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

(DS427)

RESPONSE OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST PANEL MEETING

PUBLIC VERSION

Double brackets ("[[ ]]") indicates where
business confidential information was redacted

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Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, 2003, adopted 20 August 1999.
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, circulated 15 June 2012.
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr. 1, adopted 28 July 2011.
EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr. 1.
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 2003, adopted as modified by Appellate Body 18 August 2003.
Korea – Dairy (AB)	Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Beef & Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*, WT/DS295/R, 2005, as modified by Appellate Body Report WT/DS295/AB/R.
Mexico – Beef & Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005.
Mexico – Pipes and	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and*

Tubes	*Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
US – Cloves (AB)	Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 2011, adopted 25 March 2011.
US – Hot Rolled Steel (AB)	Appellate Body Report, United States – *Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – OCTG Sunset (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Softwood Lumber Final AD Determination	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report WT/DS264/AB/R.
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US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007.
US – Wheat Gluten (AB)	Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, adopted 19 January 2001.

China – Countervailing and Anti-Dumping Duty Measures on Broiler Products from the United States (DS427)

Response of the United States to Questions from the Panel to the Parties Following the First Substantive Meeting of the Panel

I. GENERAL QUESTIONS

Question 1 (to both Parties): The scope of the order refers to fresh, chilled or frozen broiler products. How much of the total exports of respondents to China are frozen? Approximately how much of their exports are (i) paws; (ii) breast meat; (iii) other products? Approximately what proportion of their production of these product types was exported? Please answer from information on the record.

1. The United States has attempted to compile the relevant information to the extent possible. At present, the United States can provide data for Tyson. The United States is examining whether it can secure similar information for the other mandatory respondents.

Tyson

100 percent of Tyson's exports of broiler products to China were frozen. The percentage of Tyson exports was (by weight):

(i) paws: [[ ]] percent (by weight)
(ii) breast meat: [[ ]]
(iii) remaining products: leg quarters ([[ ]] percent), wing tips ([[ ]] percent), drumsticks ([[ ]] percent) and gizzards ([[ ]] percent).

Tyson provides below the US sales of products exported to China as a percentage of Tyson's US production of each product:

- Wings: [[ ]]
- Thigh meat: [[ ]]
- Drumsticks: [[ ]]
- Gizzards: [[ ]]
- Leg quarters: [[ ]]
- Paws: [[ ]]

- Wing tips: [[ ]]

This data demonstrate that Tyson had significant domestic sales of many of the products exported to China. For three products (wings, thigh meat, and drumsticks), the majority of Tyson's production was sold in the United States. In the aggregate, Tyson's US sales of the products exported to China
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Tyson submitted data, from which the above can be derived, via an exhibit during the course of the investigation. The exhibit, Table 6-3, was submitted as part of Tyson's response to the second supplemental questionnaire.

Question 2 (to both Parties): **We note that the parties have provided different translations of certain documents, notably:**

- **Petition (Exhibits USA-1, CHN-2);**
- **AD Final Determination (Exhibits USA-4, CHN-3); and**
- **Response to US Comments before Final Determination (Exhibits USA-42, CHN-10).**

Are any of the differences of translation in these or any other documents material to the Panel's resolution of the US claims?

2. At this time, the United States is unaware of any differences in translation that might be material to the resolution of the U.S. claims. The United States believes it will be in a better position to determine whether translation issues need resolution by the time of the second panel meeting.

Question 4 (United States): United States, please provide to the Panel the various documents referred to in relation to the US claims under Article 2.4 of the Anti-Dumping Agreement, and in particular: forms 6-3, 6-5, 6-6, 6-7 of Keystone's AD Questionnaire Response; MOFCOM's Verification Report for Keystone and all relevant Exhibits, in particular those referred to by the United States in its first written submission.

3. The United States submits the following exhibits to the panel: Keystone's Form 6-3 (USA-54), Form 6-5 (USA-55), Form 6-6 (USA-56) and Form 6-7 (USA-57), which were submitted by Keystone with Keystone's AD Questionnaire Response (USA-34); and MOFCOM's Verification Report for Keystone (USA-58).

II. PROCEDURAL CLAIMS

A. OBLIGATIONS UNDER ARTICLE 6.2 OF THE ANTI-DUMPING AGREEMENT

Question 5 (United States): In your submission, you refer to the term "public hearing" when discussing the meeting contemplated under Article 6.2 of the Anti-Dumping Agreement. What do you mean by "public hearing"? How does this term comport with the text of Article 6.2?

4. The United States uses the term "public hearing" in its submission for three reasons: (1) as shorthand for the "opportunity" required under Article 6.2, (2) because that is how MOFCOM titles its rules for hearings ("Rules on Public Hearings with Regard to Investigations of Injury to Industry"[1] and "Provisional Rules on the Conduct of Public Hearings in Antidumping Duty Investigations."[2]), and (3) because the U.S. request for a hearing in the underlying investigation[3] is framed as such. In using the term "public hearing," the United States does not mean to imply that it views China's obligations as anything different from, or greater than, those set out expressly in Article 6.2. Thus, China's arguments about the extraordinary nature of the U.S. request for a public hearing and the obligations of Article 6.2 are misdirected. Indeed, the United States in its submission identified Article 6.2 as having four elements;[4] a requirement that the meeting be open to the public was not one of them.

5. To the extent the Panel is asking whether the United States believes that Article 6.2 requires that a meeting be open to the public, the United States recognizes that per the text, the meeting may very well need to "take account of the need to preserve confidentiality" and that an investigating authority accordingly may need to make such allowances depending on the need. Of course here, though, MOFCOM denied a hearing altogether and accordingly the question of whether MOFCOM improperly took account of the need to preserve confidentiality simply does not arise. In short, the reference to "public hearing" is only factually relevant because it confirms that MOFCOM in fact denied a hearing as defined under its own rules.

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

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

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

[4] United States, First Written Submission, paras. 46-51.

Question 6 (both 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 organize and hold a hearing.

6. 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.

7. First, an investigating authority can provide for a procedure whereby an interested party can initiate a hearing, such as in Article of 5 of MOFCOM's Rules on Public Hearings with Regards to Investigations of Injury to the Industry ("Injury Hearing Rules").[5]

> Article 5: A public hearing on investigations of injury to industry may be held upon request for it with respect to injury to industry and the causal link from the petitioners, defendants, or any other interested parties subject to anti-dumping, countervailing duty or safeguard investigations, or where SETC deems it necessary.

Second, the investigating authority can announce the logistics for the hearing and allow *all interested parties* the opportunity to participate, perhaps through a registration process.

> Article 7: SETC shall organize a public hearing in respect of investigations of injury to industry, and shall notify relevant interested parties of information in that regard such as the decision to hold a public hearing, the subjects to be heard, the time and place of the hearing, and relevant requirements, by means of a public notice or written notices 20 days before commencement of the hearing.
>
> Article 8: Interested parties shall, within 15 days following the date of publication of the notice or issue of written notices for the public hearing on investigations of injury to industry, register with SETC in accordance with the specified requirements and submit a summary of the presentation and relevant supporting materials for the public hearing, which shall be in the common language and be made in 10 originals.
>
> Article 9: The parties with respect to the public hearing are those who have registered with SETC for participating in the public hearing, including the petitioners for anti-dumping, countervailing duty or safeguard investigations, the defendants, and any other interested parties.

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

If an investigating authority followed these procedures, then the investigating authority would have comported with the language in Article 6.2 that provides an investigating authority "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests …".

8. Third, the investigating authority can conduct its hearing 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.

> Article 17: The public hearing shall be conducted in accordance with the following procedure:
>
> > (1) the chief hearing officer announces the commencement of the hearing, and presents the background to the case;
> >
> > (2) the applicant presents the facts and grounds on which the application for the public hearing is based;
> >
> > (3) the parties make their presentations;
> >
> > (4) the parties make their final statements;
> >
> > (5) the chief hearing officer announces the closure of the hearing.

If an investigating authority conducted its hearing in this manner, then the investigating authority would have abided by its obligation in Article 6.2 to conduct the meeting so that "opposing views may be presented and rebuttal arguments offered." If an investigating authority did all of the foregoing, then the United States would agree that an investigating authority satisfied its obligations under the second sentence of Article 6.2. In this case, there is absolutely no evidence on the record to reflect that MOFCOM provided any opportunity for the United States, as the requesting interested party, to meet parties with adverse interests, so that opposing views could be presented and rebuttal arguments offered. To the contrary, the evidence reflects exactly the opposite.[6]

9. In respect to when an investigating authority may refuse to hold a hearing, the United States references the Appellate Body's report in *US – OCTG Sunset.*[7] The Appellate Body stated there that Article 6.2 is one of the provisions that "set out the fundamental due process rights to which interested parties are entitled in antidumping investigations and reviews."[8] Accordingly,

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[6] The United States is not contending that China was required to make the Petitioner attend. The United States is arguing that the record confirms that no opportunity for participation in a hear occurred because MOFCOM decided *ab initio* hearing would not be held.

[7] *US – OCTG Sunset (AB)*.

[8] *Id*. at para. 241.

"there should be liberal opportunities for respondents to defend their interests."[9] However, the Appellate Body also stated that the opportunities are not unlimited.

> Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to "control the conduct" of its inquiry and to "carry out the multiple steps" required to reach a timely completion of the sunset review, a respondent will have reached the limit of the "ample" and "full" opportunities provided for in Articles 6.1 and 6.2 of the Anti-Dumping Agreement.[10]

In other words, an investigating authority need not give repeated hearings or entertain requests beyond reasonable deadlines. For example, the Appellate Body in *US – OCTG Sunset* explained that "the rights to present evidence and request a hearing cannot be said to be 'denied' to a respondent that is given an opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable."[11]

10. Here of course, 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.[12] Per its July 14 letter, the reason MOFCOM denied the request was it had decided, *ab initio*, that it had undertaken the investigations in a "public, just and transparent manner" and that accordingly the issues in the U.S. request "are not relevant to the interested parties directly."[13]

B. DISCLOSURE OF ESSENTIAL FACTS

Question 8 (both Parties): **China argues in paragraphs 32-34 of its first written submission that the respondents had ample information in the Final Disclosures to understand what MOFCOM did in the investigation. For example, taking the issue of the decision that sales were made outside the ordinary course of trade or below cost:**

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9 *Id*.

10 *Id*. at para. 242. (footnote omitted).

11 *Id*. at para. 252.

12 Nor could MOFCOM now claim that either of the two listed criteria justifies the denial of a hearing request in this case if China maintains its present position that the U.S. application was proper and accepted. See China, First Written Submission, para. 9 ("the application for a public hearing was in proper form and therefore accepted.")

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

(a) Where in the record is the list of the sales which were disregarded because they were determined to not have been made in the ordinary course of trade or which had been excluded because they were below cost of production? Where in the record could the respondents find these elements? Please explain.

Response to part (a)

11. The list of sales which were disregarded (for reasons of ordinary course of trade or below cost of production) was not on the record in the proceeding. Respondents did not have access to this information.

12. Instead, the disclosure documents provided by MOFCOM included only summary statements that MOFCOM, for certain products, was using the domestic sales, excluding sales transactions lower than the costs of production, as a basis to determine normal value. Those documents did not identify which transactions were excluded. For example, MOFCOM indicated the following in Pilgrim's Final AD Disclosure:

> "According to the Regulation of Article 4 of the *Anti-dumping Regulation of the People's Republic of China*, for the domestic sales of these products, investigating authority decided to use the domestic sales by excluding the sales transactions that were lower than the costs as the basis to determine the normal value."[14]

13. MOFCOM provided a similarly vague statement, without identifying which particular sales were determined to be below cost, in Tyson's Final AD Disclosure:

> "The investigation authority conducted lower-than-cost test to the like products in domestic sales in accordance with the adjusted production cost and expenses. Pursuant to Article 4 of the *Anti-dumping Regulations of People's Republic of China*, for the specification of like product of subject merchandise whose lower-than-weighted-average-cost domestic sales quantity exceeds 20% of the domestic sales quantity (1st Joint (Drummette), 2nd Joint (mid-joint), Back-out thigh, Leg quarter, Whole leg, Wog), the investigation authority determines to construct its normal value based on the domestic sales excluding those lower-than-cost sales; for the specification of like product of subject merchandise (Gizzard) whose domestic sales are all lower than the weighted average cost, thus the investigation authority determines to use the constructed normal value."[15]

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[14] Pilgrim's Final AD Disclosure, p. 8 (USA-13) (emphasis added).

[15] Tyson Final AD Disclosure, p.2 (USA-12) (emphasis added).

(b) How were the respondents informed of this information?

Response to part (b)

14. As noted above, the respondents were not informed of this information.

(c) Is the above information (sales disregarded or excluded and the elements of constructed value) "essential facts" within the meaning of Article 6.9?

Response to part (c)

15. Yes, the above information, if used by MOFCOM to calculate the respondents' normal value, are "essential facts" within the meaning of Article 6.9 of the AD Agreement because they are absolutely indispensible to the determination of the existence and magnitude of dumping. This example regarding disregarded home market sales illustrates MOFCOM's failure to disclose the essential facts in breach of Article 6.9 of the AD Agreement. In paragraphs 32-34 of its First Written Submission (which is referenced in this question from the Panel), China tries, without success, to justify this failure.

16. First, China asserts that it met its disclosure obligation because each of the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping.[16] Disclosure of summary figures does not meet China's obligations under Article 6.9 of the AD Agreement. At most, these disclosures merely allowed the exporters to guess at or approximate the calculations. 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.

17. Second, China suggests that it is sufficient under Article 6.9 if the respondents could perform their own calculations. This argument has no validity. In order to defend their interests, the respondents needed to be able to review and comment on the calculation performed by MOFCOM. For example, without access to the actual calculations performed, the respondents could not check MOFCOM's methodology and arithmetic for errors. An investigating authority must provide respondents with the necessary calculations and data because even a minor mistake could result in a serious distortion of the dumping margin. Moreover, without the actual calculations performed by MOFCOM, the respondents could not check the calculations against the methodological explanations given, to ensure that MOFCOM did what it explained it would do.

18. In sum, the actual data used by MOFCOM to calculate the respondents' normal value are "essential facts" because they are absolutely indispensible to the determination of the existence and magnitude of dumping. If the respondent does not know which transactions were excluded from the investigating authority's calculation of normal value, and is not otherwise informed of

[16] China, First Written Submission, paras. 32-34.

the essential facts forming the basis of the investigating authority's decision to impose definitive measures, it cannot know how the normal value was calculated or adequately defend its interests.

Question 9 (United States): Please clarify that the information in paragraph 3 of China's oral statement accurately reflects the information the United States believes should have been included in the disclosure?

