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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION	12
1.1 Complaint by the United States	12
1.2 Panel establishment and composition	12
1.3 Panel proceedings.....	12
1.3.1 General	12
1.3.2 Preliminary ruling	13
2 THE MEASURES AT ISSUE	13
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS	13
4 ARGUMENTS OF THE PARTIES	15
5 ARGUMENTS OF THE THIRD PARTIES	15
6 INTERIM REVIEW	15
7 FINDINGS	17
7.1 General principles.....	17
7.1.1 Treaty interpretation	17
7.1.2 Standard of review.....	17
7.1.3 Burden of proof	18
7.1.4 Article 21.5 proceedings	18
7.2 Article 2.2.1.1 of the Anti-Dumping Agreement: the proper allocation of costs	19
7.2.1 Introduction.....	19
7.2.1.1 Our findings in the original report	19
7.2.1.2 MOFCOM's redetermination	20
7.2.1.2.1 Tyson	20
7.2.1.2.1.1 Tyson's initial value-based cost allocation	21
7.2.1.2.1.2 MOFCOM's weight-based cost allocation	21
7.2.1.2.2 Pilgrim's Pride.....	22
7.2.2 Main arguments of the parties.....	23
7.2.2.1 United States	23
7.2.2.1.1 Tyson	23
7.2.2.1.2 Pilgrim's Pride.....	23
7.2.2.2 China	23
7.2.2.2.1 Tyson	23
7.2.2.2.2 Pilgrim's Pride.....	25
7.2.2.3 Main arguments of the third parties.....	26
7.2.3 Evaluation	26
7.2.3.1 The law	26
7.2.3.1.1 Consider	27
7.2.3.1.2 All available evidence	27
7.2.3.1.3 Conclusion	29

7.2.3.2	Tyson	30
7.2.3.2.1	Preliminary observations	30
7.2.3.2.2	MOFCOM's rejection of Tyson's value-based cost allocation.....	31
7.2.3.2.3	MOFCOM's use of weight-based cost allocation.....	32
7.2.3.2.4	Tyson's proposed weight-based methodology	34
7.2.3.2.5	"Historically utilized"	35
7.2.3.3	Pilgrim's Pride.....	36
7.2.4	Conclusion	37
7.3	Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement: price effects	37
7.3.1	Introduction	37
7.3.1.1	Our findings in the original report	37
7.3.1.2	The redetermination's consideration of price effects	38
7.3.1.2.1	Price undercutting	38
7.3.1.2.2	Price suppression	39
7.3.2	Main arguments of the parties	40
7.3.2.1	Price undercutting	40
7.3.2.1.1	United States.....	40
7.3.2.1.2	China.....	40
7.3.2.2	Price suppression	41
7.3.2.2.1	United States.....	41
7.3.2.2.2	China.....	42
7.3.3	Evaluation	42
7.3.3.1	Price undercutting	42
7.3.3.1.1	Price comparison.....	42
7.3.3.1.2	Representativeness	45
7.3.3.2	Price suppression	47
7.3.4	Conclusion	48
7.4	Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement: impact on the domestic industry	48
7.4.1	Introduction	48
7.4.2	Main arguments of the parties	48
7.4.2.1	United States	48
7.4.2.2	China	49
7.4.3	Evaluation	50
7.4.3.1	MOFCOM's redetermination	50
7.4.3.2	The law	51
7.4.3.3	Analysis.....	53
7.4.3.3.1	Capacity utilization	53
7.4.3.3.1.1	MOFCOM's comparison	53
7.4.3.3.1.2	Capacity utilization and overall analysis.....	55

7.4.3.3.2 Inventories.....	56
7.4.3.3.3 Focus on part of the POI	57
7.4.3.3.4 "Potential" negative effect and future imports	58
7.4.4 Conclusion	59
7.5 Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement: causation	60
7.5.1 Introduction	60
7.5.2 Main arguments of the parties	60
7.5.2.1 United States	60
7.5.2.2 China	61
7.5.3 Evaluation	62
7.5.3.1 The law	62
7.5.3.2 MOFCOM's redetermination	63
7.5.3.2.1 Causation.....	63
7.5.3.2.2 Non-attribution	64
7.5.3.3 Analysis.....	65
7.5.3.3.1 Subject import volumes did not increase at the expense of the domestic industry	65
7.5.3.3.2 MOFCOM failed to reconcile its analysis with evidence of improved performance.....	67
7.5.3.3.3 Constraints on domestic production of chicken feet	68
7.5.4 Conclusion	68
7.6 Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement: notice and ample opportunity to present written evidence	69
7.6.1 Introduction	69
7.6.2 Main arguments of the parties	69
7.6.2.1 United States	69
7.6.2.2 China	70
7.6.3 Main arguments of the third parties	71
7.6.4 Evaluation	71
7.6.4.1 The law	71
7.6.4.1.1 All interested parties.....	72
7.6.4.1.2 Shall be given notice	73
7.6.4.1.3 Of the information which the authorities require.....	74
7.6.4.2 The facts.....	75
7.6.4.3 Analysis.....	75
7.6.4.3.1 Notice requirement.....	75
7.6.4.3.1.1 Notice of Initiation	76
7.6.4.3.1.2 General Verification Letter	77
7.6.4.3.1.3 Non-confidential summaries.....	79
7.6.4.3.1.4 Conclusion.....	79
7.6.4.3.2 Obligation to provide ample opportunity to present written evidence	80

7.6.5 Conclusion	80
7.7 Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement: timely opportunities to see information and to prepare presentations on the basis of this information	80
7.7.1 Introduction	80
7.7.2 Main arguments of the parties	80
7.7.2.1 United States	80
7.7.2.2 China	81
7.7.3 Main arguments of the third parties	82
7.7.4 Evaluation	82
7.7.4.1 The law	82
7.7.4.1.1 Whenever practicable provide timely opportunities to see.....	83
7.7.4.1.2 All information	83
7.7.4.1.2.1 That is relevant to the presentation of their cases	83
7.7.4.1.2.2 That is not confidential as defined in paragraph 5	84
7.7.4.1.2.3 That is used by the authorities	84
7.7.4.1.3 Provide timely opportunities ... to prepare presentations on the basis of this information	85
7.7.4.2 Analysis.....	85
7.7.4.2.1 Providing timely opportunities to see	85
7.7.4.2.1.1 Preliminary observations	85
7.7.4.2.1.2 Non-confidential pricing information	87
7.7.4.2.1.3 The identities of the Chinese producers	90
7.7.4.2.1.4 Requests for information	90
7.7.4.2.1.5 Additional "context" regarding the data in the non-confidential summaries and aggregate data	92
7.7.4.2.1.6 Information in respect of "sampling"	93
7.7.4.2.2 Opportunities to prepare presentations	93
7.7.4.2.3 Issues related to the non-confidential treatment of information.....	93
7.7.5 Conclusion	94
7.8 Article 6.8 of the Anti-Dumping Agreement and paragraphs 3 and 5 of Annex II: facts available	94
7.8.1 Introduction	94
7.8.2 Factual background.....	94
7.8.3 Main arguments of the parties	95
7.8.3.1 United States	95
7.8.3.2 China	96
7.8.4 Main arguments of third parties	97
7.8.5 Evaluation	98
7.8.5.1 The law	98
7.8.5.2 Analysis.....	99
7.8.5.2.1 China's response in respect of paragraph 3 of Annex II	100

7.8.5.2.2	China's response in respect of paragraph 5 of Annex II	101
7.8.6	Conclusion	102
7.9	Article 6.9 of the Anti-Dumping Agreement: essential facts.....	102
7.9.1	Introduction	102
7.9.2	Main arguments of the parties	103
7.9.2.1	United States	103
7.9.2.2	China	103
7.9.3	Evaluation	104
7.9.3.1	The law	104
7.9.3.1.1	Essential facts.....	104
7.9.3.1.2	The obligation to "inform"	105
7.9.3.1.3	Conclusion	106
7.9.3.2	Analysis.....	106
7.9.3.2.1	Disclosure obligation in respect of dumping margin calculations	106
7.9.3.2.2	Disclosure obligation in respect of the "original" data of Pilgrim's Pride	107
7.9.3.2.3	Disclosure obligation in respect of the data of Keystone	111
7.9.4	Conclusion	117
7.10	Article 9.4(i) of the Anti-Dumping Agreement: maximum amount of anti-dumping duty for imports from exporters not individually examined	118
7.10.1	Findings of the Panel in the original report	118
7.10.2	MOFCOM's findings in the redetermination	118
7.10.3	Main arguments of the parties	119
7.10.3.1	United States.....	119
7.10.3.2	China.....	120
7.10.4	Evaluation.....	120
7.10.4.1	The law.....	120
7.10.4.2	Analysis	121
7.10.5	Conclusion	122
7.11	Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement: public notice.....	122
7.11.1	Introduction	122
7.11.2	Main arguments of the parties	122
7.11.2.1	United States.....	122
7.11.2.2	China.....	123
7.11.3	The law	123
7.11.4	Analysis and conclusion	124
7.12	Consequential claims.....	125
8	CONCLUSIONS AND RECOMMENDATION	125

LIST OF ANNEXES**ANNEX A****WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW**

	Contents	Page
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	A-6
Annex A-3	Interim Review	A-8

ANNEX B**ARGUMENTS OF THE UNITED STATES**

	Contents	Page
Annex B-1	Executive summary of the First Written Submission of the United States	B-2
Annex B-2	Executive summary of the Second Written Submission of the United States	B-10
Annex B-3	Executive summary of the Opening Oral Statement of the United States at the Substantive Meeting of the Panel	B-18

ANNEX C**ARGUMENTS OF CHINA**

	Contents	Page
Annex C-1	Executive summary of the First Written Submission of China	C-2
Annex C-2	Executive summary of the Second Written Submission of China	C-10
Annex C-3	Executive summary of the Oral Statements of China at the Substantive Meeting of the Panel	C-18

ANNEX D**ARGUMENTS OF THE THIRD PARTIES**

	Contents	Page
Annex D-1	Integrated executive summary of the arguments of the European Union	D-2
Annex D-2	Integrated executive summary of the arguments of Japan	D-4

ANNEX E**PRELIMINARY RULING**

	Contents	Page
Annex E-1	Ruling by the Panel on jurisdictional issues dated 22 March 2017	E-2

CASES CITED IN THIS REPORT

Short title	Full case title and citation
<i>Argentina – Hides and Leather (Article 21.3(c))</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10 , 31 August 2001, DSR 2001:XII, p. 6013
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW , adopted 4 August 2000, DSR 2000:IX, p. 4299
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<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW , adopted 24 April 2003, DSR 2003:III, p. 965
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<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW
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Short title	Full case title and citation
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<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
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<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R , adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Russia – Commercial Vehicles</i>	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/R and Add.1, circulated to WTO Members 27 January 2017 [appealed by Russia 20 February 2017]
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<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R , adopted 24 April 2012, DSR 2012: XI, p. 5751
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
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<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R , adopted 31 August 2004, DSR 2004:V, p. 1875
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<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW , adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AUV	Average unit values
CIF	Cost, insurance, freight
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
JT&N	Jincheng Tongda & Neal
Keystone	Keystone Foods, LLC
MOFCOM	Ministry of Commerce of the People's Republic of China
Pilgrim's Pride	Pilgrim's Pride Corporation
POI	Period of investigation
Redetermination	Ministry of Commerce, Notice No. 44 of 8 July 2014 of the Redetermination of the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the US
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Steptoe	Steptoe & Johnson LLP
RMB	Chinese Renminbi
Tyson	Tyson Foods, Inc.
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. This compliance dispute concerns the challenge by the United States to measures taken by China to comply with the rulings and recommendations of the Dispute Settlement Body (DSB) in the original proceeding *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*.

1.2. Paragraph 1 of the Agreed Procedures under Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) reached between the United States and China states that "[s]hould the United States consider that the situation described in Article 21.5 of the DSU exists, the United States will request that China enter into consultations with the United States." The United States considered that China's measures taken to comply with the recommendations and rulings of the DSB in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* are not consistent with the covered agreements and therefore requested, on 17 May 2016, that China enter into consultations.

1.3. Consultations were held on 24 May 2016, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 27 May 2016, the United States requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU with standard terms of reference.¹

1.5. At its meeting on 22 June 2016, the DSB referred this dispute, if possible, to the original Panel, in accordance with Article 21.5 of the DSU.

1.6. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in documents WT/DS427/11 and WT/DS427/11/Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.²

1.7. In accordance with Article 21.5 of the DSU, the Panel was composed on 18 July 2016 as follows:

Chairperson:	Mr Faizullah Khilji
Members:	Mr Serge Fréchette
	Ms Claudia Orozco

1.8. Brazil, Ecuador, the European Union, and Japan reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.9. After consulting the parties, the Panel:

- a. adopted its Working Procedures³ and timetable on 9 November 2016;
- b. revised the timetable on 1 December 2016, and again on 4 July 2017; and

¹ Request for the establishment of a panel by the United States, WT/DS427/11 and WT/DS427/11/Corr.1 (United States' panel request).

² Constitution note of the Panel, WT/DS427/12.

³ See the Panel's Working Procedures in Annex A-1.

- c. adopted, on 22 November 2016, additional procedures for the protection of Business Confidential Information (BCI).⁴

1.10. The Panel held its substantive meeting with the parties on 25 and 26 April 2017. A session with the third parties took place on 26 April 2017. The Panel issued its Interim Report to the parties on 22 September 2017. The Panel issued its Final Report to the parties on 17 November 2017.

1.11. In these panel proceedings, each party raised concerns regarding the late submission of exhibits by the other party, outside of the deadlines prescribed by the Working Procedures adopted by the Panel.⁵ As necessary and appropriate, we address the substance of these concerns in our findings below. We do, however, stress the importance of adherence by all parties and third parties to the time-limits for filing submissions provided for in the timetable, including exhibits, in the interests of fairness and the orderly conduct of panel proceedings.

1.3.2 Preliminary ruling

1.12. In its first and second written submissions, China requested the Panel to rule that certain claims addressed by the United States are not within the scope of its request for the establishment of a panel in this dispute and are therefore not within the jurisdiction of this Panel. The United States responded to China's request in its second written submission.

1.13. By communication dated 22 March 2017, the Panel issued a preliminary ruling, set out in Annex E-1.

2 THE MEASURES AT ISSUE

2.1. This dispute concerns measures taken by China to implement the DSB recommendations and rulings in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*. These measures comprise the Ministry of Commerce of the People's Republic of China (MOFCOM)'s redetermination⁶ issued on 8 July 2014 and the continued imposition of anti-dumping and countervailing duties on imports of broiler products from the United States.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that the measures at issue are inconsistent with the following provisions⁷:

- a. Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Articles 15.1 and 15.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because MOFCOM's analysis of the alleged price effects of imports under investigation did not involve an objective examination of the record and was not based on positive evidence. For example, MOFCOM:
 - i. failed to account for differences in the product mix between the average unit value (AUV) of subject imports and the AUV of domestic sales;
 - ii. failed to explain how it collected product-specific pricing data in the reinvestigation, why data was solicited from only four domestic producers, and what proportion of total domestic industry sales were covered by the data;

⁴ See Additional Working Procedures of the Panel concerning Business Confidential Information, Annex A-2.

⁵ United States' general comments on China's response to Panel questions, paras. 2-4; China's letter dated 12 June 2017 to the Chairperson of the Panel.

⁶ Ministry of Commerce, Notice No. 44 of 8 July 2014 of the Redetermination of the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the US (Redetermination), (Exhibit CHN-1 (translated version), also submitted as Exhibit USA-9 (translated version)).

⁷ As set out in the United States' panel request.

