CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES
(DS427)

SECOND INTEGRATED EXECUTIVE SUMMARY BY THE UNITED STATES OF AMERICA

January 24, 2013

TABLE OF CONTENTS

I. OVERVIEW

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

II. MOFCOM'S PROCEDURAL FAILINGS

A. China Cannot Defend MOFCOM's Denial of the U.S. Hearing Request.

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

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

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

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

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

6. The United States demonstrated that MOFCOM acted inconsistently with Article 6.9 by failing to disclose to interested parties the "essential facts" forming the basis of MOFCOM's decision to apply anti-dumping duties, including by failing to make available the data and

calculations it performed to determine the existence and margins of dumping. China claims that MOFCOM was under no obligation to provide the actual data and calculations that formed the basis of its dumping determination because the U.S. respondents, based on the limited information disclosed by MOFCOM, could have replicated MOFCOM's calculations. However, the limited data disclosed by MOFCOM was too scant to allow respondents to defend their interests and to meet China's obligations under Article 6.9.

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

7. The calculations relied on by an investigating authority to determine the normal value and export price, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. The calculations and data are "essential facts" because they are the "indispensible and necessary" facts considered by the investigating authority in determining whether definitive measures are warranted, *e.g.*, whether dumping has occurred and, if so, the magnitude of such dumping. Without the calculations and data, no affirmative determination could be made and no definitive duties could be imposed.

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

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

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

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

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

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

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

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

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

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

the fact that the interested party in that case "explained why, in its opinion, it was impossible to summarize certain information," something that is missing in the record here.

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

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

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

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

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

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

China's *Post Hoc* Arguments
• The very distinct markets for broiler products in the United States and China and how the respondents' cost methodologies were reported – over allocating costs to breasts popular in the United States and under allocating costs to paws and other parts popular in China – became important considerations for MOFCOM in evaluating whether respondents' reported product-specific costs reasonably reflected the cost of production of the subject merchandise for purposes of the antidumping investigation. ➢ *China's arguments do not address that MOFCOM's determinations contain no explanations or analysis regarding purported Chinese or U.S. markets.* • In the antidumping context, recorded costs based on such a methodology cannot

China's *Post Hoc* Arguments

reasonably reflect the actual costs of production for a given product. Moreover, the extreme bias resulting from this methodology given product preferences in China could not be justified.

- ➢ *The determinations though do not even reference any bias given product preferences in China or note what preferences Chinese consumers have.*

- This distortion is even more severe when using costs based on U.S. market values to determine the reasonableness of prices being charged in China.

  - ➢ *The determinations do not reference a distortion, severe or otherwise. There is nothing on the record to suggest that MOFCOM's issue was interested in determining what market values the respondents' utilized. Indeed, MOFCOM did not even solicit such information from the respondents.*

- The respondents' real and/or practical treatment of the status of paws and other products under their cost allocation methodology was a point of initial concern for MOFCOM, given the relatively high sales value of such products.

  - ➢ *The determinations do not reflect any concerns about the treatment of paws. Indeed, it is notable that the determinations for Keystone and Tyson are nearly identical, yet in these proceedings, China focuses primarily on how Keystone purportedly treated paws.*

- Tyson claimed to treat all products as joint products, but its treatment of products like paws in the allocation process did not really resemble standard joint product treatment. Rather, its allocation reflected a by-product approach.

  - ➢ *There is nothing in the determinations about joint products or byproducts or why one is acceptable and the other not. In fact, the determinations do not even call into question how Tyson characterized its accounting treatment of the products.*

- China's point is that in a value-based allocation one must take into account the circumstances of all sales to properly allocate costs to all production.

  - ➢ *There is nothing in the determinations even touching upon value-based allocations, let alone anything regarding what MOFCOM thought a value-based allocation must include.*

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

20. China has attempted to sidestep the prohibition against *post hoc* arguments by presenting two claims. First, China asserts its reasoning for rejecting respondents' kept costs is "self-evident" and thus did not need to be elucidated in its determinations. Second, China appears to assert that rather than look to whether the determination objectively sets forth the reasoning – which is what the Appellate Body and every panel that has considered this issue has concluded – the panel must instead try to consider what the respondents should have understood at the time to be MOFCOM's unwritten concerns and conclusions.

