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

(DS427)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING

PUBLIC VERSION

Double brackets ("[[ ]]") indicate where
Business Confidential Information was redacted

December 20, 2012

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China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012.
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr. 1, adopted 28 July 2011.
EC – Salmon (Panel)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008.
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.
US – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report WT/DS264/AB/R.
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004.
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, adopted 19 January 2001.

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

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

I. GENERAL

Question 81 (United States): Please provide the US respondents' submissions concerning various cost allocations and cost allocation methodologies including in answers to initial and supplemental questionnaires, follow-up comments and any other submission. (The Panel notes that the parties have indicated that some underlying data was several hundred pages long; there is no need to provide all the underlying data to the responses, and there is no need to provide documents already provided to the Panel).

1. As requested, the United States is providing as new exhibits U.S. respondents' submissions concerning cost allocations that were not previously submitted. As this question anticipates, underlying exhibits and tables for some of these submissions are voluminous, and these exhibits and tables could be submitted if the Panel so requests.

2. To assist the Panel, the United States is also providing in this response two tables. First, the United States is providing an index listing submissions made by U.S. respondents during the underlying investigation that addressed the propriety of their cost allocation methodologies. The index references (i) the submission's title, (ii) the corresponding exhibit number, and (iii) the date the document was submitted to MOFCOM. Exhibits with numbers 73 and greater are new, and are included with this submission. To assist the Panel in determining when these documents were submitted in relation to MOFCOM's decision-making, the index is organized in chronological order. The second table, which is also intended to assist the panel in determining when the document was submitted in relation to MOFCOM's decision-making, matches dates to MOFCOM's actions during the investigations.

Index of U.S. Respondents' Submissions

Document	**Exhibit**	**Document Date**
Keystone, Investigation Questionnaire Response	USA-34	December 3, 2009
Pilgrim's Pride, Investigation Questionnaire Response	USA-32	December 3, 2009
Tyson, Investigation Questionnaire Response	USA-36	December 3, 2009
Keystone, Supplemental Questionnaire Response	USA-35	December 18, 2009
Pilgrim's Pride, Supplemental Questionnaire Response	USA-28	December 18, 2009
Tyson, Supplemental Questionnaire Response	USA-73	December 18, 2009
Pilgrim's Second Supplemental Questionnaire	USA-74	January 4, 2010
Tyson, Comments on the Preliminary AD Determination	USA-25	February 20, 2010
Pilgrim's Pride, Comments on the Preliminary AD Determination	USA-27	March 5, 2010
Tyson, Further Comments on the Preliminary AD Determination	USA-26	April 9, 2010
Keystone, Comments on the Preliminary AD Determination	USA-30	April 9, 2010
USAPEEC, Further Comments on the Preliminary AD Determination	USA-31	July 16, 2010
Pilgrim's Pride, Comments on the Final AD Disclosure	USA-75	July 24, 2010
Tyson, Comments on the Final AD Disclosure	USA-40	July 26, 2010
Keystone, Comments on the Final AD Disclosure	USA-29	July 26, 2010

Chronology of Key MOFCOM Actions

October 20, 2009	MOFCOM issued the AD Questionnaires
December 11, 2009	MOFCOM issued the First Supplemental AD Questionnaire
February 5, 2010	MOFCOM issued its Preliminary AD Determination
June 3 to June 17, 2010	MOFCOM conducted on-site verifications of the respondents
July 16, 2010	MOFCOM issued Final AD Disclosures to the respondents
September 26, 2010	MOFCOM issued its Final AD Determination

Question 86 (United States): Please provide Exhibit 4 to Tyson's comments on the Preliminary AD determination (Exhibit USA-26).

3. The United States submits the document to the Panel as Exhibit USA-76.

No questions directed to the United States

III. CALCULATION OF THE ANTI-DUMPING AND COUNTERVAILING DUTIES

A. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

Question 90 (both parties): The United States argues that a value-based allocation methodology, which uses sales prices as a proxy for actual costs incurred, is an appropriate basis for calculating the cost of production under Article 2.2.1.1. In this context, please explain how cost allocations based on sales that have been determined to be outside the ordinary course of trade should be considered in the calculation of the costs.

4. At the outset, the United States regrets any confusion but would clarify the facts of this case in two respects.[1] First, the respondents in their normal books and records incurred actual costs. It is correct that respondents use references in making some allocations. Tyson, for

[1] In the present case, the United States is not challenging MOFCOM's decision to employ a cost of production method to determine normal value for the U.S. respondents. Accordingly, there is no further analysis of "ordinary course of trade" in respect to the allocation of the incurred costs under Article 2.2.1.1.

example, derived its allocations for wing tips, paws, and gizzards using weekly market price data collected by the Urner Barry service to determine the market value for different parts, which became the basis for the allocated values for those chicken parts.[2] But, the central issue is whether MOFCOM acted consistently with the AD Agreement in rejecting the respondent's allocations, as used in their normal books and records, for allocation of costs to various broiler products. Indeed, neither party disputes that an allocation needed to be made; that is, for example, China does not assert that costs could be assigned to various products without an allocation. In the facts of this dispute, allocations are required – that is, because the various broiler products are all produced from one animal, no company could have incurred a separate cost for parts, such as wings and paws, prior to the point when these parts are separated.

5. Second, it is important to clarify that the record does not support the conclusion that MOFCOM did not make use of home market sales as the basis for normal value because of the cost test in paragraph 2.2.1. Article 2.2 of the AD Agreement provides three scenarios when the cost of production method may be utilized to determine normal value:

> [1] When there are no sales of the like product in the *ordinary course of trade* in the domestic market of the exporting country or [2] when, because of the particular market situation or [3] the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison …[3]

In order to invoke the first option, the investigating authority must apply the test (referred hereafter as "cost test") in Article 2.2.1:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per

[2] Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) (Exhibit USA-26), p. 5; Tyson Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-36), p. 9. To the extent that the Panel may be questioning if a below-cost test could still be applied, for example, when the value of wing tips, paws and gizzards are derived from a reference price, the answer is "yes." The reference prices reflect averages, and therefore comparable products found to be sold below that average value would fail the cost test, and potentially face exclusion from the price to price analysis.

[3] Emphasis added.

> unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[4]

In the present dispute, where MOFCOM did not use domestic sales and resorted to the cost of production method to determine normal value, its stated basis was the third method – low volume – as illustrated by the references to the record that follow:

Tyson

> for the like product of subject merchandise whose domestic sales quantity less than 5% of the exporting quantity to China (Breast skin, Drumstick, Paw, Wing tip), the investigation authority determines to use the weighted average production cost adds reasonable expense and profit to construct the normal value.[5]

Pilgrim's

> …three subject merchandise models domestic sales accounted for less than 5% of the export sales to China during the same time period. According to the Regulation of Article 4 of the Anti-dumping Regulation of the People's Republic of China, investigating authority decided to adopt the production cost plus reasonable expense, profits of these three products (for cost, expense, adopted your company's first supplemental response table 6-3, tab 3 claimed weighted average data …[6]

Keystone

> With regard to the quantity examination on model basis, in accordance with Section 4 of *Antidumping Regulation of Peoples Republic of China*, for each of the models, the ratio as specified above is less than 5%, the investigation authorities have decided to use the production costs plus reasonable expenses and profits (we

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4 Footnotes omitted.

5 MOFCOM, Tyson Final AD Disclosure (Exhibit USA-12), p. 1.

6 MOFCOM, Pilgrim's Final AD Disclosure (Exhibit USA-13), p. 7.

> have temporarily adopted 5% as a normally realized profit margin) to determine the normal value.[7]

In short, MOFCOM made no finding that any of the respondents' sales were outside the "ordinary course of trade." Respectfully, it thus appears the question posed is a hypothetical. Accordingly, the United States understands question 90 to ask "if home market sales are rejected for failing to meet the cost test in paragraph 2.2.1, could the prices of those home market sales be used for the purpose of the cost allocations under paragraph 2.2.1.1?" The United States submits that per the text of the AD Agreement, such a situation does not arise.

6. The cost test under Article 2.2.1 is not independent of the disciplines in Article 2.2.1.1, nor something that an authority may consider without regard to the disciplines regarding cost calculations set out in 2.2.1.1. To the contrary, the cost of production to be calculated for Article 2.2.1 is the same cost of production derived under Article 2.2.1.1. Article 2.2.1.1 is explicit in this regard; it begins with the language "for the purposes of paragraph 2", meaning it applies to Article 2.2 and all its subparts, which includes Article 2.2.1. Thus, Article 2.2.1.1 is the starting place of any cost analysis, including the costs incorporated into Article 2.2.1's cost test. The AD Agreement does not contemplate that a cost of production, even if derived from a value based allocation, calculated under 2.2.1.1 and then used in the Article 2.2.1 cost test, must then be subject to further revision or additional tests when establishing normal value if some sales are found to be outside the ordinary course of trade as a result of the cost test. Indeed, if China had made an ordinary-course-of-sales determination under the cost test in Article 2.2.1 without regard to the cost calculation rules in paragraph 2.2.1.1, then this would have been a plain breach of the AD Agreement.