- iii. failed to explain how the alleged price underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects at other points during the period of investigation (POI); and
 - iv. failed to address evidence that prices for domestically produced products that competed with subject imports declined far less than prices for other domestic products in the first half of 2009.
- b. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and Articles 15.1 and 15.4 of the SCM Agreement, because MOFCOM's findings that subject imports had an adverse impact on the domestic industry did not involve an objective evaluation of all relevant economic factors and indices having a bearing on the state of the industry. For example, MOFCOM did not address economic evidence and factors that contradicted its finding that the industry was suffering material injury on account of US imports.
 - c. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.
 - d. Articles 6.4 and 6.5 of the Anti-Dumping Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to disclose the questionnaires it submitted to Chinese domestic producers during the reinvestigation.
 - e. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the reinvestigation.
 - f. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform interested Members and parties of the essential facts under consideration which form the basis for its decision to apply definitive measures. For example, MOFCOM did not disclose the calculations utilized to determine the dumping and subsidy margins for US producers.
 - g. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material, all relevant information on matters of fact and law and the reasons which led to the imposition of final measures, and the reasons for the acceptance or rejection of relevant arguments or claims. For example, MOFCOM's explanations with respect to its findings for its material injury determination fail to address key arguments made by interested parties.
 - h. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because MOFCOM improperly calculated the cost of production for US producers, failed to calculate costs on the basis of the records kept by the US producers under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.
 - i. Article 9.4 of the Anti-Dumping Agreement because MOFCOM applied to imports from producers and exporters not included in the examination – and to which the application

of facts available was not warranted – an anti-dumping duty that exceeded the weighted average margin of dumping established with respect to the selected exporters or producers. For example, MOFCOM failed to correctly calculate dumping margins for US interested parties, and then applied a rate to imports from producers and exporters not included in the examination that exceeded the selected exporters or producers' weighted average margin of dumping.

- j. Article 6.8 and Annex II of the Anti-Dumping Agreement (including, *inter alia*, paragraphs 1, 3, 5, and 6) because MOFCOM made determinations for US producers on the basis of the facts available even though it:
 - i. failed to specify in detail the information required from interested parties and the manner in which it should be structured;
 - ii. did not take into account verifiable and appropriately submitted information; and
 - iii. failed to provide supplying parties of the reasons evidence or information was rejected and an opportunity to provide further explanations.
- k. Article 1 of the Anti-Dumping Agreement as a consequence of the breaches of the Anti-Dumping Agreement described above.
- l. Article 10 of the SCM Agreement as a consequence of the breaches of the SCM Agreement described above.
- m. Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 as a consequence of the breaches of the Anti-Dumping Agreement and the SCM Agreement described above.

3.2. China requests that the Panel reject the US claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures.⁸

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union and Japan are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures.⁹ Brazil and Ecuador did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. We issued the Interim Report to the parties on 22 September 2017. On 28 September 2017 China requested a one week extension of the deadline for submitting written requests for the Panel to review aspects of the interim report.¹⁰ On 29 September 2017 we sought comments from the United States. On 2 October 2017 the United States submitted a response in which it agreed to China's request for an extension on condition that there be no change in the date for the release of the Final Report.¹¹ On 3 October 2017, the Chair of the Panel transmitted the following communication to the parties:

I refer to China's letter of 28 September 2017 and the response of the United States in its letter of 2 October 2017. China requests that the Panel extend the time-period for comments on the Interim Report from 6 October to 13 October 2017, to accommodate a Chinese national holiday. In the event China's request is acceded to,

⁸ See the parties' executive summaries in Annexes B-1 to B-3 and C-1 to C-3.

⁹ See the European Union's and Japan's executive summaries in Annexes D-1 and D-2.

¹⁰ Letter dated 28 September 2017 from China to the Panel.

¹¹ Letter dated 2 October 2017 from the United States to the Panel.

the United States requests a commensurate extension of the deadline for comments without further delay in the issuance of the final report.

My colleagues and I are sensitive to the importance of accommodating national holidays in timetables where possible. It may be recalled, for instance, that following their comments at the organizational meeting, the parties' requests to avoid domestic holiday periods (Thanksgiving, Christmas and Chinese New Year) were accommodated in setting the dates for the first and second written submissions.

It may also be kindly recalled that both parties were provided with the final revised timetable on 4 July 2017. China did not raise any concerns about the timetable at that time or, indeed, at any point before its letter of 28 September 2017. In its letter, China merely requests a one-week delay in the deadline for submission of requests for interim review. It neither explains why it failed to alert the Panel earlier of the possible impact of the Chinese National Day holiday on its ability to comment on the Interim Report, nor explains why it failed to do so at this point until nearly a week after it received the Interim Report.

It needs emphasizing that the Panel is mindful of the importance of national holidays, and recalls that it took such holidays into account in establishing the original timetable in this dispute. However, the Panel is also concerned with preserving the integrity of dispute settlement procedures and protecting the rights of both parties. In this regard, the Panel considers that it is necessary, as a rule, for a party to a dispute to:

1. raise procedural objections at the earliest point at which it becomes or ought to become aware of the facts underlying those objections; and
2. if it is unable to do so, set out clearly in its request for a remedy the reason why it could not have made its objections earlier.

China's letter of 28 September 2017 came very late in the proceedings – well after China knew, or should have known, of the potential conflict with its holiday. China's letter contains no explanation or justification for raising its objection so late in the proceedings, more than two months after the final revised timetable was issued to the parties. Please note that the United States requests a commensurate extension of the deadline for comments, in the event that China's request is acceded to, but further asks that the issuance of the final report not be delayed. It is not possible for the Panel to accommodate both parties in this matter. In these circumstances, and having considered the interests of both parties and of orderly proceedings and the needs of the Panel, the Panel has decided on balance to deny China's request for an extension of time to request review of precise aspects of the interim report.

The dates for the remainder of this dispute, as set forth in the Timetable circulated to the parties on 4 July 2017 are therefore confirmed:

- Deadline for parties to request review of part(s) of the report and to request interim review meeting: 6 October 2017, 5 p.m.
- Interim review meeting, if requested – If no meeting requested, deadline for comments on requests for review: 20 October 2017, 5 p.m.
- Issuance of final report to the parties: 17 November 2017, 5 p.m.¹²

6.2. The parties submitted their written requests for the Panel to review aspects of the interim report and subsequent comments on those requests in accordance with the established deadlines.

¹² Emphasis original.

7 FINDINGS

7.1 General principles

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.¹³ Articles 31 and 32 of the Vienna Convention on the Law of Treaties codify in part these customary rules.¹⁴ Finally, WTO Ministers have recognized with respect to the Anti-Dumping Agreement and Part V of the SCM Agreement, "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".¹⁵

7.1.2 Standard of review

7.2. Article 11 of the DSU provides that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets out the special standard of review applicable to disputes under the Anti-Dumping Agreement:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review that a panel is required to apply with respect to both the factual and the legal aspects of the present dispute. This means that in reviewing the investigating authority's determination in this dispute, we must:

- a. examine whether the authority has provided a reasoned¹⁶ and adequate¹⁷ explanation as to:

¹³ Article 17.6(ii) also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

¹⁴ Appellate Body Report, *US – Gasoline*, p. 17.

¹⁵ Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

¹⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent."

¹⁷ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant."

- i. how the evidence on the record supported its factual findings¹⁸, and
- ii. how those factual findings support the overall determination¹⁹;
- b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;
- c. limit our examination to the evidence that was before the investigating authority during the course of the investigation²⁰;
- d. take into account all such evidence submitted by the parties to the dispute²¹; and
- e. not simply defer to the conclusions of the investigating authority: our examination of those conclusions must be "in-depth" and "critical and searching".²²

7.1.3 Burden of proof

7.3. In WTO dispute settlement, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".²³ Where a party "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".²⁴ A complaining party establishes a *prima facie* case where, in the absence of effective refutation by the defending party, a panel is required as a matter of law to rule in favour of the complaining party.²⁵

7.1.4 Article 21.5 proceedings

7.4. A panel in an Article 21.5 proceeding related to anti-dumping and countervailing investigations has three key and closely related responsibilities. It is charged with making findings as to whether:

- a. the measures found inconsistent with the WTO Agreement have been brought into conformity;
- b. the "measures taken to comply"²⁶ are otherwise substantively consistent with the WTO Agreement²⁷; and
- c. in seeking to bring itself into compliance, the investigating authority observed the procedural protections of the relevant WTO agreements in the compliance investigation/determination/proceedings.

¹⁸ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it."

¹⁹ Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."

²⁰ Anti-Dumping Agreement, Article 17.5(ii); Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

²¹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

²² Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

²³ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

²⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

²⁵ Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

²⁶ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; and Panel Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.41; *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, paras. 7.160 and 7.165.

²⁷ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-41.

7.5. In a compliance reinvestigation and redetermination it is not enough for an investigating authority to only address specific items of concerns identified by a panel in its original report finding inconsistency/ies. Although resolving problems identified by a panel in an original proceeding may well be the *sine qua non* in bringing the measure at issue into conformity, an adopted panel report requires a Member to bring its measure into conformity with the WTO Agreement/s at issue, and not just the specific findings.

7.2 Article 2.2.1.1 of the Anti-Dumping Agreement: the proper allocation of costs

7.2.1 Introduction

7.2.1.1 Our findings in the original report

7.6. In the original report, we made certain findings under the first and the second sentences of Article 2.2.1.1 of the Anti-Dumping Agreement, which provide:

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

The issue before us in this proceeding is whether, in its redetermination, MOFCOM complied with the second sentence of Article 2.2.1.1. Given the structure of the provision and the arguments of the parties in these proceedings, it is useful to briefly revisit our findings under both sentences of Article 2.2.1.1:

First sentence

- a. The two conditions of the first sentence of Article 2.2.1.1 are cumulative²⁸: for the requirement to use the respondents' books and records to apply, those books and records must be both consistent with Generally Acceptable Accounting Principles and reasonably reflect costs associated with production and sale.²⁹
- b. An investigating authority is required to explain why it has declined to use a respondent's books and records.³⁰
- c. MOFCOM did not explain its decision not to use the books and records of Keystone Foods, LLC (Keystone) and Tyson Foods, Inc. (Tyson), but in respect of Pilgrim's Pride Corporation (Pilgrim's Pride) it specifically found "the data as originally submitted was irreconcilable and that the information to correct the errors was untimely".³¹
- d. China acted inconsistently with the first sentence of Article 2.2.1.1 when MOFCOM declined to use Keystone's and Tyson's books and records in calculating the cost of production for determining normal value.
- e. With respect to Pilgrim's Pride, MOFCOM explained its reasons for departing from the norm and declining to use Pilgrim's Pride books and records. Therefore, with respect to

²⁸ Panel Report, *EC – Salmon (Norway)*, para. 7.483.

²⁹ Panel Report, *China – Broiler Products*, para. 7.166.

³⁰ Panel Report, *China – Broiler Products*, para. 7.161.

³¹ Panel Report, *China – Broiler Products*, para. 7.173.

Pilgrim's Pride, the United States did not establish that China acted inconsistently with the first sentence of Article 2.2.1.1.³²

Second sentence

- a. The requirement to "consider" evidence goes beyond merely taking note of evidence; it entails examining, and weighing the merits of, relevant evidence.³³
- b. An investigating authority is required to engage in "some degree of deliberation" in considering "all available evidence ... so as to ensure that there is a proper allocation of costs".³⁴
- c. Although an investigating authority will not always have to examine and weigh the merits of evidence relating to alternative allocation methodologies, the circumstances of a particular case may require such consideration in order to act consistently with Article 2.2.1.1³⁵ and this must be reflected in the record of its decision.³⁶
- d. "Given the explanations and alternative cost methodologies proposed to MOFCOM by the respondents, there was 'compelling evidence' that more than one allocation methodology potentially may be appropriate. Therefore, MOFCOM was required to reflect on and weigh the merits of the various allocation methodologies".³⁷
- e. MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 because there was "no evidence on the record of the investigation that the merits of the alternative allocation methodologies put forward by the respondents after the Preliminary Anti-Dumping Determination were weighed or reflected upon".³⁸
- f. MOFCOM's straight allocation of total processing costs to all products necessarily means that it included costs solely associated with processing certain subject broiler products in its calculation of costs to all subject broiler products.³⁹
- g. Evidence relied upon by China did not support its position that "the per pound costs assigned to each product were derived from total cost minus the costs associated with the production of the products derived from a chicken that are not in the list".⁴⁰
- h. MOFCOM acted inconsistently with the second sentence of Article 2.2.1.1 also because it "improperly allocated costs from certain products derived from a chicken to other products derived from a chicken".⁴¹

7.2.1.2 MOFCOM's redetermination

7.2.1.2.1 Tyson

7.7. For certain product models, the volume of like products sold in the domestic market accounted for less than 5% of Tyson's total volume of "the product concerned"⁴² exported to China. Accordingly, MOFCOM proceeded to construct the normal value "by using weighted average production cost, plus reasonable expenses and profit".⁴³

³² Panel Report, *China – Broiler Products*, para. 7.175.

³³ Panel Report, *China – Broiler Products*, para. 7.187.

³⁴ Panel Report, *China – Broiler Products*, para. 7.188.

³⁵ Panel Report, *China – Broiler Products*, para. 7.190.

³⁶ Panel Report, *China – Broiler Products*, para. 7.192.

³⁷ Panel Report, *China – Broiler Products*, para. 7.193. (emphasis added)

³⁸ Panel Report, *China – Broiler Products*, para. 7.195. (emphasis added)

³⁹ Panel Report, *China – Broiler Products*, para. 7.196.

⁴⁰ Panel Report, *China – Broiler Products*, para. 7.197.

⁴¹ Panel Report, *China – Broiler Products*, para. 7.197. (emphasis added)

⁴² We understand that by "product concerned", the determination is referring to chicken feet and not the subject products as a whole.

⁴³ Redetermination, (Exhibit CHN-1 (translated version)), p. 28. (emphasis added)

7.2.1.2.1.1 Tyson's initial value-based cost allocation

7.8. At the time of the original investigation, Tyson was transitioning from one accounting system to another. Under the new system⁴⁴, it allocated costs to various broiler product models on the basis of their value in the US domestic market. Wing-tips, feet, and gizzards – some of the broiler product models exported to China – were classified as "offal", which has a low value in the US market⁴⁵; costs were allocated accordingly, with additional adjustments for freight and processing. MOFCOM found that "excessive meat cost were [*sic*] allocated to certain products disproportionately, while other products were allocated almost no meat cost".⁴⁶

7.9. In the reinvestigation, MOFCOM "conducted further investigation on the allocation method of meat cost and on the processing cost of each product model" for Tyson.⁴⁷ MOFCOM found that:

- a. In respect of certain broiler product models (such as chicken feet) valued and costed as offal, "export sales prices were much higher than the prices of other offal products sold in the domestic market".⁴⁸
- b. Tyson did not allocate costs on the basis of "overall sales price" to those broiler product models, but rather costs on the basis of their domestic price.⁴⁹
- c. Tyson did not allocate various other common costs (such as feed and common processing) to these broiler product models.

MOFCOM determined that Tyson's records did not "reasonably reflect the production cost associated with the product concerned".⁵⁰

7.2.1.2.1.2 MOFCOM's weight-based cost allocation

7.10. In the original investigation, MOFCOM found that:

- a. "it was not able to distinguish which feeds were specifically used to produce which parts of the product concerned";
- b. "weight-based method could be more objective and more reasonable than the value-based method ... [to] reflect the production cost associated with the product concerned"⁵¹; and
- c. "[t]he weight-based methodology ... would not allocate too much meat costs to a part of products, while allocate almost none of meat cost to other part of the products".⁵²

In its comments in the original investigation and then again in the questionnaire response to the reinvestigation, Tyson argued that:

[I]f the Ministry of Commerce insists to use the weight-based cost allocation method in the final determination, it shall consider all products generated from live chickens, and use the cost data re-submitted by Tyson company.⁵³

MOFCOM considered Tyson's approach "not reasonable"⁵⁴ because:

⁴⁴ Tyson "transitioned from a fully-absorbed cost system to a standard cost system" during the POI. (United States' first written submission, para. 123). "Tyson explained that it used standard costs for the first half of 2009, rather than for the entire period of investigation, because those were the only standard costs available during the reinvestigation." (United States' first written submission, para. 124).

⁴⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 28.

⁴⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 29.

⁴⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 30.

⁴⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 30.

⁴⁹ We will refer to this as a domestic-value-only cost allocation.

⁵⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 31.

⁵¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 33.

⁵² Redetermination, (Exhibit CHN-1 (translated version)), p. 35.

