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

(DS427)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

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SHORT FORM	FULL CITATION
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, circulated 15 June 2012.
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr. 1, adopted 28 July 2011.
EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1.
Mexico – Beef & Rice (AB)	Appellate Body Report, *Mexico — Definitive Anti-Dumping Measures on Beef and Rice — Complaint with Respect to Rice*, WT/DS295/AB/R, 2005, adopted 20 December 2005. DSR 2005.
Mexico – Pipes & Tubes	Panel Report, Mexico – Anti-dumping duties on Steel Pipes and Tubes from Guatemala, WT/DS331/R, adopted 24 July 2007.
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006.

I. Introduction

1. Mr. Chairman, members of the Panel, we thank you for your attention to this matter and appreciate the significant work the Panel is undertaking to review the parties' respective arguments. Our statement today will focus on the arguments that China has proffered in its written submission. In particular, we will demonstrate that the fundamental problem is not simply the errors with what China asserts – though there are many – but that China failed to make any such arguments during the course of the investigations. China's *post-hoc* rationalizations only further prove that MOFCOM simply ignored and discounted evidence and arguments that it found problematic throughout the underlying investigations. Accordingly, China's measures are indeed the result of a flawed process yielding flawed results.

2. As the Appellate Body has made clear, the mandate of a panel is to review the actual reasoning of the investigating authority during the investigation at issue.[1] While China's first written submission offers many explanations in response to the facts and arguments cited by the United States, China does not – because it cannot – argue that MOFCOM offered these explanations at any time during the course of the investigations. Instead, China argues that the explanations it provides now, some of which require elucidation over a dozen pages, were unnecessary during the underlying investigations because they were "self-evident" or because China had not been properly informed of the problem. As we will explain, China's assertions cannot be reconciled with the actual record.

3. Alternatively, China attempts to excuse its conduct by asserting that its practice is similar to U.S. practice. These assertions are without merit. Although we find such allegations puzzling

[1] United States, First Written Submission, para. 37, quoting *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.

and at odds with China's equally erroneous allegations that the United States is trying to impose its preferences on WTO Members, they are ultimately not relevant because the questions before the Panel *concern China's measures.* And in respect of those measures, we begin by discussing China's defenses for its procedural failings.

II. China's Defense of its Flawed Process

A. China's Assertion That the Petitioner Declined to Participate in a Hearing Has No Support in the Record (Breach of ADA Article 6.2)

4. First, China acknowledges that it denied the U.S. request for a hearing.[2] China asserts that the denial was justified because MOFCOM had contacted the Petitioner who indicated it had no interest in meeting with the United States. China asserts it therefore did all that was required of it, and it did not have to proceed with the requested hearing.

5. In making this argument, China cannot point to any reference in the record to support its assertion that MOFCOM denied the hearing request because the Petitioner declined to participate. To the contrary, the record provides very different reasons for MOFCOM's denial of the U.S. request. Specifically, MOFCOM, in its reply to the United States,[3] rejected U.S. concerns by arguing that it had undertaken its investigations in a proper manner and, in particular, that it provided the United States and respondents sufficient time to submit responses and comments. Per MOFCOM, the issues in the hearing request were thus not relevant to the interested parties directly. Nowhere does the letter make reference to the Petitioner or the supposed inquiry as to its participation.

6. The final determinations also make no mention of the Petitioner declining to meet with the United States. In its submission, China appears to indicate that the United States misread the

[2] China, First Written Submission, para. 10.

[3] Exhibit USA-24.

final determination when it indicated a hearing had not been granted. China suggests that what was granted was not the application's request for a hearing, but the ability of the United States to file the application itself.[4] In other words, according to China, the determination recorded that the United States made a request. If so, then where in the determination is any explanation as to the more pertinent question: was the opportunity to meet sought by the application granted or denied and why?

7. The only document in the record that addresses those questions is the July 14 letter from MOFCOM.[5] The letter states that MOFCOM judged that the issues were irrelevant to the interested parties "directly" and that it had conducted the investigation properly. However, MOFCOM did not contact any of the respondents, even though a central issue in the proposed hearing was whether the respondents had sufficient time to submit responses in the investigation. Thus, China's defense is ultimately that MOFCOM engaged in contact with the Petitioner – China notably does not say the respondents – in order to resolve issues relevant to respondents.[6] If MOFCOM did so, it is emblematic of the flawed process the United States takes issue with.

8. Moreover, the Petitioner would have had every interest in accepting MOFCOM's offer to decline participation. Article 6.3 of the AD Agreement provides that the oral information provided in a hearing shall only be taken into account if it is reproduced in writing and made available to other interested parties. For a party such as the Petitioner, who would be adverse to the issues raised in the proposed hearing, MOFCOM's procedure of substituting a closed meeting as soon as a petitioner declines to meet, allows a petitioner an easy way to avoid a

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4 China, First Written Submission, para. 9.

5 Exhibit USA-24.

6 China, First Written Submission, para. 9.

hearing and limit the record of arguments it finds objectionable. Not surprisingly, the United States has been asking China to end its practice of closed meetings with select parties since as far back as 2005.[7]

9. In sum, the record shows that China acted inconsistently with Article 6.2 of the AD Agreement when MOFCOM denied the U.S. hearing request in favor of a closed presentation. The record, specifically the July 14 letter,[8] provides that MOFCOM, within two days of receiving the U.S. request, decided no hearing would be held because, in its own words, it had already decided that it had conducted the investigation properly and that the issues mentioned in the hearing request accordingly "are not relevant." There is no discussion of any conversations with the Petitioner. That is what the record confirms, and China cannot now change it.

B. MOFCOM's So-Called Summaries Do Not Excuse Non-Disclosure of the Anti-dumping Calculations (Breach of ADA Article 6.9)

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

11. Article 6.9 requires the investigating authority to disclose the essential facts "under consideration which form the basis for the decision whether to apply definitive measures." Definitive measures are only applied if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. Therefore the data and calculations used

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7 Statement of the United States to the Committee on Antidumping Practices on 31 October 2005, G/ADP/E/449, pg. 2 (2 Nov. 2005).

8 Exhibit USA-24.

to determine the normal value and export price constitute "essential" facts. Without those facts, no affirmative dumping determination could be made, and no definitive duties could be imposed.

12. China asserts that the U.S. reading of Article 6.9 creates a disclosure requirement without limit.[9] To the contrary, we explained that the disclosure obligation has at least three important limitations – it applies only to *facts*, as opposed to reasoning; it concerns only the *essential* facts, as opposed to any and all facts; and it is limited to those essential facts that *form the basis of the decision to apply definitive measures*. These limitations are clearly reflected by the text of Article 6.9.

13. China's interpretation of Article 6.9 departs from the text and asserts that essential facts "are more appropriately limited to the fact of the existence of dumping and those other fundamental facts that provide an understanding of how the conclusion was reached".[10] However, simply disclosing the "fact" that dumping exists is plainly inconsistent with the text of Article 6.9, which makes clear that the investigating authority must disclose the essential facts forming the basis of that very determination.

14. Additionally, Article 6.9 makes clear that the aim of the requirement is "to permit parties to defend their interests." The panel's report in *EC – Salmon* stated that the purpose is to "provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority" and "provide additional information or correct perceived errors".[11]

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9 China, First Written Submission, para 27.

10 China, First Written Submission, para 28.

11 *EC – Salmon*, para 7.805.

15. China asserts that it met its disclosure obligation because each of the final AD disclosure documents included a table of certain summary figures, including export price, normal value, and the resulting margin of dumping.[12] China therefore concedes that export price and normal value are "essential facts". However, these summary figures represent merely the final stage of a margin calculation and at no point does MOFCOM disclose the data or calculations used to derive them. Without those essential facts, these summary figures do not allow the respondents to defend their interests – for example, they could not "comment on the completeness or correctness of the facts" or "correct perceived errors."

16. In its first written submission, China submitted three exhibits containing tables that, according to China, could direct the respondents to the information relied on by MOFCOM and allow them to reconstruct the exact calculation performed by MOFCOM to determine the margin of dumping.

17. Two important points about these tables: First, these tables were created by China for this panel proceeding, were not part of the administrative record, and were not provided to the interested parties during the investigation. Second, even if they had been provided during the investigation, they still do not disclose the essential facts – they merely refer the respondents to the scattered and vague statements in the final AD determination and disclosure documents concerning adjustments purportedly made by MOFCOM. They do not provide the data and calculations used by MOFCOM to determine the existence and magnitude of dumping.