7. The United States understands the European Union to be making a similar point in its opening statement:

> If, "in the ordinary course of trade" in the domestic market, one of the two parts separated from the whole has no value, and is in fact waste, why would one allocate any costs to it at all? If anything, additional costs will probably have to be incurred to dispose of it, and these additional costs will surely be attributable to the other part of the whole, which does have value. One can see this in terms of the question: why does the firm incur the cost? To which the answer is, in order to extract what is of value.[8]

***

[7] MOFROM, Keystone Final AD Disclosure (Exhibit USA-14), p. 3.

[8] European Union, Opening Statement, para. 15.

> The European Union observes that, if it would turn out that the measure at issue would be inconsistent with the Anti-Dumping Agreement with respect to this first issue (whether sales in the US domestic market are in the ordinary course of trade and permit a proper comparison), then that might consequentially vitiate the calculation of the dumping margin itself, without the Panel ever reaching the question of the allocation methodology for the second issue (the calculation of costs of production for the purposes of determining normal value).[9]

As the European Union has explained, it may well be the case that a product has little or no value and still be in the ordinary course of trade (because the allocation of costs satisfied the requirements of 2.2.1.1), in which case resort to the cost of production method is unnecessary. In short, the AD Agreement does not hold that a product with a waste value in the home market is necessarily outside the ordinary course of trade and hence precludes a comparison of sales on the basis. Outside this circumstance, the notion of "ordinary course of trade" is not relevant for constructing a cost of production.

8. The United States notes one final consideration for the Panel. One reason the issues are unfortunately muddied are the *post hoc* explanations proffered by China. The reality is that MOFCOM simply ignored the evidence proffered by respondents or failed to solicit it. As one example, China has made certain claims about Tyson's reliance on offal prices,[10] which ignore the fact that Tyson explained its methodology to MOFCOM and noted that the so-called offal price was a market price. Consider the following submitted by Tyson:

> The Plant Variance Summary and Production Cost Summary for that plant and week are provided in pages 2 through 5 of **Exhibit 2**. As can be seen on page 2 of the exhibit, the actual bird cost of … combined with the withdrawals from inventory and beginning work in process ("WIP") constitute the meat costs for the products produced by the plant in that week.
>
> Pages 3 through 5 show how the meat costs are allocated across all the products produced in the plant during that week. The meat costs for each product are shown on a per pound basis under the

[9] European Union, Opening Statement, para. 19.

[10] *See e.g.*, China, First Written Submission, para. 101 ("Tyson's standard cost methodology had the same problem in as much as it assigned a value to certain parts (i.e., non-boneless) based on a waste or "offal" price.")

> heading "Meat." Page 6 shows the extended meat cost (production volume times per unit meat cost) for each product. … Tyson provides in page 7 of Exhibit 1 a copy of Clarksville's costing flowchart which shows the various cost centers. Products are grouped by cost center in the Production Cost Summary provided on pages 3-5. Therefore, BOFT can see the split-off point for each product based on its cost center.
>
> As explained in the original questionnaire response, under the standard costing system, the meat cost for wing tips, paws, and gizzards is assigned based on the weekly offal market price. The offal market price is then adjusted using a formula to account for freight and processing costs to arrive at a meat value for these products. This is called the "offal credit." The meat costs for other products are also based on market prices. Tyson uses weekly market price data collected by the Urner Barry service to determine the market value for the different parts. As noted, the resulting per unit cost is seen in the "Meat" column.[11]

This excerpt was part of a larger discussion where Tyson explained its cost summary with respect to a particular plant and provided a flow chart explaining the various cost centers. Nowhere on the record is there any indication that MOFCOM, which bore a "positive obligation" under Article 2.2.1.1, sought further information about Tyson's allocation, nor is there any discussion in the determinations expressing the concerns China now asserts MOFCOM had about offal prices.[12] In sum, despite all the invective directed toward the United States and the respondents, it does not change that China cannot produce a single sentence by MOFCOM suggesting it was actually interested in the issues it now claims to be so critical.

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[11] Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) (Exhibit USA-26), p. 5 (emphasis in the original). Tyson also noted that reports were provided as Exhibit 6-I-5-2 to the original questionnaire response and that Urner Barry is "the oldest commodity market news reporting service in the United States. It tracks market pricing information for a wide variety of commodities, including poultry, beef and seafood. Urner Barry gathers market prices on a daily basis from a wide range of buyers, sellers, and brokers."

[12] *US – Softwood Lumber V (Panel)*, para. 7.237.

Question 93 (United States): Please explain why, in your view, China's weight-based methodology is tailored to finding dumping. (US opening statement at the second meeting, paragraph 38).

9. To be clear, the United States is not asserting that the use of a weight-based methodology is always inappropriate. Indeed, outside the context of a joint-product scenario, weight-based, volume-based, or unit-based methodologies are common methodologies used to derive costs of production.

10. Furthermore, the United States is also not asserting that the use of weight-based methodology is always tailored to find dumping in a joint-product scenario. In fact, the results of a weight-based methodology could be tailored just as much to avoid a finding of dumping, as it was tailored in this case to find the existence of dumping. For example, if U.S. exports had consisted primarily of breast meat (which has a high sales value to weight ratio), using a weight-based cost allocation to determine the cost of production would have significantly reduced or eliminated the exporters' dumping margins.

11. The problem is that a methodology that is used to allocate costs should not be tailored to find any result – whether it be a finding of dumping or the avoidance of such a finding. In a joint-product scenario, however, this is precisely what can occur if a weight-based methodology is applied when the joint products are non-homogenous and realize different values for the producer upon sale of the merchandise.

12. Using a weight based allocation method for joint products results in incredible profits for the high value products – *e.g.*, breast meat – and extreme losses for the low value products – *e.g.*, paws – guaranteeing that dumping will be found when the low value products' normal value is compared to the much lower transaction costs in the export market. Accordingly, the result for a product such as paws is an average per unit weight cost of production plus part of the high profit resulting from breast meat sales.

13. In the AD investigation, as a result of using a weight-based methodology, MOFCOM constructed a value for paws using, in part, the inflated profit derived from the sales of high value breast meat, which in turn guaranteed that the normal value would be large, the comparable export prices for paws would be smaller (as they did not contain such an inflated profit amount), and an inflated dumping margin would result. In this regard, it is important to remember why value based costing is the preferred accounting method for joint-product producers such as the poultry industry. It is not possible to produce chicken breasts, the highest value product, without chicken paws, a relatively low value part. Importantly, in this circumstance, the producer can only determine if the business is profitable when all the parts taken from the chicken are sold and the total revenue is compared to the total cost. A value based cost allocation reproduces this outcome on a product-by-product basis by assigning, in effect, each product the profit rate at the split-off point as was earned on the sale of all products resulting from the same production process. In other words, in value based costing, the actual profit rate that results from comparing total revenue to total cost is assigned to each product.

14. The United States also asserts that MOFCOM's choice of a weight-based methodology was results driven and served the purpose of creating or inflating dumping margins, an assertion reflected by both the record and even China's submissions.[13] As confirmed by China, the United States did not export breast meat[14] – what China dubs a "prime product."[15] The products that were actually exported to China have low sales value to weight ratios. Thus, by improperly disregarding the value-based allocations actually used in the respondents' normal books and records in favour of a weight-based allocation, China caused the exported products to have much higher costs of production than recorded in the ordinary course of business. Moreover, although the foregoing is the principal problem, the United States notes that MOFCOM exacerbated the problem by taking processing costs incurred specifically to breast meat and spreading them across all products. This resulted in a further inflation of the dumping margin.

15. The United States notes one final, yet essential, point about the results-oriented nature of MOFCOM's approach. The U.S. respondents put evidence on the record regarding why they kept costs the way they did and why they should be viewed as reasonable. Nowhere in its determinations did MOFCOM address why their arguments and evidence regarding their kept allocations were deficient and MOFCOM's weight-based methodology was "proper." In these proceedings, China has done nothing to dispel that point – and that is ultimately what this dispute concerns.[16] Instead, China's retort has been that respondents bear the burden as part of the "anti-dumping context" to persuade MOFCOM to do anything other than what it had already decided.

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[13] *See* China, First Written Submission, paras. 79, 97, 100, 105, 111, 112; China, First Oral Statement, para. 15. Indeed, until it retreated from its position, China openly acknowledged it sought to hold respondents responsible for conditions in China's market. *See e.g.*, China, First Written Submission, para. 93 ("However, Tyson never addressed its actual recorded costs or explained, for example, why its actual recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products *as sold in the Chinese market* (or the U.S. market for that matter). (emphasis added).