⁵³ Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

⁵⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

- a. Tyson's methodology did not account for weight loss due to dead birds or birds "inappropriate for processing"⁵⁵;
- b. "during the original investigation and re-investigation, the Investigating Authority calculated the production costs of each model of the products concerned ... this production cost didn't include that of the non-concerned products, such as feather, blood, etc. ... [t]he cost allocation method for other products generated from the live chicken products (e.g. feather, blood, deep processed product, cooked product) is not the target of this investigation"⁵⁶;
- c. "costs of live chickens were monthly different during the period of the investigation. The Company did not explain in details [*sic*] which parts of live chickens were used for the production of the product concerned, and which parts were used for the production of other products"⁵⁷; and
- d. "by using the method claimed by the Company to calculate the cost, the total cost of the product concerned would be lower than the total cost of the product concerned in the Company's accounting book, but the Company did not explain in details what cost was reduced therefrom".⁵⁸

7.11. MOFCOM then issued detailed supplemental questionnaires in the reinvestigation to ascertain processing costs per product model. It found that, "the production cost data submitted by the Company in the responses to the original investigation and the re-investigation could not fully and truly reflect the actual production cost of all models of the product concerned".⁵⁹ Accordingly, it determined that:

- a. "the meat cost for all models of the product concerned should be calculated by using the weight based methodology";
- b. "processing cost of common process should be allocated to all products by using the weight-based methodology";
- c. "processing cost incurred for the particular product should be allocated to the particular product"; and
- d. "production costs for all models of the product concerned should be determined on the basis of facts available and best information available".⁶⁰

7.2.1.2.2 Pilgrim's Pride

7.12. MOFCOM determined that:

Since the Dispute Settlement Report does not address the determination of the investigating authority on the Company's normal value, export price, price adjusted items and [cost, insurance, freight (CIF)] price, the investigating authority decides in the re-investigation to maintain the determination of the original investigation with respect to the Company's normal value, export price, price adjusted items and CIF price.⁶¹

7.13. In the reinvestigation, MOFCOM sought to comply with the Panel's findings regarding disclosure in its original report. In doing so, MOFCOM "found a calculation mistake" and proceeded to correct the error.⁶² In its redetermination, MOFCOM stressed that it did not "change the

⁵⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

⁵⁶ Redetermination, (Exhibit CHN-1 (translated version)), fn 30. (emphasis added)

⁵⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 37.

⁵⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 37.

⁵⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 42.

⁶⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 43 (emphasis added). This indicates that blood, feathers, and viscera were excluded from the calculation.

⁶¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 54.

⁶² Redetermination, (Exhibit CHN-1 (translated version)), p. 54.

determination method and source of data with respect to the normal value and the export price in the original investigation", but rather corrected faulty calculations.⁶³

7.2.2 Main arguments of the parties

7.2.2.1 United States

7.14. MOFCOM failed to ensure a proper cost allocation in respect of Tyson and Pilgrim's Pride and therefore acted inconsistently with the second sentence of Article 2.2.1.1.⁶⁴

7.2.2.1.1 Tyson

7.15. In the redetermination, MOFCOM purported to apply a weight-based cost allocation methodology to determine the cost of production of the products at issue. It calculated the per-pound cost of production by dividing the total cost of producing a chicken by the weight of the chicken less the weight of certain by-products; specifically, it excluded the weight of blood, feathers, and organs, on the basis that they were not "used for human consumption".

7.16. MOFCOM's approach is inconsistent with the second sentence of Article 2.2.1.1, which requires a "proper allocation of costs". A "proper" cost allocation must be internally coherent. If MOFCOM applies a weight-based cost allocation methodology, it must fully account for all products that are produced from the live birds, including by-products. To do so, MOFCOM would have had to divide the total cost of the live birds by their total weight.⁶⁵ Tyson did report this total cost in the event that MOFCOM rejected Tyson's value-based allocation approach and decided instead to adopt a weight-based allocation.⁶⁶ MOFCOM's exclusion of by-products not "used for human consumption" is not relevant in this context "since the joint costs of the chicken are used to produce non-subject merchandise – and they are being distributed to only certain products".⁶⁷

7.2.2.1.2 Pilgrim's Pride

7.17. MOFCOM failed to consider any alternative allocation methodologies for Pilgrim's Pride.⁶⁸ The Panel in its original report found that "there was insufficient evidence of consideration [by MOFCOM] of alternative allocation methodologies presented by the respondents".⁶⁹ "The respondents" included Pilgrim's Pride.⁷⁰ MOFCOM was required "to address that deficiency in its redetermination, and its failure to do so is inconsistent with China's WTO obligations".⁷¹ To ensure "a neutral, fact-driven consideration of the 'proper' allocation of costs", MOFCOM was required to "consider[] data submitted by Pilgrim's Pride – whether flawed or not".⁷² Regardless of whether the Panel in its original report had made this finding specifically in respect of Pilgrim's Pride, because the measure is within its terms of reference, the Panel is required to address the claim.

7.2.2.2 China

7.2.2.2.1 Tyson

7.18. In its original report, the Panel did not "engage in any specific interpretation of what the word 'proper' in Article 2.2.1.1 meant, or what specific obligation that word created".⁷³ While "some of the Panel's language in the original report could be read to suggest a substantive

⁶³ Redetermination, (Exhibit CHN-1 (translated version)), p. 55; see also Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), p. 1.

⁶⁴ In its panel request, the United States also cited Article 2.2 of the Anti-Dumping Agreement. The United States does not develop any arguments in any of its submissions in respect of an alleged violation of Article 2.2. We therefore do not further address the claim in respect of Article 2.2.

⁶⁵ United States' first written submission, para. 93.

⁶⁶ United States' response to Panel question No. 24(c), para. 60.

⁶⁷ United States' response to Panel question No. 24(a), para. 57.

⁶⁸ United States' first written submission, para. 102.

⁶⁹ United States' first written submission, para. 101 (referring to Panel Report, *China – Broiler Products*, paras. 7.193 and 7.198).

⁷⁰ United States' second written submission, para. 118.

⁷¹ United States' second written submission, para. 116.

⁷² United States' second written submission, para. 119.

⁷³ China's response to Panel question No. 31, para. 118.

obligation"⁷⁴, the Panel in the original report "did not present any interpretation that focused specifically on the legal issue of whether the second sentence of Article 2.2.1.1 imposes a substantive obligation or the nature of that obligation". For this reason, this "is the legal issue that the Panel should address anew in this proceeding".⁷⁵

7.19. First, the only obligation in the second sentence of Article 2.2.1.1 is to consider all available evidence; there is no substantive obligation to allocate costs properly.⁷⁶ MOFCOM did consider all available evidence on the proper allocation of costs, including Tyson's proposed cost allocation methodology. The redetermination discusses Tyson's proposed cost allocation methodology, satisfying the three-part test set out by the Panel in its original report for "consideration" within the meaning of second sentence of Article 2.2.1.1.⁷⁷

7.20. Second, the information at issue is not "evidence" because it was not "historically utilized"⁷⁸; therefore, there was no obligation to consider it.⁷⁹

7.21. Third, even if the second sentence of Article 2.2.1.1 contains substantive obligations, the Panel in its original report did not define the term "proper".⁸⁰

7.22. Fourth, the Panel's "finding in [paragraph] 7.198 [of its original report] was based on the Panel's understanding of the facts at that time. These facts have been significantly clarified during the re-investigation and this Article 21.5 proceeding".⁸¹

7.23. MOFCOM met the requirements of Article 2.2.1.1 because it:

- a. asked Tyson "for the breakdown of sales into subject and non-subject merchandise", adding a clarification with respect to "non-subject merchandise" that "products not for human consumption, such as chicken feather, chicken blood, internal organs" are not subject products⁸²;
- b. sought Tyson's own allocation method for dividing subject and non-subject products⁸³ and accepted Tyson's division⁸⁴;
- c. found that Tyson "reasonably drew distinctions between higher revenue and lower revenue products"⁸⁵ and accepted "Tyson's normal accounting approach for this initial distinction into subject and non-subject merchandise"⁸⁶;
- d. considered "the evidence about the proper way to allocate costs among the specific products within the subset of edible subject products"⁸⁷ and "realized that the Tyson's [*sic*] value-based method in fact introduced a distortion by using a very low value of

⁷⁴ China's response to Panel question No. 31, para. 119.

⁷⁵ China's response to Panel question No. 31, para. 119.

⁷⁶ China's first written submission, para. 147.

⁷⁷ China's first written submission, paras. 164-165.

⁷⁸ China's response to Panel question No. 31, para. 128.

⁷⁹ China's first written submission, para. 166; response to Panel question No. 31, para. 128.

⁸⁰ China's response to Panel question No. 31, para. 125.

⁸¹ China's response to Panel question No. 31, para. 127. Specifically, according to China, the United States incorrectly alleges that "MOFCOM did not allocate any costs to blood and feather": China believes the Panel now has a sufficient factual basis to dismiss that U.S. fiction. As discussed extensively in response to Question 24(g) above, MOFCOM simply left in place the assignment of costs to blood and feathers that Tyson itself has used in the ordinary course of business.

⁸² China's response to Panel question No. 24(a), para. 63.

⁸³ China's response to Panel question No. 24(a), para. 64.

⁸⁴ China specifically argues that MOFCOM accepted "as the initial step the division of products into subject and non-subject, and the Tyson assignment of total costs into those two buckets." (China's second written submission, para. 175 (emphasis added)). China acknowledges that Tyson's breakdown was based on MOFCOM's own product definition: "According to MOFCOM's request in the re-investigation, Tyson confirmed that the reported cost of the subject products in the original investigation did not cover the cost of the non-subject products, such as feathers and blood." (China's response to Panel question No. 24(b), para. 65).

⁸⁵ China's second written submission, para. 175.

⁸⁶ China's second written submission, para. 175.

⁸⁷ China's second written submission, para. 176.

offal (or price of waste products) to establish costs for the certain products (like chicken paws)"⁸⁸; and

- e. rejected Tyson's proposed cost allocation methodology as not correctly reflecting costs.⁸⁹

Article 2.2.1.1 focuses on the "product under consideration". Therefore, including products not under consideration, such as the by-products at issue here, would not "reasonably reflect" the cost of the products at issue.⁹⁰ The US approach would require that "even though Tyson had itself assigned few costs to inedible waste products, MOFCOM had to go back and take costs that Tyson had itself allocated to edible broiler parts, and reallocate them back to the inedible waste products based on weight."⁹¹ MOFCOM accepted the total meat costs of the subject products reported by Tyson, and then allocated that total meat cost to individual models of the subject broiler products based on weight.⁹²

7.2.2.2.2 Pilgrim's Pride

7.24. The claim is not within the Panel's terms of reference. Even if it were:

- a. the Panel in its original report "never found any inconsistency with the second sentence of Article 2.2.1.1 with regard to MOFCOM's determination for Pilgrim's Pride"⁹³;
- b. the reference to "respondents" in the original report is only to Tyson and Keystone⁹⁴ because:
 - i. the Panel's summary of the arguments does not refer to Pilgrim's Pride⁹⁵,
 - ii. the Panel's analysis does not mention Pilgrim's Pride⁹⁶,
 - iii. the only finding specific to Pilgrim's Pride was in respect of the first sentence of Article 2.2.1.1⁹⁷, and
 - iv. the Panel in its original report could not have found that MOFCOM should have considered Pilgrim's Pride's alternative methodologies, because "[t]he errors in the [sic] Pilgrim's Pride data rendered any alternative allocations largely irrelevant, since they would have been based on fundamentally flawed information that had not been corrected on a timely basis"⁹⁸;
- c. because the Panel did not find any inconsistencies in an original panel report, China cannot be found not to have implemented a finding in a subsequent Article 21.5 dispute⁹⁹; and
- d. if there are any ambiguities in the original report, they should be resolved in favour of China because "it would be unfair to penalize China for not specifically addressing an issue not raised in the Panel Report".¹⁰⁰

⁸⁸ China's second written submission, para. 176. We will refer to the product concerned, variously described as chicken "feet" or "paws", as "chicken feet".

⁸⁹ China's first written submission, para. 166: "In particular, in both the original determination and the redetermination, MOFCOM expressly considered and rejected the alternative cost allocation method which Tyson proposed."

⁹⁰ China's first written submission, para. 171.

⁹¹ China's second written submission, para. 177.

⁹² China's response to Panel question No. 24(h), para. 98.

⁹³ China's first written submission, para. 136.

⁹⁴ China's first written submission, para. 137.

⁹⁵ China's first written submission, para. 138.

⁹⁶ China's first written submission, para. 138.

⁹⁷ China's first written submission, para. 138.

⁹⁸ China's first written submission, para. 139.

⁹⁹ China's first written submission, para. 136.

¹⁰⁰ China's first written submission, para. 142.

7.2.2.3 Main arguments of the third parties

7.25. The European Union argues that in respect of the first claim, the second sentence of Article 2.2.1.1 contains a substantive obligation of proper cost allocation. A cost allocation methodology must be applied in a coherent manner. In case of a weight-based cost allocation methodology, costs which occur with regard to the whole chicken must, in principle, be spread over all broiler products according to their weight.¹⁰¹

7.26. In respect of the second claim, the findings made by the Panel in the original report in relation to the second sentence of Article 2.2.1.1 also relate to Pilgrim's Pride. But even if this should not be the case, the redetermination would nevertheless be subject to scrutiny in these compliance proceedings regarding the issue in dispute.¹⁰²

7.2.3 Evaluation

7.2.3.1 The law

7.27. Article 2.2.1.1 of the Anti-Dumping Agreement provides (for ease of reference, we set out the three sentences separately):

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.

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

Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

7.28. "Paragraph 2", referred to in the first sentence is Article 2.2 of the Anti-Dumping Agreement, which provides:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.¹⁰³

Thus, by its own terms Article 2.2.1.1 sets out parameters for a methodology for arriving at a proper allocation of costs necessary to arrive at a "cost of production" that may be used in constructing a normal value for purposes of the comparison required under Article 2.2. This requires, in the context of the second sentence of Article 2.2.1.1, the investigating authority to "consider ... all available evidence on the proper allocation of costs".

¹⁰¹ European Union's third-party submission, paras. 29-30.

¹⁰² European Union's third-party submission, paras. 33-34.

¹⁰³ Emphasis added; fn omitted.

7.2.3.1.1 Consider

7.29. The first sentence of Article 2.2.1.1 requires that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The use of the term "normally" in a legal obligation indicates a rule from which derogations are permitted subject to the conditions set out in the legal provision.¹⁰⁴ In respect of Article 2.2.1.1, this means that to calculate cost of production for the purposes of Article 2.2, the rule for the information to be used is that the investigating authority relies on the records kept by the exporter or producer under investigation, except where the conditions for the application of the rule, set out in the provision¹⁰⁵, are not met.

7.30. The second sentence relates to the methodology for allocating costs: an investigating authority must "consider" all evidence on proper cost allocation. This consideration is not to be undertaken in the abstract. In context, its purpose is clear: to ensure that cost elements for the subject product are properly determined for, we recall, purposes of constructing a normal value for that product. The consideration of evidence as to cost allocation methodology goes to the heart of what Article 2.2.1.1 is about: coming up with a properly allocated cost of production for the product under investigation for use by an investigating authority in constructing a normal value for that product. This is further confirmed by the third sentence: "[u]nless already reflected in the cost allocations under this sub-paragraph". Fundamentally, a normal value for a product cannot be properly constructed unless costs of production are properly allocated to that product, and a proper allocation of costs cannot happen without consideration of all available evidence on the proper allocation of costs.

7.31. Accordingly, Article 2.2.1.1 sets out an integrated obligation to calculate a cost of production for purposes of the comparison required under Article 2.2, with two elements:

- a. in the first sentence, the rule as to the information to be used, including allocated costs; and
- b. in the second sentence, the method for resolving issues of allocation when those records cannot be used in this respect:
 - i. consideration of all evidence as to proper allocation; and
 - ii. choosing an appropriate methodology to ensure a proper allocation of costs of production to the subject product in constructing normal value.

7.2.3.1.2 All available evidence

7.32. Where an investigating authority constructs normal value on the basis of cost of production, and determines that the records of an exporter or a producer are not appropriate for purposes of properly allocating costs to the subject product, the second sentence sets out the evidentiary basis for the investigating authority's choice of a cost allocation methodology. The investigating authority is required to "consider":

- a. all;
- b. available;
- c. evidence;
- d. on the proper allocation of costs:

¹⁰⁴ Panel Report, *China – Broiler Products*, para. 7.161. See also Appellate Body Report, *US – Clove Cigarettes*, para. 273.

¹⁰⁵ Those conditions are that those 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".

- i. including that which is made available by the exporter or producer in the course of the investigation; and
- ii. provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

7.33. The term "evidence" is not defined in the Anti-Dumping Agreement. It is not necessary for us to do so in this case; at a minimum, it encompasses information provided to an investigating authority by an interested party, whether or not positive, accurate or adequate. Nothing in the Anti-Dumping Agreement, or the WTO Agreement as a whole, suggests that information loses its character as "evidence" by virtue of failing to meet certain criteria. Whether the evidence meets these criteria is a separate matter for the investigating authority to consider.