18. Without these essential facts, the respondents could not re-construct the exact calculations, contrary to China's suggestion, and certainly could not review the data and calculations used by MOFCOM to determine whether they contain clerical or mathematical

[12] China, First Written Submission, para. 32.

errors, or whether the investigating authority actually did what it purported to do. MOFCOM's failure to disclose the data and calculations prevented the respondents from knowing the essential facts about how the dumping margins had been determined and is therefore a breach of Article 6.9 of the AD Agreement.

C. China's *Post-hoc* References to Portions of the Petition and its Determinations Do Not Constitute Non-Confidential Summaries (Breach of ADA Article 6.5.1 and SCM Article 12.4.1)

19. China attempts to sidestep its failure to require the Petitioner to provide non-confidential summaries by noting the United States is not challenging the underlying claims of confidentiality. That argument, however, fails to sequence the issues properly, or, as we say in the United States, puts the cart before the horse. The relevant provisions of the AD and SCM Agreements require the investigating authority to assess the confidentiality claim. If valid, the authority must require the interested party submitting the confidential information to provide an appropriate summary. As the Appellate Body has recognized, the summary is critical because interested parties cannot defend their interests – including challenging the confidentiality claim – without an understanding of the information in question.[13]

20. In respect to the actual claims at issue, China argues that the Petitioner did in fact prepare the summaries, at other sections of the Petition, even though they were not labeled as such, and that, alternatively, MOFCOM prepared the summaries in its preliminary determination, even though they were not labeled as such.[14] These arguments, however, avoid the two questions that

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13 *EC – Fasteners (AB)*, para. 397.

14 China, First Written Submission, para. 44 ("The petitioning parties in fact provided adequate non-confidential summaries of the information for which confidential information was provided." … "[S]upplemental summarization was supplied in the preliminary determination prior to any final determination.")

are critical to the inquiry under Articles 6.5.1 and 12.4.1: (1) where in the record are the non-confidential summaries and (2) what justifies the failure to prepare non-confidential summaries?

21. With respect to the first question, the recent panel report in *China – GOES* makes clear that interested parties do not have "to infer, derive and piece together a possible summary of confidential information."[15] Yet, that is precisely what China is arguing here. We will discuss two examples cited by China to illustrate why its approach is misguided.

22. The first example concerns the issue of production and standing. China asserts that the public version of the Petition makes the "factual assertion" "that the production accounted for by petitioner is more than 50 percent of the total production in the industry." According to China, this assertion is sufficient for a "reasonable understanding" of the confidential information. This precise argument was made – and rejected – by the panel in *China – GOES*, which held that a mere conclusion "does not provide an interested party with a basis to challenge whether the confidential information provides a basis for the conclusion drawn."[16] China has not appealed this finding by the *GOES* panel. Moreover, there are other reasons for concern. China's submission claims that the Petitioner was somehow responsible for more than 50 percent of total domestic production,[17] but other domestic producers supplied more to the domestic market.[18] Perhaps this discrepancy can be explained, but what cannot be explained is China's position that interested parties should have no alternative but to simply accept the Petitioner's claim.

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15 *China – GOES*, para. 7.202.

16 *China – GOES*, para. 7.205.

17 China, First Written Submission, para. 48.

18 China, First Written Submission, para. 400.

23. The second example concerns production capacity. China cites "graphic representations" in the Petition as providing a reasonable understanding of the confidential information.[19] We thought it would be helpful to the Panel to see these graphic representations firsthand. While China may claim it relevant that these graphics are scaled, it ignores the fact that the scales are missing. It is therefore impossible to discern whether any specific trends, and the magnitudes thereof, are actually taking place. Accordingly, these graphic representations do not provide a reasonable understanding of what the underlying information constitutes.

24. Even if the inquiry were what China asserts, i.e., whether a non-confidential summary could be cobbled together – a proposal flatly rejected by the panel in the *GOES* dispute – China cannot meet its own test. The examples it cites do not give a reasonable understanding of the purportedly confidential material.

25. With respect to the second question – what justifies the failure to require non-confidential summaries – China cites the panel's report in *Mexico – Pipe and Tubes.* 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."[20] 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

[19] China, First Written Submission, para. 49.

[20] China, First Written Submission, para. 42.

information,"[21] something that is missing in the record here. Whether you look at the translation provided by the United States or China, it is clear that the Petitioner only provided the most generic statement about why confidential treatment was needed – for every situation. In *EC – Fasteners* for example, the Appellate Body explicitly disclaimed reliance on a generic statement for different pieces of confidential information.[22] The Appellate Body was clear that investigating authorities cannot permit undefined claims about the need to protect confidential information to justify confidential treatment, particularly when they rely on that information in their determinations to the detriment of the other parties. If an underlying purpose of the SCM and AD Agreements is to reflect a balance between the rights and concerns of domestic industries and foreign respondents, such one-sided treatment by China is clearly not in conformity with that object and purpose.

26. Furthermore, China's argument is a non-sequitur in light of its other argument: that MOFCOM prepared non-confidential summaries for the instances cited by the United States. China cannot have it both ways. It cannot assert on the one hand that MOFCOM relied on the Petitioner's generalized confidentiality claim to excuse production of summaries but on the other that it undertook the necessarily analysis and prepared the summaries.

27. In sum, it is the investigating authority that bears responsibility for assessing whether the reasons proffered by the party seeking confidential treatment excuse production of a non-confidential summary. Thus, China's arguments that non-confidential summaries could be pieced together from elsewhere in the Petition or through MOFCOM's determinations are simply more *post hoc* rationalizations to justify its breaches of Article 6.5.1 of the AD Agreement and

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21 *Mexico – Pipe and Tubes*, para. 7.394.

22 *EC – Fasteners*, para. 553.

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

D. China Still Cannot Justify its Determinations for "All Other" Producers (Breach of ADA Articles 6.8, 6.9, 12.2, 12.2.1 and 12.2.2 and SCM Articles 12.7, 12.8, 22.3, 22.4 and 22.5)

28. China breached the AD and SCM Agreements with respect to MOFCOM's determination of the so-called "all others" dumping margin and "all others" CVD rate in at least three respects.

29. First, MOFCOM breached Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement by applying "facts available" that were adverse to the interests of exporters and producers it did not notify. The Petition identified six U.S. producers of broiler products. MOFCOM notified only those six producers of the initiation of the investigation, and provided 20 days for any other U.S. producer to come forward and register with MOFCOM.

30. Of those producers that were notified and those that came forward and registered, MOFCOM investigated and calculated individual dumping margins and subsidy rates for three companies. With respect to companies that registered with MOFCOM, but were not investigated, MOFCOM applied the weighted average dumping margin and subsidy rate of the investigated companies. However, with respect to so-called "all other" U.S. producers – producers that MOFCOM did not identify or notify – MOFCOM assigned an "all others" dumping margin and subsidy rate significantly higher than the weighted average of the investigated companies. The "all others" dumping margin was more than twice the weighted average margin; the "all others" subsidy rate was more than four times greater than the weighted average subsidy rate.

31. China claims that any unidentified U.S. producers or exporters were properly notified by virtue of the fact that MOFCOM requested the U.S. embassy to notify any other producers or exporters, posted the notice on MOFCOM's website, and placed a copy of the initiation notice in a reading room in Beijing.[23]

32. However, Article 6.8 requires, as the Appellate Body has made clear, that an exporter or producer must be given the opportunity to provide information required by an investigating authority before the investigating authority resorts to facts available adverse to the exporter or producer's interests.[24] An exporter that is unknown to the investigating authority is not notified of the information required of it, and is thus denied an opportunity to provide it.

33. MOFCOM failed to notify, or even identify, the other exporters or producers of the pending investigation and the information required of them. And, as China appears to admit in its written submission, MOFCOM applied facts available to "all other" producers in a manner that was adverse to the interests of those producers.[25] China asserts that resorting to adverse facts available was justified in order to provide an incentive for unknown companies to make themselves known.[26] But an incentive only works if a party is aware of – or given notice of – that incentive. By applying facts available adverse to the interests of companies that were not notified of the information required of them, were never sent copies of the antidumping or CVD questionnaires, and were not otherwise provided the notice required by the AD and SCM Agreements, MOFCOM breached Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement.