19. The information in paragraph 3 of China's oral statement does not accurately reflect the arguments of the United States regarding the U.S. claim under Article 6.9 of the AD Agreement. In relevant part, Paragraph 3 of China's oral statement provides:

> "The United States construes Article 6.9 of the AD Agreement as requiring authorities to disclose any and all aspects of the calculations and data used to calculate the margins of dumping being considered by the investigating authority. 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."[17]

20. China presents a classic straw man argument: that is, China purports 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, and explains why China failed to meet its Article 6.9 obligations in the investigation that is the subject of the dispute. Article 6.9 provides:

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

21. Although no one has argued for the position that disclosure under Article 6.9 must address "every detail" of the authority's consideration, the United States notes that this is not correct under the plain text of Article 6.9. As explained in the U.S. First Written Submission, this text clearly reflects at least three important limitations: it applies only to *facts*, and not to all matters; it concerns only the *essential* facts, as opposed to any and all facts; and it is limited to those essential facts that *form the basis of the decision to apply definitive measures*.[18]

22. The United States' First Written Submission accurately reflects the information that MOFCOM should have disclosed to the interested parties.[19] These essential facts include the

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[17] China, Oral Statement, para. 3.

[18] United States, First Written Submission, paras. 54-56.

[19] United States, First Written Submission, para. 66.

data and calculations used by MOFCOM to determine the respondents' normal values, costs of production, and export prices.[20] To the extent that the investigating authority used "individual transaction data" to calculate a respondent's normal value or cost of production, then "yes", this data should have been disclosed. As indicated in response to Question 8, above, the actual data used by MOFCOM to calculate the respondents' normal value, as well as the calculations performed using those data, are "essential facts" because they are absolutely indispensible to the determination of the existence and magnitude of dumping. Without these essential facts, the respondents could not adequately defend their interests.

Question 11 (United States): Considering that a preliminary determination may serve as disclosure of essential facts, was additional disclosure required for those items where there was no change from the preliminary determination?

23. Article 6.9 of the AD Agreement requires the disclosure of essential facts "before a final determination is made." If an investigating authority disclosed all the essential facts with its preliminary determination, and every essential fact did not materially change after its initial disclosure, then the AD Agreement does not require the further provision of essential facts before the final determination. However, further clarification or explanation might be necessary in the final determination, depending on the arguments raised by the parties.

24. In this case, MOFCOM did not disclose the essential facts with its preliminary determination. The timing of MOFCOM's disclosure of essential facts is therefore not at issue. Rather, China breached Article 6.9 of the AD Agreement because it failed to provide essential facts in the first place to the interested parties at any point in the investigation.

Question 12 (both Parties): How do you distinguish "facts" from "reasoning"? In particular:

(a) What are the criteria for distinguishing essential facts from regular facts, and facts from reasoning?

(b) 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 explain.

[20] China's reference to the "calculation worksheets, and the calculation program itself" appear to be in response to the following statement in the United States First Written Submission, para. 66: "[w]here a computer program was used, MOFCOM should have provided the actual files and spreadsheets created within the computer program, along with the formulas used to calculate normal value and export price, along with any adjustments." Where used, such facts would be essential to an investigating authority's dumping determination because they would form the basis of its decision to apply definitive measures and the determination of the dumping margin.

25. The word "fact" is defined as "[a] thing known for certain to have occurred or to be true; a datum of experience" and "[e]vents or circumstances as distinct from their legal interpretation."[21] The panel report in *EC—Salmon* defines "fact" similarly.[22] The use of the adjective "essential" to modify "facts" indicates that the obligation in Article 6.9 does not encompass "any and all" facts, but is instead concerned with only those facts that are "absolutely indispensible or necessary". This, of course, raises the question of "indispensible or necessary" to what? That question is answered by the first sentence of Article 6.9, which provides relevant context for understanding that term. Article 6.9 requires the disclosure of essential facts "under consideration which form the basis for the decision whether to apply definitive measures." Therefore, the term "essential facts" in Article 6.9 can be understood to mean those facts that are indispensible or necessary for the investigating authority's decision to determine whether definitive measures are warranted.[23]

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

27. The panel report in *Argentina – Poultry* provides a brief discussion of the distinction between an "essential fact" and "reasoning":

> In our view, however, the failure to inform an interested party of a reason does not equate to failure to inform an interested party of an essential fact. The word "fact" is defined inter alia as "a thing that

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

[22] *EC – Salmon*, para. 7.805 ("The word 'fact' is defined variously as 'Truth; reality' and 'A thing known for certain to have occurred or to be true; a datum of experience' and 'A thing assumed or alleged as a basis for inference' and 'Events or circumstances as distinct from their legal interpretation.' In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact.").

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

> is known to have occurred, to exist or to be true", whereas a "reason" is a "motive, cause or justification".[24]

The panel report also indicated that "a reason is part of the evaluation of a fact, and not the fact itself."[25]

28. With regard to the Panel's example of the application of the test to determine whether sales were in the ordinary course of trade, an investigating authority must examine a respondent's sales data and decide whether to exclude certain transactions. The sales data and mathematical tests are facts, but the investigating authority's motivation for adopting its test constitutes its reasoning. The actual data and mathematical test used by the investigating authority, including excluded transactions and adjusted data, would constitute essential facts because they form the basis of the investigating authority's decision of whether to apply definitive measures.

C. REQUIREMENT TO PROVIDE NON-CONFIDENTIAL SUMMARIES

Question 13 (United States): Is your claim about the lack of non-confidential summaries limited to the examples cited in your first written submission?

29. Yes, the U.S. challenge is limited to the six examples cited from the Petition cited in the U.S. first written submission.

Question 14 (both 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.

30. As an initial matter, the United States notes a similar issue arose in the *China – GOES* dispute. There, China suggested non-confidential summaries could be found in a section of the Petition labeled Part I.[26] The United States contested China's attempt to cobble together non-confidential summaries in that general section and claim that those summaries applied to its calculations. The United States argued that the panel's inquiry had to be limited to Part II of the Petition, which stated "below are non-confidential summaries of the appendices that have been applied for confidential treatment."[27] The panel rejected China's position and proceeded to

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[24] *Argentina – Poultry*, para. 7.225 (citing The Concise Oxford Dictionary of Current English (Clarendon Press, 1995), p. 482.).

[25] *Argentina – Poultry*, para. 7.227.

[26] *China – GOES*, para. 7.194.

[27] *Id*. at para. 7.196.

examine only the summaries in Part II because it agreed with the United States that Part II was intended to serve as the non-confidential summaries.[28] In other words, the panel did not accept China's offer to play a guessing game of whether some information somewhere might possibly serve as a non-confidential summary.

31. The rejection was appropriate because the inquiry must be focused on whether there is "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." A reasonable understanding is unlikely to be achieved if a party does not know that information is intended to provide an understanding of that submitted in confidence. As the panel in *GOES* noted:

> Articles 12.4.1 and 6.5.1 explicitly 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.[29]

Yet, that is precisely what China is asking to do here and what was rejected by the panel in *GOES*.

32. Thus – since the inquiry is whether sufficient detail exists to allow a reasonable understanding – then the answer is that labeling will often be appropriate, as it will allow the reader to link the non-confidential summary with the information that has been redacted. Conversely, a lack of labeling may support the conclusion that the summary as presented does not meet the standard contained in Article 12.4.1 of the SCM Agreement.[30] While the United States will not totally foreclose that there may be options other than formal labeling to ensure that a reader has a reasonable understanding that certain information is to serve as a non-confidential summary, the United States notes that China has provided no explanation here as to what other indicia would have let an interested party know that the information China cites now was intended as a non-confidential summary. Therefore, it appears China is simply left with its offer of letting an interested party engage in post-hoc guess work; an offer rejected by the panel in *GOES* and that should likewise be rejected here.

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[28] *Id*. at para. 7.197.

[29] *Id*. at para. 7.202.

[30] *China – GOES*, para. 7.213 ("given the lack of cross-referencing and the mismatch between the redacted information and the purported non-confidential summaries, a respondent may be confused regarding whether the summary information is based on the same data source as the redacted information and thus represents the "non-confidential" summary. In this sense, the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested.")

Question 15 (United States): Given China's explanation in paragraphs 46-59 of China's first written submission that the non-confidential version of the Petition contained sufficient information to permit a reasonable understanding of the information submitted in confidence, please explain why this information is not sufficient to comply with Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement and what, in your view, would have constituted a summary that satisfies this requirement.

33. First, 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. In some ways, the situation is worse than that presented in *GOES* because in *GOES* at least the Petitioner designated a section of the Petition as containing the summaries. Accordingly, a threshold issue is that all of the examples cited by China are defective because there is no detail that would let an interested party know – and accordingly have a reasonable understanding – that the information is intended to serve as a non-confidential summary for a particular piece of redacted information.

34. The second failing common to all of the examples cited by China is that they entail conclusions that an interested party must summarily accept rather than any summarization of the actual information. As the Appellate Body in *EC – Fasteners* noted, the obligation in Article 6.5.1 is that investigating authority ensure the summary "permit a reasonable understanding of the *substance of the information* submitted in confidence."[31] The panel in GOES explained that:

> to accommodate the concern of due process, interested parties must have access to a summary of the confidential information that is relied upon to draw certain conclusions, so that those conclusions may be challenged. Simply relying on the conclusion as the non-confidential summary does not provide interested parties with a means to challenge whether the confidential information in fact provides a basis for the conclusion drawn. China's position is that interested parties reading the application should assume that the applicants correctly interpreted the redacted data to reach the conclusion relating to standing. In our view, this is not what is envisaged by Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. Rather, it is necessary to provide a summary of the substance of the confidential information and not merely to assert the conclusions that may be drawn from it.[32]

Here, every single one of China's supposed summaries is simply a conclusion with no explanation of the underlying information.

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31 *EC – Fasteners (AB)*, para. 549.

32 *China – GOES*, para. 7.205.

Item #1: Production[33]

- "The public version of the Petition makes this factual *assertion*, and more specifically that the production accounted for by petitioner is more than 50 percent of total production in the industry. That *assertion alone* provides a 'reasonable understanding' …." [34]

Iten #2: Production Capacity

- *Given petitioners' statement* that they represented more than 50 percent of total production in China, one may *deduce*[35] both minimum and maximum capacity figures for each time period using the aforementioned estimates on utilization."[36]

Item #3: Domestic Inventory Levels

- "The ending inventory in 2007 increased considerably by 38.74% than 2006; the ending inventory in 2008 further increased by 9.86% than 2007. In the first half of 2009, the ending inventory kept increasing by 8.33% than 2008."[37]

Item #4: Cash Flow

- "Since the import quantity of the products concerned keeps increasing and the market share goes up constantly, but the import price is always at a low level, the capability of like products in China to create benefits is severely affected and the loss has been suffered for years. Correspondingly, the net cash flow from operating activities of like products in China is also significantly affected. The like products in

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33 In respect to production capacity, China made a nearly identical argument in *GOES*, and lost. *China—GOES*, paras. 7.203 – 7.208.

34 China, First Written Submission, para. 47 (emphasis added).

35 *See China – GOES*, para. 7.218 ("where an interested party is required to perform its own calculations in order to derive its own summary of the confidential information, this is an indication that the party providing the confidential information did not furnish an adequate summary to the investigating authority in accordance with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.")

36 China, First Written Submission, para. 50.

37 China, First Written Submission, para. 51, citing CHN-2, p. 74.

> China had net cash outflow in 2006 and 2007, and net cash inflow in 2008. However, the like products in China had to bear net cash outflow again in the first half of 2009, up to [ ], since the selling price and sales quantity of like products dropped to different degrees. The cash for the survival and development of the domestic industry has been severely reduced."[38]

Item #5: Wages & Employment

- As stated above, the domestic industry keeps expanding its scale of production and increasing the jobs in order to satisfy the market demand. In 2007 and 2008, the employment figures related to like products in China increased by 15.58% and 17.75% respectively. In the first half of 2009, the domestic industry was still expanding its scale of production, but the capacity utilization decreased dramatically due to the decline of sales market. Therefore, the yield went down and the employment figures decreased by 12.91% over the same period of the previous year. Moreover, it caused to the serious issue related to social stability. With regard to average salary related to like products in China, it has been increasing on the whole since 2006 due to the inflation of prices and the downsizing.[39]

Item #6: Labor Productivity

- Since 2006, the employment figures related to like products in China have been fluctuated dramatically, but the labor productivity of employees has been remained stable on the whole.[40]

35. In short, even the *post-hoc*, cobbled together summaries provided by China fail to constitute proper non-confidential summaries because they are merely self-serving conclusions and not an explanation of the actual underlying information.

Question 16 (China): Please indicate whether the graphs in the Petition that had the underlying data redacted were to scale?

36. The United States would respectfully submits that there is no indication in either the version of the Petition provided by China[41] or the United States[42] that these graphs are intended to be to scale or what the units on the scales should be.

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38 China, First Written Submission, para. 53, citing CHN-2, p. 83.

39 China, First Written Submission, para. 55, citing CHN-2, p. 83.

40 China, First Written Submission, para. 57, citing CHN-2, p. 84.

III. USE OF ADVERSE FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATES

Question 17 (both 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 part (a)

37. Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide restrictions on the actions of investigating authorities – not restrictions to unknown interested parties. In other words, those provisions limit the investigating authorities' ability to apply the use of facts available under certain criteria. Article 6.8 of the AD Agreement provides:

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

38. Article 12.7 of the SCM Agreement is worded almost identically, except that it uses the phrase "any interested Member or interested party" whereas Article 6.8 of the AD Agreement refers only to "any interested party".

39. Article 6.11 of the AD Agreement and Article 12.8 of the SCM Agreement define "interested parties" as including "an exporter or foreign producer or the importer of a product

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[41] Petition, CHN-2, p. 71-72

[42] Petition, USA-1, p. 69-70.

subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product". There is no requirement that the exporter or foreign producer of the product under investigation be known to the investigating authority in order for it to be considered an interested party. Thus, Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement restrict the ability of the investigating authority to apply facts available in all situations, including those in which there are unknown producers and exporters. By applying facts available to unknown exporters that were not notified of the information required of them, and that therefore did not refuse to provide necessary information or otherwise impede the investigation, China acted inconsistently with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

40. Annex II of the AD Agreement, paragraph 1, clarifies the conditions under which resort may be had to facts available in the context of an anti-dumping proceeding:

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

41. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions on the use of facts available and, therefore, Annex II may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement.

42. However, it is not necessary for the Panel to reach a conclusion 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 unknown producers have received notice. MOFCOM did not identify these exporters and producers, did not provide them with the necessary requests for information, and therefore could not find that they had "refused access to" or "otherwise did not provide" requested information. Thus, in applying facts available, MOFCOM acted inconsistent with China's obligations under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

(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 of the Anti-Dumping Agreement apply to unknown interested parties who were not part of the universe of interested parties considered for the sample or selection; or should they be captured by Article 6.8? If neither is applicable, what is the applicable provision for calculating their rate?

Response to part (b)

43. Article 6.8 and Article 9.4 of the AD Agreement contain independent obligations. Article 6.8 concerns the application of facts available to any interested party which failed to provide information requested by the investigating authority, while Article 9.4 concerns the application of an anti-dumping duty to an exporter or producer that was not individually examined by the investigating authority.