7.34. First, given the requirements of Article 2.2.1.1, the evidence must be "on the proper allocation of costs". The qualifier "proper" has a range of meanings, not all of which are relevant for the purposes of the Anti-Dumping Agreement; it is in the context in which the term is found and with a view to giving effect to Article 2.2.1.1 that the relevant "ordinary meaning" is revealed:

- a. The first sentence of Article 2.2.1.1 refers to "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration".¹⁰⁶
- b. The last sentence of the same subparagraph provides that "costs shall be adjusted appropriately" for certain items or in respect of certain circumstances.¹⁰⁷
- c. Article 2.2.2 refers to costs that are "based on actual data pertaining to production and sales in the ordinary course of trade" of the product at issue.

7.35. Thus, for example, evidence that a particular allocation methodology reasonably reflects the cost of production of the product at issue, evidence of "appropriate" adjustments to costs, or evidence that certain costs relate to production of the product in question, is evidence "on the proper allocation of costs". We do not mean to suggest that in every instance, there is a single "correct" allocation to be determined upon considering the evidence on cost allocation methodologies. Indeed, the use of the term "proper" suggests due deference to the circumstances of a product's life-cycle or a producer's or an exporter's production line and business model, as well as the availability of data and different accounting systems used.¹⁰⁸

7.36. Second, the reference to "all available" evidence requires, in our view, consideration of all evidence that is available to the investigating authority. The phrase beginning "including" makes clear that certain types of evidence must be considered if available, but does not limit the scope of "all available evidence" that must be considered in any event. Rather, it establishes, for instance, that an investigating authority must consider evidence on the proper allocation of costs made available by the exporter or producer where such allocations have been historically utilized, even if that exporter or producer's records were rejected as the basis for calculating costs under the first sentence of Article 2.2.1.1. Merely because an investigating authority determines that the records kept by an exporter or producer are not in accordance with the generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration does not necessarily mean that the cost allocation methodologies reflected in those records may not be appropriate if properly applied using appropriate information. An investigating authority may not summarily dismiss evidence of cost allocation provided by the exporter or producer that it had historically used.

7.37. This recognizes a commercial reality: the cost allocations in a company's records may be used for multiple reasons in internal accounting systems, but not, one would expect, generally in

¹⁰⁶ Emphasis added.

¹⁰⁷ Emphasis added.

¹⁰⁸ We recall also China's arguments, based on dictionary definitions, that "proper" means "suitable" and "appropriate". (China's second written submission, para. 131). This is also consistent with China's reliance on the equally authentic French and Spanish version: *juste* and *adecuada*, which China translates as "just, fair, appropriate" and "suitable, appropriate". (China's second written submission, para. 132).

anticipation of an anti-dumping investigation. Where an exporter has historically utilized a cost allocation methodology, this suggests that the methodology was, in fact, not put in place for the sole purpose of the investigation. Thus, as noted above, even if the actual data on costs as reported in the records are rejected under the first sentence, the allocation methodology reflected in those records may nonetheless result in a proper allocation of costs if applied to a different set of data.

7.38. In the light of the above, evidence of allocation in the records of an exporter, where such allocation is historically utilized, must be "considered" – alongside all other evidence – to arrive at an allocation methodology that can generate a "proper allocation of costs" in calculating "cost of production" for the "purposes of paragraph 2".

7.2.3.1.3 Conclusion

7.39. To appreciate the import of the second sentence of Article 2.2.1.1, the entirety of the provision should be considered as a single obligation with multiple parts:

- a. When an investigating authority constructs a normal value for purposes of the comparison under Article 2.2, Article 2.2.1.1 sets out two requirements for the calculation of costs of production.
- b. Where the conditions of the first sentence are met, an investigating authority must use the information reported in the records kept by the exporter or producer in question to calculate cost of production for the product and the producer in question. This is the "normal" method, and an investigating authority may not reject the records without having first established, and explained, why the records are either not in accordance with the generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration.
- c. When questions of cost allocation arise in calculating cost of production for the purposes of constructing a normal value for purposes of the comparison under Article 2.2, whether or not on the basis of:
 - i. the information in the producer's records, or
 - ii. an alternative set of data because the producer's records are rejected under the first sentence of Article 2.2.1.1.
- d. The investigating authority must consider all available evidence related to the proper allocation of costs.
- e. This evidence includes:
 - i. evidence made available by exporters and producers, where the cost allocation was historically utilized: this includes evidence of cost allocation methodologies in records rejected under the first sentence, where the allocation is historically utilized;
 - ii. calculations, data, and allocation methodologies generated by an exporter at the behest or request of the investigating authority; and
 - iii. alternative allocation methodologies put forward by an exporter or producer during the investigative process (including a reinvestigation), either on its own, or to address concerns or questions raised by the investigating authority, in, for example questionnaires or follow-up questions, verification, etc.
- f. Article 2.2.1.1 requires an investigating authority not just to "consider" certain evidence but to do so with a view to a proper allocation of costs for the purposes of Article 2.2.
- g. There may be no single "proper" allocation of costs. An investigating authority's cost allocation is proper when it is appropriate to the facts and circumstances of the producer

and product in question, and is arrived at following the investigating authority's consideration of all available relevant evidence.

- h. An investigating authority must adequately explain its consideration of the evidence and its choice of allocation methodology based on that consideration as one that, if applied properly, will result in a proper allocation of costs.

7.2.3.2 Tyson

7.40. We recall the product description set out in the redetermination:

Detailed description of the product concerned: broiler products after slaughter and processing of living broiler chickens, including whole chickens, parts of whole chicken after cutting, by-products of broiler chickens, regardless whether it is fresh, chilled or frozen. Living chickens, broiler products packed in cans and other similar ways, broiler sausages and similar products, cooked broiler products are all not included in the scope of the investigation.

Main application: the main application of the broiler products in domestic market is for human consumption, which normally reach the consumers directly or indirectly through whole-sales or retail-sales channels such as agricultural products markets or supermarkets, and through the catering industry.¹⁰⁹

7.41. The product description, the exclusions, and the "usage" or "application" have not changed substantially from the original investigation.¹¹⁰

7.2.3.2.1 Preliminary observations

7.42. At the outset, we address two arguments that appear to have formed the core of each party's case.

7.43. The United States argues that MOFCOM's allocation methodology was not "internally coherent" and therefore did not constitute "proper allocation" because MOFCOM used two different cost allocation methodologies for different parts of a chicken: for feathers, blood, and inedible viscera, MOFCOM relied on Tyson's cost allocation based on domestic market values; for all other models it used a weight-based allocation. Even granting that MOFCOM used two different cost allocation methodologies, this alone does not demonstrate that China acted inconsistently with Article 2.2.1.1, for at least two reasons.

7.44. First, nothing in the text or context of Article 2.2.1.1 suggests that a "proper" allocation of costs is necessarily one that is "consistent", "internally coherent", or follows the same "logic" throughout. We see nothing in the text of the provision or in the concept of a "proper" allocation of cost that would require an investigating authority to use the same cost allocation methodology in every instance a cost allocation is necessary in an investigation. For instance, different stages of a subject product's production cycle, or the production of different models of a subject product, or the production of by-products in the process of producing a subject product, may all raise questions of the proper allocation of costs. We see no inherent reason that all such questions must be resolved by applying the same cost allocation methodology in a given investigation. An interpretation that would so narrow the meaning of "proper cost allocation" would be inconsistent with our understanding of the provision as requiring consideration of evidence of cost allocation that is appropriate to the circumstances.

¹⁰⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 2.

¹¹⁰ Panel Report, *China – Broiler Products*, fn 8:

Specific description of the subject merchandise: chicken products into which alive [*sic*] broiler is slaughtered and processed, including whole chicken without cutting into pieces, cuts and offal, side product of chicken products, fresh, chilled or frozen. The product scope does not include live chicken, chicken products in can or other kinds of packages or preservations, the chicken sausage and like products, and cooked chicken products.

Major usage: Broiler products or chicken products are used in the domestic market of China for human food directly through markets and supermarkets by retail or wholesale and indirectly through catering.

7.45. Second, nothing in the facts of this case as presented and argued to us demonstrates why, in the particular circumstances of this case, the use of the same cost allocation methodology throughout was necessary. The US argument that MOFCOM was required to use a "consistent" or "internally coherent" cost allocation methodology is not based on the circumstances of either Tyson or the broiler products at issue. For one thing, nothing in the record suggests that any evidence on whether such consistency would be necessary from an accounting or a commercial perspective was provided to MOFCOM. For another, we can envision a variety of situations in which strict consistency in the application of cost allocation methodologies might not be necessary or appropriate. For example, large manufacturing conglomerates with multiple subsidiaries, factories and business lines may well employ different cost accounting methodologies internally across their operations, vertically and horizontally. It would be neither practicable nor reasonable for such a company, in responding to an anti-dumping investigation involving one of its products, to be required to provide cost data for that product based on a "consistent methodology" of cost allocation. As we have stated, we see nothing in Article 2.2.1.1 or its context that would require an investigating authority to use the same cost allocation methodology in respect of a product throughout. Of course, to the extent that an investigating authority uses more than one cost allocation methodology in calculating costs of production for purposes of determining normal value, the basis for this approach would have to be reasonable and adequately explained in its determination.

7.46. China asserts that it relied upon Tyson's value-based methodology for the first step of the cost allocation exercise (allocating costs between subject and non-subject goods) and argues that "[i]t is hard to fault MOFCOM for accepting Tyson's normal accounting approach for this initial distinction into subject and non-subject merchandise".¹¹¹ We recall that MOFCOM provided Tyson a "clarification" that, according to MOFCOM, defined the scope of subject and non-subject broiler products, i.e. those models that were and were not the subject of the investigation.¹¹² As we understand it, MOFCOM was well aware of Tyson's use of value-based cost allocation methodology – indeed, this was the very subject matter of the original case under Article 2.2.1.1, first sentence. Thus, when MOFCOM "clarified" the scope of the subject product definition, it in all likelihood was fully aware that Tyson would apply a value-based cost allocation to distinguish subject and non-subject broiler product models. However, the fact that MOFCOM "accepted" this initial cost allocation does not elucidate in any way the reasons for its shift to a different cost allocation methodology at a later stage. Accordingly, we do not consider it relevant to our analysis.

7.2.3.2.2 MOFCOM's rejection of Tyson's value-based cost allocation

7.47. MOFCOM accepted Tyson's initial cost allocation between "subject and non-subject merchandise" on the basis of a value-based cost allocation methodology. MOFCOM did so because it found that Tyson's value-based cost allocation between subject and non-subject products "reasonably drew distinctions between higher revenue and lower revenue products".¹¹³ MOFCOM did not, therefore, apparently have any objections in principle to the use of a value-based cost allocation in general or Tyson's value-based methodology specifically.

7.48. MOFCOM next considered "the evidence about the proper way to allocate costs among the specific products within the subset of edible subject products".¹¹⁴ According to China, in examining Tyson's cost allocation among subject product models:

MOFCOM realized that the [*sic*] Tyson's value-based method in fact introduced a distortion by using a very low value of offal (or price of waste products) to establish costs for the certain products (like chicken paws).¹¹⁵

MOFCOM considered the use of the value of offal "a distortion" in Tyson's subject product allocation because, unlike certain other product models valued as offal in the United States, chicken feet had a consumer market outside the United States that valued those product models more highly. Accordingly:

¹¹¹ China's second written submission, para. 175.

¹¹² This clarification related to the "main application" of the subject products. (See fn 110 and related text above; and Panel Report, *China – Broiler Products*, fn 340).

¹¹³ China's second written submission, para. 175. (emphasis added)

¹¹⁴ China's second written submission, para. 176.

¹¹⁵ China's second written submission, para. 176.

MOFCOM then reasonably and objectively concluded that for this anti-dumping investigation, a weight-based allocation was more reasonable method than the Tyson value-based method to allocate costs among those products that were physically subject products.¹¹⁶

7.49. The United States argues that, "[t]he essence of the problem is the internal inconsistency of MOFCOM's logic concerning a weight-based methodology".¹¹⁷ The "logic" the United States refers to concerns the application of MOFCOM's weight-based methodology. The United States argues, "under that logic, an objective investigating authority would need to account for all products that derive revenue and then allocate cost by weight to all of them".¹¹⁸ That is, for the United States, as a matter of logic, if a weight-based methodology is used to allocate costs among the subject product models, then the same methodology should have been used to allocate costs between subject and non-subject broiler product models, since both generated revenue.

7.50. We have found that nothing in Article 2.2.1.1 requires an investigation authority to apply the same methodology to allocate costs at different stages of its investigation. An investigating authority may use different cost allocation methodologies consistently with the second sentence of Article 2.2.1.1, so long as:

- a. the reasons for doing so are unbiased and reasonable in the circumstances;
- b. the methodology chosen results in a proper allocation of costs; and
- c. the investigating authority explains its choice as between different methodologies.

7.51. The United States does not dispute that certain subject products have value in the Chinese consumer market that they do not have in the US market. MOFCOM's rejection of a value-based cost allocation that does not capture the value of a product model in its principal market does not, for the purposes of the second sentence of Article 2.2.1.1, strike us as inherently biased or unreasonable.

7.2.3.2.3 MOFCOM's use of weight-based cost allocation

7.52. We now turn to the question of whether MOFCOM considered all available evidence before it on the proper allocation of costs. MOFCOM decided to use a weight-based cost allocation for the subject broiler products. The costs allocated among different models of subject broiler products were those Tyson had allocated to all subject products on the basis of its domestic value-based methodology. MOFCOM rejected that methodology for allocating costs among the different models of subject broiler products. We found in the original report that:

Of the two types of methodologies for doing so that were discussed in this case – one based on relative sales value ("value-based allocation") and one based on the weight of the products ("weight-based allocation"), the Panel is of the view that neither method is in principle inherently unreasonable.¹¹⁹

Having identified a problem with an exporter's cost allocation methodology, an investigating authority that is required to consider all available evidence may not, however, disregard evidence related to that allocation, and use its own methodology, without an explanation of its decision that is reasoned and adequate.

7.53. MOFCOM accepted Tyson's domestic-value-only allocation of costs between subject and non-subject products on the basis that it drew a reasonable distinction "between higher revenue and lower revenue products". For the allocation of costs among subject broiler product models, however, MOFCOM in the redetermination concluded that a weight-based allocation methodology better reflected the costs of production of subject product models, than a methodology based on

¹¹⁶ China's second written submission, para. 176.

¹¹⁷ United States' first written submission, para. 91.

¹¹⁸ United States' first written submission, para. 91. (emphasis added)

¹¹⁹ Panel Report, *China – Broiler Products*, para. 7.167. (fns omitted)

their value on the domestic market of the exporting country. In this respect, MOFCOM made the following observations:

- a. "[p]roduction cost means the necessary expenses invested by a producer to produce products, rather than the income that a producer can gain from sales of a product"¹²⁰; and
- b. MOFCOM "was not able to distinguish which feeds were specifically used to produce which parts of the product concerned".¹²¹

In respect of subject product models, MOFCOM decided to allocate "the necessary expenses invested by a producer to produce products" on the basis of the weight of the entire broiler less the weight of feathers, blood, and viscera – because, it stated, the latter were non-subject products.

7.54. There is no dispute between the parties that feathers, blood, and viscera are not "produced" for human consumption. At the same time, while there is no evidence directly on the record on this subject, it should be uncontroversial for us to take notice of the fact that feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models. MOFCOM does not explain why the cost of "producing" feathers, blood, and viscera is not part of "the necessary expenses invested by a producer to produce" the subject product models. Nowhere in the redetermination does MOFCOM explain why it was appropriate to exclude from its weight-based allocation of costs of producing subject product models "necessary expenses" of producing a live bird, merely because it had accepted an allocation of costs between subject and non-subject products based on domestic market value, i.e. "the income that a producer can gain from sales of a product".

7.55. In respect of MOFCOM's exclusion of feathers, blood, and viscera, China argues that these products were "waste".¹²² We note in this regard MOFCOM's finding in the redetermination that "offal" (which includes viscera) can be turned into "feedstuff"¹²³, as well as the reference to "feather meal"¹²⁴, indicating that the products at issue were perhaps low-value by-products, but not "waste". Even if characterizing the product models at issue as "waste" were an explanation for its choice of methodology, this clearly was not a finding that MOFCOM made.

