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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX C

ARGUMENTS OF CHINA

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX E

PRELIMINARY RULING

ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 9 November 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list

of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

16. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

17. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages. A summary submitted by a party of its opening and/or closing statements presented at the substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

20. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable

adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. However, when Exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to XXXXXX@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

g. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 November 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include (1) information that was previously treated as confidential within the meaning of Articles 6.5 of the Anti-dumping Agreement and 12.4 of the Agreement on Subsidies and Countervailing Measures by the investigating authorities of China in the anti-dumping and countervailing investigations and subsequent proceedings at issue in this dispute, and (2) information that was previously treated as BCI in the original proceeding in this dispute, unless the person who provided the information in the course of those investigations or proceedings agrees in writing to make the information publicly available.

3. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the proceedings at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings. An authorizing letter need not be provided in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceedings.

4. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

5. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.

6. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

7. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The

Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.

8. Submission of BCI:

   (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit US-1 (BCI)).

   (ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

   (iii) In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7(i).

9. Where a party submits a document containing BCI to the Panel, the other party or third party, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents or other media containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the report of the Panel.

ANNEX A-3

INTERIM REVIEW

1.1. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out our response to the parties' requests made at the Interim Review stage. Our assessment of the parties' requests and comments is informed by the following considerations:

a. The Interim Review stage is not an opportunity for parties to reargue the case or to "introduce new legal issues and evidence or to enter into a debate with the Panel".[1]

b. The descriptions of the arguments of the parties in our Report are not meant to and do not reflect the entirety of the parties' arguments. Rather, they highlight the principal points of those arguments that we considered relevant to our resolution of the issues in dispute and addressed in our findings.[2] Finally, we note that, the executive summaries of the arguments of the parties, set out in Annexes B1-B4, were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments. However, as provided for in paragraph 17 of the Panel's Working Procedures, "These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case."

c. A panel may develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. A panel is not required to "test" its intended reasoning with the parties in advance.[3]

1.2. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including some identified by the parties.

1.1 The United States' request for review of the Interim Report

1.4. In respect of **paragraph 7.39(e) (paragraph 7.39(g) in the Final Report)**, the United States asks the Panel to clarify this paragraph and proposes two modifications.[4] China disagrees.[5] The proposed US language more clearly reflects our intent; we have therefore modified the paragraph to better reflect our intent.

1.5. In respect of **paragraph 7.51**, the United States requests that the Panel revisit, in particular, the second sentence, and either delete or reformulate it to ensure that it addresses the specific legal matter at issue in this Article 21.5 proceeding.[6] China disagrees with the proposal to delete the sentence.[7] On reflection, we have modified this paragraph to more clearly express our views regarding the specific legal question at issue.

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[1] Panel Report, *India – Quantitative Restrictions*, para. 4.2.

[2] A panel has "the discretion to address explicitly in [its] reasoning only the arguments and evidence [it] deem[s] necessary to resolve a particular claim and support the reasoning [it is] required to provide." (Panel Report, *India – Agricultural Products*, para. 6.7 (referring to Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414)).

[3] Report of the Appellate Body, *U.S. – Tuna II (Mexico), Article 21.5*, para. 177.

[4] United States' request for interim review, paras. 4-5.

[5] China's comments on the United States' request for interim review, para. 2.

[6] United States' request for interim review, paras. 6-8.

[7] China's comments on the United States' request for interim review, para. 3.

1.6. In respect of **paragraph 7.52**, the United States requests that the Panel's reference to its original findings more closely track the language of those findings.[8] China disagrees, asserting that "in this Article 21.5 proceeding the Panel is addressing a particular methodology and the paragraph reflects this fact."[9] We have modified the text and added the appropriate reference to better reflect the original findings to which we refer.

1.2 China's request for review of the Interim Report

1.7. In respect of **paragraph 7.23(e)**, China asserts that **footnote 86 (footnote 89 of the Final Report)** refers to a different matter than the text, and asks the Panel to distinguish the two by adding a new footnote.[10] We agree that the reference in footnote 86 is incorrect, and have changed it. We also made a minor consequential modification to footnote 85 (footnote 88 of the Final Report). Having done so, we do not consider it necessary to add the additional footnote requested by China.

1.8. In respect of **paragraph 7.53(b)**, China requests that the reference to "MOFCOM" be removed from the sentence, asserting that "it is not MOFCOM's quote but is a statement attributed to Tyson."[11] The United States disagrees, contending that the text is accurate as drafted.[12]

1.9. This paragraph is based on the following passage in MOFCOM's redetermination:

> In the original investigation, considering that meat cost was the main cost constitution of the product concerned, and that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned, the Investigating Authority found that weight-based method could be more objective and more reasonable than the value-based method submitted by the Company in the questionnaire response to reflect the production cost associated with the product concerned, therefore, the weighted average production cost of all product groups was regarded as the production cost of the product concerned and the like product.[13]

Thus, MOFCOM found "that weight-based method could be more objective and more reasonable" on the basis of two considerations: first, that "meat cost was the main cost constitution of the product concerned", and second, "that for feeding live chickens by the Company it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned". We recognize that it is not entirely clear in this translation of the redetermination, submitted by China, whether "it" in the second sentence refers to Tyson ("the Company") or to MOFCOM. As the United States noted, there is nothing cited or referred to in the redetermination that would attribute the statement in question to Tyson.[14] The United States translation[15] is also pertinent in this regard:

> In the original investigation, considering that chicken cost is the main composition of cost of the subject merchandise, when the company raises live chicken, it's hard to tell which feed is especially for production of which part of the subject merchandise. The investigating authority believes that using the weight-based method can reflect the cost related to production of the subject merchandise more objectively and reasonably. Therefore, the weighted average production cost of every group is regarded as production cost of the subject merchandise and like product thereof.[16]

Moreover, we recall China's argument in the original case: "After all, the different parts of the live bird do not have different costs of production. It does not cost more to grow a kilogram of breast

[8] United States' request for interim review, para. 9.
[9] China's comments on the United States' request for interim review, para. 5.
[10] China's request for interim review, para. 5.
[11] China's request for interim review, para. 6.
[12] United States' comments on China's request for interim review, para. 9.
[13] Redetermination, (Exhibit CHN-1 (translated version)), p. 33. (emphasis added)
[14] United States' comments on China's request for interim review, para. 10.
[15] China has not challenged the accuracy of the United States' translation of the redetermination.
[16] Redetermination, (Exhibit USA-9 (translated version)), p. 33. (emphasis added)

than it costs to grow a kilogram of paws."[17] Taken as a whole, it appears to us that MOFCOM accepted and expressly relied upon the proposition that which feeds were specifically used to produce which parts of the product concerned could not be distinguished. We therefore consider that the text as drafted is accurate. Accordingly we have not modified the text in this regard.

1.10. In respect of **paragraph 7.54**, China notes that neither the United States nor China made a claim that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models" and asks the Panel to "provide the basis for this characterization."[18] The United States disagrees that any clarification of or authority for this "incontrovertible point" is needed.[19]

1.11. As is clear from the opening phrase of the sentence quoted by China, we recognized that there was no direct evidence before the Panel on this point. At the same time, a panel is entitled, in our view, to recognize and refer to incontrovertible facts where relevant. In this case, one such fact is that the production of a "whole bird" requires the production of those parts of a bird without which the bird cannot be produced. Indeed, China itself, in its submission in the original dispute, stated that, "a significant portion of the total costs of production are incurred on a unitary basis for the whole bird".[20] China does not dispute the fact that "feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models", but rather asks the Panel to provide a basis for it. We consider this to be a self-evident fact, and therefore decline China's request.

1.12. In respect of **paragraph 7.58**, China argues that, "[i]n light of the Panel's finding of inadequate explanation, it should at least refer to MOFCOM's explanation in its Redetermination" and requests that the Panel delete the phrase "allowed for the exclusion of certain parts of a live broiler (feather, blood and viscera)", because, according to China, "MOFCOM never excluded any parts from its cost allocation".[21] The United States opposes both requests.[22]

1.13. In respect of the first aspect of this request, we have in fact referred to MOFCOM's explanation earlier in this section, in paragraph 7.53. We consider it unnecessary to do so again in this paragraph. Accordingly we have not modified the text in this regard.

1.14. In respect of the second aspect of this request, we recall that China argued that MOFCOM appropriately distinguished between what it termed "the product concerned" and other products, including feathers, blood and viscera. According to China, "MOFCOM specifically noted that the 'production cost didn't include that of the non-concerned products, such as feather, blood, etc.'."[23] It was this "product cost", i.e. a product cost excluding feathers, blood, and viscera, that was allocated to "the product concerned" on the basis of weight. We note that China has not requested review of paragraphs 7.54 and 7.55, in which we also refer to MOFCOM's "exclusion of feathers, blood, and viscera". In the light of the foregoing, we decline China's request that we delete the phrase in question.

1.15. In respect of **paragraphs 7.58 and 7.59**, China refers to not only our findings in these two paragraphs, but also to paragraphs 7.50 and 7.51 and the Panel's "remaining discussion", asserting that "the Panel does not make clear … whether it views the MOFCOM redetermination to have been at odds with the second aspect, the third aspect, or both" of the obligation in the second sentence of Article 2.2.1.1.[24] China suggests that "the Panel appears to take care to avoid suggesting anything about whether the MOFCOM approach was proper or not", and asks the Panel to "clarify that its findings address the third aspect of the obligation – the failure to explain – and not whether the MOFCOM allocation method was proper or not".[25] The United States opposes China's request, contending that China has failed to make a "request for review of a precise aspect

[17] United States' first written submission, para. 91 (quoting China's first written submission in the original dispute, para. 133). (emphasis added)
[18] China's request for interim review, para. 7.
[19] United States' comments on China's request for interim review, para. 11.
[20] China's first written submission in the original dispute, para. 133. (emphasis added)
[21] China's request for interim review, para. 8.
[22] United States' comments on China's request for interim review, para. 13.
[23] China's first written submission, para. 174 (quoting Redetermination, (Exhibit CHN-1 (translated version)), fn 30).
[24] China's request for interim review, para. 9.
[25] China's request for interim review, para. 9.

of the interim report" and that "It is clear that the Panel is examining the issue of MOFCOM's explanation as part of MOFCOM's consideration of all available evidence related to a proper cost allocation."[26]

1.16. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". The paragraphs discussed by China in its request concern different sections of the Panel's analysis. Paragraph 7.50 deals specifically with the argument that MOFCOM was required to use a single methodology throughout the investigation and rejects that view, while paragraph 7.51 concludes that MOFCOM's rejection of a value-based cost allocation in the redetermination was not inherently biased or unreasonable.

1.17. Paragraphs 7.52 through 7.58 specifically examine MOFCOM's explanations for and use of a weight-based cost allocation, concluding that MOFCOM failed to adequately explain its decision to use that allocation, and therefore failed to "consider all available evidence on the proper allocation of costs", that is, failed to act consistently with the second sentence of Article 2.2.1.1. We are unable to determine precisely what aspects of these paragraphs China considers require modification, and what changes it considers would be appropriate. We have, nonetheless, made minor modifications in paragraphs 7.51 and 7.52.

1.18. With respect to **paragraphs 7.63 and 7.64**, China argues that, as it contends with respect to paragraphs 7.58-7.59, "the Panel again seems to avoid making any findings about what is proper or not" and asks the Panel to "to clarify that its findings address the third aspect of the obligation – the failure to explain – and not whether the Tyson allocation method rejected by MOFCOM was proper or not."[27] The United States considers that, as with respect to paragraphs 7.58-7.59, China's "complaint here does not constitute a request for review of a precise aspect of the interim report".[28]

1.19. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.20. In respect of **paragraphs 7.66-7.70**, China asserts that the Panel failed to explain whether its interpretation of the term "historically utilized" in the second sentence of Article 2.2.1.1 was consistent with that of a previous panel report on the same issue, *US- Softwood Lumber V*, and contends that the Panel should "offer some reaction" to the points raised by China in this regard.[29] The United States disagrees, asserting that China has failed to make a "request for review of a precise aspect of the interim report".[30] In the United States' view:

> China fails to explain (i) what conclusion or statement in these paragraphs is inconsistent with the analysis in particular paragraphs in *US – Softwood Lumber V*; (ii) why, even if there is an inconsistency, it needs to be addressed in this Report; and (iii) why the Panel should assess China's characterization of the U.S. position in *another* dispute.[31]

1.21. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". We are unable to determine precisely what aspects of these paragraphs China considers should be modified, and what changes it considers would be appropriate. We do not consider that our findings need further clarification as requested by China. Accordingly we have not modified the text in this regard.

1.22. In respect of **paragraphs 7.89-7.99**, China argues that the Report leaves "the impression that MOFCOM took fewer steps to corroborate and analyse the data from the four domestic

[26] United States' comments on China's request for interim review, para. 14.
[27] China's request for interim review, para. 11.
[28] United States' comments on China's request for interim review, para. 17.
[29] China's request for interim review, para. 10.
[30] United States' comments on China's request for interim review, para. 15.
[31] United States' comments on China's request for interim review, para. 15. (emphasis original)

producers".[32] China describes steps MOFCOM took[33] in relation to "the analytical process by which MOFCOM analysed the pricing data of the four re-verified domestic producers" and states that these details it describes "warrant further description" in the report.[34] The United States opposes China's request, contending that China has failed to make a "request for review precise aspects of the interim report".[35] Moreover, in the United States' view, China has failed:

a. "to identify how the Panel's analysis misstates the approach noted in the redetermination"[36]; and

b. "to explain why the analysis in the interim report is deficient".[37]

1.23. We make two observations.

1.24. First, China does not explain precisely what aspects of these paragraphs it considers should be modified and what changes it considers would be appropriate. Rather, it simply contends that a more detailed exposition of the facts regarding MOFCOM's reinvestigation and analysis of product-specific pricing data is important to its legal position in this case. This is not enough to help us determine what precisely should be modified and how.

1.25. Second, we have carefully considered all of the arguments and evidence put before us; there is, however, no requirement that we reflect in our report all the facts that each party may consider important to its positions. Rather, we must set out in our report those facts that are important to our resolution of the issues in the dispute before us, in the context of our analysis, reasoning, and conclusions. We recall that our findings in the original dispute concerned the comparability of two baskets of goods in the light of differences in the composition of those baskets.[38] In this proceeding, China argued that MOFCOM verified the prices of individual components of the Chinese basket for four of seventeen domestic producers. This argument does not address the concerns we had originally, and again in this proceeding, with respect to the comparability of the domestic and imported prices as a consequence of the composition of the baskets of broiler products being compared. We fail to see how a more detailed exposition of the facts concerning how MOFCOM went about verifying the prices of certain domestic producers relates to the issue we were addressing.

1.26. We consider that China has failed to make a proper request for "review precise aspects of the interim report". We do not consider that our findings need modification as requested by China. Accordingly we have not modified the text in this regard.

1.27. In respect of **paragraph 7.102**, China asserts that:

a. "it is important for the Panel to point out that although the two baskets may have been of dissimilar composition, MOFCOM considered that their composition was in fact known such that MOFCOM believed it controlled for product mix"[39];

b. "[t]he current description suggests MOFCOM did not take any steps to understand the respective compositions of the two baskets"[40]; and

c. with respect to the "risk that price effects were the effects of competition from product models within the domestic basket", "for the same reason of substitutability, there may

[32] China's request for interim review, para. 15.
[33] China's request for interim review, para. 16.
[34] China's request for interim review, para. 17.
[35] United States' comments on China's request for interim review, para. 23.
[36] United States' comments on China's request for interim review, para. 24.
[37] United States' comments on China's request for interim review, para. 25.
[38] See paragraph [7.106] above:
In the original report, we did not find, because Articles 3.2 and 15.2 do not require, that in a price comparison, MOFCOM had to adopt the "lower of the two" price benchmarks; our findings were about the comparability of the baskets rather than the relative value of different AUVs.
(emphasis added)
[39] China's request for interim review, para. 19.
[40] China's request for interim review, para. 19. (emphasis added)

be price effects resulting from product models in the dumped import basket on product models within the domestic basket that were not in the dumped import basket".[41]

1.28. The United States opposes any change to this paragraph, asserting that:

a. "the Panel, in paragraph 7.105 of the interim report, expressly considered and rejected MOFCOM's argument that it controlled for product mix differences"[42]; and

b. "China is essentially asking the Panel revise and dilute its findings", in particular in a manner that "would create ambiguity" in these findings.[43]

1.29. We consider that China has failed to make a proper request for "review of precise aspects of the interim report." Rather, in our view, China is attempting to re-argue issues that the Panel has resolved, rather than clearly indicating what precise aspects of the report it considers should be modified and why. We therefore decline to modify this paragraph.

1.30. In respect of **footnote 205 (footnote 209 of the Final Report)**, China requests that we delete the final two sentences, asserting that the "statement that MOFCOM's price effects determination 'might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome' is purely speculative."[44] The United States opposes China's request, contending that it reflects a well-supported evaluation of a "key matter before the Panel" and noting that it had argued during the proceeding that one of the principal problems with the selection of four firms for reverification was that "their selection appeared biased in light of the lack of any explanation".[45]

1.31. The penultimate sentence of footnote 205 does not state that MOFCOM's "price effects determination" itself may give rise to an appearance of selectivity. Rather, it makes clear that it is the "lack of any explanation in the redetermination for the choice" of which producers' prices were reverified that may give rise "to an appearance of selecting among domestic producers based on their data to ensure a particular outcome". The last sentence makes clear that the Panel did not make any findings on this point. We consider it appropriate to raise such concerns in the course of resolving a dispute, in order to assist parties in the course of their efforts to implement DSB rulings and recommendations, and act consistently with their obligations. We therefore decline China's request.

1.32. In respect of **paragraphs 7.150-7.162**, China requests that the Panel delete the discussion in these paragraphs, and any findings, from the report. China argues that:

a. "[T]he Panel analyses two issues under Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement that do not reflect proper claims before the Panel. The issues of: (1) whether MOFCOM inadequately focused on the later part of the POI; and (2) potential negative effect and future imports both appear to arise as rebuttal responses by the United Sates in its Second Written Submission."[46]

b. "It is unclear to China how these issues rise to the level of specific claims for which the Panel makes specific findings."[47]

c. Paragraph 6 of the Working Procedures "makes clear that any claim raised by the United States for purpose of its challenge should be presented in its First Written Submission".[48]

[41] China's request for interim review, para. 20. (emphasis added)
[42] United States' comments on China's request for interim review, para. 27.
[43] United States' comments on China's request for interim review, para. 28.
[44] China's request for interim review, para. 21.
[45] United States' comments on China's request for interim review, para. 30.
[46] China's request for interim review, para. 22.
[47] China's request for interim review, para. 22.
[48] China's request for interim review, para. 23.

d. "As such, these arguments are 'counter arguments' as contemplated by paragraph 6 of the Working Procedures and do not represent claims upon which the Panel should rule."[49]

e. "For these reasons, the Panel should strike this discussion and any findings from the final report."[50]

1.33. The United States opposes China's request, noting that:

a. there is a difference between claims and arguments[51];

b. the arguments (and counterarguments) at issue were properly raised and the Panel properly considered them[52]; and

c. "That the arguments China itself raised undermined its defence – rather than supported it – does not, as China now argues, somehow implicate procedural fairness."[53]

1.34. We consider that China has failed to make a proper request for "review of precise aspects of the interim report". Rather, in our view, China's request amounts to an attempt to re-argue issues that the Panel has resolved and does not clearly indicate what precise aspects of the report it considers should be modified and why.

1.35. In these paragraphs, the Panel is addressing various arguments in the context of considering the United States' claim that MOFCOM's redetermination is inconsistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement.[54] This claim is properly before us.[55] Over the course of the proceedings, starting with the first written submissions, and then in the second written submissions and at the hearing, and finally in responses to questions and comments on those responses:

a. the United States made certain arguments in support of its claim;

b. China responded with arguments of its own; and

c. the United States replied to China's arguments.

1.36. Each party in a dispute has the right to make the arguments and submit the evidence it wishes in defence of the positions it adopts in respect of a given claim. Having presented its arguments and evidence and advanced its position, a party may not, however, seek the assistance of the panel to deny to the other party the same right to present its arguments and evidence in reply. Nothing in the Working Procedures contemplates any such departure from basic rules of fairness in an adjudicative proceeding.

1.37. China seems to be of the view that because some of the United States' arguments in support of its claim were first advanced in its second written submission, and the Panel considered and made findings addressing those arguments, the United States has wrongly been allowed to advance claims at a late stage of the proceedings which the Panel then resolved. This is not the case. The Panel's conclusions are in respect of the claims of the United States under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement. To arrive at those conclusions, and consistently with our obligations under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU, we took into account all the arguments and the respective replies of the parties, and as necessary made findings in respect of those arguments and replies. We did so in accordance with our responsibility to "make an objective assessment of the matter before [us], including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

[49] China's request for interim review, para. 23.
[50] China's request for interim review, para. 23.
[51] United States' comments on China's request for interim review, para. 32.
[52] United States' comments on China's request for interim review, para. 33.
[53] United States' comments on China's request for interim review, para. 33.
[54] United States' panel request, para. 2.
[55] Ruling by the Panel on Jurisdictional Issues dated 22 March 2017, para. 3.10.

1.38. We therefore decline China's request to delete this entire section of the report.

1.39. In respect of **paragraphs 7.332(e) and 7.335**, China requests that we modify the report "to reflect that MOFCOM did not reject Tyson's reported data in its entirety"[56] and "did not reject all of Tyson's data".[57] The United States disagrees because, in its view, China has not shown any errors in these paragraphs.[58]

1.40. Paragraph 7.332(e) sets out the factual background to our consideration of the United States' claims regarding use of facts available. Paragraph 7.332 as a whole sets out, in sequence, MOFCOM's requests and Tyson's responses on the issue of meat and processing cost information. At paragraph 7.332(e), the statement that MOFCOM rejected Tyson's reported data in its entirety in the redetermination is immediately followed by the explanation that "MOFCOM found that the reported data, generated by applying the methodology developed by Tyson using the data available in its accounting records, were not the *meat and processing costs* actually incurred"[59], thus making clear what reported data were rejected. Moreover, the same paragraph goes on to set out MOFCOM's decision not "to accept the *meat cost and processing cost data* of each model of the product concerned calculated by the ratio method".[60] Thus, it is clear that in referring to MOFCOM's rejection of "Tyson's reported data in its entirety" and "all of Tyson's data", we were referring to the rejection of all of the meat and processing cost data that Tyson had generated and provided during the reinvestigation. In order to avoid any uncertainty in this regard, we have modified the text to explicitly state that that data that was rejected in its entirety was Tyson's reported meat and processing cost data.

1.41. In respect of **paragraph 7.335(d)**, China requests adjustments to "further reflect" that Tyson provided "inconsistent cost data" in every response.[61] The United States disagrees, contending that the requested changes cannot be drawn from the paragraphs of China's first written submission cited by the Panel, and China has provided no other citation or justification for the request.[62]

1.42. In its request for review China does not indicate where, in its submissions in this proceeding, it argued that Tyson provided inconsistent cost data in every questionnaire and supplemental questionnaire response in the reinvestigations. We have, nevertheless, modified paragraph 7.335(d) to clarify that the asserted inconsistencies were not just between data provided in the original investigation and data provided in the reinvestigation.

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[56] China's request for interim review, para. 12.
[57] China's request for interim review, para. 13.
[58] United States' comments on China's request for interim review, paras. 18-19.
[59] Underlining original, italics added.
[60] Emphasis added.
[61] China's request for interim review, para. 14.
[62] United States' comments on China's request for interim review, para. 21.

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Articles 7 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) charge a WTO panel with making those findings that will assist the DSB in making the recommendations provided for in the covered agreements – namely, the recommendation to bring a measure found to be inconsistent with a covered agreement into conformity with the Member's WTO obligations under that agreement (DSU Art. 19.1). And that is precisely what the Panel did in this dispute, finding that China's antidumping and countervailing duty determinations were inconsistent with numerous basic obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Unfortunately, China did not take those findings and recommendations as an opportunity to comply and, thus, to bring about a positive solution to the dispute (DSU Art. 3.7).

2. Both the conduct of the reinvestigation and the findings in the redetermination confirm that MOFCOM adheres – without justification – to problematic practices or reasoning – and even moves in precisely the wrong direction: toward less transparency, less due process, and less objectivity.

II. PROCEDURAL BACKGROUND

3. On July 15, 2014, the United States and China informed the DSB that the two parties had concluded Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding ("Agreed Procedures"). On May 10, 2016, the United States requested consultations pursuant to Article 21.5 of the DSU concerning China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, which were held on May 24, 2016.

4. On May 27, 2016, the United States filed a panel request requesting recourse to Article 21.5 of the DSU. At the June 22, 2016 meeting of the DSB, the DSB agreed to refer to the original panel, if possible, the matter raised by the United States. Brazil, Ecuador, the European Union, and Japan reserved their third party rights. On July 18, 2016, the compliance panel was composed with the members from the original panel.

