 'inducing' the serious injury." The Appellate Body was careful to

clarify that the authority need not show that the subject imports were the only cause, or the major cause, of the injury. Rather, the authority need only show that the imports contribute in some manner, *“even though other factors are also contributing, ‘at the same time’, to the situation of the domestic industry.”* Although the Appellate Body has not directly addressed the degree of “contribution” necessary, in *U.S. – Tyres (China)* it equated “significant cause” to “important contribution.” The Appellate Body explained that “significant cause” amounted to more than a mere contribution, implying that the use of “cause” alone equals little more than the imports merely contributing to the serious injury.

115. Indeed, the United States has agreed with this interpretation of the scope of Articles 3.5 and 15.5. In its talking points presented to MOFCOM during this proceeding, the United States argued that MOFCOM did not show a “meaningful contribution” by subject imports. In making this argument, the United States acknowledges that subject imports need not be the only cause, the most important cause, or even an important or significant cause. Rather, subject imports need only be making some meaningful contribution to the material injury being suffered.

116. Thus, the burden on the United States in making a *prima facie* claim under Articles 3.5 and 15.5 is to demonstrate that MOFCOM failed to show that subject imports were making a meaningful contribution to the material injury. On the other hand, China can defeat the U.S. claim simply by showing that MOFCOM reasonably found that subject imports were contributing in some way to the material injury. Subject imports need not be a “significant cause,” a phrase used in other WTO contexts. Rather, subject imports need only be a “cause,” and may be one of many causes and still be sufficient to satisfy Articles 3.5 and 15.5.

117. The United States tries to meet this *prima facie* burden with three arguments, but they all fail. First, MOFCOM did not ignore evidence about market share. Rather, it is the United States that tries to ignore market share gain by U.S. subject imports at the expense of the Chinese industry as a whole. The United States ignores the fact that subject imports from the United States gained much more market share than non-subject imports from other countries lost.

118. Second, MOFCOM did not rely on price undercutting analysis as the sole basis for its discussion of adverse price effects. Rather, MOFCOM reasonably relied on both proper price undercutting analysis and proper price suppression analysis as legally independent bases for adverse price effects. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

119. Third, MOFCOM did not fail to reconcile its causation analysis with trends over the period. Rather, it is the U.S. argument that tries to ignore and downplay the sharp declines in the first half of 2009 and the dismal financial performance over the entire period of investigation. The existence of some positive trends does not negate the conclusions MOFCOM drew from weak and deteriorating financial performance over the period.

120. MOFCOM thus properly established the “causal relationship” required by Articles 3.5 and 15.5. Since the United States does not otherwise make any distinct arguments under Articles 3.1 and 15.1, the failure of the U.S. arguments under Articles 3.5 and 15.5 means that MOFCOM has fully complied with its WTO obligations regarding causal link.

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*Second Integrated Executive Summary by China***I. PROCEDURAL ISSUES****A. MOFCOM's Decision To Not Hold A Public Hearing Did Not Violate Article 6.2 Of The AD Agreement**

1. The United States has not articulated any legitimate basis for finding MOFCOM's decision to not hold a hearing, public or closed, inconsistent with Article 6.2 of the AD Agreement. The language of Article 6.2 is straightforward and the facts as presented are equally straightforward. Article 6.2 does not include the term "public hearing," and otherwise imposes no obligation on authorities to provide a public hearing or compel parties with adverse interests to meet. Rather, Article 6.2 simply obligates authorities, on request, to "provide opportunities for all interested parties *to meet* those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered" (emphasis added). The text makes clear that an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests is one of facilitator -- to promote the conditions under which such a meeting could occur. This interpretation is consistent with the plain meaning of the phrase "provide opportunities" as used in Article 6.2.

2. In the underlying investigation MOFCOM did not reject a U.S. request to meet with the petitioner. It accepted that request. MOFCOM notified all interested parties it understood to have interests adverse to the U.S. Government and determined that they had no intention to meet the United States at such a hearing. MOFCOM's action constituted efforts to organize the requested meeting and "provide opportunities" for such a meeting, consistent with Article 6.2. Thus, MOFCOM fulfilled its obligation under Article 6.2, and the question of a hearing where parties with adverse interests meet was rendered moot. The U.S. argument is reduced to a nonsensical claim that because a hearing was not held, the United States was somehow constrained in the arguments it could present to MOFCOM. The United States has yet to articulate how its arguments were constrained in the opinion meeting MOFCOM organized for the United States in the absence of a hearing where parties with adverse interests declared they would not be present. It cannot.

**B. MOFCOM's Disclosure Of Essential Facts Related To The Dumping Calculation Was Consistent With Article 6.9**

3. MOFCOM's dumping margin disclosures fully complied with the obligations of Article 6.9. MOFCOM disclosed all the "essential facts" that "form the basis for the decision" to apply the AD measures, and all the facts that were necessary for respondents to "defend their interests." Specifically, in the underlying proceeding, MOFCOM gave each respondent a particularized disclosure document that explained the MOFCOM calculation and provided the key benchmarks – normal value, CIF price, and net export price – necessary for each respondent to see which products created what dumping margins, and sufficient for each respondent to cross check MOFCOM's calculations with the data that respondent had provided. China understands that there might be certain specific situations where the investigating authority applies data not submitted by the respondents themselves. In such cases, China recognizes that additional disclosure might be necessary to allow respondents to defend their interests. But that is precisely what MOFCOM did in this case, such as with respect to the adjustment of Keystone's freezer fees.

4. The United States argues this is insufficient, insisting that authorities must provide all calculations, data, and computer programs with respect to normal value, export price, and cost of production. The United States fundamentally misreads the text. The disclosure required under Article 6.9 covers only facts, not reasoning, and only "essential facts." Moreover, the facts of this particular dispute show that disclosure of methodologies can meet the obligation to disclose "essential facts" and to allow all the parties "to defend their interests." The U.S. reading of "essential facts" that need to be disclosed effectively defeats the meaning of the word "essential".

5. As a final interpretive point, the United States contends that China has misinterpreted Article 6.9 by conflating the second sentence of that provision with the scope of disclosure required by the first sentence. China disagrees. In terms of the first sentence, the issue is whether an authority has informed interested parties of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States asserts that

such essential facts must include the full panoply of data, analyses, worksheets, and computer programs used by the authority. But if the basis for the decision whether to apply definitive measures may be understood from something less than this extensive disclosure, then it is plainly evident that the more extensive disclosure consists of more than "essential facts." It is otherwise axiomatic that if a more limited disclosure may impart the same understanding, then it is sufficient for the party to defend its interests.

6. Indeed, it is the United States that tries to confuse the issue by essentially arguing that the "essential facts" referred to in Article 6.9 include all facts "under consideration which form the basis for the decision whether to apply definitive measures." This reading is incorrect. Article 6.9 concerns only those "essential facts under consideration." And these facts, of course, are those indispensable to an understanding of the final determination, and therefore indispensable to the defense of a party's interests. MOFCOM's final disclosure met this standard by providing the respondents the means to understand the authority's consideration of whether dumping has occurred and, if so, the magnitude of such dumping, thereby allowing the parties to defend their interests.

7. Nowhere does the United States explain or provide any example of why the specific disclosures made by MOFCOM in this particular case were insufficient. In its questions to the parties, the Panel asked the parties to consider the issue of sales disregarded as not being in the ordinary course. China explained how MOFCOM addressed this issue for each of the three respondents. The United States complained about the lack of a list of specific transactions that had been disregarded, asserting that these below cost sales are "absolutely indispensable" to the calculation of dumping margins. But the key issue is whether the authority provided enough information and explanation for the respondent to have understood was the authority had done with the respondents' information, and how that information was being used to determine the dumping margin. If the respondents felt the need to know the specific sales excluded, the MOFCOM disclosure allowed the respondents to derive that information. The United States has not explained why it could not be done, or how the specific list of excluded sales were either "essential" or necessary to "defend their interests." It may be that the U.S. demand for "data" and "calculations" is probably a WTO consistent approach, but it is not the only WTO consistent approach; it is merely the U.S. approach that the United States now demands that every other Member follow. But the text of Article 6.9 does not mandate one approach over the other, and it would be inappropriate for the Panel to impose one particular method.

**C. The United States Has Failed To Demonstrate That The Non-Confidential Summaries Contained In The AD/CVD Petitions Were Inadequate Under Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement**

8. The United States has advanced two arguments with respect to non-confidential summaries. First, it claims that while Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement have no labelling requirements, the facts of the underlying investigation mandated labelling of the non-confidential summaries contained in the petition. According to the United States, there were no indicia contained in the petition that would allow a party to know that what it was reading was intended as a non-confidential summary. Second, the United States claims that summaries made available (that it was evidently able to identify without the labelling it now demands) represent mere conclusions that "an interested party must summarily accept rather than any summarization of the actual information." Both arguments are without merit.

9. With respect to the question of specific labelling, China agrees, consistent with the findings of the Appellate Body, that Articles 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement are intended to serve due process interests. But the sole standard by which the sufficiency of non-confidential summaries is to be assessed is by reference to whether the summaries "permit a reasonable understanding of the substance of the information submitted in confidence." As far as the purported lack of any indicia that would allow parties to know that they were reading a non-confidential summary, the United States neglects to mention that the document to which it refers is in fact the "non-confidential version" of the confidential petition. The remainder of the U.S. argument is tantamount to encouraging parties to not read the non-confidential version of a petition out of concern they would realize that what they were reading was a non-confidential summary that would permit a reasonable understanding of the substance of the information submitted in confidence.

10. Neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary and that it can readily relate to specific confidential information that has been redacted, but no more than that. More importantly, those due process concerns are not raised here, where there is no question that parties would understand the non-confidential version of the petition as presenting non-confidential summaries in a logical and identifiable format.

11. Regarding the U.S. claim that the non-confidential summaries contained in the petition contained mere conclusions and therefore did not permit a reasonable understanding of the information submitted in confidence, the facts simply do not support this assertion. When one considers the summaries in their totality, it leads to the unavoidable conclusion that the summaries provided did permit a reasonable understanding of the information submitted in confidence, consistent with Article 6.5 of the AD Agreement and Article 12.5.1 of the SCM Agreement. The United States is simply complaining about the form in which they were conveyed. The question of whether non-confidential summaries are adequate is a fact specific inquiry. The inquiry does not begin with the presumption that respondents are universally incapable of discerning the existence of non-confidential summaries absent labelling or summarization in a particular manner. The United States is over reaching, and its arguments are belied by the very cases it cites for support. In particular, China is surprised that the United States would raise *Mexico – Olive Oil*, since it supports China's position.

## II. MOFCOM'S ANTIDUMPING DETERMINATION

### A. The U.S. Claim About Freezer Costs under Article 2.4

12. The United States incorrectly argues that it is inconsequential that its consultations request made no mention of fair comparison, Article 2.4, or freezer storage costs. Yet, these subjects touch upon both the factual and legal bases of the U.S. claim in its panel request. Raising these matters in the panel request where no such mention was made in a consultations request necessarily expands the dispute. To suggest otherwise would diminish the due process standard governing notice of the scope of a dispute.

13. The Article 2.4 claim is not a derivation of the U.S. consultation inquiry under Article 2.2 and Article 2.2.1.1. Specifically, the United States raised two contentions in its consultations request: First, that MOFCOM acted inconsistently with Articles 2.2 and 2.2.1.1 by *failing to calculate costs on the basis of the records kept by the U.S. producers under investigation*; Second, that MOFCOM acted inconsistently with Articles 2.2.1.1 because it *failed to properly allocate production costs*. There is no legal link to Article 2.4 and no factual link to freezer costs in these claims.

14. The U.S. excuse about discovering the real nature of the freezer cost issue at consultations fails for two important reasons. First, whether a panel request has impermissibly expanded the scope of a dispute is made by exclusive reference to the written request for consultations, not from what is discussed at consultations. Second, the notion that the United States "had a better understanding" of freezer costs as a result of consultations is belied by the record. The United States cannot plead ignorance or confusion about the facts. It is clear from MOFCOM's final AD disclosure that it addressed the freezer cost issue in the context of export price to effect a fair comparison, which is the subject of Article 2.4. U.S. claims that the disclosure was somehow "vague" are without any support and require the U.S. to quote passages from MOFCOM's final disclosure without proper context. There is no basis to relate the facts of MOFCOM's final disclosure on freezer costs to a consultation request concerning Article 2.2.1.1.

15. But should the Panel consider the merits, it should reject the U.S. Article 2.4 claim. The United States ignores the obscured manner in which Keystone reported its freezer costs, a failure that cannot be attributed to MOFCOM, but to Keystone's decision to avoid its obligation to be forthright and accurate in responding to MOFCOM's questions. For example, beyond ambiguous or misleading statements in its questionnaire, Keystone did not specify in Form 6-7 that what it was reporting were freezer storage costs. The item in question only referred to "storage." In Form 6-5, which concerned production costs and expenses, Keystone reported these freezer storage



expenses as "other expenses," and placed nearly all of those "other expenses" under domestic sales. The United States then faults MOFCOM for verifying the Keystone data, a fact that does not bear on whether the freezer cost data were fairly reported. The United States also claims that MOFCOM's further consideration of the record after verification and discovery of the freezer costs issue is nowhere to be found on the record. That is not accurate. In fact, the issue is discussed in detail in Keystone's final disclosure.

16. The freezer cost issue constituted a difference between export price and normal value affecting price comparability for which due allowance was warranted. The United States all but admits as much in its Second Written Submission. The U.S. complaint really centers on how the adjustment was to be effected in light of the circumstances. China submits that the outcome and resulting adjustment to export price must be examined in light of how MOFCOM met its obligation to request specific information on freezer costs and the nature of such costs in relation to export price, how Keystone did not meet its obligations by misleading MOFCOM in the way it reported such costs in its questionnaire responses, and the need for MOFCOM to resolve the issue with the information on the record.

**B. MOFCOM's Determination With Respect To Cost Allocation Was Consistent With Article 2.2.1.1**

**1. U.S. characterizations of the respondents' cost allocation methodologies are erroneous**

17. The United States contends that both respondents treated products like paws as joint products in the production process, on the same tier as products like chicken breasts. This approach would make sense given the substantial value the respondents derived from products like paws. But for practical purposes both respondents treated paws as by-products. The United States asserts that China has argued that the distinction between joint products and by-products becomes a dispositive consideration of whether costs are reasonable for purposes of Article 2.2.1.1. China has never made that argument. Rather, China agrees that the issue is whether the respondents' recorded costs are (1) GAAP consistent and (2) reasonably reflect costs associated with the product and sale of the product concerned. Both conditions must be met. But when contradictions exist between how a respondent characterizes its allocation methodology and the methodology actually employed, such as in the case of Tyson, these contradictions contribute to serious doubts about the reasonableness of recorded costs.

18. As illustrated by the United States, Tyson repeatedly claimed to treat paws as joint products, an infinitely reasonable characterization under the circumstances. Any cost accounting text will indicate that joint products are two or more products from a joint production process with relatively significant sales values. The prices commanded for Tyson's paws would imply such a characterization. But having identified paws as a joint product, Tyson's reported *actual* accounting practice went in the opposite direction. Tyson valued paws as waste, assigning the price for offal as the cost of paws (the "offal credit"), offsetting meat costs for boneless product with that value, which is more consistent with how standard accounting texts address by-products.

19. Contrary to suggestions by the United States, the fact that a company labels a product a "joint product" does not mean it actually treats that product like a joint product, as is evident in the case of Tyson. The inconsistencies in Tyson's statements, the reality that paws were higher value products, and Tyson's methodology that ignored paw values were legitimate red flags. They raised serious issues and justified MOFCOM's immediate suspicion and scrutiny, not in terms of whether paws were joint products or by-products, but in terms of whether Tyson's allocated costs reasonably reflected the costs associated with the production and sale of the product concerned.

20. The respondents' approach to accounting for paws and similar products informs the second mischaracterization of the United States concerning the type of allocation methodology applied by the respondents. According to the United States, the respondents applied a "relative value-based allocation." In China's view there was little that was relational or even rational about the allocation. [\*\*\*] and Tyson assigned paws a waste value disconnected with the market value or its actual realized sales for that product. In summary, the relevant respondents – Tyson and Keystone -- were treating for allocation purposes products like paws contrary to their overall sales experience with these products. These facts provide extremely important context in addressing the remainder of the U.S. arguments, particularly in relation to U.S. claims that China has argued for

market-specific costs when in fact it was the U.S. respondents that pursued this approach and did so in an arbitrary manner.

21. Finally, although the United States wants to leave the impression that Pilgrim's Pride submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data later provided by Pilgrim's Pride after the disclosure on the preliminary determination were rejected as out of time, forcing MOFCOM to apply facts available under Article 6.8.

## **2. The United States wrongly asserts that China is arguing in favor of market-specific costs of production**

22. The United States claims that China is advocating market-specific costs of production in order to facilitate a fair comparison under Article 2.4. The EU offered a similar contention at the first meeting with the Panel. These assertions turn China's argument and the facts of the underlying investigation on their head. China is not advocating export market-specific costs of production. China is arguing that value-based cost allocations cannot be driven by any specific market. In particular, value-based allocations must take into account the circumstances of all sales to properly allocate costs to all production. But that is not how the respondents allocated their costs. They allocated costs based on how they *perceived* the value of certain products in the U.S. market, ignoring the actual value of their total production sold in all markets. They viewed paws as waste, not based on their total U.S. production of paws, but based on how they *perceived* that product's value (not production) if sold in the U.S. market. This approach is not consistent with Article 2.2. The relevant "cost" under Article 2.2 and its subsections relates to "production" in the country of origin. It does not relate to perceptions or values (real or arbitrary) assigned to a "product" sold in the country of origin.

23. The United States also embraces an EU argument that the "cost of production" referred to in Article 2.2 refers to the cost of production in the country of origin. China agrees to the extent that production can only take place in the country of investigation. An authority cannot superimpose costs from production situated elsewhere. But this does not obviate the need to determine the "price to be paid for the act of producing" consistent with the meaning of "cost of production" as elaborated on by the panel in *EC – Salmon*.

24. Finally, China is not arguing that value-based cost methodologies are inherently unreasonable, as the United States contends. Rather, China's argument, as validated by the facts of this case, is that value-based allocations are vulnerable to distortion if driven by the subjective or arbitrary choices of the companies in question when choosing what values to use as the basis for their cost allocations. There is no question that these distortions were at work in the instant case and therefore the respondents' costs did not reasonably reflect the costs associated with the production and sale of the product under consideration.

## **3. The respondents' reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and were therefore properly rejected**

25. The respondents reported allocated costs did not reasonably reflect the cost associated with the production and sale of the product under consideration and MOFCOM's concern over the respondent's value-based allocations was not novel, but in fact reflected concerns that have been cited by even U.S. authorities when considering allocation issues. To summarize some of the more unusual and problematic aspects of the Tyson and Keystone allocation methodologies and the distortions that flowed from those methodologies:

- As a practical matter, [\*\*\*] despite the relatively high sales value of these products, contrary to conventional cost accounting practices regarding joint production.
- Although Tyson claimed to apply a "relative sales value" approach to allocating meat costs, at best it applied a relative price approach, disconnected from its actual sales.

- In using prices to assign meat costs, Tyson did not use prices for the product concerned. For example, and as discussed above, with respect to high value products such as paws Tyson relied on an offal price, or effectively a waste price.
- In using prices as meat costs, [\*\*\*].
- Keystone stated that it [\*\*\*].
- Under circumstances in which [\*\*\*] the respondents' profit margins for domestically-sold breasts were [\*\*\*] while paws, the principal product to China showed profit margins [\*\*\*].
- Under circumstances in which [\*\*\*] they proved incapable of [\*\*\*]. At the same time, respondents showed [\*\*\*] for exports to China. Overall profitability [\*\*\*].

The United States still has no response to these facts. Instead, the United States clings to an argument that Article 2.2.1.1 will not sustain – that the presence of a GAAP-consistent methodology creates some form of presumption that reported allocated costs are reasonable.