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

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

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

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

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

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

25. China argues that a company's costs in its books and records are not reasonable if the end result is that a company's costs of production are based on its experience in its home market, and remain the same despite different price trends (arising perhaps, from market tastes and demands) in another, importing country. But that would mean that in any instance where the producers' kept costs result in a normal value lower than the export price that the costs are *per se* unreasonable and a new methodology must be derived that finds a dumping margin. China appears to argue that the AD Agreement has some sort of gloss – the "anti-dumping context"– that permits costs to be calculated in a manner that permits a finding of dumping.

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

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

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

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

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

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

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

31. China acknowledges that "consideration" under Article 2.2.1.1 entails "some degree of deliberation"; however, China neglects the object of that deliberation: "a proper allocation of costs." China's interpretation turns the obligation to "consider all available evidence" into what

the Appellate Body has specifically held as insufficient under Article 2.2.1.1: simply receiving and noting evidence. Here, MOFCOM failed to engage in consideration with respect to both its decision to reject U.S. respondents' kept costs and in adopting its weight-based methodology.

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

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

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

a. MOFCOM's Determinations Do Not Reflect "Consideration"

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

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

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

anything else from the investigation indicates that MOFCOM considered this evidence, including the alternative methodologies proffered by MOFCOM.

37. Likewise, Pilgrim's submitted evidence explaining its costs and why they were reasonable. China does not even bother to argue MOFCOM's determinations reflect consideration of Pilgrim's evidence. Instead, China asserts that MOFCOM applied "Facts Available." However, at no time did MOFCOM ever issue a warning to Pilgrim's that Facts Available would be applied if requested information was not provided – or what the missing information was. China's assertions that such notice is provided for in *AD Final Disclosure* is simply untenable. In short, China has not explained why MOFCOM was entitled to afford Pilgrim's such treatment and why the records and evidence Pilgrim's submitted – months before the AD disclosure – had to be ignored. China's claim that MOFCOM applied Facts Available is simply an admission that MOFCOM failed to consider Pilgrim's evidence.

b. China Misrepresents the Factual Record

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

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

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

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

products produced from the live birds as by-products [and it] … treats all products that are produced from the live birds as co-products. Tyson assigns production costs to all of these products and records the revenue generated from sales of these products as sales revenue."

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

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

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

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

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

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

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

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

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

respondents' reported methodologies. Such a response is unreasonable and inconsistent with the requirements of Article 2.2.1.1.

B. China Breached Article 2.4 of the AD Agreement by Failing to Conduct a Fair Comparison between Keystone's Constructed Normal Value and Export Price

50. MOFCOM breached Article 2.4 of the AD Agreement by failing to conduct a fair comparison between the export price and normal value in the calculation of Keystone's dumping margin. MOFCOM made an undue adjustment to Keystone's export price to account for certain freezer storage expenses that were already included in Keystone's constructed normal value.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63. The data provided in response to the Second Supplemental Questionnaire is for <u>total</u> purchases of corn and soybean, not just those purchases for subject merchandise. The respondents' exhibits, on their face, indicate they are intended to provide the ingredients in the feed consumed by chickens and the quantity and value thereof. The fact that the respondents viewed the data as total feed can be confirmed as follows. For Tyson, its response, as reflected in Exhibit CS2-I-3, reported the total "production quantity of live broiler chicken" in tons. Tyson reported the total quantity (tons) and value (USD) of each ingredient used to produce the

feed that was consumed by those live chickens. With respect to Pilgrim's, it reported total purchases of corn and soybeans, as reflected in Exhibit S-II-I-2 of the Second Supplemental CVD Questionnaire Response. It can be confirmed that the figures reflect total purchases of corn and soybeans for all production by comparing the data in this response to the response to Question 9 of the First Supplemental CVD Questionnaire, which asked for the "purchases of raw materials (including soybean, corn, feed for broilers and live chickens) during the POI." The response to that question is found in Exhibit S-I-9(b) of the First Supplemental CVD Questionnaire Response (which is a restatement of the table responding to question III-3 of the original anti-subsidy questionnaire, asking for the same). Exhibit CHN-38, which was part of Pilgrim's submission, explicitly notes that some of the feed is going to pullets and breeders. Thus, while it is conceivable that U.S. respondents were confused as to the question posed by MOFCOM, MOFCOM was in a position to see what U.S. respondents interpreted.