III. FACTUAL BACKGROUND

5. The Panel found that MOFCOM breached Article 6.9 of the AD Agreement by failing to disclose margin calculations and data used to determine the existence of dumping.

6. The United States contended in the original dispute that MOFCOM breached the second sentence of Article 2.2.1.1, because, *inter alia*, MOFCOM allocated Tyson's production costs of non-subject merchandise – including blood, feathers, and organs – to subject merchandise, thereby inflating normal value. The Panel considered the evidence presented by the United States regarding the products produced by Tyson and China's materials and found that the United States had established a breach of Article 2.2.1.1. Moreover, the Panel found that one particular aspect of MOFCOM's methodology – straight allocation of total processing costs – was inherently unreasonable.

7. The Panel found that MOFCOM's price effects analysis in its injury determination was inconsistent with China's WTO obligations because it failed to account for differences in the product mix between subject imports and domestic products. The Panel also noted that MOFCOM's finding of price suppression is "at least partly dependent" on its finding of price undercutting – and that "MOFCOM's Determinations do not separately or independently discuss the impact of the volume and increased market share of subject imports on the ability of domestic producers to sell at prices that would cover their costs of production." The Panel also asserted judicial economy on the

United States' claim concerning MOFCOM's flawed impact and causation analyses – and explicitly recognized that MOFCOM would need to revisit such analyses.

IV. SCOPE OF AN ARTICLE 21.5 PROCEEDING

8. Under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB's recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding.

V. STANDARD OF REVIEW

9. An Article 21.5 panel is to engage in an objective assessment to determine the existence or consistency of a measure taken to comply. If on a specific issue the underlying evidence and the explanations given by the investigating authority have not changed from the original determination, then an Article 21.5 panel would normally reach the same conclusions as the original panel. The investigating authority is responsible for ensuring that its explanations reflect that conflicting evidence was considered.

VI. MOFCOM'S REINVESTIGATION BREACHED THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

10. MOFCOM's reinvestigation breached key procedural protections contained within the AD and SCM Agreements.

A. Factual Background

11. Before the Reinvestigation Injury Disclosure (RID), U.S. interested parties received no notice as to which Chinese firms were being specifically investigated; why they were chosen; what questions and information requested were posed to these firms; and what data and information the Chinese firms provided in response. The critical questions of (i) what information was specifically required by MOFCOM from these firms and (ii) what they provided remain entirely unanswered.

B. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because MOFCOM Denied Interested Parties Notice or Knowledge of the Information MOFCOM Required in its Reinvestigation

12. Here, it is clear from the RID that MOFCOM *required* pricing information from four domestic Chinese companies in order to revise its price effects analysis. Specifically, these four companies provided MOFCOM with sales data concerning chicken feet, chilled chicken cuts with bone, chicken wings, and gizzards, which MOFCOM then purportedly used to compare against prices for subject imports, and ultimately reach its finding of price undercutting. It is also clear that interested parties, such as U.S. respondents and the United States, did not have notice that MOFCOM required this information.

C. China Breached Articles 6.1.2, 6.2, and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying Interested Parties of Evidence Presented by the Other Interested Parties Participating in the Reinvestigation

13. It is undisputed that the four Chinese domestic companies that received requests for information from MOFCOM during the reinvestigation are "producers of the like product in the Importing Member." MOFCOM was thus required to "promptly" make available to U.S. respondents the information provided by interested parties in response to MOFCOM's requests during the reinvestigation. Because MOFCOM failed to make the information available *at all* to respondents, China is in breach of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2.

14. MOFCOM's failure to permit interested parties access to the information relied on by MOFCOM and to enable those parties, through review of that information, to prepare their cases is also inconsistent with Articles 6.2 and 6.4 of the AD Agreement and SCM Agreement Article 12.3. These provisions provide that interested parties have both timely opportunities (i) to see "all

information" that is relevant, non-confidential, and used by competent authorities and (ii) timely opportunities to prepare their presentations "on the basis of" that information. In the reinvestigation, the information subject to this obligation includes: (1) the pricing information provided by the four Chinese domestic enterprises to MOFCOM during the reinvestigation; (2) the precise identity of those Chinese enterprises; and (3) the specific questionnaires and information requests issued by MOFCOM to those Chinese companies.

15. First, MOFCOM failed to disclose information "relevant" to the interested parties' presentation of their cases. The *information* requested by MOFCOM from the four Chinese domestic enterprises during the reinvestigation constitutes product-specific pricing data that MOFCOM sought and that MOFCOM considered supported its findings of purported price cutting, as part of its price effects injury analysis. Second, as noted previously, MOFCOM has *not* claimed that any of this information is confidential. Third, the information was "used" by MOFCOM in the reinvestigation because it is the explicit basis by which MOFCOM maintains its price effects findings.

16. In addition, China breached the obligation under AD Agreement Article 6.4 and SCM Agreement Article 12.3 "to provide timely opportunities" for interested parties "to *prepare presentations* on the basis of this information" because MOFCOM did not permit interested parties to see the information. If a party is denied access to information, then it follows that the party was also denied an *opportunity* to prepare a presentation. Thus, MOFCOM's failure also constituted a breach of Article 6.2 of the AD Agreement.

D. China, Once Again, has Breached Article 6.9 of the AD Agreement by Failing to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

17. Despite the original Panel's finding that China breached Article 6.9 of the AD Agreement by failing to disclose essential facts related to the dumping margins for Pilgrim's Pride, Tyson, and Keystone, MOFCOM has, once again, failed to disclose dumping margin calculations and underlying data for two of these respondents – Pilgrim's Pride and Keystone. With respect to Pilgrim's Pride, it was denied access to the data calculations from the original investigation even though MOFCOM used a purported error in the data and calculations to increase the margin of Pilgrim's Pride. Similarly, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation.

VII. MOFCOM'S ANTIDUMPING DUTY FINDINGS ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 9.4, AND 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Breached the Second Sentence of Article 2.2.1.1 of the AD Agreement

1. MOFCOM Applied to Tyson a Biased Weight-Based Methodology that Improperly Allocated Costs Not Associated with the Production and Sale of the Product Under Consideration

18. China has breached the second sentence of Article 2.2.1.1 because MOFCOM did not "consider all available evidence on the proper allocation of costs." The essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology. The position advocated by China through its prior WTO submissions and in MOFCOM's redetermination is that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across *all* products. But, under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them. Thus, products that might earn little revenue, particularly in respect to their weight, such as blood, organs, feathers, etc., still would need to have costs distributed to them, rather than leave the costs focused on the remaining products – which artificially inflates normal value. MOFCOM did not do that apportionment in its first determination, and it has not done so now in its redetermination.

19. During the redetermination, Tyson argued that MOFCOM should accept the value-based accounting reflected in its books and records. However, Tyson also argued that "in the event that MOFCOM incorrectly continues to rely on a weight-based allocation, it must fully account for all products that are produced from the live birds that are processed into both subject and

non-subject merchandise." To that end, Tyson made a straightforward request: if MOFCOM erroneously resorts to allocating costs by weight rather than as reflected in Tyson's books and records, then MOFCOM (per its own logic) would need to "divid[e] the total cost of the live birds by their total weight" – and not simply omit products it finds inconvenient from the calculation. A supposed weight-based methodology that fails to actually account for the weight contributed by all the products derived from the bird is internally incoherent and therefore cannot be a "proper allocation of costs" consistent with Article 2.2.1.1.

20. The reasons proffered by MOFCOM for rejecting Tyson's position – and the consistency of MOFCOM's own position – are not reasoned or adequate. First, MOFCOM seems to be suggesting that it does not apportion costs across all products because some chickens died *en route* to the processing plant or were otherwise not processed. But that assertion does not speak to the point at hand, which is that costs must be allocated across all products that are produced. Moreover, the data provided by Tyson explicitly made proper allowance for "costs of any birds that are not processed because they die at the farm or are condemned at the plant. . . ." Second, MOFCOM asserts that Tyson confirmed that the costs to produce subject merchandise were exclusive. That position cannot be reconciled with either the data submitted by Tyson referenced above, or Tyson's explicit argument seeking for costs to reflect all products. Third, China is claiming that Tyson's value based cost allocation methodology is perfectly reasonable *when it comes to products that are not subject to the investigation*. This reason, again, does not address the point that all costs need to be accounted for. Finally, MOFCOM cites as support that the monthly costs for live birds changes and that Tyson does not specify which are used for subject merchandise and non-subject merchandise is misplaced as well. Whether costs change from month to month does not obviate the need to ensure costs are properly allocated.

2. MOFCOM has not Addressed the Article 2.2.1.1 Findings with respect to Pilgrim's Pride

21. Despite the Panel's findings, MOFCOM's redetermination refused to consider any alternative allocation methodologies for Pilgrim's Pride. Instead, MOFCOM only investigated and modified the dumping margin for Pilgrim's Pride on the basis of the purported errors in calculation. Thus, because China's redetermination does not contain any additional "evidence of consideration" of alternative methodologies, China's redetermination remains in breach for the same reasons as in the original investigation.

B. China Breached Article 9.4 of the AD Agreement through the "All Others" Rate Set by MOFCOM

22. MOFCOM's arbitrary selection of the highest rate found is not consistent with the disciplines of Article 9.4, which establishes that the all others' rate shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers."

C. China's Resort to and Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement

23. MOFCOM has not presented any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information. Tyson took appropriate steps to use the data available in its records to satisfy MOFCOM's request for information to the fullest extent that it could.

24. Over the period of investigation, Tyson recorded, as part of its accounting practice, only the aggregate actual costs incurred and the "standard costs," the latter of which reflect Tyson's expectation as to what was incurred at a particular segment. Tyson used the standard costs to create allocation percentages, which it then applied to the aggregate actual cost to generate the specific costs MOFCOM requested. Tyson did not track the data requested by MOFCOM as part of its standard practice. MOFCOM completely disregarded what Tyson proffered and, instead used the best information available. MOFCOM did not present any evidence or explanation that the costs reported by Tyson were not "supplied in a timely fashion" and in the "requested medium" or "appropriately submitted so that {they} can be used in the investigation without undue difficulties." Moreover, the claims cited by MOFCOM for rejecting Tyson's reported costs do not

indicate any efforts by MOFCOM to undertake an "objective process of examination" and to attempt to verify their accuracy and reliability.

25. MOFCOM's assertion that Tyson's costs reported in the reinvestigation do not tie to those in the original investigation is contradicted by the very exhibit relied upon MOFCOM. Moreover, Tyson in fact reported costs for each of the combinations. Further, MOFCOM erroneously asserts that Tyson failed to report actual meat and processing costs incurred during the period of investigation. In addition, Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation.

VIII. MOFCOM'S FINDINGS IN ITS INJURY REDETERMINATION REMAIN INCONSISTENT WITH THE AD AND SCM AGREEMENTS

A. China's Biased Price Effects Analysis Breached Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement

26. MOFCOM purported to control for the "clear differences in product mix that affected price comparability" found by the Panel by analyzing product-specific pricing data collected from only four of the 17 domestic producers included in the domestic industry. MOFCOM did not disclose its methodology for selecting producers for inclusion in its sample of the domestic industry or for collecting product-specific pricing data from these producers, however. Nor did MOFCOM disclose the percentage of domestic industry sales covered by the product-specific data collected. Accordingly, MOFCOM failed to establish that the pricing data it collected was sufficiently representative to permit an objective underselling analysis.

27. Absent any explanation to the contrary, MOFCOM was in a position to collect pricing data from all members of the domestic industry. MOFCOM thus failed to ensure that its new underselling analysis was based on an objective examination of positive evidence. The above facts also confirm that MOFCOM has also breached China's obligations under Article 6.4 of the AD and Article 12.3 of the SCM Agreement.

28. MOFCOM also based its finding of price suppression on underselling in the redeterminations. Significantly, MOFCOM revised the concluding paragraph of its price section in the redetermination to eliminate the references to subject import volume and market share found in the corresponding paragraphs of the original determinations, clarifying its view that price suppression resulted from subject import underselling, not subject import volume. In responding to various arguments raised by USAPEEC, MOFCOM likewise resorted to the notion that subject import underselling necessarily means that those imports suppressed domestic prices. Given MOFCOM's reliance on its new underselling analysis for its price suppression finding, the deficiencies of that underselling analysis render MOFCOM's price suppression finding inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2. Because this deficient underselling analysis is also the foundation for MOFCOM's finding of price suppression, MOFCOM's price suppression finding is inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2.

29. MOFCOM's reliance on underselling to support its price suppression finding was also unsupported by the evidence because the record showed no correlation between underselling and price suppression. MOFCOM failed to explain or investigate how subject import underselling could have significantly suppressed domestic prices in the first half of 2009 when the same underselling had no "significant" price suppressive effects between 2006 and 2008. Thus, there is no evidence to support MOFCOM's price suppression finding. By failing to recognize or consider that the domestic industry's prices increased faster than its costs between 2006 and 2008, MOFCOM also therefore failed to base its analysis of price suppression on an objective examination of positive evidence. By ignoring evidence that factors other than subject imports drove domestic price trends in the first half of 2009, MOFCOM failed to properly establish that price suppression was "the effect" of subject imports. By ignoring such evidence, MOFCOM also failed to base its price analysis on an objective examination of positive evidence.

B. China's Impact Analysis in its Redetermination Breached Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement

30. MOFCOM's finding that subject imports had an adverse impact on the domestic industry does not satisfy the requirement for an objective evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." In addressing impact, MOFCOM ignored evidence that the domestic industry's performance improved according to almost every other measure during the period. MOFCOM also ignored evidence that the domestic industry's rate of capacity utilization during the period was dictated by the domestic industry's decision to increase capacity well in excess of demand growth. It also failed to address evidence that domestic industry end-of-period inventories were not significant relative to domestic industry production or shipments.

31. MOFCOM's finding that subject import competition had an adverse impact on the domestic industry's rate of capacity utilization over the 2006-2008 period does not reflect an "objective examination" because it is clearly contradicted by the record evidence. Capacity utilization was increasing at the same time subject imports were also increasing. Critically though, an objective examination would consider this trend in conjunction with the record evidence regarding the domestic industry's own capacity expansion in excess of demand, which MOFCOM ignored. Moreover, subject import competition could not have reduced domestic industry output between 2006 and 2008, and by extension domestic industry capacity utilization, because subject imports did not increase their share of apparent consumption at the expense of the domestic industry. Had the domestic industry not expanded its capacity in excess of apparent consumption growth, the domestic industry's increase in share of apparent consumption would have translated into a higher rate of capacity utilization. Thus, MOFCOM's finding was not based on an "objective examination" of "positive evidence" in breach of Article 3.1 of the AD Agreement and Article 15.1.

32. MOFCOM also found that the increase in the domestic industry's end-of-period inventories was caused by subject imports. This finding too cannot be the result of an "objective examination". What MOFCOM crucially neglected to consider was the significance of that increase relative to the domestic industry's actual performance, including, how that increase related to the domestic industry's production and shipments.

33. MOFCOM's finding that subject imports had an adverse impact on the domestic industry from 2006 to 2008 rests primarily on its flawed findings regarding capacity utilization and end-of-period inventories, which failed to reflect an objective examination of positive evidence, as discussed above. In light of MOFCOM's dependence on these flawed findings, MOFCOM's analysis that the domestic industry was adversely impacted is unsubstantiated. Moreover, in contrast to MOFCOM's finding, the record evidence clearly indicates that the domestic industry's performance improved markedly according to almost every measure during this period, when the bulk of the increase in subject import volume and market share took place. Therefore, MOFCOM's examination and evaluation was not based on an "objective examination" of "positive evidence."

C. MOFCOM's Causal Link Analysis in its Redetermination Breached Articles 3.1, 3.5, 12.2, and 12.2.2 of the AD Agreement and Articles 15.1, 15.5, 22.3, and 22.5 of the SCM Agreement

34. MOFCOM's causation analysis in its redeterminations remains as flawed as the one it provided in its original determination because MOFCOM continues to (1) ignore record evidence that subject import volumes did not increase at the expense of the domestic industry; (2) relies on flawed analysis of price undercutting and suppression; and (3) fails to reconcile its analysis with evidence that the domestic industry's performance *improved* as subject import volume and market share increased.

35. Here, MOFCOM cited no evidence that the increase in subject import volume or subject import price competition was injurious to the domestic industry. During that same period, the domestic industry increased its market share to *an even greater degree* than subject imports. With respect to the price effects of subject imports, MOFCOM relied on its flawed price comparisons and finding of price suppression. Further, MOFCOM disregarded evidence that subject import competition was significantly attenuated because nearly half of subject import volume consisted of

chicken paws, which the domestic industry could not produce in quantities sufficient to satisfy demand.

36. MOFCOM's findings on import volume and market share are clearly contradicted by evidence on the record. For example, MOFCOM failed to address evidence that subject imports could not have injured the domestic industry because the small increase in subject import market share did not come at the expense of the domestic industry, which also *gained* market share during the POI. MOFCOM also failed to address USAPEEC's argument that subject import competition was substantially attenuated by the fact that nearly half of subject imports during the period of investigation, and 60 percent of the increase in subject import volume, consisted of chicken paws. MOFCOM did not address the issue in its final determinations or in its redetermination.

37. MOFCOM's causation analysis is inconsistent with the obligations of Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because the analysis disregarded evidence that subject import volume did not increase at the expense of the domestic industry. In addition, MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because it was based on MOFCOM's flawed price and impact analyses.

38. MOFCOM's determination of a causal link rested on its finding that subject import volume and market share increased significantly and contemporaneously with certain trends exhibited by the domestic industry. But relevant record evidence indicated that the increase in subject import volume and market share did not negatively impact the domestic industry because the domestic industry gained market share during the same period. MOFCOM does not examine or explain such evidence, contrary to Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Additionally, with no evidence linking the increase in subject import and market share to material injury, MOFCOM's causal link analysis also failed to demonstrate that any material injury suffered by the domestic industry was the effect of subject import volume, as required under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

39. Because MOFCOM's deficient underselling analysis is the sole basis for its finding that subject imports suppressed domestic like product prices, and other evidence ignored by MOFCOM contradicts the finding, MOFCOM's price suppression finding, too, is WTO-inconsistent. Moreover, given that domestic like product prices increased over the period examined, there was no evidence of price depression. With no evidence that subject imports suppressed or depressed domestic like product prices, MOFCOM failed to predicate its causal link analysis on an objective examination of positive evidence, in breach of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement for the reasons outlined above.

40. MOFCOM's causal link analysis was also deficient because it failed to address record evidence that the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance. MOFCOM does not explain how subject imports could have caused any material injury to the domestic industry when the domestic industry's worst performance of the period examined occurred in 2006, before any increase in subject import volume and market share. An investigating authority cannot be said to have examined "the relationship between subject imports and the state of the domestic industry" by focusing, without reasonable explanation, solely on a discrete portion of the period of investigation. By failing to reconcile its causation analysis with evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance, MOFCOM failed to conduct an objective evaluation of positive evidence.

41. MOFCOM ignored at least two compelling arguments concerning the absence of any causal link between subject imports and material injury. First, both USAPEEC and the United States argued that there could be no link between subject imports and material injury because subject import market share increased entirely at the expense of non-subject imports. This issue was clearly "material" to MOFCOM's causal link analysis. MOFCOM necessarily had to resolve the issue before relying on the increase in subject import volume and market share to establish a causal link. Consequently, MOFCOM was obligated to provide "all relevant information" on its resolution of the issue in the public notice of its final determinations. It was also obligated to provide the reasons for its rejection of U.S. respondents' argument concerning the issue.

42. USAPEEC also argued that subject imports could not have had an adverse impact on the domestic industry because over 40 percent of subject imports consisted of chicken paws, which Chinese producers were incapable of supplying in adequate quantities. By failing to provide the reasons for its rejection of USAPEEC's argument concerning chicken paws, MOFCOM breached Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement. MOFCOM's misplaced response to USAPEEC's chicken paws argument also ignores evidence that the substantial proportion of subject imports consisting of chicken paws could not have been injurious. MOFCOM thus failed to base its causation analysis on an objective examination of positive evidence and an examination of all relevant evidence.

IX. CONCLUSION

43. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that the challenged measures are inconsistent with China's obligations under the AD Agreement and SCM Agreement and that China has failed to implement the recommendations of the DSB to bring its antidumping and countervailing measures on broiler chickens from the United States into conformity with those agreements.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The aggressive rhetoric found in China's rebuttal does not address – no less refute – the many flaws in MOFCOM's reinvestigation and redeterminations explained in the U.S. First Written Submission. Instead of addressing the legal issues in this dispute, China's rebuttal often focuses on irrelevant or extraneous matters. These types of arguments do not engage with the main task in this proceeding – namely, to determine whether China has brought its measures into compliance with the recommendations of the Dispute Settlement Body (DSB). In this second submission, the United States will continue to focus on demonstrating – through reference to record evidence – that MOFCOM failed to abide by China's WTO obligations.

II. CHINA CANNOT DEFEND MOFCOM'S PROCEDURAL FAILINGS DURING THE INVESTIGATION

A. China Breached Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement through MOFCOM's Failure to Provide Notice to All Interested Parties of the Pricing Information It Required from Domestic Producers

2. The United States' claims under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement are straightforward. MOFCOM sought and obtained pricing data from domestic firms, which it then used to underpin its findings for its pricing analysis in its injury redetermination. In this process, MOFCOM failed to provide known interested parties, such as U.S. respondents, with any notice as to what specific data it required the domestic industry to produce. Without notice of what MOFCOM was requiring, U.S. respondents were not in a position to address effectively the significance of the pricing information – and therefore were denied the "ample opportunity to present evidence." Thus, MOFCOM breached China's obligations under Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because it failed to provide affirmatively to U.S. interested parties both (1) notice of the information it required from Chinese firms and (2) concomitantly, opportunity to present in writing all evidence that U.S. interested parties might consider relevant.

1. Notice 88

3. Notice 88 is simply the notice of initiation for the reinvestigation. It does not provide any details as to the specifics of the information that the investigating authority will be requesting, nor does it explain in detail the conduct of the investigation, including any opportunities for interested parties to present evidence.

2. The General Verification Letter

4. The General Verification Letter is deficient in both form and substance as to MOFCOM's obligations to provide notice. With respect to form, MOFCOM did not *notify* U.S. interested parties of the General Verification Letter. Although it appears the letter is made out as "To Whom it May Concern," China's rebuttal clarifies that the letter is addressed to Chinese domestic producers. Accordingly, the interested parties MOFCOM put on notice – i.e., to "alert or warn" – were Chinese domestic producers. Substantively, China fares no better. An investigating authority's notation that it intends to conduct "on spot verifications," without any specifics regarding the precise information it requires from participating parties, falls far short of the requirements to provide notice to interested parties of information *required* by MOFCOM.

3. Chinese Producers' Summaries

5. The Chinese producer summaries suffer from two significant deficiencies, each of which preclude China establishing that it provided notice consistent with AD Agreement Article 6.1 and

SCM Agreement Article 12.1: (1) China did not provide interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform interested parties of the information MOFCOM required. First, to the extent China points to Exhibit CHN-14, a webpage that lists what China deems public documents, there is no indication as to when the materials were loaded on the webpage or that China provided any notice to interested parties that such information could be found there. Second, the summaries cannot be construed as notice of the *information that MOFCOM required*. They are summaries of what *information Chinese producers purportedly provided*. Knowledge of the precise parameters that MOFCOM required for this information is of course necessary to understanding the significance of and potential errors in the responses. Further, China glosses over the fact that these May 20 documents were ***submitted one day before*** release of the RID.

B. China Breached Articles 6.1.2 and 6.4 of the AD Agreement and Articles 12.1.2 and 12.3 of the SCM Agreement by Denying U.S. Interested Parties the Evidence Presented by the Domestic Producers Participating in the Reinvestigation

6. The Chinese producer summaries do not satisfy China's obligations as to AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 because, once again, (1) China did not provide U.S. interested parties notice of the summaries, and (2) the content of the summaries themselves does not inform U.S. interested parties of the information MOFCOM required. Even assuming the notice was not deficient, the *only* information it provided to interested parties consisted of *summaries* of the pricing information. They do not *convey* the context surrounding what positions were advocated by the domestic producers providing the information, and the corresponding issues that MOFCOM sought to resolve during the reinvestigation.