26. The United States also declined to engage the Panel with a response to a fundamental question: is it appropriate to use a non-profitable price directly as a cost or as a basis for cost allocation? In the first instance, the concerns of circularity are immediate as the direct use of a non-profitable price for a product as the cost for that product would render the below-cost test virtually meaningless. But even in the second instance, the use of an arbitrarily low price as a basis for allocating cost for one product when using more accurate prices for other products as part of the same allocation gives rise to the same circularity problems. In the underlying investigation this is precisely what happened. The respondents resorted to irrational values that could not generate reasonable costs. Thus, their actual recorded cost allocations were unreasonable and could not be used. In the case of Tyson, China notes that Tyson employed low prices – the so-called “offal credit” -- directly as costs for products like paws, giving rise to circularity and undermining the below cost test. Where such a cost allocation ensures that the export prices of main export products are always higher than production cost, [\*\*\*], antidumping rules would be circumvented and rendered ineffective.

27. China also rejects the U.S. contention that it has “muddied” the waters of this issue by “ignoring the evidence proffered by respondents” regarding their cost allocation methodologies. For example, the United States touts that the offal market price relied upon by Tyson was published by Urner Barry. But the source of the price was not necessarily material. It was the price used that really mattered. Consider Exhibit 6-1-5-2 of Tyson’s original questionnaire, highlighted by the United States for purposes of its argument. In this exhibit Tyson provided an example of a production cost summary report for one plant for one week. Tyson itemized separate per unit meat costs for a variety of products under a “Meat” column. For many of the products listed, including paws, Tyson assigned [\*\*\*] – the “offal credit” that Tyson and the United States state was a market price. Exhibit 6-1-5-2 underscores the following: First, Tyson valued paws on the same basis as, for example, [\*\*\*]. Second, this was not a relative sales value approach to cost allocation for paws since no relative sales value for paws was used to allocate cost, contrary to arguments by the United States. In sum, whether or not “market prices” were used is not the core of the issue. U.S. arguments that this is the crux of China’s argument are simply misplaced.

**4. The respondents failed to meet their burden to show that their reported cost allocations reasonably reflected the cost of production and sale of the product under consideration**

28. The United States contends that MOFCOM had the burden to demonstrate that the respondents’ cost allocations did not reasonably reflect the cost associated with the production and sale of the product under consideration. The U.S. argument appears to be that there is a rebuttable presumption that such costs are reasonable if they are GAAP-consistent. China disagrees with this interpretation of Article 2.2.1.1. The respondent has some obligation to demonstrate that its cost allocations reasonably reflect the cost of production, and this cannot be presumed even where their records are GAAP-consistent. The language of Article 2.2.1.1 supports China’s position. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must “consider” that information, and that the

burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

29. Respondents did not present MOFCOM with a rationale for accepting their allocated costs. The respondents' instead emphasized the assertion that their records were GAAP-consistent, and those explanations at times did not even reflect the respondent's own actual accounting methodologies which as discussed produced self-evident distortions in the respondents' cost data. Such a defense does not survive scrutiny under Article 2.2.1.1. Although the United States effectively wants to advance respondents' argument here, even the United States has to concede that an authority need not accept a respondent's records where they do not meet both express conditions under Article 2.2.1.1., and namely: (1) that records are GAAP-consistent; and (2) that they reasonably reflect the cost associated with product and sale of the product under consideration. Under the circumstances, the respondents did not meet their burden to establish that their reported allocated costs reasonably reflected the cost associated with production and sale of the product concerned.

#### **5. MOFCOM's own weight-based allocation was proper within the meaning of Article 2.2.1.1 of the AD Agreement**

30. The United States argues that MOFCOM's weight-based allocation was inconsistent with Article 2.2.1.1 because it did not reflect a "proper" allocation of costs. Specifically, the United States contends that a "proper" allocation captures "the costs of production in the country of origin and that can be accurately used to ensure that anti-dumping duty is not greater than dumping as to a particular product." But the general U.S. concern about ensuring that the anti-dumping duty is not greater than the dumping as to a particular product merely validates China's point about the proper allocation of costs and the purpose of the AD Agreement. The United States appears to agree with all the contextual elements that inform Article 2.2.1.1 and the proper allocation of costs that China has raised. To summarize that context, the issue is not cost of production generally or conceptually within the confines of a GAAP-consistent methodology; the issue is cost of production of a specifically defined product and the specific normal value to be derived from that cost. More specifically, the "cost of production" as enumerated in Article VI:1(b)(ii) of GATT 1994, and the AD Agreement more generally, is about ensuring reasonable comparisons, and using the cost of producing the good as the anchor to prevent distorted comparisons.

31. The United States claims that MOFCOM's weight-based methodology results in the same amount of costs being assigned to low and high value products, and that the allocation of costs to low value products would be in excess of the fair market value of such products. This observation ignores the facts of the underlying case, especially that the respondents' own distorted, market-specific allocations resulted in certain high value products (the products shipped to China) being assigned costs far below fair market value while other high value products (the products not shipped to China) were assigned costs that approached or exceeded fair market value. Although the United States acknowledges that weight-based methodologies are not always inappropriate and are not specifically tailored to find dumping, it seems to argue that weight-based methodologies are always inappropriate in joint-product scenarios involving non-homogeneous products, and claims that in this case MOFCOM applied a weight-based methodology for the specific purpose of finding dumping. China disagrees with this characterization, which ignores all of the context of the case.

32. First, the U.S. argument rests in part on the existence of joint products. But the United States provides no support for the proposition that weight-based methodologies are always inappropriate when joint products are non-homogeneous. Indeed, the very accounting texts cited by the respondents in the underlying proceeding indicated that weight-based approaches are appropriate in joint production scenarios, and this was particularly the case in the context of rate regulation proceedings such as antidumping proceedings. Second, the record does not reflect that the respondents were treating all products as joint products, which undercuts the United States proposed *per se* rule against weight-based methodologies. Third, for all the U.S. protests regarding inflated profits when a weight-based approach is applied, the reality is that it was the U.S. respondents that were generating this result with their arbitrary approaches to cost allocation. The respondents' approaches to cost allocation in fact functioned as if they were tailored to avoid a finding of dumping. Tyson's "relative sales value" approach is inconsistent with every fundamental

rule proposed for such a methodology as presented in the accounting text presented at Exhibit USA-72.

33. MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions for the respondents' total production in the market rather than respondents' distorting cost methodologies. MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to either the U.S. or Chinese markets. In other words, MOFCOM applied a market-neutral approach to costs. The weight-based approach was reasonable because: (1) it avoided the distortions that had made the respondents' value-based cost allocations unreasonable as discussed above; (2) it reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts; and (3) it was specifically listed as one of the reasonable alternatives in the materials cited by respondents, particularly in the context of a price regulation proceeding; and (4) it was also proposed by the respondents in their alternatives.

34. MOFCOM's methodology was to take total reported costs for the production of subject merchandise and allocate those costs over total reported weight of subject merchandise production. This methodology was implemented using the data reported in Table 6-3 provided by the various respondents, where such data was reported. Thus, contrary to U.S. arguments, there could be no over-allocation of costs to subject merchandise.

35. Finally, the United States argues that including product-specific processing costs within the weight-averaged allocation of costs was improper. But the circumstances of the instant case warranted that approach. But both Keystone and Tyson's responses and data suffered from contradictions or discrepancies that could not be reconciled or relied upon. Thus, any processing costs had to be weight-averaged with other costs.

**6. MOFCOM met its obligation under Article 2.2.1.1 to consider all available evidence on the proper allocation of costs**

36. The obligation imposed on authorities under Article 2.2.1.1 includes a requirement to "consider all available evidence on the proper allocation of costs . . . ." The Appellate Body in *U.S. – Softwood Lumber* has elaborated on the term "consider" as used in Article 2.2.1.1, explaining that "consideration" would not be satisfied by simply "receiving evidence" or merely "taking notice of evidence." Rather, evidence of "consideration" must demonstrate "some degree of deliberation on the part of the investigating authority." At the same time, the Appellate Body found that "the nature of this deliberative process will depend on the facts of a particular case before the investigating authority."

37. The record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue beyond simply receiving or taking notice of evidence. The fact that this evidence is found across multiple documents produced as part of the investigation does not diminish the overall probative value of the documents as a whole. As the panel in *Egypt – Steel Rebar* stated, the evidence needed to rebut a *prima facie* case can be found "in the disclosure documents, in the published determination, or in other internal documents." As such, China's evidence adequately rebuts the U.S. claim.

38. Moreover, the Appellate Body in *US – Lumber V* indicated that the nature of an authority's "deliberative process will depend on the facts of a particular case before the investigating authority." In this case there were very substantial distortions associated with the respondents' allocation methodologies as further revealed in the costs themselves. To the extent such methodologies led to the costing of a product in a manner disconnected from market reality, as was plainly evident in the case here, the need for a particular form of consideration must give way to the fundamental and obvious nature of the problem. Under such circumstances, if there is basic evidence of consideration, that should be sufficient. This approach is consistent with how panels have viewed an authority's obligation under Article 2.2 when dealing with extensive cost data, such as reflected by the panel report in *EC – Salmon*. Based on the multiple instances of consideration reflected on the record, MOFCOM met its obligation to "consider all available evidence on the proper allocation of costs" as required by Article 2.2.1.1.

39. Concerning U.S. claims that MOFCOM did not consider all evidence on alternative methodologies, MOFCOM in fact addressed arguments raised by both Keystone and Tyson

concerning MOFCOM's weight-based allocation methodology. As MOFCOM noted, these arguments did not sufficiently justify the reason why different parts of the subject products had different costs. Indeed, what these arguments focused on were the "reasonableness" of value-based allocations in the context of GAAP-consistency. To the extent the respondents addressed weight-based allocations, both respondents actually provided a weight-based alternative. With the respondents also suggesting such an approach, and with their own accounting literature indicating that weight-based methodologies were proper in certain contexts, MOFCOM can not be faulted for actually applying a weight-based methodology. If the authority is actually applying a methodology also proposed by the respondents, it is difficult to contend that the authority did not consider this evidence. The circumstances of the case warranted a weight-based allocation of these costs.

40. Finally, the United States continues to misstate the obligation under Article 2.2.1.1, insisting MOFCOM was required to "explain" its decision to reject respondents' reported allocated costs and apply an alternative allocation in its determination. Contrary to the U.S. argument, there is no positive obligation under Article 2.2.1.1 to "explain." Rather, as noted, MOFCOM was required to "consider" all available evidence on the proper allocation of costs. China has demonstrated that the record reflects such consideration and the United States has not established a *prima facie* case where it focuses on "explanation." China also notes that in its panel request the United States raised a claim under Article 12.2 in relation to the cost allocation issue. Throughout this entire proceeding, the United States has not prosecuted this claim in any manner. There is not a single articulation of a *prima facie* case under Article 12.2 with respect to the cost allocation issue found in any submission made by the United States, or during meetings with the panel. Indeed, the United States has never even mentioned Article 12.2 in relation to the cost allocation issue. Thus, China believes that this U.S. claim must be set aside, and the Panel should carefully consider the U.S. arguments concerning "explanation" and how they relate, if at all, to the claims actually prosecuted by the United States in this proceeding, and the distinctions that exist with the substantive obligation under Article 2.2.1.1 and the panel's standard of review under Article 17.6.

## **7. U.S. *Post Hoc* Rationale Arguments**

41. Looking further at the issue of "explanation" and "consideration," the United States also claims that China is now engaging in *post hoc* rationales to support MOFCOM's decision on the question of cost allocation that should be ignored by the Panel, consistent with Article 17.6 of the AD Agreement. The United States has in fact not fairly articulated the parameters of a *post hoc* claim. China submits that its arguments presented to the Panel are not *post hoc*, but are merely elaborations of the record evidence embodied in MOFCOM's rationale for declining to use respondents' reported allocated costs, and namely that respondents' reported allocated costs did not reasonably reflect the cost of production.

42. First, this is not an issue where MOFCOM failed to consider the question of cost allocation altogether and is only now trying to offer rationales for MOFCOM's decision. Thus, it is very different from cases, such as *Korea – Dairy Safeguards*, where the record did not reflect any examination of specific injury factors. Second, the Panel must distinguish among the decision at issue, the rationale, and the supporting record. The United States has inappropriately conflated the decision with the rationale in this case and therefore approaches the issue of *post hoc* argument at the wrong level. The decision under Article 2.2.1.1 concerns whether or not to utilize respondents' reported allocated costs or some alternative cost allocation for purposes of constructed normal value. The relevant rationales relate to whether respondents' cost allocations were GAAP-consistent, whether they reasonably reflect the cost of production and sale, and whether the applied allocation was proper. The supporting record for the rationales is drawn from the investigation record as a whole. This is consistent with how panels have considered the question of *post hoc* arguments in prior cases, including cases cited by the United States in advancing its *post hoc* arguments, including in *Guatemala – Cement II*, *Argentina – Ceramic Tiles*, and *Mexico – Pipes and Tubes*. Importantly, once a panel has identified the stated decision and rationale in the record, the next step is to engage in "a detailed examination of the record evidence" to see if the authority's rationale was objective and unbiased.

43. This is precisely how the Panel must examine the U.S. *post hoc* argument claims in this proceeding. First, the Panel must identify the decision at issue. To that end, the United States does not dispute that MOFCOM plainly set forth its decision declining to use respondents' reported allocated costs and apply an alternative methodology. Second the Panel must examine the record to see if MOFCOM set forth a rationale for this decision. Likewise, there is no dispute that MOFCOM

set forth in both its preliminary and final disclosures that the rationale for not using respondents' reported allocated costs was that the reported allocated costs did not reasonably reflect the cost of production of the product concerned. Finally, the Panel must examine the record facts as established by MOFCOM to determine if MOFCOM's rationale was unbiased and objective. As already discussed, the record facts objectively reveal that respondents' reported costs did not reasonably reflect the cost of production, and the alternative selected by MOFCOM was proper. Under the circumstances, there is no basis for the U.S. *post hoc* claims.

44. Finally, China notes that the U.S. argument would require the Panel to go well beyond its authority under Article 17.6(i) of the AD Agreement. That provision makes clear that as long as the facts have been properly established, and evaluated in an unbiased and objective manner, that evaluation by the authority "shall not be overturned." Article 17.6(i) does not otherwise specify what is "proper", "unbiased" and "objective", neither does Article 2.2.1.1 require the specific extent of disclosure and explanation of the facts in the final determination, only that the authority shall consider all evidence. Concerning whether the facts established by MOFCOM were proper and whether the evaluation was unbiased and objective, China submits that despite the record evidence and elaborations thereof submitted by China during the course of the dispute, the United States has offered nothing in response to justify respondents' reported product specific costs, particularly the costs reported for paws, a failure that China believes underscores the appropriateness of MOFCOM's finding that the respondents' reported costs were not reasonable.

### **C. Antidumping "All Others" Rate**

45. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation. MOFCOM also gave adequate disclosure of the margin. With respect to unknown and non-participating parties China believes the announcement of the margin provides the "essential facts" to such parties and puts them on notice to begin evaluating other options under Chinese law if they wish to export to China at some time in the future.

46. The United States contends that it is not necessary for the Panel to reach any conclusions regarding what information MOFCOM should have included in the notice of initiation or what would be a sufficient manner of notice such that the investigating authority can assume that producers have received notice. According to the United States, because MOFCOM did not identify other exporters and producers, or provide them with necessary requests for information, it could not find that they refused to cooperate with the investigation. China disagrees. These inquiries are germane and necessary for determining whether China complied with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

47. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement also apply to unknown producers. These provisions apply whenever a party "otherwise does not provide." This more general language "otherwise does not provide" extends to both known and unknown parties. Given this more open-ended language, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement govern those situations involving unknown exporters. The question of whether MOFCOM specifically identified these unknown exporters and producers is not relevant to the issue of whether such unknown exporters received sufficient notice and whether they complied with requests for information.

48. In terms of sufficient notice of necessary information and the consequences of not appearing, MOFCOM's notice of initiation stated MOFCOM would apply facts available to companies that failed to register within the specific time period. The notice of initiation also made clear that the "Registration Form for Countervailing Investigation" could be downloaded from the MOFCOM website and provided the specific web address. China believes this provided sufficient notice of the information requested and of the consequences of not appearing in the investigation.

49. In terms of what constitutes a sufficient manner of notice such that an authority can assume that unknown producers have received notice and can apply Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement, China's approach has been to take three specific actions, including placing the notice in the public reading room at MOFCOM, publishing the notice on the internet, and providing a copy of the notice to the government authorities of the unknown producers. China believes that this constitutes a sufficient manner of notice to apply facts available

in both the AD and CVD cases was consistent with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

50. As far as MOFCOM's disclosure obligations under Article 12.2, 12.2.1, and 12.2.2 of the AD Agreement, the preliminary determination noted that MOFCOM had relied on the facts available. The final determination specified that the "all others" rate was based on the normal value and export price of a model from the sampled companies to determine their dumping margins. This referred to the data of the three companies, including Keystone, Tyson, and Pilgrim's.

### III. COUNTERVAILING DUTY ISSUES

#### A. Subsidy Allocation

51. On the subsidy allocation issue, MOFCOM's approach and calculation was consistent with Article 19.4 and Article VI:3 of the GATT 1994. The United States continues to engage in distraction by attacking MOFCOM's holistic inquiry to obtain the relevant data on feed subsidies to ensure the subsidy was properly calculated. Indeed, MOFCOM presented several questions on purchases, production cost, and unit consumption in the initial questionnaire. Had complete and accurate responses been provided, MOFCOM would have been able to properly allocate the benefit received from the upstream subsidy programs to the subject products. There would have been no need for supplemental questionnaires. Thus, China does not agree with the United States that MOFCOM's initial questionnaire was "irrelevant." The United States is merely trying to obscure the fact that there were serious deficiencies in the responses provided. The respondents in many cases provided no response to the questions presented, and where they did respond, it was not responsive to the question. The respondents offered no evidence that they would adequately respond, if at all, to the questions presented. Rather than holding the respondents to complete and accurate responses to those questions, and the prospect of a facts available finding, MOFCOM elected to offer the respondents an alternative, simplified approach.

52. In the second supplemental questionnaire, MOFCOM focused on a few basic questions, the responses to which would form the basis of its calculation. But China must again emphasize that the issuance of the second supplemental questionnaire was the result of the serious deficiencies found in the responses to the initial questionnaire, and the fact that the data used in the final subsidy rate calculation came from responses to the second supplemental questionnaire did not render the initial questionnaire irrelevant.

53. In terms of the simplicity of the second supplemental questionnaire. For question I.4 of the Tyson second supplemental questionnaire and question I.6 of the Pilgrim's second supplemental questionnaire, the information sought concerned total consumption of feed in the production of broiler products, i.e., subject products, during the period of investigation: "Please provide the specific names, main contents, quantity and value of the various feeds grains (such as corns, soybeans etc) consumed in the production of the broiler products during the POI by your company." Despite the clarity of these questions, the United States attempts to argue that the meaning of "broiler products" was unclear and became the origin of the alleged misallocation, but it is obvious that the reference was to subject merchandise. This is plainly stated in the initiation notice. The respondents provided responses to these questions, which formed the basis for MOFCOM's calculation. There is no room for ambiguity in the question presented, and by all accounts the respondents understood its meaning.

54. The U.S. claim that the data provided in response to this question related to the total purchase of corn and soybeans ignores all of the facts cited by China. In response to this question, Tyson did not state it was providing data on total purchases of corn and soybeans. Nor would Tyson be expected to, given the unambiguous nature of the question. Tyson responded as follows:

*The feeds grains consumed by Tyson during the POI in the production of the broiler products were only corns and soybeans. Please see the relevant data provided in Annex CS2-I-3 for the quantity and value of these two raw materials.*

55. Thus, Tyson indicated in response to the question that it was reporting feed consumed in the production of broiler products and directed MOFCOM to data – "the relevant data" -- in Annex CS2-I-3, provided as Exhibit CHN-37. The United States points to data contained in CS2-I-3



reporting quantity of "live broiler chicken," but there is nothing in the exhibit that indicates that what was being reported was all live broiler chicken and not live broiler chicken intended for the production of subject merchandise. Moreover, the respondents' failure to respond to the full set of MOFCOM's questions regarding production cost in the initial questionnaire prevented MOFCOM from cross-checking the information. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise. The United States has still not addressed why Tyson never sought to correct Annex CS2-I-3 if it was ever in error. Under all the circumstances present in the case, MOFCOM was entitled to accept the data as reflecting feed consumed in the production of subject merchandise.