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23 China, First Written Submission, para. 180.

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

25 China, First Written Submission, para. 183.

26 China, First Written Submission, para. 183.

34. MOFCOM also breached Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement by failing to inform the interested parties of the essential facts under consideration in calculating the "all others" dumping margin and subsidy rate. These essential facts would have included the facts that led MOFCOM to conclude that the use of "facts available" adverse to the interests of the "all other" companies was warranted, the facts that led MOFCOM to conclude that a dumping margin and subsidy rate significantly higher than those for the investigated companies were appropriate, and the facts underlying the calculation of those rates.

35. Finally, MOFCOM also breached 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 adequately explain the "all others" determinations. MOFCOM was required to provide in sufficient detail the findings and conclusions that led to the imposition of facts available. The single conclusory statement that MOFCOM was resorting to the use of facts available provides no explanation of the reasons used to calculate the dumping margin and subsidy rate and is therefore plainly insufficient to satisfy China's obligations.

III. China's Defense of its Flawed Anti-dumping Determinations

A. China Still Cannot Point to Any Record Evidence to Support MOFCOM's Assertion that U.S. Producers' Recorded Costs Were Unreasonable (Breach of ADA Article 2.2.1.1)

36. A central point in the U.S. first written submission is that MOFCOM's determinations provide no explanation as to why China found the costs of U.S. producers unreasonable. The third parties that have addressed this issue concur that an investigating authority should provide an explanation regarding the supposed unreasonableness of producers' costs.[27] In its first written

[27] *See* European Union, Third Party Written Submission, para. 37; Saudi Arabia, Third Party Written Submission, para. 17 ("a compelling explanation should be provided by the investigating

submission, China does not – as it cannot – cite anything in its determinations suggesting further consideration of that question beyond what the United States has already provided. Instead, China relies on *post-hoc* rationalization. Accordingly, MOFCOM proffers, after 22 single-spaced pages, that the supposed unreasonableness of U.S. producers' costs was "self-evident."[28] The fact that China must rely on 22 single-spaced pages to defend its position serves as compelling testament that the rejection of U.S. records as unreasonable was anything but "self-evident."

37. Faced with this contradiction, China tries to bolster its *post-hoc* rationalizing by confusing both what the United States asserts about Article 2.2.1.1 and what Article 2.2.1.1 supposedly entails. With respect to how the United States supposedly misinterprets this provision, China asserts that the United States conflates GAAP consistency with reasonableness as being one and the same. This is false. Our first written submission is quite clear on this point.[29] Our submission noted that MOFCOM never disputed the GAAP consistency of U.S. producers' records. Nothing in China's submission suggests the contrary. We also explained that these GAAP consistent records were reasonable, which China says is the "real question."[30] But what China does not say is where is MOFCOM's explanation as to why U.S. producers' costs were unreasonable.

38. Critically, it is important to remember the context of MOFCOM's silence. U.S. producers put evidence on the record explaining why their costs were reasonable. This evidence

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authorities as to why the allocation methodology historically utilized by the foreign producer or exporter is not 'reasonable.'").

28 China, First Written Submission, para. 138.

29 *See e.g.*, United States, First Written Submission, paras. 86, 91.

30 China, First Written Submission, para. 63.

includes U.S. and Chinese accounting treatises, letters from auditors, and precedents from other investigating authorities. MOFCOM did not analyze or discuss any of this evidence during the course of the investigations. In determining if China has met its WTO obligations, the question is what is on the record. China cannot cure any breach by introducing new arguments or material after the fact in these proceedings.

39. In addressing reasonableness, MOFCOM's failure has to also be considered in light of a key point: the present case concerns *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, 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 we cited in our first written submission.[31] Indeed, the methodology is so reasonable that the industries in both the United State and China utilize it for their accounting.[32]

40. In considering the issue of the use of U.S. producers' records, it is important to bear in mind the language of Article 2.2.1.1:

> costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with production and sale of the product under consideration.

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[31] *See e.g.*, United States, First Written Submission, paras. 98-102.

[32] *See e.g.*, United States, First Written Submission, para. 98.

Accordingly, even if another accounting method has merits, the preference is for producers' records as long as they are reasonable. Moreover, there is nothing reasonable about China's weight-based allocation methodology. China's *post-hoc* citations and examples serve only to demonstrate the problem.[33] For example, China provides a hypothetical about red and blue widgets. The hypothetical widgets are not joint products. Unlike the widget hypothetical, different products command different values. And distinct from China's hypothetical,[34] there were different processing costs as well, a fact that MOFCOM ignored during the investigation.

41. Furthermore, China's own *post-hoc* position on what constitutes reasonableness is unreasonable. China asserts that reasonableness must be focused on the cost of production and not on sales.[35] In support of this interpretation, China quotes at length the portion of the panel report in *EC – Salmon* that states there is no explicit description of "cost of production" in the AD Agreement.[36] 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*, on the same page China quotes from, 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.'"[37] 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

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33 China, First Written Submission, paras. 121-125.

34 China, First Written Submission, para. 132.

35 China, First Written Submission, para. 70.

36 China, First Written Submission, para. 70, quoting *EC – Salmon*, para. 7.483.

37 *EC – Salmon*, para. 7.481

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. Additionally, these products with different values also have different processing costs. MOFCOM's approach is less connected to capturing the costs of production than that employed in the respondents' records.

42. Let's look at some of the determinations that China references in its submission.[38] The MOFCOM determinations simply state, at most, that the companies had not provided reasons – albeit to questions unknown to them – explaining why different parts had different costs. If China is really concerned about the cost of production for the various pieces, then its methodology is a particularly poor choice.

43. Consider two points in our submission that China completely ignored. First, U.S. producers explained that their assigned costs not only reflected the relative value of the products, but processing costs as well. China makes much of the fact that a primary product sold in China is paws and not breast meat. U.S. producers provided a compelling reason for why production of breast meat costs more than chicken paws: the former requires processing including deboning.[39] China's supposed "neutral basis" for allocating costs did not factor in these considerations. Even now, China cannot explain why it could not take such arguments into account.

44. The second point is that a U.S. producer, Tyson, asked MOFCOM to consider whether it was assigning costs incurred in producing non-subject merchandise to subject merchandise.[40]

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38 China, First Written Submission, paras. 80-84.

39 United States, First Written Submission, paras. 101, 113.

40 United States, First Written Submission, para. 113; Exhibit USA-40.

MOFCOM did not respond to this concern. At a minimum, one would expect MOFCOM to at least engage Tyson regarding its allegations or request further information. We note that this is the same producer that China alleges in its submission did not provide any actual costs of production.[41] This appears to be a very significant point of fact regarding production, and MOFCOM should have at least discussed this potential problem. It did not.

45. China emphasizes that the reasonableness of reported costs should have nothing to do with sales. As China puts it, it would be wrong if a "price is deemed 'fair" because it is the price that is charged."[42] By China's logic, any exporting country with weak domestic demand for a product would be engaged in dumping if it exports the product to a country where the product is highly valued. That is wrong and is fundamentally against the notion that trade will naturally arise where relative costs and values differ.

46. Indeed, to start with, such an interpretation cannot be reconciled with the rest of Article 2.2.1.1 or the AD Agreement more generally. First, the relevant GAAP in Article 2.2.1 is that of the *exporting* country, not the importing country. Why would one utilize the GAAP of an exporting country if the reasonableness of the costs is to be determined from the perspective of the importing country? Second, the second sentence of the provision provides that an investigating authority must consider a producer's historically used allocations. Why should an investigating authority do so since historically used costs are never going to reflect conditions in the importing market or have been prepared to consider reasonableness "in the context of an anti-dumping proceeding"?[43] Third, China's position contradicts the express preferences of the AD

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41 China, First Written Submission, para. 93.

42 China, First Written Submission, para. 76.

43 *See e.g.*, China, First written Submission, para. 93, 111.

Agreement. The AD Agreement provides that the investigating authority, if possible, use sales in the exporting market if they are made in the ordinary course of trade.[44] If a product's price in the exporting country is subject to less demand and has a lower price than in the importing country, the AD Agreement accepts that conclusion. Just as there can be no duties imposed in the absence of injury, or threat of injury, even if dumping is found, there can be no duties imposed in the absence of dumping as defined by the AD Agreement.[45]

47. China's submission asserts that in the "anti-dumping context," an investigating authority can apply methodologies that are:

- internally inconsistent;
- based on distorted values; or
- assign an artificial cost based on factors *other than the actual cost of producing the item in question*.[46]

Article 2.2.1.1 is a rejection of that position because it creates a preference for a particular methodology – use of the producer's records provided they are consistent with GAAP and reasonable – even if others could be developed.