C. China Breached AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 Because it Failed to Permit Access to Evidence that would have Enabled the Interested Parties to Prepare their Cases

7. China acted inconsistently with AD Agreement Articles 6.4 and 6.2 and SCM Agreement Article 12.3 because it failed to permit access to information to interested parties that would have enabled them to prepare their cases and defend their interests. MOFCOM failed, per AD Agreement Article 6.4 and SCM Agreement Article 12.3, to provide interested parties timely opportunities to see information that is relevant, non-confidential, and used by authorities in their investigation. China's public release of summaries does not excuse its failure to provide the context for these data, including the specific products for which pricing data was requested, that clearly fall within the scope of the articles. The same deficiencies apply to China's failure to provide the precise identity of the four Chinese domestic enterprises that provided information to MOFCOM. Moreover, although an oral "hearing" took place on June 13, 2014, that "hearing" in no way provided interested parties with an opportunity to prepare presentations in defense of their interests. U.S. respondents were told by MOFCOM during this meeting that the re-investigation was closed, and that no further comments could be submitted by interested parties.

D. China's Failure to Disclose the Margin Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins was Inconsistent with AD Agreement Article 6.9

8. China's failure to disclose "essential facts," i.e., the margin calculations and data it relied upon to determine the existence of dumping by U.S. respondents Pilgrim's Pride and Keystone, was inconsistent with AD Agreement Article 6.9. Pilgrim's Pride was denied access to the data calculations from the original investigation in the reinvestigation while MOFCOM used a purported error in the data and calculations from the original investigation to increase the margin of Pilgrim's Pride. Without the *original* calculations and data, Pilgrim's Pride had no ability to identify precisely what had changed – which entirely denied Pilgrim's the opportunity to defend its interests. Similarly, MOFCOM did not abide by the obligation to ensure that a disclosure was made "in sufficient time for … [Pilgrim's] to defend … [its] interests." Likewise, Keystone was denied access to its data and calculations for the new antidumping rate that was set following the reinvestigation. Although Keystone did not cooperate in the reinvestigation, and MOFCOM applied facts available to it, Keystone was an "interested party," and its data and calculations were "essential facts" underlying MOFCOM's decision to maintain the duties.

III. CHINA CANNOT DEFEND MOFCOM'S ANTIDUMPING REDETERMINATION

A. China Has Not Rebutted U.S. Claims That MOFCOM Failed to Properly Allocate Tyson's Costs Under the Second Sentence of AD Agreement Article 2.2.1.1

9. The substantive obligation in the second sentence of AD Agreement Article 2.2.1.1 demands that investigating authorities deliberate and evaluate the "proper" allocation of costs based on its consideration of the evidence presented. The Panel recognized this fact. China's suggestion to the contrary is wholly unsupported and should be rejected.

10. China failed to meet the requirement in the second sentence of AD Agreement Article 2.2.1.1 to "consider all available evidence on the proper allocation of costs" because of MOFCOM's decision to adhere to a weight-based methodology while failing to allocate costs by weight to all products that derive revenue from the production of the product under consideration – including a failure to allocate costs to blood, organs, feathers, and other viscera. China itself recognized this problem in its prior WTO submissions and its redetermination, which explicitly noted, in support of its weight-based methodology, that apportionment of costs by weight is reasonable because it applies costs of the chicken equally across all products. Yet China chose to ignore these distortions and allocate costs over a more limited range of products – resulting in artificially inflated normal values for those products.

B. MOFCOM's Failure to Consider Any Alternative Allocation Methodologies for Pilgrim's Pride was Inconsistent with AD Agreement Article 2.2.1.1

11. China's suggestion that the general findings were exclusive of Pilgrim's Pride is not supported by the plain text of the Panel's decision. Moreover, China's suggestion that it did not need to consider Pilgrim's data at all because it believed the data to be flawed is flatly inconsistent with the original panel's finding that China failed to explain why its methodology led to a "proper" allocation of costs. The only way that China could have engaged in a neutral, fact-driven consideration of the "proper" allocation of costs, as required under the second sentence of AD Agreement Article 2.2.1.1, is if it had considered data submitted by Pilgrim's Pride.

C. China Acted Inconsistently with Article 9.4 of the AD Agreement on Account of MOFCOM's "All Others" Rate

12. China ignored its obligation under the general rule of Article 9.4 to calculate an all-others rate that "shall not exceed . . . the weighted average margin of dumping established with respect to the selected exporters or producers" and, instead, arbitrarily applied the highest antidumping duty rate found, as a result of the reinvestigation of Pilgrim Pride's rate. MOFCOM's investigation was limited to three companies: Tyson, Pilgrim's Pride, and Keystone. In the present circumstances, there were no new respondents that MOFCOM could potentially add to the investigation – nor were there any respondents who failed to cooperate. The exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4.

D. China's Application of Facts Available to Tyson Is Inconsistent with Article 6.8 and Annex II of the AD Agreement.

13. China's use of facts available instead of Tyson's reported costs is inconsistent with Article 6.8 and Annex II of the AD Agreement. Contrary to China's suggestions, Tyson did not refuse access to, fail to provide, or other otherwise impede MOFCOM's ability to obtain requested information – such that MOFCOM could justify the application of facts available under Article 6.8. China's claims that Tyson made unexplained changes in its data during the redetermination proceedings are baseless. Rather, all changes made by Tyson during the reinvestigation were made at the specific request of MOFCOM and because MOFCOM altered its approach compared with the original investigation. China's argument rests on its belief that it can make an unreasonable and unrealistic demand for data in a reinvestigation that is fundamentally at odds with its requests during the original investigation, and that the investigating authority knows will be impossible for a respondent to provide in light of its standard accounting and business practice. Tyson made every effort that it could to comply with MOFCOM's requests for information, and cooperated to the best of its ability.

IV. MOFCOM'S INJURY REDETERMINATION BREACHED THE AD AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Remains Inconsistent with AD Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

14. There is nothing in MOFCOM's redetermination that establishes MOFCOM actually controlled "for differences in physical characteristics affecting price comparability" – a deficiency the Panel found in its report with respect to the original determination. In its redetermination, MOFCOM apparently sought and collected product-specific pricing data from only four of 17 domestic producers that in its view justified its original average unit value comparisons, without ensuring that its sample of domestic industry sales prices was representative. MOFCOM's redetermination fails to explain why MOFCOM chose these four producers, how it ensured their data was reliable, and how it could ensure that this limited data could be extrapolated to support MOFCOM's findings.

1. MOFCOM's Underselling Analysis Remains WTO-Inconsistent

15. MOFCOM based its finding that subject import underselling was significant on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient. China readily acknowledges that MOFCOM's AUV comparisons remain the sole basis for its finding that subject imports undersold the domestic like product significantly, and that MOFCOM took no steps to adjust these data or otherwise control for differences in product mix in its redetermination.

16. Because the average unit value of subject imports differed dramatically by product, changes in the product mix of subject imports during the period of investigation would have directly influenced the average unit value of all subject imports during the period; for example, an increase in the proportion of lower-priced products from one year to the next would have caused the average unit value of all subject imports to decline. By failing to control for changes in the product mix of subject imports, MOFCOM's underselling analysis relied on subject import underselling margins that reflected not only differences in product mix between subject imports and domestic industry sales but also changes in the product mix of subject imports over time.

17. China argues that MOFCOM was justified in relying on its original average unit value comparisons because the product-specific pricing data it collected from four of the 17 domestic producers comprising the domestic industry suggested that the product mix of subject imports contained a higher proportion of high-value products than the product mix of domestic producers. But MOFCOM's AUV comparisons cannot be deemed objective or reliable. Specifically, both the magnitude and the trend of subject import underselling margins calculated from AUV comparisons would have reflected differences in product mix and changes in the product mix of subject imports over time. In other words, MOFCOM cannot proceed to compare and draw conclusions because no controls had been applied to ensure the underlying data – which by nature was in flux – was in fact comparable. Furthermore, MOFCOM's analysis of product-specific pricing data did not establish that subject imports were comprised of a higher proportion of high-value products because MOFCOM failed to ensure that its sample of domestic producers and their sales prices on specific products was representative.

2. MOFCOM's Price Suppression Finding Remains WTO-Inconsistent

18. As the panel and Appellate Body found in *China – GOES*, "*merely showing* the existence of significant price depression does not suffice for the purpose of Article 3.2 of the [AD] Agreement and Article 15.2 of the SCM Agreement . . . Thus . . . it is *not* sufficient for an authority to confine its consideration to what is happening to domestic prices alone for purposes of the inquiry stipulated in Articles 3.2 and 15.2." As the Appellate Body explained in *China – GOES*, the obligation of investigating authorities to consider whether subject imports have "explanatory force" for price depression and suppression, under AD Agreement Article 3.2 and SCM Agreement Article 15.2, and "the state of the domestic industry," under AD Agreement Article 3.4 and SCM Agreement Article 15.4, is an integral part of an authority's consideration of causation under AD Agreement Article 3.5 and SCM Agreement Article 15.5. Thus, MOFCOM was required under AD Agreement Article 3.2 and SCM Agreement Article 15.2 to establish that subject imports caused the significant suppression of domestic like product prices.

19. Because the principal basis for MOFCOM's finding that subject imports caused price suppression in the redetermination was its deficient underselling analysis, the Panel should find that MOFCOM's price suppression finding remains WTO-inconsistent. Although China also claims that MOFCOM supported its price suppression finding with reference to subject import volume, MOFCOM did not find in its redetermination that subject import volume alone suppressed domestic like product prices to a significant degree. On the contrary, MOFCOM emphasized in the section of its redetermination titled "Impact of the Import Price of the Subject Merchandise to the Price of the Domestic Like Products" that it was subject import underselling, not subject import volume, that suppressed domestic like product prices. It was MOFCOM's reliance on its deficient underselling analysis in finding price suppression that led the original panel to find MOFCOM's price suppression finding inconsistent. MOFCOM's continued reliance on its deficient underselling analysis in finding price suppression in the redetermination is likewise inconsistent with those articles.

20. MOFCOM also failed to establish that the alleged underselling by subject imports caused the significant suppression of domestic like product prices. Most of the alleged underselling by subject imports, which occurred between 2006 and 2008, was not accompanied by the "prevent[ion of] price increases, which otherwise would have occurred, to a significant degree," contrary to MOFCOM's finding that subject imports significantly suppressed domestic like product prices. MOFCOM not only ignored this evidence that contradicted its analysis of price suppression, but also failed to explain how subject imports could have suppressed domestic like product prices in the first half of 2009 when most of the increase in subject import volume and market share, and most of the alleged subject import underselling, did not suppress domestic like product prices between 2006 and 2008.

B. MOFCOM's Impact Analysis Breached AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4

21. MOFCOM was required under AD Agreement Article 3.4 and SCM Agreement Article 15.4 to not only examine the domestic industry's performance during the period of investigation but to also examine "the consequent impact" of subject imports on that performance. Furthermore, an investigating authority cannot examine the impact of subject imports on the domestic industry during the period of investigation without considering the relationship between subject imports and domestic industry performance over the entire period of investigation. Doing so would not be an "objective examination," as required under AD Agreement Article 3.1 and SCM Agreement Article 15.1, because it would ignore periods in which subject imports coincided with improving or stable domestic industry performance, thereby making an affirmative determination more likely. Such an analysis would also ignore "relevant economic factors," namely the industry's improving performance over most of the period of investigation. Here, it was particularly important that MOFCOM examine the impact of subject imports on the domestic industry over the entire period of investigation because most of the increase in subject import volume and market share occurred between 2006 and 2008.

22. Yet, by China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened. The record before MOFCOM established that during the three full years of the period of investigation, which coincided with most of the increase in subject import volume and most of the alleged underselling by subject imports, the domestic industry's performance improved substantially according to most measures. Although the domestic industry's end-of-period inventories increased, they remained insignificant relative to industry production and sales (equivalent to around 3 percent of both), as China concedes. By failing to account for the bulk of the record evidence showing that subject imports had no adverse impact on the domestic industry between 2006 and 2008, MOFCOM failed to conduct an evaluation of all relevant economic factors, contrary to AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.

23. None of the factors cited by China in its first written submission excuse these deficiencies in MOFCOM's impact analysis. MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire period of investigation, including those periods in which the industry's performance improved. Nor was MOFCOM entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation," to the exclusion of other contradictory factors. That the domestic industry had pre-tax losses throughout the period of investigation says nothing about the changes or trends in the industry's financial

performance. Nor does it take into consideration the multiple other "relevant economic factors" enumerated in AD Agreement Article 3.4 and SCM Agreement Article 15.4. The record before MOFCOM showed that the domestic industry's worst financial performance during the 2006-2008 period occurred in 2006, before the increase in subject import volume and market share. The data show that most of the increase in subject import volume and market share coincided with an improvement in the industry's financial performance, according to every measure. By ignoring these trends, just as it discounted all other positive trends in the industry's performance, MOFCOM failed to objectively evaluate "all relevant economic factors," in violation of AD Agreement Article 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4. The third factor that China cites in defense of MOFCOM's impact analysis, alleged future subject import volume, was completely irrelevant to MOFCOM's analysis of the impact of subject imports on the domestic industry during the period of investigation. MOFCOM found that "U.S. producers of chicken products or broiler products are likely to expand exports to China, and cause further adverse effects to China's industry." China's argument has two fundamental problems. First, this finding on likely future trends was not supported by the record. Second, future subject imports could have no impact whatsoever on the domestic industry during the period of investigation.

24. Finally, China is incorrect that MOFCOM's analysis of the domestic industry's capacity utilization supported its finding that subject imports adversely impacted the domestic industry during the 2006-2008 period. China argues that the domestic industry's capacity did not grow in excess of demand between 2006 and 2008 because the increase in capacity, at 780,700 MT, was less than the increase in demand, at 955,600 MT. The increase in the domestic industry's capacity between 2006 and 2008, equivalent to 81.7 percent of the increase in apparent consumption, was not proportionate to the industry's share of apparent consumption, which increased from 37.81 percent to 42.42 percent during the period. Only the domestic industry's 26.2 percent increase in capacity, in excess of the 17.0 percent increase in apparent consumption, prevented the industry's capacity utilization rate from improving just as dramatically as other measures of industry performance.

C. MOFCOM's Causation Analysis Breached AD Agreement Articles 3.1, 3.5, 12.2 and 12.2.2 and SCM Agreement Articles 15.1, 15.5, 22.3 and 22.5

25. MOFCOM's reliance on a flawed analysis of the effects of subject imports to demonstrate a causal link breaches the first sentence of AD Agreement Article 3.5 and SCM Agreement Article 15.5. Moreover, MOFCOM acted inconsistently with the second sentence of these articles by failing to base its causation analysis on "an examination of all relevant evidence." Specifically, MOFCOM ignored evidence that the increase in subject import volume and market share was not at the expense of the domestic industry, which increased its market share by an even greater amount.

1. MOFCOM Failed to Examine All Relevant Evidence in Breach of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Article 15.1 and 15.5

26. MOFCOM explicitly predicated its finding of a causal link between subject imports and injury on "the increase of the import volume" and "the large volume of dumped imports originating in the U.S.," yet ignored that the 3.92 percentage point increase in subject import market share during the period of investigation did not prevent the domestic industry from increasing its market share by an even greater 4.38 percentage points. This evidence that subject imports captured no market share from the domestic industry during the period of investigation, and did not prevent the industry from growing its market share during the period, was clearly "relevant evidence" within the meaning of AD Agreement Article 3.5 and SCM Agreement Article 15.5 that MOFCOM was required to "objectively examine" under AD Agreement Article 3.1 and SCM Agreement Article 15.1. That MOFCOM "noted" the increase in the domestic industry's market share somewhere in the redetermination does not remedy this deficiency.

27. MOFCOM's isolated reliance on the increase in subject import volume and market share in finding a causal link between subject imports and injury also ignored that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of chicken paws that could not, as a factual matter, have injured the domestic industry. An uncontested fact on the record before MOFCOM, which China does not dispute, was that domestic producers were incapable of producing more chicken paws without increasing production of other chicken products to

uneconomic levels. The clear implication of this irrefutable fact is that subject imports of chicken paws could not have injured the domestic industry.

28. China asserts that MOFCOM's reference to its preliminary finding that chicken feet were within the scope of the investigation somehow satisfied its obligation. MOFCOM's observation that chicken feet were within the scope was a complete *non sequitur*. By ignoring that subject imports of chicken feet could not have injured the domestic industry, MOFCOM's causation analysis relied on an increase in subject import volume and market share that was greatly inflated by the inclusion of non-injurious chicken feet. Relying on its defective impact analysis, MOFCOM's finding of a causal link between subject import and injury also ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008. By limiting its causation analysis to those portions of the period of investigation in which the industry's performance weakened while ignoring those portions coinciding with most of the increase in subject imports, MOFCOM failed to base its causation analysis on an "objective examination," and "all relevant evidence."

29. Contrary to China's claim that the United States has made no challenge to MOFCOM's analysis of adverse volume effects, the United States continues to argue, as it did before the original panel, that MOFCOM ignored evidence that the increase in subject import volume and market share coincided with strengthening domestic industry performance between 2006 and 2008, and did not prevent the domestic industry from increasing its own market share to an even greater degree. These deficiencies in MOFCOM's volume effects finding underscore the WTO-inconsistency of MOFCOM's causation analysis.

2. MOFCOM's Failure to Address Key Causation Arguments Raised by U.S. Respondents Violated AD Agreement Articles 12.2 and 12.2.2 and SCM Agreement Articles 22.3 and 22.5

30. MOFCOM's approach manifestly failed to provide "in sufficient detail . . . the reasons for the . . . rejection of relevant arguments." Specifically, China argues that MOFCOM "addressed" USAPEEC's and the United States' argument that subject imports had no adverse volume effects because they captured no market share from the domestic industry by stating that "[d]uring the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product . . . ." Conspicuously absent from MOFCOM's response is any mention or consideration of market share, and specifically the record evidence highlighted by USAPEEC and the United States showing that subject imports captured no market share from the domestic industry. Having failed to address the very point raised by USAPEEC and the United States, MOFCOM cannot be said to have provided "in sufficient detail" its reasons for rejecting the argument.

31. China also argues that MOFCOM "addressed" USAPEEC's argument that the 40 percent of subject imports consisting of chicken paws could not have injured the domestic industry by referencing its finding from the preliminary determination that "the scope of the investigated products includes Paw; therefore, the investigation authority proceeds by investigating the import of all the investigated products including Paw as a whole . . . ." That MOFCOM included the words "chicken paws" in its response to USAPEEC's argument revealed nothing about the "reasons" why MOFCOM decided to ignore completely uncontested evidence on the record that 40 percent of subject imports, and 60 percent of the increase in subject imports, consisted of non-injurious chicken paws.

V. CHINA'S TERMS OF REFERENCE ARGUMENTS ARE WITHOUT MERIT

32. The United States' Panel Request provides more information than is required under the DSU to present the claims at issue in this dispute. In particular, the United States often previewed some of the specific arguments it intended to advance by providing indicative examples of how China breached its WTO obligations. In each of the instances China complains of, the U.S. Panel Request has clearly stated the measures and claims at issue – and is thus entitled to have the Panel consider them. China's position essentially demands that Members not only identify claims, but that they must also provide in the Panel Request the precise arguments that will be presented in their submissions. The DSU does not compel this result.

33. The Panel Request clearly identifies that the measures at issue are those leading to the continued imposition of AD and CVD duties on U.S. broiler products – and further clarifies for China that the United States is concerned with MOFCOM's conduct during the reinvestigation. For each of its claims, the United States has identified the relevant obligation in the covered agreement. The United States has done so not only by identifying treaty provisions, but also by providing appropriate narrative descriptions when necessary. Moreover, the United States has also provided in some instances precise examples of how it might seek to demonstrate breach. The Appellate Body's prior analysis has correctly recognized that Members may provide indicative examples of how the claim might be established. Such an examples are simply foreshadowed arguments; they do not detract from the claim itself.

VI. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

34. Because China has not rebutted the foregoing claims demonstrated by the United States, China as a consequence is also unable to rebut that it has breached AD Agreement Article 1, SCM Agreement Article 10, and Article VI of the GATT 1994.

VII. CONCLUSION

35. For the reasons set forth in this submission and its first written submission, the United States respectfully requests the Panel to find that China's measures are inconsistent with China's obligations under the AD Agreement, SCM Agreement, and the GATT 1994, and thus that China has failed to comply with the DSB recommendations in this dispute.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. We are here today because China, notwithstanding the clear findings earlier in this dispute – and other disputes – has breached the basic procedural and substantive obligations of the AD and SCM Agreements in maintaining antidumping and countervailing duties on U.S. broiler products. To a large extent, China has not addressed the legal and factual arguments of the United States, but rather relies on rhetoric and conclusory statements. Rather, China's arguments are primarily, as this Panel put it in the original proceeding, simply *post-hoc* rationalizations that are "irrelevant for the purposes of our assessment of MOFCOM's actions."

II. MOFCOM'S FLAWED INJURY REDETERMINATION BREACHES THE AD AND SCM AGREEMENTS

2. China's defense of MOFCOM's injury redetermination centers on the assertion that the United States is seeking to substitute its judgment for MOFCOM's. The issue is not whether MOFCOM has discretion, but whether the exercise of that discretion comports with the obligations in the AD and SCM Agreements.

A. China Cannot Defend MOFCOM's Price Effects Analysis

3. An objective examination of pricing data requires that the prices the investigating authority compares must correspond to comparable products. Tellingly, MOFCOM's price effects analysis in the redetermination continues to rely on its original flawed analysis of AUVs, rather than make any of the requisite adjustments to ensure comparability.

4. First, MOFCOM's determination does not explain why its approach of using domestic pricing data from these four particular firms would resolve the issue of product mix. As is evident, we have no understanding how this data was applied to ensure that product mix is not an issue. Second, there is nothing in the redetermination about why or how these firms were selected. Nor does the record indicate the coverage of their product-specific data. Even the *post hoc* rationalization offered by China in its submissions suggests the only reason these firms were chosen was that it was convenient for MOFCOM since it was already familiar with these four firms and decided it lacked the time and resources to examine all 17 firms. It is important to keep in mind that the data from these four firms is a sample of a sample. As the Panel may recall, in defending against the U.S. challenge on how MOFCOM defined its domestic industry in the original proceeding, China stressed the large number of firms that comprised its domestic industry. Particularly, in the absence of any explanation as to the methodology employed by MOFCOM to select these firms, it is clear that MOFCOM's attempt to remedy the AUV deficiency is not an "objective examination" based on "positive evidence." Third, as our submissions explain, the record demonstrated that the product mix of subject imports was dynamic in that it changed over time. China's attempted response is that MOFCOM's "spot check" confirmed that this was not an issue. China's argument, which lacks any citation to the record or the determinations, is a *non-sequitur*. It ignores that a "spot check" cannot, by definition, examine a changing market situation. Fourth, China fails to address that MOFCOM did not even attempt to examine the product mix pricing for imports. The limited data indicated that paws tended to be ranked 3rd or 4th in terms of price, and the sales price index for paws was little higher than the sales price index for breast meat, which China characterizes as a "lowest price product." The products ranked 1st and 2nd in terms of price, wings and gizzards, were sold by the four domestic producers, but not imported from the United States in appreciable quantities. In light of this, MOFCOM could not objectively conclude that the product mix sold by the domestic industry was comparable to that of the imported subject merchandise.

5. China's defense of MOFCOM's price suppression finding appears to rest on two points. First, China appears to argue that a price suppression finding does not need to be well explained under the relevant obligations. This position has no legal basis. Second, China asserts that the United States is misreading the record. But the relevant portions of the record are clear, and the United States has accurately described MOFCOM's reasoning: MOFCOM predicated its finding that subject imports significantly suppressed prices for the domestic like product on its deficient underselling analysis. In addition, MOFCOM failed to address record evidence that prices for the domestic like product were not, in fact, suppressed during the 2006-2008 period. In particular, even as subject imports allegedly undersold the domestic like product, the Chinese domestic industry was able to increase its prices by more than the increase in its costs between 2006 and 2008.

B. China Cannot Defend MOFCOM's Impact Analysis

6. China has confirmed that MOFCOM's analysis on the impact of subject imports on the domestic industry in the redetermination remains *completely unchanged* from that in the original determination. Accordingly, MOFCOM has taken no steps to address any of the arguments concerning why its impact analysis is deficient under the AD and SCM Agreements.

7. First, MOFCOM's examination of the impact of subject imports on the domestic industry failed to consider the numerous factors attesting to the overall health of the industry. Almost every metric during the period of investigation *improved*. China claims MOFCOM "systematically addressed" these factors. But the text of the redetermination indicates otherwise. Only two factors in the Chinese broiler industry did not appear to improve over the period of investigation: the domestic industry's rate of capacity utilization and end-of period inventories. With respect to inventories, MOFCOM failed to consider the increase in inventories in relation to the domestic industry's production and shipments. Also, the industry's inventories were objectively small, equivalent to only around three percent of industry output and shipments. Likewise, MOFCOM's findings on capacity utilization fail to address evidence indicating that the level was not due to subject imports. As our submissions explain, capacity utilization actually increased slightly during the 2006-2008 period corresponding to most of the increase in subject import volume. The only reason the industry's capacity utilization did not increase dramatically during the period was the industry's own decision to increase capacity far beyond growth in domestic demand.