44. The obligations of Article 9.4 apply where the "authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6". The first sentence of Article 6.10 refers to the determination of an individual margin of dumping for each "known exporter or producer." However, the second sentence of Article 6.10 provides, in part, that investigation authorities "may limit their examination" on the basis of three different means of analysis if "the number of exporters, producers or importers or types of products involved is so large as to make such a determination impracticable". Depending on the methodology applied, such an analysis can be based on "the basis of information available to the authorities at the time of the selection," for example, or "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

45. An "all others" dumping or subsidy rate based on one or all (whether as a simple average, weighted average, or otherwise) of the dumping and subsidy rates calculated for the investigated companies could have been calculated and applied to the unknown exporters or producers that were not notified of the investigation by MOFCOM, consistent with China's obligations under the WTO Agreements.

Question 19 (United States): Please explain why, in your opinion, MOFCOM's notice to potential exporters was insufficient, and which additional steps MOFCOM could have taken to meet the requirements of Article 6.8 and Annex II.

46. MOFCOM notified only the six producers identified in the petition and little more. It is not necessary in this dispute to resolve what additional steps MOFCOM could have taken to meet the requirements of Article 6.8 and Annex II of the AD Agreement. It is sufficient to find that the exporters and producers subject to the "all others" rates were not notified of the information required of them and therefore MOFCOM's application of facts available to those exporters and producers was inconsistent with China's obligations under Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

Question 22 (both Parties): 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 notes that when establishing conditions for the use of facts available, the SCM Agreement directly refers to an "interested Member", whereas the Anti-Dumping Agreement mentions "any interested party". The European Union argues that whereas a WTO Member, when given a notice of the initiation of the AD/CVD investigation, may not be aware of all firms producing the product under investigation in its territory who may be exporting to the investigating Member, it is likely to know the firms that it is subsidising. Please discuss 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) The European Union's argument implies that non-cooperation on the part of an "interested Member" can be the basis for applying a facts available "all others" rate to producers/exporters who were not given direct notice from the investigating authority of the information required. Do you agree?

(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?

47. Annex II of the AD Agreement, which clarifies the conditions under which resort may be had to facts available in the context of an anti-dumping proceeding, may provide relevant context for the purpose of interpreting Article 12.7 of the SCM Agreement. The United States considers that Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement provide for similar conditions for the use of facts available.

48. Article 6.8 of the AD Agreement provides for the use of facts available where any "interested party" refuses access to or otherwise fails to provide necessary information within a reasonable period of time or significantly impedes the investigation. Article 6.11 of the AD Agreement defines "interested parties" as including "the government of the exporting Member". The definition of "interested parties" in Article 12.9 of the SCM Agreement does not include "the government of the exporting Member". However, Article 12.7 of the SCM Agreement provides for the use of facts available where any "interested Member or interested party" refuses access to or otherwise fails to provide necessary information or significantly impedes the investigation. Thus, there does not appear to be any significant difference between the two Agreements with respect to the party from whom information may be requested.

49. With respect to subpart (b) (the European Union's suggestion that non-cooperation on the part of an "interested Member" can be the basis for applying a facts available "all others" rate to

producers or exporters who were not given notice by the investigating authority of the information required), the United States views the EU's suggestion as having no basis in the text of the Agreement.[43]

50. The United States further notes that the European Union's suggestion appears to be based on the assumption that an exporting Member necessarily knows the names and addresses of firms that are producing the product that is subject to the investigation. There is no basis for this assumption. For example, at the time of initiation of the investigation, there has been no finding that a Member is, in fact, providing a subsidy. One of the purposes of the countervailing duty investigation is to determine whether that is the case. If no subsidy is being provided, a Member would not have any particular knowledge of those companies that allegedly received a subsidy. Moreover, even if there were a subsidy and the Member had knowledge of the companies that it directly provided the subsidy to, it may not necessarily have knowledge of the ultimate recipient of that subsidy. For example, in the case of a subsidy that an investigating authority decides is passed-through, the Member may have knowledge of the upstream recipient, but it may not necessarily have knowledge of the downstream producer to which the alleged subsidy was passed.

51. With regard to subpart (c), the United States notes that an investigating authority's request to an interested Member to take action with respect to a third party (*i.e.*, notifying that party of the investigation), is distinct from a request to that interested Member to provide the investigating authority with information.

IV. CALCULATION OF THE ANTI-DUMPING AND COUNTERVAILING DUTIES

A. CALCULATION OF COSTS *NOT* USING THE NORMAL BOOKS AND RECORDS OF THE RESPONDENTS

Question 25 (United States): Please explain your view on the relationship between the two provisos set forth in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Please provide an explanation, with reference to the interpretative process set forth in the Vienna Convention, as to how in your view that represents the ordinary meaning of the provision.

52. The first sentence of Article 2.2.1.1 states:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with [1] the generally accepted accounting principles of

[43] The United States also notes that neither China, in its written submission, nor MOFCOM in its determinations, appear to suggest that the resort to facts available during the investigations was in response to any non-cooperation on the part of the United States.

> the exporting country and [2] reasonably reflect the costs associated with the production and sale of the product under consideration.

The United States understands from the Panel's question that it seeks to properly interpret the relationship between the two conditions in the dependent clause of Article 2.2.1.1: that the costs are (1) accordance with the exporting country's GAAP and (2) reasonably associated with the production and sale of the product under consideration.

53. The Appellate Body has explained how the customary rules of interpretation reflected in the Vienna Convention apply to the WTO Agreements:

> it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously." An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.[44]

Accordingly, it is important as an initial matter to recognize how these conditions are to be interpreted in light of the "whole." First, it is important to recognize that 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. Of particular note, 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.

54. Second, the provisos are to be interpreted as conditions on the operative clause: the obligation to calculate costs on the basis of the records kept by the producer or exporter. So just as the inclusion of these two provisos in the dependent clause means there are scenarios where costs need not be calculated on the basis of kept costs, it is equally true that the conditions cannot be construed to offer unfettered discretion to an investigating authority or in a manner that would be inherently incompatible with how a producer would keep its records. Otherwise, the operative clause would be rendered a nullity.

55. China's *post-hoc* reasons for rejecting the costs render the operative clause a nullity. Specifically, China's position is that costs are unreasonable if they are not "fair," i.e., too low compared to what China's investigating authority feels appropriate for its own market.[45] As others have noted, why would a producer normally keep its recorded costs for a particular export

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[44] *Korea – Dairy (AB)*, para. 81. (italics original) (footnote omitted).

[45] *See e.g.*, China, First Written Submission, paras. 79, 88, 104.

market,[46] particularly when as conceded here the producers' operational focus was not on the Chinese market.[47] Moreover, China's expressed concerns are inconsistent with the objective of calculating the cost of production in the country of origin. Indeed, China's interpretation of the "reasonably associated" requirement effectively vitiates the operative clause by destroying any boundaries on the application of the condition. Specifically, China's position means that it is free to reject a producer's costs whenever the investigating authority believes they are unfair from its perspective, *i.e*, not capable of sustaining a dumping margin. In other words, Article 2.2.1.1 would impose no restraint at all. Accordingly, China's interpretation of Articles 2.2.1.1 and Article 2.2 should not be accepted.[48]

56. Now, where there are two conditions it is conceivable that in some instances one condition may be satisfied while the other is not. However, the same evidence that supports a finding of consistency with GAAP may also support a finding that the costs are reasonably associated with the production and sale of the product under consideration. For example, as U.S. producers noted to MOFCOM during the investigation, for inventory produced in groups, US GAAP permits a relative sales or net realizable value to be used in order to assign costs since costs cannot be determined individually.[49] The same evidence used to confirm consistency with US GAAP – that the sales value was used to assign costs – can also support a finding that the costs are reasonably associated with the production and *sale* of the product under consideration. In short, consistency with GAAP may often also indicate that the costs are reasonably associated with production and sale.

57. The U.S. producers put on extensive evidence that the use of a relative value-based allocation methodology is reasonable. While the United States will not exhaustively recite all of their evidence, the United States would note two categories of evidence, none of which received any attention from MOFCOM. First, U.S. respondents provided evidence that the use of a relative value-based allocation methodology is industry standard both in the United States and

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[46] European Union, Oral Statement, para. 17 ("The European Union does not understand on what basis firms might be expected to tailor domestic cost allocation methodologies to the circumstances pertaining in a particular export market."); Saudi Arabia, Oral Statement, para. 10 ("A cost allocation methodology cannot be disregarded simply because accounting rules or market conditions are different in the importing country nor because the methodology is not considered appropriate for "purposes of an anti-dumping investigation.")

[47] China, First Written Submission, para. 87.

[48] Indeed, China's interpretation essentially would incorporate text that is not there. *See* European Union, Oral Statement, para. 8 ("However, China does appear to subsequently use the term "fair" to colour its arguments – a point to which we return below. The European Union suggests that the Panel stick to the terms actually used in the treaty.")

[49] Tyson, Further Comments on Preliminary AD Determination (April 9, 2010), p. 6 (USA-26); Keystone, Comments on the AD Final Disclosure (July 26, 2010), p. 22 (USA-29).

China.[50] The fact that in the normal course of business, both U.S. and Chinese producers resort to value-based allocation methodologies militates in favor of finding such a methodology reasonable.

58. Second, the respondents provided respected accounting authorities confirming that in the case of non-homogeneous joint products, the use of a relative value based allocation is a reasonable method of allocating costs. Conversely, those authorities noted that a weight-based value allocation is often unreasonable when it comes to allocation of costs.[51] In addition, these respondents noted their allocation was the standard means of allocating costs in the industry, including the chicken industry in China. Thus, the respondents provided evidence that their allocation methodology is reasonable for their industry in all markets, and that the methodology MOFCOM adopted was not reasonable. Yet, MOFCOM found it could summarily declare U.S. producers' costs unreasonable without any justification.

Question 27 (both Parties): Please provide your views on the relevance of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

59. The meaning of the term "normally" was recently discussed in the *U.S. – Clove Cigarettes* dispute. There, the Appellate Body stated:

> We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule". In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term "normally" . . . indicates that the rule … admits of derogation under certain circumstances.[52]

The United States posits, in accordance with the Appellate Body's reasoning above, that the use of the term "normally" 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 under which it would be possible to derogate from this rule: provided that such records are in accordance with [1] the generally accepted accounting principles of the exporting country and [2] reasonably reflect the costs associated with the production and sale of the product under consideration.

60. Here, critically, there is nothing on the record that MOFCOM put forward a reason as to why U.S. producers' costs were unreasonable. All of the arguments China presents in its written

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50 *See e.g.*, United States, First Written Submission, para. 98; Tyson, Comments on the Preliminary AD Determination, p. 4 (USA-25).

51 United States, First Written Submission, paras. 98 n. 108, 99 n. 112, and 100 n. 117.

52 *US – Cloves (AB)*, para. 273.

submission and at the Panel hearing are *post-hoc* and thus cannot be considered. Even if MOFCOM had made them though, the type of concerns invoked by China in this proceeding – such as conditions in the Chinese market –have no textual support in Article 2.2.1.1 and therefore are not grounds that permit resort to another methodology.

Question 28 (both Parties): Please confirm the Panel's understanding, from the parties' discussion at the first substantive meeting, that the basic information used by MOFCOM to construct normal value was from the respondent's records, and that the difference lies in the allocation of the costs.

61. The United States does not agree with the above characterization of the methodology employed by MOFCOM. The "basic information" in a company's records *includes* allocations. Indeed, the proper method of allocating various line items in a company's books are core issues of both the accounting profession, and of generally accepted accounting principles. Thus, it would be incorrect to say that MOFCOM based its constructed normal value on the basic information in respondents' records.

62. That said, the United States understands that MOFCOM did use some elements of respondents' records in calculating a normal value, resulting in an overall calculation that was fundamentally inconsistent with the basic information in the respondents' books and records.

63. The United States also notes that the allocation issue is not only that MOFCOM allocated those costs by weight, therefore assigning, for example the same costs to chicken thighs and offal, but that costs were overstated for at least some producers. For example, in response to the preliminary determination, in which MOFCOM relied on the weight-based costs for the first time, Tyson submitted complete cost information to calculate a proper cost per pound.[53] Specifically, Tyson provided the cost and weight for all birds, by plant and week, for the entire POI. This provided MOFCOM with the necessary information to calculate a correct cost per pound for the meat cost (i.e., direct materials). Tyson proposed that the product-specific processing costs be used because these costs are not allocated by value. In other words, MOFCOM's methodology resulted in the inclusion of costs not associated with the production and sale of the like product.[54]

Question 29 (United States): In paragraph 39 of its Opening statement at the first substantive meeting, the United States indicates that a value-based allocation is not inherently unreasonable and that it can account for differences in physical characteristics based on how the market values those differences. Could a company, therefore, have different cost allocations for each market and then for each product within that market?

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[53] Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) at Exs. 8-9, (USA-26).

[54] *EC – Salmon*, paras. 7.490-7.491, 7.507, 7.514.

With respect to the "value based" cost allocations in the investigation at issue, were these allocations done with reference to the domestic market, the export market, or global sales?

64. The United States meant that a value based allocation company can reflect how a market values particular products and agrees that a value based allocation can reflect world-wide prices. Article 2.2.1.1. provides that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation. In this investigation, none of the respondents used different cost allocation methodologies for each market in its normal books and records. Moreover, the United States is unaware of any company in the chicken (or other industry) using such methodologies. Ultimately, costs are used to determine inventory values that are in turn used to establish the cost of goods sold. Varying the cost allocation by market could affect the accuracy of the balance sheet and income statement. It would create the illogical situation where two identical products, produced at the same time, on the same line, ended up with two different costs. Moreover, producers often do not segregate inventory by market creating another practical hurdle to developing such allocations.

65. In part for this reason, such an approach would raise serious questions of consistency with U.S. GAAP and indeed international accounting standards. U.S. GAAP requires that a cost accounting system associate costs with the revenues which were earned from the items that gave rise to the cost, which a value allocation does. International Accounting Standards would hold the same.[55] In the present case, calculating market specific costs would quite possibly be a violation of GAAP.

66. In respect to the value based allocations applied here, the producers' allocations were made with respect to the following markets.

- Tyson: Tyson used

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- Keystone: Keystone used [[

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  Pilgrim's: Pilgrim's used [[
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[55] International Accounting Standards Board, The Conceptual Framework for Financial Reporting (Sept. 2010), 4.44, 4.45, 4.49, 4.50 (USA-59).

Question 31 (United States): With respect to the United States' arguments in paragraphs 96 and 104-107 of its first written submission, please explain the legal basis in Article 2.2.1.1 of the Anti-Dumping Agreement for the investigating authority's obligation to explain its decision to decline to use a respondent's books and records with respect to the allocation of the costs.