[14] China, Responses to the Panel's First Set of Questions, para. 2.

[15] China, First Written Submission, paras. 97, 105, 112; China, First Oral Statement, para. 15.

[16] *US – Softwood Lumber V (AB)*, para. 133 ("the second sentence of Article 2.2.1.1 requires the consideration of 'all available evidence on the proper allocation of costs'. (emphasis added) The word "proper", in our view, supports our reading of the word "consider", because it suggests some degree of deliberation on the part of the investigating authority in "consider[ing] all available evidence", so as to ensure that there is a proper allocation of costs.").

Question 94: The Panel is faced with two diametrically opposed readings of the facts concerning the US respondents' cost allocations. With reference to the exhibits, please explain how the record supports your view as to:

(a) (to both parties) How the data referred to by the United States in response to Panel question Nos. 34 and 38 (including Exhibit USA-60) as well as that referred to by China in response to Panel question No. 34, paragraphs 66-69 of China's second written submission, and paragraph 28 of China's opening statement at the second meeting, supports your view as to whether Keystone allocated zero cost to paws.

16. As explained in greater detail in the U.S. Second Written Submission,[17] Keystone did not "allocate zero cost to paws," but rather allocated costs [[ ]] In Keystone's original Form 6-3 and Form 6-4 submitted on December 3, 2009,[18] Keystone reported costs for all products sold to China (*i.e.*, all products reported on Form 3-4). Accompanying Form 6-3 and 6-4 was a full narrative explanation specifically discussing how the costs were reported. As demonstrated in the U.S. response to Panel question Nos. 34 and 38, including Exhibit USA-60, Keystone did, in fact, allocate costs to paws. This is evidenced in the bottom line "Production costs," which does indeed contain a unit cost for paws derived from the above-allocated costs. Accordingly, while MOFCOM may not have been satisfied with what costs were allocated – though it never explained why – an assertion that Keystone "allocated zero cost to paws" is simply false.

17. To the extent China asserts its argument concerning "zero costs" means [[ ]], MOFCOM again provided no explanation to that effect in its determinations. Moreover, the statement rests on China's latest assertion that MOFCOM would have considered a value-based allocation for joint products rather than by-products. That assertion is belied though by the fact that Keystone submitted to MOFCOM an alternative cost calculation (using only data already on the record) which allocated [[ ]] to all products, including paws, based on the relative sales value of each of the products. This submission explained how "Direct Materials Internal Meat Cost" were allocated using "Relative sales value of Production." Included with Keystone's submission was an electronic version of the Form 6-3 containing the formulae used simply to allocate costs that Keystone had already reported to MOFCOM. As such, with this submission, MOFCOM possessed both the cost data and a narrative explanation of that data which clearly allocated meat cost to paws.

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17 United States, Second Written Submission, paras. 63-64.

18 Keystone, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-34).

18. As Keystone has often been the focus of China's arguments, the United States provides the following list of Keystone's submissions to assist the Panel in understanding where its accounting practices were detailed. To the extent the underlying exhibits have not been submitted because they are voluminous, the United States is willing to do so upon request of the Panel.

- Keystone, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-34), particularly Section VI "Production Cost and Relevant Expenses" and responses to questions VI.II. 3-5, and accompanying Forms 6-3—6-8, therein. Keystone included with Form 6-3 details of its allocation of production costs among the subject product categories. In addition to furnishing monthly Form 6-3 data in total for each month of the POI Keystone also provided [[

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- Keystone, Supplemental Questionnaire Response (December 18, 2009) (Exhibit USA-35), in particular responses to questions 27-30 on pages 19-32 (English version). Keystone explains how the costs were allocated, even taking examples of specific costs and tying them to specific cost centres, invoices and company accounts.

- Keystone Comments on the Preliminary AD Determination (Exhibit USA-30), particularly Section II ("BOFT's Rejection of Keystone's Submitted Product-Specific Cost Was Unreasonable and Contrary to Law"), III ("BOFT's Use of a Single Weighted Average Cost for ALL Products is Factually and Legally Faulty"), IV ("Even if Keystone's Product-Specific Cost are Rejected, BOFT has the Data to Calculate a More Reasonable Margin"—providing alternatives such as allocating based on relative value in Exhibits 1 and 2 thereto which specifically illustrated the allocation of meat cost using the relative sales value). Electronic (with formulae included) and hard copy of both the original and alternative cost allocations were submitted and the narrative made clear that "no new data were submitted, as all data already exist and are provided in Form 6-3."

- Keystone Comments on the AD Final Disclosure (Exhibit USA-29), specifically Section I, which cites various authorities in defence of its accounting methodology.

(b) (to the United States) Please point to the record evidence that supports and explains your answer to Panel question No. 29 with respect to which markets the cost allocations for each producer related to.

19. The United States obtained the market information at the Panel's request after consultation with the respondents. The United States cannot point to any particular record evidence to explain the answer because the United States is unaware of MOFCOM having ever solicited or considered such information during the investigation.

20. The United States would note that Tyson's and Pilgrim's in their initial questionnaire responses indicated that they allocated costs per the marketplace while Keystone provided an explanation of its specific methodology. The responses were provided in response to question VI.1.11(1) in the initial questionnaire, which asked respondents to:

> Please describe in detail the cost accounting system for unit cost of the same or like product and indicate whether your cost accounting system is part of your accounting system used to compile financial statements.

Excerpts of those responses are provided below:

Tyson

[[

]][19]

Pilgrim's

[[

]][20]

[19] Tyson Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-36), p.9.

[20] Pilgrim's Pride, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-32), p. 55.

Keystone

[[

]][21]

In short, MOFCOM knew the respondents' allocations entailed market prices. To the extent China asserts this issue was important to MOFCOM, then the assertion is refuted by the fact that MOFCOM asked no further questions nor did its determinations address the relevance of which markets those allocations were made by.

(c) (to both parties) With respect to China's arguments in paragraphs 51-59 of its second written submission, please explain with reference to the record evidence whether Tyson treated paws and other subject merchandise as "by products" or as "joint products".

21. As an initial matter, the United States notes two points regarding paragraphs 51-59 of China's second written submission. First, China does not define what a joint product or by-product is – or why such a distinction would be dispositive. Neither term is in the AD Agreement. The relevant provision, Article 2.2.1.1, provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

The AD Agreement thus does not make a distinction between "joint products", "by-products," or "whole products" regarding how costs are to be calculated. Rather, it is concerned instead with whether the costs are those kept by the exporter or producer and whether they are GAAP consistent and reasonably reflect costs associated with production and sale. Accordingly, there is no rule that certain accounting methodologies are precluded from consideration, or, in other words, that a firm whose accounting treats a product as a joint product can have that allocation accepted under the AD Agreement, while one that allocates costs as if the product was a by-product cannot. As noted by the United States and third parties, even if something is considered

[21] Keystone, Investigation Questionnaire Response (December 3, 2009) (Exhibit USA-34), p. 76.

to be a "waste product," its normal value does not change even if it is valued in the export market.

22. Second, China's arguments that Tyson and Pilgrim's allocations treated products as by-products is not supported by any recitation to MOFCOM's determinations. China now concedes that value-based cost methodologies are not inherently unreasonable.[22] The implication of its arguments in paragraphs 51-59 is that MOFCOM would have been prepared to accept a value based cost allocation if it entailed "true" joint products. The fact that China does not define "joint products" or point to any discussion in MOFCOM's determination about "joint products" – or anything about why the costs were purported unreasonable – confirms that this argument is simply more *post hoc* rationalization.

23. As a factual matter, though, Tyson did treat its products as joint products and the evidence on the record confirms as much. In its supplemental questionnaire, Tyson noted the following:

> Tyson does not classify any products produced from the live birds as by-products. Tyson treats all products that are produced from the live birds as co-products. Tyson assigns production costs to all of these products and records the revenue generated from sales of these products as sales revenue.[23]

Tyson reiterated this point in its Further Comments on the Preliminary AD Determination:

- "Tyson uses value-based allocations in the ordinary course of business to allocate meat costs to specific poultry products because they are ***joint products*** derived from a single input – a chicken."

- "Chicken breasts, leg quarters, wings, etc. are ***joint products*** because they are produced simultaneously (by raising a live bird), but are not identifiable as separate products until the bird is slaughtered and separated into different parts. Joint costs are costs that are incurred in a production process that results in the simultaneous production of multiple products. In Tyson's case, the costs associated with producing live birds are ***joint costs that must be allocated to the products derived from the bird.***"[24]

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22 China, Second Written Submission, para. 68.

23 Tyson, Supplemental Questionnaire (Exhibit USA-73), p. 12.

24 Tyson, Further Comments on Preliminary AD Determination (April 9, 2010) (Exhibit USA-26), p. 3 (emphases added).

At no time did MOFCOM ever question this assessment. For the first time before this Panel, China seeks to advance the argument that the use of the "offal market price" to allocate the joint costs to paws somehow converts them into a by-product. Neither MOFCOM during the investigation, nor China now, presents any support for this position, or for the proposition that MOFCOM made any distinction between by-products, joint-products, or that even a value-based allocation could have possibly been accepted.