C. China Cannot Defend MOFCOM's Causal Link Analysis

8. Our submissions highlight that MOFCOM's causation analysis in its redetermination remains flawed for precisely the same reasons as the original determination. With respect to the first point, the redetermination failed to address that the increase in subject import market share during the period of investigation failed to prevent the domestic industry from increasing its market share by an even greater amount. The second reason MOFCOM's finding of causation is inconsistent with the AD and SCM agreements is because it relies on MOFCOM's price underselling analysis, which remains flawed for the reasons already discussed. The third flaw in MOFCOM's finding of a causal link between subject import and injury is that MOFCOM ignored evidence that most of the increase in subject import volume and market share coincided with a strengthening of the domestic industry's performance between 2006 and 2008.

III. MOFCOM'S FLAWED REINVESTIGATION BREACHES THE PROCEDURAL PROTECTIONS OF THE AD AND SCM AGREEMENTS

A. MOFCOM Failed to Provide Notice to Interested Parties of the Pricing Information it Required from Chinese Domestic Producers and Denied Them Ample Opportunity

9. As the Panel has noted in its Preliminary Ruling, "MOFCOM required, sought, and obtained additional information from Chinese domestic producers in the course of its reinvestigation." And, because MOFCOM failed to afford both notice and opportunity to interested parties in connection with the information that it required from Chinese producers, China is in breach of AD Agreement Article 6.1 and SCM Agreement Article 12.1. Indeed, the United States notes that it is striking that even after two rounds of submissions, no one other than China still knows the precise requests that were actually posed to the Chinese producers.

B. MOFCOM Failed to Permit Interested Parties Timely Access to Information Such that they could Defend Their Interests

10. China has also breached Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement, which requires investigating authorities to permit *timely* access to information to interested parties, to *enable them to prepare their cases, and defend their interests.* China failed to afford those opportunities as to the data MOFCOM requests from China's domestic producers, including the identity of those producers and the specific information requests issued by MOFCOM. China asserts that its supposed deposit of documents to the public information room at China's Ministry of Commerce satisfied its obligations. The deposit of documents in the reading room is not meaningful, absent notice to interested parties.

C. China's Failure to Disclose the Anti-dumping Calculations and Data

11. In the reinvestigation, Pilgrim's Pride was denied access to the data calculations from the original investigation, even though MOFCOM cited a purported error in the data and calculations from the original determination to increase the margin of Pilgrim's Pride by 20 points. Keystone likewise was denied access to its margin calculations and data from the original investigation. Keystone, as a foreign producer, was indeed an "interested party" as defined under Article 6.11, whether or not it chose to participate by submitting new data. In addition, China's explanation concerning Keystone's supposed lack of an authorized representative is without merit. Keystone's duly appointed representative indicated through a memorandum that it was authorized to "act on behalf of Keystone and to receive any document on Keystone's behalf."

IV. MOFCOM'S FLAWED ANTI-DUMPING DETERMINATION BREACHES THE AD AGREEMENT

A. China Cannot Point to Any Record Evidence to Support MOFCOM's Assertion that U.S. Producers' Recorded Costs Were Unreasonable

1. The Methodology Applied to Tyson is Not Proper

12. The Panel found in the original dispute that China breached the second sentence of AD Agreement Article 2.2.1.1 by relying upon a distortive weight-based allocation methodology for Tyson. In its redetermination, MOFCOM did not address this error. China's attempt to manipulate a value-based allocation method to distinguish total meat costs into categories, but then rely on a separate weight-based method to allocate total meat costs for only one of those categories into specific products, is not consistent with Article 2.2.1.1. Furthermore, if China indeed wanted to use a weight-based methodology, it by necessity needed to allocate costs across all products – and not just to broiler products. To allocate costs selectively introduces substantial distortions.

13. Further, China's claim that the scope of its investigation only included chicken for "human consumption" must be rejected. China's own response submission implicitly recognizes such, in stating that "Tyson's normal books and records demonstrated that the little cost [sic] was assigned to feathers and blood because the sales revenues of these items were very low." All parts of a chicken, including both those for human consumption and those that are rendered, are co-products, and a consistent, reasonable methodology must be used to allocate production costs to all co-products.

2. The Methodology Applied to Pilgrim's Pride is Not Proper

14. China similarly failed to give any consideration of the "proper" allocation of costs with respect to Pilgrim's Pride. The Panel's decision made two findings that applied to *all* respondents – specifically, that China failed to give proper consideration to "alternative allocation methodologies presented by the respondents," and that China "improperly allocated all processing costs to all products." MOFCOM failed to do any evaluation with respect to Pilgrim's Pride's costs, and for this reason alone breached Article 2.2.1.1's obligation to "consider all available evidence on the proper allocation of costs," and resulted in a failure to provide a reasoned and adequate explanation for its determination.

B. MOFCOM's "All-Others" Rate

15. The plain text of Article 9.4 establishes a cap on the duty that may be applied to imports from "exporters or producers not included in the examination." Here, MOFCOM's investigation was limited to only three companies; no other exporter was examined. Article 9.4 does not allow for distinctions between classes of exporters or producers "not included in the examination". Any exporters or producers not included in the examination are entitled to a rate consistent with AD Agreement Article 9.4.

C. China's Reliance on Facts Available for Tyson was Unsupported because Tyson Fully Cooperated to the Best of its Ability

16. MOFCOM's use of facts available is inconsistent with Article 6.8 and Annex II of the AD Agreement. China has failed to present any evidence that Tyson refused access to, failed to provide, or other otherwise impeded MOFCOM's ability to obtain requested information – such that could justify the application of facts available. Rather, MOFCOM during the reinvestigation sought information that simply did not exist, and Tyson still made every reasonable effort to use the data available in its business records to satisfy MOFCOM's request. Contrary to China's assertion, Tyson did not make unexplained changes to its data during the redetermination proceedings. Rather, Tyson used the standard costs data it had to breakdown these total actual costs for each product-brand code into meat and processing costs for each cost center. Tyson was forthcoming with MOFCOM on why and how it was proceeding in this manner. Yet China completely rejected this information provided by Tyson in the reinvestigation, without engaging in an objective process of examining the submitted data or an effort to verify its accuracy or reliability.

17. Finally, China's reliance on the Panel report findings, at paragraph 7.196 with regard to "pure meat" and "pure processing" costs is disingenuous. In fact, Tyson provided this information in the only way that it could. And it is obvious why the processing costs changed: those processing costs were embedded in the total meat costs during the original investigation, and Tyson had to disaggregate those processing costs during the reinvestigation, using the data Tyson had at its disposal. Such extensive efforts by Tyson do not reflect a failure to cooperate.

V. CHINA HAS BREACHED AD AGREEMENT ARTICLE 1, SCM AGREEMENT ARTICLE 10, AND GATT ARTICLE VI

18. These claims are consequential and therefore do not require any independent evidence to be established – they simply result from breaches of other provisions of the AD and SCM Agreements. Accordingly, the Panel may issue findings on these claims if it finds breaches on the foregoing claims we have discussed.

VI. CONCLUSION

19. For these reasons and those set forth in our submissions, the United States respectfully requests the compliance panel to find that China's measures taken to comply with the recommendations and rulings of the DSB are inconsistent with China's obligations under the AD Agreement, the SCM Agreement, and GATT 1994.

ANNEX C

ARGUMENTS OF CHINA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. The United States seriously mischaracterized the factual context and the findings made by MOFCOM during the redetermination proceedings that bring the antidumping and countervailing duty measures at issue in DS427 into compliance with China's obligations under the WTO. First, the United States seeks to pursue several specific claims that are beyond this Panel's Terms of Reference. In other areas, the U.S. First Written Submission drops any argument about provisions that were included in the Panel Request. Second, the United States argues for other approaches to issues that would have also been permissible, had MOFCOM decided to adopt them, but that simply were not required given the Panel findings. Third, when focusing on the specifics of each U.S. claim, it is important not to lose sight of what the United States has not challenged and therefore concedes to be WTO-consistent. The Panel focus, of course, will be on the U.S. claims, but the evaluation of those claims needs to take into account the factual and legal context that has not been challenged.

II. THE FACTUAL BACKGROUND PROVIDED BY THE UNITED STATES CONCERNING MOFCOM'S INVESTIGATIVE PROCESS OMITS OR MISSTATES KEY FACTS

2. The United States has presented a somewhat self-serving summary of the redetermination proceeding, omitting or misstating key facts that are important for the Panel's consideration.

3. China promptly began the procedure to implement the Panel findings in this dispute. On 25 December 2013, MOFCOM issued its Announcement No.88 of 2013 notifying its intention to reinvestigate the anti-dumping and countervailing measures on imports of broiler products originating in the United States. The purpose of the reinvestigation was to implement the findings of the Panel in DS427.

4. Questionnaires were issued to those U.S. exporters for which the Panel findings required some reconsideration by MOFCOM on 7 January 2014. Investigative procedures were tailored appropriately, seeking specific information regarding the issues about which the Panel had made findings. No company was asked to prepare entirely new responses for a new period of time or for a new product. U.S. exporters had a typical due date of two weeks to respond to the initial questionnaire. They requested more time, and MOFCOM granted the requests to the extent practicable, as well as multiple opportunities to clarify their responses.

5. MOFCOM also reinvestigated the Chinese domestic producers. On 19 February 2014, the MOFCOM released its Notification on On-spot Verifications in the Anti-dumping and Anti-subsidy Re-investigation on Broiler Products, which provided the schedule and the methodology of the investigations to be carried out. Given the Panel Report findings on MOFCOM's failure to ensure price comparability with regard to its analysis of price effects, the parties had a clear sense of what was expected from them through the Notice.

6. MOFCOM conducted on-site verifications of the same three producers whose questionnaire responses had been verified in the original verification, as well as the largest producer that was visited before the original final determination. Product-specific price data were sourced using standard verification methodologies and on the basis of the companies' questionnaire responses from the original investigation. MOFCOM requested a breakdown of the sales quantity and value reported to show product-specific pricing data. MOFCOM also verified these data by requesting product coding, sales ledgers and sampled invoices.

7. On 16 May 2014 MOFCOM issued disclosures to Pilgrim's Pride, Tyson, and the U.S. Government. These disclosures covered all issues for the two U.S. exporters. Keystone had not designated an agent and was otherwise not cooperating with the reinvestigation, so MOFCOM tried

reaching out to Keystone directly and through the U.S. Embassy, but MOFCOM was not able to provide any disclosure directly to Keystone.

8. On 20 May 2014, the four domestic producers filed the public versions of their Post-Verification Supplemental Information. The names of these producers were disclosed in the public version. On 21 May 2014, MOFCOM released its injury disclosure and the essential facts to all known interested parties, and provided an opportunity for comment.

9. On May 23, 2014, the Investigating Authority issued its Notification on Hearing and on May 30, 2014, the hearing was held. The domestic parties declined to attend the hearing. The U.S. Government, Tyson Foods Inc and Pilgrim's Pride Corporation attended the hearing. At the hearing, the U.S. Government gave a presentation. The U.S. exporters choose not to make their own presentations, but they attended.

III. MOFCOM ABIDED BY ITS PROCEDURAL OBLIGATIONS UNDER THE ANTI-DUMPING AGREEMENT AND THE SCM AGREEMENT

A. China Did Not Act Inconsistently with Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

10. This U.S. claim falls outside the Panel Request. The U.S. claim cites to documents that do not even exist, and does not "present the problem clearly" as required by Article 6.2 of the DSU. It only identifies MOFCOM's alleged failure to disclose questionnaires submitted to the domestic industry and it is preceded by the phrase "for example". Although such language might serve to specify a previously generally identified measure, it does not reference any specific part of the Redetermination, and instead references only "questionnaires" that do not even exist.

11. Even if the claim were properly raised, it nevertheless fails on its merits as factually incorrect and legally baseless. The U.S. argument simply ignores all of the disclosure, including the initiation notice of re-investigation, the general verification letter, and the public versions of verification exhibits, that took place earlier in the process and was more than sufficient to satisfy Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

B. China Did Not Act Inconsistently with Article 6.4 and Article 6.5 of the Anti-Dumping Agreement and Articles 12.3 and 12.4 of the SCM Agreement

12. This U.S. claim is outside the Panel's Terms of Reference because it does not identify the "specific measures" at issue nor does it provide a "brief summary of the legal basis" for its claim. The U.S. purports to have identified the "specific measures" at issue and to have provided a "brief summary of the legal basis" but there are several key aspects of this language that ignore the requirements of Article 6.2 of the DSU. In its First Written Submission, the U.S. contends that China acted inconsistently with certain specific provisions, yet paragraph 5 of the Panel Request does not even mention Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement at all. Nor do the claims under Articles 6.4 and 12.3 present the problem clearly. To include these provisions now would be contrary to Article 6.2 of the DSU.

13. Even if the Panel were to consider such claim as within its Terms of Reference, the U.S. claim that MOFCOM acted inconsistently with these provisions is without merit. These provisions require that relevant information provided by one party in an investigation is promptly made available to other participating parties. China promptly made available evidence in writing to the interested parties participating in the investigation in accordance with these provisions by releasing as timely as possible – that is on the very same day of receipt – the Public Versions of the Post-Verification Exhibits by the domestic producers and by providing to all interested parties in the reinvestigation access to the files in the Public Information Room.

14. The United States has dropped its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. But even if considered, this claim fails. MOFCOM provided the parties with access to all relevant information through notice and public summaries. The parties had sufficient time to prepare their defenses and in fact did so.

C. China Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

15. MOFCOM in fact disclosed the "essential facts" to Pilgrim's Pride. The U.S. narrative is factually inaccurate. MOFCOM not only provided Pilgrim's Pride with all of the data and calculations used in the reinvestigation, which included the data from the original investigation, but also discussed its corrections with Pilgrim's Pride. In fact, MOFCOM made additional adjustments to its calculations based on Pilgrim's Pride input, further evidencing that Pilgrim's Pride in fact had all of the essential facts necessary to have a meaningful participation.

16. The other objection raised by the United States is that Pilgrim's Pride received the essential facts too late. This statement is factually wrong. MOFCOM disclosed the essential facts to Pilgrim's Pride at the opportune moment and before its decision was final. Moreover, MOFCOM discussed its corrections with Pilgrim's Pride. By indicating calculation errors and corresponding corrections, Pilgrim's Pride was fully aware of the data and calculations of dumping margin from the original investigation. Consequently, there is no factual basis to argue that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride.

17. MOFCOM also disclosed essential facts to Keystone. The U.S. argument fails to note that although Keystone was duly notified of the reinvestigation through the publication of Notice No. 88 on MOFCOM's website, and that MOFCOM also attempted to contact Keystone directly, as well as through the U.S. Embassy, Keystone refused to participate in the reinvestigation proceedings. The precise calculations were business confidential information, and could not be released publicly. Since Keystone did not duly appoint any representative, there was no one to whom MOFCOM could have disclosed such confidential information and so MOFCOM was limited in its ability to disclose. Nonetheless, it is clear in the Redetermination that MOFCOM did comply with its obligation to disclose essential facts to Keystone.

IV. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 2.2.1.1, 6.8, 9.4, AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

A. China Did Not Act Inconsistently with the Second Sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

18. In terms of Pilgrim's Pride, the U.S. claim is outside the Panel's terms of reference because nothing in the Panel request provided a summary sufficient to understand this particular claim. But even if the U.S. claim is within the Terms of Reference, it fails because it depends on a finding that the Panel in fact never made. The Panel finding under the second sentence of Article 2.2.1.1 applied only to Tyson and Keystone, not to Pilgrim's Pride. MOFCOM made no change in the redetermination proceedings with regard to Pilgrim's Pride on cost allocations because the Panel had made no finding that MOFCOM needed to address in its Redetermination.

19. With regard to the Tyson claim, the United States misstates the nature of the obligation under the second sentence of Article 2.2.1.1. This provision requires only that the authority "consider all available evidence". MOFCOM did in fact "consider all available evidence" on the alternative cost allocation proposed by Tyson, including whether they were "historically utilized" by Tyson, as required by Article 2.2.1.1. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs and instead applied a weight-based cost allocation to Tyson for the products under investigation.

20. MOFCOM made the reasonable choice to adopt a weight allocation for the meat cost of the product under consideration, and not to include products not under consideration, and explained its rationale for doing so in some detail. The U.S. claim that Tyson's costs of blood and feathers were not allocated appropriately under MOFCOM's weight based allocation method is flawed.

21. First, the Redetermination confirms the original determination that MOFCOM reasonably replaced Tyson's flawed value-based allocation method with a weight-based allocation method to allocate meat cost among different models of the product concerned – the edible parts of the broiler products. Tyson had misused the price of offal (waste products) to estimate unreasonably the cost of paws (edible products), which led to distorted costs for each model of the product concerned. The Redetermination confirms MOFCOM's reasonable rejection of Tyson accounting

records for allocating the cost of each model of the product concerned. The United States does not challenge it under the first sentence of Art. 2.2.1.1.

22. Second, Tyson treated the inedible part of the broiler product – blood and feathers – as waste products under its cost allocation. Unlike the treatment of edible products, the Redetermination finds that the use of prices of waste products to allocate the cost of inedible products did not unreasonably reflect costs, which also means that Tyson's accounting records on this specific point could be accepted. The United States does not challenge MOFCOM's finding under the first sentence of Art. 2.2.1.1.

23. Third, the essence of the U.S. claim is to challenge appropriateness of the MOFCOM's rejection of Tyson's alternative by using a total live-chicken weight-based method under second sentence of Art.2.2.1.1. This U.S. alternative, however, is not based on any cost allocation that had been historically utilized by Tyson, and cannot be considered as evidence under second sentence of Art. 2.2.1.1.

24. Fourth, Tyson tried to obfuscate the nature of the different products to distort the costs. For instance, at the beginning, Tyson tried to confuse offal and broiler products such as paws; later, Tyson tried to equate the waste products, such as feathers and blood, with edible products including the products concerned; finally, Tyson even tried to treat dead birds equally with live chicken. Tyson argued for all these alternatives for the same purpose – to obscure the nature of different products to distort the costs. The Tyson approaches that the United States now defends could not reasonably reflect the cost of the product concerned, nor appropriately allocate the costs for the product concerned. It would depart from common sense notions about edible products and non-edible products, primary products and waste products, and basic antidumping rules to distinguish the product concerned and the non-product concerned.

25. The U.S. argument is little more than a disagreement with MOFCOM's determination on this issue. The United States is essentially asking the Panel to second-guess MOFCOM and substitute the Panel's opinion about the proper cost allocation for the decision that MOFCOM made on this issue.

B. China Did Not Act Inconsistently with Article 6.8 of the Anti-Dumping Agreement with Respect to Tyson

26. The United States focuses exclusively on the MOFCOM`s decision to apply "facts available", but presents no argument at all about MOFCOM`s choice of particular facts. The Appellate Body and several panels have concluded that Article 6.8 and Annex II impose a particularly high standard on responding parties, explaining that a respondent is required to act "to the best of its ability". Failing that, the investigating authority is entitled to resort to facts available under Article 6.8. Furthermore, even if an interested party cooperates and acts "to the very best of its ability", if the requested information is not obtained, investigating authorities may resort to facts available.

27. Tyson did not meet this high standard during the reinvestigation. There were significant discrepancies between what Tyson said about costs in the original proceedings and what Tyson was saying in the redetermination proceedings. In the original Panel proceeding, the United States claimed that MOFCOM did not allocate Tyson's product-specific processing cost as they were actually incurred in the production of those specific products. MOFCOM made repeated efforts during the reinvestigation to obtain the cost of raw material used to grow broiler chickens, without any processing costs. Yet, Tyson never satisfactorily provided this information and did not participate in the original investigation and reinvestigation proceedings to the "best of its ability". Instead, Tyson provided MOFCOM with unreliable and inconsistent answers to several questionnaires. For instance, the meat cost was discovered containing processing costs, while some processing costs became negative. Under these circumstances, MOFCOM was completely justified in applying "facts available" under Article 6.8 and Annex II.

C. China Did Not Act Inconsistently with Article 9.4 of the Anti-Dumping Agreement Through the "All Others" Rate Assigned to Exporters or Producers that did Not Identify Themselves

28. The United States argues that China acted inconsistently with Article 9.4 of the Anti-Dumping Agreement by setting a rate for those exporters who did not identify themselves for purposes of the proceeding based on the rate applied to Pilgrim's Pride rather than the weight average of rates for individually investigated companies.

29. The argument is mistaken because Article 9.4 does not apply to the "all others" rate set in the underlying proceeding. In the underlying proceeding "all others" pertained to producers and exporters who did not cooperate in the selection of respondents. Thus, the facts involved in MOFCOM's reinvestigation do not implicate Article 9.4 of the Anti-Dumping Agreement. The flaw in the U.S. argument is in its apparent assumption that "all others" as used by MOFCOM in the reinvestigation has the same meaning the U.S. Department of Commerce assigns to "all others" in its own domestic proceedings. In U.S. Department of Commerce cases, "all others" refers to those parties not asked to cooperate in the investigation. But this term was used differently by MOFCOM. In the reinvestigation "all others" referred to those companies that chose not to register and provide information as requested in MOFCOM's Notice of Initiation.

V. MOFCOM'S REDETERMINATION IS CONSISTENT WITH ARTICLES 3 AND 12 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15 AND 22 OF THE SCM AGREEMENT

A. China's Price Effects Analysis Was Consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1, 15.2, and 15.4 of the SCM Agreement

30. The United States makes two specific and relatively narrow claims concerning MOFCOM's price effects analysis, focused on: (i) the way that MOFCOM found price undercutting, and (ii) the implications of that price undercutting for the price suppression analysis. Both claims should be dismissed.

31. First, the United States claims that MOFCOM failed to ensure objective price comparisons in its underselling analysis because the product-specific price data relied upon for that purpose were not representative. But this argument fundamentally misstates MOFCOM's analysis to create the false issue of representativeness. In its original determination MOFCOM analyzed annual trends in the average unit price of subject imports and in the price of the domestic like product. The Panel found that differences in product mix risked affecting price comparability and distorting any price effects analysis if steps were not taken to control for product mix, or if necessary adjustments were not made. Consistent with the Panel's findings and conclusions, MOFCOM's Redetermination took steps to control for differences in physical characteristics affecting price comparability to determine if any adjustments were necessary.

32. Specifically, MOFCOM performed an additional round of on-site verifications of the domestic industry in order to collect supplemental price data with which to distinguish among product specifications. MOFCOM also analyzed product-specific import statistics from Chinese Customs and cross-checked it with export data from the respondents. MOFCOM's approach was sufficiently representative for the limited purposes to which it was applied. MOFCOM found that imports from the United States were concentrated in products that the Chinese market valued at the high end of the value chain. As such, any bias existing in its aggregate AUV price comparison in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product. Therefore, MOFCOM's use of AUVs to reflect price undercutting was a cautious and conservative approach given the specific facts of this case.

33. Having met its obligations to take additional steps to ensure that product mix and price comparability were not problems in this specific case, MOFCOM reasonably relied on price undercutting based on overall annual AUVs for the domestic industry. These AUVs reflected all products for all 17 domestic firms that were part of the domestic industry as defined by MOFCOM, and as previously upheld by the Panel.

34. Second, the United States also claims that China failed to establish that subject import prices had the effect of suppressing domestic like product prices. But this U.S. claim also relies upon a mischaracterization of the record and MOFCOM's approach in the redetermination. MOFCOM did not rely solely or principally on its price undercutting findings, and presented various other reasons in support of its price suppression analysis.

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

35. At the outset, we note this claim is outside the Panel's Terms of Reference. There were no changes in the MOFCOM determination on this issue and therefore no measure taken to comply with regard to this issue now before the Panel. To find otherwise would sanction China for not making changes when no changes were required, and would deny China any chance to bring its findings into conformity with regard to this issue.

36. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. By doing so the United States ignores the totality of the evidence before MOFCOM, and selectively picks time periods to create the illusion of a domestic industry doing well, when it in fact was suffering material injury.

37. The United States makes three analytical errors. First, it focuses on an earlier period, the period from 2006-2008, and ignores the sharp declines in various indicators during the most relevant and most recent period, the first half of 2009. Second, it also ignores MOFCOM's findings that U.S. exporters may expand exports to China, causing continued adverse effects to the domestic industry. Material injury at the end of an investigative period reinforced by expected near term trends is still material injury. Third, it focuses on volume indicators, and ignores the weak financial indictors over the entire period. A domestic industry with net operating losses every year is suffering material injury.

38. The U.S. arguments regarding two specific injury indicators, production capacity utilization and end-of-period inventories, are similarly flawed. Note that although Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement list numerous factors to be considered in the examination of the impact of the subject imports, the United States raises claims about only two. MOFCOM's Redetermination included "an evaluation of" these two factors, and thus complied with the relevant obligation. That the United States disagrees with how MOFCOM evaluated these two factors does not mean the MOFCOM evaluation was not an "objective examination".