7.56. China further argues that in the redetermination, MOFCOM stressed that feathers, blood, and viscera were not subject products. We had found otherwise in our original report¹²⁵, but that is of no moment here: in our view, the distinction between subject and non-subject products or product models is not, in itself, determinative for the purposes of determining whether MOFCOM, considering all evidence on the proper allocation of costs, came to a reasoned conclusion in choosing a methodology to allocate costs to subject broiler product models. On the facts of this case, we note:

- a. MOFCOM could, and did, isolate the cost of production of a broiler;
- b. in respect of a broiler, MOFCOM found that it could not distinguish between the costs of feed used to grow breast meat and feed used to grow chicken feet;
- c. feathers, blood, and viscera are broiler product models that, while according to China not subject to the investigation, are no less intrinsic to the production of a live broiler than subject broiler product models such as its breasts or feet; and
- d. the other non-subject products comprised "[l]iving chickens, broiler products packed in cans and other similar ways, broiler sausages and similar products, cooked broiler

¹²⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 35. (emphasis added)

¹²¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 33.

¹²² China's first written submission, paras. 123 and 166; responses to Panel question No. 24(b), para. 65 and No. 29, para. 108.

¹²³ Redetermination, (Exhibit CHN-1 (translated version)), p. 34 (citing with apparent approval the petitioner's submission).

¹²⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 34.

¹²⁵ Panel Report, *China – Broiler Products*, fn 340.

products"¹²⁶ – they do not form part of a single live broiler that will be slaughtered and separated into various product models before export, and are thus not intrinsic to the production of subject broiler product models.

7.57. Article 2.2.1.1, second sentence requires consideration of all evidence on the proper allocation of costs, and a proper allocation of costs by an investigating authority is one that is appropriate to the circumstances of the subject product/product models and the company. We have already found that:

- a. nothing in Article 2.2.1.1 requires an investigating authority to apply a single cost allocation methodology in all aspects of its investigation; and
- b. in the facts of this case, use of both a value-based methodology and weight-based methodology was not, in itself, unreasonable.

7.58. However, in the facts of this case, certain of the broiler product models identified by MOFCOM as "non-subject" were inseparable from and intrinsic to the production of the subject broiler product models. In its consideration of all available evidence related to a proper cost allocation, MOFCOM was required, at a minimum, to explain why the concern – that allocations must "reasonably reflect costs" of production – it relied upon to choose a weight-based cost allocation for subject product models nonetheless allowed for the exclusion of certain parts of a live broiler (feathers, blood, and viscera) that are necessarily part of the production of the subject broiler product models from its cost allocation.

7.59. For this reason, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.2.4 Tyson's proposed weight-based methodology

7.60. Tyson proposed a weight-based allocation methodology that took into account feathers, blood, and viscera. MOFCOM found this approach "not reasonable".¹²⁷

7.61. First, MOFCOM identified problems of an accounting nature in Tyson's proposed weight-based cost allocation:

- a. Tyson's methodology did not account for weight loss due to dead birds or birds "inappropriate for processing"¹²⁸;
- b. "costs of live chickens were monthly different during the period of the investigation. The Company did not explain in details [*sic*] which parts of live chickens were used for the production of the product concerned, and which parts were used for the production of other products"¹²⁹; and
- c. "by using the method claimed by the Company to calculate the cost, the total cost of the product concerned would be lower than the total cost of the product concerned in the Company's accounting book, but the Company did not explain in details [*sic*] what cost was reduced therefrom".¹³⁰

Tyson disputed that these problems justified rejecting its proposed methodology.

7.62. When an investigating authority identifies "problems" with evidence made available to it by a producer purporting to reflect a proper cost allocation methodology and disregards the evidence or the methodology on that basis, it must explain why those problems support a decision that the proposed methodology is inappropriate. In this instance, MOFCOM nowhere explains how any of

¹²⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 2.

¹²⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

¹²⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 36.

¹²⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 37.

¹³⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 37.

the accounting problems it identified justified the conclusion that the weight-based cost allocation proposed by Tyson was not reasonable.

7.63. Second, MOFCOM found that:

[D]uring the original investigation and re-investigation, the Investigating Authority calculated the production costs of each model of the products concerned ... this production cost didn't include that of the non-concerned products, such as feather, blood, etc. ... [t]he cost allocation method for other products generated from the live chicken products (e.g. feather, blood, deep processed product, cooked product) is not the target of this investigation.¹³¹

As MOFCOM itself acknowledged, albeit indirectly, the production costs of "each model of the products concerned" are not separable from the production costs of the live broiler from which both subject and non-subject products derive: the same feed that allows chicken breasts and chicken feet to grow, also enables the growth and "production" of feathers, blood, and viscera, without which neither feet nor breasts would exist. As well, MOFCOM's observation that "[t]he cost allocation method for other products generated from the live chicken products ... is not the target of this investigation" is true, but not germane. This is because the distinction between subject and non-subject products by Tyson, based on domestic-value and accepted by MOFCOM, in fact resulted in the following formula:

Total cost of production - cost of non-subject goods = cost of subject goods

And so the cost figure that MOFCOM used in its weight-based cost allocation for subject products was inextricably linked to "[t]he cost allocation method for other [non-subject] products generated from the live chicken products". As we have explained, Article 2.2.1.1 does not require an investigating authority to use the same cost allocation methodology throughout the investigation. Nevertheless, in respect of cost allocation to parts of a single animal, reliance on a value-based distinction between subject and non-subject products, in a context where the costs of producing both are entwined, does not suffice in itself to justify rejecting evidence of a proposed methodology that purports to take this into account.

7.64. For these reasons, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.2.5 "Historically utilized"

7.65. China argues that MOFCOM had no obligation to consider Tyson's weight-based cost allocation methodology because it did not constitute "evidence" for the purposes of Article 2.2.1.1.¹³² MOFCOM does not appear to have addressed this point at all in the redetermination. Indeed, MOFCOM states that it conducted the reinvestigation "[b]ased on the evidence submitted by the interest [*sic*] parties and evidence collected by the Investigating Authority in the original investigation and re-investigation"¹³³ and makes no distinction between "evidence submitted" and a putative category of "information submitted that did not constitute evidence". China's argument is thus after the fact justification and cannot play a part in our review of the consistency of the redetermination with Article 2.2.1.1.

7.66. In any event, China's argument does not demonstrate that MOFCOM acted consistently with the second sentence of Article 2.2.1.1, for the following two reasons.

7.67. First, nothing in the WTO Agreement defines "evidence" or makes a distinction between information that is "evidence" and information that is not. Information that purports to support an asserted fact is evidence; it may be good or bad, weak or strong, relevant, or not.

¹³¹ Redetermination, (Exhibit CHN-1 (translated version)), fn 30. (emphasis original)

¹³² China's first written submission, paras. 163 and 166; second written submission, paras. 144 and 146.

¹³³ Redetermination, (Exhibit CHN-1 (translated version)), p. 1.

7.68. Second, the subordinate clause starting with "including" does not limit the scope of the evidence to be considered; rather, it confirms the breadth of the phrase "all available evidence". This is *a fortiori* the case where, as here, the evidence submitted is expressly developed by an exporter or producer at the behest or request of an investigating authority, or in response to its concerns. We recall that MOFCOM had rejected Tyson's data based on its historical cost allocation methodology and demanded that Tyson generate new data based on a methodology inconsistent with Tyson's accounting system. To read the subordinate phrase in the second sentence as permitting an investigating authority to ignore any evidence of proper cost allocation unless it is "historically utilized" would mean that an investigating authority could simply ignore information and data submitted in response to its own questions and purporting to satisfy requirements without even examining it or weighing its merits.

7.69. This strikes us as an unacceptable outcome and an unwarranted limitation of the explicit requirement to consider "all available evidence". Having failed to do so in this case, MOFCOM could not reject the data submitted by Tyson based on the methodology it developed in an effort to conform to MOFCOM's requirements, solely because that methodology was not "historically utilized", as China contends.

7.70. For these reasons, we conclude that China did not act consistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

7.2.3.3 Pilgrim's Pride

7.71. The threshold legal question before us with respect to MOFCOM's redetermination regarding Pilgrim's Pride is whether, in our original report, our findings under the second sentence of Article 2.2.1.1 applied in respect of Pilgrim's Pride, or were limited to Tyson and Keystone. In the original report we identified the question we were to resolve as "whether MOFCOM took into consideration 'compelling evidence' with respect to the reasonableness of its own methodology and available alternatives".¹³⁴ We then made the following observation:

China has not provided any citations to the record of the investigation where MOFCOM deliberated or explained the weight-based methodology it chose to apply or why it chose that methodology over the alternatives proposed by the respondents. All of the evidence of consideration that China points to in its submissions relates to MOFCOM's consideration of the original books and records of the respondents, rather than to the appropriateness of MOFCOM's allocations or the alternative methodologies that Keystone and Tyson proposed.¹³⁵

7.72. According to China, this finding – including our specific references to Keystone and Tyson – should be read against the background of our findings in respect of Pilgrim's Pride. In particular, China relies on our findings in the original report in respect of evidence submitted by Pilgrim's Pride as to its cost allocation methodology:

MOFCOM's basis for rejecting the costs as recorded in the respondent's books and records is not the unreasonableness of the allocation, but rather a specific determination that the data as originally submitted was irreconcilable and that the information to correct the errors was untimely. ... Indeed, Pilgrim's Pride's Comments on the Preliminary Anti-Dumping Disclosure acknowledge and confirm that the data was incorrect as Pilgrim's Pride goes into great detail describing how the errors arose.¹³⁶

¹³⁴ In arriving at our findings, we relied on the statement of the Appellate Body in *US – Softwood Lumber V* that:

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

(Panel Report, *China – Broiler Products*, para. 7.189 (quoting Appellate Body Report, *US – Softwood Lumber V*, para. 138))

¹³⁵ Panel Report, *China – Broiler Products*, para 7.194.

¹³⁶ Panel Report, *China – Broiler Products*, para 7.173. (emphasis added)

7.73. We note, of course, that these findings were made in the context of the first sentence of Article 2.2.1.1. Nothing in our original findings suggests that the fact that an investigating authority finds data to be "incorrect" or "irreconcilable" under the first sentence is or would be relevant in respect of "evidence" of a "potentially ... appropriate" allocation methodology that an investigating authority would be required to "consider" under the second sentence. Nothing in our findings in the original report referring to "respondents" could be read to exclude any respondent on the basis that its data were rejected, consistently with the first sentence of Article 2.2.1.1, as being not a proper basis for the determination of costs of production.

7.74. Consequently, we confirm that in the original report we found China to have acted inconsistently with the second sentence of Article 2.2.1.1 in respect of "respondents", including Pilgrim's Pride as well as Tyson and Keystone. MOFCOM did not reinvestigate Pilgrim's Pride in this context or do anything else to satisfy its implementation obligations. Thus, we conclude that China acted inconsistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement with respect to Pilgrim's Pride.

7.2.4 Conclusion

7.75. In respect of Tyson, China did not act consistently with Article 2.2.1.1 of the Anti-Dumping Agreement because:

- a. MOFCOM did not explain why the concern – that allocations must "reasonably reflect costs" of production – it had relied upon to choose a weight-based cost allocation for subject product models nonetheless allowed for the exclusion of certain parts of a live broiler (feathers, blood, and viscera) that are necessarily part of the production of the subject broiler product models from its cost allocation; and
- b. MOFCOM did not provide a reasoned and adequate explanation for its rejection of Tyson's alternative weight-based cost allocation methodology.

7.76. In respect of Pilgrim's Pride, China did not act consistently with Article 2.2.1.1 of the Anti-Dumping Agreement because:

- a. in the original report we found China to have acted inconsistently with the second sentence of Article 2.2.1.1 in respect of Pilgrim's Pride; and
- b. China did not in any way address this implementation obligation.

7.3 Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement: price effects

7.3.1 Introduction

7.3.1.1 Our findings in the original report

7.77. We found in the original report that:

- a. an investigating authority has "a certain level of discretion" in the methodology used for a price effects analysis¹³⁷;
- b. that discretion is not unbounded: Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement¹³⁸ require that "the prices being compared must correspond to products and transactions that are comparable"¹³⁹;
- c. "price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis"¹⁴⁰; and
- d. where an investigating authority performs a price comparison on the basis of a "basket" of products or sales transactions, it must:

¹³⁷ Panel Report, *China – Broiler Products*, para. 7.474.

¹³⁸ We will refer to these as Articles 3.2 and 15.2.

¹³⁹ Panel Report, *China – Broiler Products*, para. 7.475. (emphasis added)

¹⁴⁰ Panel Report, *China – Broiler Products*, para. 7.479. (emphasis added)

- i. "ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from 'price undercutting' and not merely from differences in the composition of the two baskets being compared"¹⁴¹, or
- ii. "make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product".¹⁴²

7.78. Turning to MOFCOM's determination, we took note of China's arguments that:

- a. the "like product" at issue was a broiler and nothing in the Anti-Dumping Agreement or the SCM Agreement requires "a price comparison on the basis of product segments within the single like product"¹⁴³; and
- b. "MOFCOM ... considered that all chicken parts competed and were substitutable with one another".¹⁴⁴

7.79. We found in the original report that, as a matter of fact:

- a. "the product mix varied considerably between the two sets of data compared by MOFCOM in the investigations at issue"¹⁴⁵; and
- b. "the information before MOFCOM ... revealed important price differences between the different broiler products".¹⁴⁶

7.80. We concluded that:

China acted inconsistently with Articles 3.1/15.1 and 3.2/15.2 because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values that included different product mixes without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments.¹⁴⁷

7.3.1.2 The redetermination's consideration of price effects

7.3.1.2.1 Price undercutting

7.81. In the preliminary determination in the original investigation, MOFCOM had found that "the product concerned had caused price undercutting and suppression to the like product of the domestic industry".¹⁴⁸ The US interested parties objected that, "there is apparent difference in the product mixes between the imported product concerned and the domestic like product".¹⁴⁹ In response to these concerns, in the redetermination MOFCOM considered that it "can apply appropriate methodology based on specific facts of specific case".¹⁵⁰ To that end, MOFCOM:

- a. "conducted on-site verifications on four domestic producers in the reinvestigation";
- b. "collected supplemental sales data that distinguish the different product specifications";

¹⁴¹ Panel Report, *China – Broiler Products*, para. 7.483.

¹⁴² Panel Report, *China – Broiler Products*, para. 7.483. See also *ibid.* para. 7.479: "the need for adjustments necessarily depends on the factual circumstances of the case and the evidence before the authority".

¹⁴³ Panel Report, *China – Broiler Products*, para. 7.468.

¹⁴⁴ Panel Report, *China – Broiler Products*, para. 7.605 (emphasis added); see also *ibid.* para. 7.468: "MOFCOM's methodology ... recognises the substitutability among different types of products".

¹⁴⁵ Panel Report, *China – Broiler Products*, para. 7.490.

¹⁴⁶ Panel Report, *China – Broiler Products*, para. 7.490.

¹⁴⁷ Panel Report, *China – Broiler Products*, para. 7.494. (emphasis added)

¹⁴⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 73.

¹⁴⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

¹⁵⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

- c. "analyzed these sales data"; and
- d. "cross-checked with the Customs import data of the product concerned and the data provided in the injury questionnaire responses of the exporters".¹⁵¹

7.82. On the basis of its reverification of the data, MOFCOM:

- a. did not consider it necessary to conduct a new underselling analysis, as it had "confirmed" the reliability of the results of the original investigation and analysis;
- b. found that "the basic facts on which the U.S. relevant claims were based are not consistent with the actual situation"¹⁵²; and
- c. "considered that the selling prices of the different product specifications in the domestic market supported by these evidences are representative".¹⁵³

7.3.1.2.2 Price suppression

7.83. MOFCOM in the redetermination found that the volume and market share of imports of the product concerned had increased continuously since 2006. It also found that the "import price of the product concerned had significant effect on the selling prices of the like product of the domestic industry".¹⁵⁴ Specifically, according to MOFCOM:

[B]ecause the import volume of the product concerned increased continuously afterwards, the import price further undercut the price of the like product of the domestic industry, resulted in the selling price of the like product of the domestic industry was further suppressed [*sic*] ...