56. With respect to Pilgrim's, the company's response to same unambiguous question on consumption in the production of subject merchandise was simply as follows: "Please refer to Annex II-SI-2: Feed Formulation" The U.S. response does not address the fact that Annex II-SI-2 expressly states that "over time, such as the POI, the purchases are reflective of the consumption," and purchase records are therefore "reflective of the actual consumption." Thus, Pilgrim's made clear that it understood it was responding to a question on consumption and that it was affirmatively stating that purchases and consumption during the POI were equal. Pilgrim's expressed no confusion, contrary to the U.S. argument, but instead clarified why its purchase data and consumption data were the same. The United States fails to address other issues associated with Annex II-SI-2, including those related to feed consumed for pullets and breeders and external feed sales identified by China.

57. In summary, China's position is that MOFCOM's subsidy margin calculation properly relied upon data provided by the respondents concerning the volume of feed purchased and consumed in the production of subject merchandise and the total weight of subject merchandise sales. First, there is no question that this calculation aligns the proper numerator and denominator for purposes of deriving a subsidy margin specific to subject merchandise. Thus, MOFCOM's choice of methodology is correct, and its choice of a *per unit* methodology reflects the text of Article 19.4, which addresses the proper level of countervailing duties relative to the "subsidization per unit of the subsidized and exported product" found to exist.

58. Second, the respondents provided MOFCOM with the information necessary to perform the calculation, and in particular data on consumption in the production of subject merchandise. Although the United States contends that MOFCOM never requested information specific to subject merchandise, as previously noted, that is not an accurate statement. There is no question that the second supplemental questionnaire specifically asked for consumption of feed in the production of "broiler products" – that is, subject merchandise. To any party reading the notice of initiation and the questionnaire, the meaning of "broiler products" would be unmistakable. U.S. claims of confusion over this term simply do not work. And it was on the basis of the response to this question that MOFCOM calculated its subsidy margin, as MOFCOM made clear in the final disclosure.

59. Third, although MOFCOM was well aware of respondents' arguments on over-allocation, the arguments made by the respondents focused on the wrong issue or were otherwise supported by erroneous information. In one fashion or another, the basis of each argument was that MOFCOM affirmatively used feed purchases in excess of that applicable to subject merchandise in the subsidy calculation. This was not the case and did not reflect MOFCOM's methodology, which focused on the volume of feed purchased and consumed in the production of subject merchandise. Tyson claimed that MOFCOM used total purchases, and therefore sought an increased in the denominator, but it ignored the fact that it reported the same figure for consumption in the production of broiler products and did not otherwise substantiate its claim in light of its response on subject merchandise feed consumption. Pilgrim's claimed that certain deductions to its reported purchases used in the production of broiler products were warranted, but failed to substantiate these deductions. It sought deductions for breeders and pullets without establishing why feed for such animals was not part of the production process. It sought deductions for feed sales when it previously told MOFCOM in its initial questionnaire that it had no feed sales. Finally it sought to reduce the calculated benefit by applying a ratio of [\*\*\*] which it said reflected output of subject product, but offered no substantiated evidence for such a reduction, only the estimate for output, which consistently pegged output at an unwavering [\*\*\*] in each year between 2006 and 2008 and into the period of investigation. The estimate itself was not even derived from evidence on the record of the CVD proceeding.

60. Fourth, having determined an appropriate calculation methodology, and after giving ample opportunity for the respondents to provide requested data, MOFCOM was entitled to apply that methodology to the data reported by the respondents as feed consumed in the production of subject merchandise during the period of investigation. The United States, however, contends that the respondents actually provided information to MOFCOM regarding the mismatch as well as the remedy. But what the United States is really arguing is that MOFCOM was required to alter its calculation methodology – either by increasing the denominator or reducing the numerator on a basis that did not reflect MOFCOM’s methodology and/or the data MOFCOM had expressly requested from the respondents.

61. What the United States never addresses is that if the respondents understood that there was a mistake in their reported data, they should have provided corrected data, not alternative approaches to the claimed problem. Yet, the record of the investigation reflects no attempt by either Tyson or Pilgrim’s to provide corrected data, if such corrections were ever necessary. Instead, both respondents advanced either different methodologies without a sufficient basis, or conflicting and unsubstantiated data. Moreover, they made no claim that they could not provide the data in the form requested by MOFCOM. Instead, they requested that MOFCOM change its calculation methodology in a variety of ways. It was not MOFCOM’s obligation under the facts presented to yield to every demand of the respondents as to how it should perform its calculation.

62. China adds that one of the purposes of the verification was to verify the elements reported that were essential in calculating the respondents’ subsidy rate. In this regard, the consumption of corn and soybean for the production of the subject product was one of the essential elements. Tyson claimed that it did not maintain the requisite consumption records, and that purchases could be used as basis to consider consumption. Pilgrim’s claimed in the exhibit provided in response to question I.6 of the second supplemental that purchases equalled consumption. For these reasons, MOFCOM had to verify the consumption data through the basis of purchases. The verification disclosures contained a section titled “*Verification of the Completeness of the Company’s Sales and the Data on Purchase of Corn and Soybean Meal*”. But this does not discount the representations of the respondents in terms of consumption for the production of subject merchandise.

63. China believes the data provided by the respondents in the questionnaires were correct in terms of reporting feed purchased and consumed in the production of subject merchandise. If not, the record presents other serious issues related to the accuracy of the respondents’ submissions. For example, at verification Tyson reported a consumption value that was roughly 10 percent in excess of what it reported as the value of consumption in its questionnaire responses. This may have in fact reflected total consumption, reinforcing the idea that what Tyson reported in its response was limited to subject merchandise consumption, consistent with what the question requested. Either MOFCOM was correct in this understanding, or the data revealed that Tyson’s responses suffered from serious inaccuracies and could not be trusted – including its statement that it did not keep consumption records (proven wrong at verification) and the data provided in response to Question I.4 could not be matched to the records found at verification. MOFCOM chose to accept Tyson’s responses at face value. These and other data discrepancies and shortcomings with respect to Pilgrim’s may shed some light, for example, on why the respondents declined to provide corrected responses that were responsive to the questions posed. They also reflect that MOFCOM was conservative and reasonable in its approach.

#### **B. CVD “All Others” Rate**

64. With respect to the CVD “All Others” rate, China reiterates the points it previously made with respect to the AD “All Others” rate. China has explained the steps taken by MOFCOM at initiation to notify producers and exporters of initiation and the consequences of failing to respond to MOFCOM’s notice, which it believes was adequate under the circumstances. It has also described how it approached the examination of producers and the treatment of known and unknown parties, as well as the nature and adequacy of its disclosure.

65. In terms of whether the “all others” rate included any upstream feed program found not found countervailable by MOFCOM in the investigation, the Final Disclosure to the U.S. Government does indicate that the subsidy programme used for determining the “all others” rate was a countervailable feed programme. The reference to “upstream subsidy” in the Final Disclosure is an explicit reference to the feed subsidy. Indeed, there was no single “countervailable feed program,” but multiple “upstream subsidy programs” for feed ingredients, the benefits from

which were found to pass through to the sampled respondents. The full analysis of these programs and how benefit passed through to the respondents is contained in a section entitled "Upstream Subsidy Programs," a term used consistently throughout the investigation in the multiple disclosures to refer to the feed subsidy programs.

66. MOFCOM calculated the *ad valorem* "all others" rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy benefit received by the upstream suppliers that actually passed through to the sampled companies. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This approach resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). Because the rate was derived from the benefits received by these companies, it could only include countervailable feed programs.

67. The United States claims that MOFCOM, in calculating the subsidy rate for the "all others" producers, treated them as if they could receive a benefit that was actually greater than the amount that they could receive. This assertion is incorrect. If the competitive benefit exceeded the calculated pass-through amount from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount (i.e., Tyson and Keystone). The record reflects, that there are circumstances under which the calculated competitive benefit amount could be lower than the pass through amount, as in the case of Pilgrim's. Thus, applying facts available, MOFCOM could rely on an actual calculated competitive benefit amount from the investigation.

#### **IV. INJURY ISSUES**

68. China makes three overarching points about the U.S. injury claims. First, the United States has not provided sufficient factual support for its claims to make a *prima facie* case. Sometimes there is no evidence at all. Sometimes there is only misinterpreted evidence. China has shown how the U.S. assumptions are inconsistent with both the evidence on the record before MOFCOM at the time, and with other available evidence. Thus, even assuming the United States may have met its initial *prima facie* burden as the complaining party, China has fully rebutted that *prima facie* case during these proceedings.

69. Second, the United States repeatedly tries to use Articles 3.1 and 15.1 to create specific obligations with regard to the various issues addressed by the other provisions of Articles 3 and 15 in a general way but without any specific obligations. These arguments, however, fail as going well beyond the text. If the substantive provision cited by the United States does not impose a specific requirement or specific methodology on authorities that must be met in every case, then Articles 3.1 and 15.1 cannot be interpreted to impose such specific methodologies that apply in every case. These absolutist positions must be rejected, because the texts of Articles 3 and 15 do not support them. If the Panel finds that the United States has not met its burden of providing sufficient facts to support its claims in this specific case, then those claims must fail.

70. Third, contrary to repeated U.S. claims China is not advancing new rationales. The rationales are present in determinations and the record. China is just elaborating on those rationales on the basis of facts on the record that support those rationales. This is not *post hoc* argument. Moreover, it is not *post hoc* for China to provide a factual rebuttal to the premises or assumptions behind the U.S. claims before the Panel. If those claims lack any factual basis in the record, then the United States has failed to meet its *prima facie* case.

### **A. Defining the Domestic Industry**

71. China has shown that MOFCOM reasonably defined the domestic industry, alerting all known domestic producers, and successfully obtaining information from seventeen domestic producers that represented a “major proportion” of the domestic industry. No questionnaire responses received were excluded from the analysis. The only known producers left out were those that knew about the pending case, but declined to respond to the domestic producer questionnaire.

72. At the outset of its investigation, MOFCOM considered the domestic industry as all domestic producers. MOFCOM stressed that “all interested parties” included all domestic producers, and that “every domestic producing company” had the right to submit questionnaire responses. At the outset, MOFCOM was open to receiving responses from any and all domestic producers. As MOFCOM stressed in the Determination, the authority “did not limit the scope of the domestic industry.”

73. But eventually MOFCOM realized that it had received only 17 responses, and was unlikely to receive any more, and so MOFCOM then considered the domestic industry as those responding producers that represented more than half and thus the “major proportion” of the domestic industry as a whole. MOFCOM expressly noted the 17 responding domestic “accounted for a major part of the total production quantity of the domestic like product.”

74. The United States has not identified any known producers who were not given a full and equal opportunity to participate, and whose responses were not considered. This is not a case where the authority knew of other domestic producers that were ignored. The known producers were those larger white feather broiler producers that had organized themselves into an association group. They all knew about the investigation and most of them responded. Thus, this case is fundamentally different from other situations, where the authority knew of other producers and even had responses from other producers, but excluded those responses from the investigation.

75. MOFCOM did not erect any obstacles, and rather took extra steps to publish the specifics of the investigation on its website. The United States confuses the important distinction between what MOFCOM did and the resulting responses by the domestic producers. If MOFCOM had an open process and uses all the responses received, MOFCOM cannot be faulted, particularly when MOFCOM in fact obtained responses representing more than half of estimated total domestic production. The MOFCOM notice applied to all “interested parties” not just to “respondents.” Chinese domestic producers knew that they were “interested parties.” The U.S. argument boils down to the claim MOFCOM should have done more. But in the absence of other known producers who could be notified about the investigation, it is not at all clear what the United States expects MOFCOM to have done.

76. Since there were no obstacles, the United States tries to create a theory of distorting self-selection that has no factual basis. The U.S. theory that those domestic producers with stronger financial performance would not respond is just wrong. Of the five CAAA members that did not respond, three of them were Tyson affiliated joint ventures. If their participation in the investigation would have helped the respondents because they were more profitable, the more logical inference is that they would have participated to benefit their joint venture partners. Of the fifteen responding CAAA members, several of them were in fact profitable in various years of the period of investigation. Of the seventeen responding domestic producers, eight companies were profitable in 2007, one company was profitable in 2008 and a different company was profitable in the first half of 2009. Under the U.S. theory of self-selection, these profitable companies should not have responded; but they did respond.

77. The United States also continues to claim MOFCOM set up “obstacles to make it infeasible” to respond, even though two companies not members of CAAA were able to respond. The U.S. speculation that these companies received questionnaires from petitioners has no factual basis. The information was all available on the MOFCOM website, and it is more plausible that these companies obtained the questionnaire from the website. The point is not the size of these two companies, but rather what their participation confirms about the process. The process was not limited to petitioners and companies that were not petitioners did in fact participate. Their responses were used, and were not excluded.

78. The United States also ignores the highly fragmented nature of the Chinese white feather broiler industry, and misstates the nature of the information available. The United States attacks the Ministry of Agriculture statistical information, but presents an unpersuasive argument that ignores the reality that much of the chicken production in China occurs on small family farms. It does not “defy logic” that there are a lot of small family farmers in China who are not specialized producers of poultry. Much of the national production has been consolidated into a few very large domestic producers. In addition, the fragmentation applies to both segments of the Chinese chicken industry. The CAAA members were the largest producers of white feather broiler chickens, and accounted for about half of total domestic production of that product. But it would still take tens of thousands – perhaps millions -- of other producers to account for the other half of the white feather production.

17. Although MOFCOM did not explicitly discuss the fragmentation of the domestic industry in its Final Determination, MOFCOM's consideration of the fragmented nature of the industry can be found in record evidence. The Ministry of Agriculture was part of the investigation team, which means that Ministry of Agriculture statistics and the knowledge of those statistics was part of the overall deliberations by the team. Moreover, in the Exhibit 6 of the Petition, the consultant who estimated the overall size of the domestic industry specifically noted the evolution from 12 enterprises at the great-grandparent stage leading to thousands of individual enterprises at the parent generation. Going an additional generation (from parents to the current generation of producers) would turn thousands into millions. Even if one simply took note of the specific statement that there were “thousands of parent production enterprises” that fact alone establishes the highly fragmented nature of the domestic white feather broiler industry in China. The fragmentation of the domestic industry was thus part of the known factual background against which MOFCOM considered the domestic industry and framed the investigation.

79. Contrary to the U.S. argument, there was no data or contact information for specific domestic producers. Rather, the tracking being done by the consultant and by the Ministry of Agriculture was done based on statistical models, not based on individual company responses or tracking. The United States tries to imply that ten years ago a few breeder pairs arrived and those specific companies have been tracked ever since, but this argument misstates reality. The white feather chicken industry in China started about thirty years ago, and the tracking has been by statistical models of growth in the aggregate, not the individual domestic producers. Moreover, the forms received by the Ministry of Agriculture do not have any company specific data. Contrary to the U.S. argument, there was no list of even the 147 largest domestic producers. White feather broiler chicken production by these other companies not part of the CAAA group was in fact very small relative to the total industry production. The United States has not provided any evidence of known companies who did not know about the case or whose response was excluded from consideration. Bald speculation that MOFCOM could have done more does not sufficient.

27. At most, the United States has identified a single additional company – Fujian Summer -- that could have been contacted. Fujian Summer was not a member of CAAA either before or at the time of filing of the petition. Yet even though Fujian Summer was not explicitly contacted by MOFCOM, China has provided to the Panel definitive evidence that Fujian Summer was aware of the case, but nevertheless did not register and did not submit a questionnaire response. Under these facts, MOFCOM not providing a questionnaire to a company that had actual notice of the pending investigation and declined to participate does not violate any WTO obligations. The United States concedes there is no WTO obligation to compel unwilling producers to respond. Fujian Summer was such an unwilling producer.

### **1. Articles 3.1 and 15.1**

80. The United States fundamentally misinterprets Articles 3.1 and 15.1 and the Appellate Body decision in *EC-Fasteners*. MOFCOM did not “define” the industry as those willing to participate in a sample. Rather, MOFCOM initially considered the industry as all producers, and then proceeded with a reasonable and neutral effort to collect responses from as many as possible. The U.S. claim that MOFCOM “effectively limited its definition” glosses over a key factual distinction, because MOFCOM did not limit its definition in any way. The United States confuses what MOFCOM did with what responses naturally occurred. MOFCOM also did not exclude any responses. In *EC-Fasteners*, the Appellate Body was particularly troubled that the EC had contact information for 318 producers, and partial responses from them, but then ignored most of those known

companies. These facts could not be more different from the current case, where the United States keeps insisting MOFCOM should do more to contact unknown producers.

81. The United States concedes the Agreements provide no specific steps that MOFCOM had to take, and essentially argues that MOFCOM had some obligation to somehow contact unknown producers, even though MOFCOM already had received information constituting a “major proportion” of the industry. Nothing in the text imposes such an obligation. MOFCOM had no obligation to do the impossible or impractical, and needed only to conduct an “objective examination,” which MOFCOM did in this case.

82. MOFCOM in fact took actions largely consistent with each of the actions suggested by Mexico, to the extent they were relevant in this particular case. MOFCOM in fact worked with the Ministry of Agriculture to ensure there was no other available information on the identity of other domestic producers. MOFCOM was working with the national level officers at the Ministry of Agriculture. MOFCOM checked with the Ministry of Agriculture and confirmed that there are no lists of white feather broiler producers at either the national level or the provincial level; that is not the way the Ministry of Agriculture tracks its statistical information. MOFCOM also worked with the CAAA, the producers association responsible for white feather broiler chicken producers in China. MOFCOM knew that this association would include all or at least most of the major producers in China, and would thus allow MOFCOM to reach a broad and representative group of domestic producers. CAAA is the only such association, and there are no other producer associations of the subject merchandise. MOFCOM is not aware of any programmes that provide such subsidy benefits to Chinese domestic producers of broiler chickens, as opposed to general support for all agriculture generally.

## **2. Articles 4.1 and 16.1**

83. MOFCOM also fully complied with the obligations of Articles 4.1 and 16.1 by defining the domestic industry as those producers representing the “major proportion” of the Chinese domestic industry.

84. The United States argues for a preference first to consider the industry as a “whole,” but neither the text nor the context reflects such preference over defining the industry as the “major proportion.” Rather the text presents two alternatives separated by “or” without any preferences. Particularly when contrasted with other provisions that set forth a very explicitly preference for one approach over another, the texts of Articles 4.1 and 16.1 do not provide any preferences. The exceptions set forth in Articles 4.1 and 16.1 apply to either method for defining the domestic industry and do not indicate any preference.

85. The United States also argues Articles 4.1 and 16.1 impose a positive obligation to make “active efforts” that does not exist. The text creates no such obligation. Rather, the text explicitly references only certain other obligations in Articles 3 and 15, strongly suggesting that the other obligations not referenced should not be read into Articles 4.1 and 16.1. The United States draws a false analogy to *U.S. - Wheat Gluten* that addressed a specific issue relating to safeguards. The United States ignores the more relevant guidance of *Mexico – Beef and Rice* that rejected U.S. efforts to read the word “investigation” to create obligations regarding things an authority should have known, but did not actually know.

86. Any such violation would have to depend on the facts of a particular situation. There is no *per se* rule that if a complaining party identifies some possible action that could have been taken, the defending party has violated its WTO obligations because something that could have been done was not done. In China’s view, one must consider both the nature of the proposed action, and the likelihood it would have generated some material information.

87. An authority need not take every possible action, since authorities have discretion as to how they shape their investigations. In this investigation, MOFCOM faced a highly fragmented industry. There was no “master list” of domestic producers. China repeatedly confirmed that no such list existed and the United States provided no evidence of such a list. Under such circumstances, once MOFCOM had worked with the industry association to reach out to known producers, and once MOFCOM had collected questionnaire response representing a “major proportion” of the domestic industry, the lack of action to attempt to find additional domestic producers is not WTO inconsistent.

88. In addition, since some actions are unlikely to yield any material information, authorities must have discretion to determine how best to allocate the finite resources available for each investigation. In this particular case, with MOFCOM having received responses from all the largest producers and having received responses from enough domestic producers to constitute a major proportion of the domestic industry, additional responses are likely to have been from smaller producers and are therefore unlikely to have materially affected the analysis. These circumstances provide yet another reason that the lack of action attempting to find other producers – assuming they could have been found at all – is not inconsistent with WTO obligations.