C. China Properly Demonstrated the Causal Link Required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

39. At the outset, China notes that certain aspects of this U.S. claim are beyond the Panel's Terms of Reference. The third part of the U.S. claim – that MOFCOM did not reconcile its causation analysis with the improving domestic industry performance – was excluded from the Panel Request and cannot be included now.

40. The Appellate Body has repeatedly made clear that a causation requirement in the context of a trade remedy proceeding requires only that the imports under investigation have contributed in some meaningful way to the injury being suffered by the domestic industry. The Appellate Body was careful to clarify that the authority need not show that the subject imports were the only cause, or the major cause, of the injury.

41. Thus, the burden on the United States in making a *prima facie* claim under Articles 3.5 and 15.5 is to demonstrate that MOFCOM failed to show that subject imports were making a meaningful contribution to the material injury. On the other hand, China can defeat the U.S. claim simply by showing that MOFCOM reasonably found that subject imports were contributing in some way to the material injury.

42. Second, MOFCOM did not rely on a flawed analysis of price effects as the sole basis of its discussion of causal relationship. Rather, MOFCOM reasonably relied on both a proper price undercutting analysis and a proper price suppression analysis as legally independent bases for

adverse price effects. Moreover, in the Redetermination, MOFCOM also proved that the differences in the product specifications alleged by the United States has not distorted the price undercutting reflected in the average prices comparison, and the price undercutting reflected in the average prices comparison was not caused by differences in the specifications. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

43. Third, MOFCOM did not fail to reconcile its causation analysis with trends over the period. Rather, it is the U.S. argument that tries to ignore and downplay the sharp declines in the first half of 2009 and the dismal financial performance over the entire period of investigation. The existence of some positive trends does not negate the conclusions MOFCOM drew from weak and deteriorating financial performance over the period. Thus, MOFCOM's determination that subject imports were causing injury is not based on a flawed impact analysis.

D. China Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

44. Contrary to the U.S. argument, MOFCOM did not "merely reiterated its unfounded assertions" regarding gains in domestic market share. The United States may not agree with MOFCOM's conclusion, and the focus on other aspects of the factual record to draw its conclusions about causal link, but MOFCOM sufficiently addressed this issue.

45. MOFCOM noted the specific U.S. argument about the domestic industry market share, and then responded at length in the original determination. MOFCOM again noted this specific argument during the redetermination process, and then responded once again. As MOFCOM summarized: "During the whole injury investigation period, the quantity of the produce concerned had increased sustainably, and the imports prices were at a low level, which resulted in significant undercutting and suppression to the domestic like product, impacted by which, the domestic industry have been suffering long-term losses, the pre-tax profit margin and ratio of return on investment have stayed at a very low level". There is no doubt that MOFCOM addressed this issue and explained why it rejected the U.S. argument. As important, the Panel previously addressed this same U.S. argument, and rejected the U.S. argument. The United States has not presented any reasons for the Panel to reach a different conclusion in this Article 21.5 proceeding.

46. Also contrary to the U.S. argument, the impact of subject imports of chicken paws was in fact injurious and MOFCOM explained why. The U.S. argument focuses on the physical quantity of chicken paws in isolation, without addressing the price effects that were so important to MOFCOM's causation analysis. MOFCOM addressed this issue twice: once in the original determination, and again in the Redetermination.

47. The Redetermination proceedings provided particularly relevant discussions relating to chicken paws, and the importance of considering not just the physical quantity but also the prices. The Redetermination collected data that showed price undercutting for chicken paws ranging from 9.51 percent to 24.74 percent. The volume of chicken paws, therefore, was lower priced and had adverse price effects on the domestic industry. The Panel has previously addressed this same U.S. argument. In the original proceeding, the Panel found that MOFCOM would need only to cross reference its rejection of the argument in the preliminary determination. That is precisely what MOFCOM has done, referencing the preliminary determination and the lack of any need to repeat those findings again. This is more than sufficient. The United States now simply repeated the argument from the original investigation. Therefore, there is no new element that MOFCOM needed to address other than cross-referencing the preliminary determination.

VI. THE REDETERMINATION IS CONSISTENT WITH ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT 1994

48. The United States raised three consequential claims in its Panel Request but did not present any substantive arguments in this regard. It appears that the United States has decided to waive these three consequential claims as it did not even present a *prima facie* case regarding these claims. Even if the Panel decides to reach these claims, they fail for reasons explained above.

VII. CONCLUSION

49. For the reasons set forth above, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's WTO obligations under all of the covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

INTRODUCTION

1. The themes that China highlighted in its First Written Submission continue to apply after the U.S. Second Written Submission. The United States has not seriously addressed any of these concerns. First, the United States continues to press several claims that are wholly or partially beyond the Panel's terms of reference. Since China's arguments under Article 6.2 of the DSU go to the Panel's very jurisdiction to hear those challenged claims, the Panel has no choice but to address those arguments and confirm the precise limits of the Panel's jurisdiction in this dispute.

2. Second, the United States continues to assert a single approach to issues for which the text of the relevant obligation contemplates a range of approaches, arguing that MOFCOM should have agreed with the U.S. respondents and their efforts to distort the per unit cost of producing different types of edible broiler parts, and to dismiss the injurious impact of the increasing volume of low-priced subject imports. But MOFCOM met its obligation by unbiasedly and objectively considering all available evidence and alternative cost allocations, and then explaining reasonably, objectively, and thoroughly why it chose one reasonable and proper allocation method, as mandated by Article 17.6 of the Anti-Dumping Agreement, as well as why Tyson's alternative was not acceptable. It met the same obligation by objectively and reasonably ensuring that its underselling analysis, based on a comparison of aggregate average unit values ("AUVs"), was not distorted. The underselling found was not merely a function of product mix. Indeed, the U.S. contention that that price of chicken paws is lower than the price of chicken breast was proven false. Thus, the analysis conservatively showed that imports undersold the domestic like product given the extremely limited volume of breast imports.

3. Third, the United States continues to press claims that make little sense in light of what the United States did not challenge in MOFCOM's Redetermination and concedes was WTO consistent. The specific U.S. claims must be evaluated in the context of the overall Redetermination. The MOFCOM Redetermination addressed all the findings made by the Panel in its original report, and did so in a way that respected China's obligations under the Anti-dumping and SCM Agreements.

I. CHINA RAISES SERIOUS OBJECTIONS UNDER ARTICLE 6.2 OF THE DSU THAT THE UNITED STATES SEEKS TO DISREGARD

4. The United States filed a deficient Panel Request that prevented China from anticipating the scope of several of the claims the United States raised in its First Written Submission. In its Second Written Submission, the United States attempts to disregard China's challenges under Article 6.2 of the DSU, claiming them to be "irrelevant or extraneous matters" to implementation proceedings under Article 21.5 of the DSU. This is simply wrong. On numerous occasions panels and the Appellate Body have affirmed the fundamental nature of an assessment of the scope of their jurisdiction in consideration of the text of the panel request, emphasising the due process objective of such assessment. They have also affirmed that such a jurisdictional assessment is relevant and applicable to implementation procedures under Article 21.5 of the DSU. The United States failed to identify with sufficient detail the measures taken to comply with the original panel report by China that it seeks to challenge, nor did it identify the specific omissions or deficiencies in such measures. Instead, the United States presents broad references, ambiguous language, and seeks to challenge unchanged aspects of the original determination. If also fails "to provide the legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies".

II. MOFCOM'S REDETERMINATION FULLY COMPLIED WITH THE PROCEDURAL OBLIGATIONS OF THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM Fulfilled Its Obligations Under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement

5. The claims under Article 6.1 of the Anti-Dumping Agreement and 12.1 of the SCM Agreement fall outside the panel's terms of reference and should be dismissed without consideration of its merits. The United States has failed to demonstrate that a reference to the Redetermination *in toto* accompanied by the use of non-exclusive language suffice to satisfy the requirements of Article 6.2 of the DSU in respect of its claim under Articles 6.1 and 12.1.

6. Moreover, China complied with its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. This U.S. claim rests on an artificial isolation of the procedural steps adopted by MOFCOM in the reinvestigation. But the facts for the reinvestigation taken as a whole show that the U.S. respondents were provided with the information requested from the Chinese producers, including their identities. The facts also show that through the hearing held by MOFCOM on 30 May 2014 at the request of the U.S. parties, they were provided with ample opportunities to present evidence in writing but only the United States chose to do so on June 3. The other parties failed to do so.

B. MOFCOM Fulfilled Its Obligations Under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement

7. The United States has not rebutted China's arguments for dismissing the U.S. claims under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement. Once again, the U.S. claim rests on the basis of an untenable mischaracterization of China's procedural obligation and should be rejected by the Panel.

8. First, as China explained in its First Written Submission, the United States simply failed to cite Article 6.1.2 and Article 12.1.2 in its Request for Panel. Given the nature of the obligations contained in the sub-provisions of Article 6 and 12, the absence of the reference to these specific sub-provisions is fatal for the proper identification of the legal basis for the U.S. claim. It therefore falls outside of the terms of reference of the Panel.

9. Second, and even if the Panel were to consider the U.S. claim as within its terms of reference, China respectfully submits that the claim must still be dismissed on the merits as legally baseless. The United States has fundamentally mischaracterized MOFCOM's obligations under these specific provisions, emptying them of content and equating them to its obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. Contrary to what the United States argues, by releasing the public versions of the verification exhibits in the Public Reading Room, MOFCOM promptly made available non-confidential evidence provided by the Chinese producers in the reinvestigation.

C. MOFCOM Fulfilled Its Obligations Under Articles 6.4 and 6.2 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement

10. The Panel should also dismiss the U.S. claims under Articles 6.4 and 6.2 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. Once more, the United States attempts to fault China for the failure of the U.S. respondents during the redetermination proceeding and as such these claims are factually incorrect and legally baseless.

11. First, the United States fails to rebut China's terms of reference objection with respect to these claims. China has demonstrated that a general reference to the Redetermination accompanied by the language "for example" and followed by the reference to a non-existent measure does not suffice to fulfil the identification requirement set forth in Article 6.2 of the DSU in respect of the U.S. claims under Articles 6.4 of the Anti-dumping Agreement and 12.3 of the SCM Agreement. Furthermore, the United States is bringing a new claim under Article 6.2 of the Anti-dumping Agreement not included at all in its Request for Panel. China respectfully submits that these claims should be rejected without consideration of their merits.

12. Second, and even if the Panel were to consider these claims within its terms of reference, China submits that the United States fails to demonstrate that MOFCOM breached its obligations under Article 6.4 of the Anti-dumping Agreement and Article 12.3 of the SCM Agreement. In particular, the United States fails to demonstrate that the U.S. respondents were denied by MOFCOM access to the record where the public version of the information provided by the Chinese producers is located. Nor has the United States demonstrated that China failed to give the U.S. respondents opportunities to make a presentation of their views.

13. It should be further noted that the United States does not contest China's argument in respect of the waiver of its claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement. Indeed the U.S. Second Written Submission confirms such waiver. While the United States includes a reference to this provision in the title of the section where it attempts to rebut China's terms of reference objections, these claims are not substantially argued by the United States.

D. MOFCOM Did Not Act Inconsistently with Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the Essential Facts

14. The U.S. arguments rest on the mistaken assumption that the "essential facts" in a reinvestigation proceeding are the same as the "essential facts" of the original investigation. According to the United States, any and all facts of the original investigation are also essential facts in the Redetermination. This view is wrong. The facts of the original investigation do not automatically become essential facts in the reinvestigation, and so what constitutes an "essential fact" of the reinvestigation might be different from what constitutes an "essential fact" of the original investigation. As a consequence, MOFCOM was not under the obligation to automatically disclose any and all data and calculations from the original investigation to all parties to the reinvestigation, except insofar as they were also "essential facts" for purposes of the Redetermination.

15. As regards Pilgrim's Pride, the United States argues that MOFCOM breached Article 6.9 because (1) it did not inform Pilgrim's Pride of all of its data and calculations from the original investigation; and (2) it disclosed the information too late in the process for Pilgrim's Pride to defend its interests. Both arguments are mistaken. First, MOFCOM only had to disclose the "essential facts" considered during the Redetermination proceedings. MOFCOM nonetheless disclosed data from the original investigation to Pilgrim's Pride. Second, the timeline of the disclosure presented by the United States is misleading. The facts show that Pilgrim's Pride made good use of the information and had ample opportunity to defend its interests before MOFCOM. In fact, MOFCOM made adjustments to its margins based on Pilgrim's Pride comments. In light of these circumstances, the U.S. argument that MOFCOM acted inconsistently with Article 6.9 as regards Pilgrim's Pride must be rejected.

16. The arguments concerning Keystone are equally misguided. MOFCOM recognizes that, notwithstanding Keystone's non-cooperation, MOFCOM had an obligation to disclose "essential facts" to Keystone. But China submits that MOFCOM properly discharged this obligation because the "essential facts" as regards Keystone are not the same as those of a cooperating party. In any case, MOFCOM was unable to disclose all data and calculations to Keystone, either directly or through the U.S. Embassy, in light of its failure to appear in the proceedings or duly appoint a representative to receive confidential information.

III. MOFCOM'S DUMPING REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Allocation of Tyson's Costs Was Consistent With Article 2.2.1.1

1. The second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs" and MOFCOM did so

17. This U.S. claim about Tyson is wrong both legally and factually. Legally, the United States tries to read more into the second sentence of Article 2.2.1.1 than the provision requires. China has presented an interpretation grounded in the text and context that the United States still has

not addressed: the second sentence of Article 2.2.1.1 requires only that the authority "consider all available evidence on the proper allocation of costs". China now confirms that interpretation by showing it better reflects the three equally authentic texts of Article 2.2.1.1 and the meaning of "proper", "juste", and "adecuada" in that provision. Moreover, under the second sentence of Article 2.2.1.1 the allocations not "historically utilized" by the exporter should not be considered as "evidence" for the authority. The "proper" allocation shall be interpreted in the context of Article 2.2.1.1 as whole; a cost allocation which is reasonably reflected under the first sentence of Article 2.2.1.1 shall be considered as "proper" under the second sentence. The United States, by withdrawing its claim on "reasonable reflection" under the first sentence and limiting its claim to "proper allocation" under the second sentence, presents an argument unhinged from that context. Finally, there is no legal requirement under Article 2.2.1.1 to investigate all products, as wrongly claimed by the United States.

18. China is not arguing that the authority can adopt an "improper" allocation of costs. China's point is that there is not a single "proper" allocation like the solution to a math problem. Rather, there are range of permissible "proper" allocations, provided the authority has considered the alternatives and sufficiently explained its reasoning. MOFCOM met this obligation.

2. MOFCOM reasonably rejected the Tyson alternative cost methodology as not correctly reflecting costs

19. In the original investigation, Tyson's records did not reasonably reflect the cost of the product under consideration because Tyson misallocated the price of offal (waste products) to certain edible products, such as paw. MOFCOM corrected the distortion applying a weight-based methodology to allocate costs to specific models of the product under consideration.

20. Factually, MOFCOM thoroughly explained why it rejected Tyson's proposed alternative methodology. During the original panel proceedings, the Panel found insufficient evidence in the determination itself of MOFCOM's consideration. Given this finding, during the reinvestigation, MOFCOM clarified the facts and then explained the effect of Tyson's misallocation and its distortion in much more detail its reasons for adopting a weight-based allocation for the product under consideration, and for not accepting the Tyson alternative weight-based allocation for all products. MOFCOM thus complied with all findings by the original Panel, and eliminated any procedural deficiencies of MOFCOM's original determination.

21. After reviewing the Redetermination, the United States has not pursued its original claim for "reasonable reflection" under the first sentence, nor its prior claims under the second sentence that blood and feather were not allocated any cost under MOFCOM's weight-based method, and has now shifted to a claim about whether the cost allocation for blood, feathers, and other inedible parts was proper under the second sentence of Article 2.2.1.1, and whether all available evidence on the proper cost allocation had been considered. Indeed, the United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false.

22. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between the products under consideration and those products <u>not</u> under consideration, a distinction well-grounded in the anti-dumping practice and the specific facts of this particular investigation. The United States tries to misrepresent a statement by this Panel, reading a narrow statement about the "ambiguity" of a document as somehow embracing the U.S. substantive theory about how costs should be allocated. This time there is no ambiguity. China has submitted Tyson's Table 6.3, and the U.S. argument does not address this actual document. The Redetermination sets forth at some length the numerous and specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. Tyson's alternative was not supported by its accounting records, was deficient in terms of missing data (dead birds), was not verifiable (no indication of accounting sources), and was contradictory (unit costs were incomparable to previously reported costs). The U.S, argued that only a reallocation of costs to all products (not to the products under consideration only) by weight can justify the MOFCOM's weight-based allocation method. This is fundamentally wrong. It is indeed Tyson itself to have applied different cost method for edible and inedible products (waste products) in its accounting practice. In response, the U.S. arguments invite the Panel to substitute its views for those of authority, something contrary to the standard of review in Article 17.6(i) of the Anti-Dumping Agreement.

B. MOFCOM's treatment of Pilgrim's Pride's costs was also consistent with Article 2.2.1.1

23. This U.S. claim about Pilgrim's Pride is also wrong. One legal defect is that this claim about Pilgrim's Pride is outside the Panel's terms of reference. The Panel had not made any findings about Pilgrim's Pride under the second sentence of Article 2.2.1.1 and the U.S. Panel Request must be read in that context. Article 6.2 of the DSU does not allow the United States to craft a vague claim and then define that claim only later during the dispute.

24. Another legal defect is that the United States now seeks to enforce a finding the Panel never made. The finding in the original Panel Report regarding the second sentence of Article 2.2.1.1 did not apply to Pilgrim's Pride. MOFCOM completely implemented the Panel's actual finding. Since the Panel had accepted MOFCOM's decision to reject the Pilgrim's Pride reported information as unreliable, it underscores that the Panel finding about the second sentence was limited to those companies that had submitted reliable information as mentioned by the Panel in its conclusion.

25. A final legal defect is that the United States has not presented any argument in support of its claim sufficient to establish a *prima facie* case. Merely asserting that China did not comply with the finding – without any legal or factual discussion – is not enough to establish a *prima facie* case. And the MOFCOM explanations of the reasons for choosing the weight based allocation more than rebut the unsupported U.S. argument.

C. MOFCOM acted consistently with Article 9.4 of the Anti-Dumping Agreement in its selection of the rate for "all others"

26. The United States continues to argue the general rule of Article 9.4 that when an investigation is limited according to the second sentence of Article 6.10 an all-others rate shall not exceed the weighted average margin of dumping of the selected respondents. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

27. Finally, the U.S. assertion that exporters subject to MOFCOM's all-others rate were not asked to cooperate in MOFCOM's *reinvestigation* is irrelevant. The Panel in the original proceeding expressly upheld the sufficiency of MOFCOM's notice to interested parties. MOFCOM had no obligation as part of its implementation of DS427 to offer such parties a second opportunity to cooperate through the reinvestigation.

D. MOFCOM acted consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement with respect to Tyson

28. Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information. Since Tyson did not provide MOFCOM with the necessary data, MOFCOM was thus forced to turn to the "facts available" on the record – which included the data provided by Tyson. The United States does not challenge MOFCOM's legal argument nor the proposed standard that a responding party has to act to the "very best of its ability" or face the consequence that the investigating authority may resort to facts available. Rather, the United States challenges only the factual basis for MOFCOM's decision to resort to facts available, attempting to show that Tyson acted "to the best of its ability", while remaining silent on MOFCOM's choice of data as "facts available".

29. MOFCOM's purpose in the Redetermination was to implement the Panel's findings. The Panel found that MOFCOM's weight-based method was improper because the U.S. respondents such as Tyson claimed that China did not determine the real processing cost occurring at each processing step to each specific model. Thus, MOFCOM sought to ensure proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon earning the result from the Panel, Tyson complained in the redetermination that MOFCOM sought too much information. To the contrary, MOFCOM sought

only what was claimed by Tyson and required of it by the Panel, and without such information it could not accomplish its task. Tyson was the cause of this result.

30. China reiterates that responding parties such as Tyson are required to act to the very best of their ability when responding to the investigating authority. Failure to do so entitles the investigating authority to resort to facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement. The United States has neither disputed the existence of this rigorous standard, nor China's interpretation of this standard. Instead, the United States attempts to shift the debate by focusing on Tyson's failed attempts at responding adequately to MOFCOM's questionnaires and trying to explain away the deficiencies of Tyson's responses. The United States is mistaken. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement. The reinvestigation was driven by Tyson's claims, yet Tyson was not then prepared to comply through the provision of adequate information. Even if that was the "best" of Tyson's ability, MOFCOM was fully justified in resorting to facts available in light of the fact that it did not receive the necessary information from Tyson.

IV. MOFCOM'S INJURY REDETERMINATION WAS CONSISTENT WITH THE ANTI-DUMPING AND SCM AGREEMENTS

A. MOFCOM's Analysis of Underselling and Price Suppression Were Consistent with Anti-Dumping Agreement Articles 3.1 and 3.2 and SCM Agreement Articles 15.1 and 15.2

31. The United States continues to claim that MOFCOM took "no action" that complied with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. As established by China, MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel in this proceeding.

32. Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing. This approach was a reasonable and objective method to address the issue of price comparability consistent with Article 17.6 of the Anti-Dumping Agreement. From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products. This was the Panel's concern, and therefore MOFCOM's approach was the direct way to address that concern. The evidence showed that, contrary to U.S. understanding about the value of different parts of the chicken in the Chinese market, U.S. imports were actually concentrated in high value products, and therefore price comparisons conducted on an aggregate AUV basis would be reasonable – there would be no risk that any price underselling showing in the comparisons would merely be the result of product mix. The United States is unhappy with MOFCOM's approach, but that does not make the approach unreasonable or WTO inconsistent.

33. With respect to price suppression, the United States adds nothing new. It repeats the same factual arguments that China already rebutted in its First Written Submission. The only new aspect of the U.S. argument is its insistence that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 under the SCM Agreement is the equivalent of the causation analysis called for under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. This much is confirmed from the very authority cited by the United States – the Appellate Body Report in *China – GOES* – in arguing the contrary conclusion. MOFCOM's Redetermination met the relevant standard.

B. MOFCOM's Analysis of Adverse Impact Was Consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

34. The United States complains that MOFCOM did not redo its analysis of adverse impact. This complaint, however, is misplaced for two reasons. First, since there was no measure taken to

comply and there was no need for MOFCOM to redo its analysis, this claim is outside the Panel's terms of reference for this Article 21.5 proceeding. It would be fundamentally unfair to subject China to potential consequences for acting inconsistently with Articles 3.4 and 15.4 when China has had no chance to react to specific concerns identified by a Panel. China and other WTO Members should not have to react to arguments, as opposed to findings by panels.

35. Second, MOFCOM's finding of adverse impact completely respected the obligations of Articles 3.4 and 15.4. MOFCOM expressly considered all enumerated factors, including those raised by the United States in its arguments. MOFCOM considered all those factors in context, putting particular weight on the domestic industry's consistently bad financial performance throughout the period, and the severely deteriorating overall performance at the end of the period in 2008 and early 2009. It is reasonable and objective to put particular weight on financial performance and the more recent period. That the United States can point to some positive trends for some factors earlier in the period does not render the MOFCOM findings unreasonable or biased. Those positive trends were discussed, but in the end MOFCOM correctly considered all of the factors.

C. MOFCOM's Analysis of the Causal Link Was Consistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

36. The United States continues to seek an impermissible expansion of its claim #3. The United States defined that claim as ignoring certain WTO provisions "because" MOFCOM's determination "was not based on an examination of all relevant evidence". This language is a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore, relates to the specific obligations found in the second sentence. The U.S. claim then specified the two categories of evidence that were ignored as part of the very same sentence. The claim was thus defined by reference to these two specific categories of evidence. The United States cannot now avoid the implications of its narrowly drawn claim and add a third and entirely different aspect about an alleged failure by MOFCOM to reconcile the causation finding with improving domestic industry performance. The Panel must see this effort for what it is and limit its consideration to the claim as it was specifically framed in the U.S. Panel Request.

37. Regarding the issue of chicken paws, the Panel finding on this issue was limited to the procedural claim about proper disclosure of the MOFCOM discussion. Since the United States had only raised the issue about chicken paws as a procedural claim under Article 12.2.2, the Panel only addressed that issue, and MOFCOM only addressed that issue. MOFCOM fully addressed the finding the Panel actually made regarding chicken paws. MOFCOM did precisely what the Panel required – which was a cross reference to the earlier discussion of this issue in the MOFCOM preliminary determination.