During the investigation period, the increase of the import volume of the product concerned was obtained by making low-priced sales. Such low-prices [*sic*] sales caused price undercutting to the selling prices of the like product of the domestic industry, and further more suppressed the prices of the like product of the domestic industry significantly ... [.]¹⁵⁵

7.84. In response to the arguments of the interested parties, MOFCOM noted that there was no disagreement with "the trend of substantial increase of the absolute import volume".¹⁵⁶ MOFCOM was not, however, required to look at increases in relative terms as well. In particular, MOFCOM:

[C]onsidered that, from 2006 to 2008, although the domestic market had a continuously high demand in broiler products, the domestic like product also obtained some market shares. However, that did not imply that the domestic industry did not suffer from injury. On the contrary, because the import volume of the product concerned increased substantially and the import price remained at a relatively low

¹⁵¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

¹⁵² Redetermination, (Exhibit CHN-1 (translated version)), p. 75. Because at issue is MOFCOM's methodology, the actual numbers are not essential for the Panel's determination. For the sake of completeness, we note that MOFCOM found that chicken feet, wings, and gizzards did not, in the Chinese market, belong to "broiler products of lowest value". Looking specifically at certain components of its own comparator basket of products, MOFCOM found that chicken breasts (included in the domestic basket but not in the import basket) were actually priced lower than chicken feet. On this basis, "the product specifications similar to the imported product concerned, as produced and sold by the domestic industry, belong to the product specifications of relatively high price."

¹⁵³ Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

¹⁵⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 70. According to MOFCOM: During the investigation period, the dumped and subsidized imports were imported in a large quantity and sold, which suppressed the selling price of the like product of the domestic industry significantly, the selling price had been below the sales cost for a long period of time, and the domestic industry could not obtain reasonable profit margin, and the like product was in losses all the time.

(emphasis added)

¹⁵⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 71. (emphasis added)

¹⁵⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 72. (emphasis added)

level, resulted in significantly undercutting and suppression to the domestic like product ...

...

[T]he effect of the import volume of the product concerned on the domestic industry should be investigated comprehensively combined with the situation of change of the import price in the corresponding period.¹⁵⁷

7.85. According to MOFCOM:

[T]he data indicates that the import price of the product concerned was still lower than the price of the domestic like product, and significantly undercut the price of the domestic like product. Affected by this, the domestic like product was forced to reduce the price substantially to maintain market share.¹⁵⁸

7.3.2 Main arguments of the parties

7.3.2.1 Price undercutting

7.3.2.1.1 United States

7.86. MOFCOM's price effects analysis remains inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement¹⁵⁹, for two reasons.

7.87. First, the Panel in the original report found that China failed to ensure price comparability because it did not control for differences in product mix when comparing the prices of different chicken products. MOFCOM, however, "took no action that complied with the Panel's instructions".¹⁶⁰ It based its underselling findings "on the very same comparisons of the average unit value of subject imports to the average unit value of domestic industry sales that the original panel found deficient".¹⁶¹

7.88. Second, China does not demonstrate that data collected from only four of the 17 domestic producers included in the domestic industry were representative. In particular, MOFCOM did not disclose why it narrowed down the sample, the methodology for selecting the producers, or their share in the total domestic sales.¹⁶² The data relied on cannot be considered as "positive evidence" and the analysis as an "objective examination" within the meaning of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement¹⁶³; MOFCOM's analysis is also inconsistent with the requirements in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement¹⁶⁴ that the injury analysis focus on the "domestic industry".¹⁶⁵ Where "samples" are used, they must be properly representative.

7.3.2.1.2 China

7.89. MOFCOM used AUVs rather than model-specific prices to compare price trends; the WTO Agreement permits reliance on AUVs for price comparison purposes¹⁶⁶ and Articles 3.2 and 15.2 do not mandate a particular price-comparison methodology.¹⁶⁷ Following the Panel's findings in the original report, MOFCOM collected additional data from four domestic producers to determine whether, as a factual matter, the product types exported by the United States were in

¹⁵⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 73. (emphasis added)

¹⁵⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 76.

¹⁵⁹ We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.

¹⁶⁰ United States' second written submission, para. 149.

¹⁶¹ United States' second written submission, para. 149.

¹⁶² United States' first written submission, paras. 135, 136, and 146.

¹⁶³ We will refer to these as Articles 3.1 and 15.1.

¹⁶⁴ We will refer to these as Articles 3.2 and 15.2.

¹⁶⁵ United States' first written submission, para. 142.

¹⁶⁶ China's first written submission, para. 277.

¹⁶⁷ China's first written submission, para. 278.

fact low-value products in China's market or were high-value products.¹⁶⁸ MOFCOM found that the subject imports consisted of products higher in value¹⁶⁹ than the domestic like product used in determining AUVs. As a result, the initial use of AUVs in the original investigation was in fact biased in favour of the respondents. In this light, MOFCOM did not need to make any adjustments for differences in the product mix in the redetermination.¹⁷⁰

7.90. The underselling analysis therefore remained exactly the same as in the original investigation and is thus based on data from all domestic producers included in the original investigation. The more limited data collected in the redetermination served only to confirm that there was no bias in the original method (using aggregate AUVs rather than product-specific prices for the underselling analysis); for this more limited purpose, collecting data from four domestic producers was fully sufficient.

7.91. MOFCOM's choice of the four domestic firms from which it sought additional data during the reinvestigation was based on time and resource constraints and MOFCOM's familiarity with the four firms.¹⁷¹ For three of the four firms MOFCOM had conducted full verifications in the original proceedings; the fourth was the largest of those for which it had conducted more limited verifications. MOFCOM made a specific finding in its redetermination, based on a review of all the evidence, "that the selling prices of the different product specifications in the domestic market supported by these evidences are representative".¹⁷²

7.3.2.2 Price suppression

7.3.2.2.1 United States

7.92. MOFCOM's price suppression finding relied exclusively on the flawed finding of price underselling. Because the latter was flawed, the former was also necessarily inconsistent with Articles 3.1, 3.2, 15.1, and 15.2.¹⁷³

7.93. The underselling analysis and product-specific pricing data did not support MOFCOM's findings of price suppression in the first half of 2009 because the evidence did not show any correlation between the alleged underselling and price suppression.¹⁷⁴ Specifically:

- a. The long-term trend in the domestic industry's net loss does not support the conclusion of price suppression.
 - i. The domestic industry's decrease in losses (due to prices increasing more than the increase in costs) during the period 2006 to 2008 is inconsistent with a finding of price suppression.
 - ii. MOFCOM failed to explain or investigate how the alleged underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects between 2006 and 2008.¹⁷⁵

¹⁶⁸ China's response to Panel question No. 45(b), para. 166.

¹⁶⁹ China's response to Panel question No. 45(b), para. 167: "pricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum showing products like paws to be high value."

¹⁷⁰ This conclusion was based on the following analysis: (a) MOFCOM identified those product models mainly exported from the United States; (b) for those product models, MOFCOM calculated the overall average (domestic) price from price data collected from the four domestic producers selected during the reinvestigation; (c) this overall domestic price was relatively high; and (d) on that basis MOFCOM inferred that the corresponding product models exported from the US belong to higher-value product models. (China's first written submission, paras. 270-272). China further noted:

[T]he verification and data collection were used to establish price relationships across product types, irrespective of their absolute values, to demonstrate that price differences shown in a comparison of aggregate AUVs drawn from the industry as a whole was not merely the result of product mix but could reasonably be attributed to price undercutting.

(China's response to Panel's question No. 45(c), para. 168)

¹⁷¹ China's first written submission, para. 295.

¹⁷² China's response to Panel question No. 45(c), para. 168.

¹⁷³ United States' first written submission, paras. 151-157.

¹⁷⁴ United States' first written submission, paras. 151, 158, and 159.

¹⁷⁵ United States' first written submission, para. 158.

- b. The short-term price trend for domestic product types competing directly with subject imports compared to the price trend for other domestic product types suggests that other factors unrelated to the dumped imports were responsible for the alleged price suppression.¹⁷⁶ MOFCOM disregarded evidence that prices for domestically produced products that competed directly with most subject imports (i.e. chicken drumsticks, feet, and gizzards) declined far less than prices for other domestic products in the first half of 2009.

7.3.2.2.2 China

7.94. In relation to the United States' first argument, the price suppression finding relied not only on the underselling analysis but also on the effects of increased volumes of imports and the combined effects of both.¹⁷⁷

7.95. In relation to the United States' second argument:

- a. The legal standard under Articles 3.2 and 15.2 is not a full causation analysis but asks whether subject imports have "explanatory force" for the price suppression. MOFCOM made such a showing on the basis of the correlation between domestic and import prices, the consistent underselling and losses of the domestic industry, the increase in the margin of price undercutting in 2008, and the consistent increase in import volume.¹⁷⁸
- b. Regarding the US argument on decreasing losses, losses only narrowed in 2007 which cannot preclude a finding of price suppression on the basis of the totality of the evidence over the full period, in particular the increase in volume and market share of subject imports.¹⁷⁹
- c. Regarding the US argument on price suppression during the first half of 2009 being driven by other factors¹⁸⁰:
 - i. the US argument is not compatible with MOFCOM's aggregate approach;
 - ii. there was a price undercutting effect for the product as a whole and model-specific prices fell even if the degree of the decline varied between product models; and
 - iii. the price decline for those product models directly competing with imports was still "significant".

7.3.3 Evaluation

7.3.3.1 Price undercutting

7.3.3.1.1 Price comparison

7.96. We recall the second sentence of Article 3.2 of the Anti-Dumping Agreement:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member ... [.]¹⁸¹

¹⁷⁶ United States' first written submission, para. 159.

¹⁷⁷ China's first written submission, paras. 302-310.

¹⁷⁸ China's first written submission, paras. 317-320.

¹⁷⁹ China's first written submission, paras. 321-322.

¹⁸⁰ China's first written submission, paras. 323-327.

¹⁸¹ Emphasis added. Article 15.2 of the SCM Agreement is essentially identical.

As we observed in the original report, "price comparability has to be ensured in terms of the various features of the products and transactions being compared".¹⁸² We concluded that, as a matter of law, where an authority:

[P]erforms a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product.¹⁸³

7.97. Neither party has directed us to any developments since that would require us to revisit this finding.

7.98. Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement¹⁸⁴ set out the rules and conditions that apply with respect to the determination of injury, which is one of the fundamental prerequisites for the imposition of an anti-dumping measure.¹⁸⁵ The provisions of Articles 3 and 15 requiring consideration, examination, and evaluation of various factors contemplate "a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".¹⁸⁶ The price comparison required in Articles 3.2 and 15.2 is an important analytical step in an investigating authority's injury and causation analysis under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. It requires an investigating authority to consider whether any observed significant price undercutting is "the effect of the dumped imports".¹⁸⁷ A price comparison under Articles 3.2 and 15.2 is thus not a static snapshot of the relationship between two prices (or averages). It requires, rather, a dynamic consideration of two sets of prices in a specific market context and within a given time-frame. The consideration must address whether observed movements in domestic prices are the effect of the prices of the dumped imports.

7.99. The facts relevant to our Articles 3.2 and 15.2 analysis in this proceeding may be summarized as follows:

- a. In the original case, MOFCOM disagreed with the arguments of US interested parties that imports from the United States contained "low value" products, as opposed to what the United States characterized as "high value" domestic product models in the domestic comparator basket.¹⁸⁸
- b. In the redetermination, MOFCOM sought to verify whether "the selling prices of the different product specifications in the domestic market supported by these evidences [*sic*] are representative".¹⁸⁹
- c. MOFCOM selected four domestic producers for additional verification of data and obtained further product-specific information from these companies. The data verified and gathered were not for the purpose of comparing prices, but rather, "to establish price relationships across product types, irrespective of their absolute values".¹⁹⁰

¹⁸² Panel Report, *China – Broiler Products*, para 7.480.

¹⁸³ Panel Report, *China – Broiler Products*, para. 7.483. We note that the parties did not appeal our findings.

¹⁸⁴ We will refer to these as Articles 3 and 15.

¹⁸⁵ Panel Report, *China – Cellulose Pulp*, para. 7.11.

¹⁸⁶ Appellate Body Report, *China – GOES*, para. 128; Panel Report, *China – Cellulose Pulp*, para. 7.14.

¹⁸⁷ Emphasis added.

¹⁸⁸ Panel Report, *China – Broiler Products*, para. 7.469.

¹⁸⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 74.

¹⁹⁰ China's response to Panel question No. 45(c), para. 168.

- d. The data gathered from the four domestic producers indicated that product models identified by the United States as "low value"¹⁹¹ or "high value" do not have similar "values" in the Chinese market¹⁹², at least for those producers, and could not be considered "low value".
- e. In the light of this model-specific evidence, MOFCOM considered that the domestic benchmark AUV it used for its price underselling analysis was more "conservative"¹⁹³ than an AUV based on a basket of product models including only models in the US-export basket.

7.100. The discussion of comparability in our original report concentrated on the following point: to consider whether the AUV of a basket of imported goods has had the effect of undercutting the AUV of a basket of domestic like products, the product composition of the two baskets must be "comparable" such that the price of the products in one basket can have an effect on the price of the products in the other basket. This is because where the baskets are composed of different product models a consideration of the effect of the price of a basket of imported goods on the prices of the basket of domestic goods becomes complicated: the more the divergence in composition, the less accurate the comparison of average values and the less reliable any consideration of the effects of one set of prices (or AUVs) on another.

7.101. In the original investigation¹⁹⁴, MOFCOM's price comparison was further complicated by at least two other factors, and these complications were not addressed or rectified in the redetermination.

7.102. First, in considering the price effects of dumped imports, MOFCOM undertook a price comparison between two baskets of dissimilar compositions and considered the effects of the AUV of a smaller import basket on the AUV of a larger domestic basket. In the original case MOFCOM had found that the "like product" for the purposes of the investigation was a broiler and not specific product models, and that many of the product models at issue were substitutable in the Chinese market.¹⁹⁵ MOFCOM was thus aware of potential price effects as a result of competition among product models within each basket. Given substitutability of the product models within the larger domestic basket, there was some risk that price effects were the effects of competition from product models within the domestic basket that were not in the dumped import basket.

7.103. Second, we note the observation by the United States that, "MOFCOM found that chilled chicken cuts accounted for 40 to 47 percent of subject imports and chicken feet accounted for 29 to 39 percent of subject imports, depending on the year".¹⁹⁶ We recall the model-specific prices that MOFCOM found in the course of the reverification. Given the range of prices among the various product models and the change in the composition of the domestic basket from year to year, it is not a given that any observed price effects are "not merely from differences in the composition of the two baskets being compared".¹⁹⁷ An unbiased and objective investigating authority would be expected to seek to control for these variations in considering the effect of the prices of subject imports on the prices of the domestic like product.

¹⁹¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 75: "the main product specifications exported from the U.S. to China were frozen chicken with bones (normally most of them are chicken legs, HS 02071411), chicken wing (HS02071421), paw (HS 02071422), gizzard (HS 05040021)".

¹⁹² Redetermination, (Exhibit CHN-1 (translated version)), p. 75:

From 2006 to first half year of 2009, the average prices of chicken legs sold by domestic producers in domestic market were 9,676 RMB, 12,566 RMB, 13,656 RMB and 11,875 RMB per ton, the average prices of chicken paw were 10,198 RMB, 12,142 RMB, 12,958 RMB and 12,837 RMB per ton, while at the same period the average prices of chicken breast were 9,342 RMB, 11,489 RMB, 12,573 RMB and 11,031 RMB per ton. According to the above data, the product specifications similar to the imported product concerned, as produced and sold by the domestic industry, belong to the product specifications of relatively high price.

¹⁹³ Redetermination, (Exhibit CHN-1 (translated version)), p. 75.

¹⁹⁴ We underline that MOFCOM did not undertake to reopen the investigation to consider price effects, but reverified its data and gathered additional information. On this basis, it found that the AUVs it relied upon in its consideration of price effects in the original investigation were "conservative".

¹⁹⁵ Panel Report, *China – Broiler Products*, para. 7.605 (referring to the Preliminary Determination in the original investigation, (Original Exhibit USA-2)).

¹⁹⁶ United States' second written submission, para. 150 (referring to Redetermination, (Exhibit USA-9 (translated version)), section VII(ii)(2)).

¹⁹⁷ Panel Report, *China – Broiler Products*, para. 7.483.

7.104. As a matter of law, we continue to be of the view that:

- a. a simple comparison of prices in respect of baskets with different compositions does not indicate the effect of one set of prices (of the subject import basket) on the other set of prices (the domestic basket, comprising a larger number of product models); and
- b. where AUVs are based on baskets whose product mixes are not comparable, an investigating authority is required to seek to "control for differences in physical characteristics affecting price comparability or making necessary adjustments".¹⁹⁸

7.105. China argues that the reverification amounted to "controlling" for the different basket compositions, because it demonstrated that the domestic AUVs used for comparison purposes are more "conservative" than an AUV that might be derived from a basket composed of the same product models as the subject imports.¹⁹⁹ While we might agree with China that, at least for the four producers subject to reverification, domestic AUVs appear to be more "conservative" than the dumped import AUVs, given our specific findings in the original case and the requirements of Article 3.2, this alone does not suffice to demonstrate that MOFCOM controlled for the different composition of the two baskets for the specific purpose of considering the effects of the price of subject imports on a comparator basket of the domestic like product.