89. Moreover, even if there were some textual preference, it is not clear what that preference would establish for purposes of this particular case. MOFCOM did not choose a “major proportion” over the industry as whole, nor did MOFCOM ignore any available data. MOFCOM used all the data it had, and those responses collectively constituted a “major proportion.” Once it properly found the responding producers represented a “major proportion,” MOFCOM complied with the obligations of Articles 4.1 and 16.1.

## **B. Price Effects**

90. China has also shown that MOFCOM reasonably determined the existence of adverse price effects in this case, based on both price undercutting and price suppression. The United States and China have fundamental disagreements over both the facts of this particular case, and the nature of the WTO obligations regarding price effects. The United States hopes its aggressive legal interpretation that imposes specific methodologies will somehow trump the factual deficiencies of its claim, for otherwise the U.S. claim fails.

### **1. Price Undercutting**

91. MOFCOM properly found price undercutting, comparing average prices for the broiler products as a whole and comparing those prices at the same level of trade – landed, duty-paid prices in China. MOFCOM considered the products as a whole because all broiler chicken parts were part of the same like product, and all types of broiler chicken parts competed with each other. U.S. exports of chicken paws competed directly with Chinese produced chicken paws, but they also competed with other Chinese produced broiler chicken parts. MOFCOM specifically found that prices of imported and domestically sold chicken parts were “comparable.” MOFCOM compared domestic ex factory prices with imported CIF prices because that comparison was at the same level of trade.

#### **(a) Product Mix**

92. The U.S. claim about price effects rests in part on flawed assumptions about product mix, assuming that chicken breast prices were higher than other chicken part prices and that chicken paws were low value products. The United States assumes without any evidence that the prices of certain parts -- particularly chicken breasts not exported to China by the United States, but prevalent in the Chinese domestic market -- were higher and distorted the comparison with the allegedly “low value” parts exported by the United States. But these U.S. assumptions are totally at odds with all of the available information and evidence to the contrary.

93. China presented to the Panel extensive record evidence on this point. (1) questionnaire data submitted by the USAPEEC that contradicted U.S. arguments about the relative prices of different types of broiler chicken parts; (2) official Chinese import statistics showing the relative prices of different products; and (3) numerous invoices for actual transactions by various domestic producers. All of this record evidence confirmed and provided mutually reinforcing evidence for a proposition that would be common sense for anyone in China – that chicken paws are more expensive than chicken breast. Thus contrary to the unsupported U.S. assertion in this Panel proceeding, the record evidence on the relative prices of different chicken parts is that chicken breast prices in China were lower than other products, so including these prices in the average domestic price significantly understated the actual margins of price undercutting.

94. The United States tries to dismiss China’s rebuttal, by calling the rebuttal *post hoc*, but these arguments misunderstand China’s point. MOFCOM specifically rejected the respondents’ argument that import prices were low by finding that the import prices were comparable. Moreover, MOFCOM’s methodology was neutral on its face; there is nothing inherently wrong in

using overall average prices. The United States has the burden of showing not just that there was price variation, but that there were some adverse distortions from that price variation. The United States does not win its claim simply by showing that the prices of different products varied. The prices must vary by enough and must be adverse to the respondents' interests here. The United States recognizes this burden, and that is why the United States presented its "chicken breast prices are higher" argument in its First Written Submission. China's arguments have been to rebut the U.S. argument that there was any adverse distortion here. There is nothing *post hoc* about rebutting the factual basis presented by the United States as the basis of its claim.

95. The United States asserts the products exported to China were "the lowest value chicken parts," even though the record evidence does not support that assertion at all. China has shown that the actual data submitted by respondents during the investigation did not support these sweeping claims that exports to China were of "low value products." Moreover, China has also shown that the record evidence about prices in the Chinese market completely refutes the U.S. argument that including chicken breasts in the overall average created any adverse distortion. In fact, China has shown that comparing the prices of specific products – wings, claws, and legs – that represent about 80 percent of U.S. exports to China would show consistently higher margins of underselling than MOFCOM found. In particular, we note that the margins of underselling for imported chicken paws compared to domestic chicken paws were consistently higher – more than three times higher -- than the underselling margins MOFCOM found. The premise that U.S. exports to China were low value and that low value creating underselling margins is just wrong. The MOFCOM approach was not adverse to respondents; it was a conservative methodology that actually favored respondents.

96. The United States misreads the Panel and Appellate Body guidance in *China-GOES*. Those decisions were made based on the specific factual evidence in that dispute, and the belief that China had not sufficiently addressed and rebutted before the Panel the factual basis of the U.S. claim in that dispute. Here, China has fully rebutted the U.S. factual claim that there were any differences in product mix that were adverse to U.S. respondents. The very weak factual basis presented by the respondents' data has been fully rebutted. China does not see how a conservative methodology that understated the margins of underselling provides any factual basis for the U.S. claim that MOFCOM was not "objective" in its analysis.

97. The United States dismisses China's use of record evidence about the relative prices of different chicken parts. These invoices were not "hand-picked" or in any way collected to address this specific U.S. argument – which had not yet been made. Rather, this evidence on MOFCOM's record provides a broad sampling of chicken prices in the Chinese market that allows one to test the factual premise of the U.S. claim. The evidence confirms that the factual premise of the U.S. claim is wrong, but also that MOFCOM's methodology was not in any way adverse. MOFCOM's methodology understated the margins of underselling.

98. In addition, we note the following about these invoices. First, the invoices were collected randomly during the verifications of the three domestic producers before the preliminary determination. In other words, the invoices were not "hand picked", but rather were collected in the ordinary course of the verification. Second, the 63 invoices were broadly representative, since they cover the different years of the period of investigation and were issued to 28 different customers. Third, the individual invoice prices are internally consistent, confirming that these samples are representative rather than outliers. Finally, the prices on these invoices can be crossed checked with prices reported in the import data. Though there were no imports of chicken breasts, the prices of imports of wings, paws, leg quarters, and offal show a relative ranking of prices that is consistent with the invoices for domestic prices of the same products. For all of these reasons, this record evidence is reliable and representative.

(b) Level of Trade

99. MOFCOM reasonably compared prices at comparable levels of trade. Domestic prices were ex factory prices – the prices paid by customers in China, without any expenses included. Import prices were CIF duty-paid prices – again, the prices paid by customers in China, without any expenses included. On both sides, the customers were mostly distributors – companies that were buying chicken parts, either from domestic suppliers or from U.S. exporters, and then reselling them. The U.S. producers never argued to the contrary. They never argued to IBII that the level of trade needed to be taken into account.



100. The U.S. claim rests on flawed assumptions about the underlying facts about the customers in China. The United States asserts without any evidence that “as a general commercial matter “CIF import prices are at a different level of trade than domestic producer sales to first arms-length customers.” This argument, however, assumes that most U.S. exports go to importers that are not themselves distributors of chicken parts, and that those importers always resell at higher prices that earn them a profit. Neither of these assumptions has any factual basis. Rather, the U.S. argument rests entirely on unsupported factual assertions that the prices being compared were at different levels of trade.

101. The United States assumes without any evidence that U.S. exports were first imported by companies that were not themselves distributors and that had to be resold to another company that was the distributor. In fact, the record showed both domestic shipments and U.S. imports were going to a similar mix of customers, with roughly 80 percent of the volume going to customers who were distributors – someone reselling the merchandise. This argument is not a *post hoc* rationalization. Rather, it is showing how the factual assertion by the United States not only is a bald factual assertion without any supporting evidence, but also is actually contradicted by the record evidence before MOFCOM.

102. Moreover, the U.S. assumption of a positive importer mark-up is directly contradicted by a U.S. Government report showing that importers of U.S. chicken parts were reselling at a loss. The United States tries to ignore this inconvenient fact, arguing MOFCOM still had to compare prices at the same level of trade. Yet the U.S. argument is that the price paid by importers cannot be used because of the importers’ mark-up, an assertion without any factual basis that is contradicted by evidence China has presented the Panel. The U.S. claim depends critically on this assumption about mark-up, but there is no factual basis for this assumption.

103. China notes that this issue arose very late in the investigation. This issue had not been raised by any of the U.S. respondents during the investigation. From the initiation in September 2009, through the questionnaire responses and verification, through the arguments before and the Preliminary Determination itself in February 2010, no U.S. responding party raised this issue. The issue of the level of trade arose for the first time on 20 July 2010, when the U.S. Government raised this issue in a meeting with MOFCOM, and then summarized its comment in written notes filed after the meeting.

104. Even though the U.S. argument about level of trade was raised very late, MOFCOM had in fact addressed this issue of sales channels early as part of its determination of “like product.” MOFCOM explained regarding “sales channels and customer groups” that: “The white-feather broiler products produced domestically and the product concerned were identical or overlapped in terms of sales channels, areas of sales, and that certain of the customer groups of the two products were also overlapping.” Virtually the same discussion was included in the Preliminary Determination, long before the U.S. Government raised its concern about level of trade.

105. This qualitative statement about overlap can be confirmed with the record evidence. China arrived at an estimate by comparing the largest customers reported for the period of investigation by domestic producers and exporters. The total volume by those domestic producer customer that appeared to be resellers was 1.04 million MT. The total volume for all reported customers was 1.29 million MT. The ratio is 80.2 percent. The same proportion occurred with U.S. exporters. This calculation of the 80% thus quantifies a more general qualitative finding that MOFCOM had already made, back at the time of preliminary determination.

106. Having already found as a factual matter that sales channels “were identical or overlapped” and that the Chinese customers were considering domestic and imported product at “the same time,” and thus “were competing with each other” in these sales channels, MOFCOM then summarized and addressed the specific U.S. comment about levels of trade in its Final Determination. MOFCOM presented its response that: (1) MOFCOM had “taken into consideration” the possible difference between the “sales levels” of the domestic and import prices being compared, (2) MOFCOM had already adjusted the import price to the level reflected in the landed (duty-paid) price reported in the Chinese Customs statistics, and (3) none of the interested parties had raised any issues about the adjusted import price and underselling margins that had been calculated and announced in the preliminary determination back on 5 February 2010. Under these circumstances, MOFCOM made no further adjustments.

107. Beyond the discussion as part of the like product determination, the issue is not otherwise discussed on the record, because of the extreme late date on which the specific issue was first raised. Although MOFCOM's factual findings about the "identical" or "overlapping" sales channels and MOFCOM methodology for comparing domestic and import prices was disclosed as early as 5 February 2010 in the preliminary determination, the specific U.S. complaint about levels of trade was not raised for more than six months on 20 July 2010. This comment was raised about a month before the CVD Final Determination on 29 August 2010, which presented the injury analysis that was then repeated a month later on 26 September 2010 in the AD Final Determination. A comment raised for the first time a month before an authority issues its Final Determination cannot be expected to trigger much in the way of additional consideration before what MOFCOM had done here – acknowledge the issue, and explain its position with regard to the issue.

(c) Implications of U.S. Arguments

108. The factual errors of the U.S. claim can be seen most clearly by considering the alternative methodologies the United States has proposed, which show higher margins of underselling than MOFCOM found in its Final Determination. The available evidence suggests that taking into account resale prices by importers would have increased the underselling margins in 2008 by 20 percentage points or more. The available evidence suggests that taking into product mix into account – and focusing on the competition for wings, claws and legs in the Chinese market -- would have increased the underselling margins by 20 to 30 percentage points or more in virtually every period of comparison. Conservative methodologies that understate the margins of underselling fully meet the obligation of "objective examination," and otherwise comply with Articles 3.2 and 15.2.

109. The U.S. argument reveals the extent to which the United States is seeking to impose a specific methodology regardless of the facts. The United States goes so far as to argue that even if some importers were in fact themselves distributors in China, if any of the importers were not distributors the prices to those importers could not be used. The U.S. argument is basically that MOFCOM had to use resale prices charged by the importers, and could never use the prices paid by those importers. This desire to impose a specific methodology can also be seen in the U.S. insistence that MOFCOM had to collect questionnaire responses from importers, and complaining that MOFCOM did not do enough to collect such responses. But this U.S. argument assumes MOFCOM was under some obligation to collect importer questionnaire responses, and did not have the discretion to make decisions about how to collect data for the investigation. Nothing in the Agreements requires this specific methodology, and the United States has not provided the factual basis to justify requiring that methodology in this case.

110. Given the absence of any specific rules in Articles 3.2 and 15.2, it is not surprising that different WTO members use different methodologies. China understands that Canada uses an approach similar to the United States, looking at resale prices charged by importers. But China also understands that Pakistan and Colombia use approaches similar to China, looking at CIF prices from import statistics. Authorities may ask about importer resale prices in importer questionnaire responses, but in many countries such responses are not routinely submitted in sufficient quantities to be a reliable basis for determinations. Neither approach is inherently right or wrong. Either approach is facially neutral, unless shown to be problem in a specific case based on specific facts.

111. In China's view, these facts and the diversity of WTO member practices confirm that MOFCOM's use of its facially neutral methodologies in this particular case was "objective examination" based on "positive evidence." The United States has not established a *prima facie* case that these neutral methodologies made an affirmative determination more likely, and so the U.S. claim must fail.

112. Beyond these misunderstandings of the facts, the United States also incorrectly reads Articles 3 and 15 as always requiring the authority to consider price comparability, and in particular the issues of (1) levels of trade and (2) product mix. China agrees that such an obligation may arise, but it only arises based on the facts and circumstances of a particular case. In other words, when an authority has existing policies that are neutral on their face, as MOFCOM does here, the obligation to go beyond those existing policies arises only from the facts and circumstances of each individual case. The U.S. effort to use "objective examination" to impose specific methodologies on authorities in every case goes well beyond the text of the Agreements.

In this case, the United States has not met its factual burden of demonstrating a need to take into account either level of trade or product mix.

## 2. Price Suppression

113. The United States argues that MOFCOM's finding of price suppression rested entirely on its findings of price undercutting. Since MOFCOM's findings of price undercutting were completely proper, there is no error in noting the connection between the price undercutting and the price suppression in this case. But even if the Panel were to take issue with MOFCOM's findings of price undercutting, China notes that price suppression can exist independently of any price undercutting. The United States has conceded this point, and the Appellate Body recently confirmed this point.

114. Besides discussing price undercutting, MOFCOM also relied on volume effects and market share effects, and specifically described the price suppression finding as an alternative finding. In other words, MOFCOM's Final Determination in fact explained how subject imports had "explanatory force" with regard to the suppression of domestic prices through the adverse volume effects. At the end of its discussion of subject import volume (section V(I)) and subject import prices and domestic prices (section V(II)), MOFCOM inserted a summary paragraph that addressed both subject import volume and subject import price. This concluding paragraph discussed both volume and price, and so integrated both of these issues. In this summing up its conclusions about the effects of subject imports, MOFCOM noted that the "continuous expansion of the market share" and the "large quantity" of dumped/subsidized subject imports in the Chinese market had two effects: (1) they undercut domestic prices, but they also (2) led to a "decrease of profit level," and thus were suppressing prices. The price undercutting was necessarily a price effect, since undercutting involves comparing two sets of prices. But the price suppression finding simply observed that in the face of the larger volume and market share of subject imports, domestic prices were suppressed and thus the domestic industry suffered lower profit levels. In this concluding paragraph, MOFCOM was thus drawing a direct connection between the volume of subjects imports and price suppression as one of the consequences of that "large quantity" of subject imports.

115. The U.S. argument to the contrary misstates the MOFCOM final determination. The title may refer to subject import prices, but the discussion in the last paragraph of this section discussed the "large quantity" of subject imports and their "continuous expansion of the market share." The fact that MOFCOM also noted the effect of price undercutting on price suppression does not mean that subject import volume and market share were not also causing price suppression. That is why MOFCOM used the phrasing "not only ... but also."

116. The United States tries to support its argument about the exclusive link between undercutting and price suppression by citing other passages in MOFCOM's determination, but these U.S. citations simply highlight two very misleading translation mistakes.

117. The first translation mistake is subtle, but important. The U.S. translation reads: the "lower price of the Subject Products has also suppressed sales prices of the domestic like products." China's translation reads instead: the "low-priced sales of the product concerned also suppressed the selling price of the like product." The U.S. translation's use of the phrase "lower price" implies price undercutting. In fact, the Chinese original refers to "low-price sales of the product concerned," which is a stock Chinese language phrase to refer to dumped/subsidized imports.

118. The second mistake relates to a MOFCOM discussion of pricing trends in early 2009. The U.S. translation reads: "... the price cutting of the Subject Products caused substantial suppression on the sale price of the domestic like products...." China's translation reads instead: "... the activity of price reduction of the product concerned caused apparent undercut and suppression to the price of the domestic like product...." In other words, the United States mistranslated "price reduction" as "price cutting." More seriously, while the original lists "price reduction" as the cause of both price undercutting and price suppression, the U.S. translation turns price undercutting into the cause of price suppression. This mistake may be quite convenient for the U.S. argument in this dispute, but it ignores the correct reading of the MOFCOM determination on this point.

119. Thus, contrary to the U.S. argument, MOFCOM did not point to price undercutting as the sole cause of price suppression. Rather, MOFCOM noted price undercutting and price suppression

as parallel adverse consequences caused by the increasing volume and market share of subject imports at the prices for which they were being sold in China. A proper interpretation of the MOFCOM Final Determination must take into account several points. First, the Final Determination is responding to a specific argument by the U.S. respondents about the magnitude of price decreases in the first half of 2009. The context is thus a specific price decrease and explaining the magnitude of that price decrease. Second, the phrase “affected by this” also refers to the degree to which domestic broilers and subject import competed with each other and were substitutable, and also refers to subject import market share. Third, MOFCOM stressed that the domestic industry needed to cut its own price to preserve market share. Finally, MOFCOM concluded its discussion by explaining with regard to the first half of 2009 that “the activity of price reduction” by subject imports had two effects: (1) price undercutting, and (2) price suppression. Thus, the connection is not price undercutting causing price suppression, but rather price reduction causing both undercutting and suppression.

### **C. Adverse Impact**

120. MOFCOM also properly found material injury. MOFCOM objectively examined the entire period of investigation, not ignoring the critical first half of 2009 as does the United States. MOFCOM also objectively examined all the injury factors, not ignoring the domestic industry financial performance as does the United States.

121. The United States mistakenly argues that MOFCOM's finding of injury rested on only two factors. Yet the United States continues to ignore the persistent operating losses throughout the period. The United States quotes part of the MOFCOM determination, where MOFCOM explains how notwithstanding some positive trends, the continued growth and low prices of subject imports prevented the domestic industry from effectively utilizing its new capacity, and thus contributed to the continuing operating losses. The United States highlights part of the quote, but should have stressed the key last phrase: “so profit before tax for the domestic like products remained negative during the POI.”

122. MOFCOM properly relied on the evidence of low capacity utilization. One cannot reasonably compare percentages when applied to different base amounts. Moreover, the United States makes a more fundamental error, claiming that domestic industry capacity expansion “entirely explained” the trend and capacity utilization was “not affected by subject imports.” These absolute statements are just wrong. Subject imports grew over the period, gaining about four percentage points of market share. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers, and domestic capacity utilization would have been higher. Thus, subject imports had a necessary and unavoidable effect, through their increased volume and market share. MOFCOM was fully entitled to rely upon this effect.

123. MOFCOM also properly relied on the evidence of growing end-of-period inventories. China has not conceded the inventories were not significant. Rather, China simply noted it was under no obligation to find inventories in themselves to be significant. MOFCOM properly noted that inventories were increasing. And as with capacity utilization, subject imports made the situation worse. If unfairly traded subject imports had not gained four points of market share, that volume could have been served by domestic producers and their inventory levels would have been lower.

124. MOFCOM in fact considered all the economic factors over the entire period, not just 2009. That MOFCOM focused on the end of the period does not mean MOFCOM ignored the earlier part of the period. The United States believes it can focus on the improving volume trends over the 2006 to 2008 period, and ignore the persistent operating losses over the entire period. A modest improvement in 2007 that still left the domestic industry with operating losses does not make up for cumulative operating losses over the full three year period of 2.651 billion yuan – the period of time when the subject imports increased the most.

125. MOFCOM most certainly did not ignore these huge operating losses over this period, or their pattern over time. MOFCOM focused on the impact of the subject imports on the financial performance of the domestic industry, and thus properly respected the obligations of Articles 3.4 and 15.4. MOFCOM drew this connection as part of its discussion of causal link, and then reiterated this connection between subject import volume and the financial results, and between subject imports generally and the financial results.