38. Turning to the merits of the U.S. claim, MOFCOM established the necessary causal link between subject imports and the condition of the industry, and that none of the U.S. arguments break this causal link. To this end, the United States concedes that MOFCOM need only show that subject imports contributed to the adverse condition of the domestic industry. The United States also concedes the adverse impact from the increasing volumes of low-priced subject imports that undersold domestic prices. These subject imports injured the domestic industry throughout the period of investigation (as reflected by the consistent operating losses), and led to a dramatic fall in indicators from 2007 to 2008, and in early 2009. Its rebuttal consists of an argument that MOFCOM did not consider certain other facts, that MOFCOM did not examine "all" relevant evidence. But this argument is wrong. The Redetermination shows that MOFCOM did consider "all relevant evidence".

39. First, MOFCOM did not ignore the evidence regarding domestic market share. China addressed this point at some length in its First Written Submission. The United States simply ignores that discussion. Second, MOFCOM did not ignore the evidence regarding chicken paws. The United States asserts that imports of chicken paws "could not have injured the domestic industry", but this assertion is just wrong and rests on several flawed premises about the market and the evidence before MOFCOM. Third, MOFCOM did not ignore the evidence of correlations between subject imports and the condition of the industry. The United States largely repeats is own prior arguments, without addressing China's arguments. The United States continues to cite the change by comparing 2006 to 2008, in a disingenuous effort to mask the sharp decline from 2007 to

2008, and to avoid the further decline in interim 2009. Overall, the domestic industry had an unacceptable level of financial performance throughout the period of investigation. Finally, the United States also makes a consequential claim based on allegedly defective MOFCOM analysis of price effects. But as already discussed MOFCOM did not rely on a defective analysis of price effects.

40. In sum, MOFCOM established that subject imports were contributing to the adverse condition of the domestic industry, and established the requisite causal link, particularly given the absence of any other possible causes. The Panel should uphold the Redetermination as fully consistent with Articles 3.1 and 15.1 as well as Articles 3.5 and 15.5.

D. MOFCOM Properly Addressed Key Causation Arguments as Required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement

41. The United States reiterates its earlier argument that MOFCOM did not really address in the Redetermination the substance of the arguments made in the proceeding, but does not really respond to China's arguments that MOFCOM in fact did address these arguments. Regarding domestic market share, the U.S. argument is really a complaint that MOFCOM considered all of the evidence and put into context the single fact that the domestic industry gained market share with all of other facts showing a domestic industry suffering material injury because of unfairly traded subject imports. The United States apparently thinks that increasing domestic share is somehow entitled to more weight than other facts, but it is not. Regarding chicken paws, the United States continues to argue that MOFCOM's response was not enough, but without addressing either of China's arguments. China explained how the Redetermination included new information about the price effects of chicken paws, including specific margins of chicken paw price underselling; further, China also explained that it made the very correction to the final determination the Panel had suggested.

V. MOFCOM'S REDETERMINATION WAS CONSISTENT WITH ARTICLE I OF THE ANTI-DUMPING AGREEMENT, ARTICLE 10 OF THE SCM AGREEMENT, AND ARTICLE VI OF THE GATT

42. The United States presents no argument at all in support of its three consequential claims. Although these claims were raised in the Panel Request, they were not mentioned at all in the First Written Submission. It is not enough to raise a consequential claim in a Panel Request and then present no argument at all. These claims have either been waived, or the United States has failed to present a *prima facie* case. The United States has not responded to this legal objection at all. The Appellate Body has made clear that (1) the complaining party bears the burden of proof with regard to its claims, and (2) a *prima facie* case requires more than just an allegation without any discussion of the facts or legal basis. In this dispute, the United States has made this issue easy for the Panel by providing no discussion at all in the U.S. First Written Submission, and essentially no rebuttal or discussion in the U.S. Second Written Submission. For these reasons, whatever the Panel decides about the other U.S. claims, it must reject the U.S. consequential claims as not having been established.

CONCLUSION

43. For the reasons set forth in China's First Written Submission and Second Written Submission, China respectfully requests the Panel to reject all of the U.S. claims and to find that the Redetermination is fully consistent with China's obligations under all of the covered agreements.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF CHINA AT THE SUBSTANTIVE MEETING OF THE PANEL

1. This document summarizes the key points presented by China during its opening and closing statement at the substantial meetings with the Panel on 25 and 26 April, 2017.

2. China notes at the outset that the United States has effectively abandoned one of its claims under the first sentence of **Article 2.2.1.1 of the Anti-dumping Agreement** and its other two claims under the second sentence. The U.S. claims that MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 by including costs for products not subject to investigation into the costs for the products subject to investigation.

3. China did not address in detail the U.S. argument concerning Pilgrim's Pride as Panel acknowledged in its preliminary ruling on jurisdictional issues that in the original dispute, the Panel made no specific findings of violation under the second sentence of Article 2.2.1.1 regarding Pilgrim's Pride. But even if the Panel allows the U.S. claim on Pilgrim's Pride cost allocation, the United States merely asserted that China did not comply with the findings and has not provided any legal or factual discussion during this proceeding. This is not enough to establish a *prima facie* case.

4. In regards of Tyson and what it concerns the proper allocation of cost, China considers that the U.S. interpretation of the second sentence in isolation from the context provided in the first sentence improperly eliminates the logical interrelationship between the two sentences, an approach that is contrary to the U.S. interpretative approach in the original dispute. Instead, it is China's belief that Article 2.2.1.1 focuses on the correct process to consider evidence for the proper allocation of costs and that the second sentence needs to be read in conjunction with the first sentence of Article 2.2.1.1. Indeed, the "proper" allocation of costs under the second sentence is supplemental to "reasonable" reflection under the first sentence of Article 2.2.1.1. Since China's weight-based allocation method does "reasonably reflect" the cost under first sentence, it should be considered as the "proper" allocation of costs under second sentence of Article 2.2.1.1. China's argument is that, depending on the facts of each case, there may well be more than one "proper" way to allocate costs. China's interpretation has not been challenged by the United States and can be confirmed easily by looking at the text of Article 2.2.1.1 in all three authentic languages.

5. The United States challenges MOFCOM's decision to reject Tyson's proposed alternative cost methodology. However, China notes that MOFCOM's redetermination satisfies the Panel's ruling in the original proceeding; and that MOFCOM was entitled under Article 2.2.1.1 not to accept Tyson's proposal as evidence since it had not been historically utilized. This has been confirmed by the findings of the panel in *US – Softwood Lumber V* and the U.S. position in that case.

6. As to the factual grounds of this claim, China noted that during the original investigation MOFCOM found that Tyson's records did not reasonably reflect the cost of the product under consideration because it misused the price of offal (waste products) to estimate the cost of certain edible products, such as paws. MOFCOM corrected the distortion by applying a weight-based methodology to properly allocate costs to specific models of the product under consideration. During the reinvestigation, MOFCOM clarified the facts surrounding Tyson's costs and MOFCOM's findings, and explained in much more detail why MOFCOM decided to adopt a weight-based allocation for the products. In short, the problem is that Tyson tried to confuse the product subject to investigation with products not subject to investigation to assert that MOFCOM did not properly reallocate the cost to all products.

7. The Redetermination sets forth at some length the four specific reasons why MOFCOM did not accept Tyson's alternative methodology, none of which have been shown to be unreasonable or biased by the United States. First, Tyson did not take into account weight loss resulting from dead birds. Second, Tyson provided only the cost of product under investigation in Table 6-3 without including weight and cost of non-subject product. Third, MOFCOM did not determine that

the cost allocation methodology for non-subject products was unreasonable. And fourth, Tyson did not provide the cost of live chickens used for the product concerned.

8. The United States essentially argues that the scope of the product concerned included blood and feathers, which is plainly false. The Redetermination shows that MOFCOM reasonably and objectively drew a distinction between subject products and non-subject products. This distinction is well-grounded in the anti-dumping practice and the specific facts of this particular investigation. Moreover, Tyson was fully aware of the distinction. For example, in the original investigation, Tyson submitted cost table 6-3 listing many specific products, all edible, none inedible; and in the reinvestigation, when it submitted some information on products not within the scope in its first supplemental questionnaire response, Tyson provided that information under the heading "inedible".

9. MOFCOM's definition of the subject products (i.e., edible products) is reasonable. The United States cannot require MOFCOM to use a different definition because doing so violates Article 17.6(ii) of the Anti-Dumping Agreement – requiring MOFCOM to replace its permissible interpretation of the like product (i.e., edible products) with a different one.

10. In respect of the U.S. claim under **Article 6.8**, China notes that Tyson did not cooperate with MOFCOM to the best of its ability, and also did not provide MOFCOM with the necessary information as requested. Consequently, MOFCOM was thus forced to turn to the "facts available" on the record –facts that were based on the data provided by Tyson. For the purpose of implementing the findings by the original Panel, MOFCOM sought to ensure a proper separation of processing and meat costs, and to identify the detailed processing costs incurred at each processing step for each specific model. Yet, upon learning the result from the Panel, Tyson complained during the redetermination proceeding that MOFCOM sought too much information while Keystone failed to cooperate in the redetermination. Tyson's conduct did not meet the rigorous standard under Article 6.8 and Annex II of the Anti-Dumping Agreement.

11. We now turn to the **Article 9.4** issue. The United States argues that when an investigation is limited according to the second sentence of Article 6.10, an "all-others" rate shall not exceed the weighted average margin of dumping of the selected respondents as per the general rule of Article 9.4. But Article 9.4(i) does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. MOFCOM required all exporters to identify themselves through registration. Those who did not register did not make themselves known to MOFCOM.

12. Let me turn to **price suppression and underselling**. The U.S. claim is that MOFCOM took "no action" to comply with the Panel's instructions "to control for differences in physical characteristics affecting price comparability" or to make any "necessary adjustments" to ensure price comparability in its underselling analysis. But MOFCOM's Redetermination directly responded to the principal concerns raised by both the United States and the Panel by collecting the full range of product specific pricing data from the verified producers in the reinvestigation –and by expressly addressing the product mix issue.

13. First, under **Articles 3.2 of the Anti-Dumping Agreement** and **15.2 of the SCM Agreement**, MOFCOM is free to select its own method of pricing analysis, provided it conducts an "objective examination" of "positive evidence"; and two, the Panel did not require MOFCOM to abandon its use of average annual AUVs. MOFCOM was simply required to "consider" whether there was "significant" price undercutting and had ample discretion to choose its methodology.

14. MOFCOM disproved the U.S. assertion that subject imports were dominated by low value products. MOFCOM examined: (1) import data compiled by China Customs; (2) export data provided by USPEEC; (3) product-specific pricing by four domestic producers, data which was verified during the Redetermination; and (4) the prices shown on the invoices. This data proved that imports were concentrated in high value products, suggesting that any comparison of aggregate AUVs would work against the domestic industry, not in favor. The United States no longer directly challenges this argument; rather, it attacks the representativeness of the domestic data. The United States effectively conceded the point in the redetermination proceeding and now

seeks to ignore this reality. But the reality is clear: in the Chinese market even Tyson charges more for products like paws than products like chicken breast.[1]

15. First, MOFCOM has the discretion to select the method it considers best depending on the particular circumstances of the investigation. And second, MOFCOM's underselling analysis was based on complete industry data, not the data of four producers. There was no sampling of data. MOFCOM's limited examination of product-specific data was merely to confirm the two key points: (1) whether U.S. imports were concentrated in lower value products; and (2) whether the overall AUV comparison was conservative, including whether the underselling would have been higher using product specifications. On both points, the supplemental analysis confirmed MOFCOM's conclusions in the original determination, an approach that is both reasonable and objective.

16. As to price suppression, it needs to be noted that MOFCOM considered the combined effects of increasing volume and underselling and found price suppressing effects from both. As explained in the redetermination, the dumped and subsidized imports had two effects. First, they created a situation of price undercutting. Second, they also caused price suppression, as reflected in the decreasing profit levels. Both of these effects were the result of the dumped and subsidized subject imports.

17. The United States further insists that an authority's obligation to establish the explanatory force of subject imports with respect to price suppression under Articles 3.2 of the Anti-dumping Agreement and 15.2 of the SCM Agreement is equivalent to the causation analysis under Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. But Articles 3.2 and 15.2 only require the authority to "consider" the "effect of such imports" in its analysis of price suppression. The mere existence of price suppression alone is not enough, but this does not mean that Articles 3.2 and 15.2 require a full demonstration that subject imports caused the price suppression. In this case, MOFCOM's Redetermination met the relevant standard.

18. The United States complains that MOFCOM did not redo its entire analysis of adverse impact. But contrary to the U.S. complaints, the Panel did not make a finding requiring MOFCOM to carry out its analysis anew.

19. In its redetermination, MOFCOM listed the injury factors, and then provided an explicit overall discussion of how those factors interacted and how subject imports were explaining that adverse impact. MOFCOM was careful in drawing an explicit link to both lower domestic prices and lower domestic profits. MOFCOM also discussed the causal link extensively, and explained how the subject imports were linked to specific injury indicators. The increasing volume and market share of low priced subject imports led MOFCOM to conclude: (1) such imports had a "material impact on the sales price" of the domestic industry; (2) the domestic industry could not "reach a reasonable profit margin"; (3) domestic industry capacity utilization "has been on a relative low level"; (4) the return on investment was on a "relative low level"; and (5) the inconsistent cash flow "impacted the investment and financing". **Articles 3.4 and 15.4** expressly include these as injury factors.

20. The other arguments raised by the United States also miss the point. Contrary to the U.S. argument, the prospect of future imports is not irrelevant to MOFCOM's current injury analysis. China presented a specific argument regarding the meaning of the key phrase "potential decline". In China's opinion, this language contemplates a forward-looking analysis. The United States simply ignores this part of the text of Article 3.4 and instead cites to language from the decision of the Appellate Body in *China – GOES* that was not addressing this specific issue. The United States has simply not responded to China's argument based on the text.

21. The weak capacity utilization reinforced the severe financial problems of the domestic industry, and reinforced MOFCOM's finding of current material injury. First, the United States has not seriously challenged MOFCOM's finding about increasing inventories; in fact, it largely dropped this part of its claim and does not address at all the increase in inventory in 2009. The U.S. argument on adverse impact thus comes down to its argument about capacity utilization. Yet by focusing on one or two of the many injury factors, the United States misses the point that although the authority must address each factor, the authority need not show that each individual

[1] *See, e.g.,* https://list.tmall.com/search_product.htm?q=%CC%A9%C9%AD&type=p&vmarket=&spm=875.7931836%2FB.a2227oh.d100&from=mallfp..pc_1_searchbutton (listing Tyson chicken prices in China).

factor by itself has been linked to subject imports. The authorities are to consider all the factors, but then consider them as a whole when making the broader conclusion that subject imports have explanatory force with regard to the condition of the domestic industry.

22. The evidence on the record fully supports MOFCOM's finding. China's argument is straightforward: by definition, any volume of subject imports was having some impact on the excess domestic capacity. Any volume not supplied by subject imports would have been available for domestic suppliers. Even if non-subject imports supplied some of that volume, domestic suppliers would also have supplied some and therefore, would have had higher capacity utilization.

23. Instead, the United States argues that there was low capacity utilization because of expanding domestic capacity. Regardless, the rate of utilization would have been higher, but for the presence of increasing volumes of subject imports.

24. MOFCOM properly focused on the actual situation of the domestic industry, and properly found material injury consistent with Articles 3.4 and 15.4.

25. Let me briefly touch on the issue of **causation**. We refer the Panel to paragraph 31 of the U.S. opening statement and the U.S. claim that MOFCOM in its redetermination ignored U.S. arguments concerning increasing market share. There, the United States cites to a single page in the redetermination and contends this constitutes MOFCOM's entire analysis of the market share issue as contended by China in its First Written Submission. The United States ignores other sections of China's First Written Submission, such as paragraph 385, where China demonstrated that MOFCOM took into account all the factors as a whole, including market share. The United States also ignored China's discussion of this issue at paragraphs 345 and 346 of its Second Written Submission. But perhaps most glaring is that the United States ignored MOFCOM's specific response to this U.S. argument about market share at page 79 of its Redetermination, which is provided as Exhibit China-1. The redetermination, read as a whole, clearly addresses and responds to the U.S. argument.

26. China wishes to conclude its remarks with two very important matters that we believe play a very important role and that came to a head during these meetings.

27. The first is the standard of review under **Article 17.6.** A Panel's role is to review the authority's determination, but not to arrive at its own separate conclusion about what the Panel would have done under similar circumstances. To this end, we expect the Panel to conclude that if MOFCOM's redetermination was reasonable, it will be upheld, even if the Panel would have approached the matter differently.

28. Second, China believes it is extremely important to establish and respect who bears the burden of proof in this proceeding. China requests the Panel to review whether the United States has met its own burden by presenting evidence in support of its claim. To this end, the fact that China has produced a document at the request of the Panel does not necessarily mean that the burden has shifted to China.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 26 April 2017.

2. On the United States' **procedural claims relating to disclosure requirements**, the European Union notes that following the Panel's Preliminary Ruling of 22 March 2017, the United States' claims under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement (ADA) are outside the Panel's terms of reference, while the United States' claims under Articles 6.1 and 6.4 ADA are within the Panel's terms of reference.

3. The European Union considers that **Article 6.4 ADA** is more directly relevant to the alleged omission than Article 6.1 ADA. The data provided by the domestic firms, which was the main pillar of the revised price effects analysis, is "relevant information" "used by the authorities" pursuant to Article 6.4. MOFCOM thus had to give interested parties a timely opportunity to see such information and prepare presentations accordingly. "Timely opportunities" means that the information must be made available early enough in the process, so that the comments can still be taken into account in the decision-making of the investigating authorities. The European Union invites the Panel to closely scrutinize whether this was the case here.

4. The European Union is of the view that the obligations set out in **Article 6.1 ADA** (both alternatives) concern information requests to those parties that are supposed to hold the relevant information. It should not be read as establishing a general obligation to systematically *notify* any information request to all players in the investigation, regardless of whether the information required falls within their remit.

5. On **Article 6.9 ADA**, the European Union considers that calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority's calculations, constitute essential facts pursuant to Article 6.9. As far as the redetermination is concerned, this means that all data and calculations for determining this duty must be disclosed, including data from the original investigation, if it was determinative/ relied on in the redetermination. On the other hand, data from the original investigation which had no direct relevance for the re-determined duty would not qualify as an essential fact. Where facts available are used to determine a duty, the same disclosure obligation applies in principle. Thus, specific data and calculation methods used must be disclosed, subject to the requirements of Article 6.5 ADA.

6. Regarding the United States' **claims on dumping**, the European Union's position is that **Article 2.2.1.1 ADA** sets up a substantive obligation of proper cost allocation, not just a procedural obligation to consider evidence. Such a procedural obligation would be void and empty if it did not reflect, and were not tied to, the existence of a substantial obligation. In this regard, the European Union agrees with the original Panel[1] and the panel in *EC – Salmon (Norway)*[2] that the allocation method applied by an investigating authority must not result in the calculation of a cost of production that includes costs not "associated" with production and sale of this product in the period of investigation. The European Union also agrees with the United States that the allocation method used must be applied consistently. Thus, if the allocation is done on the basis of weight, and not value, costs which occur with regard to the whole chicken, must be spread over all products according to their weight, even if they generate little value – to the extent they are associated with the product in question.

7. On the use of facts available pursuant to **Article 6.8 ADA**, the European Union stresses that the aim of the provisions on the use of facts available is not to punish non-cooperating interested parties. It is to allow investigating authorities to arrive at accurate determinations based on reliable data, where interested parties do not provide such data. Thus, an investigating authority is

[1] Panel Report, paras. 7.196-7.197.
[2] Panel Report, *EC – Salmon (Norway)*, paras. 7.491, 7.507.

allowed to replace any necessary information that has been requested from an interested party but has not been provided, whatever the reason for not providing it (non-cooperation or not). To the extent that information is not missing, for instance because the respondent has provided partial information, it cannot be replaced[3], unless it is unreliable. Non-cooperation is one case where data is considered unreliable, but there are others, as Annex II.3 ADA shows. Untimely submission which makes a necessary verification impossible is one example. Another example, a selective submission of data, where one sub-set of data is provided but not another one, may cast doubts on the reliability of the whole data set. In this context, costs of production have been identified as a particularly crucial sub-set of data, the absence of which may very well have ramifications beyond the pure cost analysis. If an investigating authority wants to disregard data as unreliable, the burden of substantiating the unreliability falls on the authority; lack of cooperation will make findings of unreliability more plausible.

8. Regarding the United States' **claims relating to the findings on injury**, as far as the price effects analysis under **Article 3.1 ADA** is concerned, the European Union notes that the requirement to base the "determination of injury" on positive evidence and an objective examination extends to all fundamental elements of the injury analysis. Any finding on this issue should thus be supported by "positive evidence" pursuant to Article 3.1 ADA (i.e., evidence of an affirmative, objective and verifiable character, which is credible[4]), which is gathered, inquired into and, subsequently, evaluated in a way that conforms to the basic principles of good faith and fundamental fairness. The analysis must be based on data which provides an accurate and unbiased picture of what it is that one is examining[5]. The European Union acknowledges that where samples are used, the samples must be "properly representative of the domestic industry"[6]. Samples that represent a too low proportion of the domestic industry can be problematic.

9. However, in the European Union's view, the standards for representativeness of samples for general price levels of products (as at stake in the present case) are not necessarily the same as for samples on price trends. Price trends depend on a range of factors and easily vary from one segment of the industry to another, in particular due to different economic performance of different segments of the industry. On the other hand, the European Union would a priori imagine that the difference in value of certain product types is less likely to change fundamentally according to which segment of the industry is being looked at, as it does normally not depend on the economic performance of the industry segment in question. Depending on the circumstances of the case, a smaller sample could thus be sufficient for assessing differences in value of product types.

10. On the impact analysis under **Article 3.4 ADA**, the European Union expects that the Panel will be guided by the high standard that the Appellate Body has set in this field. According to this standard all factors having a bearing on the state of the industry must *always* be evaluated by the investigating authorities in every investigation[7]; this evaluation consists of an analysis and interpretation of the facts established in relation to each listed factor, its role, relevance and relative weight[8]. Where several factors show positive trends, an overall evaluation of all factors becomes even more indispensable. This evaluation, which puts data on all factors in context to each other, must explain why and how, *despite the positive factors*, the domestic industry was injured, and whether and how the positive movements were outweighed by any other factors[9].

11. The Panel might wish to examine in particular the two main aspects highlighted by China, namely the weaker financial indicators and the trends in the first half of 2009, in order to assess how "heavy" they weigh in relation to the other factors examined, in particular those that were positive. The European Union invites the Panel to assess carefully whether the consideration that China submits it has given to all relevant factors is apparent not only from the submissions to the Panel, but duly reflected in relevant documentation from the investigation[10].

[3] Appellate Body Report, *Mexico – Anti-Dumping measures on Rice*, para. 288.
[4] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192; *China – GOES*, para. 126.
[5] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; *China – GOES*, para. 126.
[6] Appellate Body Report, *EC – Fasteners (China)*, paras. 435–436.
[7] Appellate Body Reports, *China – HP-SSST*, paras. 5.203-5.209, and cases cited therein.
[8] Panel Reports, *Egypt – Steel Rebar*, paras. 7.42-7.51; *EC – Tube or Pipe Fittings*, para. 7.314
[9] Panel Reports, *Thailand – H-Beams*, paras. 7.249 and 7.255; *Korea – Certain Paper*, para. 7.273.
[10] Appellate Body Report, *China – GOES*, para. 131.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. In this proceeding, Japan addresses its views on systemic aspects regarding the interpretation of Articles 2.2.1.1, 3.1, 3.2, and 6.9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA") and Articles 15.1 and 15.2 of the Agreement on Subsidies and Countervailing Measures (the "SCM"), as well as regarding its view on judicial economy regarding the claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5. Japan does not take any particular position on factual aspects on this dispute.

I. MOFCOM'S Analysis of Price Comparability under ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2

2. The original panel found that the product mix of the subject imports and that of the domestic like products varied considerably. The subject imports were composed of limited parts of chicken products, including a high proportion of paws, legs, wings and gizzards, whereas the domestic like products included all other parts of chicken, including breast meat.[1] Despite such difference, MOFCOM simply compared their average unit values (AUVs) and found that the subject imports had undersold the domestic like products.[2] The panel found that the evidence showing price differences between different chicken parts "should [] have alerted MOFCOM to the fact that the outcome of its price comparison would be affected by the composition of each of the product 'baskets'".[3] The original panel thus found that MOFCOM failed to ensure price comparability in terms of product mix in violation of ADA Articles 3.1 and 3.2 and SCM Articles 15.1 and 15.2.

3. In this dispute, the United States alleges that, MOFCOM collected product-specific pricing data from four out of the seventeen domestic producers that constituted the domestic industry in the course of the Reinvestigation[4]. According to the United States, MOFCOM found that, these data from the four domestic producers show that chicken paws, legs, wings and gizzards were priced higher than other parts of chicken, indicating that subject imports consisted primarily of higher-value products, not lower-value products as respondents alleged.[5] MOFCOM thus concluded in the Redetermination that "the price undercutting reflected in the average price difference is not caused by different product mix".[6]

4. The United States argues in its first written submission that MOFCOM still failed to ensure the price comparability, because MOFCOM failed to establish that the data collected from only four domestic producers were sufficiently representative of the prices of the domestic like products.[7] The United States also argues that MOFCOM's analysis of price comparability is deficient.