Question 97 (both parties): How did the respondents allocate the values in the supplemental set(s) of costs submitted to MOFCOM? Please explain in particular:

24. As an initial matter, the United States wishes to clarify its understanding that the question is directed to the alternative cost allocation proffered by Keystone in which it allocated [[ ]] across all products. The United States notes again that MOFCOM did not address this alternative allocation in its determinations.

(a) On which basis (or using which benchmark) each respondent estimated the values of subject products in its books and records (i.e. did the values relate to prices, an average, etc.)

25. Keystone's books and records recorded the "Relative sales value" for each of the products sold during the period of investigation. The "Relative sales value" was indicated in Line 8 of Form 6-3. These values were used to allocate the "Direct Materials—Internal Meat Cost" on Line 15 of Form 6-3 in the alternative cost allocation methodology presented to MOFCOM by Keystone in its Comments on the Preliminary Determination[25]

(b) Were respondents adjusting these values on the basis of new information about sales?

26. Keystone did not adjust the values on the basis of new information about sales.

(c) Did the information differentiate the costs of raising a bird and the processing of the different parts?

27. Up to the split off point, Keystone did not differentiate the cost of raising a live bird and the processing of different parts

[25] Keystone, Comments on the Preliminary AD Determination (April 9, 2010) (Exhibit USA-30).

(d) Were paws given a value of what was obtained in the market or were they given a different value?

28. Paws were assigned an apportionment of the total actual cost incurred based on the paws relative share of the revenue earned on the sale of all the various chicken parts/products that resulted from processing for market.

Question 98 (United States): Do you agree that the totals used in MOFCOM's allocation methodology reflected the actual totals of the respondents?

29. Because of MOFCOM's inadequate disclosure, the United States does not know what totals MOFCOM derived in the course of MOFCOM's weight-based allocations. MOFCOM asserts it used the actual totals of the respondents in arriving at a weight based methodology – i.e., using a single, per kilogram cost for all products. However, the United States is in no position – nor was any interested party during the investigation – to confirm whether MOFCOM actually did so since MOFCOM did not disclose the calculations used in determining the anti-dumping margins. Moreover, as explained in the United States' first written submission, the evidence suggests that MOFCOM actually miscalculated the total used for Tyson. As noted by the United States, such a miscalculation is in and of itself a breach of Article 2.2.1.1.[26]

30. The precise problem faced by Tyson can be found in its Comments on the Final AD Disclosure.[27] To summarize though, MOFCOM failed to include all products produced from chickens in the denominator of its cost allocation. MOFCOM recalculated Tyson's costs by taking the total costs reported in the supplemental questionnaire and dividing them by the total pounds of the product reported in the response. This resulted in the same cost per pound for all products. MOFCOM's calculation though does not take into account several products derived from the chicken (e.g., blood and feathers) that should absorb a portion of the material costs. Thus, MOFCOM's weight based allocation – besides being an already inappropriate alternative to the producers' kept costs – appears to be additionally defective because MOFCOM's calculation did not take into account these additional products even though Tyson incurs costs for them.

31. Tyson provided the total pounds and cost for live chickens delivered to each of its U.S. processing plants during the POI. Although MOFCOM's weight-based allocation was not "neutral," as claimed by China, even presuming that it was "neutral" in concept, it was not "neutral" in application, because MOFCOM did not even divide the total costs for live bird by the total weight of live birds to "neutrally" calculate a weight-based cost for all products.

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26 United States, First Written Submission, para. 113 and n. 140.

27 Tyson, Comments on Final AD Disclosure (July 26, 2010) (Exhibit USA-40), pp. 5-6.

32. The United States emphasizes that even if China had started with totals costs as reported by respondents, China would not have met its obligations under Article 2.2.1.1. For purposes of Article 2.2.1.1, the respondents' allocations – not simply the total figures – are the kept costs. There appears to be no dispute on that point from the Parties. The United States understands China's position to be that it was entitled to reject U.S. respondents' kept costs as unreasonable, not that "kept costs" under Article 2.2.1.1 are exclusive of allocations:

> The real question for the Panel is whether the U.S. producers' books and records "reasonably reflect" the costs associated with the production and sale of the broiler products for purposes of the AD Agreement. On their face, the reported costs in this case did not meet this test and MOFCOM appropriately rejected them.[28]
>
> ***
>
> Having rejected respondents' reported costs that did not "reasonably reflect" the cost of producing the broiler parts at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents' distorting cost methodologies.[29]
>
> ***
>
> The real question for the Panel therefore is whether in this dispute the U.S. producers' books and record "reasonably reflect" the cost associated with the production and sale of the broiler products for purposes of the AD Agreement. On their face, the reported costs did not meet this test and appropriately rejected them.[30]

In short, while the Parties contest much, it appears they agree on one critical aspect: MOFCOM rejected the costs in the respondents' books and records. China argues, *inter alia*, it did so because the costs are "unreasonable" while the United States asserts MOFCOM's determinations do not explain why those costs are unreasonable. In any case, both, thus far, agree a rejection of the respondents' costs occurred even if the totals were utilized.

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28 China, First Written Submission, para. 63.

29 China, First Written Submission, para. 129.

30 China, First Opening Statement, para. 9.

B. ALLOCATION OF THE SUBSIDY BENEFIT

Question 100 (both parties): With respect to the US respondents' responses to the second supplemental questionnaire (I.4 for Tyson and I.6 for Pilgrim's) in Exhibits CHN-37 and CHN-38, please support your view as to whether the data relates to total purchases of corn and soybeans or to purchases of corn and soybeans per unit of subject merchandise.

33. The data related to the total purchase of corn and soybeans. The exhibits, on their face, indicate they are intended to provide the ingredients in the feed consumed by chickens and the quantity and value thereof. As the United States explained to MOFCOM during the investigation, MOFCOM's calculations were flawed because they assumed that chickens "ultimately sold as subject merchandise" consumed all the chicken feed, while the "chickens that were ultimately used to produce cooked chicken products and other non-subject merchandise were fed nothing."[31] The United State's explanation, however, followed information already placed on the record by the respondents that highlighted this clear error in MOFCOM's calculations. Exhibit CHN-38, Pilgrim's form explicitly notes that some of the feed is going to pullets and breeders.[32] Thus, while it is conceivable that U.S. respondents were confused as to the question posed by MOFCOM, MOFCOM was in a position to see what U.S. respondents interpreted.

34. The fact that the respondents viewed the data as total feed can be confirmed as follows. For Tyson, its response, as reflected in Exhibit CS2-I-3, reported the total "production quantity of live broiler chicken" in tons. Tyson reported the total quantity (tons) and value (USD) of each ingredient used to produce the feed that was consumed by those live chickens. For example, as shown on page 1 of Exhibit CHN-37, in July 2008, Tyson received [[ ]] tons of corn and produced [[ ]] tons of live chickens, not tons of broiler products.

35. With respect to Pilgrim's, it reported total purchases of corn and soybeans, as reflected in Exhibit S-II-I-2 of the Second Supplemental CVD Questionnaire Response. It can be confirmed that the figures reflect total purchases of corn and soybeans for all production by comparing the data in this response to the response to Question 9 of the First Supplemental CVD Questionnaire, which asked for the "purchases of raw materials (including soybean, corn, feed for broilers and live chickens) during the POI." The response to that question is found in Exhibit S-I-9(b) of the First Supplemental CVD Questionnaire Response (which is a restatement of the table responding to question III-3 of the original anti-subsidy questionnaire, asking for the same). In both exhibits the total quantity of corn is [[ ]], value [[ ]]; and the total quantity of soybean meal is [[ ]], value [[ ]].

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31 United States, Subsidy Calculation Letter (Exhibit USA-52), p. 1.

32 Exhibit CHN-38.

36. China's argument criticizing respondents' questionnaire responses, such as to these, is essentially one of procedural default, but that does not excuse the obligations of Article 19.4. Pilgrim's, Tyson, and the United States brought the issue to MOFCOM's attention and indicated how to remedy it. Confronted with the data, MOFCOM did not address it or make any inquiry to confirm the figures were correct. By China's logic, an investigating authority can pose a broad or imprecise question and absolve itself of any further responsibility to ensure an accurate countervailing duty rather than an approximation.

Question 101 (United States): With respect to the second alternative proposed by US respondents and discussed in paragraph 237 of the United States' first written submission (citing Exhibit USA-52), please indicate where on the record is the information about the amount of corn and soybean meal used to produce chicken feed for chickens used to produce subject merchandise.