48. When considering the positions China espouses in its submission, we would ask you to consider one other critical point in addition to the deficiencies we just identified: China never made these positions known to respondents. As our submission notes, various parties, including the United States, repeatedly shared their view about what Article 2.2.1.1 required throughout

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44 AD Agreement, Article 2.2.

45 *US – Anti-Dumping Act of 1916 (AB)*, Para. 107 ("note that, under Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, neither the intent of the persons engaging in "dumping" nor the injurious effects that 'dumping' may have on a Member's domestic industry are constituent elements of 'dumping'.")

46 China, First Written Submission, para. 62.

the investigation.[47] If China viewed the U.S. respondents' costs as unreasonable because of how those products were valued in the Chinese market, it certainly never put anything on the record to indicate so. Even now, consider the authorities cited by China. One, the 14th edition of Professor Horngren's accounting treatise, was published *after* MOFCOM's investigations.[48] The rest are mentioned nowhere in the determinations.

49. Although this dispute concerns China's measures, we will briefly note two points about China's reference to U.S. practice in the softwood lumber investigations. First, the United States applied a value-based allocation in that proceeding. Second, the United States explained at length its reasoning and considered the arguments put forward by the parties. We also note one example of U.S. practice that China did not address, which was brought to MOFCOM's attention by a U.S. producer during the course of the investigation: *Pineapples from Thailand.*[49] That U.S. determination references an earlier edition of Professor Horngren's accounting treatise, also brought to MOFCOM's attention. That quotes states:

> Significantly, the use of physical weighting for allocation of joint costs, i.e., in this case the cost of the pineapple fruit, may have no relationship to the revenue-producing power of the individual products. Thus, for example, if the joint cost of a hog were assigned to its various products on the basis of weight, center-cut pork chops would have the same unit cost as pigs' feet, lard, bacon, ham, and so forth. Fabulous profits would be shown for some cuts, although losses consistently would be shown for other cuts.[50]

Neither MOFCOM during the investigation nor China now in its submission shared their views on why this point did not merit consideration. In sum, China's analysis was set forth for the first

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47 *See e.g.*, United States, First Written Submission, para. 114; Exhibit USA-26 at 2.

48 China, First Written Submission, para. 135, n. 106.

49 Exhibit USA-26 at 9-10 citing Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand, 60 Fed. Reg. 29,553, 29560-61 (June 5, 1995).

50 Exhibit USA-26.

time in its submission before the Panel – and still fails to reflect its obligations under Article 2.2.1.1. Accordingly, we respectfully request the Panel to reject these *post-hoc* arguments and find China in breach.

B. MOFCOM's Undue Adjustment to Respondent Keystone's Export Price (Breach of ADA Article 2.4)

50. In our first written submission, we demonstrated that 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. Specifically, MOFCOM improperly adjusted Keystone's export price for certain freezer storage expenses that were reflected in Keystone's constructed normal value.

51. Article 2.4 requires due allowances to be made for differences between the export price and normal value that affect price comparability. The *a contrario* application of this requirement means that no allowances or adjustments should be made for differences that do not affect price comparability.

52. MOFCOM constructed Keystone's normal value using Keystone's reported costs of production. Those costs unquestionably included freezer storage expenses, as even China appears to admit in its first written submission.[51] In the Final AD Determination, however, MOFCOM erroneously asserted that Keystone had not reported those freezer storage expenses and adjusted the export price to exclude them.[52]

53. This was an undue adjustment because no difference existed between the normal value and export price in regard to freezer expenses that affected price comparability. Both incurred these expenses. As a result of this undue adjustment, MOFCOM compared a normal value that

[51] China, First Written Submission, para. 177.

[52] China, Final AD Determination, Sec. 4.1(c)3.2.

included freezer storage expenses to an export price that was adjusted to exclude those same expenses. Given that MOFCOM's comparison of normal value and export price reflected this undue adjustment – not the presence or absence of dumping – it is therefore inconsistent with Article 2.4.

54. China has responded with two assertions: first, that the U.S. claim is outside of the panel's terms of reference; and second, that the adjustment to Keystone's export price warranted.[53]

55. *With regard to the first assertion* – China argues that the U.S. claim regarding Article 2.4 is outside the panel's terms of reference because neither Article 2.4 nor the phrase "freezer storage expenses" were specifically referenced in the U.S. request for consultations. However, as even China appears to recognize, Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request.

56. In this regard, the Appellate Body in *Mexico – Beef and Rice* stated the following:

> [I]t is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the 'legal basis' that formed the subject of consultations.[54]

It went on to state, in particular, that:

> *[a] complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure – that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent.* Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become

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53 China, First Written Submission, paras. 139, 159.

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

> relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.[55]

57. The United States requested consultations "with respect to China's measures imposing anti-dumping duties and countervailing duties on broiler products from the United States" as set forth in the AD and CVD determinations issued by MOFCOM. China cannot dispute that we are challenging the same determinations that were included in our consultations request.

58. As the Panel is aware, we are pursuing several claims concerning China's various failures during the investigation to disclose certain essential facts, information and reasoning. In particular, we are challenging China's failure to disclose the calculations and underlying data used by MOFCOM to determine the dumping margins, including the calculations of normal value and the export price of the respondents. Given MOFCOM's flawed and insufficient disclosures, it was not readily apparent what adjustments to those values MOFCOM made or failed to make during the investigation. We requested consultations concerning the dumping and countervailing duty determinations, including MOFCOM's calculations of the dumping margins, and, as a result of those consultations, it became clear that one component of those calculations – MOFCOM's calculation of and adjustment to Keystone's export price – should properly be considered under Article 2.4. Therefore, contrary to China's assertion, the legal basis for our claim regarding Article 2.4 clearly evolved from the legal basis that formed the subject of consultations.

59. *With regard to its second argument* – China makes two conflicting assertions – on the one hand, that the adjustment to Keystone's export price was warranted; but on the other, that

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[55] *Mexico – Beef & Rice (AB)*, para. 138 (emphasis added).

while there was a mismatch between the normal value and export price, any error was Keystone's responsibility. Neither assertion is supported by the record.

60. China argues that the adjustment was warranted because all of Keystone's exports to China were of frozen product, and therefore incurred freezer storage expenses, but only a fraction of Keystone's domestic sales incurred freezer storage expenses because not all of those products were frozen. According to China, by allocating those freezer storage expenses over all domestic production, Keystone's normal value was artificially reduced. MOFCOM made no such assertion during the investigation and there is no indication that it adjusted the export price on that basis. China ignores that, if such an allocation was made, it was the result of MOFCOM's construction of Keystone's normal value. We know that MOFCOM constructed Keystone's normal value based on its reported costs, which included freezer storage expenses. Because MOFCOM's disclosure of its calculation of Keystone's normal value was flawed, we have no details as to how MOFCOM may have allocated those costs.

61. However, assuming *arguendo* that the freezer storage expenses reflected in the normal value had been artificially reduced, the solution would not be to subtract completely those expenses from the export price. Doing so would create a mismatch between a normal value that reflected at least some portion of those expenses and an export price that reflected none of those expenses. China recognizes this error in its submission, where it stated the following: "MOFCOM recognized that Keystone also allocated freezer storage expenses to normal value, given the late stage of the process at which the issue was discovered and the limited information

provided by Keystone in its questionnaire response, MOFCOM declined to calculate a normal value adjustment in light of Keystone's incomplete responses."[56]

62. China's response relies on the *post-hoc* characterization of Keystone as failing to provide accurate or timely responses to MOFCOM's request. However, contrary to that assertion, MOFCOM verified that all of the costs of Keystone's financial reports, which included freezer storage expenses, had been properly reported to MOFCOM. In Keystone's verification report, MOFCOM stated the following:

> The Verification Team has verified the completeness, accuracy, and truthfulness of Keystone's general situation, sales to the Mainland China, domestic sales in America, and allocation of costs and charges of the like product of the subject product.