126. The United States improperly tries to dismiss the MOFCOM finding of future declines in the economic indicators. China agrees that the examination in Articles 3.4 and 15.4 refer to the same past imports as Articles 3.2 and 15.2. The point, however, is that even past imports can have future adverse effects. That is why Articles 3.4 and 15.4 refer to the “potential negative effects” for several of the injury indicia. A past history of increasing imports – particularly when viewed in the context of possible future increases in imports – can create the types of “potential negative effects” Articles 3.4 and 15.4 mention. An authority may properly put past imports into the context of possible future imports when assessing these past imports. For example, continued U.S. exports to China would continue to depress capacity utilization, and would continue to leave excess inventories languishing at the companies or force liquidation sales to clear inventory. These are precisely the type of future declines that the phrase “actual and potential declines” in Articles 3.4 and 15.4 contemplates.

127. MOFCOM properly relied on data for the responding domestic producers, in the context of the overall domestic industry. China disagrees with the brief and overbroad statements of the panel in *EC – Bed Linen* that would appear to limit the authority to do so. This summary statement, not reviewed by the Appellate Body, does not adequately address the text of the Agreements or the factual information being considered.

128. Regarding the text, we note three points. First, nothing in the text of Articles 4.1 or 16.1 requires a single definition of the domestic industry. Nothing in the text precludes an authority from defining the domestic industry as all producers in some respects but as a “major proportion” in other respects, depending on the issue and the available evidence. Second, the text actually contemplates using two different sets of data, since the “major proportion” in Articles 4.1 and 16.1 is determined by reference to “the total domestic production.” It is not possible to determine a “major proportion” without reference to some data beyond the subset that constitute the “major proportion.” Third, the text of Articles 3.4 and 15.4 expressly allows an authority to consider “all relevant economic factors and indices have a bearing on the state of the industry.” In other words, the analysis is not just the facts for the industry, but also the facts that might have a “bearing on the state” of that industry, however defined. This broad language can include more than just the facts narrowly defined by the responding domestic producers in a case.

129. This case provides good examples of how other information can be factually relevant. Consider apparent consumption. This economic factor is a common way to assess broad demand trends. If the authority has data on total domestic production, an authority has discretion to measure apparent domestic consumption based on either the industry as a whole, or based on the subset of total domestic production represented by the 17 responding producers. Or consider market share. If an authority exercises its discretion to define total apparent domestic consumption based on all domestic production, an authority also has discretion to report market share based on that total apparent domestic consumption. It is more accurate to say the 17 responding domestic producers have about 40% of the total market and to say that subject imports have about 10% of the total market, rather than to inflate both numbers by ignoring the domestic production of non-responding producers.

130. MOFCOM thus used the different kinds of information appropriately. The analysis of the factors under Articles 3.4 and 15.4 generally relied on the information reported by the 17 responding domestic producers. But for apparent consumption and market share, MOFCOM reasonably and properly viewed the production and shipment data for the 17 responding domestic producers in the context of the available information on the total domestic production by all domestic producers, and the total apparent consumption based on that total domestic production.

#### **D. Causation**

131. Finally, MOFCOM properly drew the causal link between the increasing subject imports and both the adverse volume and adverse price effects those subject imports had on the domestic industry. The U.S. claim concerning causation is actually quite narrow. It involves only the requirement in the second sentence of Articles 3.5 and 15.5 to find a “causal relationship,” and does not address the requirement in the third sentence to “examine any known factors other than” subject imports. The United States still has not offered any other causes as alternative explanations for why the Chinese domestic industry had operating losses in every year, and suffered declines in 2008 and even more severe declines in 2009.

## 1. Basis for Finding Causal Link

132. The United States tries to dismiss China's arguments as *post hoc*, but the United States misses the point of these arguments. China's arguments seek to rebut the arguments the United States has made in support of its claim. The United States has both mischaracterized MOFCOM's final determination, but also ignored other aspects of the factual record before MOFCOM. China can properly explain how the factual record before MOFCOM rebuts the specific factual claims the United States has now made.

133. The U.S. claim involves only three specific arguments. If those three arguments are wrong, then the United States has not established a *prima facie* case and the U.S. claim relating to causation must fail.

134. Regarding the argument about market share, the U.S. claim focused on a few facts in isolation, and simply ignored other facts. China has not presented new evidence. Rather, the United States ignored all the facts in MOFCOM's determination, in particular that subject imports gained more market share than non-subject imports. In its First Written Submission, the United States misrepresented the record, because it simply ignored the distinction between the half of the domestic industry for which MOFCOM had questionnaire responses and the other half of the domestic industry for which MOFCOM did not have questionnaire responses. That is why China pointed out the U.S. factual assertion "the entire increase in subject import market share ... came at the expense of non-subject imports" was just wrong.

135. MOFCOM's determination focused on analyzing the market share of the 17 responding domestic producers. That is the absolute level of market share MOFCOM reported in its Final Determination, and that is the basis of the market share trends that MOFCOM relied upon in its analysis. But since MOFCOM reported all market share figures relative to total apparent consumption for the entire market, those market share figures implicitly considered the non-responding domestic producers as well. When reporting the market share of the 17 responding domestic producers (averaging around 41%), the market share of subject imports (averaging around 9%), and the market share of non-subject imports (averaging around 3%), MOFCOM determined each of these segments relative to the total apparent domestic consumption, not just the consumption defined based on the reported production by the 17 responding domestic producers. That is why these market shares add up only to 53% (on average), and leaves about 47% (on average) unaccounted for. By reporting market shares of 41%, 9% and 3%, MOFCOM was also implicitly considering the remaining 47% need to reach 100% of the market.

136. The U.S. claim that MOFCOM "ignored" the evidence of the market share increases by the reporting domestic producers is also just wrong. To the contrary, MOFCOM specifically acknowledged this argument and addressed the argument, noting the domestic industry efforts to stabilize its market share when discussing volume effects, and acknowledging the increasing market share when discussing causation. MOFCOM specifically explained that even though the "market share of the like product presented an increase to certain extent in general, but this did not mean that the domestic industry did not suffer from injury." MOFCOM noted its assessment depended on all the economic factors, and stressed that even the gain in market share could not "change the worsening financial situation of the domestic industry."

137. Thus, this aspect of the U.S. claim must fail, because the U.S. assertions are flatly contradicted by the record evidence and MOFCOM's determination. Subject imports gained market share beyond that lost by non-subject imports and MOFCOM acknowledged and addressed the gain in market share by the reporting domestic producers. China's efforts to present the complete picture based on record evidence simply complements these other reasons to reject this aspect of the U.S. claim.

138. Regarding the argument about price effects, the United States repeats its claim that MOFCOM's methodology made a "finding of subject import underselling more likely." Yet China has demonstrated the opposite is true – that MOFCOM's methodology actually understated the margins of underselling. Thus, China has rebutted the essential factual premise of the U.S. claim, and thus the U.S. claim itself.

139. MOFCOM properly relied on both price effects and volume effects. These arguments are not *post hoc*, but rather reflect points made in the Final Determination. The United States argues that

MOFCOM's determination rested entirely on price undercutting, even though the Final Determination explicitly relied on a combination of factors, not just price undercutting. In particular, when discussing the volume effects, MOFCOM expressly found the increasing subject import volume at relatively low prices forced the domestic industry to cut its prices below cost to maintain market share. The fact that the domestic producers may have gained some market share over this 2006-2008 period does not mean the increasing subject import volume was causing the price suppression that MOFCOM found. Moreover, when discussing the effect of subject imports on the condition of the domestic industry, MOFCOM again found the link between the quantity and prices of subject imports to the deteriorating financial condition of the domestic industry, regardless of the market share.

140. The U.S. argument assumes that absent a loss of market share, an authority cannot find any adverse volume effects. But this argument is just wrong. Articles 3.2 and 15.2 explicitly allow the authority to find adverse volume effects based on either an increase in absolute volume or an increase in market share. An increase in subject import market share is not an indispensable requirement. Moreover, MOFCOM expressly acknowledged the increase in market share by the reporting domestic producers, but nevertheless found adverse effects from the increasing absolute volume of subject imports that forced the domestic firms to adjust prices that could not keep up with costs, and thus increased the financial losses.

141. The United States tries to obscure this essential point by arguing deceptively about changes relative to 2006 and arguing vaguely about "most other measures." Yet the operating losses in 2008 were larger than 2006, and were even worse in the first half of 2009. The United States cannot make these financial losses disappear by ignoring them. Nor are these financial losses any less injurious because the domestic industry may have had some improving indicators. Even as the domestic industry increased its production and sales, it continued to have severe financial losses, and the increasing volume of subject imports contributed meaningfully to those losses. In a growing overall market, instead of seeing their operating losses disappear, the domestic industry operating losses persisted at a high level.

142. Finally, regarding the argument about correlation over time, the United States makes several mistakes. First, the United States assumes that subject imports were not causing material injury in 2006, and that any improvement from 2006 therefore means imports were not causing injury. There is no factual basis for this assumption, and the operating losses even in 2006 support MOFCOM finding material injury for the entire period.

143. Second, the United States misconstrues MOFCOM's finding as limited to injury caused by subject imports in the first half of 2009. China addressed this period of time in its First Written Submission because the United States had completely ignored this most recent period of time. The MOFCOM Final Determination, however, makes clear that it was considering the entire period of investigation, putting all of these trends into proper context. That MOFCOM was fully considering the entire period can be seen throughout the Final Determination. First, MOFCOM systematically discussed all industry trends over the entire period, including each full year as well as the first half of 2009. Second, when summarizing these trends, MOFCOM expressly acknowledged the positive trends in some factors over the 2006 to 2008 period, and the improvement in 2007, while also noting the inability of the domestic industry to earn operating profits in any year during this period. Third, when discussing the causal link, MOFCOM also discussed the full 2006 to 2008 period. Finally, when addressing the arguments of the various parties concerning causation, MOFCOM expressly addressed this U.S. argument about the trends over the 2006 to 2008 period, and specifically addressed the 2006 to 2008 period and then the first half of 2009. It is simply disingenuous for the United States to argue that MOFCOM did not consider the full period of time.

144. Nothing in the WTO cases cited by the United States requires a different result. MOFCOM did not focus exclusively on the first six months of each year, and instead considered full year data. That situation is very different from recognizing that material injury occurring over the entire period had become worse at the end of the period. Moreover, MOFCOM did not ignore the trends earlier in the period, and expressly acknowledged them as part of showing why there was injury over the entire period that became worse at the end of the period.

145. Third, the United States also improperly dismisses the adverse financial trends, apparently considering a 4.7 percent operating loss in 2008 as somehow being a good result and the absence of any material injury caused by subject imports. The MOFCOM Final Determination, however,

makes clear that these operating losses throughout the period were in fact injurious, and the record supports that finding.

146. Fourth, the United States makes much of the import volume over the 2006 to 2008 period, but ignores the other aspects of market conditions in 2007. It is true that a large portion of the total increase in subject imports occurred in 2007. But this was a year when apparent domestic consumption improved strongly, and the margin of subject import underselling was smaller than other years. The modest improvement in financial performance in 2007 does not prove that subject imports were not causing any material injury. The domestic industry still had operating losses. Those losses were somewhat mitigated by the strong market and less severe price undercutting in 2007. The pattern over 2006, 2007, and 2008 in fact confirms that subject imports were contributing significantly to the material injury – particularly the financial losses – being suffered by the Chinese industry.

147. In sum, subject imports need not be the only cause; they need only contribute meaningfully to the adverse condition of the domestic industry. In this case, broiler products from the United States made such a contribution to the material injury, and thus met the standards of Articles 3.5 and 15.5.

## **2. Addressing Respondents' Injury Arguments**

148. Regarding the argument about non-subject imports, the MOFCOM Final Determination reasonably and repeatedly addressed this argument. MOFCOM first addressed this argument about subject imports simply substituting for non-subject imports in the general discussion of the impact of subject import volume, noting that the Agreements allow an authority to consider either absolute volume or market share. And the record evidence before MOFCOM showed that subject imports were increasing by much more than non-subject imports. Indeed, over the 2006 to 2008 period, subject imports increased by almost 200,000 MT while non-subject imports did not decrease but rather increased by about 35,000 MT. It is hard to see how increasing subject imports were replacing increasing non-subject imports. MOFCOM addressed this argument a second time, when it noted that subject imports were a growing portion of total imports, and that non-subject imports were thus not an alternative explanation of the domestic industry problems. The fact that subject imports were increasing so much more than non-subject imports does not mean subject imports were only replacing the non-subject imports.

149. Regarding the argument about chicken parts, the United States mischaracterizes the MOFCOM treatment of this issue. The United States claims MOFCOM's preliminary determination discussion of this issue was only a decision about scope that did not address respondents' argument. In fact, MOFCOM was noting that since the investigation included all chicken parts, MOFCOM was conducting its analysis based on all the products under investigation as a whole, and not separate market segments. MOFCOM specifically noted that all chicken parts were part of the same "like" product and competed with each other, even if the different parts did not have a one-to-one relationship of competition. MOFCOM did not misunderstand the respondents' argument, and MOFCOM's comment was not just about scope. MOFCOM was explaining why it rejected the proposed analysis based on different product segments. The United States also claims respondents were not asking for a market segments analysis. But by insisting that MOFCOM consider competition among different types of broiler chicken parts, respondents were in fact asking for a market segments analysis even if they did not label it as such. The United States has not made such a causation argument before the Panel – and has not established a *prima facie* case that an authority must conduct its causation analysis based on market segments, or that there was anything not objective about MOFCOM analyzing causation for broiler chicken as whole.

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**ANNEX B**WRITTEN SUBMISSIONS, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE  
THIRD PARTIES OR INTEGRATED SUMMARIES THEREOF

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**ANNEX B-1****THIRD-PARTY STATEMENT OF CHILE**

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party in this dispute, welcomes the opportunity to present its views on certain systemic aspects of this case.

2. Chile feels that this dispute covers issues of great importance for the proper application and interpretation of the Anti-Dumping and SCM Agreements, in particular as regards compliance with rules that enable the parties to be provided with the information and opportunities needed to defend their interests, a prerequisite for due process and one that is considered essential for ensuring the legitimacy of any investigation.

3. First of all, Chile considers compliance with the obligations set forth in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement, which require the authorities to inform interested parties of the essential facts forming the basis of their determinations, to be of vital importance.

4. The above-mentioned provisions are fundamental rules of due process, and compliance therewith is vital to ensuring that the parties receive the information needed to defend their interests in a focused manner. These obligations not only guarantee the parties' right to defend themselves in the proceedings, but also ensure the legitimacy of the authority's investigation and its decision.

5. In order to determine effective compliance with the rules in question, the Panel must examine the content of the information provided by the authority, so as to ensure that it is sufficient and adequate for guaranteeing the parties' right of defence. In this respect, the Panel in *EC-Salmon (Norway)* stated that the essential facts are "the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority... the essential facts to be disclosed are those 'under consideration which form the basis of the decision'".<sup>1</sup> Chile also believes that the Panel should verify when exactly this essential information was provided, making sure that the parties have had sufficient time to formulate their defence. The rule will no longer be effective if these conditions are not verified.

6. Chile also wishes to emphasize the importance of Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement, which state that the authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, where such parties indicate that such information is not susceptible of summary, a statement of the reasons why summarization is not possible must also be provided.

7. We agree with the assertions made by the United States in its first written submission to the effect that the above-mentioned rules apply to any interested party in the investigation, and therefore MOFCOM should have required the petitioners to provide non-confidential summaries in accordance with the requirements set forth in those rules. The inability to provide such a summary due to the existence of exceptional circumstances should have been explained and justified by the petitioners, and the authority should have evaluated the relevance of those justifications. In this regard, the Appellate Body in *EC-Fasteners (China)* stated that "[f]or 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

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<sup>1</sup> Panel, *EC-Salmon (Norway)*, paragraph 7.796.

potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel".<sup>2</sup>

8. The importance of compliance with the above lies in allowing the interested parties to access the information contained in non-confidential summaries, thus securing them the right to properly defend their interests and ensuring the legitimacy of the investigation process by verifying one of the basic principles of due process: the right of all parties to be heard.

9. Lastly, and without wishing to refer to whether the investigating authority properly defined the domestic industry as established in Article 4.1 of the Anti-Dumping Agreement and Article 16 of the SCM Agreement, Chile would like to suggest to the Panel that in the analysis of the companies covered by the concept of domestic industry in the present case, it take these provisions into consideration, given that this concept not only covers the Chinese companies supporting the anti-dumping and countervailing duty investigations, but also the domestic producers as a whole of the like products or those whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Once again, many thanks for this opportunity.

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<sup>2</sup> EC – Fasteners (AB), paragraph 544.

**ANNEX B-2****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY THE EUROPEAN UNION****I. PROCEDURAL CLAIMS****A. *Obligations under Article 6.2 ADA***

1. The United States complains that, pursuant to Article 6.2 *ADA*, it requested the investigating authority to provide an opportunity, in this case, for the United States to meet with those parties having adverse interests, so that opposing views might be presented and rebuttal arguments offered. The key point in China's response is the factual assertion that the investigating authority contacted the petitioners and the petitioners indicated that they would not participate in any such meeting. The European Union has not located evidence of such a contact in the documents submitted to the Panel. In the eventuality that the contact and response is not recorded in the file, or otherwise evidenced, then the key point in China's response would not appear to be supported by the evidence.

**B. *Disclosure of Data and Calculations Used to Establish Dumping Margins***

2. The European Union agrees with the United States that the calculation method employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute "essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9 *ADA*. Those calculations are both material to the authority's decision and important for the determination. It is clear that without those calculations a decision on the definitive measure could not be taken. By failing to disclose the data and calculations used to establish dumping margins, China has acted inconsistently with Article 6.9 *ADA*.

**C. *Disclosure of Essential Facts under Consideration in Calculating the "All Others" Dumping Margin***

3. China has also breached Article 6.9 *ADA*. It appears that China has also failed to disclose the methodology or identify the essential facts under consideration regarding its calculation of the "all others" dumping margin and the imposition of a residual duty at 105.4 %. A single sentence to the effect that it used the facts available and the best information available to make such determinations was insufficient to satisfy the disclosure obligations under Article 6.9 *ADA*.

**D. *Explanation of the Decision to Apply Facts Available in Calculating the "All Others" Dumping Margin***

4. The European Union agrees with the United States that a single sentence in the Final Determination, stating that MOFCOM is resorting to facts available, is not sufficient to meet the requirement of Article 12.2.2 *ADA* to give public notice of "all relevant information on matters of fact and law" and state the "reasons which have led to the imposition of final measures", and that the failure to provide more detailed explanations constitutes a breach of Article 12.2.2 *ADA*.

**E. *Non-Confidential Summaries***

5. If the non-confidential version of the petition contains data that can be regarded as a summary of the redacted confidential information, the parties under investigation should be made aware of that, so they can be reassured that they have the full picture in front of them and there is no missing information that could be useful for them to build a defensive strategy. Such awareness is necessary "to permit a reasonable understanding of the substance of the information submitted" as required by Articles 6.5.1 of the *Anti-Dumping Agreement* and 12.4.1 of the *SCM Agreement*. The investigating authorities are therefore bound to require the interested parties submitting confidential information to indicate in a clear and understandable manner where in the text of their submission the non-confidential summaries of the redacted information are to be found.

## II. ANTI-DUMPING DUTIES

### A. Article 2.2.1.1 ADA: the allocation of production costs among different broiler products: by value or by weight

6. Article 2.1 of the *Anti-Dumping Agreement* directs the investigating authority to enquire into "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The exporting country is the United States, not China. Thus, these provisions did not direct the investigating authority to enquire into the costs of production of a chicken paw wherever in the world it might be destined for consumption. Rather, they directed the investigating authority to enquire into the costs of production of a chicken paw destined for consumption in the *United States*.