5. China argues that MOFCOM's additional findings based on the product-specific price data in the Reinvestigation were made only to establish that the comparison based on the overall AUVs did not negatively bias the US producers.[8] China explains that "[i]f any bias existed in the comparison, it in fact favored U.S. producers, not the domestic industry, since U.S. imports were shown to be concentrated in high value products whereas the domestic industry sold the full spectrum of domestic like product."[9]

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[1] Panel Report, *China – Broiler Products*, para. 7.490.
[2] Panel Report, *China – Broiler Products*, paras. 7.490-494.
[3] Panel Report, *China – Broiler Products*, para. 7.493.
[4] United States' first written submission para. 145.
[5] United States' first written submission, para. 134.
[6] United States' first written submission, para. 38, quoting RID, Section VII (ii) (2) p. 18-19 (Exhibit USA-8).
[7] United States' first written submission, paras. 145-149.
[8] China's first written submission, para. 288. ("MOFCOM made additional findings about product-specific underselling based on the available data. But these findings were only to establish there was no bias in using the overall AUV approach.")
[9] China's first written submission, para. 274.

6. Japan agrees with the United States that the analysis of price effects of the subject imports on the domestic like products would not be performed properly unless MOFCOM would show that the product-specific price data collected by MOFCOM were sufficiently representative of the entire sales of the domestic like products. Other domestic producers, who were not reinvestigated by MOFCOM, may have different product-specific pricing. Thus, the investigating authority must make sure that the sales data on the chicken paws, legs, wings and gizzards collected from a limited number of domestic producers are sufficiently representative of the entire sales by the domestic industry.

7. In addition to the above, Japan notes that the need to ensure the price comparability between the subject imports and the domestic like products in conducting the price effects analysis is well-established in the WTO jurisprudence. According to the Appellate Body in *China – GOES*, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[10] The Appellate Body has stated that a failure to ensure price comparability is inconsistent with the requirement under ADA Article 3.1 and SCM Article 15.1, which provide that a determination of injury be based on "positive evidence" and involve an "objective examination".[11] The Appellate Body has emphasised that "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."[12] The requirement to ensure the price comparability between the subject imports and the domestic like products is therefore an integral aspect of the obligation to consider the price effects of subject imports under ADA Article 3.2 and SCM Article 15.2.

8. The requirement to ensure the price comparability between them is supported by the notion of the "logical progression of inquiry" under ADA Article 3 and SCM Article 15. Drawing on this notion, the panel in *China – X-ray Equipment* stated, in the context of ADA Article 3, that:

> It is precisely because the price undercutting analysis under Article 3.2 ultimately must be used to assess whether dumped imports "through the effects of dumping, as set forth in paragraphs 2 and 4" are causing injury to the domestic industry, that it is necessary to ensure the prices that are the subject of an undercutting analysis are comparable.[13]

9. As the panel in *China – X-Ray Equipment* also correctly observed, prices of the subject imports and the domestic like products are not comparable if they are not in a competitive relationship, and consequently do not interact to each other in the domestic market. The original panel also stated to this effect: "the focus of the comparison performed under ADA Article 3.2 and SCM Article 15.2 is on the competitive relationship".[14]

10. Recently, the Appellate Body has confirmed in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that the analysis "must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry within the meaning of Article 3.5 of the Anti-Dumping Agreement."[15] Accordingly, in order to reach the ultimate determination of the causation, "[a]n examination of the competitive relationship between products is … required so as to determine whether such products form part of the same market."[16]

11. It is therefore irrelevant whether the product-mix difference between the subject imports and the domestic like products would work in favour of the former or the latter. Japan considers that in this regard, China's argument does not speak to the propriety of such comparison and cannot cure the flawed price comparability analysis.

12. Japan also notes that the likeness finding between the product under investigation and the domestic like products as a whole would not provide sufficient basis to conclude that each

[10] Appellate Body Report, *China – GOES*, para. 200.
[11] Appellate Body Report, *China – GOES*, para. 200.
[12] Appellate Body Report, *China – GOES*, para. 200.
[13] Panel Report, *China – X-Ray Equipment*, para. 7.50. *See* also Panel Report, *China – Broiler Products*, para. 7.475. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.162.
[14] The original panel expressly stated that "the focus of the comparison performed under Articles 3.2 and 15.2 is on the competitive relationship between subject imports and domestic like products in the market of the importing Member". Panel Report, *China – Broiler Products*, fn 737.
[15] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.180.
[16] Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.262.

individual type of the products under investigation competes with, and accordingly are comparable with, each of the domestic like products.

13. In this regard, the panel in *China – X-ray Equipment* clarified that an investigating authority's conclusion of "likeness" for the purpose of defining the product under consideration and the domestic like products cannot automatically form the basis for the price comparability between individual products. The panel in *China – Autos (US)* also noted, "these issues arise at and relate to different stages of an investigation"[17], and accordingly, "[e]ven granting that a like product determination may be relevant as the starting point of an assessment of price comparability…it will not always be determinative".[18]

14. As the original panel found, "evidence of [price differences between different chicken parts] should in our view have alerted MOFCOM to the fact that the outcome of its price comparison would be affected by the composition of each of the product 'basket' [and would] have required MOFCOM to take necessary steps to ensure price comparability".[19] As discussed above, it is irrelevant whether the difference in product-mix would favour the US imports or the domestic products. The focus should be on whether, for example, chicken gizzards and chicken breasts are in a competitive relationship and thus comparable for the purpose of price effects analysis. If the average price of chicken gizzards is substantially higher than that of chicken breasts in the Chinese market, this suggests that different parts of chicken may have limited substitutability and a weak competitive relationship. If this is the case, a price undercutting of chicken gizzards would have little, if any, effects on the price of chicken breasts and thus the AUV comparison between the broad basket of the subject imports and that of the domestic like products would be inappropriate for the purpose of the price effect analysis under Articles 3.2 and 15.2. Japan invites the Panel to take into account these legal considerations in deciding on this issue in this dispute.

II. The Practice of Judicial Economy regarding the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5

15. The original panel found that MOFCOM's price effects analysis was inconsistent with ADA Article 3.2 and SCM Article 15.2. With respect to the United States' claims under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5, the panel exercised judicial economy and did not make any findings. The panel stated that making additional findings with regard to ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 would not assist the resolution of the dispute, because "[i]mplementing the Panel's findings with respect to MOFCOM's price effects analysis will require China to re-examine MOFCOM's Determination concerning the impact [and causation]".[20] However, in implementing the original panel's finding with respect to the price effects, MOFCOM did not change its impact analysis in the re-determination.

16. In this compliance proceeding, China alleges that MOFCOM was not in a position to change its impact analysis and causation analysis, given that the original panel exercised judicial economy and did not make any findings on whether its impact and causation analyses are WTO consistent. Irrespective of whether China's allegation is correct or wrong, Japan considers that it might have assisted in resolving this issue of dispute had the panel made findings with respect to ADA Articles 3.4 and 3.5 and SCM Articles 15. 4 and 15.5.

17. In this respect, Japan recalls that the Appellate Body has stated, in *Australia – Salmon* that "the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system.....A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member."[21] A panel should carefully assess how its findings or non-findings regarding a claim would affect the Member's implementation of DSB recommendations and rulings.

[17] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, fn 441.

[18] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, para. 7.278.

[19] Panel Report, *China – Broiler Products*, para. 7.493. *See also* Appellate Body Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.181 ("a proper analysis of price effects ought to have taken into account the fact that there were significant differences in the prices of these product types.").

[20] Panel Report, *China – Broiler Products*, paras. 7.555, 584.

[21] Appellate Body Report, *Australia – Salmon,* para. 223. (underline added).

18. In the Panel's preliminary ruling of 22 March 2017, the Panel held that the claims of the United States under ADA Articles 3.4 and 3.5 and SCM Articles 15.4 and 15.5 were within the terms of reference for this compliance proceeding. To secure a positive resolution of the current dispute, Japan encourages the Panel to make findings with respect to the claims of the United States that are within the terms of reference for this compliance proceeding.

III. Proper Allocation of Costs under ADA Article 2.2.1.1

19. With respect to ADA Article 2.2.1.1, Japan agrees with the United States that the investigating authority is required to evaluate all available evidence and undertake a "proper" allocation of cost to calculate the normal value. On this point, the original panel suggested that the investigating authority may weigh in mind the facts of a particular case under investigation when considering the evidence relating to cost allocation methods.

20. ADA Article 2.2.1.1 read together with Article 2.2, for the purpose of this paragraph, provides conditions an investigating authority needs to satisfy when constructing the normal value on the basis of production costs in the country of origin. Japan understands that in principle, the normal value should be an appropriate proxy of the price in the "ordinary course of trade" for the products when destined for the consumption in the exporting country. Japan notes that in circumstances where a certain part of joint-products has little commercial value in the exporting country's market, while all joint products are commercially marketed in the importing market, due to consumers' different eating habits, such facts in a particular case may need to be taken into account in calculating the dumping margin. The question is whether an investigating authority can take into consideration the actual market practices of relevant countries, such as differences in consumers' perceptions, as against only evidences of exporting countries, when deciding the proper allocation of costs.

21. In the original panel proceeding there was a debate on whether the investigating authority should have used weight-based cost allocation or value-based cost allocation. The issue disputed could be understood as whether the investigating authority may take into consideration the relevant countries' proper market practices under the circumstances of the case. In this compliance proceeding, the United States focused its argument on MOFCOM's use of alleged distortive weight-based allocation methodology in its redetermination, and challenged that MOFCOM's cost allocation methodology was not "proper". Japan considers that whether or not the cost allocation is "proper" cannot be determined in the abstract. If the investigating authority chooses to deviate from the cost allocation used by exporters and foreign producers, it should adhere to the actual market practices of the relevant countries and fully explain its deviation. In this regard, Japan views that China has not adequately explained why MOFCOM's decision regarding cost-allocation was "proper" based on the market practices of the relevant countries.

IV. Disclosure of Essential Facts

22. Finally, Japan would like to emphasise the importance of the disclosure of "essential facts" which form the investigating authority's basis of determination, pursuant to ADA Article 6.9.[22] The necessity to secure the transparency and due process of interested parties in anti-dumping investigations remains the same under reinvestigations. ADA Article 6.9 obliges the authorities to inform interested parties of the body of facts necessary for the authorities' process of analysis. In other words, disclosure by investigating authorities should provide the interested parties with the necessary information that enables them to comment on the completeness and correctness of the facts being considered by the investigating authority, and thus ensure a fair determination by the investigating authority. In light of the above, while Japan takes no position on the factual issues of this case, Japan respectfully request the panel to review the consistency of MOFCOM's disclosure during its reinvestigation with *AD Agreement* Article 6.9.

[22] Panel Report, *China – Broiler Products*, para. 7.90.

ANNEX E

PRELIMINARY RULING

ANNEX E-1

RULING BY THE PANEL ON JURISDICTIONAL ISSUES

22 March 2017

1 INTRODUCTION

1.1. In its written submissions, China has requested that the Panel rule a number of claims outside its jurisdiction. To enable the parties to better focus their arguments at the substantive meeting, we have decided to resolve at this stage of the proceeding China's assertions that certain US claims set out in its panel request[1] are outside the Panel's terms of reference either because they do not comply with Article 6.2 of the Dispute Settlement Understanding (DSU), or as a consequence of the Panel's exercise of judicial economy in the original dispute.

2 ARTICLE 6.2 OF THE DSU

2.1 Arguments of the parties

2.1.1 China

2.1. Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2 are not within the Panel's terms of reference because they are not set out in the panel request.

2.2. The claim under the second sentence of AD Agreement Article 2.2.1.1 in respect of Pilgrim's Pride is not within the Panel's terms of reference because:

a. the Panel made no findings in respect of Pilgrim's Pride under the second sentence of Article 2.2.1.1 in the original dispute[2];

b. cost allocation issues with regard to Pilgrim's Pride were not addressed by MOFCOM in the redetermination, and are therefore not before the Panel, and the original determination in this respect cannot be raised in this Article 21.5 proceeding[3]; and

c. the narrative language of the panel request concerns cost allocation issues related to Tyson and is unrelated to the reinvestigation of Pilgrim's Pride.[4]

2.3. Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 are not within the Panel's terms of reference because the panel request does not identify the specific measure[5] and does not "present the problem clearly". In particular, the panel request refers, as "an example", to documents that do not exist (i.e. questionnaires).

2.4. The United States asserts in its first written submission that MOFCOM failed to reconcile its causation analysis with the improving domestic industry performance. This assertion constitutes a new element of the claim under AD Agreement Articles 3.1 and 3.5 and SCM Agreement

[1] Request for the establishment of a panel by the United States, WT/DS427/11 and WT/DS427/11/Corr.1.
[2] China's first written submission, para. 131; second written submission, paras. 199 and 202.
[3] China's first written submission, para. 133.
[4] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[5] China's second written submission, para. 82:

> [T]he United States general reference to measures imposing AD/CVD duties to U.S. products, accompanied with the reference to the Redetermination without any further specification, does not fulfil the requirements of Article 6.2 of the DSU since it fails to identify with sufficient precision the challenged measure.

China's second written submission, para. 83: "China is arguing that the United States has failed to identify the measure".

Articles 15.1 and 15.5 that had not been set out in the panel request. In particular, the use of the word "including" in the panel request, as opposed to "including but not limited to", indicates an intention on the part of the United States to set out an exhaustive list of the elements of its claims under these provisions.

2.1.2 United States

2.5. In respect of the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, "China's argument is misplaced because it rests on an erroneous assumption: that the United States simply cited AD Agreement Article 6 and SCM Agreement Article 12 – and nothing more."[6] In fact, the panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[7]; thus, the United States "narrowed its concerns to those that flow from AD Agreement Article 6.1 and SCM Agreement Article 12.1".[8] The findings of the Appellate Body in respect of DSU Article 23 in *US – Countervailing Measures on Certain EC Products* that "there is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23"[9] and finding a claim within the panel's terms of reference as a result are "directly on point" in this context. In a similar way, the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1".[10] The claims are included in the claims under Articles 6.1 and 12.1 because the "factual predicate" is the same as that of the claims under Articles 6.1 and 12.1.

2.6. Regarding its claim under Article 2.2.1.1 with respect to Pilgrim's Pride, the United States asserts:

> The Panel Request clearly states that the United States is bringing a claim under the second sentence of Article 2.2.1.1. Moreover, the language the United States uses is with respect to "producers," not simply Tyson. There is no reason from the language of the claim to believe that the United States circumscribed its claim with respect to Tyson only.[11]

"[T]he DSU requires identification of measures and claims – not particular interested parties."[12] Because the Panel's findings under the second sentence of Article 2.2.1.1 in the original report were "with respect to consideration of allocation methodologies and allocation of processing [costs] extended to all respondents, including Pilgrim's Pride"[13], this matter falls within the jurisdiction of the Panel.

2.7. The "example" referred to in connection with the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 in the second sentence of paragraph 5 of the panel request is "wholly unnecessary" to the statement of the US claim as it was "simply a preview of what the United States might argue in its submissions".[14] In particular, "[t]he questionnaire is not the measure at issue; the continued imposition of AD and CVD duties are, including the conduct of the reinvestigation".[15]

2.8. In respect of the claim under AD Agreement Article 6.4 and SCM Agreement Article 12.3, the United States maintains it is clear that "the measures at issue are those that continue to lead to imposition of AD and CVD duties on U.S. broiler products";[16] the second sentence example simply foreshadows US arguments. In particular, the reference to questionnaires is simply an example.

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[6] United States' second written submission, para. 203.
[7] United States' second written submission, para. 204.
[8] United States' second written submission, para. 204.
[9] United States' second written submission, para. 205 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 111).
[10] United States' second written submission, para. 205.
[11] United States' second written submission, para. 212. (emphasis added)
[12] United States' second written submission, para. 211.
[13] United States' second written submission, para. 213.
[14] United States' second written submission, para. 195.
[15] United States' second written submission, para. 197.
[16] United States' second written submission, para. 207.

> Whether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers.[17]

2.9. In respect of the claim under AD Agreement Article 3.5 and SCM Agreement Article 15.5, "China conflates claims with arguments".[18] Responding to the arguments of China in respect of the scope of the term "including" in the panel request:

> What panel and the Appellate Body have appropriately recognized is that the term's open-ended meaning cannot be used to keep claims undefined. At no time has any panel or the Appellate Body ever found that it cannot be used as part of an indication to preview some – but not all – arguments.[19]

2.2 Relevant Law

2.10. Articles 7 and 6.2 of the DSU govern the jurisdiction of the Panel. Article 7 provides that, unless the parties agree otherwise, a panel shall have the standard terms of reference set out in that provision, which encompass the "matter referred to the DSB" by the complainant in the request for establishment. Article 6.2 sets out the requirements for a request for establishment of a panel (panel request), which describes the "matter referred to the DSB" and thus establishes the parameters of the jurisdiction of the panel. Article 6.2 states:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.11. It is well settled that:

a. The "matter" referred to the DSB comprises the measure(s) at issue and the claims as set out in the request for establishment.[20]

b. Where a matter, including claims, does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.[21]

c. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.[22]

d. A defect in the panel request may not be "cured" in later submissions.[23]

e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".[24]

f. There is a difference between the claims of a complainant and its arguments in support of those claims. The Panel may only address the claims set out in the panel request. However, arguments need not be included in the request for establishment, and a party may raise any arguments in support of those claims it wishes. Moreover, a panel is not limited to arguments submitted by the parties in resolving the matter before it, but may develop its own reasoning.[25]

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[17] United States' second written submission, para. 207.
[18] United States' second written submission, para. 220.
[19] United States' second written submission, para. 221.
[20] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[21] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; and *US – Carbon Steel*, para. 126.
[22] Appellate Body Report, *US – Carbon Steel*, para. 127.
[23] Appellate Body Report, *EC – Bananas III*, para. 143.
[24] Appellate Body Reports, *EC – Fasteners* (China), para. 597; and *India – Patents (US)*, para. 90.
[25] Appellate Body Reports, *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156.

g. Article 6.2 protects Members' due process interests in the course of dispute settlement.[26] At the same time, the procedural rules of the WTO should not be used as litigation techniques, but so as to promote the fair, prompt and effective resolution of disputes.[27]

h. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference, and may need to do so even in the absence of any request by a party.[28]

2.3 Analysis

2.3.1 Claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2

2.12. DSU Article 6.2 requires that a complainant "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint". It is axiomatic that "the listing of the treaty provision(s) allegedly violated is normally a prerequisite for a panel request to be consistent with Article 6.2 of the DSU".[29] At the same time, because a finding under DSU Article 6.2 goes to the parameters of our jurisdiction, deciding whether a claim is sufficiently set out in the panel request is not a mechanical task. Rather, we are required to read the panel request in its entirety; the statement of a claim may be inferred from the totality of a panel request, such that a complainant's failure to list a specific provision would not necessarily deprive a panel of jurisdiction to address a claim under that provision.[30]

2.13. The question before us in this proceeding is whether the US claims under AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2, as argued in its first written submission, were properly set out in the panel request. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[31]

On its face, the panel request does not refer to AD Agreement Articles 6.1.2 and 6.2 and SCM Agreement Article 12.1.2.

2.14. China's jurisdictional challenge is simple: AD Agreement Article 6.2 is not referred to in the panel request. The United States does not make any arguments in response to China's arguments. In the absence of any response from the United States that would explain that a claim under that provision is nonetheless set out in the panel request, we conclude that no claim under AD Agreement Article 6.2 is properly before us in this dispute.

2.15. According to the United States, the claim in respect of AD Agreement Article 6.1.2 and SCM Agreement 12.1.2 may be understood to be within the terms of reference under paragraph 5 of the panel request, because:

a. the US panel request "explicitly references AD Agreement Article 6.1 and SCM Agreement Article 12.1"[32];

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[26] Appellate Body Report, *US – Carbon Steel*, para 126; *Argentina – Import Measures*, Annex D-2, para. 4.26. This extends to third parties, to ensure that they receive "sufficient notice" of the specific measures that a complainant is challenging. (*Argentina – Import Measures*, Annex D-2, para. 4.20).

[27] Appellate Body Report, *Thailand – H-Beams*, para. 97 (citing Appellate Body Report, *US – FSC*, para. 166).

[28] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

[29] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.31.

[30] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.33. We also recall our findings to this effect regarding claims under Articles 12.2.2 and 22.5 of the AD and SCM Agreements respectively in the original panel report, para. 7.520.

[31] United States' request for the establishment of a panel, WT/DS427/11 (United States' panel request), para. 5.

[32] United States' second written submission, para. 204.

b. US concerns in respect of AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 "flow from" its concerns under AD Agreement Article 6.1 and SCM Agreement Article 12.1[33];

c. there is a "close relationship"[34] between AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 on the one hand, and the listed provisions on the other, in that the claims at issue are "a particular application of the broader obligation in AD Agreement Article 6.1 and SCM Agreement Article 12.1"; and

d. the claims at issue are included in the claim under AD Agreement Article 6.1 and SCM Agreement Article 12.1 because they have the same "factual predicate".

2.16. We recall that Articles 6.1.2 and 12.1.2 were addressed in the US first written submission but not mentioned in the US panel request. At issue is whether these Articles are so closely related to Articles 6.1 and 12.1 that, as a consequence, and in the light of the narrative in paragraph 5 of the panel request, the statement of claims specifically under Articles 6.1 and 12.1 may be found to include claims under Articles 6.1.2 and 12.1.2. To resolve this question, we first examine the provisions at issue. Articles 6.1 and 6.1.2 of the AD Agreement provide:

> 6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
>
> …
>
> > 6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

The corresponding provisions of the SCM Agreement, Articles 12.1 and 12.1.2, are largely identical – the minor textual differences are not relevant in this context.

2.17. AD Agreement Article 6 and SCM Agreement Article 12, entitled "Evidence", address a wide range of topics beyond strictly evidentiary matters and establish a number of diverse but often related obligations in respect of the conduct of anti-dumping and countervailing duty investigations. AD Agreement Article 6.1 and SCM Agreement Article 12.1 contain <u>two</u> distinct but related obligations on the investigating authority concerning the conduct of the investigation:

a. to give notice to all interested parties of information required by the investigating authorities; and

b. to provide to all interested parties an ample opportunity to present relevant evidence in writing.

AD Agreement Article 6.1.2 and SCM Agreement Article 12.1.2 require that non-confidential evidence presented in writing by one party must be made available to other participating interested parties promptly.[35]

2.18. There is no question that AD Agreement Articles 6.1 and 6.1.2 and SCM Agreement Articles 12.1 and 12.1.2 are related to some extent, as they all refer to the presentation of evidence in writing. However, it is not at all clear to us that Articles 6.1.2 and 12.1.2 are, as the United States argues, "nothing less than a specific application of the denial of opportunity that

[33] United States' second written submission, para. 204.
[34] United States' second written submission, para. 205.
[35] Articles 6.1.1 and 12.1.1, not at issue here, set out a time-frame for exporters and producers (and in countervailing duty investigations, interested Members) to reply to questionnaires they receive; Articles 6.1.3 and 12.1.3 require the provision of the full text of the application to known exporters and the authorities of the exporting Member, and other interested parties upon request, with due regard for the protection of confidential information.

AD Agreement Article 6.1 and SCM Agreement Article 12.1 require".[36] Articles 6.1.2 and 12.1.2 require that evidence submitted by one interested party in writing be made available promptly to other participating interested parties. In our view, this is a very different obligation from those set out in Articles 6.1 and 12.1, requiring notice of the information required and "ample opportunity" for interested parties to present relevant evidence in writing. Thus, while the obligation in Articles 6.1.2 and 12.1.2 may be related to the "ample opportunity" to present evidence in writing required under Articles 6.1 and 12.1, compliance with the one does not require or establish compliance with the other. It is entirely possible for an investigating authority to give notice of the information required and ample opportunity to submit evidence in writing, but fail to ensure that evidence presented in writing is made available promptly to other interested parties, and vice versa. Neither in form nor in substance do we consider the provisions so "closely related" that the statement of a claim under Articles 6.1 and 12.1 in a panel request can, without more, be understood to include a claim under Articles 6.1.2 and 12.1.2. Merely that Articles 6.1.2 and 12.1.2 concern information submitted in writing pursuant to the opportunity required by Articles 6.1 and 12.1, does not suffice to bring the former within the scope of the latter.