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

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

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

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

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

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

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

68. An investigating authority's recourse to facts available under ADA Article 6.8 and SCM Article 12.7 is limited to situations where an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. The *Mexico – Beef & Rice* panel explained that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information. The Appellate Body report further explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. Given MOFCOM's failure to notify "all other" exporters or producers, those exporters and producers cannot be said to have failed to provide necessary or requested information, or otherwise to have impeded the AD and CVD investigations. Therefore, MOFCOM's resort to facts available adverse to the interests of those exporters or producers was inconsistent with ADA Article 6.8 and SCM Article 12.7.

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

70. The panel in *GOES*, in regard to factual circumstances nearly identical to those of this dispute, found that China's attempts to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with ADA Article 6.8. The panel reached a similar conclusion with regard to SCM Article 12.7. Given the similarity of the underlying facts and legal arguments in *GOES* and this dispute, the panel's reasoning there should be considered highly persuasive here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. MOFCOM'S FLAWED INJURY DETERMINATIONS

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

80. China attempts to defend MOFCOM's approach to defining the domestic industry by arguing that defining the domestic industry in an unbiased fashion was simply not possible under the circumstances. According to China, MOFCOM reasonably provided questionnaires only to producers listed in the petition, which all belonged to petitioner CAAA, because the Chinese broiler industry was hopelessly fragmented, allegedly consisting of 27,638,046 producers. And, China argues MOFCOM's definition of the domestic industry to include only the 15 questionnaire responses completed by producers listed in the petition and two producers clearly handpicked by petitioner, all of which unsurprisingly supported the petition, should be excused, because these producers represented over 50 percent of Chinese broiler production.

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

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

82. China does not deny that MOFCOM limited its definition of the domestic industry to those domestic producers that completed domestic producers' questionnaire responses, and that

MOFCOM provided domestic producers' questionnaires only to the 20 producers belonging to petitioner CAAA listed in Exhibit 2 of the petition. As members of the CAAA, these 20 producers were by definition petitioners. Nor does China deny that the only affirmative actions taken by MOFCOM to identify other domestic producers was its publication, on September 27, 2009, of a "Notification on Registration of Participating in Industry Injury Investigation" with respect to both the antidumping and countervailing duty investigations, and the posting of a blank domestic producers' questionnaire on its website.

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

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

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

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

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

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

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

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

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

90. In defending MOFCOM's approach to defining the domestic industry, China provides a revisionist framework in an apparent effort to make MOFCOM's approach appear reasonable. The Panel's review, however, centers around those findings the authority actually made, and not findings that the Member attempting to defend the authority's action may choose to assert after the fact. Thus, China's *post hoc* rationalizations are of no relevance to the Panel's examination of "whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."

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

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

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

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

93. China argues that MOFCOM's definition of the domestic industry was not biased because two of the 17 producers included in the definition were not producers listed in the petition, but rather producers that managed to complete domestic producers' questionnaire responses under unexplained circumstances. The most plausible way in which these two

producers could have received blank domestic producers' questionnaire is if they received them from the *producers listed in the petition*, which would have been the only source of questionnaires other than MOFCOM. Thus, these two producers were no less handpicked by petitioners than were the producers listed in the petition. Moreover, MOFCOM's inclusion of these two producers within its domestic industry definition would not have reduced the bias that resulted from MOFCOM's approach to defining the domestic industry.

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

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

95. In response to a Panel question, China concedes that these data on Chinese broiler farms include producers of yellow feather chickens, which are outside the domestic industry boundaries that MOFCOM itself set. It bears noting that during the investigations, MOFCOM made a deliberate decision to limit the domestic industry to the producers of white feather chicken products coextensive with the scope of imported products, rather than to define the industry more broadly to cover yellow feather chicken production as well. Having affirmatively made this decision to proceed with the narrower domestic industry definition, China cannot now have it both ways by arguing that its investigatory task was overly burdensome because of the large number of producers and employees producing yellow feather chicken products. The data now relied on by China – which include yellow feather chicken production – are therefore of no use in ascertaining the degree of fragmentation of the white feather chicken industry in China.