7. Article 2.4 of the *Anti-Dumping Agreement* addresses the obligation to make a fair comparison. It requires that due allowance be made (by adjusting normal value or export price) for differences affecting price comparability, and includes an open list. All of the items in the list refer to the objective characteristics of the product or the transaction. Although the list is open, the examples expressly included in the list give guidance as to the types of things that might justify an adjustment, even if they are not expressly included in the list. Since all the expressly included items are objective, that suggests that other types of adjustment, not expressly listed, would also be objective in nature. The notion of consumer preference is not objective. It refers to the gratification of the consumer. This cannot be objectively assessed. It is not therefore a suitable basis on which to make an adjustment that would tend to increase or create a margin of dumping, any more than it would be to decrease or eliminate a margin of dumping. If, for reasons of consumer preference, a particular item is characterised in the home market as a "by-product" having a relatively lower value, but in the export market as a product having a relatively higher value, this fact does not in itself lead to the conclusion that the data do not permit a proper comparison, or that an adjustment should be made.

8. This conclusion does not change in circumstances where the product (such as a chicken paw) is initially joined with some other product (such as a chicken breast) as part of a whole, such that the only possible approach with respect to production costs prior to separation is allocation. If the facts indicate that the value in the home market is not distorted, for example by government regulation or subsidies, then value may be a reasonable basis on which to allocate such pre-separation costs. If the value in the home market is very low, or zero, then it may be reasonable to allocate very low, or zero, production costs to the chicken paw.

9. This may not be a burden of proof issue, because the facts appear to be reasonably well known and not controversial. Rather, the question is whether the accounts reasonably reflect the costs of production. This is more a matter of explanation, that is, the interpretation and application of the *Anti-Dumping Agreement*. The European Union would expect such explanation to be forthcoming, in the first place, from the exporter providing access to the accounting records. One would thus expect it to be in the file. If the investigating authority would decide to reject such explanation, in favour of a different explanation, then one would expect such different explanation to be set out in the measure at issue, or in the underlying documents, or at least to be otherwise apparent from the file. The task of the complaining Member in DSU litigation would then be to explain why the original explanation is reasonable, and the different explanation advanced by the investigating authority is not reasonable. The task of the defending Member would be to explain why the explanation advanced by the complaining Member is not reasonable, and why the different explanation preferred by the investigating authority is reasonable. The Panel then has to decide. Normally, the two explanations will not be equally reasonable, because as the parties are pressed, it will become apparent that one explanation can be sustained on the basis of rational considerations, whilst the other cannot. If, however, the two explanations (that is, interpretations and applications) remain in equipoise, then, in accordance with Article 17.6(ii) of the *Anti-Dumping Agreement* and the case law interpreting that provision, the Panel should find the measure to be in conformity with the *Anti-Dumping Agreement*. No DSB report has ever found this to be the case and it is possible that such a conclusion may never be sustained. In light of the above explanations, the European Union would be surprised if this would be such a case, because the different explanation elaborated by China is obviously irrational.

*B. "All Others" dumping margin: all interested parties ... shall be given notice (Articles 6.1 and 6.8 and Annex II ADA)*

10. The European Union notes that in this case it is possible that the US claim does not raise the general question of how investigating authorities can give notice to producers that exist but are not known and do not make themselves known. Rather, it is possible that in this case the US claim is limited to the narrower proposition that the steps taken by the investigating authority in this case, and particularly the period of 20 days, whilst constituting "notice", nevertheless did not constitute "sufficient" notice. The European Union would therefore suggest that the Panel focus on this question, which appears to be the point that is in dispute between the Parties. The question of whether "sufficient" notice has been given would appear to be one that is largely dependent on all the facts and circumstances surrounding the particular case, and therefore one on which the European Union does not further comment in this Third Party Written Submission.

### III. COUNTERVAILING DUTIES

*A. "All Others" subsidy rate: all interested parties ... shall be given notice (Articles 12.1 and 12.7 of the SCM Agreement), be informed of the essential facts (Article 12.8 of the SCM Agreement) and there shall be an explanation of the determination (Articles 22.3, 22.4 and 22.5 of the SCM Agreement)*

11. With respect to the requirement to give notice the European Union notes the differences in the wording of Article 6.1 *ADA* and Article 12.1 of the *SCM Agreement*, as well as in the substance of the two agreements. Thus, although under the *Anti-Dumping Agreement*, a Member might not necessarily know the names and addresses of firms producing on its territory and exporting to the investigating Member, and that may, or may not, be engaged in dumping, the situation is not necessarily identical under the *SCM Agreement*. On the contrary, in the case of subsidies taking the shape of direct transfer of public funds or, as in this case, of preferential terms of sale offered by the central government, one might have thought that, in order for a subsidy to be granted, and eventually paid, it might generally be necessary, if only from a practical point of view, for the granting Member to have the name and address of the recipient. In these circumstances, the Panel may wish to consider, on the basis of the particular facts of the case before it, whether or not notice to the interested Member at least under the *SCM Agreement* might serve as adequate notice to interested parties that exist, but that are not known to the investigating authority, and that do not make themselves known. Therefore the European Union would suggest that the Panel should approach with caution the proposition that the Appellate Body's findings on this point in *Mexico – Beef and Rice*, which relate to the *ADA*, can be automatically transposed to the context of the *SCM Agreement*, without taking into account the particularities of the *SCM Agreement*.

12. The United States further claims that the measure at issue is inconsistent with (1) Article 12.8 of the *SCM Agreement* because the investigating authority failed to inform all interested parties, including the government of the United States, of the essential facts under consideration which form the basis for the decision, particularly with respect to the "all others" subsidy rate; and (b) Articles 22.3, 22.4 and 22.5 of the *SCM Agreement* because the investigating authority failed to explain its determination, also particularly with respect to the "all others" subsidy rate. Given the apparent absence of any meaningful disclosure, the European Union agrees with the both of these claims and arguments of the United States.

*B. Allocation of Subsidies in Relation to Subject Products*

13. The European Union agrees with the US that in calculating the subsidisation per unit ratio under Article 19.4 of the *SCM Agreement*, there should be a parallelism between the numerator and the denominator, in the sense that they should either reflect the full amount of the subsidy in the numerator and the total sales of all products benefiting from it, in the denominator (Option 1) or, alternatively, be confined to the part of the subsidy benefiting the subject merchandise, in the numerator, and to the sales of the subject merchandise only, in the denominator (Option 2). These alternative methods are the most appropriate and it appears from the file that the data available allowed for each of them to be applied in this case. Other methods, even if they are less precise, would also be legitimate to the extent that they can ensure that the resulting figures do not exceed the ceiling fixed in Article 19.4 of the *SCM Agreement*. However, the method chosen by China, which is based on the unreasonable assumption that the full amount of the subsidy was

allocated to benefit the subject merchandise, has inflated the subsidisation per unit ratio and led to the imposition of countervailing duties that were certain to exceed the actual level of subsidisation.

#### **IV. CONCERNING MOFCOM'S INJURY DETERMINATIONS**

##### *A. Price Effects Analysis*

14. In order to ensure compliance with Article 3.1 *ADA* and Article 15.1 of the *SCM Agreement*, whenever a price effects analysis resorts to a direct price comparison between domestic and imported goods, such comparison must necessarily take into account the possible discrepancies between the prices compared in terms of product mix and level of trade. Based on the specific facts of the case before it, the investigating authority has to determine if such discrepancies have an actual impact on the comparability of prices, and if so, it must satisfy itself that the prices compared correspond to a comparable product mix and to the same level of trade, or alternatively, that appropriate adjustments are made to take into account the differences in product mix or level of trade.

15. Product mix may have an impact on price comparability where, due to varying production costs or consumer preferences, one product mix is objectively valued higher than another so that a direct comparison between the two turns out to be inappropriate.

16. The level of trade has such an impact to the extent that the transition of the product concerned from one level of trade to the other adds new costs, which are reflected in the prices charged for that product further down the distribution chain.

##### *B. Impact Analysis*

17. Article 3.4 *ADA* contains a mandatory – rather than illustrative – list of fifteen factors which must always be evaluated by the investigating authorities in every investigation. At the same time, "all relevant factors" may include, in a given case, factors in addition to those listed in Article 3.4 *ADA*. An overall evaluation (rather than a simple data gathering) of all factors in the appropriate context is particularly necessary in cases where several factors show positive trends. Such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured.

18. Therefore, if as it appears, MOFCOM's finding of adverse impact of the dumped imports was based predominantly on the assessment of two of the injury factors and made without engaging into an in-depth analysis of the particular relevance and relative weight of all relevant factors, and without an overall assessment of the existing trends, the European Union is of the opinion that the impact analysis is flawed and Articles 3.1 and 3.4 *ADA* and 15.1 and 15.4 of the *SCM Agreement* are breached.

##### *C. Causation Analysis*

19. Causation is a necessary element not only of the overall injury analysis under Articles 3.5 *ADA* and 15.5 of the *SCM Agreement* but also of the price effects analysis under Articles 3.2 *ADA* and 15.2 of the *SCM Agreement* and of the impact analysis under Articles 3.4 *ADA* and 15.4 of the *SCM Agreement*, with the only nuance that the latter two do not require a non-attribution analysis.

20. So far as the non-attribution analysis in this case is concerned, this is a rather fact-intensive discussion, in which the European Union prefers not to take a definitive position. It deems, however, appropriate to point out that, although the evolution of sales volumes and market shares, as presented by the US, seems sufficient to make a *prima facie* case that the US imports did not increase at the expense of the domestic industry (whose sales and market share also grew during the same period) but rather at the expense of third country imports (whose volume and market share declined), it is not sufficient in itself to justify a definitive conclusion to that effect. It could be, for example, that apart from eroding the volume and share of third-country imports, US imports have also had the effect of preventing domestic product sales from increasing at an even higher scale. Whether or not this was the case indeed, is a point of fact that the investigating

authority has the burden of verifying. It appears however, that MOFCOM has failed to discharge this burden and link the increase in US imports to any material injury suffered by the domestic industry.



**ANNEX B-3****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY JAPAN****A. Disclosure of the Essential Facts Before the Final Determination Under Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement**

1. As the preceding panels clarified<sup>1</sup>, Articles 6.9 of the *AD Agreement* and 12.8 of the *SCM Agreement* oblige the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis and the final findings and conclusion on the existence of dumping or subsidization, injury, and causation. And such disclosure must be sufficient enough for interested parties to defend their interests.

2. The fact-finding processes for the normal value, the export price, and adjustments are all indispensable for the final fact-findings of dumping. Accordingly, the authorities must disclose at a minimum the actual process of fact-findings of the normal value and export price and adjustments thereto to the exporter which submitted the relevant raw data.

3. When the authorities decide to apply the facts available in the calculation of the dumping margin for "all others", they are required to disclose such facts available in accordance with Article 6.9 of the *AD Agreement*. Furthermore, Article 6.9 of the *AD Agreement* requires the authorities to disclose to interested parties the body of facts, on which the authorities found that the interested party *did not* provide necessary information.

4. The United States alleges that MOFCOM failed to disclose the facts necessary to calculate a 30.3 percent subsidy rate applicable to un-examined producers. The authorities must disclose the body of facts, on which they found the financial contribution, benefit, and specificity, including the "facts available" used, and the calculation of per-unit *ad valorem* subsidy rate. A failure to disclose these facts is inconsistent with Article 12.8 of the *SCM Agreement*.

5. Furthermore, the process of the application of the below-cost test including the actual sales prices and their actual costs are also facts necessary for the authority to find the normal value and indispensable elements of the determination of dumping and the calculation of the dumping margin. As such, they "form the basis for the decision whether to apply definitive measures." Thus, in accordance with Article 6.9, the authority is required to inform interested parties of these facts.

**B. Preparation of Non-Confidential Summaries under Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement**

6. Pursuant to Article 6.5.1 of the *AD Agreement* and Article 12.4.1 of the *SCM Agreement*, when an application does not contain a non-confidential summary of confidential information, the authorities are obliged to scrutinize whether the applicant's statement established the exceptional circumstances specific to the particular information. If the authorities accept an application containing neither a non-confidential summary nor statements establishing exceptional circumstances, the authorities would act inconsistently with these provisions.

7. The Panel should review carefully whether the application adequately provided a non-confidential summary in accordance with the disciplines in the *AD Agreement* and the *SCM Agreement*. If not, the Panel should review whether or not the MOFCOM accepted the application upon confirming that the applicant's statement appropriately explained the reasons why particular pieces of confidential information are not susceptible of summary in light of particular circumstances of the information.

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<sup>1</sup> Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179 para. 7.110 and 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 para. 7.407.

**C. The Determination of the All Others Rates**

8. As the panel in *China – GOES* stated, Article 6.1 and paragraph 1 of Annex II of the *AD Agreement* clarify that the authorities must notify the exporter or foreign producer of the specific information which the authorities require from the exporter or foreign producer. Only when such party does not provide the specifically requested information may the authorities apply the facts available instead of the original information the party would have submitted. Inaction by exporters/producers, who were unknown to the authorities, to make themselves known to the authorities would not be a valid reason for the importing Member to apply facts available. A dumping determination based on facts available with respect to such exporters/producers would be inconsistent with Articles 6.1 and 6.8 and Paragraph 1 of Annex II of the *AD Agreement*. Japan is of the view that the same interpretation also applies to Article 12.7 of the *SCM Agreement*.

**D. The Sufficiency of the Description in the Notice of Preliminary and Final Determinations**

9. With respect to the alleged failure to explain the basis to determine an “all others” anti-dumping rate based on facts available, Japan agrees with the United States that investigating authorities must explain in sufficient detail the factual basis to determine to apply facts available and the factual basis to determine the normal value and the export price to calculate the dumping margin.

10. In the countervailing duty investigation in question, MOFCOM was obliged to explain in sufficient detail the background and reasons, both legally and factually, that led MOFCOM to find a 31.4 percent margin in the preliminary determination and 30.3 percent margin in the final determination for those exporters which failed to make an entry for appearance or failed to submit a questionnaire response.

11. The United States alleges that MOFCOM “failed to disclose the methodology that it claimed to have used to adjust subject import prices to account for their different level of trade” in its analysis of price undercutting.<sup>2</sup> Pursuant to Article 12.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*, the authorities must provide sufficient background and reasons for its conclusion of issues of law and fact relevant to, and material in the authorities’ final determination in the public notice or a separate report of the final determination. Articles 3.2 of the *AD Agreement* and 15.2 of the *SCM Agreement* set forth that “the investigating authorities shall consider whether there has been a significant price undercutting”. As this text clarifies, the authorities are obliged to consider the issue of price undercutting to reach the determination of injury. Accordingly, this issue is relevant and material to the final determination. MOFCOM thus was obliged to provide sufficient background and reasons in the public notice or a separate report of the final determination of the issue of fact that MOFCOM considered in making price-undercutting analysis.

**E. The Authorities’ Consideration of Price Suppression**

12. In its First Written Submission, China takes the position that Article 3.2 of the *AD Agreement* and Article 15.2 of the *SCM Agreement* “require only a showing of the existence of adverse price effects” but do not “require a showing that subject imports caused or affected the price suppression.”<sup>3</sup> China’s interpretation does not account for the full text of these provisions, which make explicit that the effect on prices is that of the dumped or subsidized imports: “the effect of the ... imports on prices.”

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<sup>2</sup> First Written Submission of the United States of America, submitted on 27 June 2012, para. 312.

<sup>3</sup> First Written Submission of the People’s Republic of China, para. 336.

13. 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 suppression analysis.<sup>4</sup> The text of these Articles, however, imposes certain disciplines on the flexibility afforded to investigating authorities in determining price suppression. As explained above, price suppression must be considered in relation to the imports. A price suppression analysis that is limited to a comparison of domestic prices and costs without consideration of the imports does not satisfy the requirement to assess the “effect of the . . . imports on prices.”

14. As a general matter, an examination of the relative price levels of the domestically produced and imported products is an effective way to analyze price effects. China’s position that a finding of price suppression has nothing to do with the relative price levels of both products is extreme and untenable.

15. In respect of the authorities’ obligation to consider price suppression, Japan concurs with the Appellate Body that “with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices”<sup>5</sup>. Furthermore, the Appellate Body has upheld the finding of the panel in that case that, “because Articles 3.2 and 15.2 require an investigating authority to consider *whether the effect of* subject imports is to depress prices of like domestic products to a significant degree, “*merely showing* the existence of significant price [suppression] does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement”<sup>6</sup>.

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<sup>4</sup> See, e.g., Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:1, 3, para. 7.638 (“It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to “consider” whether there has been significant price undercutting.”). See also Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, para. 7.328 (“Article 15.2 confers wide latitude on the investigating authority.”)

<sup>5</sup> Appellate Body Report, *China-Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, circulated to WTO Members 18 October 2012 (“*China-GOES*”), para. 154.

<sup>6</sup> Appellate Body report, *China-GOES*, para. 159 (a footnote omitted).

**ANNEX B-4****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY MEXICO****I. Choice of the basis for calculating costs****A. The obligation to calculate costs on the basis of the records kept by the exporter or producer under investigation is not absolute**

1. Mexico agrees with China that the obligation under Article 2.2.1.1 of the *Anti-Dumping Agreement* (AD Agreement) to calculate costs on the basis of the records kept by the exporter or producer is not absolute. We note that the text of this article establishes two basic premises:

- (a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;
- (b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:
  - (i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
  - (ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In *US – Clove Cigarettes*<sup>1</sup>, the WTO's Appellate Body interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule", and stated that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation. Thus, in the context of Article 2.2.1.1 of the AD Agreement, the expression "normally" implies that there is a presumption in favour of the accounting records of the producer or exporter being considered for the calculation of the costs when they comply with the conditions identified in indents (i) and (ii) above, but that this presumption can always be rebutted. In other words, if the records satisfy these conditions and the authority decides not to use them, then the authority bears the burden of explaining why they were not considered.

3. As for the second premise in Article 2.2.1.1 of the AD Agreement, the Panel in *US – Softwood Lumber V* found that Article 2.2.1.1 required that the costs be calculated on the basis of the exporter or producer's records, insofar as those records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration.<sup>2</sup> Mexico considers that Article 2.2.1.1 of the AD Agreement establishes a *juris tantum* presumption: unless proven otherwise, the exporters' records will be considered to be in accordance with GAAP and to reasonably reflect the costs associated with the production and sale of the product under consideration. Consequently, the initial burden of rebutting the said presumption would lie with the investigating authority.<sup>3</sup>

4. In short, Mexico considers that the obligation to use the records of the exporter or producer under investigation is not absolute for two reasons: (1) because the records must be compatible with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration; and (2) because, according to the text of Article 2.2.1.1. of the AD Agreement and the Appellate Body's interpretation of the term "normally" in *US – Clove Cigarettes*, even if the records satisfied these two conditions, the investigating authority would not necessarily have to use them if faced with a case in which such action was justified.

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<sup>1</sup> Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, paragraph 273.

<sup>2</sup> Appellate Body Report, *US – Softwood Lumber V*, paragraph 7.237.

<sup>3</sup> Reply by Mexico to question 10 of the Panel.

*B. A methodology for allocating costs by price might not reasonably reflect the costs of production and sale of a product under investigation*

5. In Mexico's view, a methodology for allocating costs by price, such as that used by the United States exporters, might not reasonably reflect the costs of production and sale of the product under consideration. In this connection, we consider it important to define the meaning of the expressions "cost of production" and "cost of sale", given that one of the requirements for using the accounting records of the exporter or producer is that they reasonably reflect those costs.

6. As indicated in China's first written submission, in *EC – Salmon (Norway)* the Panel established that the ordinary meaning of the expression "cost of production" is "the price to be paid for the act of producing".<sup>4</sup> Thus, assuming that the cost of production is the price to be paid for the act of producing, it is permissible to suppose that the meaning of the expression "cost of sale" is the price to be paid for the storage of the product to be sold. Mexico considers that even a zero cost of production can reasonably reflect the costs associated with the production (but not necessarily the sale) of a product provided the price paid for the act of producing the product was really zero.<sup>5</sup> What is essential here is that the cost of production should actually be equal to zero.

7. Thus, for an investigating authority to be able to take into account the accounting records of the exporter, those records must reflect both the price paid for the act of producing and the price paid for the storage of the product to be sold. Consequently, if the costing methodology of United States exporters did not satisfy the above requirement, then it could not be used by the Chinese investigating authority.

8. The methodology of costing by price basically consists in allocating costs on the basis of the price at which a product is sold to the end consumer. If this methodology is applied to the case of joint products, then the cost of the product as a whole is pro-rated and allocated to each joint product in relation to its market price. Thus, a greater cost is allocated to those joint products that have a higher market price, and a lower cost to those that have a lower price.