China's suggestion that MOFCOM's error was somehow justified by the actions of Keystone should therefore be rejected because it is not supported by the record.

63. What the record does reflect, however, is that MOFCOM made an undue adjustment to exclude freezer storage expenses from the Keystone's export price and therefore compared a normal value that included at least some portion of those expenses, as China admits, to an export price that did not. MOFCOM's comparison of normal value and export price reflected this undue adjustment – not simply the presence or absence of dumping – and therefore was inconsistent with Article 2.4.

IV. China's Defense of its Flawed CVD Determinations

A. MOFCOM Was Made Perfectly Aware That it had Misallocated the Alleged Subsidy in Relation to Subject Products and Continued to do so (Breach of SCM Article 19.4)

[56] China, First Written Submission, para. 177.

64. With respect to the subsidy allocation issue, *i.e*. the numerator/denominator mismatch, China takes issue with the United States' supposedly simplistic rendition. The issue, however, is simple. There are three principal points that need to be made, and only one of which is contested. First, China agrees that the numerator and denominator need to be properly aligned in order to calculate the appropriate subsidy margin.[57] Second, China allocated purported subsidies to non-subject products. While MOFCOM refused to acknowledge as much during the investigation, now, in its submission, China does not contest that MOFCOM's alignment was improper. China's only defense leads us to our third point. China claims that it was forced into this position because it had to do the best it could with the data provided and that it was the respondents' fault for not developing the record better. That is incorrect.

65. As an initial matter, the notion that MOFCOM was concerned about this issue and attempted to do the best it could is undermined by its response to the U.S. request on this issue.[58] On the screen is the relevant excerpt from USA-42, MOFCOM's 13 August 2010 reply, to U.S. concerns. As the excerpt clearly states, MOFCOM asserted there was no mismatching because it used the data provided by the respondents. In other words, MOFCOM rejected that there was a mismatch at all.

66. China now tells us that this mismatch is the result of a purportedly holistic error and blames the United States for emphasizing the questions in the second supplemental questionnaire. Of course, our emphasis does not change the fact that MOFCOM asked the question we cited, which asked about the purchase of feed for all chickens. And while China may cite its own translation of earlier questionnaire responses, which still ask about material

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57 China, First Written Submission, para. 195.

58 United States, First Written Submission, para. 239.

provided to produce chickens, not subject merchandise, it does not change, as Exhibit USA-42 clearly confirms, that MOFCOM is the one that refers to the second supplemental questionnaire in justifying its subsidy calculation in respect to Tyson.

67. MOFCOM also referred to the second supplemental questionnaire – and nothing else – as its basis for its subsidy allocation decision to Pilgrim's Pride.[59] On the screen is USA-19, Pilgrim's final CVD Disclosure. The relevant text makes clear that MOFCOM based its determination on the response to a question in the second questionnaire: how much corn and soybean meal was purchased for chickens. That question made reference to feed purchased for chickens, not feed used to produce subject merchandise. The record thus demonstrates that China calculated the subsidy solely on the questionnaire response we referenced in our first submission.

68. The record also demonstrates that the affected respondents and the United States brought this issue to MOFCOM's attention early. Indeed, the United States noted that MOFCOM's logic meant that chickens that produced subject merchandise were fed only subsidized meal and those that were used to produce non-subject merchandise were fed nothing.[60] As those instances are cited in our first submission, we will not revisit them here except to note two things. First, the affected producers and the U.S. government not only identified the problem, they provided two specific options to address it.[61] MOFCOM could revise the denominator to reflect total sales of chicken. Alternatively, it could reduce the numerator to reflect the amount of meal used to

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59 Exhibit USA-19.

60 Exhibit USA-52.

61 United States, First Written Submission, paras. 237-238.

produce subject merchandise. Nowhere on the record does MOFCOM address why these options were not viable.

69. The second thing to note is that this is not mere administrative oversight. MOFCOM knew the problem and the relevant figures to fix it. In Exhibit 19, the Pilgrim's CVD disclosure document, you can see reference to a percentage figure. That MOFCOM noted the figure is confirmation that MOFCOM was clearly aware of it. We would like to remind everyone of the origins briefly. On April 28, 2010, still months away from the final CVD determination, Pilgrim's submitted its comments on the preliminary CVD determination. It explained the mismatch error, cited the relevant tables with the correct figures, and explained that subject production only accounted for that percentage figure I just mentioned. Moreover, Pilgrim's noted that it had recalculated the subsidy benefit as a result. As the final disclosure confirms, MOFCOM was perfectly aware of the arguments. MOFCOM thus had ample time to make the correction and if it had any concerns, could have put them forth so the interested parties could try to resolve them. But that is another thing the record does not show. Accordingly, we respectfully request the Panel to find that MOFCOM improperly and unjustifiably misallocated the subsidy and that China has breached Article 19.4 of the SCM Agreement as a result.

V. China's Defense of its Flawed Injury Determinations

A. MOFCOM's Definition of the Domestic Industry is Flawed (Breach of ADA Articles 3.1, 3.2, 3.4, 3.5, and 4.1, and SCM Articles 15.1, 15.2, 15.4, 15.5, and 16.1)

70. China's submission sidesteps the principal question that needs to be addressed with respect to Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement: whether the method chosen to define the domestic industry was biased? China's discussion of the Chinese market does not change the fact that the answer to that question remains yes.

71. The United States does not seek to prescribe a particular method by which MOFCOM had to define the domestic industry. We simply note that the method MOFCOM chose is inherently biased. The essential facts are as follows: First, MOFCOM provided blank questionnaires only to the Petitioner and "known producers" in China selected by the Petitioners in its Petition. Assume *arguendo* that MOFCOM also made the questionnaire available somewhere on its website. Even if so, it does not change the fact that parties that are directly sent questionnaires are much more likely to respond. Second, MOFCOM's September 27, 2009, notices did not inform domestic producers that they would need to register for participation in the injury investigations in order to receive a questionnaire. So even if it was widely known that anti-dumping and countervailing duty investigations were underway, MOFCOM's official notices did not make it clear how domestic producers could participate. The only producers truly put on notice were those sent questionnaires by MOFCOM – the producers hand-selected by the Petitioner.

72. In short, by providing blank questionnaires only to producers identified by the Petitioner and to producers that responded to MOFCOM notices by registering for participation in the investigations MOFCOM created a "self-selection process" in favor of domestic producers posting the weakest performance. The only producers with an incentive to voluntarily register to participate would be those whose performance was weak. Domestic producers posting stronger performances would have an incentive not to come forward as the inclusion of their data in the domestic industry definition would make an affirmative injury determination less likely. This is the same type of biased analysis the Appellate Body found inconsistent in *EC – Fasteners*.[62]

[62] *EC – Fasteners (AB)*, paras. 426-427.

73. The arguments proffered by China do not remove or excuse the bias in its method. For example, China argues that there are millions of broiler farms in China that slaughter chickens. Accordingly, China suggests that in light of this burden, it was only reasonable to turn to the Petitioner as the "practical mechanism" for reaching out to the largest producers.[63] Why? Other feasible and objective mechanisms existed. For example, MOFCOM could have turned to government data, resorted to sampling, or distributed public notices that actually invited and compelled responses. MOFCOM did none of these things.

74. Indeed, China's arguments highlight its biased selection. If the domestic industry was as fragmented as China now claims, then it would have been particularly important that MOFCOM make an effort to collect data from a representative subset of domestic producers. China claims that MOFCOM's domestic industry definition did not leave out any major domestic producers, although China also relies on a statistical table claiming there are over 147 farms that slaughter over a million birds annually.[64] This data, published by the U.S. Department of Agriculture, but sourced from China's Ministry of Agriculture, confirms MOFCOM excluded numerous domestic producers. China does not explain why it could not have utilized data from the Ministry of Agriculture to provide blank domestic producers' questionnaires to other producers.

75. Additionally, by intentionally excluding a class of producers from the domestic industry; namely, producers that could not complete domestic producers' questionnaire responses, MOFCOM also violated Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement. Finally, MOFCOM's biased and flawed definition of the domestic industry tainted its entire injury analysis – e.g., market share, price effects, impact, and causation – rendering that

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63 China, First Written Submission, para. 240.

64 China, First Written Submission, paras. 238, 248.

analysis inconsistent with Articles 3.2, 3.4, and 3.5 of the AD Agreement and Articles 15.2, 15.4, and 15.5 of the SCM Agreement.