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

97. In any event, the complexity or fragmentation of a domestic industry does not excuse an investigating authority from making active, independent efforts to identify a representative subset of domestic producers for purposes of defining the domestic industry. Even if the domestic industry producing white feather poultry was as fragmented as China argues, China should have made an effort to collect information that was representative of the industry as a whole. China could have accomplished this and met its WTO obligations by any of several means, including actively seeking data from the 147 major producers, or by sampling. As the Appellate Body explained in *EC – Fasteners*, "an injury determination regarding a fragmented industry must . . . cover a large enough proportion of total domestic production to ensure that a

proper injury determination can be made pursuant to Article 3.1." As the *EC – Salmon* panel explained, such a sample must also be representative of domestic producers as a whole, because "{a} sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for . . . an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of [ADA] Article 3.1."

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

98. MOFCOM's approach to defining the domestic industry shared fundamental similarities with the EC's approach in *EC – Fasteners*. In *Fasteners*, the EC published a notice inviting domestic producers to make themselves known and volunteer for inclusion in a sample of the domestic industry, and then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample. The Appellate Body held that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EC's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in violation of ADA Article 4.1.

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

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

101. China's argument that "MOFCOM did not intentionally exclude any domestic producers from its investigation" is unpersuasive. MOFCOM's approach to defining the domestic industry ensured that only petitioners and petition supporters – the domestic producers likely to post the

weakest performance – would complete questionnaire responses and thus be included in the domestic industry definition. MOFCOM's consideration of all data collected from such a biased subset of producers would not have mitigated the material risk of distortion created by MOFCOM's process for defining the domestic industry.

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

B. China Cannot Defend MOFCOM's Price Effects Analysis

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

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

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

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

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

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

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

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

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

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

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

MOFCOM in its final determinations, much less disclosed to the parties during the investigations.

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

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

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

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

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

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

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

114. Even if the Panel were to find that MOFCOM predicated its price suppression finding on a combination of subject import price and volume effects, MOFCOM made no finding and provided no explanation as to how subject import volume effects alone were sufficient to suppress domestic like product prices to a significant degree. In *GOES*, as in this dispute, China argued that MOFCOM's price depression and suppression findings were based on subject import price and volume effects, and could be upheld on the basis of volume effects alone. The Appellate Body rejected this argument and agreed with the Panel that "it was 'not possible to

conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports.'" The Panel should reach the same conclusion here because MOFCOM's final determinations are similarly bereft of any explanation as to how significant price suppression could have been the effect of the increase in subject import volume alone.

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

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

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

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

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

117. Domestic industry capacity utilization and end-of-period inventory trends did not constitute "positive evidence" that subject imports had an adverse impact on the domestic industry "during the entire POI," including the 2006-2008 period. The domestic industry's rate of capacity utilization did not increase with domestic industry output between 2006 and 2008 because the 26.2 percent increase in domestic industry capacity outstripped the 17.0 percent increase in apparent consumption during the period. Thus, the domestic industry's capacity utilization trend was entirely explained by the industry's own capacity expansion and was not

affected by subject imports. MOFCOM's reliance on domestic industry capacity utilization to support its finding that subject imports had an adverse impact on the domestic industry "during the entire POI" was therefore not supported by an objective examination of positive evidence, in breach of ADA Article 3.1 and SCM Article 15.1. Nor does its reliance on this factor reflect an examination of all relevant economic factors and indices, in breach of ADA Article 3.4 and SCM Article 15.4.

118. The United States has also shown that the increase in domestic industry end-of-period inventories as a share of domestic industry shipments and production was too small to be materially adverse. In response, China argues that MOFCOM was under no obligation to find end-of-period inventories "significant" because, in its view, ADA Article 3.4 and SCM Article 15.4 only require investigating authorities to evaluate the enumerated injury factors. However, MOFCOM did in fact find the increase in end-of-period inventories significant when it relied on this increase, in combination with the domestic industry's capacity utilization trends, to find that subject imports adversely impacted the domestic industry "during the entire POI," including the 2006-2008 period.