67. The obligation of an investigating authority to explain its decision flows from at least three sources. First, the obligation stems from the general requirement that an investigating authority's actions are subject to review by WTO panels. 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. The following statements by panels and the Appellate Body are instructive:

- "According to the Appellate Body, the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination."[56]

- "In conducting this review, we recall our obligations under the standard of review in Article 17.6. In particular, we are bound to evaluate the claims and arguments before us, and to render our findings, on the basis of what actually happened in the investigation as reflected in the record thereof. We are not to reweigh evidence so as to conduct a de novo review of the evidence. Nor are we to take into account *post hoc* arguments as to the reasons for decisions by the investigating authority which reasons cannot be found in the authority's own contemporaneous explanations contained in its determinations and other documents of record."[57]

- "Although the text of Article 17.6(i) is couched in terms of an obligation on panels – panels "shall" make these determinations – the provision, at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts. . . . Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities'

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56 *China – GOES*, para. 7.3

57 *Mexico – Pipes and Tubes*, para. 7.117. (italics original; underlining added).

> establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*."[58]

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.[59]

68. Second, it is important to recall that Article 2.2.1.1 is a "positive" obligation upon the investigating authority:[60] "costs *shall* normally be calculated ..." The investigating authority has an affirmative duty to undertake an action. In order to establish that it met the requirements for derogation, an investigating authority must set forth its explanation in the investigation as to why derogation was appropriate. As the Panel in *Egypt – Steel Rebar* stated:

> Here we must emphasize that in the context of an antidumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a prima facie case that an evaluation has not taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record — whether in the disclosure documents, in the published determination, or in other internal documents — of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a prima facie case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all.[61]

In short, absent an explanation confirming the investigating authority abided by its explanations, the authority will be presumed not to have engaged in the evaluation that was mandated by the provision.

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58 *US – Hot Rolled Steel (AB)*, para. 56 (italics original; underlining added).

59 *See e.g.*, *US – Lamb (AB)*, paras. 106-107("A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. … If a panel concludes that the competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the Agreement on Safeguards.").

60 *US – Softwood Lumber Final AD Determination*, para. 7.237.

61 *Egypt – Steel Rebar*, para. 7.49.

69. Finally, while the foregoing is true as a general principle of WTO dispute settlement, it is particularly critical here because of the specific obligation at issue: the duty to "consider." As noted previously, it is important to understand the relationship between the sections of Article 2.2.1.1 as a whole. Accordingly, the sentences in the provision are not to be looked at in isolation. Specifically, it is not the case that the second sentence of Article 2.2.1.1 is only relevant if the investigating authority declines to use a producer's costs. The second sentence provides:

> Authorities shall *consider* all available evidence on the *proper* allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.[62]

One function of this sentence is to serve as a safeguard in the event the investigating authority declines to use a producer's recorded costs. If the investigating authority finds the kept costs not in accordance with GAAP or not reasonably associated with the production or sale, it does not have *carte blanche* to devise whatever methodology it sees fit. It must engage in an evaluation to ensure that its allocation is *proper*. The provision is also relevant because it is relevant to making a finding under the prior sentence. As the investigating authority must *consider all available evidence* on the proper allocation, it must of course consider whether the producers' books and records are proper or not, e.g., not in accordance with GAAP or reasonably associated with the production and sale of the product under consideration.[63]

70. As the Appellate Body has explained, the obligation to "consider all available evidence" will vary upon the circumstances. But here, the circumstances are such that respondents put forward substantial evidence, both quantitatively and qualitatively, as to why their books and records were in accordance with GAAP and reasonably associated with production and sale. In the face of this evidence, MOFCOM could not be said to "consider all available evidence" by summarily noting the producers' costs were unreasonable. The Appellate Body has observed similarly:

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62 Emphasis added.

63 Saudia Arabia, Third Party Submission, paras. 16-17.

> However, in other instances—such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs—the investigating authority may be required to "reflect on" and "weigh the merits of "evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence"[64]

In sum, the second sentence of Article 2.2.1.1 required MOFCOM to not only consider the allocation methodology historically used by producers or exporters in their books and records, but also offer an explanation as to why the methodology of using the producer's kept records was unavailing compared to its own weight-based methodology. MOFCOM was required as part of that explanation to analyze and address the evidence that the producers' records were in fact reasonable.[65]

71. The views of third parties may be relevant to the Panel. Specifically, both the European Union and Saudi Arabia noted that they expected an investigating authority to explain why costs would not be considered reasonable:

- [T]he European Union would expect that the measure at issue would normally explain why the surround facts and circumstances of a particular case supported the conclusion that the value-based allocation did not reasonably reflect the costs associated with the production and sale of the product under consideration.[66]

- The express reference to such evidence in the Agreement confirms that before rejecting such evidence as not "reasonably reflecting" costs associated with the production and sale of the particular product under consideration, a compelling explanation should be provided by the investigating authority historically utilized by the foreign producer or exporter is not "reasonable."[67]

- Before rejecting such a cost allocation method, the authorities are to provide a reasoned and reasonable explanation that the cost allocation

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64 *US – Softwood Lumber V* (AB), para. 138.

65 The United States understands that China's position is not that the language in the second sentence of Article 2.2.1.1 does not have any bearing on whether an explanation is required, but that one was not necessary here because the unreasonableness in China's view was "self-evident." China, First Written Submission, paras. 137-138.

66 European Union, Third Party Submission, para. 37.

67 Saudi Arabia, Third Party Submission, para. 17.

> method is not reasonably reflecting the actual cost and must allow them a reasonable period of time to comment.[68]

Question 32 (both 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?

(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?

Overview

72. The United States would note two things as an initial matter. First, these are the types of questions that should be contemplated by an investigating authority such as MOFCOM. If MOFCOM had posed these questions, the records would likely be very different. Parties would have provided their thoughts; the authority would have provided its analysis; and the specific concerns appropriately defined.

73. In contrast, conducting these inquiries is not the task of a panel. Critically, the standard of review for a WTO panel is not *de novo*. As other WTO panels have noted, a panel should not reweigh the evidence or engage in fact finding or look beyond the reasoning set forth by the investigating authority:

> as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority.[69]

These questions would have been relevant for an authority such as MOFCOM. The fact that these questions are now being asked for the first time only serves to confirm that MOFCOM did not abide by its obligations.

74. Second, the United States would like to provide some background on joint products and how the relevant literature recommends costs be treated for purposes of allocation. By definition, joint products arise at a split-off point where two or more separately identifiable products are generated from a common input. In such instances a direct assignment of cost to

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[68] Saudi Arabia, Third Party Oral Statement, para. 11.

[69] *Argentina – Poultry*, para. 7.49.

each product cannot be made. Indeed, the producer may not even desire to obtain one or more of the joint products, but will obtain them anyway. 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 v solids). As explained by the respondents during the course of the investigation, commonly accepted value based cost accounting allocation methodologies appropriately address these situations. Specifically, a relative value based allocation method will generally serve as a reasonable, effective way of allocating joint costs to non-homogeneous joint products.

75. In the course the investigation, the respondents introduced extensive evidence and materials on allocations, including the following.

- The relative sales value method allocates joint costs on the basis of the products' relative sales value at the split-off point. This method is considered as the best allocation method, since the costs are allocated in proportion to the relative revenue-generating power of the individual products. J. Siegel & J. Shim, Barron's Accounting Handbook 103 (3rd ed. 2000).[70]

- The relative sales value based allocation method is based on the theory that the joint products with higher sales price should proportionately bear higher portion of the joint costs, aimed at obtaining a uniform gross profit margin for the joint products. Apparently, this method makes up the drawback of the simple average unit cost method, as it establishes a correlation between the allocation of joint costs and the final sales value of the joint products, and allocates the joint costs of the joint products prior to the separation based on the proportion of the sales value of each joint products." (Xu Zhengdan, et. al., Cost Accounting at Chapter 13 (Shanghai Sanlian Bookstore 1994)).[71]

- Costs are allocated to products in proportion to their revenue-generating power (their expected revenues). This method is both straightforward and intuitive. The cost-allocation base (total sales value at splitoff) is expressed in terms of a common denominator (the amount of revenues) that is systematically recorded in the accounting system.[72]

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[70] Pilgrim's Pride, Comments on the Preliminary AD Determination (March 5, 2010), p. 7-8 (italics removed) (USA-27).

[71] Keystone, Comments on Final AD Disclosure (July 26, 2010), p. 22 (USA-29).

[72] Tyson, Further Comments on the Preliminary AD Determination (April 9, 2010), p. 6, citing Cost Accounting: A Managerial Emphasis, at 577. (USA-26).

Moreover, if the difference between the total sales value for a joint product and the further processing costs incurred after the split off point (i.e., net realizable value of the product generated at the split) is a positive value, then that product should be burdened with a proportionally amount of the joint costs based on its net realizable value compared to the net realizable value of the other joint products. In short, the relevant literature recommends that the costs be allocated in a way that is associated with the sale and production of the joint products. Notably, nowhere in MOFCOM's determinations is there any consideration of these facts, or any explanation of why MOFCOM rejected the respondents' records and instead used a weight-based methodology.

Response to part (a)

76. There is nothing in MOFCOM's determinations that remotely suggests its concern was with how the products were valued in the Chinese market as opposed to the U.S. market. Indeed, if that was MOFCOM's concern, one would have expected that MOFCOM would have asked producers' questions regarding these concerns or perhaps at least explain why such concerns would be relevant for those products whose value was determined in reference to global prices. MOFCOM did none of that.

77. Nowhere in the AD Agreement is there support for China's position that dumping calculations can be engineered so as to produce high margins where joint products possess little value in the domestic market but attract a high price on the export market. The very reason a producer will offer the joint product for export is because it commands a better price abroad than it does at home. The fact that a producer can produce a product more efficiently in one country (comparative advantage) and send it where the product is scarce or valued is the foundation of economics and international trade.[73] In short, there is nothing in the text of the AD Agreement that support the position that a scenario where products are valued lowly in an exporter's domestic market, but highly in the importing market entitles the importing country to impose an antidumping duty. The European Union and Saudi Arabia have noted as much as well:

- [T]he short answer to China's complaint is: why not – or more specifically what is there in the Anti-Dumping Agreement that precludes that, or authorises the importing Member to respond with an anti-dumping duty? ... Perhaps the real solution to this situation is competition rather than protection.[74]

- 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

[73] Adam Smith, The Wealth of Nations, book IV, Chapter 2 ("If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage.")

[74] European Union, Oral Statement, paras. 21 & 22.

> that by-product or that waste product is of great value in the country of importation.[75]

Thus, if the value based allocation assigns low values to products because their value is indeed low in the exporting country's market, so be it. In respect to costs' reasonableness, Article 2.2.1.1 simply notes that the costs reasonably reflect the costs "associated with the production and sale of the product under consideration." The dictionary notes that "be associated with" means "be involved with."[76] A value based allocation clearly appears to be involved with production and sale. In respect to the former, it assigns productions costs where possible, such post split-off. In respect to sale, it associates the cost with the value of the product.

78. A contrary interpretation – that costs are unreasonable by virtue of conditions in the importing market – runs afoul of the AD Agreement. Article 2.2.1.1 instructs the investigating authority to calculate costs of production to be used for normal value on the basis of the producer's records. But if one accepts the arguments that costs can be rendered unreasonable simply by comparison to the value of the product in the importing country, then any cost of production that would not permit a finding of dumping is *ipso facto* unreasonable. In short, the provision is rendered a nullity.

79. The United States would also note that allocating costs on a common unit of measure like weight where non-homogeneous joint products are concerned is less likely to be associated with production and sale. Such a methodology takes joint production costs, and in the case of the anti-dumping investigation before the Panel, post-split off costs and simply averages them across multiple products. For example, MOFCOM averaged specific processing costs. Moreover, it would distort any dumping calculation. Specifically, such an approach would have the same cost assigned to low and high value products. Thus, the profits realized on the high value products become enormous, while the low value products are all driven below cost.

Response to part (b)

80. At the panel meeting, China claimed that respondents had allocated a value of zero to certain products, specifically paws. As the charts provided in response to Question 38 show, this is a false representation of the record. The producers had allocated costs to all subject merchandise. Accordingly, this assertion of zero costs is simply more *post-hoc* misdirection by China that is not relevant to the present dispute and possibly confirmation that MOFCOM failed to truly analyze the producers' records.

81. That said, the United States' position is that costs are not unreasonable simply because they are low. As a practical matter, it would be highly unlikely that producers would even assign a cost of zero to a joint product unless it was the practice of the producer not to engage in any

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[75] Saudi Arabia, Third Party Submission, para. 18.

[76] Concise Oxford Dictionary, p. 79 (USA-66).

further processing of the product after split-off and to simply give it away. As far as the United States knows here, that is not the case with any of the producers.

Question 33 (United States): **Could the consequence of your interpretation of Article 2.2.1.1 be that an investigating authority would be prevented from addressing alleged "dumping" caused by sales of subject merchandise which are considered zero cost by-products in the home market?**

82. No, because it would require a presumption that dumping could exist outside the scope of the AD Agreement.[77] Both the concept of "dumping," and the prescribed methodology for determining the existence or level of dumping, are set out in the AD Agreement, in the text agreed to by all Members. If, under the rules set out in the text of the agreement, dumping is found not to exist, then *ipso facto* no Member has been prevented from addressing dumping.

83. Beyond that, the question presents a scenario not present in this case, and indeed unlikely to ever exist. First, as the United States has explained, the rule in 2.2.1.1. is that the Administering Authority "normally" must use the respondents' records for purposes of allocating costs. This rule does not preclude an Authority, after full consideration of the facts, and with adequate reasons from using a different methodology. MOFCOM, of course, did not do that here. Second, the hypothetical presented in the question would only arise if the product was subject to absolutely no processing post-split off and was given away (which is not the case for the products in this dispute).

Question 34 (China): **At the first substantive meeting, China stated that the respondents allocated zero or almost zero value and thus cost to the "by-products" (i.e., paws) irrespective of the fact that these products did have value. Please elaborate.**

84. The United States' recollection of this matter at the first substantive meeting was that China in particular emphasized that the U.S. producer Keystone recorded a cost of "zero" for paws. As noted in the U.S. closing statement,[78] that is patently false.

85. Keystone accounts for chicken paws as a by-product. Under US and International Accounting Standards, by-products can be assigned a value equal to their net realizable value, i.e., cash sale value less additional processing cost after the split off point. Generally, one of two bookkeeping methods is used to record the value of by-products. In the first, when the by-product is harvested, the producer credits the production cost center with an estimate of the net realizable value and records the by-product in inventory at the same value. When it is subsequently processed and sold, the value assigned the by-product is removed from inventory

[77] AD Agreement Article 18.1 ("No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.").