7.106. In the original report, we did not find, because Articles 3.2 and 15.2 do not require, that in a price comparison, MOFCOM had to adopt the "lower of the two" price benchmarks; our findings were about the comparability of the baskets rather than the relative value of different AUVs. The fact that a domestic AUV is more or less "conservative" or might otherwise benefit exporters or foreign producers does not affect our analysis. Rather, at issue under Articles 3.2 and 15.2 is the effect of subject imports on domestic like product prices during the POI. This requires that the baskets of goods used for comparison be comparable, or at least that any price comparison controls for or adjusts in respect of different compositions to ensure sufficient comparability.

7.107. In this light, we find that MOFCOM's "reverification" did not suffice to bring China's measure into conformity with its obligations under Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement, in that it failed to address the comparability of AUVs derived from different baskets of products for the purpose of considering the effects of prices of subject imports on domestic like product prices.²⁰⁰

7.3.3.1.2 Representativeness

7.108. In response to the arguments of the United States that the data collected from four domestic companies were not representative, China submits that in its view:

[T]he "representativeness" of the selected producers [is] a question regarding price comparability of specific products, which was not the purpose of the MOFCOM verification exercise and collection of supplemental information.²⁰¹ ...

China further argues that:

The exercise did not require any direct product price comparisons, but merely to establish pricing relationships across product types, whatever the absolute prices may be.²⁰²

[P]ricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum showing products like paws to be high value. None of the U.S. interested parties submitted any evidence or

¹⁹⁸ Panel Report, *China – Broiler Products*, para. 7.494.

¹⁹⁹ China's second written submission, para. 262; opening statement at the meeting of the Panel, para. 46.

²⁰⁰ We do not mean to suggest, of course, that all MOFCOM had to do was to address the findings of the Panel in its original report. At issue in this case is the consistency of the redetermination with "the covered agreements".

²⁰¹ China's response to Panel question No. 45(b), para. 165.

²⁰² China's response to Panel question No. 45(b), para. 166. (emphasis added)

argument during the re-investigation process in an attempt to rebut these facts and common knowledge.²⁰³

7.109. The question of "representativeness" arises in the context of "sampling". Sampling is an exercise in which observations about the whole of a population are based on data collected from a subset of that population. The methodology used to sample from a larger population depends on the type of analysis being performed, but may include simple random sampling or systematic sampling. Whatever the sampling methodology, in the context of the Anti-Dumping Agreement and the SCM Agreement, application of sampling as an analytical tool is valid where it can be demonstrated that the sample is sufficiently representative to allow for a reasoned conclusion about the population as a whole.²⁰⁴ In this instance, MOFCOM obtained additional data from four domestic producers²⁰⁵ on "volume, value, and unit value on a product-specific basis"²⁰⁶ in the context of analysing "pricing relationships across product types". According to China, this was done "to establish" such relationships, in respect of not only the four domestic producers subject to verification, but also the domestic industry as defined. Moreover, according to China, "pricing evidence collected by MOFCOM through verification during the re-investigation process further established a pricing spectrum".²⁰⁷

7.110. That is, on the basis of data gathered from a subset of the population (four producers), MOFCOM drew certain conclusions about the population as a whole ("a pricing spectrum" or "pricing relationships across product types" in respect of all domestic producers defined as the domestic industry). This is, in effect, a sampling exercise, regardless of the methodology employed by MOFCOM.

7.111. Nothing in Articles 3.2 and 15.2 – or, indeed, in Articles 3 and 15 as a whole – expressly prohibits or permits, or specifically regulates, sampling as an analytical methodology.²⁰⁸ Nonetheless, any sample that is used to "establish" a conclusion about the population as a whole must be representative.²⁰⁹ An unbiased and objective investigating authority cannot reasonably

²⁰³ China's response to Panel question No. 45(b), para. 167. (emphasis added)

²⁰⁴ See in particular, Appellate Body Report, *EC – Fasteners (China)*, para. 436:

[W]e disagree with China's contention that the only way to ensure representativeness is through a statistically valid sample. In our view, as long as the domestic industry is defined consistently with the *Anti-Dumping Agreement*, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample. A statistically valid sample is a proper way to ensure the representativeness of the sample. Yet, the *Anti-Dumping Agreement* imposes no obligation on an investigating authority always to resort to statistically valid samples.

(emphasis added)

"Representativeness" is not about the methodology of sampling; even a randomly selected sample may need to be controlled to ensure representativeness, such that any observations based on the sample can be validly extended to the population as a whole.

²⁰⁵ There were 17 domestic producers in the "domestic industry". (Redetermination, (Exhibit CHN-1 (translated version)), pp. 26-27).

²⁰⁶ China's response to Panel question No. 5(c), para. 14.

²⁰⁷ China's response to Panel question No. 45(b), para. 167. (emphasis added)

²⁰⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 435:

Turning to the substance of China's claims, we note that the *Anti-Dumping Agreement* is silent on the issue of whether sampling may be used for purposes of the injury determination. The Agreement thus does not prevent an authority from using samples to determine injury, and China does not contest this view.

And para. 436:

[B]ecause the *Anti-Dumping Agreement* does not specify whether sampling is allowed for purposes of an injury determination, it also does not contain guidance on how sampling should be conducted.

²⁰⁹ Sampling is generally concerned with gathering data from a sub-set of a population for the purpose of drawing conclusions about the population as a whole. In this instance, the investigating authority already had considerable data – not just of the sub-set, but of the population as a whole; indeed, China stresses that the reason why MOFCOM reverified the four companies was that it knew the sub-set sampled. We are sympathetic to MOFCOM's stated reason for the selection: given tight timelines, it is not unreasonable for an investigating authority to seek data from producers that have already been verified and that are familiar to it. At the same time, and especially given the lack of any explanation in the redetermination for the choice of these producers, this sequence of events might well give rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, which would not be consistent with an objective analysis of the evidence. We need not and do not make any findings on this point, but only note that MOFCOM's approach was not without risk.

draw conclusions about a population as a whole based on data gathered from a subset that is not representative.

7.112. The redetermination is silent as to the selection criteria, the selection process, and the representativeness of the sample. The explanations proffered by China in its submissions do not in any way address the question of representativeness of the sample, but rather contend that the choice of the four companies reverified was not arbitrary. Accordingly, even if MOFCOM's "reverification" amounted to the type of "control" required for a proper price comparison, MOFCOM did not explain in the redetermination in what way its sample was sufficiently representative that it could draw a reasoned conclusion about the population as a whole.

7.113. In this light, we find that China did not act consistently with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement because in conducting its "reverification", MOFCOM failed to explain in what way the companies chosen were "representative" such that a consideration of price effects based on data for these companies could be generalised to the domestic industry.

7.3.3.2 Price suppression

7.114. We found in the original report that even if there were contributing factors, at a minimum price undercutting was a factor in MOFCOM's price suppression analysis.²¹⁰

7.115. For the redetermination, MOFCOM merely "confirmed" through the reverification of the four companies that the comparator basket was a "conservative" one and that its price undercutting analysis was accurate but left its original price effects analysis unchanged. MOFCOM did not, in the redetermination, seek to "disentangle" price undercutting, price suppression, and volume and market-share effects. We refer, for example, to MOFCOM's response to the argument that part of the injury to the domestic industry was attributable to grain price increases:

[B]ecause the import price of the product concerned was always lower than the average selling price of the like product of the domestic industry, it undercut the price of the like product significantly, resulted in the suppression on the selling price of the domestic like product, and could not pass through the cost caused by price increase of raw materials downward, and the due price increase of the like product which should have occurred hadn't been realized.²¹¹

And again, responding to the pork price argument of the interested parties:

While its price was significantly lower than that of the domestic like product, it caused apparent suppression on the price increase of the domestic like product, and the price was lower than the production cost for a long time, and could not gain the profit margin. Therefore, the low-priced activity of the product concerned was the direct reason causing the injury to the like product of the domestic market [*sic*].²¹²

7.116. In this light, we find that China acted inconsistently with Articles 3.2 of the Anti-Dumping Agreement and 15.2 of the SCM Agreement because MOFCOM's consideration of price suppression still rests on its consideration of price undercutting, such that its price suppression analysis was undermined by a flawed analysis of price undercutting.

²¹⁰ Panel Report, *China – Broiler Products*, para. 7.511. In arriving at this conclusion, we relied on the findings of the Appellate Body in *China – GOES* to the effect that:

MOFCOM's Determinations do not separately or independently discuss the impact of the volume and increased market share of subject imports on the ability of domestic producers to sell at prices that would cover their costs of production. In these circumstances, we find ourselves unable to disentangle the respective contribution, in MOFCOM's determinations, of price undercutting and of volume and market share effects on the resulting price suppression.

(Panel Report, *China – Broiler Products*, para. 7.511)

²¹¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 85.

²¹² Redetermination, (Exhibit CHN-1 (translated version)), p. 88.

7.117. Having made findings in respect of price undercutting and in the light of the foregoing, it is not necessary or useful for us to make additional findings in respect of the second line of argument of the United States regarding price suppression.

7.3.4 Conclusion

7.118. For the foregoing reasons, we find that:

- a. China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in respect of price undercutting;
- b. China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement in respect of price suppression; and
- c. as a consequence, China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.

7.4 Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement: impact on the domestic industry

7.4.1 Introduction

7.119. In our original report we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.²¹³ We did not consider that making additional findings in respect of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement²¹⁴ would help the parties in resolving the dispute because:

- a. MOFCOM's examination of the state of the domestic industry was "inextricably linked" to its flawed consideration of price effects; and
- b. implementing the report on Articles 3.2 and 15.2 would require MOFCOM to re-examine its the impact of subject imports.

7.120. In this implementation proceeding, the United States again asserts that MOFCOM erred in various aspects of its examination of the impact of subject imports:

- a. In its redetermination, MOFCOM limited the scope of its reinvestigation to "the implementation of the rulings and recommendation of the DS427 Panel on the issues of injury and causality".²¹⁵
- b. MOFCOM did not examine different or additional information; its evaluation of all relevant factors is not different from that in its original investigation.

In these circumstances, to assist the parties to secure a positive resolution to the current dispute, we consider it appropriate to make findings with respect to the US claims.²¹⁶

7.4.2 Main arguments of the parties

7.4.2.1 United States

7.121. MOFCOM's impact analysis did not reflect an "examination of the impact of the subject imports on the domestic industry concerned" and an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" as required by Articles 3.4 and 15.4, for three reasons.

²¹³ We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2 or, where appropriate, Articles 3.2 and 15.2.

²¹⁴ We will refer to these as Articles 3.4 and 15.4.

²¹⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 15.

²¹⁶ This also reflects Japan's suggestion to the Panel in its third-party statement, para. 5.

7.122. First, MOFCOM relied exclusively²¹⁷ (or primarily²¹⁸) on a flawed analysis of the decrease in capacity utilization and an increase in end-of-year inventories, instead of evaluating all relevant factors and taking into account evidence that nearly all other factors were positive for the period 2006 to 2008.²¹⁹

7.123. Regarding capacity utilization:

- a. MOFCOM ignored that between 2006 and 2008 the decline in capacity utilization was due to the fact that the domestic industry's capacity increased in excess of demand growth.²²⁰
- b. The decline in capacity utilization between 2006 and 2008 was also not the effect of subject imports because their share of apparent consumption increased entirely at the expense of non-subject imports, not at the expense of the domestic industry, whose share of apparent consumption also increased.²²¹

7.124. Regarding end-of-period inventories, MOFCOM focused on an absolute increase in domestic industry end-of-period inventories. The relative increase in end-of-period inventories, both as a share of domestic industry production and as a share of domestic industry shipments, ranged between only 2.9% and 3.5% for the period 2006-2008, which was not significant.²²²

7.125. Second:

[B]y China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened.²²³

MOFCOM was required to consider the impact of subject imports on the domestic industry during the entire POI, including those periods in which the industry's performance improved.²²⁴ MOFCOM was not entitled to "focus" its impact analysis "on the financial indicators that were consistently weak throughout the period of investigation" to the exclusion of other contradictory factors.²²⁵

7.126. Third, China expressly argues that MOFCOM also considered potential future imports. However, "future subject imports could have no impact whatsoever on the domestic industry during the period of investigation".²²⁶

7.4.2.2 China

7.127. US arguments in respect of capacity utilization are problematic because:

- a. they relate to causation, which is irrelevant under Articles 3.4 and 15.4²²⁷;
- b. MOFCOM did not base its evaluation primarily or exclusively on capacity utilization, but evaluated "all of the injury factors, both individually and collectively"²²⁸;
- c. the observed capacity expansion is in part the result of "a shift from smaller producers to large producers", reflecting the "recent trend in the Chinese market" of "larger firms consolidating a growing portion of the market"²²⁹; and

²¹⁷ United States' first written submission, para. 170.

²¹⁸ United States' first written submission, para. 182.

²¹⁹ United States' first written submission, paras. 165 and 171.

²²⁰ United States' first written submission, paras. 172-173.

²²¹ United States' first written submission, para. 174.

²²² United States' first written submission, paras. 177 and 179.

²²³ United States' second written submission, para. 168.

²²⁴ United States' second written submission, para. 170.

²²⁵ United States' second written submission, para. 171 (quoting China's first written submission, para. 350).

²²⁶ United States' second written submission, para. 172.

²²⁷ China's first written submission, para. 358.

²²⁸ China's second written submission, para. 301.

²²⁹ China's first written submission, para. 357.

- d. the "allegation that capacity grew in excess of increasing consumption is not factually true".²³⁰

7.128. In respect of inventories, the United States failed to consider that inventories were growing in absolute and relative terms and MOFCOM had discretion on which basis to evaluate this factor.²³¹

7.129. In respect of US arguments on the POI, the United States focuses on the period from 2006 to 2008, and only on various non-financial indicators of the health of the domestic industry²³², ignoring the most recent part of the POI, the first half of 2009.²³³ Thus, the United States:

- a. improperly focused on volume indicators and ignored the weak financial indicators;
- b. improperly focused on the period 2006-2008 and ignored the most recent period, the first half of 2009;
- c. ignored the "cumulative impact of consistent pre-tax losses"²³⁴; and
- d. did not take account of expected near term trends.

7.130. By contrast, in its evaluation, MOFCOM "considered all of the evidence for the period as a whole"²³⁵ and put particular weight on²³⁶:

- a. negative financial indicators over the full POI;
- b. the deterioration in most injury factors during the first half of 2009²³⁷; and
- c. expected negative near term trends.²³⁸

7.4.3 Evaluation

7.4.3.1 MOFCOM's redetermination

7.131. MOFCOM conducted the reinvestigation on "procedural and substantive issues which formed the basis of [sic] the original anti-dumping measure and original countervailing measure".²³⁹ On injury, MOFCOM limited the scope of the reinvestigation to "the implementation of the rulings and recommendation of the DS427 Panel on the issues of injury and causality".²⁴⁰ MOFCOM did not examine any additional or different information in its redetermination, and based on largely the same evaluation of the facts, reached the same conclusions regarding the impact of subject imports on the domestic industry as in the original investigation.

²³⁰ China's first written submission, para. 356:

The United States makes a misleading comparison of percentages that are being applied to very different base numbers – 780,700 metric tons is a 26 percent increase from 2.98 million, while 955,600 metric tons is only a 17 percent increase from 5.64 million tons. But the denominator for the consumption increase is almost twice the size of the denominator for the reported domestic capacity.

(fn omitted)

²³¹ China's first written submission, paras. 360-365.

²³² China's first written submission, para. 339.

²³³ China's first written submission, para. 340.

²³⁴ China's second written submission, para. 312.

²³⁵ China's second written submission, para. 300.

²³⁶ China's first written submission, paras. 340-350.

²³⁷ China's first written submission, para. 342:

Aside from noting these negative indicators, the MOFCOM Redetermination also specifically highlighted this shift in 2009. MOFCOM noted that: "[i]n the first half of 2009, all the economic indexes of domestic industry continued to deteriorate". The MOFCOM focus on 2009 could not be mistaken.

(emphasis added; fn omitted)

²³⁸ China's first written submission, para. 344.

²³⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 1.

²⁴⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 15.