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

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

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

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

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

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

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

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

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

124. China attempts to proffer new evidence – not mentioned by MOFCOM in its determinations or otherwise disclosed to the parties – that, in its view, shows that the increase in subject import market share did come at the expense of the domestic industry. Even if the Panel were to examine China's new data, these data would not serve to support MOFCOM's causation findings. China acknowledges that its new market share data include data reflective of all domestic producers, including those "for which MOFCOM did not have questionnaire responses." MOFCOM could not have factored the market share trends of domestic producers as a whole into its causal link analysis because the evidentiary record on the domestic industry's performance was limited to data from the 17 domestic producers included in its domestic industry definition. A market share loss suffered entirely by domestic producers outside the domestic industry definition would not have been reflected in the performance data collected from producers included within the domestic industry definition. MOFCOM could not find that market share lost by producers outside the definition contributed to any adverse trends reported by producers within the definition in accordance with the positive evidence and objectivity requirements under ADA Article 3.1 and SCM Article 15.1. Thus, China's new market share data is irrelevant to the Panel's assessment of whether MOFCOM's causal link analysis was consistent with China's WTO obligations.

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

market share to subject imports between 2006 and the first half of 2009 and therefore possessed no positive evidence with which to examine the causal relationship between subject imports and the performance of those producers.

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

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

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

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

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

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

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

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

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

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

133. China concedes that MOFCOM predicated its causal link analysis almost entirely on trends in the first half of 2009 and asserts that such a reliance was consistent with China's WTO obligations. China fails to recognize that MOFCOM was obligated to examine the causal relationship between subject imports and domestic industry performance during the entire period of investigation, not just during a selective period. An investigating authority cannot predicate

its causal link analysis on "all relevant evidence," much less an "objective examination" of "positive evidence" pursuant to ADA Article 3.1 and SCM Article 15.1, without examining the relationship between subject imports and domestic industry performance over the entire investigative period for which data has been collected. An investigating authority that limits its impact analysis to data from portions of the period of investigation that support its analysis fails to base its analysis of "the consequent impact of [subject] imports on domestic producers" on an "objective examination" of "positive evidence," in breach of ADA Article 3.1 and SCM Article 15.1.

134. An investigating authority cannot selectively pick data points that appear to support its causal link analysis, while ignoring conflicting trends over the period of investigation as a whole, without breaching ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5. Doing precisely that, MOFCOM predicated its causal link analysis entirely on subject import and domestic industry performance trends in the first half of 2009, while ignoring subject import and domestic industry performance trends over the entire period of investigation that conflicted with its analysis. Moreover, the absence of a coincidence between an increase in imports and a decline in the relevant injury factors over the entire period examined by MOFCOM contradicted MOFCOM's finding that subject imports adversely impacted the domestic industry during the period of investigation. Because MOFCOM's impact analysis relied exclusively on trends in the first half of 2009 without reconciling trends over the 2006-2008 period, the analysis was inconsistent with both the impact analysis envisioned by ADA Article 3.4 and SCM Article 15.4 and the objectivity requirement under ADA Article 3.1 and SCM Article 15.1.

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

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

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

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

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

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

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

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

140. With respect to the U.S. respondents' argument concerning chicken paws, China concedes that "MOFCOM did not explicitly address this specific issue in its Final

Determination." China argues that the Panel should excuse this omission because MOFCOM addressed the argument in the preliminary determination and "did not believe the U.S. respondents had provided any new information on this issue, so did not repeat its earlier discussion of this issue." China's argument is factually incorrect.

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

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

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

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

producers. China has failed to rebut the United States' demonstration that USAPEEC's argument concerning chicken paws raised a material issue that MOFCOM failed to address in the final determinations, much less resolve "in sufficient detail," in breach of ADA Articles 12.2 and 12.2.1 and SCM Articles 22.3 and 22.5.