[78] United States, Closing Statement, para. 4.

and any difference between the assigned value plus additional processing cost and the revenue received is generally recorded in cost of sales. In the second method – how Keystone keeps its records – when the by-product is harvested, the producer removes it from production and records it at zero value. Subsequent processing costs, however, are recorded. Keystone's Form 6-4, attached as Exhibit USA-60, reflects processing costs for paws, including fuel, labor, and manufacturing. Once the by-product is subsequently processed and sold, Keystone takes the full amount of the sale price less the cost of additional processing and credits it to cost of sales. Critically, the net effect of the two methods on the reported cost of sales is the same. Effectively, both methods assign a value to by-products equal to their net realizable value. Thus, China's assertion that Keystone claimed "zero" costs for paws is a misrepresentation of the record..

Question 35 (both Parties): Please explain exactly what costs of production MOFCOM took into account when it constructed the respondents' normal value. In particular:

(a) How much of the total cost of production relates to raising the live bird?

(b) How much of the total cost relates to processing? (e.g. deboning)

(c) Did MOFCOM include costs for processing, (deboning, etc.) in the per ton cost of production which it subsequently allocated to various models of subject merchandise?

(d) How did MOFCOM account for differences in processing costs of different product models?

86. As an initial matter, as the United States has noted previously, and China appears to have conceded at the first panel meeting, there is evidence MOFCOM utilized it its determinations that has never been seen by the United States or the respondents. In the face of this imperfect knowledge, the United States notes as follows:

<u>For all producers</u>

(c) and (d) MOFCOM included the processing costs in its per ton cost of production. These processing costs included the processing costs that occurred post split-off. However, MOFCOM did not account for the differences in processing costs of different product models. Instead, MOFCOM applied the same processing costs to all products

<u>Tyson</u>

(a) The cost related to raising the live bird, account for [[ ]]% of the cost of production.

(b) Processing costs account for [[ ]] percent.

Keystone

(a) On average, raw materials, *i.e.*, the cost related to raising the live bird, account for [[ ]]% of the cost of production.

(b) Processing costs account for approximately [[ ]] percent.

Pilgrims

(a) On average, meat costs, *i.e.*, a cost related to raising the live bird, account for approximately [[ ]]% of the cost of production.

(b) On average, labor costs, a component of processing costs, account for approximately [ ]] percent of the cost of production.

Question 36 (United States): The United States is making a claim that the weight-based allocation methodology applied by MOFCOM was itself inconsistent with Article 2.2.1.1. Where in Article 2.2.1.1 do you find the legal basis for a claim with respect to the methodology actually used by the authority?

87. The United States does not assert that a weight-based allocation methodology will always be inconsistent with Article 2.2.1.1. It cannot be over-stressed that the issue in this dispute is not whether any particular allocation methodology is necessarily consistent or inconsistent with the WTO Agreement.

88. Rather, the issue in this dispute is whether MOFCOM, in its antidumping determination, complied with the WTO Agreement, including Article 2.2.1.1. As the United States has explained, the WTO Agreement required MOFCOM to consider all the facts, to "normally" use the allocation method employed in the respondents' records, and to explain its determination if it did not follow the 'normal' methodology set out in the agreement. China may not, as it has attempted at great length in this proceeding, provide an *ex post facto* justification for a decision MOFCOM might have made had it complied with the WTO Agreement.

89. Although the Panel need not determine how it might have addressed the issue if it had stood in the shoes of MOFCOM during the investigation, the United States would nonetheless point out some of the salient facts that would have governed an administering authority in this type of situation. Chicken parts involve non-homogenous joint products. By applying a weight-based allocation in these circumstances, MOFCOM acted inconsistently with its obligation to establish that its cost allocation methodology was "proper."

90. The second sentence of Article 2.2.1.1 provides that:

> Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course

> of the investigation provided that such allocations have been historically utilized by the exporter or producer...[79]

As the Appellate Body has explained, the use of the term "proper" is to guide the investigative as part of a deliberative process:

> The word "proper", in our view, supports our reading of the word "consider", because it suggests some degree of deliberation on the part of the investigating authority in "consider[ing] all available evidence", so as to ensure that there is a proper allocation of costs. The nature of this deliberative process will depend on the facts of a particular case before the investigating authority.[80]

Accordingly, an investigating authority, even if it was permitted not to derogate from its obligation to calculate costs on the basis of the producers' records would of course need to ensure that the allocation it did devise was "proper" as determined through a deliberative process.

91. Now, in regards to what is a "proper" allocation, the United States submits that two other provisions are relevant for context. First, there is Article 2.2. As noted above, Article 2.2.1.1 is for the purposes of paragraph 2, i.e. Article 2.2. Article 2.2 provides for "cost of production in the country of origin." Accordingly, a proper allocation of costs reflects the costs of production in the country of origin. Second, the United States notes that Article 2.2.1.1 is relevant because it provides the method by which normal value will be calculated and used to determine the margin of dumping. Article VI:2 of the GATT defines:

> "margin of dumping" as the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping". The margin of dumping reflects the magnitude of dumping. … Article VI:2 lays down that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Thus, the margin of dumping also is defined in relation to a "product."[81]

Thus, 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. By those guideposts, and in light of the facts here, MOFCOM's weight-based allocation cannot be considered "proper."

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79 (emphasis added).

80 *US – Softwood Lumber Final AD Determination (AB)*, para. 134.

81 *US — Zeroing (Japan) (AB)*, para. 114.

92. 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.

93. Moreover, MOFCOM's decision to adopt such a methodology seems to suggest the deliberative process ignored key concerns:

- Why does it make sense to take costs that are in fact already associated with sale and remove that characteristic from them by averaging them according to weight?

- Why does it make sense 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 does this methodology make sense when producers cannot adopt it in the course of their normal records thus vitiating the principle that costs should reflects 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.[82]

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

94. Finally, the United States notes one other aspect of MOFCOM's methodology that rendered it improper. For at least one producer, MOFCOM failed to assign part of the cost of raising the bird to revenue generating by-products such as blood, feathers, etc.[83] In doing so, MOFCOM applied costs that were not associated with the production and sale of subject merchandise.[84]

Question 38 (United States): **With respect to the table on page 45 of the United States' first written submission, please provide the actual data, in the same format, for each respondent.**

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[82] International Accounting Standard 2 on valuing inventories (USA -64).

[83] Tyson, Comments on Final AD Disclosure dated July 26, 2010, at 5-6 (USA-40).

[84] *See EC – Salmon,* para. 7.491 ("We agree with Norway that any allocation of cost performed for the purpose of establishing cost of production must not result in the inclusion of costs not "associated with the production and sale" of the like product during the period of investigation.")

95. The United States has provided these tables as Exhibits 61, 62, and 63. The United States notes that these tables are constructed with the following references:

- The product specific costs are taken from the books and records kept by the producers.
- The weight based averaged is taken from the Final AD Disclosure document.
- The normal value does not factor in expenses or profit.
- They reflect the products noted in the U.S. submission as well as paws. As a practical matter, these producers produce far more and accordingly an actual table, if feasible, could be potentially voluminous.

Within those parameters, the United States has attempted to reconstruct tables similar to the one on page 45 of the U.S First Written Submission. However, the United States notes that it is not in a position to know precisely how MOFCOM used those costs to arrive at the average weight based cost. The United States believes MOFCOM arrived at its figures by looking at Table 6-3 provided by the producers during the course of the investigation.

B. CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT WITH RESPECT TO FREEZER STORAGE EXPENSES

1. TERMS OF REFERENCE

Question 39 (United States): Please elaborate on your argument in paragraphs 57-58 of your opening statement that the legal basis of your claim under Article 2.4 "clearly" evolved from the legal basis that formed the subject of consultations:

(a) Is the United States suggesting that because consultations were requested with respect to the determinations at issue, every aspect of those determinations could be challenged in the panel request?

(b) Given that those determinations, including the issue of deduction of freezer storage expenses from export price, were known to the United States prior to making its request for consultations, could the United States have learned something new during consultations that led to the evolution of its claims?

(c) In its consultations request, the United States referenced a variety of provisions of the Anti-Dumping Agreement. Could the United States please indicate from which of these provisions its claim under Article 2.4 evolved?

96. 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 clearly evolved from the legal basis that formed the subject of consultations.

The United States is not suggesting that because consultations were requested with respect to the determinations at issue, every aspect of those determinations could be challenged in the panel request.

97. The Panel Report in *Mexico—Beef and Rice* found that there was no need for "complete identity between the scope of the request for consultations and the request for establishment [of a panel]."[85] The Appellate Body agreed and, after discussing the use of the term "legal basis" in Articles 4.4 and 6.2 of the DSU, indicated the following:

> "It does not follow from the use of the same term in both provisions, however, that the claims made at the time of the panel request must be identical to those indicated in the request for consultations. Indeed, instead of such a rigid approach, we consider that the dispute settlement mechanism, which generally requires that a panel request be preceded by consultations, allows for a measure of flexibility to Members in subsequently formulating complaints in panel requests."[86]

98. With regard to the "measures at issue", the Appellate Body has indicated 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, provided that the "essence" of the challenged measures had not changed.[87] With regard to the "legal basis" at issue, the Appellate Body found that the logic of *Brazil-Aircraft* applied to the legal basis of the complaint.[88] In particular:

> "[a] complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.

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85 *Mexico – Beef & Rice (Panel)*, para. 7.41 (The panel rejected Mexico's request for a preliminary ruling from the Panel that certain claims advanced by the complaining party were outside the Panel's terms of reference because, inter alia, the provisions with which the challenged measures were alleged to be inconsistent in the request for the establishment of a panel differed from those identified in the request for consultations.).

86 *Mexico – Beef & Rice (AB)*, para. 136.

87 *Brazil – Aircraft (AB)*, para. 132.

88 *Mexico – Beef & Rice (AB)*, para. 138.

. . .

> In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."[89]

99. 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. Specifically, the U.S. consultations request cited Article 2.2 and Article 2.2.1.1 of the AD Agreement because MOFCOM failed to calculate costs on the basis of the records kept by the U.S. producers under investigation and failed to properly allocate production costs. At the time of that request, it was apparent that there was some discrepancy in MOFCOM's treatment of Keystone's reported costs in constructing Keystone's normal value, including its treatment of Keystone's reported costs for freezer storage expenses. However, given MOFCOM's limited and flawed disclosures, it was unclear what MOFCOM had done.

100. Prior to consultations, Keystone and the United States were provided only with MOFCOM's vague reasoning and statements in the Final AD Determination and in Keystone's AD disclosure document:

> "During the on-site verification, the Investigating Authority found the company did not report the expense for cold storage, so the Investigating Authority increased the adjustment according to the data obtained in the on-site verification."[90]

> "During verification, the authority found that your company did not report freezer storage expenses. The authority added such adjustment according to data collected during verification. According to materials collected during verification, the total freezer storage expenses during the POI are [[ ]]. According to Form 1-4, your company exported [[ ]] of subject products (frozen) to China and [[ ]] of like products (frozen) to third countries and [[ ] of like products (frozen) in the domestic market. The authority allocated total freezer storage expenses on the basis of the quantities above and

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89 *Mexico – Beef & Rice (AB)*, para. 138 ("Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations – namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request.").

90 MOFCOM, Final AD Determination, sec. 4.1.C.3.2 (USA-4).

> export to China is allocated with [[ ]] of freezer storage expenses. The authority further allocated the same expenses to each of the models that are exported to China: 2-4-2 is allocated with [[ ]]; 2-5-2 is allocated with [[ ]]; 3-6-2 is allocated with [[ ]]; 2-7-2 is allocated with [[ ]].*"*[91]

101. Based on these statements, it is not at all clear how MOFCOM treated Keystone's reported costs or adjusted its export price. This passage could be read as suggesting that MOFCOM had allocated additional freezer storage expenses, not only to the export price, but also to domestic production, resulting in a double counting of freezer storage expenses in constructing Keystone's normal value. It was not until consultations did it become 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*, cited above, where a complaining party learns of additional information during consultations that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent.

2. SUBSTANTIVE CLAIM

Question 40 (both Parties): Please confirm, with reference to relevant evidence: (i) whether all of Keystone's exports of subject products to China were of frozen products; (ii) the proportion of Keystone's sales on the domestic US market of the domestic like product that were frozen.

102. With regard to (i) (sales to China), all of Keystone's exports of subject products to China during the period of investigation were frozen products. With regard to (ii) (sales in the United States), the information on the record is contained in Form 4-2, which Keystone submitted as an exhibit to its Investigation Questionnaire Response.[92] Column 6g of Form 4-2 indicates whether the domestic sale was of fresh or frozen product. It appears that [[ ]] observations are "[[ ]]" and [[ ]] observations are "[[ ]]". However, MOFCOM did not use home market sales to calculate Keystone's normal value. Instead, MOFCOM constructed Keystone's normal value based on its reported costs of production.

Question 41 (United States): Paragraph 119 of the United States' first written submission states that:

> **"During the POI, Keystone incurred costs for freezer storage expenses <u>on all of its broiler products</u>, including those products that were destined for consumption in the United States and those that were exported, including to China." (emphasis added)**

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

92 The United States submits an excerpt containing the first 100 observations in Form 4-2 as an exhibit (USA-65). The entirety of Form 4-2 can be provided if needed.

Furthermore, in Keystone's answer to Q. 15 of the Supplemental Questionnaire (Exhibit USA-35), Keystone appears to indicate that there are no differences in freezer costs between domestic and export sales. Please reconcile these statements with the fact that Keystone's sales to the United States were mostly of unfrozen broiler products.

103. 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. However, MOFCOM used a constructed normal value based on Keystone's costs of production, rather than home market sales. To the extent freezer storage expenses were incurred by only some of the products considered on the normal value side of the equation, but were incurred by all products on the export price side of the equation, a reasonable adjustment likely would have been for MOFCOM to have excluded those expenses from both the constructed normal value and the export price. MOFCOM did not. Instead, it made only an adjustment to the export price and ultimately compared a normal value that reflected at least some portion of those expenses to an export price that reflected no such expenses.

Question 42 (both Parties): Please discuss which provisions of the Agreement are implicated in MOFCOM's treatment of the freezer storage expenses. In particular, please explain why MOFCOM considered that there was a difference between export price ("EP") and normal value ("NV") *that affected price comparability* which required an adjustment to the export price, as opposed to requiring MOFCOM to modify the manner in which it constructed Keystone's normal value.