9. This costing method involves artificially transferring part of the profit obtained from the sale of the joint products for which there is a high demand to the joint products with a lower demand. The effect is that all the joint products always have the same profit margin, no matter which joint product is concerned and no matter the price at which it is sold. Thus, the method of costing by price involves circularity: if the cost depends on the price, then that cost will normally be below the price.

10. This does not necessarily pose a problem for the calculation of a dumping margin because if the joint products have more or less similar prices on the market of the exporting country, the difference between the profits yielded by the price-based method and the real profits, per joint product, would be minimal or zero. Consequently, the distortion could be insignificant or non-existent.

11. However, in cases such as this one, the distortion could be severe, since there are joint products with a very high selling price on the US market (e.g. chicken breast), and others with a very low value on the same market (e.g. legs). While Mexico considers the existence of a very distinct difference in prices between the joint products investigated on their market of origin to be relevant, it would like to point out in relation to one of the questions of the Panel that it does not believe that the value of a product on the export market is relevant for the purposes of Article 2.2.1.1 of the AD Agreement.<sup>6</sup> Given the enormous difference in prices on the US market, the methodology of costing by price would distort costs, allocating a higher cost to chicken breasts and a lower cost to legs. As a result, the prices that should be below the costs might artificially end up exceeding them.

12. In the face of this problem, one of the viable alternatives is to use a method based on weight, as did the Chinese authority. When this method is used, the distortion created by the

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<sup>4</sup> Panel Report, *EC – Salmon (Norway)*, paragraph 7.481.

<sup>5</sup> Reply by Mexico to question 8(b) of the Panel.

<sup>6</sup> Reply by Mexico to question 8(a) of the Panel.

combination of such different prices for joint products on the United States market and the method of costing by price does not arise.

13. Thus, in the present case, taking into account the serious distortions that ensue and given the enormous difference in price between the joint products included in the product under consideration, we must conclude that, in this case, the method of costing by price does not reasonably reflect the costs associated with the production and sale of the product under consideration, since it could not reflect "the price to be paid for the act of producing", as interpreted by the Panel in *EC – Salmon (Norway)*, or the "price to be paid for the storage of the product to be sold", proposed by Mexico in its first oral statement (inferred by analogy from the determinations of the panel in question). For this reason, Mexico agrees with China that "[i]f a company has to spend \$100 to produce an item, the fact that the item may only sell for \$10 does not change the fact that the 'price to be paid for the act of producing' that item was \$100".

## **II. Definition of the domestic industry**

*A. China should explain the basis on which its authority concluded that the 17 companies investigated represented more than 50% of the domestic industry for the purposes of the determination of injury*

14. Mexico notes that the Chinese authority found that the 17 domestic producers that supported the investigation accounted for 45.53%, 50.72%, 50.82% and 52.59% of the total volume of domestic production in China in the years 2006, 2007, 2008 and 2009, respectively. However, China did not provide any detailed explanation of the basis on which its investigating authority reached these conclusions. In its first written submission, China makes several statements<sup>7</sup> which raise doubts as to whether the investigating authority really knew the total production of the like product on its domestic market. China also states that its authority did not take a sample because it had no knowledge of the universe of producers that constituted the industry under investigation. It is therefore indispensable that China provide a detailed description in this respect.

*B. The United States' appraisal of the facts may not be correct and therefore its claim regarding Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well founded*

15. Assuming that China was justified in finding that the 17 companies that supported the investigation represented more than 50% of the total volume of domestic production, Mexico agrees that the United States' exposition of the facts in its first written submission could be incorrect. In fact, it is not clear to Mexico that China defined the domestic industry with the bias alleged by the United States. Therefore, the United States' claim concerning Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement may not be well-founded.

16. The United States claims that, inconsistently with Articles 4.1 of the AD Agreement and 16.1 of the SCM Agreement, China excluded from the domestic industry all producers of white-feather broiler products that did not support the investigation and that its authority did not make any significant effort to identify other producers different from those already known. Proof at this was the fact that no producer other than these 17 appeared in the investigation. This, according to the United States, increased the possibility of an affirmative determination of injury, and it claims that this is inconsistent with the requirement to conduct an objective examination, as provided for in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Likewise, the United States points out that the Chinese authority should have identified the universe of domestic producers rather than limiting its definition of the domestic industry to the 17 producers aforementioned.

17. China asserts that mechanisms additional to publication on the website were used and involved the reporting of the investigation by China's larger television channels and major newspapers. Moreover, it states that the assertion made by the United States is incorrect, since of these 17 producers, only 15 participated in the initial petition while the other two replied to the questionnaire without having had previous contact with the Chinese authority.

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<sup>7</sup> First written submission of China, paragraphs 235, 243, 250 and 257.

18. With regard to the actions taken by the Chinese authority, assuming that it had not used any mechanism apart from publication on the website, Mexico would agree with the United States that the actions of an investigating authority cannot be limited to such publication, especially in China's case as it acknowledges the existence of a very large number of producers. Mexico recalls in this connection what was established by the Appellate Body in *US – Wheat Gluten*, namely that the authorities "must *actively* seek out pertinent information" in the case before them.<sup>8</sup> Consequently, in Mexico's view the Chinese authority could have taken some additional action to seek to identify as many producers as possible so as, on that basis, to define the domestic industry and, subsequently, to conduct its injury analysis. For example, the Chinese authority could have enquired among local government agencies and producers' associations and checked lists of beneficiaries of subsidy programmes, consulted the authorities in charge of animal health matters, etc.<sup>9</sup>

19. With regard to the domestic industry, Mexico notes that China found that the companies that supported the investigation represented the domestic white-feather broiler products industry inasmuch as they were the only ones to appear in the proceedings because they constituted more than 50% of China's total production during the examination period. Assuming that two other producers actually did appear, and that they replied to the questionnaire, that would suggest that the approach of the Chinese authority was to define the industry as a "major proportion" of the total domestic production. In this connection, Mexico notes that Article 4.1 of the AD Agreement clearly indicates that a domestic industry can be defined in two different ways: (a) as the domestic producers as a whole; or (b) as producers whose production constitutes a major proportion of total domestic production.

20. The United States maintains that China was obliged to identify all of the domestic producers and send them a questionnaire, and to include all of the domestic producers in the injury analysis.

21. In Mexico's opinion this is not necessarily so. Article 4.1 of the AD Agreement allows the domestic industry to be defined as including only producers that produce a major proportion of the total domestic production. Insofar as the Chinese authority based its analysis on this approach and complied with the standard applicable, it would not have unjustifiably excluded any producer from the definition of the domestic industry.

22. Nevertheless, it is clear that to be in a position to decide whether the actions of the authority were sufficient, it is necessary to know how it determined the total domestic production. As there are no data in the final determination to indicate the basis on which the total production was determined, Mexico considers that there could have been a violation of Article 12.2.2 of the AD Agreement. However, if the record contains elements that justify the determinations concerning the composition of the domestic industry, it would be incorrect to conclude that there was also a violation of Article 3 of the AD Agreement. For these reasons, we respectfully request this Panel to examine the contents of the administrative record of the investigation.

### **III. Comparison of the prices of the imports with the domestic prices on the market of the importing country**

A. *The comparison of the price of the imports with the price of the domestic product should be based on positive evidence and involve an objective examination*

23. Mexico notes that, in accordance with the reasoning of the Panels in *Egypt – Rebar*<sup>10</sup> and *EC – Tube or Pipe Fittings*<sup>11</sup>, there is no single valid method of conducting the undercutting analysis under Article 3.2 of the AD Agreement. However, even if there is no mandatory method, Mexico considers that the conditions established in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement are applicable to the undercutting analysis, since these articles govern all aspects relating to the determination of injury.

24. Consequently, the undercutting analysis should be consistent with Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement, i.e. it should be based on positive evidence and

<sup>8</sup> Appellate Body Report, *US – Wheat Gluten*, paragraph 53.

<sup>9</sup> Reply by Mexico to question 11 of the Panel.

<sup>10</sup> Panel Report, *Egypt – Rebar*, paragraph 7.73.

<sup>11</sup> Panel Report, *EC – Tube or Pipe Fittings*, paragraph 7.292.

involve an objective examination.<sup>12</sup> In other words, the undercutting analysis should be carried out in an unbiased manner, without favouring the interests of any party, since the determination will always be influenced by the objectivity of the investigation process, or the lack thereof.

B. *The price comparison must be conducted at the same level of trade*

25. As already mentioned, in the AD Agreement there is no indication of the details that should be taken into account in analysing the level of undercutting in the context of a determination of injury. Nevertheless, Mexico considers that, in addition to the general rules laid down in Article 3.1 of the AD Agreement, certain obligations laid down in Article 2.4 of the AD Agreement are applicable to the undercutting analysis.

26. In this respect, in *EC – Tube or Pipe Fittings*, the Panel determined as follows:

7.292 [I]n view of the stark contrast in the text, context, legal nature and rationale of the provisions in Article 2 of the *Anti-Dumping Agreement* relating to the calculation of the dumping margin and Article 3 relating to the injury analysis, **we decline to transpose wholesale the more detailed methodological obligations of Article 2 concerning dumping into the provisions of Article 3 concerning injury analysis.**

7.293 In a dumping determination, one focus of **adjustments** may be on differences in costs that a producer/exporter might reasonably be expected to reflect in his prices; **by contrast, the focus in a price undercutting analysis may be on differences between the imported and domestic like product that have a perceived importance to customers.** (Emphasis added.)

27. Thus, the Panel recognized that although all of the obligations of Article 2 cannot be transposed into the analysis envisaged in Article 3, it is possible to transpose some of them and, moreover, accepted that making adjustments is one of the obligations capable of being transposed.

28. In this connection, Mexico considers that the price comparison for the purposes of injury analysis must be conducted at the same level of trade and that, if need be, the necessary adjustments should be made to ensure that the comparison between the like product and the product under investigation is objective and fair. This is necessary to prevent distortions or bias in the analysis of the effects of the imports on domestic prices in the importing country. In Mexico's opinion, this is something that needs to be addressed in order to be able to fulfil the obligation of carrying out an objective examination in accordance with Article 3.1 of the AD Agreement.

C. *A significant difference in the values of the baskets of products compared could produce erroneous results in the price analysis*

29. Mexico agrees with the United States that a significant difference between the values of the domestic products and the like national products could lead to a biased conclusion regarding the levels of undercutting, if it is decided to compare average prices.

30. Although the Chinese authority has explained its reasons for not conducting the price analysis on a disaggregated basis, Mexico is not convinced that this explanation is adequate. In Mexico's opinion, where the analysis of the effects of the imports on internal prices in the importing country is concerned, the Chinese authority should have compared products "of the same species" and not products "of the same genus". In Mexico's view, a disaggregated comparison between products "of the same species" would make possible a more appropriate and reasonable comparison.

31. This is based on Articles 3.1 and 3.2 of the AD Agreement, which require that the investigated product and the domestic product be like. Indeed, Article 3.1 states that the determination of injury must include an objective examination "of the effect of the dumped

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<sup>12</sup> Regarding the meaning of the expression "objective examination", see the Appellate Body Report in *US – Hot-Rolled Steel*, paragraph 193.



imports on prices in the domestic market for *like* products". Likewise, the second sentence of Article 3.2 states that "[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting ... as compared with the price of a like product of the importing Member [...]".<sup>13</sup>

32. Finally, as Mexico stated in its replies to the questions raised by this Panel, Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement set out three types of price effects which are alternatives and do not depend on each other. Mexico has three reasons for considering this to be so: (1) Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement mention three price effects with different characteristics; (2) each price effect is separated by the word "or", which suggests that the investigating authority can take into account one or more of them; and (3) the last sentence of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement<sup>14</sup> suggest that the authority can analyse the undercutting in isolation and independently of the price depression or suppression.<sup>15</sup>

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<sup>13</sup> Reply by Mexico to question 15 of the Panel.

<sup>14</sup> "No one or several of these factors can necessarily give decisive guidance".

<sup>15</sup> Reply by Mexico to question 13 of the Panel.

**ANNEX B-5****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY NORWAY****I. The authorities' duty to provide opportunities for a meeting between interested parties and parties with adverse interests**

1. The US claims that China acted inconsistently with Article 6.2 of the *AD Agreement*, by refusing the request for a public hearing.<sup>1</sup> The wording of the second sentence of Article 6.2, "the authorities *shall*" (emphasis added), makes it clear that the authorities have no flexibility as regards providing opportunities for a meeting between interested parties and parties with adverse interests (provided the authorities have been asked by an interested party to hold a meeting). It is an obligation they have to fulfill. The terminology chosen, "provide opportunities", entails contacting the parties with adverse interests and asking them to take part in such a meeting.

2. After being contacted and asked to attend (with sufficient attention being paid to the convenience of the parties, cf. the third sentence of Article 6.2), the parties with adverse interests may however decide that they cannot or do not want to attend the meeting, in line with the fourth sentence of Article 6.2. In such a case, if *all* parties with adverse interests inform the authorities that they will not be attending the meeting, the authorities would not be obliged to hold the meeting. Norway would like to underline that this is the *only* viable reason not to hold a meeting in line with Article 6.2. Under such circumstances, the authorities' obligation of "providing opportunities" for the relevant parties to meet has been met.

**II. Disclosure of essential facts under consideration which form the basis for the decision of whether to apply definitive measures**

3. The US claims that China is in breach of Article 6.9 of the *AD Agreement*, as the investigating authority did not disclose the data and calculations performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.<sup>2</sup> The core of the duty of disclosure under Article 6.9 relates to "essential facts". The term "fact" has been interpreted to mean "a thing that is known to have occurred, to exist or to be true".<sup>3</sup> On the basis of that definition, the panel in *Argentina – Poultry* found that while the authority's *reasons* should explain *inter alia* how it weighed the facts and how the facts in the record supported its determination, the duty of disclosure relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed.<sup>4</sup>

4. Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. Absent disclosure of the essential facts, interested parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

5. Accordingly, if the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. This is important for the legitimacy of the process as well as a safeguard mechanism for the correctness of the actual numbers and data relied on. These facts are essential to the final determination, as it could not otherwise be made and no duties could then be imposed. Such disclosure is important to ensure interested parties have the opportunity to defend their interest, in accordance with Article 6.2 of the *AD Agreement*.

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<sup>1</sup> The US' First Written Submission, paras. 39 and 40.

<sup>2</sup> The US' First Written Submission, para. 53.

<sup>3</sup> Panel report, *Argentina – Poultry*, para. 7.225.

<sup>4</sup> Panel report, *EC – Salmon*, para. 7.807.

### III. The determination of the «all others» rate

6. The US claims that China applied facts available to producers that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, thereby acting inconsistently with Article 6.8 and Annex II of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.<sup>5</sup> Paragraph 1 of Annex II of the *AD Agreement* insists that the authority “specify in detail the information required from any interested party” and ensure that the interested party be “aware that if the information is not supplied within a reasonable time”, the authority may use facts available. Accordingly, in *Mexico – Rice*, the Appellate Body ruled that the authority could not apply facts available to the exporters that were not investigated and not notified of the required information.<sup>6</sup> Inaction is thus not sufficient grounds for resorting to facts available.<sup>7</sup> In the case before the Panel, China submits that a higher level of notice was effected compared to *Mexico – Rice*, as the notice was posted on the website of MOFCOM.<sup>8</sup> The Panel in *China – GOES*, on this very issue, noted the following:

“Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party.”<sup>9</sup>

7. This conclusion follows directly from the wording of paragraph 1 of Annex II of the *AD Agreement*. “Aware” is defined as “conscious”, “not ignorant”, “having knowledge” or “well-informed”.<sup>10</sup> The fact that the notice is available on the internet, together with millions of other documents, does not ensure that the individual producer actually knows about the notice. Furthermore, if this lower threshold was to be applied, inconsistent with the wording of paragraph 1 of Annex II, it would imply that the producers would have to ensure they were up to date with all potential notices from all investigating authorities in all WTO Members to whom they export goods at all times. According to paragraph 1 of Annex II, the responsibility is clearly put on the investigating authority. The only viable interpretation of paragraph 1 of Annex II is thus that putting a notice on the internet is not sufficient to fulfill the requirement of awareness as stipulated. In such cases, the interested parties cannot be seen to have been notified of the required information in the terms of Article 6.8 of the *AD Agreement*.

8. Although the *SCM Agreement* has no equivalent to Annex II of the *AD Agreement*, the Appellate Body in *Mexico – Rice* found that the same limitations on the authorities’ discretion when resorting to the use of facts available apply to Article 12.7 of the *SCM Agreement*.<sup>11</sup> It is thus Norway’s view that Article 12.7 of the *SCM Agreement* should be interpreted to the same effect, in line with the object and purpose of the said Article.

### IV. Explanation of determinations

9. The US claims that China violated Articles 12.2, 12.2.1 and 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement* because the investigating authority failed to provide an adequate explanation for some of its determinations, including the determinations of the “all others” rates and the determinations of injury.<sup>12</sup> Under the cited provisions, the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive anti-dumping and countervailing duties. The Appellate Body and panels have consistently ruled that these provisions require investigating authorities to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority’s determination.<sup>13</sup> The authority’s explanation must demonstrate in a “clear and unambiguous” manner that the substantive conditions for imposition of trade remedy measures have been satisfied.<sup>14</sup> The “evidentiary path that led to the inferences and overall conclusions of

<sup>5</sup> The US’ First Written Submission, paras. 146 and 184.

<sup>6</sup> Appellate Body Report, *Mexico – Rice*, para. 259.

<sup>7</sup> Appellate Body Report, *Mexico – Rice*, para. 259.

<sup>8</sup> China’s First Written Submission, paras. 182-184 and 190-193.

<sup>9</sup> Panel Report, *China – GOES*, para 7.386.

<sup>10</sup> The Concise Oxford Dictionary of current English, R. E. Allen, 8th edition, Oxford University Press, Oxford.

<sup>11</sup> Appellate Body Report, *Mexico – Rice*, para. 295.

<sup>12</sup> The US’ First Written Submission, paras. 166-169, 213-218 and 312.

<sup>13</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 99.

<sup>14</sup> Appellate Body Report, *US – Line Pipe*, para 217.

the investigating authority must be clearly discernible in the reasoning and explanations found in its report".<sup>15</sup>

10. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *AD Agreement* and the *SCM Agreement* governing those determinations. These provisions thus represent an important safeguard mechanism for due process rights.

## V. Definition of the domestic industry

11. The US claims that China violated Articles 3.1 and 4.1 of the *AD Agreement* and Articles 15.1 and 16.1 of the *SCM Agreement*, by including only domestic producers that voluntarily requested and returned domestic producers' questionnaire responses in the definition of the domestic industry.<sup>16</sup> Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the investigating authority to conduct an "objective examination" of the economic state of the "domestic industry" on the basis of "positive evidence". In *EC – Bed Linen (India - 21.5)*, the Appellate Body ruled that an "objective examination" requires authorities to reach a result that is "unbiased, even-handed, and fair."<sup>17</sup> In *US – Hot-Rolled Steel (AB)*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

"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."<sup>18</sup>

12. Furthermore, the Appellate Body found that the "selective" examination of just "one part" of an industry is not "objective" because the authority could choose the worst performing part of the industry for examination, thereby making an injury determination "more likely". It held that "[t]he investigation and examination must focus on the *totality* of the 'domestic industry'."<sup>19</sup> Thus, an investigating authority cannot single out particular parts or groups of the domestic industry for investigation. This ruling thus also demonstrates that the requirements of objectivity impose contextual constraints on how the investigating authority defines the "domestic industry" under Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*.

13. As to the precise definition of "domestic industry", this, according to said Articles, comprises producers "as a whole" of the like products. In the alternative, the industry may be limited to a "major proportion" of the industry. However, the *only* category of producers that may be entirely excluded from the industry is "related" producers. The definition of "domestic industry" therefore ensures the inclusion of domestic producers from all segments and sectors of the industry on an equal footing. Any determinations made with respect to the "domestic industry" will accordingly be representative of that industry as a whole. The said Articles do not authorise an authority to limit an industry solely to a certain group of producers, for example supporters of the investigation.

14. Accordingly, it is Norway's view that an investigating authority cannot limit the definition of the domestic industry to certain categories of producers, such as supporters of the investigation. This would be inconsistent with Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*. Furthermore, such a limitation of the definition of the domestic industry would not fulfil the objectivity requirement of Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*.