B. MOFCOM's Price Analysis is Flawed (Breach of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2)

76. The second component of MOFCOM's flawed injury determination is its finding that subject imports undersold the domestic like product to a significant degree. We demonstrated that China's underselling analysis was fundamentally flawed in two key respects. First, the analysis compared the value of subject imports with the value of the domestic like product at different levels of trade.[65] Second, MOFCOM failed to account for different product mixes among subject imports and the domestic like product.[66] These fundamental flaws prevented MOFCOM from conducting the objective examination of price effects required by Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

77. *With regard to levels of trade* – MOFCOM used the pricing data in the Petition to compare subject import prices based on official import statistics – on a CIF basis – to the domestic producers' sales prices to their first arm's-length customers.[67]

78. To fully appreciate the flaw in MOFCOM's analysis, it is important to understand what this pricing data represents. The average unit value of subject imports on a CIF basis reflects the prices than an importer pays for imported broiler products at the border – including costs, insurance, and freight from the United States. But the domestic producers' sales prices do not compete with CIF prices – they compete with imports that are offered to the importers' first arm's-length customers. Those products will be sold at prices that reflect additional costs, not

[65] United States, First Written Submission, paras. 288-296.

[66] United States, First Written Submission, paras. 297-305.

[67] MOFCOM, Final AD Determination, sec. 5.2.3 (USA-4).

reflected in the CIF price, such as the additional transportation costs to move the product from the border to the importers' warehouses and the importers' markup for sales, general and administrative expenses, and profit. This is significant because it means that the average unit value of subject imports on a CIF basis at the border will of course be lower than the average unit value of those same subject imports sold by the importers to their first arm's-length customers. In short, these different values reflect different levels of trade. An appropriate analogy would be trying to compare a wholesaler's prices to a retailer's prices.

79. China confirmed in its first written submission that MOFCOM failed to adjust the CIF prices to account for the fact that they were at a different level of trade than the domestic producers' sales.[68] By making the comparison of prices at different levels of trade, MOFCOM made a finding of price undercutting by the subject imports nearly inevitable. The underselling margins cited by MOFCOM reflected the different levels of trade at which subject import prices and the domestic like product prices were collected and compared.

80. The U.S. government and respondents raised this issue during the investigation and MOFCOM responded in the final determinations that it had "taken the difference of sales levels into consideration, adjusting the import price based on Customs data accordingly."[69] This statement is significant because it confirms that MOFCOM knew that the prices were at different levels of trade. MOFCOM asserted that it had adjusted the data accordingly, but those purported adjustments remained unknown because MOFCOM failed to disclose them.

81. In China's first written submission, in contrast to MOFCOM's statement in the final determinations, China states that the only adjustment made was the addition of customs duties to

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68 China, First Written Submission, paras. 288, 304.

69 MOFCOM, Final AD Determination, sec. 6.2.2 (Exhibit USA-4).

the CIF prices and that no adjustment was made to account for the different levels of trade.[70] China also asserts that it was proper to compare these pricing data, notwithstanding the different levels of trade, because both were "ready to enter further sales channels."[71] Whether they enter further sales channels does not address the inherent problem: by comparing this data, without adjustment, MOFCOM ignored the series of additional costs (such as internal transportation and administrative costs and profit margins) normally incurred before the imported goods can reach the point of actually competing on the market with domestic like products. In short, the prices were at different levels of trade and, thus, not comparable.

82. In an attempt to justify this flawed approach, China also suggests that MOFCOM could not compare these prices at the same level of trade because it would be more burdensome than simply relying on the Petitioner's data.[72] However, burden alone does not excuse an investigating authority of its obligation to conduct an objective examination of price effects based on positive evidence.

83. *With regard to the issue of product mix* – MOFCOM's price analysis failed to control for obvious and significant differences in the mix of products among subject import shipments and domestic industry shipments reflected by the record evidence.[73] In particular, the evidence showed that the overwhelming-majority of subject imports consisted of lower-value chicken products, such as chicken paws and wing-tips, while domestic producer shipments consisted of a distribution of both lower and higher value chicken products, including higher value breast

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70 China, First Written Submission, para. 304.

71 China, First Written Submission, para. 306.

72 China, First Written Submission, paras. 293-295.

73 United States, First Written Submission, para. 300; Exhibit USA-21, pp. 19, 30.

meat.[74] Given the different product mixes, comparing average unit-value data would not be a reliable substitute for pricing data of comparable products.

84. During the investigation, MOFCOM did not deny or refute this record evidence – rather, it simply claimed that it was under no obligation to take product mix into account.[75] In China's first written submission, it attempts to justify this approach by asserting that there is nothing inherently wrong with using overall averages.[76] If the mix of products is relatively homogeneous, then perhaps the use of overall averages may be appropriate – but, in the case at hand, the record evidence clearly indicated that the mix of products was not homogeneous and, therefore, the use of averages was inappropriate.[77]

85. There is an obvious reason why this matters: if you compare the average unit value of a basket of lower value products to the average unit value of a basket of lower and higher value products, you will of course find that the average unit value of the basket containing primarily lower value products is the lower of the two.

86. Neither MOFCOM, in its determinations, nor China in its submission, addresses this key issue. China nowhere refutes the fact that by comparing the average unit value of subject imports to the average unit value of the domestic like products, despite record evidence that significant differences existed between the relative mix of products, MOFCOM was not conducting a pricing analysis based on positive evidence and an objective examination.

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74 *Id*.

75 China, Final AD Determination, sec. 6.2.2 (Exhibit USA-4).

76 China, First Written Submission, para. 313.

77 United States, First Written Submission, para. 300; Exhibit USA-21, pp. 19, 30.

87. China also asserts that the differences in product mix can be ignored because "all the different parts are competing for consumer attention as an item of food."[78] China's response glosses over the variety of products included within the scope of the investigation. The fact that these various products may be sold (or eaten) in the same market does not mean that an investigating authority can ignore apparent differences in the mix of those products. By MOFCOM's logic, it would make no difference if apples and caviar were thrown into the shipment since they are eaten as well.

88. China accuses the United States of failing to appreciate how consumer preferences in China differ from consumer preferences in the United States.[79] To the contrary, we discussed consumer preferences in our submission and, in particular, cited to MOFCOM's recognition that the different consumer preferences explain why a higher proportion of certain products, such as paws, were exported from the United States in vastly different proportions to other broiler products, such as white meat.[80] But to be clear, MOFCOM's task was straightforward. MOFCOM did not have to consider how or why consumer preferences differed between the United States and China, or how those preferences could impact the mix of products. Rather, MOFCOM was presented with record evidence demonstrating that the product mix of subject imports differed from the product mix of the domestic product and was therefore obligated to control for such differences in its comparison of domestic and import prices. China concedes that MOFCOM did not do so here.

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78 China, First Written Submission para. 316.

79 *See, e.g.*, China, First Written Submission, para. 317.

80 United States, First Written Submission, para. 299; MOFCOM, Final AD Determination at sec. 5 (Exhibit USA-4); MOFCOM, Final CVD Determination at sec. 6.4 (Exhibit USA-5).

89. China also asserts that the United States did not, in fact, export primarily lower value parts to China.[81] To support this assertion, it relies on data that is not in the record, but that nonetheless fully supports the U.S. position. In particular, China acknowledges that certain tariff lines were excluded from its summary of this non-record data because the products listed under those tariff lines were not imported from the United States in sufficient quantities.[82] But that is the key point – U.S. producers did not export relatively equal proportions of the range of broiler products subject to the investigation. Rather, they exported primarily products of lower value, while the group of domestic products they would be compared to included not only those lower value parts, but also the products that the United States does not export in significant quantities. China's new data also illustrates that even among the relatively lower value products included in its table, there are significant differences in value, again indicating that the mix of products should have been taken into account by MOFCOM. China's finding of price undercutting was inherently flawed because MOFCOM failed to do so.

90. MOFCOM's failure to account for different levels of trade and different product mixes means that the price comparisons could not properly allow an investigating authority to "consider whether there has been significant price undercutting," as required by Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, or to conduct an "objective examination" of "positive evidence" pertaining to subject import price effects, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement.

91. This failing is critical considering that MOFCOM'S *only* basis for its finding that subject imports suppressed the prices of domestic like products was this finding of significant

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81 China, First Written Submission, para. 319.