37. The United States references Pilgrim's Table 1-5, attached as Exhibit USA-77.[33] This document, although initially prepared for the anti-dumping investigation, was cited by Pilgrim's to MOFCOM in order to correct the CVD calculation. Specifically, Pilgrim's suggested revising the numerator utilizing a ratio of subject merchandise to total merchandise. As can be seen from the document, the ratio can be derived by dividing "actual production quantity" of subject merchandise by "actual production quantity" of "all products from your company." As noted previously, MOFCOM did not address why the method was inappropriate or even attempt to further ascertain in light of this information what the proper subsidy would be.

IV. USE OF FACTS AVAILABLE IN CALCULATING THE ALL OTHERS RATES

Question 103 (both parties): Does the Final Disclosure to the US Government (Exhibit USA-49) indicate that the subsidy programme used for determining the "all others" rate was a countervailable feed programme

38. No, the Final Disclosure to the U.S. Government does not indicate that the subsidy program used for determining the "all others" subsidy rate was a "countervailable feed program." The entirety of MOFCOM's explanation of the "all others" subsidy rate in the Final Disclosure consists of the following:

> According to Article 21 of the CVD Regulations, with respect to other American companies which have not registered and submitted answer sheets, the investigation authority determines to adopt available facts to make a determination on ad valorem subsidy rate.

[33] Pilgrim's Pride, Table 1-5 (Exhibit USA-77).

> The Authority chooses a sampled company and uses competitive benefit method to calculate the benefit passed-through from upstream subsidy and received by the company, and obtains the company's ad valorem subsidy rate on this basis. In the final determination, the Authority uses this tax rate as other responding companies' ad valorem subsidy rate.[34]

39. This second paragraph refers to an "upstream subsidy," but not to a "feed program." No feed program was subject to MOFCOM's investigation and the only programs found by MOFCOM to have provided upstream subsidies were the Direct Payments and Crop Insurance programs, both of which pertain to crop production.[35] Crop production occurs upstream from the production of feed.

40. The only reference to an "upstream subsidy feed program" is found in China's response to the Panel's questions after the first panel meeting:

> **23. (to China) Concerning the CVD rate applicable to "all others", what subsidy programmes were included in the calculation?**
>
> **ANSWER:**
>
> 58. Only one program was included in the calculation. As referenced in the final disclosure, the included program was the upstream subsidy (feed) program.[36]

China's answer cites to page 42 of the Final Disclosure, but the relevant text quoted above contains no reference to a feed program.

41. China's response may have been intended to refer to the upstream subsidy amount determined by MOFCOM's so-called "competitive benefit" analysis, which China explained later in its response:

> As explained in the final disclosure, the "competitive benefit" was the difference in the purchase price paid for the subsidized feed materials versus the unsubsidized benchmark price. The "pass-through" benefit was a calculation of the amount of the subsidy

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34 MOFCOM, USG CVD Basic Facts (Exhibit USA-49), p. 42.

35 MOFCOM, USG CVD Basic Facts (Exhibit USA-49), p. 77.

36 China, Responses to Panel's First Set of Questions, para. 58.

> benefit received by the upstream suppliers that actually passed through to the sampled companies.[37]

42. With regard to the investigated companies, MOFCOM's approach was to use the "competitive benefit" amount, or the difference in price between the allegedly subsidized feed and the benchmark price (in this case, the price of feed in Argentina), unless that amount exceeded the amount that could actually pass-through to the producer. However, as China explained in its earlier submissions, for "all other producers", MOFCOM did not treat the pass-through amount as a limit and simply used the competitive benefit amount.[38] In effect, this meant that MOFCOM, in calculating the subsidy rate for "all other" producers, treated them as if they could receive a benefit that was actually greater than the amount that they could possibly receive in reality.[39] Of course, an explanation of this approach cannot be found in the Final Disclosure. Indeed, if such an explanation had been provided, it would have allowed the interested parties, including the United States, to understand how the margin was calculated and convey to MOFCOM the errors with such an approach, as further discussed in the United States' Second Written Submission.[40]

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37 China, Responses to Panel's First Set of Questions, para. 43.

38 China, Responses to Panel's First Set of Questions, para. 43.

39 United States, Second Written Submission, paras. 121-125.

40 United States, Second Written Submission, paras. 121-125.

V. INJURY DETERMINATION

A. DEFINITION OF THE DOMESTIC INDUSTRY

Question 107 (United States): The United States makes two interpretative arguments with respect to the obligation in Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement:

With respect to each of these interpretations, could the United States support its interpretation with reference to the ordinary meaning, context, and object and purpose of the specific provisions and the Anti-Dumping and SCM Agreements in light of the approach envisioned under the Vienna Convention.

(a) First, in response to Panel question No. 55, the United States argues that there is a positive obligation on investigating authorities to make active efforts to properly define the domestic industry.

43. The proper interpretation of the AD and SCM Agreements under the principles of treaty interpretation reflected in the Vienna Convention is that investigating authorities have a positive obligation to make active efforts to collect the information necessary to define the domestic industry in an objective manner. [41]

44. First, this is the ordinary meaning of the word "investigate" as used in provisions of the AD and SCM Agreements that set forth principals governing the conduct of antidumping and countervailing duty investigations. Specifically, ADA Article 1 and SCM Article 10 provide that antidumping and countervailing measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the respective Agreements. Similarly, ADA Article 5.1 and SCM Article 11.1 contemplate that investigating authorities will conduct "an investigation to determine the existence, degree and effect of any alleged" dumping and subsidies.

45. In requiring the conduct of an "investigation," ADA Article 1 and SCM Article 10 are analogous to Article 3.1 of the Agreement on Safeguards, which provides that "{a} Member may apply a safeguard measure only following an investigation by the competent authorities of that

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[41] As a technical matter, the United States clarifies a threshold point to avoid any misunderstanding. Article 31(1) of the Vienna Convention on the Law of Treaties provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Thus, per the Vienna Convention, it is not that each provision should be interpreted in light of its specific object and purpose but rather the provision is to be interpreted in light of the treaty's object and purpose.

Member." In *US – Wheat Gluten*, the Appellate Body considered the nature of the obligation created by the word "investigation" in Article 3.1 of the Agreement on Safeguards, and found as follows:

> The ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.[42]

In accordance with the active "investigation" contemplated by Article 3.1, the Appellate Body found that "competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligations" under other provisions of the Safeguards Agreement.[43]

46. The ordinary meaning of the word "investigation" as used in ADA Article 1 and SCM Article 10, as well as in ADA Article 5.1 and SCM Article 11.1, creates a similar obligation in the context of antidumping and countervailing duty investigations. Investigating authorities may not remain passive when confronted with an investigative record that lacks the information necessary to conduct an injury investigation in accordance with the Agreements. Rather, they must "undertake additional investigative steps . . . in order to fulfil their obligations."

47. The context supports an interpretation of Articles 1 and 5.1 of the AD Agreement and Articles 10 and 11.1 of the SCM Agreement as requiring investigating authorities to make active, independent efforts to collect the information necessary to conduct their injury analysis. In particular, the data-intensive nature of the injury analysis required under Articles 3 and 4 of the AD Agreement and Articles 15 and 16 of the SCM Agreement suggest that an investigating authority's collection of the requisite data is of the utmost importance. For example, compliance with ADA Article 3.2 and SCM Article 15.2 requires the collection of information on subject import volume and prices; domestic industry sales volume, prices, and production; and apparent consumption. Compliance with ADA Article 3.4 and SCM Article 15.4 requires the collection of a broad range of information concerning domestic industry performance, including sales, profits, market share, productivity, return on investment, utilization of capacity, cash flow, inventories, employment, wages, growth, and ability of raise capital or investments.

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42 *US – Wheat Gluten (AB)*, para. 53.

43 *Id*., para. 55.

48. Moreover, to conduct an "objective examination" of "positive evidence," as required under ADA Article 3.1 and SCM Article 15.1, investigating authorities must collect the requisite data in an active and unbiased manner. As the United States explained in response to Panel question 55, investigating authorities cannot conduct an "objective examination" of "positive evidence" without making active, independent efforts to identify the universe of domestic producers as a whole. An authority that limits its domestic industry definition to a biased subset of domestic producers most likely to post weak performance, such as petitioners, could hardly conduct an "objective examination" of "the consequent impact of {subject} imports on domestic producers," as required under ADA Articles 3.1 and SCM 15.1. Nor would the investigating authority possess the "positive evidence" necessary to conduct such an analysis because its data set would not provide an accurate and unbiased picture of domestic industry performance. Thus, the active and independent collection of information that investigating authorities must undertake to comply with Articles 3 and 4 of the AD Agreement and Articles 15 and 16 of the SCM Agreement is consistent with the ordinary meaning of the word "investigation," as used in ADA Article 1 and SCM Article 10.