104. Article 2.4 of the AD Agreement is the primary provision implicated in MOFCOM's treatment of Keystone's freezer storage expenses. The United States had initial understood Article 2.2 and Article 2.2.1.1 of the AD Agreement to be implicated because MOFCOM failed to calculate costs on the basis of the records kept by the U.S. producers under investigation and failed to properly allocate production costs, which included Keystone's reported freezer storage expenses. However, we now understand that MOFCOM made an adjustment under Article 2.4 with regard to Keystone's freezer storage expenses. Article 2.4 provides, in pertinent part, that:

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

105. In light of the limited explanation provided in MOFCOM's disclosures, it is not apparent why MOFCOM considered there was a difference between the export price and normal value "that affected price comparability" and required an adjustment to the export price, as opposed to

requiring MOFCOM to modify the manner in which it constructed Keystone's normal value. MOFCOM provided the following explanation in the Final AD Disclosure:

> During verification, the authority found that your company did not report freezer storage expenses. The authority added such adjustment according to data collected during verification. According to materials collected during verification, the total freezer storage expenses during the POI are [[ ]] According to Form 1-4, your company exported [[ ]] of subject products (frozen) to China and [[ ]] of like products (frozen) to third countries and [[ ]] of like products (frozen) in the domestic market. The authority allocated total freezer storage expenses on the basis of the quantities above and export to China is allocated with [[ ]] of freezer storage expenses. The authority further allocated the same expenses to each of the models that are exported to China: 2-4-2 is allocated with [[ ]]; 2-5-2 is allocated with [[ ]]; 3-6-2 is allocated with [[ ]]; 2-7-2 is allocated with [[ ]].[93]

106. The first sentence of this explanation suggests that MOFCOM was under the misapprehension that Keystone had failed to report freezer storage expenses as a cost of production. These expenses would have necessarily been reflected in the export price because all exported product was frozen and subject to freezer storage expenses. If freezer storage expenses were reflected in the export price, and not in the normal value, it could have constituted a difference affecting price comparability and an adjustment may have been warranted in order to ensure a fair comparison. However, as demonstrated in the United States First Written Submission[94], and as China appears to acknowledge in its First Written Submission[95], Keystone had, in fact, reported freezer storage expenses and those expenses were used by MOFCOM when constructing Keystone's normal value. To the extent freezer storage expenses were incurred by only some of the products considered in the normal value side of the equation, but were incurred by all products on the export price side of the equation, a reasonable adjustment may have been to exclude those expenses from both the constructed normal value and the export price. An alternative approach may have been to construct the normal value using the full amount of the per unit freezer expenses that was not reduced by the sale of fresh product.

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

94 United States, First Written Submission, para. 120.

95 China, First Written Submission, para. 177.

Question 43 (both Parties): Please explain, in detail, how freezer storage costs were reflected on each side of the NV / EP equation before MOFCOM had made its adjustment, and after MOFCOM had made its adjustment.

(a) Specifically, United States, please explain when and how freezer storage costs were reported: (i) with respect to NV; and (ii) with respect to EP; and (iii) why these costs were reported as applying to all sales even though the vast majority of sales on the US market were of unfrozen products.

(b) Specifically, China, (i) please explain why MOFCOM considered that the information provided in Form 6-7 did not constitute reporting of freezer storage costs; (ii) please explain how the freezer storage costs allegedly reported by Keystone were apportioned to NV once MOFCOM had constructed NV; and (iii) explain precisely what MOFCOM did in respect of the EP, including how MOFCOM determined the amount of freezer storage costs attributable to sales to China; and (iv) please explain why MOFCOM made an adjustment to the EP, rather than an adjustment to the constructed NV?

107. With respect to normal value, Keystone reported its freezer storage expenses in its response to MOFCOM's AD Questionnaire. Specifically, and as explained in the United States First Written Submission[96], these expenses were reflected in Form 6-3 ("Production Cost and Relevant Expenses")[97], 6-5 ("Profit Information")[98], 6-6 ("List of Allocation of [[ ]]")[99], and 6-7 ("List of Allocation of Sales Expenses").[100] In Form 6-7, Keystone reported an expense of [[ ]] for freezer storage expenses.[101] In Form 6-5, Keystone reported [[ ]], corresponding to the storage expenses reported on Form 6-7.[102] Form 6-5 also indicates the "[[ ]]" amount of [[ ], which is the sum of [[ ]] in "[[ ]]", [[ ]] in [[ ]]" and [[ ]] in "[[ ]]".[103] Form 6-5 also

96 United States, First Written Submission, para. 120.

97 Keystone, Form 6-3 (USA-54).

98 Keystone, Form 6-5 (USA-55).

99 Keystone, Form 6-6 (USA-56).

100 Keystone, Form 6-7 (USA-57).

101 Keystone, Form 6-7 (USA-57).

102 Keystone, Form 6-5 (USA-55).

103 Keystone, Form 6-5 (USA-55).

indicates that the [[ ]] in storage expenses were allocated to [[ ]] consistent with the [[ ]].[104] The allocation of roughly [[ ]] percent of storage expenses to sales in the [[ ]] is due to the fact [[ ]] accounted for roughly [[ ]] percent of total sales during the POI.

108. With respect to the export price, because any and all sales in the U.S. domestic market that would match to the frozen product sold to China would incur exactly the same per pound freezer storage expense, separate reporting of freezer storage expenses as an adjustment to the export price was not necessary. Moreover, reporting an adjustment to the export price was unnecessary because freezer storage expenses were included in the constructed normal value, as verified by MOFCOM. As discussed above in response to Question 42, MOFCOM indicated in the Final AD Disclosure that Keystone had not reported freezer storage expenses and that it was making an adjustment to the export price as a result.

C. ALLOCATION OF SUBSIDY BENEFIT TO SUBJECT AND NON-SUBJECT MERCHANDISE

Question 46 (United States): Are any of the products that benefitted from the subsidized corn and soybeans outside the scope of the investigations?

109. Yes. The purportedly subsidized corn and soybeans were used to feed chickens. The scope of the investigation, as reflected in MOFCOM's own determination (both U.S. and Chinese translation), recognizes that not all chicken products are subject to the investigation:

- Live chickens, broiler products packed or preserved in cans and similar means, chicken sausages and similar products, and ready-to-eat broiler products are not included in the scope of imported products under the current investigations.[105]

- Living chickens, broiler products packed in cans and other similar ways, broiler sausages and similar products, cooked broiler products are all not included in the scope of the investigation.[106]

Both Tyson and Pilgrim's explained during the course of the investigation that they produced non-subject merchandise.[107] Since all chickens are fed feed regardless of what merchandise they

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104 Keystone, Form 6-5 (USA-55).

105 USA-5, p. 15.

106 CHN-3, p. 12

107 Pilgrim's Pride, Comments on the Preliminary CVD Determination, p. 9. (USA-43); Tyson, Comments on the Preliminary CVD Determination, p. 2-4 (USA-44); Pilgrim's Pride, Comments on Basic Facts Relied Upon for the Subsidy Rate Calculation (July 24, 2010), p 6 (USA-45); Tyson,

ultimately produce,[108] it is the case that for producers such as Tyson and Pilgrim's that produced non-subject merchandise that those non-subject products benefited from the subsidy.

Question 48: With respect to Tyson's answer to question I.III.3 of the first questionnaire (referenced in paragraph 201 of China's first written submission):

(a) (to the United States) Please explain what is referred to by the terms "feed conversion ratio" and the relevance of this ratio to the allocation of feed costs to different products?

110. Feed conversion ratio is a common measurement in animal husbandry that refers to an animal's efficiency in converting feed into body mass. In layman's terms it expresses a live animal's ability to convert what it eats (i.e., a pound of corn) into added weight (i.e., additional body mass). This ratio does not address how feed costs should be allocated to different products. The ratio identifies how much corn a live bird must consume to gain a certain amount of weight. That live bird can be processed into subject merchandise or non-subject merchandise (e.g., cooked chicken). In fact, both subject and non-subject merchandise can be produced from the same bird. For example, the breast meat can be further processed into cooked chicken while the leg quarters are sold as raw chicken. The feed conversion ratio has no bearing on how the feed costs should be allocated to the products that are produced from the live birds.

Question 49 (United States): Please comment on the additional questionnaire responses and data China refers to in its first written submission. Why does the United States consider that the response to QI.1 of the Second Supplemental Questionnaire is the most relevant information for the calculation of the subsidy?

111. The United States has two preliminary points on China's position regarding the questionnaire and data responses China references in its submission. 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, as demonstrated below, 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.

112. Proceeding on to the additional questionnaire responses, China claims essentially in its submission that that they are evidence of a holistic inquiry and that the US is accordingly wrong to just focus on the second supplemental CVD questionnaire and the question focusing on the

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

[108] United States, Subsidy Calculation Letter, p.1 (USA-52)

purchase of feed.[109] For example, China asserts that MOFCOM needed "complete information on raw materials purchases, the production ratios for producing feed from feed materials, the production cost of subject merchandise, broiled feeds and live broilers, as well as the total consumption of feed in the production of subject merchandise."[110] The U.S. view is supposedly simplistic. What MOFCOM omits though is that United States impression is based on what MOFCOM told it:

> Regarding to Tyson Food, the BOFT requested, in the *second supplemental questionnaire*, the company to provide amount of corn and soybean meal the company purchased during the POI, as well as corn and soybean meal consumed for producing the subject merchandise during the POI. By verifying the two data, the BOFT found the amount of corn and soybean meal the company purchased during the POI matches the amount of corn and soybean meal consumed for subject merchandise production.[111]

At least during the investigation, MOFCOM did not tell the United States of some holistic attempt to gather the relevant information that was frustrated by the respondents' obstinacy. It told the United States that it looked at corn and soybean meal purchases and that the data for those purchases came from the second supplemental questionnaire. Accordingly, this is why the United States believes the second questionnaire is relevant as well as the question on the purchase of feed.

113. Even if we accept MOFCOM's *post- hoc* proposition – which we should not – regarding the questions though, they still do not explain why it is acceptable for the numerator and denominator not to line up properly.

Questions 1.III.3 and I.IV.1:

> US Translation
>
> 1.III.3: Please in sequence provide the detailed information of each transaction of such raw materials as soybean, corn, feeds for the broiler or chicken and live broiler or chicken your company has purchased during the POI, and explain whether your company is affiliated.
>
> I.IV.1: Please provide the specific name, main composition (mainly refer to the composition of feed), quantity and amount of various raw materials used by

109 China, First Written Submission, paras. 198-199.

110 China, First Written Submission, para. 200.

111 USA-42, p. 4 (emphasis added)

> your company to produce the broiler or chicken in unit quantity (each ton) during the POI.
>
> I.IV.2: Please provide the specific name, quantity and amount of various raw materials used by your company to produce the feed for the broiler or chicken in unit quantity (each ton) during the POI.
>
> China's Translation[112]
>
> I.III.3 Please provide the detailed information concerning each transaction of the purchase of raw materials of corns, soybean, broiler feeds and live broilers during the POI:
>
> I.IV.1 Please provide the names, specifications (for main feed materials), quantity and value of the various raw materials consumed in the production of a unit quantity (per ton) of broilers during the POI by your company.
>
> I.IV.2 Please provide the names, quantity and value of various raw materials in the production of a unit quantity (per ton) of broiler feeds during the POI by your company.

These three questions simply address the raw materials that go in producing chickens, not subject merchandise. China appears to confuse this issue by implying "broiler" means subject merchandise.[113] The problem with that is even China's translation seems to refer to broilers as chickens such as in I.III.3 where it speaks of "live broilers."

114. China also points to question I.IV.3:

> Please fill in the detailed information concerning the costs needed in the *production* of the subject product according to the requirement of Annex V. *If your company is the producer of corns, soybeans, broiler feeds or live broilers, please provide the detailed information concerning the costs in production of* corns, soybeans, broiler feeds or live broilers according to the requirement of Annex V.

As U.S. producers keep costs on the basis of value, they would submit a value-based allocation for the subject product, not a schedule divvying up feed between non-subject and subject merchandise. For *producers of feed* or live broilers – like Pilgrim's – the question asks for the

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112 CHN-11.

113 China, First Written Submission, paras. 203, 207, 214.

costs of production of the feed, not the cost of the feed explicitly used to produce subject merchandise.

115. In respect to the second supplemental questionnaire, China points to question 1.4. The U.S. translation of 1.4 is: "Please provide the particular name, main ingredients, quantity and value of each forage crop (such as corn, soybean and etc.) consumed by your company in producing chicken products during the POI." The Chinese translation is: 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.[114]" Neither explicitly says subject merchandise, so it not entirely surprising that respondents were puzzled as to what this question was seeking. But to the extent there was a misunderstanding, they acknowledged and attempted to resolve it. For example, Tyson's noted the following in its submission to MOFCOM:

> This misunderstanding appears to have been the result of Tyson's response to the second supplemental CVD questionnaire.
>
> Question 1 of the second supplemental CVD questionnaire stated:
>
> > Please provide the total quantity (in tons) of the corn and soybean (or soybean meal) purchased by your company during the period of investigation (POI), and their average price (in USD/ton).
>
> Tyson understood this question to mean that BOFT wanted Tyson to report its total purchases of corn and soybean meal because the question did not specify purchases related to the production of subject merchandise. Tyson therefore reported its total purchases.
>
> Question 4 of the second supplemental CVD questionnaire stated:
>
> > Please provide the particular name, main ingredients, quantity and value of each forage crop (such as corn, soybean and etc.) consumed by your company in producing chicken products during the POI.
>
> Corn and soybean meal are the only forage crops Tyson used to produce chicken feed.
>
> Therefore, Tyson referred to its response to question 1 of that questionnaire. The question did not ask Tyson to identify the quantity and value of corn and soybean meal Tyson consumed to produce just subject merchandise.

[114] CHN-13.

> Tyson's CVD rate could be fixed by revising ….[115]

In short, a review of the questions cited by China makes two points apparent. First, MOFCOM never precisely asked the respondents to provide information specifically needed in order to make a proper calculation of the numerator. By China's own admission, MOFCOM would have had to take various separate questions in order to ascertain the information. Under such circumstances, MOFCOM's position that respondents should have somehow recognized that these disparate questions were trying to achieving the proper numerator – and answered accordingly – is absurd. Second, even if MOFCOM now claims that respondents did not faithfully provide the answers it sought in the questionnaires – a very disputable point – why does that excuse MOFCOM's failure to try and make it right once the respondents recognized what MOFCOM was trying to accomplish and approached it with a viable solution?

Question 52 (both Parties): With reference to USA-38, did the respondents provide answers to Question 5 on the total feed to produce one unit of subject merchandise, and to Question 6 on consumption?

116. Pilgrim's answered questions 5 and 6 of the Second Supplemental CVD questionnaire. The answer to question 5 referred the reader to an "Exhibit II-SI-1 Live Costs" (also referred to as "Exhibit S-II-1-1 Live Costs"), the answer to question 6 referred the reader to an "Exhibit II-SI-2 feed Formulation" (also referred to as "Exhibit S-II-1-2 Feed Formulation"). The same chart, listing feed ingredient purchases over the period because they reflect consumption, attached as Exhibit 67, was prepared in response to both questions. Namely, the chart, per Q. 5, lists name, ingredients, quantities, and value. Per Q. 6, the chart includes at the bottom – below the heading titled Feed Conversion – information regarding subtractions that need to be made to the feed to reflect feed used for pullets and breeders (non-broilers), for inventory change, and for feed mill sales, and provides the per-unit feed conversion factor.