82 China, First Written Submission, fn 244.

underselling. The determinations cite no other evidence to link subject import competition to the suppression of domestic producer prices. Given that the price undercutting analysis is fundamentally flawed, MOFCOM has no other basis on which to support its finding of price suppression.

92. China has attempted to diminish the significance of MOFCOM's flawed analysis by asserting that MOFCOM's finding of price suppression was not, in fact, solely predicated on its price underselling analysis.[83] According to China, the price analysis was only one component of that finding, which was also based on China's consideration of volume and market share effects.[84] China implies that even if the Panel were to agree that MOFCOM's price undercutting analysis was flawed, MOFCOM's finding of price suppression is nevertheless sound because it rested on these other components. However, this argument misrepresents MOFCOM's finding, as even a cursory review of the determinations confirms.[85] Not surprisingly, China cites no language in the determinations to support its assertion. MOFCOM's discussion of price suppression focuses exclusively on MOFCOM's price undercutting analysis.[86] In light of flaws in that analysis, MOFCOM had no basis to find price effects.

93. China also argues that showing the existence of price suppression alone is sufficient to support a finding of adverse price effects.[87] This argument is based on a flawed interpretation of Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement. These articles obligate investigating authorities to establish that any significant price suppression is *the effect of such*

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83 China, First Written Submission, para. 339.

84 China, First Written Submission, para. 347.

85 *See* MOFCOM, Final AD Determination, sec. 6.2.2 (Exhibit USA-4).

86 *See, e.g.*, MOFCOM, Final CVD Determination, sec. 6.2.3 (Exhibit USA-5).

87 China, First Written Submission, paras. 336-337.

imports. Given this language, it is clear that the texts of these Articles explicitly connect a cause – that is, dumped or subsidized imports – to any identified price suppression. China offers a strained interpretation that reads the word "effect" as though it were not followed by the phrase "of such imports."[88]

94. Finally, MOFCOM's price analysis also suffers from disclosure-related errors. As mentioned earlier, MOFCOM claimed in its final determinations to have taken the different levels of trade into consideration, and to have adjusted the import price data accordingly, but those supposed adjustments were never disclosed.[89]

95. Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement require the investigating authority to provide interested parties with "all non-confidential information relevant to the presentation of their cases and used by the investigating authority."[90] The methodology MOFCOM purported to use to adjust the pricing data is clearly information relevant to the presentation of the interested parties' cases and used by the investigating authority, and therefore MOFCOM's failure to disclose that information is inconsistent with those requirements.

96. Additionally, MOFCOM's purported methodology for adjusting import prices also constituted relevant information on the matters of fact and law, and reasons which have led to the imposition of final measures, within the meaning of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. That methodology was an integral part of MOFCOM's pricing analysis, which was central to its finding of a causal link between subject imports and

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88 China, First Written Submission, para. 337.

89 MOFCOM, Final AD Determination, sec. 6.2.2 (Exhibit USA-4).

90 *EC – Fasteners* (AB), para. 480; United States, First Written Submission, para. 314.

material injury. MOFCOM's failure to disclose this methodology is also inconsistent with those articles as well.

C. MOFCOM's Impact Analysis is Flawed (Breach of ADA Articles 3.1 and 3.4 and SCM Articles 15.1 and 15.4)

97. The third component of MOFCOM's flawed injury determination is its finding that subject imports adversely impacted the domestic industry.[91] We demonstrated in our written submission that MOFCOM's finding of adverse impact was not based on an objective examination of "all relevant economic factors and indices having a bearing on the state of the industry," inconsistent with its obligations under Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement.[92]

98. MOFCOM's analysis ignored record evidence indicating that the domestic industry's performance improved from 2006 to 2008 according to almost every measure cited by MOFCOM in the determinations:

- production capacity increased by 26.2 percent;
- output increased by 28.2 percent;
- sales quantity increased by 31.2 percent;
- sales revenue grew by 88.6 percent;
- market share improved from 37.81 percent to 42.42 percent; and
- employment expanded by 10.3 percent.[93]

99. The record also demonstrates that the domestic industry's pre-tax loss narrowed during this period. MOFCOM ignored this evidence and, instead, predicated its finding of adverse

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91 China, Final AD Determination, sec. 6.2.3 (Exhibit USA-4).

92 United States, First Written Submission, paras. 321-338.

93 China, Final AD Determination, sec. 5.3 (Exhibit USA-4); China, Final CVD Determination, sec. 6.3 (Exhibit USA-5).

impact on the only two measures of industry performance that did not appear to significantly strengthen during the period: the domestic industry's rate of capacity utilization and end-of-period inventories.[94]

100. *With regard to capacity utilization*, MOFCOM's finding that the domestic industry's low level of capacity utilization resulted from subject import competition was contradicted by record evidence that the decline in capacity utilization was driven by the domestic industry's expansion of its capacity far in excess of demand growth.[95]

101. If an industry increases its capacity to produce, but the apparent consumption of its product does not increase by the same or greater rate, it will necessarily experience a decrease in its capacity utilization. Between 2006 and 2008, the domestic industry's rate of capacity utilization increased only slightly from 78.72 percent in 2006, to 79.37 percent in 2007, and to 79.96 percent in 2008.[96] This minor increase indicates very little in the abstract. When coupled with domestic demand, it reveals considerably more. The record clearly indicates that while the domestic industry increased its production capacity by 26.2 percent during this period, apparent consumption increased by only 17.0 percent.[97] An objective examination would have considered the minor increase in capacity utilization in context with the domestic industry's expansion of its capacity and the increase in apparent consumption. MOFCOM did not do so.

102. *With regard to end of period inventories*, we also demonstrated that the record evidence revealed that neither the level of end-of-period inventories, nor the increase in end-of-period

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94 *Id.*

95 United States, First Written Submission, paras. 329-332.

96 MOFCOM, Final AD Determination, sec. 5.3.4 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3.4 (Exhibit USA-5).

97 MOFCOM, Final AD Determination, sec. 5.3.1-5.3.2 (Exhibit USA-5); MOFCOM, Final CVD Determination, sec. 6.3.1-6.3.2 (Exhibit USA-5).

inventories relative to the domestic industry's output and shipments, were significant.[98] China responds that Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement do not specify any particular methodology dictating how an investigating authority must evaluate inventory, or require that it find those inventories to be "significant." What China ignores, however, is that MOFCOM treated this factor as significant – together with its flawed consideration of capacity utilization, MOFCOM relied on this factor to find that the domestic industry was adversely impacted, despite the record evidence that its performance otherwise improved.

103. China does not attempt to refute the evidence that the domestic industry's performance generally improved between 2006 and 2008. Instead, it asserts the focus should be the first half of 2009. That period, however, did not coincide with the bulk of the increase in subject imports. Between 2006 and 2008, subject imports increased by 47.2 percent – but in the first half of 2009, they were only 6.54 percent higher than they were in the first half of 2008.[99] It is understandable why China would want to discount the 2006 to 2008 period, because that is when the domestic industry's performance was generally improving. However, even considering the first half of 2009, by most measures, the domestic industry was performing better in the first half of 2009 than it was in 2006.[100]

104. Given MOFCOM's reliance of these flawed findings, and its failure to examine record evidence indicating that the domestic industry's performance improved markedly according to

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98 United States, First Written Submission, paras. 333-336.

99 MOFCOM, Final AD Determination, sec. 5.1.1 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.1.1 (Exhibit USA-5).

100 MOFCOM, Final AD Determination, sec. 5.3 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3 (Exhibit USA-5)

almost every measure between 2006 and 2008, when the bulk of subject imports occurred, MOFCOM's finding that the domestic industry was adversely impacted is entirely unsubstantiated.

D. MOFCOM's Causation Analysis is Flawed (Breach of ADA Articles 3.1 and 3.5 and SCM Articles 15.1 and 15.5)

105. The fourth and final component of MOFCOM's flawed injury determination is MOFCOM's finding of causation. MOFCOM was required to establish that subject import volume, subject import price competition, and the impact of subject imports on the domestic industry caused material injury to the domestic industry. This causation analysis must be based on an objective examination of positive evidence, as required by Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, and an examination of all relevant evidence, as required by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

106. We demonstrated that MOFCOM's causation analysis was flawed for at least three reasons.[101] First, MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry. Second, MOFCOM's finding of causation relied on the flawed price undercutting analysis, already discussed. And finally, MOFCOM failed to reconcile its causation analysis with evidence that the domestic industry's performance improved as subject import volume and market share increased.