49. As the United States explained in response to Panel question 55, an investigating authority cannot conduct an injury investigation in accordance with Articles 3 and 4 of the AD Agreement or Articles 15 and 16 of the SCM Agreement if it defines the domestic industry in a biased manner. In particular, an investigating authority may not limit its definition of the domestic industry to a subset of domestic producers most likely to exhibit the weakest performance. Thus, an investigating authority may not limit its inquiry into the appropriate domestic industry definition to the information presented by petitioners in their petition, even if petitioners arguably account for a major proportion of total production, because petitioners are more likely to exhibit weak performance than non-petitioners. Rather, it must make active, independent efforts to identify the universe of domestic producers as a whole consistent with the ordinary meaning of the word "investigation" as used in ADA Article 1 and SCM Article 10.

50. Finally, important context is provided by the language in GATT Article VI:6:

> {n}o contracting party shall levy antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry . . . ."

An investigating authority that defines a domestic industry to include only petitioners, rather than the domestic industry – which would occur if no effort is made to identify the universe of producers as a whole -- would not be consistent with that context.

(b) Second, in response to Panel question No. 58 and in paragraph 141 of its second written submission, the United States contends that there is a preferential hierarchy in the two possible definitions of domestic industry and that only after an investigating authority's effort to define the domestic industry as "domestic producers as a whole of the like product" proves unsuccessful may the authority resort to the alternative, secondary definition of the domestic industry as domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products."[44]

51. Under the interpretive approach envisioned under the Vienna Convention, the proper interpretation of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement is that these agreements express a clear preference for investigating authorities to define the domestic industry as "the domestic producers as a whole of the like product." ADA Article 4.1 and SCM Article 16.1 provide in relevant part that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . . ." The ordinary meaning and context of these provisions can only be understood in light of the principle of effectiveness. As the Appellate Body explained in *Japan – Alcoholic Beverages II*:

> A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 {of the Vienna Convention} is the principle of effectiveness (ut res magis valeat quam pereat). In United States - Standards for Reformulated and Conventional Gasoline, we noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[45]

52. Applying the principle of effectiveness to the text of Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement confirms that investigating authorities must endeavour to define the domestic industry as "producers as a whole" before resorting to the secondary definition of the domestic industry as producers "whose collective output . . . constitutes a major proportion . . . of total domestic production." If investigating authorities were free to define the

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[44] With respect to each of these interpretations, could the United States support its interpretation with reference to the ordinary meaning, context, and object and purpose of the specific provisions and the Anti-Dumping and SCM Agreements in light of the approach envisioned under the Vienna Convention.

[45] *Japan – Alcoholic Beverages II (AB)*, p. 12 (quoting *U.S. – Gasoline (AB)*, p. 23).

domestic industry to include no more than producers accounting for "a major proportion . . . of total domestic production" at their option, the clause "domestic producers as a whole" would be redundant. Under such an interpretation, investigating authorities could, as a blanket rule, comply with Article 4.1 and Article 16.1 by stopping their investigation once producers accounting for a "major proportion" are identified; at that point, the investigating authorities could simply halt their efforts to define the actual universe of domestic producers and would be absolved of any need to make the additional effort to identify and seek information from producers as a whole. And, where, as in this dispute, the firms listed by the Petitioner happen to account for an amount determined to constitute a majority of production, but to the exclusion of nearly half of domestic production, investigating authorities would be permitted to conduct a so-called investigation of this limited and non-representative self-defined industry.[46] Such an interpretation would therefore read "producers as a whole" out of ADA Article 4.1 and SCM Article 16.1, reducing the clause to redundancy or inutility. In light of this, and the fact that "producers as a whole" is listed first, ADA Article 4.1 and SCM Article 16.1 can only be interpreted as requiring authorities to endeavour to define the industry as producers as a whole before resorting to a less inclusive definition.

53. The emphasis on seeking to include in the domestic industry as close to all producers as feasible is further shown by the two explicit textual exceptions to defining the domestic industry as producers as a whole. Specifically, Article 4.1 of the AD Agreement and Article 16.2 of the SCM Agreement set out the only two circumstances that permit an investigating authority to deliberately exclude producers from the domestic industry definition-- one for related producers and one for regional industries.[47] As this list of exceptions is exhaustive,[48] these articles do not authorize investigating authorities to exclude domestic producers from the domestic industry definition by remaining passive and failing to make active, independent efforts to identify the universe of domestic producers of the like product. Thus, an interpretation of Article 4.1 and Article 16.1 as permitting authorities at their option to intentionally limit the definition of the domestic industry to identified producers who account for any major proportion of total production, to the exclusion of other domestic producers who may be willing to cooperate with the investigation, would contravene the curbs imposed by the text of the Agreements.

54. Additional context for the United States' interpretation is also provided by the pivotal role the domestic industry definition plays with respect to the analysis required under other

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[46] Arguably, the producers accounting for the other half of production would also meet the "major proportion of production" criterion, but an examination of the data for that half of the industry could present a very different picture of the state of the industry during the examination under ADA Article 3 and SCM Article 15.

[47] *See* United States, Second Written Submission, para. 142.

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

provisions of the AD Agreement and SCM Agreement. For example, under ADA Article 3.4 and SCM Article 15.4, investigating authorities must examine "the impact of dumped imports on the domestic industry." Under ADA Article 3.5 and SCM Article 15.5, investigating authorities must demonstrate "a causal relationship between the {subject} imports and the injury to the domestic industry." It stands to reason that the higher the proportion of total domestic producers included within the domestic industry definition, the more accurate will be an investigating authority's examination of impact and causation pursuant to these articles.[49] In light of this, it is only reasonable to read ADA Article 4.1 and SCM Article 16.1 as requiring investigating authorities to make an effort to define the domestic industry as producers as a whole so as to maximize the accuracy of their injury analysis before resorting to a less inclusive definition that permits a less accurate analysis.

55. Finally, Article VI of the GATT 1994 provides important context. Article VI of the GATT 1994 provides in relevant part that "{n}o contracting party shall levy antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry . . . ." (Emphasis added). ADA Article 4.1 and SCM Article 16.1 are clearly intended to provide guidance as to how investigating authorities are to go about defining the "domestic industry" for purposes of determining whether "the effect of the dumping or subsidization . . . is such as to cause or threaten material injury to an established domestic industry" within the meaning of Article VI of the GATT 1994. In this regard, it is significant that Article VI of the GATT 1994 references only "an established domestic industry," which would encompass domestic producers as a whole, while making no mention of producers whose collective output constitutes a major proportion of total domestic production. Such language is a strong indication that the phrasing of ADA Article 4.1 and SCM Article 16.1 is no accident, but intended to require investigating authorities to investigate the universe of producers as a whole before resorting to a less inclusive definition. The only definition of the domestic industry under ADA Article 4.1 and SCM Article16.1 that is perfectly coextensive with the term "an established domestic industry" under Article VI of GATT 1994 is "domestic producers as a whole."

[49] *See EC – Fasteners (AB)*, para. 414.

Question 108 (to both parties): In its response to Panel question No. 11, Mexico provides an illustrative list of possible actions an investigating authority could take to investigate the extent of the domestic industry such as questioning government agencies at the local level and producers' associations, checking lists of beneficiaries of subsidy programmes, consulting zoosanitary control agencies, etc.

(a) (to both parties) Do you agree with Mexico's assessment?

56. Yes. As Mexico correctly points out, MOFCOM could have investigated the universe of domestic producers as a whole by a variety of means, including, among other things: by questioning government agencies at the local level, by seeking information about and from other producers' associations, by checking lists of beneficiaries of subsidy programs, and by consulting zoosanitary control agencies. China itself, at the second meeting of the Panel, provided support for the investigative path suggested by Mexico. That is, China indicated that its Ministry of Agriculture data on Chinese broiler farms by flock size was based upon census forms completed by individual provinces. Although China claims that these census forms did not request more detailed information, the provincial governments that completed the forms may have done so based upon more detailed information collected at the local level. Given this, MOFCOM should have been able to identify and contact additional domestic producers through questioning provincial governments.

57. Government subsidy programs and zoosanitary control agencies are other obvious sources of information on poultry producers in China. The administration of government subsidy programs and zoosanitary control activities requires the maintenance of contact information for subsidy recipients and agricultural producers subject to inspection, respectively. This information should have been readily available to, or at least attainable by, MOFCOM.

58. Rather than seeking information on domestic producers from these or other sources, however, MOFCOM simply provided blank questionnaires to the 20 producers listed in the petition, who were all members of petitioner CAAA and hence petitioners themselves. China cannot argue that doing more than nothing to investigate the universe of producers as a whole would have been unduly burdensome, particularly given the numerous avenues of inquiry available to MOFCOM and the existence of only 147 major poultry producers in China.[50]

59. China also could have sought out information on whether Chinese producers had cooperated in forming a general purpose producers association that was not (as was the CAAA) formed for the explicit purpose of pursuing AD and CVD investigations. In this regard, the United States recalls that the articulated purposes behind the formation of the 20-member CAAA included:

[50] China, First Written Submission, para. 238.