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<sup>15</sup> Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 97.

<sup>16</sup> The US' First Written Submission, para. 257.

<sup>17</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.

<sup>18</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.

<sup>19</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.

**ANNEX B-6****INTEGRATED EXECUTIVE SUMMARY SUBMITTED BY  
THE KINGDOM OF SAUDI ARABIA**

1. The Kingdom of Saudi Arabia participates as a third party in this dispute *China – Antidumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427) to express its views on a number of important systemic issues raised in this dispute.

**I. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT: FOREIGN PRODUCERS' AND EXPORTERS' COST DATA SHALL BE USED ABSENT EXCEPTIONAL CIRCUMSTANCES**

2. Saudi Arabia is of the view that Article 2.2.1.1 of the Anti-Dumping Agreement imposes an obligation to use the costs as actually borne by the producer as reflected in the records of the producer in question as the basis for the determination whether sales are made in the ordinary course of trade or are, in contrast, below costs. The same costs as reflected in the records of the exporter or producer under investigation should also be used in the event that the normal value is to be constructed in accordance with Article 2.2 of the Anti-Dumping Agreement.

3. Article 2.2.1.1, first sentence imposes a general obligation of principle in respect of the basis for the cost determination. It provides that "costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation." The second part of the first sentence sets out the exceptional circumstances under which the rule would not apply and thus clarifies that this obligation is subject to two limited conditions only: (a) that "such records are in accordance with the generally accepted accounting principles of the exporting country"; and (b) that the records "reasonably reflect the costs associated with the production and sale of the product under consideration." These two basic conditions underline the exceptional nature of the circumstances that would allow an authority to reject the records of the producer or exporter as the basis for the cost determination.

4. The second sentence expands on one of these conditions by clarifying the final part of the first sentence relating to the condition that the costs reasonably reflect the costs "associated with" the production and sale of the product under consideration, which is affected by the cost allocation methodology that is used. Article 2.2.1.1 does not permit the rejection of costs data and their replacement with other data simply because the authorities consider that the costs as reflected in the records are below an external benchmark or because a different allocation method could have been used.

5. The condition that the costs have to "reasonably reflect" the costs "associated with" the production and sale of the product under consideration does *not* allow an authority to question the accuracy or "reasonableness" of the costs as such, but concerns merely their *association with* the product under consideration as compared with other products to which the costs may also be associated. In *US – Softwood Lumber V*, the panel noted that that there is no textual basis in Article 2.2.1.1 to conclude that for the "requirements of Article 2.2.1.1 to be met, it is necessary that the [costs] reflect the market value of those [costs]," and that to accept the "argument that Article 2.2.1.1 requires an investigating authority to ensure that the [cost] reasonably reflects the market value 'would require us to read into the text words which are simply not there'".<sup>1</sup> According to the panel in *EC – Salmon (Norway)*, "the test for determining whether 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".<sup>2</sup> That is the only relevant test to apply in the context of this second condition.

6. Furthermore, Saudi Arabia considers that Article 2.2.1.1 does not impose a particular cost allocation methodology but does impose a clear and meaningful obligation to consider all available evidence, including in particular the evidence provided by the foreign producer or exporter. As long as the method historically utilized by the foreign producer or exporter as reflected in the records is

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<sup>1</sup> Panel Report, *US – Softwood Lumber V*, para. 7.321.

<sup>2</sup> Panel Reports, *EC – Salmon (Norway)*, para. 7.483; *Egypt – Steel Rebar*, paras. 7.393 and 7.422.

reasonable, it must be accepted. A method is not “unreasonable” simply because the allocation of costs leads to less costs being allocated to a by-product or a waste product, even if that by-product or that waste product is of great value in the country of importation. Nor would it be correct to suggest that the cost allocation method has to be appropriate “for purposes of the anti-dumping investigation”. The requirement in the second sentence that the allocation method has to be one that has been “historically utilized” points in the opposite direction. It confirms that the cost allocation method as reflected in the records must be the method that the producer or exporter is used to employ, and is precisely not tailor-made for purposes of the investigation.

## **II. INVESTIGATING AUTHORITIES CAN RESORT TO THE USE OF FACTS AVAILABLE ONLY IN VERY LIMITED CIRCUMSTANCES AND NEVER IN A PUNITIVE MANNER AND MUST DISCLOSE THE BASIS FOR THE USE OF FACTS AVAILABLE**

7. Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement permit the use of facts available only in limited circumstances. These limited circumstances are: (a) when an interested party or Member has not provided “necessary” information in a timely manner (specifically “within a reasonable period”), or (b) when an interested party or Member has otherwise significantly impeded the investigation. In addition, Annex II of the Anti-Dumping Agreement makes clear that the use of facts available is permissible only when the parties have been given proper notice of the information required by the investigating authority, and have been informed of the possibility that facts available will be applied in the event of non-cooperation with the authority. This effectively means that an active approach on the side of the investigating authority is required in order to ensure that interested parties have been contacted and adequately informed before it is entitled to resort to the use of facts available. Therefore, if the investigating authority has failed to identify and notify an exporter or foreign producer, no facts available may be used in respect of this exporter. Thus, “facts available” should only be used to fill in gaps in the necessary information and cannot be used in a punitive manner. The investigating authority must employ the *best*, most appropriate and proper facts available, and the determination must not be based on speculative inferences.

8. Saudi Arabia recalls that Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require 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 anti-dumping or countervailing duties. Saudi Arabia considers that when facts available are used, the authorities must disclose the “facts” relied upon to reach the conclusion that facts available were warranted, as part of the facts necessary to the process of analysis and decision-making by the investigating authority.<sup>3</sup> In addition, in the view of Saudi Arabia, it must be disclosed why these facts were considered to be the “best” information available for the particular producer. This “factual basis” for making the dumping or subsidies determination is clearly part of the “essential facts under consideration” that interested parties must be informed of before the final determination such that they can provide their comments and defend their interest, as required by Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. Similarly, Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement also impose an obligation to include in the public notice of the determination “sufficient detail” on the important issues of facts and law considered “material” to the investigating authorities such as, undoubtedly, the factual basis for the dumping or subsidies margin calculation.

## **III. PROPER ALLOCATION OF SUBSIDIES UNDER ARTICLE 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994 REQUIRES ALLOCATION TO ALL PRODUCTS BENEFITING FROM THE SUBSIDY**

9. Saudi Arabia considers that Article 19.4 of the SCM Agreement and Article VI of the GATT 1994 impose a minimum requirement on the investigating authority to ensure a proper and correct allocation of the total subsidy amount to the specific subject product. Whatever the allocation methodology to be adopted, Saudi Arabia considers that if a subsidy benefits several products including but not limited to the product under consideration, it is improper to allocate the total subsidy amount to the subject product only. An investigating authority that does not properly allocate the subsidies over all of the products benefiting from the subsidy but instead allocates all

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<sup>3</sup> Panel Report, *China – GOES*, para. 7.408.

of the subsidy amount to the product under consideration only will likely impose countervailing duties that are in excess of the amount of subsidies benefiting the product.

**IV. AN INJURY EXAMINATION MUST BE OBJECTIVE AND BASED ON POSITIVE EVIDENCE**

10. Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement set forth an obligation to conduct an objective injury examination based on positive evidence which permeates all aspects of the injury and causation investigation, including the definition of the domestic industry to be examined. First, an injury examination can only be objective if the process that led to the definition of the domestic industry was equally objective. Second, an objective examination of price effects in the context of an injury determination under Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement needs to recognize important differences between the subject product and the like product, such as the product mix and must compare prices at the same level of trade. Third, an investigating authority conducting an injury examination under Article 3.4 of the Anti-Dumping Agreement or Article 15.4 of the SCM Agreement must provide an accurate and adequate explanation of how the facts support the findings. Fourth, an objective causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement requires investigating authorities to establish a genuine and substantial causal relationship between the dumped or subsidized imports and the injury found to exist. The non-attribution requirement requires the authorities to separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors, such as decisions on capacity expansion and other business decisions that are unrelated to the dumped or subsidized imports.

**V. DUE PROCESS REQUIRES THAT A PROPER BALANCE BE STRUCK BETWEEN TRANSPARENCY AND THE PROTECTION OF CONFIDENTIAL INFORMATION**

11. Saudi Arabia notes the balance struck in Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement between confidentiality and transparency. Due process requires that interested parties have a right to see the evidence submitted or gathered in an investigation, and have an adequate opportunity for the defense of their interests. But it is important to recall that there could be "exceptional circumstances" in which summarization of confidential information will not be possible. In this respect it must be emphasized that transparency does not trump legitimate confidentiality concerns.

## ANNEX B-7

### THAILAND'S RESPONSES TO PANEL QUESTIONS

#### I. PROCEDURAL CLAIMS

##### A. OBLIGATIONS UNDER ARTICLE 6.2 OF THE ANTI-DUMPING AGREEMENT

1. (to all third parties) Please clarify your views as to how an authority may satisfy the obligation to "provide opportunities" under Article 6.2, second sentence, of the Anti-Dumping Agreement, including the conditions, if any, under which an investigating authority may refuse to organise and hold a hearing.

**Response to Question 1:** *The Government of Thailand (GOT) considers that Article 6.2 provides opportunities for interested parties with adverse interests to meet all interested parties so that opposing views may be presented and rebuttal arguments may be offered. Where an interested party requests a hearing under Article 6.2, the GOT considers that an authority should accept the request, provided that the interested party with adverse interests is also provided an opportunity to attend and that the request is raised within the reasonable period of time as not to be a disruption to the proceedings.*

##### B. DISCLOSURE OF ESSENTIAL FACTS

2. (to all third parties) What, in your view, are the relevant "essential facts" concerning an AD calculation which an investigating authority must disclose pursuant to Article 6.9 of the Anti-Dumping Agreement? In particular, do you think the authority is obliged to disclose as "essential facts": (1) its actual dumping margin calculations; (2) exclusion of certain transactions or results of its application of the below-costs test?

**Response to Question 2:** *The GOT considers that Article 6.9 intends to provide interested parties with opportunities to defend their interests. In this respect, an authority should issue a detailed calculation of the dumping margin, including the results of any below cost tests and an explanation of why any transactions were being excluded, so that interested parties have an opportunity to comment and such comments may be taken into account prior to the issuance of the final determination.*

3. (to all third parties) What are the criteria for distinguishing essential facts from regular facts, and facts from reasoning? For instance, the application of the test to determine whether sales were in the ordinary course of trade may require an investigation authority to apply a number of assumptions to the data, which arguably may involve an element of reasoning. Does that mean that they are not "facts"? Please discuss.

**Response to Question 3:** *The essential facts are those considered relevant by an authority in determining whether there has been dumping, injury, and a causal link. These facts may include facts that explain, for example, why the authority decided sales were in the ordinary course of trade or facts that explain why sales were not considered to be in the ordinary course of trade. These facts are to be based on data submitted during the proceedings, which is considered to be reliable and verifiable.*

##### C. REQUIREMENT TO PROVIDE NON-CONFIDENTIAL SUMMARIES

4. (to all third parties) Should the investigating authority require the interested party submitting the confidential information to indicate or label the non-confidential summary of the redacted information in the non-confidential version? Why? Please refer to relevant text of the Agreements and/or any prior decisions which may inform your views on the matter.

**Response to Question 4:** *The GOT considers that it is not necessary for an authority to require the interested party to label the non-confidential summary. Our Government is of the view that the*



means to comply with Article 6.5.1. is at the discretion of an investigating authority, provided that the non-confidential summary permits a reasonable understanding of the substance of information submitted in confidence.

## II. USE OF ADVERSE FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATE

5. (to the European Union) In its third party written submission, paragraphs 49-52, the European Union has raised a textual difference between Articles 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement, as well as between the Anti-Dumping and the SCM Agreements in general. The European Union argues that whereas the government of a WTO Member may not be aware of all firms producing the product under investigation in its territory for purposes of an AD investigation, it is likely to know the firms that it is subsidising. Please elaborate, and address the following points:

- (a) Given that the definition of "interested party" in the Anti-Dumping Agreement includes the government of the exporting Member, is there any significant difference between the two Agreements with respect to the party from whom information may be requested?
- (b) Can non-cooperation on the part of an "interested Member" be the basis for applying a facts available "all others" rate to producers/exporters who were not given direct notice by the investigating authority of the information required?
- (c) Does requesting that a Member notify its allegedly subsidised producers fall within the scope of a request for information under Article 12.7 of the SCM Agreement?

6. (to other third parties) Do you agree with the European Union's reading of the textual differences between the two Agreements?

7. (to all third parties) The Panel notes that in the AD and CVD investigations MOFCOM essentially divided exporters/producers into three categories: (1) exporters/producers selected for individual examination; (2) registered companies who were not selected for individual examination (including an alternate respondent); and (3) interested parties who were unknown to MOFCOM and who did not appear before MOFCOM.

- (a) Given the meaning of the term "interested party" in Article 6.11 of the Anti-Dumping Agreement/Article 12.9 of the SCM Agreement, please clarify whether in your view Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement are applicable to the unknown producers. If so what information should be included in the notice of initiation for it to be sufficient to notify unknown producers of the information requested and of the consequences of not appearing? What would be a sufficient manner of notice such that the investigating authority can assume that unknown producers have received notice and can apply Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement?

**Response to Question 7(a):** *The GOT considers that Article 6.11 of the Anti-dumping Agreement and Article 12.9 of the SCM Agreements apply to unknown producers. The notice of initiation of the investigation should clearly mention that the proceeding concerns all producers and not just those listed in the complaint, notified directly by the authority, or contacted by the exporting Member. If the unknown producers do not make themselves known to the investigating authority within the prescribed time limits, the best available information may be applied which could result in a determination of dumping margins on the basis of facts available for the producers concerned.*

- (b) Please explain how the scope of the obligation in Article 6.8 relates to the disciplines of Article 9.4 of the Anti-Dumping Agreement. Does Article 9.4 apply to unknown interested parties who were not part of the universe of interested parties considered for the sample/selection or should they be captured by Article 6.8? If neither of these provisions is applicable, what provision applies to the calculation of their rate?

**Response to Question 7(b):** *The GOT considers that the application of Article 9.4 is a decision taken by the authority based on the number of exporting producers known to exist. As the GOT considers that unknown producers should make themselves known to the investigation within the prescribed time limits following the notice of initiation of the investigation, Article 6.8 would apply to unknown producers, which would result in a determination of dumping margins on the basis of facts available for the producers concerned.*

### III. CALCULATION OF THE ANTI-DUMPING DUTY

8. (to all third parties) With respect to an investigating authority' use or non-use of costs as reported in a producer's records pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement:

- (a) How should by-products and joint-products be treated for purposes of costs allocation, in particular where these by-products or joint products have very little value on the domestic market, but can attract a high price on the export market?

**Response to Question 8(a):** *The GOT considers that the manufacturing costs of joint or by products should be based on the overall production process from which these products are derived. This would mean that the product with very little value on the domestic market would be sold at a loss and the comparison to be made, in the example cited, would be between the constructed value and the export price.*

- (b) Do you think that a zero cost of production can ever reasonably reflect the "costs associated with the production and sale" of a product?

**Response to Question 8(b):** *Please refer to (a)*

9. (to all third parties) What are the cost components that should be included in constructing normal value of chicken paws?

10. (to all third parties) Please, provide your view as to who (i.e. a respondent or an investigating authority) bears the initial burden of proving that the records do not reasonably reflect the costs and at which point this burden shifts from one party to the other.

**Response to Question 10:** *The GOT considers that the burden of proof in demonstrating that the record does not reasonably reflects the costs is initially with the investigating authority (IA) and the burden shifts to the interested party at the time when this issue is raised by the IA within the context of the proceedings. This may occur following the questionnaire response as highlighted in the deficiency letter, during the on-site-verification or in response to the preliminary determination or essential facts.*

### IV. INJURY

#### A. DEFINITION OF THE DOMESTIC INDUSTRY

11. (to all third parties) Please explain the relationship between the ability of an investigating authority to define the domestic industry under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement as a "major proportion" of the total domestic production on one hand, and the obligation to conduct the injury analysis based on positive evidence and an objective examination under Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement on the other hand. In circumstances, such as in this case, where petitioners represent a "major proportion" of the domestic industry, how far does an investigating authority need to go to identify and invite other producers to provide data to be taken into account in the injury analysis?

**Response to Question 11:** *Under the Thai Anti-dumping law, while 25% of the domestic industry is able to initiate a complaint following the initiation, it is required that at least 50% of domestic production should participate in the investigation for the domestic industry to have standing. This is undertaken to ensure that the injury assessment is as representative as possible.*

12. PRICE EFFECTS

13. (to all third parties) China argues that Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement set out the three types of price effects they mention as alternatives. Consequently, China also argues that, under these two provisions, findings of price suppression or price depression may (in principle) be made independently from a finding of price undercutting. Do you agree? Please explain your position in this respect.

**Response to Question 13:** *The GOT agrees with China that there are three distinct price effects. Price undercutting may occur without price depression and suppression. Vice-versa, price depression may occur without price undercutting and the same is true for price suppression. To say otherwise would be to deny the impact of other factors listed under Article 3.2.*

14. (to all third parties) In your view, is there any obligation on an investigating authority to ensure for purposes of the price effects analysis that the two sets of pricing data being compared (subjects imports, domestic like products) correspond to: (i) a comparable product mix; and (ii) the same level of trade? If so, in what provision(s) do you find the obligation?

15. (to all third parties) Is likeness to be taken into account in making the comparison between imports and domestic products for the price effects analysis? In this regard please elaborate on the relationship between the "likeness" and the "objective examination" requirements and explain the overlap between the two, if any.

**Response to Question 15:** *In doing the price effects analysis, the authorities should try to compare prices of particular models or varieties within the investigated product.*

B. CAUSATION

16. (to all third parties) Please discuss whether, in your view, the issue of causation arises only under Article 3.5 of the Anti-Dumping Agreement/Article 15.5 of the SCM Agreement, or whether it also arises under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4.

**Response to Question 16:** *The GOT is of the view that Article 3.5 requires causation to be confirmed in terms of the factors listed under Articles 3.1/15.1, 3.2/15.2, 3.4/15.4*

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**ANNEX C**

WORKING PROCEDURES FOR THE PANEL

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## **ANNEX C-1**

### **CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES (DS427)**

#### **WORKING PROCEDURES FOR THE PANEL**

Adopted on 15 June 2012

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

#### **General**

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

#### **Submissions**

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers

to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant reasonable extensions of the time to make an objection upon a showing of good cause. In any event no objection shall be received after the deadline for the comments on the responses to the questions following the second substantive meeting. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6. China's exhibits could be numbered CHN-1, CHN-2, etc.

#### **Questions**

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

#### **Substantive meetings**

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- (a) The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- (b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- (c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

- (d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.
15. The second substantive meeting of the Panel with the parties shall be conducted as follows:
- (a) The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If the respondent chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.
- (b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- (c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- (d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

### **Third parties**

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

- (a) All third parties may be present during the entirety of this session.
- (b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- (c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party



shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

- (d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

### **Descriptive part**

19. Each party shall submit an integrated executive summary of its arguments as presented in its written submissions, statements and responses to questions, in two parts. The parties shall submit the first part of the integrated executive summary 10 calendar days after the responses to the questions following the first substantive meeting. The parties shall submit the second part of the integrated executive summary 10 calendar days after the comments on the responses to questions following the second substantive meeting.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement at the latest 7 calendar days after the date of the third party session, or in the event that the Panel addresses questions to the third parties, 7 calendar days after the deadline for submission of responses to these questions. The integrated summary to be provided by each third party shall not exceed 5 pages.

21. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

### **Interim review**

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

25. The following procedures regarding service of documents shall apply:

- (a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- (b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- (c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to

DSRegistry@wto.org, and cc'd to XXXXX, XXXXX, and XXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

- (d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- (e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.
- (f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

**ANNEX C-2**

**CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES  
ON BROILER PRODUCTS FROM THE UNITED STATES  
(DS427)**

**ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING  
BUSINESS CONFIDENTIAL INFORMATION**

Adopted on 19 June 2012

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously submitted to China's Ministry of Commerce ("MOFCOM") as BCI in the anti-dumping and countervailing duty investigations at issue in this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.
2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the investigations at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.
3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.
4. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
5. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.
6. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.
7. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

8. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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