117. Tyson did answer these questions, but not as responses to questions labeled 5 and 6. Tyson was posed the very same questions as 3 and 4 in the second supplemental CVD Questionnaire. Tyson responded on March 18, 2010.

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115 USA-48.

V. INJURY DETERMINATIONS

A. DEFINTION OF THE DOMESTIC INDUSTRY

Question 54 (United States): Did respondents identify any other large domestic producers not included in the domestic industry, and notify MOFCOM of their existence?

118. Yes. In its Injury Brief filed on January 7, 2010, USAPEEC apprised MOFCOM of four major Chinese poultry producers that petitioners neglected to mention in the petition:

> [T]he Petition ignores some of the largest poultry companies in China. Da Chan (Asia) Foods, Ltd. is reported to represent over 10 percent of total Chinese chicken production, but is not mentioned by name in the Petition. Other major producers not included in the Petition include New Hope Group, Ltd., Fujian Sunner Development Co., Ltd., and Shandong Xinchang Group.[116]

China claims, without citation to any evidence, that MOFCOM received questionnaire responses from Da Chan (Asia) Foods, Ltd. and New Hope Group, Ltd. under different names,[117] yet the fact remains that MOFCOM listed neither producer among those that completed questionnaire responses.[118] China tacitly concedes that MOFCOM failed to provide blank domestic producer questionnaires to either Fujian Sunner Development Co., Ltd. or Shandong Xinchang Group, but asserts, again without citation to any evidence, that Fujian "knew about the pending case from CAAA" and that Shandong "decided not to cooperate."[119] China does not explain how CAAA could have informed Fujian of the case when Fujian was not listed in the petition as among the Chinese producers known to CAAA.[120] It would appear that MOFCOM made no effort to collect information from the four major domestic producers brought to its attention by USAPEEC.

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116 USAPEEC Injury Brief at 3 (USA-21).

117 China, First Written Submission, para. 248.

118 MOFCOM, Final AD Determination at Sec. 1.2.2.3 (USA-4); MOFCOM, Final CVD Determination at sec. 2.2.2.3 (USA-5).

119 China, First Written Submission, para. 248.

120 Petition, p. 3-4 (USA-1).

Question 55 (both parties): Does an investigating authority bear a burden to independently verify information with respect to the determination of what constitutes the domestic industry?

(a) **(to the United States) Please explain whether you consider this a positive obligation and, if so, relate it to the text and context of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. What type of actions are required, and are they required no matter what percentage of the total domestic production the petitioners represent?**

Response to Common Part

119. Yes. 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.

Response to part (a)

Is this a positive obligation?

120. The United States considers this a positive obligation, both under ADA Articles 3.1 and 4.1, as well as under SCM Articles 15.1 and 16.1. The AD and SCM Agreements contemplate that investigating authorities will make active efforts to collect the information necessary to conduct the examinations required under the Agreements. ADA Article 5.1 and SCM Article 11.1 contemplate that investigating authorities will conduct "an investigation to determine the existence, degree and 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.

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"[121] and may not "remain{} passive in the face of possible shortcomings in the evidence submitted."[122] Given the centrality of the domestic industry definition to the volume, price, impact, and causation analyses required under Articles 3.2, 3.4 and 3.5 of the AD Agreement and Articles 15.2, 15.4 and 15.5 of the SCM Agreement, 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.

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121 *U.S. – Wheat Gluten (AB)*, para. 53.

122 *Id.*, para. 55.

122. In order to define the domestic industry in manner that would permit "an objective examination" of "positive evidence," consistent with ADA Article 3.1 and SCM Article 16.1, an investigating authority must make active, independent efforts to identify the universe of domestic producers of the like product. In particular, Articles 3.1 and 15.1 provide that "a determination of injury . . . shall be based on positive evidence and involve an objective examination of a) the volume of the {subject} imports and the effect of the {subject} imports on prices in the domestic market for like products, and b) the consequent impact of those imports on domestic producers of such products." "Positive evidence" is "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy,"[123] while an "objective examination" must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[124]

123. In turn, whether an investigating authority can base its examination of the volume and price effects of subject imports and "the consequent impact of those imports on domestic producers of such products" on "positive evidence" and an "objective examination" would depend on how the authority goes about defining the domestic industry. That is because an authority's analysis of subject import volume "relative to production" and whether subject imports have significantly undercut "the price of a like product" or otherwise depressed or suppressed like product prices pursuant to ADA Article 3.2 and SCM 15.2 depends upon the domestic industry definition. Similarly, an investigating authority's analysis of the impact of subject imports and the demonstration of a causal link between subject imports and injury – Articles 3.4 and 3.5 of the AD Agreement and Articles 15.4 and 15.5 of the SCM Agreement – couch the requisite analyses in terms of the "domestic industry." Specifically, investigating authorities must examine "the impact of the {subject} imports on the domestic industry" pursuant to Articles 3.4 and 15.4 and demonstrate "a causal relationship between the [subject] imports and the injury to the domestic industry" pursuant to Articles 3.5 and 15.5. Consequently, if an investigating authority were to define the domestic industry as the biased subset of domestic producers most likely to post weak performance, the investigation would be tainted from the outset. The resultant investigation could hardly constitute an "objective examination" of "the consequent impact of {subject} imports on domestic producers," as required under ADA Articles 3.1 and SCM 15.1. Nor would the investigating authority possess the "positive evidence" necessary to conduct such an analysis because its data set would not provide an accurate and unbiased picture of domestic industry performance.

124. 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

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[123] *Mexico – Beef & Rice (AB)*, paras. 163-64; *Mexico – Beef & Rice (Panel)*, para. 7.55; *see also EC – Tube or Pipe Fittings (Panel)*, para. 7.226, *upheld on this issue*, *EC – Tube or Pipe Fittings (AB)*.

[124] *Mexico – Beef & Rice (AB)*, para. 180.

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 inclusively as possible – one for related producers and one for regional industries.[125] As this list of exceptions is exhaustive,[126] the Agreements 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 has the effect of excluding from the domestic industry definition domestic producers who may potentially be willing to cooperate with the investigation has acted in breach of ADA Article 4.1 and SCM Article 16.1.

125. As the Appellate Body explained in *EC – Fasteners*, an investigating authority that limits the domestic industry definition to volunteers, "reduce{s} the data coverage that could have served as a basis for its injury analysis and introduce{s} a material risk of distorting the injury determination" in violation of ADA Article 4.1. As established by the United States in its first written submission, MOFCOM's approach to defining the domestic industry here was similar to the EC's approach in the *Fasteners* case, and therefore equally inconsistent with ADA Article 4.1 and, by extension, SCM Article 16.1.

What type of actions are required?

126. The Agreements do not specify any particular ways in which an investigating authority is to fulfill its obligation to properly define and collect data from the domestic industry. Certainly,

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[125] Article 4.1 of the AD Agreement provides that:

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

Article 16.1 of the SCM Agreement is substantially identical to Article 4.1 of the AD Agreement except that the provisions of Article 4.1(ii) of the AD Agreement are not included under Article 16.1 of the SCM Agreement but in Article 16.2 of the SCM Agreement.

[126] *See EC – Salmon (Panel Report)*, para. 7.112.

where as in this investigation, respondents have identified additional domestic producers (*see United States* response to Question 54), the investigating authority has an obligation to seek to gather data from those domestic producers. This could have been accomplished by simply sending questionnaires to the identified producers, with follow-up if necessary.

127. Moreover, in this investigation, MOFCOM itself possessed a consultant's report that was based on tracking data accounting for all domestic production. As explained by China at the first substantive meeting, the Chinese white feather industry was in existence for only about ten years at the time this investigation was initiated, and the original breeder pairs have been methodically tracked since the industry's inception. China does not explain why MOFCOM did not use these data – which should have been available from its consultant or the industry association – to identify and contact additional domestic producers, all of whom would possess the offspring of the original breeder pairs.

Are these actions required no matter what percentage of total domestic production the petitioners represent?

128. Without seeking information that allows it to determine the universe of the domestic industry, the authority simply may not know the amount of total domestic production. Thus, at the outset of an investigation, the investigating authority has a duty to assure that it is properly defining the domestic industry, and to seek to identify additional producers where it knows or learns that not all production is accounted for. The authority also has an obligation to actively seek data relevant to the injury examination for all domestic producers that are known or become known, unless the authority opts instead to seek data from a representative sample.[127] The United States is not suggesting, however, that an investigating authority is required to compel information from unwilling producers, particularly where the data obtained from willing producers is sufficiently representative of the domestic industry as a whole.

Question 58 (United States): **Is the United States' position that the domestic producers that China used in the injury determination do not represent a major proportion of total domestic production?**

129. The United States is not asserting a claim that the domestic producers do not represent a major proportion of domestic production. Rather, MOFCOM breached ADA Article 4.1 and SCM Article 16.1 by deliberately confining its domestic industry definition almost exclusively to petition supporters. MOFCOM essentially invited domestic producers to define the domestic industry themselves in a self-interested manner by providing blank questionnaires only to petitioners and producers listed in the petition and inviting other producers to volunteer for inclusion in the definition. By excluding other producers, MOFCOM inappropriately elevated a subset of domestic producers – those who held in common their support for issuance of antidumping and countervailing duty orders – to the role of *the* "domestic industry."

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[127] *See EC – Fasteners (AB)*, para. 416; *EC – Salmon (Panel)*, para. 7.130.

130. Under ADA Article 4.1 and SCM Article 16.1, the investigating authority is first obligated to make efforts to define the domestic industry as producers as a whole of the like product, with the limited exceptions discussed in our answer to Question 55. Only if this effort at inclusiveness fails may the investigating authority rely on data for a lesser set of domestic producers. That is, ADA Article 4.1 and SCM Article 16.1 realistically provide a backstop for investigating authorities to define the domestic industry as those producers who represent a major proportion of domestic production where the authority cannot reasonably know of or obtain information from all producers. But this does not excuse an investigating authority, and in this case MOFCOM, from actively seeking to include domestic producers beyond petitioners, particularly where, as here, the non-petitioning producers accounted for approximately half of domestic production.

Question 59 (both Parties): **Even if the ultimate decision is that the industry is a "major proportion" of total domestic production, does an investigating authority bear a burden to seek to understand the scope of the "whole" industry prior to reaching its conclusion?**

131. Yes, for the reasons given in response to questions 55 and 58 above, and 64 below.

Question 60 (United States): In respect of your claim under Article 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement, is your position that MOFCOM acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement as a consequence of the alleged inconsistency with Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement or is it an independent claim of inconsistency?

132. The U.S. claim that MOFCOM conducted its injury analysis based on an improper and non-objective domestic industry definition under ADA Article 3.1 and SCM Article 15.1 is separate and independent from its claim that MOFCOM's domestic industry definition was inconsistent with ADA Article 4.1 and SCM Article 16.1. Even if the Panel were to find that MOFCOM defined the domestic industry in accordance with Articles 4.1 and 16.1, the Panel should still find that MOFCOM violated Articles 3.1 and 15.1 by defining the domestic industry in a manner that was clearly biased in favor of petitioners, and hence not objective, and that did not permit an injury analysis based on positive evidence of the industry's condition.

Question 64 (both 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 in 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?**

133. As addressed above in response to question 54(a), the United States is of the view that an investigating authority cannot issue "a determination of injury . . . based on positive evidence and an objective examination," as required under ADA Article 3.1 and SCM Article 15.1, if the domestic industry definition upon which that examination relies is fundamentally biased in favor of petitioners. Only by making active, independent efforts to define the domestic industry as producers as a whole, consistent with the clear preference for such a definition expressed by ADA Article 4.1 and SCM Article 16.1 and the duty to investigate found elsewhere in the Agreements, can an investigating authority insure the objectivity of its definition of the domestic industry. Conversely, an investigating authority that defines the domestic industry in a biased manner would be in violation of ADA Article 3.1 and SCM Article 15.1 even if the definition otherwise includes producers accounting for a major proportion of total domestic production.

134. Of course, in investigations in which the petitioners represent all or virtually all domestic production, they would constitute the industry as a whole as well as a "major proportion." In different circumstances, however, in which the investigating authority knows up front that petitioners do not represent the domestic industry as a whole, the authority cannot use the fact that petitioners represent a "major proportion" as an excuse to avoid the obligations of ADA Article 4.1 and SCM Article 15.1. The investigating authority would be in breach of those Articles if it deliberately excluded domestic producers by failing to pursue a definition that included the domestic industry as a whole.

135. In turn, an investigating authority that so defines the domestic industry to include only petitioners, with no effort to identify other producers, and seeks injury data for only petitioners, would violate the objectivity requirement under ADA Article 3.1 and SCM Article 15.1 of the SCM Agreement. Such an approach to defining the domestic industry would make an affirmative determination more likely, thereby favoring petitioners, because only producers posting weak performance have an incentive to join a petition. Producers posting strong performance would have every incentive to not make themselves known, as their inclusion in the domestic industry would make an affirmative determination less likely. That petitioners represent a major proportion of total production would not make such an industry definition any less biased in favor of petitioners.[128]

136. For example, if there are only two producers in an industry, each accounting for half of production and neither falling within the related party exception, either one of them might reasonably appear to constitute a "major proportion" of domestic production. But if one is performing well and the other is not, an investigation based only on data collected from the

[128] Were there to be a case – which this one is not – where an investigating authority improperly defined the domestic industry to deliberately exclude some non-related domestic producers, but then gathered *all* relevant injury data from a broader group that included all domestic producers, there could arguably be a breach of ADA Article 4.1 and SCM Article 16.1 without a breach of ADA Article 3.1 and SCM Article 15.1.

petitioning poor performer would not be representative of the industry as a whole and would not be objective and unbiased.

137. Thus, even where, as in this investigation, the petitioners represent a "major proportion" of production, this fact does not relieve an investigating authority of its obligation to define the domestic industry inclusively.

B. PRICE EFFECTS ANALYSIS

Question 65(a) (both Parties): 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 a comparable product mix and same level of trade? If so, in what provision do you find the obligation?

138. Yes. Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement require investigating authorities to ensure that price comparisons are made using subject import and domestic like product prices that are comparable in terms of level of trade and product mix. Those articles provide, in relevant part, that "{a} determination of injury shall be based on positive evidence and an objective evaluation of . . . the effect of {subject} imports on prices in the domestic market for like products . . . ." To satisfy the "positive evidence" requirement, an investigating authority must predicate its analysis of subject import price effects on pricing data that is "relevant and pertinent" as well as "inherently reliable and trustworthy."[129] In order to conduct an "objective examination" of subject import price effects, an investigating authority must rely on pricing data that "provides an accurate and unbiased picture" of subject import prices relative to domestic like product prices "without favouring the interests of any interested party, or group of interested parties, in the investigation."[130] In other words, Articles 3.1 and 15.1, as well as cross-referenced Articles 3.2 and 15.2, obligate an investigating authority to ensure that the subject import prices and domestic industry prices that it compares are comparable and thus an accurate reflection of the extent to which subject imports undersold the domestic like product.