- "take part in the coordination work of the industrial injury investigation and action response of antidumping, anti-subsidy and other foreign trade disputes in relation to this industry, and protect the security of the industry;"
- "establish a market early-warning mechanism"; and
- "safeguard industrial interest."[51]

(c) (to both parties) Can a failure by the investigating authority to take independent action to seek out additional domestic producers give rise to a violation if the Petition was submitted on behalf of producers representing a major proportion of total domestic production, e.g. 70%?

60. As discussed above in response to question 107, ADA Article 4.1 and SCM Article 16.1 express a clear preference for defining the industry as producers as a whole and this preference. Combined with the duty to investigate, also discussed in response to question 107, investigating authorities are obligated to make meaningful efforts to investigate actively the universe of producers as a whole.

61. Indeed, such investigative efforts are particularly important in cases where petitioners themselves arguably account for a major proportion of total production because petitioning companies are more likely to exhibit injury than non-petitioning companies. Even in a case where petitioners account for 70 percent of total production, the inclusion of non-petitioning producers within the industry definition could affect an investigating authority's analysis of volume, price, and impact if the performance of non-petitioning producers is sufficiently stronger than that of petitioners, or where, as in this dispute, the non-petitioning producers are taking market share from the petitioning producers. The inclusion of non-petitioning producers within the domestic industry definition might also be relevant to an investigating authority's analysis of causation, as when non-petitioners outperform petitioners for reasons other than subject import competition.

62. Of course, the facts in the present dispute are starker than those in the Panel's hypothetical. In this case, by making no effort to identify domestic producers beyond those listed in the petition, and by providing no real avenue for other producers to be included in the industry definition, MOFCOM effectively excluded producers accounting for half of total production from its industry definition. MOFCOM thereby focused its injury analysis on those producers most likely to exhibit injury – the firms composing the Petitioner – in violation of China's WTO obligations.

[51] CAA, Petition, Sec. I.(I)1 (Exhibit USA-1).

Question 109 (United States): In a situation where responses to producer questionnaires represent a major proportion of the total production of the domestic like product (for instance 70%), is there a risk of material distortion if only this data is considered? If questionnaires are sent to producers that represent 70% of the total domestic production and responses are received only from 2/3 of these producers would the investigating authority need to take action to collect additional data?

63. For the same reasons discussed in the U.S. response to question 108(c) above, an investigating authority that limits its definition of the domestic industry to petitioners accounting for 70 percent of total domestic production, without further investigation of producers as a whole, introduces a material risk of distortion. The composition of petitioners is the result of a self-selection process among domestic producers, as producers posting the weakest performance would have the greatest incentive to go to the effort and expense of joining a petition. Because non-petitioners are likely to outperform petitioners, the inclusion of non-petitioning producers within the domestic industry definition, even those accounting for 30 percent of total production, could materially influence an investigating authority's injury analysis. Conversely, the inclusion of only petitioners within a domestic industry definition would make an affirmative injury determination more likely, which is the epitome of a material distortion.

64. The answer to the second part of the Panel's question depends upon the steps the investigating authority has taken to define the domestic industry in a thorough and unbiased fashion. If an investigating authority has made reasonable efforts to define the domestic industry to include producers as a whole, then the investigating authority has acted consistently with the Agreements even if it is unable to identify all domestic producers and receives questionnaire responses from less than all of the producers it has identified. Indeed, the secondary definition of domestic industry provided under Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement – producers "whose collective output of the products constitutes a major proportion of the total domestic production" – is intended to cover just such a potentiality.[52]

65. Thus, an investigating authority that makes reasonable efforts to investigate the universe of producers as a whole but is able to identify producers accounting for only 70 percent of total production, and then receives questionnaire responses from only two-thirds of the producers it

[52] Contrary to China's opening statement at the second Panel meeting, the United States is not arguing that an authority may never base its investigating solely on responses from petitioners. *See* China's Opening Statement at the Second Meeting with the Panel, para.64. If an investigating authority makes reasonable efforts to investigate the universe of producers as a whole but ultimately receives questionnaire responses only from petitioners accounting for a major proportion of domestic production, even after following up with non-responding producers, the authority will have acted consistently with the Agreements. The United States also recognizes that petitioners may sometimes themselves account for, or provide the names of additional producers who together with petitioners account for 100 percent of domestic production, in which case an investigating authority's definition of the domestic industry would necessarily encompass only petitioners.

has identified even after following up with non-responding producers, has acted in accordance with the Agreements. On the other hand (putting aside the allowable use of a representative sample where there is a fragmented industry), an investigating authority that sends questionnaire responses only to petitioners accounting for 70 percent of total domestic production, with no effort to identify and investigate the universe of producers as a whole, could be in violation of Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement regardless of the questionnaire response rate.

Question 111 (to both parties): Concerning USAPEEC's Injury Brief (Exhibit USA-21), please answer the following:

(b) and (d) (United States) What evidence supports your assertion that Da Chan (Asian Food) Ltd. is a different company from DaChan Wanda (Tianjin)? What evidence supports your assertion that New Hope is a separate company from Shandong Liuhe?

66. USAPEEC's un-rebutted point that Da Chan (Asian Food) Ltd. and New Hope Group, Ltd. are separate companies that were not named in the petition, and hence not contacted by MOFCOM, is evidence in and of itself. In arguing that "the petition ignores some of the largest poultry companies in China," USAPEEC observed that "Da Chan (Asia) Foods Ltd. is reported to represent over 10 percent of total Chinese chicken production, but is not mentioned by name in the Petition" and that "{o}ther major producers not included in the Petition include New Hope Group, Ltd. . . . ."[53] USAPEEC would not have brought this information to MOFCOM's attention if it did not believe that Da Chan (Asia) Foods Ltd. was different from Dachan Wanda (Tianjin) Co., Ltd. and that New Hope Group, Ltd. was different from Shandong Liuhe because both Dachan Wanda (Tianjin) Co. and Shandong Liuhe were mentioned by name in the petition, among "{e}nterprises producing domestic like products."[54] Thus, MOFCOM was aware that USAPEEC did not believe DaChanWanda (Tianjin) Co., Ltd. to be the same company as Da Chan (Asia) Foods, Ltd. or Shandong Liuhe to be the same company as New Hope Group, Ltd. China concedes that MOFCOM sent questionnaires to DaChan Wanda (Tianjin) and Shandong Liuhe not because of information provided by USAPEEC but because both producers were among the 20 members of petitioner CAAA listed in Exhibit 2 to the petition.[55] MOFCOM did not send a questionnaire to either Da Chan (Asia Food) Ltd. or New Hope Group, Ltd., despite being apprised by USAPEEC that the producers ranked among the largest poultry companies in China.[56] China now claims that Da Chan (Asia Food) Ltd. and New Hope responded on a

53 USAPEEC's Injury Brief (Exhibit USA-21), p. 3.

54 CAA, Petition (Exhibit USA-1), pp. 3-4.

55 *See* China, Second Written Submission, para. 146.

56 USAPEEC, Injury Brief (Exhibit USA-21), p. 3.

consolidated basis under the names DaChan Wanda (Tianjin) and Shandong Liuhe, respectively, but cites no evidentiary support from the record before MOFCOM.[57]

67. In short, the evidentiary record before MOFCOM does not support China's assertion. Rather than sending questionnaires to Da Chan (Asia) Foods, Ltd. and New Hope Group, Ltd. or explaining its decision not to do so in the final determinations, however, MOFCOM simply ignored the information provided by USAPEEC and did nothing.[58] China's claim that "MOFCOM sent domestic producer questionnaires to every known Chinese producer"[59] is belied by the record, which shows that MOFCOM failed to contact major producers identified by USAPEEC or explain that it had been apprised that they were submitting a consolidated response.[60]

Question 117 (United States): Given China's position that MOFCOM did not make a level of trade adjustment, what claims with respect to procedural or disclosure obligations is the United States making concerning MOFCOM's price effects analysis?

68. Notwithstanding China's admission that MOFCOM failed to predicate its underselling analysis on a comparison of domestic prices and subject imports prices at the same level of trade, the United States maintains each of its claims regarding China's violation of its procedural and disclosure obligations.

69. During the investigation, the United States objected to MOFCOM's comparison in its preliminary determination of subject import and domestic like product prices at different levels of trade[61] and, in its final determination, MOFCOM purported to have taken "the difference of

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57 China, Second Written Submission, para. 146.

58 China's misunderstanding of its WTO obligations concerning the investigation of the domestic industry is highlighted by its assertion that the United States has not identified any known producers who were not given a full and equal opportunity to participate. See China's Opening Statement at the Second Meeting with the Panel, para. 67. Contrary to China's view, it was MOFCOM's obligation to investigate the universe of producers as a whole in defining the domestic industry, regardless of whether the United States can now identify specific producers excluded from the definition. Moreover, even as a factual matter, China's assertions fail to withstand scrutiny, in light of MOFCOM's failure to provide blank questionnaires to several producers identified by the United States, specifically Da Chan (Asia) Foods Ltd. and New Hope Group, Ltd., as well as Fujian Sumner.