107. *With regard to the first point* – the record evidence clearly indicated that subject import volume and market share increased at the expense of non-subject imports, not the domestic industry.[102] The increase in subject import volume and market share did not negatively impact

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101 United States, First Written Submission, paras. 339-361.

102 MOFCOM, Final AD Determination, sec. 5.3.6 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3.6 (Exhibit USA-5).

the domestic industry because the record indicated that the domestic industry gained even more market share during the same period.

108. This evidence was certainly relevant to MOFCOM's causal link analysis, but MOFCOM chose to ignore it. China's response to this argument in its submission departs from the response provided by MOFCOM during the investigation. At that time, MOFCOM made no attempt to explain why such a compelling trend did not undermine its finding of causation – instead, it rejected this evidence on the ground that Chinese domestic law allowed MOFCOM to consider either the absolute increase in volume or the relative increase in volume, but did not require MOFCOM to consider both.[103]

109. China asserts, for the first time, that the actual facts were different from how they were reported by MOFCOM in the final determinations. In the Final AD Determination, MOFCOM clearly indicated that from 2006 to the first half of 2009, the Chinese domestic industry gained a 4.38 percent share of the market.[104]

110. Yet according to China's submission, the "actual" data showed a *loss* in market share by the Chinese domestic industry of nearly 2 percent during this same period.[105] China attempts to explain this discrepancy not by citing record evidence but by proffering an exhibit, based on information found nowhere in the record, that purports to summarize the data *actually* relied on by MOFCOM.[106] Based on this new data, China asserts that although the domestic industry, as defined by MOFCOM during the investigation, may have gained market share, other Chinese

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103 MOFCOM, Final AD Determination, sec. 6.2.1 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 7.2.1 (Exhibit USA-5).

104 MOFCOM, Final AD Determination, sec. 5.3.6 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3.6 (Exhibit USA-5)

105 China, First Written Submission, paras. 396-403.

106 *Id*.

domestic producers not included in MOFCOM's consideration of the domestic industry, actually lost market share.[107]

111. As an initial matter, China's reliance on data that is not part of the administrative record to contradict what is stated in China's final determinations is impermissible and should accordingly be disregarded. However, even assuming China's new data is correct, it does not answer this basic question: if subject imports gained market share at the expense of non-subject imports and not the domestic industry because the domestic industry also gained market share, how could subject imports have caused the injury to that domestic industry? China's new data simply does not answer this question because it concerns Chinese producers that were not part of the injury investigation and therefore reported no data on their performance during the period examined – and China offers no other argument to rebut the U.S. argument.[108] This critical question was not addressed by MOFCOM during the investigation and remains unanswered in China's submission before the Panel.

112. The second reason MOFCOM's finding of causation is inconsistent with the AD and SCM agreements is because it was premised on MOFCOM's price underselling analysis, which was flawed for the reasons already discussed. With no evidence that subject imports either undersold the domestic like product or suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence and also failed to establish that "the effects of" the dumped and subsidized import price competition are what "caused injury."

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107 *Id*.

108 China, First Written Submission, paras. 400-401.

113. The third reason MOFCOM's causation analysis is deficient is because it failed to address record evidence that the increase in subject import volume coincided with a significant improvement in the domestic industry's performance.[109] The record showed that the increase in subject import volume was accompanied by a dramatic strengthening of almost every measure of the domestic industry's performance during this same period, as already discussed. Despite the lack of any positive evidence linking the increase in subject import volume during the 2006-2008 period to any significant decline in the domestic industry's performance, MOFCOM nevertheless concluded that "during the entire POI, there is an outstanding relevance between the change of imports of the Subject Products and the situation of operation of the domestic industry."[110]

114. Even if one considers only the first half of 2009, as China suggests, the domestic industry's performance still appeared to be stronger in the first half of 2009 than it had been in 2006 according to several measures, including the domestic industry's capacity, output, sales quantity, market share, sales revenue, productivity, and average wages.[111] Moreover, MOFCOM failed to explain how the small increase in subject import volume between the first half of 2008 and the first half of 2009 could have contributed in any way to the domestic industry's performance trends during the period when the much larger increase in subject import volume between 2006 and 2008 coincided with a significant improvement in the domestic industry's condition. Indeed, the industry's worst performance was in 2006, before any increase in subject import and market share.

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109 See, e.g., MOFCOM, Final AD Determination, sec. 5.3 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 6.3 (Exhibit USA-5).

110 MOFCOM, Final AD Determination, sec. 6.1 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 7.1 (Exhibit USA-5).

111 *See* MOFCOM, Final AD Determination at sec. 5.3 (Exhibit USA-4); MOFCOM, Final CVD Determination at sec. 6.3 (Exhibit USA-5).

115. These three failings in MOFCOM's causation analysis confirm that MOFCOM's analysis is not based on an objective examination of positive evidence, in breach of China's obligations under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, or on "an examination of all relevant evidence," in breach of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. It also means that MOFCOM failed to establish that "the effects of" the dumped and subsidized imports are what "caused injury", also breaching of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

116. Finally, MOFCOM also failed to address key causation arguments raised by the respondents during the investigation. The obligations under Articles 12.2 and 12.2.1 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require investigating authorities to issue public notices of their final determinations that include "all relevant information on matters of fact and law" material to their determinations. Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement also require investigating authorities to explain their reasons for accepting or rejecting relevant arguments or claims made by interested parties pertaining to those issues.

117. We explained in our first written submission that U.S. respondents raised two principal arguments during the investigation regarding the absence of any causal link between subject imports and material injury – and both arguments went unanswered by MOFCOM.[112]

118. The first argument is related to the issue just discussed – that there could be no link between subject imports and material injury because subject import volume increased entirely at the expense of nonsubject imports. In response to this argument, MOFCOM said it was under no

[112] United States, First Written Submission, paras. 362-366.

obligation under Chinese domestic law to consider relative volume increases.[113] A statement that an investigating authority is under no obligation under its domestic law to consider the merits of an argument is different from a statement of the reasons why the authority considered the argument and ultimately rejected it.

119. The second argument that MOFCOM ignored was that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities to satisfy domestic demand.[114] We explained in our first written submission that MOFCOM purported to address this argument in the preliminary determination, but that MOFCOM was clearly under the misapprehension that the respondents' argument concerned whether chicken paws were within the scope of the investigation.[115] China's submission portrays the U.S. explanation as a concession that MOFCOM did, in fact, consider the argument.[116] China appears to be suggesting that an investigating authority can respond to an argument asserted by a respondent even if it provides a response to a different argument. China asserts in the alternative that MOFCOM must not have considered the argument to be material.[117] If nearly one-half of subject imports could have had no adverse impact on the domestic industry, competition between subject imports and the domestic industry would be

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113 MOFCOM, Final AD Determination, sec. 6.2.1 (Exhibit USA-4); MOFCOM, Final CVD Determination, sec. 7.2.1 (Exhibit USA-5).

114 *See* USAPEEC, Injury Brief at 29-30 (Exhibit USA-21); USAPEEC, Comments on Preliminary Injury Determination at 22 (Exhibit USA-46).

115 United States, First Written Submission, para. 365, fn 357.

116 China, First Written Submission, para. 432.

117 China, First Written Submission, para. 434.

significantly attenuated. This argument was clearly material to MOFCOM's causal link analysis, and a relevant argument that MOFCOM was obligated to address.

120. Thus, MOFCOM's failure to provide a "sufficiently detailed explanation" of why it rejected the U.S. respondents' arguments is inconsistent with Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. Also, as these issues were clearly "material" to MOFCOM's causal link analysis, MOFCOM's failure to address them was inconsistent with Article 12.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

VI. Conclusion

121. We understand that we have addressed a great deal today and that it has been time consuming. But we have had to do so in significant part because China chose to defend its interests by discussing arguments and data that were nowhere on the record. That raises one corresponding and final thought: if China cannot defend its investigations without having to resort to information and arguments not on the record, what hope was there that the respondents, who never saw that information or those arguments during the investigation, could have defended their interests?

122. Mr. Chairman and members of the Panel, this concludes the oral statement of the United States this morning. We thank you for your attention. We would be pleased to respond to any questions you may have.