139. As recently explained by the panel in *China – GOES*:

> In our view, a proper finding of the existence of price undercutting necessarily entails a comparison of prices, and the authority should ensure that the prices it is using for its comparison are properly comparable. As soon as price comparisons are made, price comparability arises as an issue.[131]

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129 *Mexico – Beef & Rice* (AB), paras. 163-64.

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

131 *China – GOES*, para. 7.530.

140. In the GOES dispute, the panel found MOFCOM's price effects analysis inconsistent with Articles 3.1 and 3.2 of that AD Agreement and Article 15.1 and 15.2 of the SCM Agreement in part because "MOFCOM's reliance on AUVs without any consideration of the need for adjustments to ensure price comparability," including adjustments for differences in level of trade and product mix, "is neither objective, nor based on positive evidence."[132] This finding supports that an investigating authority cannot conduct an underselling analysis "based on positive evidence and an objective analysis," as required under Articles 3.1 and 15.1, without ensuring that its comparisons of subject import prices and domestic like product prices are not distorted by differences in level of trade or product mix that make a finding of underselling more likely.

141. That differences in level of trade and product mix distorted MOFCOM's price comparisons is clear. As explained by the United States both in its first written submission and at the first substantive meeting, subject import prices on a CIF basis would generally be lower than domestic producer prices on sales to first arms-length customers because they are at a different level of trade. Specifically, subject import prices on a CIF basis represent the prices that importers pay U.S. exporters for subject merchandise delivered to the border. CIF prices do not include the additional costs that importers build into the prices that they charge their first arms-length customers, including the cost of transporting subject merchandise from the border to an importer's warehouse and an importer's sales, general, and administrative expenses and profit. Domestic producer prices to first arms-length customers include all of these things, and would therefore be higher than subject import prices on a CIF basis. As a result, MOFCOM's price comparisons across different levels of trade cannot be considered either 'objective,' or based on 'positive evidence."

142. MOFCOM's price comparisons also failed to meet China's WTO obligations because they did not consider obvious differences in product mix. As the United States has explained, U.S. respondents presented uncontested evidence that 97 percent of the volume of subject imports consisted of wing tips, leg quarter, paws, and other offal, which are among the lowest-value chicken parts.[133] Domestic industry shipments would have consisted of the full range of chicken parts that results from the slaughter of whole chickens, including a substantial proportion of higher-value parts not imported from the United States. Chinese Customs data presented by U.S. respondents during the investigation, and augmented by China in its first written submission, confirm that different chicken parts command substantially different prices.[134] Thus, the average unit value of subject imports would differ from the average unit value of domestic industry shipments because the product mix of subject imports consists primarily of low-value

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132 *Id.*, paras. 7.528, 7.530, 7.536, 7.554.

133 *See* USAPEEC's Injury Brief at 19 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 5-6 (USA-46).

134 *See* USAPEEC's Injury Brief at 19 (USA-21); USAPEEC's Comments on Preliminary Injury Determination at 5-6 (USA-46); China's First Written Submission at para. 329.

parts while the product-mix of domestic industry shipments consists of a mixture of low- and high-value parts.

143. MOFCOM's failure to account for these clear, undisputed differences in level of trade and product mix in its price comparisons rendered its analysis of subject import price effects inconsistent with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

Question 67 (United States): What evidence did the respondents provide to MOFCOM on the differences in prices between models in the Chinese market?

144. As an initial matter, under the WTO Agreement, MOFCOM in its price comparison analysis had the obligation to make an objective examination, based on positive evidence. This obligation exists regardless of whether or not the respondents pointed out the obvious fact that an objective examination required the authority to consider the effects of differences in product mix.

145. That said, USAPEEC's injury questionnaire response did in fact provide evidence supporting the point that MOFCOM needed to take account for differences in product mix. USAPPEC reported average export prices on an HTS-specific basis for the U.S. exporters included in USAPEEC's response, as well as average import prices on an HTS-specific basis from China Customs. In its Injury Brief and Comments on the Preliminary Determination, USAPEEC cited these import data to demonstrate that the average unit value comparisons proposed by petitioners and utilized by MOFCOM were distorted by differences in product mix and therefore not an accurate indication of subject import underselling.[135]

Question 69(b) (China): Did MOFCOM ask the US association of exporters to identify the importers in China?

146. MOFCOM requested this information from exporters in question 6 of the injury questionnaire.[136] In response, USAPEEC provided this information for its members in Appendix 6 to its injury questionnaire response.[137] In this Appendix, USAPEEC provided over 100 listings of Chinese importers of subject merchandise with contact information and the total quantity of subject merchandise purchased by each importer during the investigation. The exporters' efforts

[135] USAPEEC's Injury Brief at 19 (USA-21); USAPEEC's Comments on the Preliminary Determination at 5-8 (USA-46).

[136] Specifically, the questionnaire asked exporters for the following information: "Please provide the largest 10 Chinese importers (Please state the relationship if they are the affiliated companies with your company) for the subject products during the POI including names, addresses, contact persons, telephone and the purchase quantities. (Please provide the information according to the purchasing quantities)."

[137] Appendix 6 to USAPEEC's Injury Questionnaire Response (USA-68) (Appendix I-6.1 in Chinese version).

at compiling and providing this useful information was apparently no more than a futile exercise, as MOFCOM did not make use of it. MOFCOM could have sent blank importer questionnaires to the importers identified in Appendix 6 of USAPEEC's questionnaire response, but did not. Although MOFCOM had at its disposal a wealth of information obtained from the U.S. exporters that would have enabled it to identify importers and seek usable pricing information from them, it did not avail itself of this obvious opportunity. China cannot credibly claim that a lack of importer cooperation forced MOFCOM to rely on subject import pricing data at a different level of trade from domestic like product pricing data when MOFCOM itself failed to contact or provide blank importer questionnaires to known importers.

Question 70 (United States): What in your view should have been the prices used if there were no responses from importers?

147. The issue in this dispute is whether MOFCOM, in the actual circumstances of this dispute, acted in accordance with its WTO obligations. Question 70 goes to a hypothetical factual situation that does not apply to this dispute.

148. Nonetheless, the United States has the following comments on Question 70. Even if China had issued questionnaires to importers and had failed to obtain responses, China would not have been relieved of its burden to base its injury determinations on an "objective examination" of "positive evidence" pursuant to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. Investigating authorities may not plug evidentiary gaps with information that is demonstrably inaccurate but must instead address such gaps in a manner consistent with their obligation to conduct an "objective examination" of "positive evidence." Thus, in the absence of importer questionnaire responses, MOFCOM would have been obligated to either adjust its average unit value data to account for differences in level of trade and product mix, collect additional pricing data (such as purchase price data from purchasers), or else recognize the limitations of the available average unit value data and reduce the probative weight attached to average unit value comparisons accordingly. Rather than doing any of these things, MOFCOM simply predicated its pricing analysis on biased and inaccurate average unit value comparisons in violation of Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

149. As explained in response to question 54 above, investigating authorities have an obligation to make active efforts to collect the information necessary to conduct the examinations required under the Agreements. The nature of this obligation is further illuminated by Article 6.8 of the AD Agreement, providing that "{i}n cases in which any interested party . . . does not provide, necessary information" investigating authorities may make determinations "on the basis of the facts available" pursuant to "{t}he provisions of Annex II." Annex II to the AD Agreement makes clear that investigating authorities may rely on the facts available only after making active efforts to collect the requisite information from interested parties. Specifically, Annex II provides that an investigating authority must "specify in detail the information required from any interested party, and the manner in which that information should be structured . . . in its response" and "ensure that the party is aware that if information is not supplied within a

reasonable time, the authorities will be free to make determinations on the basis of the facts available." As noted by the Panel in *Mexico -- Beef & Rice*, interested parties not given notice of the information required of them cannot be considered to have failed to provide necessary information.[138] Thus, the AD Agreement contemplates that investigating authorities will make active efforts to obtain the information necessary to conduct the examinations required under the Agreements before resorting to other sources of information.

150. Here, MOFCOM received no pricing data from importers because it made no effort to collect such data.[139] According to China, MOFCOM's only effort to collect information from importers was to post a blank importers' questionnaire on its website.[140] That no importer downloaded, completed, and returned an importers' questionnaire is unsurprising given that MOFCOM's "Notification on Registration of Participation in Industry Injury Investigation of the Broiler Antidumping Case," issued on September 17, 2009 (USA-6), and the substantially identical notice issued in conjunction with the countervailing duty investigation (USA-7), made no mention of the availability of an importers questionnaire on MOFCOM's website. With no notice of the importer questionnaire's availability, importers could not have been reasonably expected to locate and download the questionnaire.

151. Nor is posting a blank questionnaire on the internet an effective means of collecting information from importers. Rather than relying on importers to take the initiative to download a questionnaire, MOFCOM should have made active efforts to identify importers so that blank questionnaires could have been mailed to them with a written request that the questionnaires be completed and returned. For example, MOFCOM could have compiled a list of major importers based on the importers of subject merchandise reported by U.S. exporters in Appendix 6 to USAPEEC's injury questionnaire response and/or on customs documentation available from China Customs. By identifying major importers in this way and sending them blank questionnaires, MOFCOM would have greatly increased the likelihood of importers completing and returning questionnaire responses, just as most of the domestic producers to whom MOFCOM provided blank questionnaires completed and returned them.[141] Instead, MOFCOM

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138 *Mexico – Beef & Rice (Panel)*, footnote 211.

139 Because MOFCOM never disclosed a blank importers' questionnaire to the parties, it is unclear whether the questionnaire even requested pricing data on importers sales to first arms-length customers, which would be at the same level of trade as the pricing data reported by domestic producers. Even if the importers' questionnaire had requested such data, however, MOFCOM could not have used these data to account for differences in product mix. One way that MOFCOM could have controlled for product mix differences was by collecting pricing data from domestic producers and importers on their sales of narrowly defined pricing products, such as leg quarters, paws, wing tips, and other offal.

140 China, First Written Submission, para. 297.

141 Of the 20 domestic producers identified in the petition and hence provided with blank questionnaires by MOFCOM, 17 completed and returned questionnaire responses. *See* China's First Written Submission at paras. 246-47.

did nothing but post an importers' questionnaire on its website that importers had no way of knowing about. China cannot complain that MOFCOM had no choice but to rely on inaccurate and biased average unit value comparisons when MOFCOM itself made no effort to collect pricing data from importers.

152. But again, under the circumstances of this case, MOFCOM never even requested importers to provide data. In short, nothing in the WTO Agreement or the record in this dispute justified MOFCOM's reliance on biased and inaccurate average unit value comparisons in analyzing subject import price effects.

Question 72 (United States): 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.

153. 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.

154. In principle, an authority could find significant price depression or suppression even in the absence of significant price undercutting. Subject imports, for example, may garner a price premium over the domestically produced product because of superior quality. In such circumstances, should import prices decline from their previous levels, prices for the domestic product may well follow suit to maintain the price differential attributable to quality differences. Thus, dumped or subsidized imports may cause price depression or suppression even if they are not undercutting domestic prices. Even in this context, however, an objective authority should perform a comparison of the pricing levels of imports and domestically produced products, as well as a review of their relative pricing trends, in order to ensure that it has performed an "objective examination" of the "positive evidence" bearing on the issue of subject imports' effect on prices in the market.

155. 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.[142] After finding that "the RMB price of the Subject Products is always lower than average sales price of domestic like products," based on flawed and biased average unit value comparisons, MOFCOM concluded that "{t}he lower price of the Subject Products has also suppressed sales

[142] *See* United States, First Written Submission, paras. 306-310.

price of the domestic like products."[143] China's claim that MOFCOM's price suppression finding was somehow independent of its defective underselling analysis is belied by the pricing analysis set forth in MOFCOM's final determinations.

Question 73 (United States): Paragraph 96 of the United States' opening statement indicates that the United States maintains its claim with respect to MOFCOM's alleged failure to disclose its "alleged methodology for adjusting subject import prices to account for their different levels of trade"[144], notwithstanding China's indication that MOFCOM did not make any level of trade adjustment. Please clarify the precise factual and legal underpinnings of this claim, *i.e.* (i) which specific provisions were allegedly infringed; and (ii) by what specific alleged action or omission on the part of MOFCOM.

156. During MOFCOM's investigation, the United States objected to MOFCOM's comparison in its preliminary determination of subject import and domestic like product prices at different levels of trade.[145] In its final determination, MOFCOM purported to have taken "the difference of sales levels into consideration, adjusting the import price based on the customs data accordingly."[146] MOFCOM, however, failed to disclose the methodology and calculations that it claimed to have used to adjust subject import prices to account for their different level of trade. The failure to provide relevant information concerning price comparisons to interested parties would constitute a breach of ADA Article 6.4 and SCM Article 12.3, because it would have deprived interested parties of the timely opportunity to see, and prepare presentations based on, this information. Further, the failure to explain how MOFCOM adjusted prices would constitute a breach of ADA Article 12.2 (chapeau) and 12.2.2, as well as SCM Article 22.5 for failure to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material to the investigating authorities."

157. As the Panel observes in posing this question, however, 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

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143 MOFCOM, AD Final Determination at sec. 5.2.3 (USA-4); MOFCOM, CVD Final Determination at sec. 6.2.3 (USA-5).

144 United States, First Written Submission, paras. 311-320.

145 Opinion presentation meeting held by MOFCOM on July 12, 2010.

146 MOFCOM, AD Final Determination at sec. VI(ii)(2) (USA-4); MOFCOM, CVD Final Determination at sec. VII(B)(2) (USA-5).

rejection of this very relevant argument that goes to the heart of the pricing analysis relied on by MOFCOM.

C. CAUSATION

Question 77 (United States): Do you agree with China's description of the nexus (causal link) that is required under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement?

158. The United States agrees that Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require investigating authorities to establish that subject imports made a meaningful contribution to a domestic industry's injury (as defined in ADA footnote 9 and SCM footnote 45).[147] It is unclear whether China's rephrasing to claim that MOFCOM needed only to establish that subject imports were contributing "in some way" to material injury is equivalent to this standard.[148] The United States would also note that, read in context, Articles 3.5 and 15.5 require the investigating authority to base any causation determination on "an examination of all relevant evidence before the authorities." In addressing causation, the investigating authority must also assure that it is not attributing injuries caused by other known factors to the dumped or subsidized imports.

VI. CONSEQUENTIAL VIOLATIONS

Question 78 (United States): Does the United States make consequential claims in respect of all its claims of violation and, in particular, does the United States make consequential claims in respect of the alleged procedural violations and in respect of the alleged violations related to MOFCOM's injury determinations?

159. Yes. To the extent the China breached the relevant provisions of the AD and SCM Agreements discussed in the United States First Written Submission, China also acted inconsistently with Article 1 of the AD Agreement and Article 10 of the SCM Agreement.

147 China, First Written Submission, para. 389.

148 China, First Written Submission, para. 391.