2.19. Nonetheless, according to the United States, "The U.S. Panel request explicitly references the lack of opportunity afforded by MOFCOM in the reinvestigation thus placing clear parameters on the scope of the claim."[37] This, we understand, refers to the statement in paragraph 5 of the panel request concerning "ample opportunity to present in writing all evidence they considered relevant". This language is in the text of Articles 6.1 and 12.1. It does not appear in Articles 6.1.2 and 12.1.2. Moreover, it is not clear to us how the failure to make information submitted in writing available to other interested parties is linked to the alleged lack of ample opportunity to present evidence in writing referred to in the narrative in paragraph 5 of the panel request. This reference cannot, in our view, bring the asserted failure to make information available within the scope of the obligations in Articles 6.1 and 12.1, and thus paragraph 5 fails to state a claim under Articles 6.1.2 and 12.1.2. The United States also relies on its first written submission to "confirm" the scope of its claim in the panel request. However, given our view that the panel request, read as whole, does not state a claim under Articles 6.1.2 and 12.1.2, there is nothing to "confirm".

2.20. In the light of the foregoing, we find that the United States' claims under Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 are not within our terms of reference.

2.4 Claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement and 12.1 and 12.3

2.21. The question before us in this context is whether the claims under AD Agreement Articles 6.1 and 6.4 and SCM Agreement Articles 12.1 and 12.3 as set out in the panel request provide the required clarity and specificity. The questions at issue are similar and so we deal with them together.

2.22. Paragraph 5 of the panel request states:

> Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[38]

Paragraph 4 of the panel request states:

> Articles 6.4 and 6.5 of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to

[36] United States' second written submission, para. 205.
[37] United States' second written submission, para. 205.
[38] Emphasis added.

disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.[39]

2.23. China's principal argument is that "the United States has failed to identify the measure".[40] Moreover, because no "questionnaires" were sent to domestic producers, these claims as set out in the panel request caused China puzzlement. The use of the words "for example" does not save each claim by enlarging it to encompass other forms of information request than "questionnaires". Neither claim presents the problem "clearly"; each is therefore inconsistent with DSU Article 6.2.

2.24. The United States responds that:

a. the measures at issue are "those that continue to lead to imposition of AD and CVD duties on U.S. broiler products" and the panel request properly identifies the measures by explicitly referencing the reinvestigation[41];

b. the reference in the panel request to "the questionnaire" foreshadows US arguments, and is not relevant to the identification of the claim[42]; and

c. "[w]hether MOFCOM called its information requirements a questionnaire, or verification, or anything else, the critical point is that MOFCOM did not provide a timely opportunity to see the information it obtained from Chinese domestic producers."[43]

2.25. Articles 6.1 and 12.1 require notice of the information required by the investigating authorities. Articles 6.4 and 12.3 require the authorities to provide opportunities to see relevant non-confidential information used by the authorities. The alleged violation in respect of each provision as stated in the panel request is an omission: that is, for Articles 6.1 and 12.1, the alleged failure to provide "notice of the information which the authorities require", and for Articles 6.4 and 12.3, the alleged failure to "provide interested parties timely opportunities to see all non-confidential information that was relevant to their case". As an "example" of the information subject to these requirements, the panel request refers to "questionnaires [MOFCOM] submitted to Chinese domestic producers during the re-investigation".

2.26. We make the following observations:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The question, then, is whether the references to questionnaires as examples in paragraphs 4 and 5 of the panel request result in the claims as set out not presenting the problem "clearly":

i. China asserts that no questionnaires were sent to Chinese producers. All MOFCOM did in the course of the reinvestigation was engage in a verification exercise. At the same time, however, throughout the redetermination MOFCOM states that it not only verified the information it had, but sought and obtained additional information.[44] Whether or not "questionnaires" in some formal sense were used in this effort, there were clearly requests made to Chinese domestic producers for further information, and information was submitted.

ii. Where, as in this case, claims are based on alleged omissions by the investigating authority, the investigating authority is in possession of information that it allegedly did not give notice of as required under Articles 6.1 and 12.1, and did not provide

[39] Emphasis added.
[40] China's second written submission, para. 83.
[41] United States' second written submission, para. 207.
[42] United States' second written submission, para. 207.
[43] United States' second written submission, para. 207.
[44] We note also China's second written submission, para. 252: "Specifically, MOFCOM conducted on-site verifications of four producers for the purposes of collecting additional information on product-specific pricing." (emphasis added)

ample opportunities to see under Articles 6.4 and 12.3. The complaining Member, of course, does not know what the relevant information is, or in what form it was required or received – or indeed, whether it exists – but does believe that information was requested and submitted to the investigating authorities. In these circumstances, it is difficult to see how the complainant could be expected to pin-point with any precision in a panel request information (including its format – in the form of a questionnaire or otherwise) it does not have and might not even know about.

iii. Whether a claim as set out in the panel request presents the problem clearly depends on not just the specific words used in the panel request but also the underlying obligations. The term "questionnaire" has a generally understood technical meaning in the context of anti-dumping and countervailing duty practice more generally; MOFCOM might not have sent a "questionnaire" in the technical sense to domestic producers during the reinvestigation. But that does not render the claim as a whole, which refers to "questionnaires" only as an example of the problem, opaque to the point of vitiating China's due process rights under DSU Article 6.2.

iv. MOFCOM required, sought, and obtained additional information from Chinese domestic producer in the course of its reinvestigation. Under Articles 6.1 and 6.4 and 12.1 and 12.3, it had obligations with respect to notice of the information required (which is not limited to information required in questionnaires) and providing opportunities to see relevant information. It is not disputed that the information provided by the Chinese domestic producers in the reinvestigation was relevant and used by MOFCOM.[45] Regardless of the limited example – reference to questionnaires – in the panel request, in our view there is little doubt as to the scope of the claims under Articles 6.1, 6.4, 12.1, and 12.3.

2.27. In the light of the foregoing, we find that the claims of the United States under Articles 6.1 and 6.4 of the AD Agreement and Articles 12.1 and 12.3 of the SCM Agreement are within our terms of reference.

2.4.1 Second sentence of Article 2.2.1.1 and Pilgrim's Pride

2.28. The question before us here is the scope of the claim of violation of Article 2.2.1.1, second sentence, specifically whether it encompasses MOFCOM's alleged violation in respect of the calculation of a dumping margin for Pilgrim's Pride in the reinvestigation. In this respect, China advances two lines of argument:

a. While the claim in the panel request is drafted broadly, the narrative language concerns only the allocation issues related to the calculation of Tyson's dumping margin. The claim itself, as set out in the panel request, appears to be unrelated to the issues surrounding the calculation of a dumping margin for Pilgrim's Pride during the reinvestigation. Accordingly, the claim as developed in the first written submission of the United States is not within the terms of reference of the Panel.[46]

b. In the original dispute the Panel made no findings in respect of the calculation of a dumping margin for Pilgrim's Pride under the second sentence of Article 2.2.1.1. Indeed, the findings of the Panel in respect of the first sentence underline that its findings under the second sentence could not have applied to Pilgrim's Pride. For these reasons, MOFCOM did not address any cost allocation issues with regard to Pilgrim's Pride during the reinvestigation, and therefore the consistency of the dumping margin for Pilgrim's Pride with Article 2.2.1.1 is not within the terms of reference of the Panel.[47]

2.29. The United States responds that:

[45] China's second written submission, para. 252: "From the information it collected MOFCOM could reasonably conclude whether or not U.S. imports were concentrated in the low value products."
[46] China's first written submission, para. 134; second written submission, paras. 197 and 198.
[47] China's first written submission, para. 131; second written submission, paras. 199 and 202.

a. the claim in the panel request is clear in that it refers to "producers", and not just Tyson[48];

b. the Panel's findings of violation of the second sentence of Article 2.2.1.1 in the original dispute were not limited to Tyson[49]; and

c. in any event, DSU Article 6.2 requires identification of measures and claims of violation – not particular interested parties.[50]

2.30. Turning to the first basis for China's challenge, we recall paragraph 8 of the panel request:

> Articles 2.2 and 2.2.1.1 of the AD Agreement because MOFCOM improperly calculated the cost of production for US producer**s**, failed to calculate costs on the basis of the records kept by the US producer**s** under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.[51]

2.31. For purposes of considering the scope of the Panel's jurisdiction, there is an important distinction between claims and arguments. The claim here is that the redetermination in respect of the calculation of costs for US producers does not meet the requirements of Articles 2.2 and 2.2.1.1. We note that:

a. The "measure taken to comply" within the meaning of Article 21.5 is the redetermination. The measure before us has been specifically identified in the panel request.

b. The legal basis for the claim is set out as Article 2.2 and both sentences of Article 2.2.1.1. The two examples provide additional clarity, but they neither expand nor restrict the scope of the claim, and are not limited as to the producers to which they refer.

Nothing in the DSU requires that the arguments in support of a claim be specified in the request for establishment. It is true that in the original dispute, there was no specific finding of violation of the second sentence of Article 2.2.1.1 with respect to Pilgrim's Pride. Nonetheless, the Panel's findings regarding that provision were not strictly limited to Tyson, but were more general in some aspects. Thus, we see no reason to foreclose the possibility of a claim under Article 2.2.1.1 involving arguments concerning other producers. We note that the panel request refers to US producers in the plural. This clearly opens the possibility for arguments concerning the alleged failure of MOFCOM to comply with the cited AD Agreement provisions in calculating a dumping margin for more than one US producer. We see no basis to require the identification of specific interested parties in respect of which an investigating authority has made a determination with respect to each claim of violation.

2.32. Among the various arguments made in support of the US claim under the second sentence of Article 2.2.1.1 is the argument in respect of Pilgrim's Pride. These arguments do not go beyond the claim as set out in the panel request. Accordingly, the claim of violation as set out in the panel request meets the requirements of DSU Article 6.2 and is properly before us.

2.33. Having so concluded, we do not consider it necessary to address China's second ground for its jurisdictional challenge.

2.34. We therefore find that China has not established that the US claims in respect of Articles 2.2 and 2.2.1.1 insofar as they relate to Pilgrim's Pride fall outside our jurisdiction.

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[48] United States' second written submission, para. 212.
[49] United States' second written submission, para. 213.
[50] United States' second written submission, para. 211.
[51] Emphasis added.

2.5 Alleged failure to reconcile causation analysis with evidence

2.35. The question before us here is the scope of claims of violation of AD Agreement Articles 3.1 and 3.5 and SCM Agreement Articles 15.1 and 15.5, and whether they encompass MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. China refers to the specific language of paragraph 3 of the panel request:

> Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

2.36. China argues that:

a. The use of the word "including" instead of "including but not necessarily limited to" must be understood as setting out an exhaustive list of elements of the US claim under Articles 3.1, 3.5, 15.1, and 15.5.[52]

b. "The contrast between the phrase 'for example' for all of the other claims, but the term 'including' only for claim #3 shows an explicit effort to distinguish the two types of claims. In this context, 'including' is being used in a limiting sense."[53]

c. The language of the paragraph is "a specific reference to the second sentence of Articles 3.5 and 15.5. The claim does not reference either directly or indirectly the other three sentences of these provisions. The U.S. claim, therefore relates to the specific obligations found in the second sentence."[54]

2.37. The United States argues that:

a. "The claim is that MOFCOM's continued imposition of AD/CVD measure on U.S. broiler products is inconsistent with the cited provisions."[55] The examples set out in the panel request are arguments; the United States was not under an obligation to set any of its arguments out in the panel request.

b. The term "include" is not exclusive.[56]

2.38. We make the following observations:

a. The phrase "including but not necessarily limited to" is an unfortunate redundancy that clutters many a legal document. We note that in certain contexts, of course, the term "including" may have a limiting effect. For example, the legal maxim *eiusdem generis* provides that a listing of items "included" in a general term could limit the scope of that term to the genre of the included items. But that is not what China argues. We are asked to find that the use of the term "including" in a jurisdictional document creates an exhaustive list for the sole reason that it is not accompanied by a redundant qualifier. We are not aware of a canon of interpretation that would require us to reach this conclusion.

b. The use of "including" in one paragraph of the panel request and "for example" in the other paragraphs is not determinative of the meaning of either term. It is the case that in certain circumstances, in a treaty the use of one term rather than another may give rise to the presumption that a different meaning was intended by its drafters. In this instance, read in the context of the panel request as a whole, nothing in the use of "for

[52] China's first written submission, para. 378.
[53] China's second written submission, para. 330.
[54] China's second written submission, para. 328.
[55] United States' second written submission, para. 220.
[56] United States' second written submission, para. 221.

example" in some paragraphs suggests a "limiting" – that is, an exhaustive – sense for the term "including".

c. As we have observed, in addressing questions of panel jurisdiction, there is an important distinction between claims and arguments. The claims here allege that the redetermination, which is the measure take to comply, does not satisfy the requirements of Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement. We note in this respect that the four sentences of Articles 3.5 and 15.5 are inextricably linked. Among the various arguments the United States makes in support of those claims is MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. Merely because this argument is not set out in the panel request does not preclude the United States from making it in the course of the dispute.

2.39. In the light of the foregoing, we find that the argument that MOFCOM allegedly failed to reconcile its causation analysis with the improving domestic industry performance is within the scope of the United States' claims that China has acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement, and within the jurisdiction of the Panel.

2.6 Conclusion on DSU Article 6.2

2.40. We find that US claims in respect of Articles 6.1.2 and 6.2 of the AD Agreement and Articles 12.1.2 of the SCM Agreement are not within the scope of our terms of reference and we will make no findings on such claims.

2.41. We find that US claims in respect of Articles 3.1, 6.1, 2.2.1.1, and 3.5 of the AD Agreement and Articles 15.1, 12.1, and 15.5 of the SCM Agreement are within the scope of our terms of reference.

3 THE PANEL'S EXERCISE OF JUDICIAL ECONOMY IN THE ORIGINAL DISPUTE

3.1 Introduction and arguments of the parties

3.1. In the original dispute, the Panel found that MOFCOM's findings of price undercutting and of price suppression were inconsistent with the relevant obligations. It observed that "MOFCOM's examination of the situation of the domestic industry was inextricably linked to its earlier analysis of the price effects of subject imports" and that implementation of its findings regarding price effects would "require China to re-examine MOFCOM's Determination concerning the impact of subject imports on the domestic industry".[57] In this situation, the Panel took the view that making additional findings with respect to MOFCOM's analysis of the impact of the subject imports on the domestic industry would not assist in the resolution of the dispute between the parties[58], and made no findings with respect to the United States' claims under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.4.[59] The Panel in the original dispute also made no findings, on the same grounds, in respect of US claims under AD Agreement Article 3.5 and SCM Agreement Article 15.5.[60]

3.1.1 China

3.2. The US claims under AD Agreement Articles 3.1, 3.4, and 3.5[61] and SCM Agreement Articles 15.1, 15.4, and 15.5 in this proceeding are beyond the scope of the Panel's terms of reference because the Panel exercised judicial economy in respect of these claims in the original dispute. Specifically:

[57] Panel Report, *China – Broiler Products*, para. 7.555.
[58] Panel Report, *China – Broiler Products*, para. 7.555.
[59] Panel Report, *China – Broiler Products*, para. 7.556.
[60] Panel Report, *China – Broiler Products*, paras. 7.584 and 7.585.
[61] China raised arguments in respect of AD Agreement 3.5 and SCM Agreement Article 15.5 for the first time in its second written submission. (China's second written submission, paras. 335 and 336). As the issues are the same as the arguments under AD Agreement Articles 3.1 and 3.4 and SCM Agreement Articles 15.1 and 15.5, we address all these arguments at the same time.

a. The Panel exercised judicial economy and did not rule on the US claims or otherwise address in any way the merits of the US arguments in support of these claims. "Neither China nor the United States 'lost' this claim – the claim was not addressed"[62]; this rendered the claims of no effect.[63]

b. "China recognizes that the Panel believed in good faith that the Panel findings on price effects 'will require' MOFCOM to reconsider its impact analysis. But with all due respect, that belief was incorrect."[64] And so, the unchanged part of the redetermination was not an "inseparable element" of the measure taken to comply[65]; MOFCOM did not need to revisit it.[66] Indeed, "there was no measure taken to comply and there was no need for MOFCOM to redo its analysis".[67]

c. The reassertion of these claims in this proceeding creates a fundamental unfairness to the detriment of China.[68] Because this is a compliance proceeding, China is deprived of any chance to address any inconsistency that may now be found or otherwise to bring its measure into compliance.

d. "If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact. The additional claim would not add anything to the overall U.S. challenge and rights under the WTO. The separate claims on impact thus really matters to the United States only if it has lost its claims regarding price effects (and other claims), and needs some independent basis to establish the WTO inconsistencies of the AD and CVD measures."[69]

e. This situation is "functionally the same" as the case in which a party did not bring a claim in the original dispute that it could have brought.[70] The United States is thus barred from bringing these claims in these 21.5 proceedings.

3.1.2 United States

3.3. The claims under AD Agreement Article 3.4 and SCM Agreement Article 15.4 are within the Panel's terms of reference[71], because:

a. "[W]here a Member fails to prove inconsistency on a claim, that claim may not be re-litigated in a compliance proceeding. The Appellate Body has never found that the exercise of judicial economy precludes consideration of a claim in a compliance proceeding. The logic for this distinction is compelling. A Member is not entitled to a second chance to prove a claim that has been already rejected. There is no justification for rejecting a claim that *was never decided*."[72]

b. The Panel exercised judicial economy in the original dispute "on the basis that MOFCOM would need to undertake a reexamination of its impact analysis – and thus decide how to address the US claim. MOFCOM's decision to decline to do so cannot absolve it from having its injury findings assessed."[73]

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[62] China's second written submission, para. 291.
[63] China's first written submission, para. 336.
[64] China's second written submission, para. 292.
[65] China's second written submission, para. 293.
[66] China's second written submission, para. 291.
[67] China's second written submission, para. 287.
[68] China's first written submission, paras. 333 and 335.
[69] China's second written submission, para. 294.
[70] China's first written submission, para. 336.
[71] The United States has responded to the arguments set out in China's first written submission. Given that the arguments in respect of AD Agreement Article 3.4 and SCM Agreement Article 15.4 are the same as those in respect of AD Agreement Article 3.5 and SCM Agreement Article 15.5, we believe we can dispose of this matter without further submission by the United States.
[72] United States' second written submission, para. 215. (emphasis original; fn omitted)
[73] United States' second written submission, para. 216.

c. "Precluding consideration of claims in a compliance proceeding on the basis that judicial economy was exercised" would undermine Articles 3.4 and 3.7 of the DSU.[74]

d. "[T]here was no barrier to China engaging in a reexamination of its impact analysis."[75]

3.2 Analysis

3.4. First, the findings of the panel and the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* relied on by China do not support its position. We recall that in that case, the panel in its original report found that the complainant had failed to establish a *prima facie* case in respect of the claim at issue. The complainant then sought to raise the same claim in the Article 21.5 proceedings. The Appellate Body upheld the panel's finding that the claim was not within the scope of is jurisdiction, noting due process and fairness concerns:

> A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel.[76]

Accordingly, the focus of the Appellate Body in that case was the actions of the complainant in failing to establish a *prima facie* case in the original dispute. More important for the question before us here, both the panel and the Appellate Body were aware of the potential consequences of their findings and explained further:

> We also recall that the Panel noted, in paragraph 6.44 of the Panel Report, that the original panel's dismissal of India's claim under Article 3.5 relating to "other factors" was *not* an exercise of "judicial economy". The issue raised in this appeal is different from a situation where a panel, on *its* own initiative, exercises "judicial economy" by not ruling on the substance of a claim.[77]

3.5. The Appellate Body had occasion to revisit the question of the effect of an exercise of judicial economy on the admissibility of a claim in the context of Article 21.5 proceedings involving redeterminations in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. At issue in that case was whether,

> [T]he USDOC's finding that the volume of imports of OCTG from Argentina declined after the imposition of the anti-dumping duty order – which was made in the original sunset determination and incorporated into the Section 129 Determination – is part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU.[78]

The Appellate Body noted that while Argentina had in fact challenged the USDOC's volume analysis in the original panel proceedings, the panel had not made a finding regarding the WTO-consistency of that analysis.[79] In that case the panel did not expressly exercise judicial economy, but both disputing parties characterized the panel's approach to the issue in the original *OCTG* dispute as an exercise of judicial economy. In that case, the United States argued that the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* applied to the USDOC's findings on volume of imports, asserting – as China does in this case – that because there had been no panel findings,

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[74] United States' second written submission, para. 217.
[75] United States' second written submission, para. 218.
[76] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.
[77] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, fn. 115 to para. 96. (italics original; underline added)
[78] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 138.
[79] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 141.

there had been no change in the USDOC findings, and the complainant could not raise the matter again in an Article 21.5 proceeding. The Appellate Body disagreed:

> [E]ven if the original panel's approach should properly be characterized as judicial economy, it would still mean that the central rationale of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* would not be applicable. The Appellate Body explained that the issue raised in that case differed "from a situation where a panel, on its own initiative, exercises 'judicial economy' by not ruling on the substance of a claim."[80]

3.6. China expressly acknowledges that the Panel exercised judicial economy in respect of the claims at issue in the original dispute. It does not argue that the Panel did not have the authority to exercise judicial economy or that it did so improperly in the original dispute; if anything, China encourages the Panel to continue to exercise judicial economy in respect of claims under Articles 3.4 and 15.4 if the Panel makes findings adverse to its interests under Articles 3.2 and 15.2.[81] In addition, China did not appeal the findings of the original Panel in this regard.[82] In our view, the findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* and *EC – Bed Linen (Article 21.5 – India)* clearly establish that the exercise of judicial economy by a panel in respect of a claim does not, for that reason alone, preclude a complaining party from bringing that same claim before a subsequent Article 21.5 panel.

3.7. In this instance, the Panel in its original report did not make any substantive findings in respect of the US claims under Articles 3.1, 3.4, 15.1, and 15.4. This was because, having found China in breach of AD Agreement Article 3.2 and SCM Agreement Article 15.2, the Panel concluded that re-examination of the analysis under those provisions would require re-examination of the impact of subject imports on the domestic industry, and therefore additional findings with respect to MOFCOM's analysis under Articles 3.4 and 15.4 would not assist in the resolution of the dispute. As it turned out, MOFCOM did not change its analysis under Articles 3.2 and 15.2, and did not deem it necessary to change its analysis under Articles 3.4 and 15.4. Nevertheless, this is not a case where the "central rationale" of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* is directly applicable, because it was not the complainant that failed to establish its claim in the original dispute, it was the Panel that opted to not rule on the claim. The fairness and due process concerns cited by the Appellate Body in denying a second chance to raise the same claim in an Article 21.5 proceeding are simply not relevant here.

3.8. Second, we note China's argument that:

> If the Panel agrees with China's argument about price effects, then the Panel will be acknowledging it was incorrect in saying implementation 'will require' a change to the impact analysis. If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact.[83]

Neither of these arguments is relevant to whether these claims are within our terms of reference in this proceeding. Whether or not we erred in not making findings under Articles 3.4 and 15.4 in the original dispute does not change the fact that we did not make such findings, and that exercise of judicial economy was not challenged on appeal. That MOFCOM did not act as we had anticipated does not, of course, demonstrate that we erred. In any event, it would not be appropriate for us to make a finding in respect of our terms of reference in this proceeding on the basis of a potential finding or exercise of judicial economy that might be the result of our consideration of the claims in this proceeding.

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[80] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148. (fn omitted)

[81] China's second written submission, para. 294: "If the Panel does not agree with China's argument about price effects, then there is no need to address the separate claims on impact." (emphasis added)

[82] We recall the findings of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para 96:

> Moreover, here, India decided not to appeal the panel finding at issue in the original proceedings, even though it could have done so, inasmuch as the issue was not of an exclusively factual nature. Hence, India itself seems to have accepted the finding as final.

(emphasis added)

[83] China's second written submission, para. 294.

3.9. Finally, we do not consider the premise of China's assertion of "fundamental unfairness" to be correct or to suffice to change our view that the United States is not precluded from raising its claims under Articles 3.1, 3.4, 15.1, and 15.4 in this proceeding. Nothing suggests that "China will never have any chance to address that inconsistency or otherwise bring its measure into compliance"[84], should the Panel find that the redetermination is inconsistent with Articles 3.1, 3.4, 3.5, 15.1, 15.4, and 15.5. It is true that China would not have the benefit of another reasonable period of time to do so, but that is not the same thing as being "deprived" of the opportunity to do so.[85] The fact that in making its redetermination, MOFCOM did not have the benefit of Panel findings in respect of the original determination did not absolve China of its obligation, under the WTO Agreement, to ensure that the measure taken to comply is consistent with all its obligations under the WTO Agreement.

3.3 Conclusion

3.10. In the light of the foregoing, we find that the claims of the United States under AD Agreement Articles 3.1, 3.4, and 3.5 and SCM Agreement 15.1, 15.4, and 15.5 are within our terms of reference.

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[84] China's first written submission, para. 333.

[85] We note that should there be continuing disagreement between the parties as to whether China has brought itself into compliance, China has recourse to Article 21.5 to resolve such a disagreement. (Appellate Body Reports, *Canada/US – Continued Suspension*, para. 347).