59 China, First Written Submission, para. 243.

60 China concedes that MOFCOM did not send a questionnaire to Fujian Sumner (China's Second Written Submission, para. 146) after being informed by USAPEEC that Fujian Sumner was a major domestic producer omitted from the petition. USAPEEC's Injury Brief, p. 3 (Exhibit USA-21).

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

sales levels into consideration, adjusting the import price based on the customs data accordingly."[62] MOFCOM's failure to disclose the methodology it purportedly used to adjust import prices violated Article 6.4 of the AD Agreement and Article 22.3 of the SCM Agreement and denied U.S. respondents a timely opportunity to review and contest the methodology. Additionally, MOFCOM's failure to explain how it adjusted import prices constitutes a breach of Article 12.2 and 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement for failure to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material to the investigating authorities." China's *post hoc* explanation of MOFCOM's actions (or inactions) in this regard cannot remedy MOFCOM's failure to disclose this methodology.

70. As discussed in our response to Panel question 73, we recognize that MOFCOM would have had no methodology for making a level of trade adjustment to disclose if it made no adjustment to subject import prices to account for their different level of trade, as China maintains. Nevertheless, we would emphasize that China's elaborate *post hoc* rationalization of MOFCOM's failure to consider clear level of trade differences when comparing domestic prices to subject import prices appears nowhere in the final determinations.[63] The totality of MOFCOM's actual response to the United States' observation at the opinion presentation meeting that subject import prices on a CIF basis were at a different level of trade than domestic producer prices to first arms-length customers was as follows:

> At the same time, when comparing the import price of the Subject Products and the sales price of the domestic like products, the Investigating Authority has taken the difference in sales levels into consideration, adjusting the import price based on the Customs data accordingly. With respects to the data of the adjusted import price and the price under-cutting on the domestic like products, the interested parties have made no objection to this.[64]

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[62] MOFCOM, AD Final Determination sec. VI(ii)(2) (Exhibit USA-4); MOFCOM, CVD Final Determination sec. VII(B)(2) (Exhibit USA-5).

[63] Specifically, China claims that MOFCOM compared subject import and domestic prices at "a comparable stage of distribution – physically in China ready to be further transferred." China, First Written Submission, para. 289; *see also* China, Second Written Submission, paras. 204-5." It also claims that "there is no evidence of there being systematic difference in levels of trade between those customers of subject imports and those customers of domestic producers." *See* China's First Written Submission at para. 302; *see also* China, Second Written Submission, paras. 207-8.

[64] MOFCOM, Final AD Determination sec. 6.2.2 (Exhibit USA-4); MOFCOM, Final CVD Determination sec. 7.2.2 (Exhibit USA-5).

71. Thus, MOFCOM seemed to acknowledge that its data on subject import prices were at a different level of trade than its data on domestic prices and indicated that it was "adjusting" subject import prices accordingly. In light of China's insistence that MOFCOM made no level of trade adjustment, and the importance of level of trade to MOFCOM's underselling analysis, MOFCOM's failure to provide the reasons for its apparent rejection of the United States' argument concerning level of trade was nevertheless in breach of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

Question 121 (United States): Please respond to China's argument that the reference to "low-priced sales" in MOFCOM's findings means that MOFCOM did not rely on price undercutting to reach its finding of price suppression.

72. As the United States has amply demonstrated, MOFCOM very explicitly predicated its finding that subject import suppressed domestic like product prices on its defective underselling analysis.[65] For the first time at the second meeting of the Panel, China alleged that the United States' argument is undermined by two "translation mistakes."[66] The first alleged "mistake," and the subject of the Panel's question, concerned the following sentence in the U.S. translation of the final determinations: "The lower price of the Subject Products has also suppressed sales price of the domestic like products."[67] Under China's preferred translation, the sentence would read the "low-priced sales of the product concerned also suppressed the selling price of the like product."[68]

73. The United States stands by its translation – "lower priced" is an accurate translation of the text in question. In any event, the difference between these two translations makes no difference to MOFCOM's determination – neither translation supports China's assertion that MOFCOM based its finding of price suppression on anything other than its flawed underselling analysis.

74. The sentence upon which China focuses has the same meaning under either translation when read in the context of the section in which it appears, the translation of which China does not challenge. The title of the section in which the sentence appears is "Impacts of Import price of Subject products on Price of Domestic Like Products." In the first paragraph of the section, MOFCOM compares subject import prices on a CIF basis to domestic producer sales prices to

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65 *See* United States, First Written Submission, paras. 306-10; United States, Second Written Submission, paras. 190-198.

66 China, Opening Statement at the Second Panel Meeting, para. 98.

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

68 China, Opening Statement at the Second Panel Meeting, para. 99.

first arms-length customers.[69] In the second paragraph, MOFCOM cites these data to find that "the RMB price of the Subject Products is always lower than average sales price of the domestic like products" and that "{t}he Subject Products have caused obvious price cuts for the domestic like products."[70]

75. The third paragraph begins with the sentence upon which MOFCOM focuses, which China translates as reading the "low-priced sales of the product concerned also suppressed the selling price of the like product."[71] Appearing in section titled "Impacts of Import price of Subject products on Price of Domestic Like Products," and immediately following a paragraph in which MOFCOM found that subject import underselling "caused obvious price cuts," the topic sentence of the third paragraph can only be understood to mean that subject import underselling "also" suppressed domestic like product prices.

76. Such an interpretation is confirmed with reference to the remainder of the paragraph, which reads as follows:

> Evidences from the investigating suggested that during the POI (with year 2007 as the only exception), sales price of domestic like products had been lower than their production costs for a quite long time, while gross profit margin of the domestic like products in 2007 remained at a fairly low level. As a result, the domestic like products sector had been losing money for a long time. Particularly since 2008, further price cuts on the part of the Subject Products have resulted in a loss in money of the domestic like products sector.[72]

77. Belying China's suggestion that MOFCOM somehow found that subject import volume and market share suppressed domestic prices,[73] MOFCOM makes no mention of subject import volume or market share in its paragraph addressing price suppression. To the contrary, in the concluding sentence of the paragraph, MOFCOM emphasizes that "since 2008, further price cuts

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

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

71 China, Opening Statement at the Second Panel Meeting, para. 99.

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

73 China, Opening Statement at the Second Panel Meeting, para. 101.

on the part of the Subject Products" resulted in further price suppression, in a clear reference to the defective price comparisons contained in the first paragraph of the section.

78. Thus, under either translation of the sentence upon which China focuses, MOFCOM could only be understood to have found that subject import underselling, based on MOFCOM's defective price comparisons, suppressed domestic prices. China does not and cannot point to any finding in the final determinations explaining how subject import volume and market share alone could have suppressed domestic price to a significant degree because MOFCOM made no such finding.[74] Given that MOFCOM's underselling analysis was inconsistent with China's WTO obligations, MOFCOM's finding that subject imports suppressed domestic prices, which relied exclusively on that analysis, is WTO-inconsistent as well.

79. With respect to the second "translation mistake" alleged by China, the United States observes that there is no operative difference between the U.S. translation of the sentence in question and China's preferred translation. The U.S. translation reads "the price cutting of the Subject Products caused substantial suppression of the sale price of the domestic like products" while China's preferred translation reads "the activity of price reduction of the product concerned caused apparent undercut and suppression to the price of the domestic like product."[75] Under either translation, MOFCOM is clearly finding that subject import prices undercut and suppressed domestic like product prices. Such a conclusion is confirmed with reference to MOFCOM's reliance on its defective underselling analysis earlier in the same paragraph, the translation of which China does not challenge:

> {T}here are data showing the price of the imported Subject Products was lower than that of the domestic like products, showing obvious price under-cutting effect on the domestic like products. With this effect, the domestic like products were forced to cut prices by a large margin in order to maintain the market share . . . [76]

80. Thus, China's second alleged "translation mistake" lends no support to its contention that MOFCOM's found significant price suppression caused by subject import volume and market share effects alone.

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[74] The Appellate Body rejected a similar argument raised by China in the GOES dispute on grounds that "MOFCOM's Final Determination does not indicate how these two factors {price and volume} may have interacted, or whether the effect of either prices or volume alone could have sustained MOFCOM's finding of significant price depression or suppression." *See China – GOES (AB)*, para. 219.

[75] China, Opening Statement at the Second Panel Meeting, para. 100.

[76] MOFCOM, Final AD Determination sec. 6.2.2 (Exhibit USA-4); MOFCOM, Final CVD Determination sec. 7.2.2 (Exhibit USA-5).