7.132. MOFCOM found that volume indicators were generally improving in 2006-2008. Financial indicators appeared generally weak and fluctuated over the same period. However, based on a comparison between the first half of 2008 and the first half of 2009, all indicators showed declining performance in the first half of 2009.

Table 1: Market trends

Factor	Observed trends
Output volume of the domestic industry	Increased throughout the 2006-2008 period, declined (by 4.37 percentage points) from H1 2008 to H1 2009.
Capacity utilization	Remained at around 79-80% throughout the 2006-2008 period, decreased by 9.78 percentage points from H1 2008 to H1 2009, to 66.48%. ²⁴¹
Sales quantities	Increased throughout the 2006-2008 period, dropped in H1 2009 by 7.74 percentage points compared to H1 2008.
Market share	Increased slightly throughout the 2006-2008 period (37.81% in 2006, 41.62% in 2007, 42.42% in 2008), decreased very slightly in H1 2009 to 42.19%. ²⁴²
Sales price	Increased in the 2006-2008 period, decreased in H1 2009. ²⁴³
Gross profit margin	Fluctuated over the period considered; generally negative except for 2007; and worsened markedly in H1 2009: -2.46% in 2006, 5.03% in 2007, -0.21% in 2008, and -4.37% in H1 2009.
Sales income	Year-on-year increase of 57.62% in 2007 and 19.65% in 2008; declined 26.80% from H1 2008 to H1 2009.
Profit before tax	Negative throughout the period considered: -1.208 billion RMB in 2006, -0.084 billion RMB in 2007, -1.359 billion RMB in 2008, and -1.090 billion RMB in H1 2009. Losses grew by 1511.72% from 2007 to 2008 and by 307.28% from H1 2008 to H1 2009.
Return on investment	Negative throughout the period considered: -13.42% in 2006, -0.86% in 2007, -12.18% in 2008, and -9.10% H1 2009 over H1 2008; year-on-year change of 12.56%, -11.31%, and -6.69% in 2007, 2008, and H1 2009.
Employment figures	Increased in 2006-2008, but decreased by 11.29% in H1 2009. ²⁴⁴
Labour productivity	Remained more or less stable over POI.
Per capita payroll	Rose throughout POI.
Ending inventory	Increased in absolute numbers during POI, from 68,257 tons in 2006 to 91,713 tons in 2007, 98,755 tons in 2008, and 105,402 tons in H1 2009. Year-on-year increase of 34.36% to 2007, 7.68% to 2008, and 6.73% to H1 2009 over H1 2008.
Net cash flows from operating activities	Fluctuated: -218 million RMB in 2006, -10 million RMB in 2007, +69 million RMB in 2008, -433 million RMB in H1 2009.

Source: Redetermination, (Exhibit CHN-1 (translated version)), pp. 65-68 and 78.

7.4.3.2 The law

7.133. Article 3.4 of the Anti-Dumping Agreement provides:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

²⁴¹ The baseline is not, however, constant. Capacity expanded throughout the period.

²⁴² MOFCOM found that the "growth rate" in the domestic industry's market share in the first half of 2009 "dropped by 4.80%" over that in the same period of 2008. It is not clear what MOFCOM means in its references to a decrease in the "growth rate".

²⁴³ MOFCOM noted that the "growth rate in the first half of 2009 dropped by 20.65% from that in the same period of 2008".

²⁴⁴ Total employment fell to 2006 levels, whereas total wages rose by over 40% in the same period.

7.134. Article 3 does not establish a strict order of analysis. It sets out substantive requirements for the determination of injury. The "consideration" required by Article 3.2 and the "examination" set out in Article 3.4 are meant to contribute to, rather than duplicate, the determination of causation required under Article 3.5.²⁴⁵ Article 3.4 requires an "examination" of the impact of the dumped imports including an "evaluation" of all relevant economic factors having a bearing on the state of the domestic industry. This examination involves consideration of the "explanatory force of subject imports for the state of the domestic industry".²⁴⁶ The fifteen factors listed in Article 3.4 are not exhaustive; other "economic factors" might well be relevant, and no one or several of the factors examined necessarily give decisive guidance. In examining the impact of dumped imports:

- a. "[T]here is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury."²⁴⁷
- b. The factors and indices evaluated under Article 3.4 may be found to be "negative" in terms of the state of the industry even in the absence of "an actual decline in performance".²⁴⁸ Similarly, "positive" trends (that is, where there is no absolute decline) may nonetheless be negative in terms of the state of the industry, for instance "when those increases are significantly less than the expansion in demand".²⁴⁹
- c. Even if there are no actual declines – in absolute or relative terms – an investigating authority may consider potential negative effects or declines in the industry. At issue when a "potential negative effect" is evaluated is still the impact of imports during the POI on the domestic industry during the POI, and not the possible impact of future (possible or likely) imports on the future state of the industry.²⁵⁰ What is relevant is the existence of a latent, as yet unrealized decline (again, in absolute or relative terms).
- d. Nothing in Article 3.4 prohibits an investigating authority from focussing on a part of the POI and undertaking a more detailed analysis of developments during that part of the POI in examining the impact of imports.²⁵¹

²⁴⁵ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China – GOES*, para. 149).

²⁴⁶ Appellate Body Report, *China – GOES*, para. 149

²⁴⁷ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.163. That panel went on to observe that: [T]he fact that one or more factors do not, taken individually, point toward injury, does not preclude the possibility of a finding that there is material injury. An examination of the impact of the dumped imports on the domestic industry under Article 3.4 includes an evaluation of all relevant economic factors having a bearing on the state of the industry to produce an overall impression of the state of the domestic industry.

See also Panel Report, *Thailand – H-Beams*, para. 7.249:

While we do not consider that such positive trends in a number of factors during the [POI] would necessarily preclude the investigating authorities from making an affirmative determination of injury ... such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the [POI].

²⁴⁸ Panel Report, *EC – Fasteners (China)*, para. 7.402:

Our view is supported by the text of Article 3.4, which requires investigating authorities to evaluate all relevant factors, "including actual and potential decline" in certain factors, and "actual or potential negative effects" on certain other factors. The New Shorter Oxford English Dictionary defines "potential" as "Possible as opp[osed] to actual; capable of coming into being or action; latent". The use of the word "potential" in the context of the Article 3.4 non-exhaustive list of relevant economic factors indicates to us that a decline need not have occurred during the period under consideration in order for an investigating authority to find injury.

(fn omitted)

²⁴⁹ Panel Report, *EC – Fasteners (China)*, para. 7.403.

²⁵⁰ The impact of future imports on the future state of the industry is a question to be examined in the context of determining whether there is a threat of injury to the domestic industry.

²⁵¹ Panel Report, *Russia – Commercial Vehicles*, para. 7.41 (adoption/appeal pending).

7.4.3.3 Analysis

7.4.3.3.1 Capacity utilization

7.135. As we understand it, the US argument rests on two factual bases: first, that the domestic industry's capacity increased in excess of growth in demand; and second, that MOFCOM relied on negative trends in inventories and capacity utilization rates without regard for positive trends in other areas in the redetermination. The United States relies on the following data:

- a. Domestic industry capacity increased by 780,000 tons, or 26.2%, in 2006-2008.
- b. Domestic demand (apparent consumption) increased by 955,000 tons, or 17%, in 2006-2008 and the domestic industry's share of apparent consumption increased from 37.81% to 42.2% in 2006-2008.²⁵²

According to the United States, MOFCOM's reliance on capacity utilization rates without considering that total capacity (the denominator in the rates being compared) was actually expanding in this period was misplaced.

7.4.3.3.1.1 MOFCOM's comparison

7.136. In discussing "capacity utilization" in the redetermination, MOFCOM sets out capacity utilization rates for each of 2006, 2007, 2008, and the first half of 2009. It notes minor increases in the first three years and a decline in the first half of 2009 of 9.78 percentage points compared with the first half of 2008.²⁵³ MOFCOM had also made the following findings in respect of production capacity, which establishes the denominator in the calculation of capacity utilization:

- a. a continuous increase of domestic demand in broiler products, resulting in
- b. expansion of capacity in each covered period²⁵⁴:

Table 2: Production capacity

	2006	2007	2008	2009 (H1)
Capacity (tons)	2,980,700	3,525,600	3,761,400	1,978,200
Increase (over previous corresponding period)		18.28%	6.69%	9.70%

Source: Redetermination, (Exhibit CHN-1 (translated version)), p. 65.

7.137. In MOFCOM's discussion of the change in capacity utilization rates, there is no recognition that industry capacity – the denominator in the calculation of capacity utilization – was increasing throughout the POI. This is not just a question of "causation", as China argues.²⁵⁵ The US argument, as we understand it, is about the reliability of MOFCOM's comparison of capacity utilization rates over time in evaluating the impact of subject imports on the domestic industry: given the changing denominators, comparing raw percentages without some examination of the context would not enable an investigating authority to objectively evaluate capacity utilization as a factor in the examination of the impact of imports on the domestic industry, as required by Article 3.4.

7.138. China argues that an investigating authority has discretion in its choice of analytical methodology in examining and evaluating data related to the state of the domestic market. We agree. However, that discretion is not unlimited: an investigating authority must use whatever methodology it chooses to objectively examine the evidence before it. If either the methodology it employs or the evidence on which it relies is not appropriate to the analytical task before it, an

²⁵² United States' first written submission, para. 174 (referring to Redetermination, (Exhibit USA-9 (translated version))).

²⁵³ Redetermination, (Exhibit CHN-1 (translated version)), p. 65.

²⁵⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 65.

²⁵⁵ Or, for that matter, non-attribution. (China's first written submission, para. 358).

investigating authority is unlikely to be able to conduct the objective examination and evaluation that is required by the Anti-Dumping Agreement and the SCM Agreement. Thus, for instance, when examining trends or comparing data, an investigating authority may not rely upon conclusions based on flawed methodology in the evaluation of a relevant economic factor; otherwise, any "comparison" would say little about the impact of dumped or subsidized imports on the state of the domestic industry.

7.139. A capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry). Rates may be meaningfully compared for the domestic industry over a period of time where:

- a. at least one factor is, or is kept, constant;
- b. if both factors vary over time, at least one factor is controlled or adjusted for any changes; or
- c. if both factors vary over time and are not controlled or adjusted for any changes, a reasonable explanation of the circumstances and any reliance on the comparison is provided.

We stress that there is nothing inherently wrong about comparing rates over time where both the numerator and the denominator change. Indeed, we do not understand the United States to be arguing that such a comparison is always faulty; the United States does not challenge the rate comparisons related to market share, profits or return on investment, even though in each case both factors were in a state of flux over the POI.

7.140. Rather, the US argument is that, on the facts of this case, because the domestic industry capacity increased throughout the POI, a simple comparison of rates was unreliable for the purposes of evaluating the impact of subject imports on the domestic industry. We agree. In the absence of any effort by MOFCOM to either control or adjust for this change, or any explanation of the circumstances and why reliance on the comparison was nonetheless appropriate, we cannot conclude that MOFCOM's examination was such as would be expected of an objective investigating authority in this context. MOFCOM merely set out figures for "apparent consumption" and "production quantity", but did not put the capacity utilization rates in perspective. MOFCOM's response to the objections of the interested parties during the redetermination in fact highlights its failure to engage with the question:

[D]ata indicated that: when the domestic demand increased continuously, the production capacity utilization rate from 2006 to 2008 was lower than 80%, but ... in the first half of 2009, the domestic demand further increased, but the production quantity of the like product of the domestic industry didn't increase correspondingly with the increase of production capacity, instead, it decreased by 4.37% compared to the same period of the previous year.²⁵⁶

MOFCOM did not address the problem of comparability of the rates in the light of continuous increases in production capacity. Given those increases, it is not clear what, if anything, the comparison of capacity utilization rates might explain in respect of the impact of imports. For instance, MOFCOM did not take into account in its evaluation:

- a. whether capacity was increasing in response to, in tandem with, or ahead of domestic demand;
- b. in what way any of these might affect the significance of any comparison of capacity utilization rates; or
- c. how shifts in the industry from smaller producers outside the defined domestic industry²⁵⁷ to larger producers within it could explain or affect the reliability of the data before it.

²⁵⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 78.

²⁵⁷ As argued before us by China.

7.141. On the basis of the information and explanation set out in the redetermination, we find that MOFCOM did not provide a reasoned and adequate explanation of its examination of "capacity utilization" rates.

7.4.3.3.1.2 Capacity utilization and overall analysis

7.142. The parties disagree about the importance of "capacity utilization rates" in MOFCOM's overall examination of the impact of subject imports. The United States argues that this was one of two negative factors on which MOFCOM impermissibly relied excessively. China responds that MOFCOM:

- a. "reasonably focused on the adverse condition of the domestic industry at the end of its period of investigation, noting the sharp deterioration in numerous indicators of domestic industry health in the first half of 2009"²⁵⁸; and
- b. "made a simple point about capacity utilization in its Redetermination – it was persistently low over the period of investigation".²⁵⁹

7.143. China argues that "although the authority must address each factor, the authority need not show that each individual factor by itself has been linked to subject imports".²⁶⁰ We agree.²⁶¹ Under Articles 3.4 and 15.4, the necessary corollary to this observation is that an investigating authority in examining the impact of subject imports must evaluate "all relevant economic factors" not in isolation from, but rather in relation to, one another. Capacity utilization is not just "a simple point"; it is one of the factors required to be evaluated under Article 3.4. A capacity utilization comparison that is not reasonable affects not just this one factor, but the entire examination of the impact of subject imports. This is apparent from China's own arguments:

But regardless of the increase in domestic capacity, the rate of capacity utilization would have been higher than it was, but for the presence of increasing volumes of subject imports.²⁶²

Where capacity increases outstrip increases in market demand, even a constant or declining volume of subject imports could result in a decline in capacity utilization without any decline in domestic production. We recall that MOFCOM found that: "When capacity utilization rate is at a relatively high level, the production of more chicken breast means increase of production quantity of more other broiler products."²⁶³ Combined with China's argument about cross-price elasticity of all broiler product models²⁶⁴, this would suggest that an expansion of production capacity in China would result in greater production of other broiler product models than wings and feet, with consequent impact on the prices of all product models. This is why an integrated examination of all of the factors evaluated is necessary in the examination of the impact of subject imports, and thus why a flawed capacity utilization comparison results in a flawed examination under Articles 3.4 and 15.4.

7.144. In this light, it is not necessary for us to determine whether MOFCOM's capacity utilization rate evaluation was "central" to its overall findings, as the United States argues, or a "simple point", as China contends. Because MOFCOM's evaluation of "capacity utilization rates" was flawed, its overall examination of all relevant economic factors was inconsistent with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

²⁵⁸ China's first written submission, para. 350.

²⁵⁹ China's first written submission, para. 354.

²⁶⁰ China's second written submission, para. 317.

²⁶¹ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.163: "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury".

²⁶² China's second written submission, para. 320.

²⁶³ Redetermination, (Exhibit CHN-1 (translated version)), p. 69.

²⁶⁴ Panel Report, *China – Broiler Products*, para. 7.605: "MOFCOM ... considered that all chicken parts competed and were substitutable with one another". See also para. 7.468: "MOFCOM's methodology ... recognises the substitutability among different types of products".

7.4.3.3.2 Inventories

7.145. The United States does not dispute that inventories rose in both absolute and relative terms. Rather, according to the United States:

- a. "MOFCOM focused on the purported increase in end-of-period inventories", while the observed relative increases were not significant²⁶⁵; and
- b. MOFCOM relied exclusively²⁶⁶ (or primarily²⁶⁷) on such flawed analysis.

We have two observations in respect of these arguments.

7.146. First, under Articles 3.4 and 15.4, an investigating authority is required to evaluate "all economic factors" including "actual and potential negative effects on ... inventories".²⁶⁸ The United States does not argue that MOFCOM did not do so; nor does it argue that inventories did not increase.²⁶⁹ Rather, it argues that the observed negative effects were not "significant". The word "significant" does not appear in the text of the provisions, and the United States has not directed us to any authority that would require us to read a requirement to consider the significance of negative effects on inventories into Articles 3.4 and 15.4. Even if the "significance" of that increase were a required consideration in this context, the United States has not put forward any argument or explanation to demonstrate that the 2.9% or 3.5% increases are not "significant" in terms of the effect of imports on inventories in the specific context of the Chinese broiler market.

7.147. And even if we agree that the observed inventory increases were not "significant" by whatever measure, the United States has not explained how this observation undermines MOFCOM's examination of the impact of subject imports in the context of its evaluation of all relevant economic factors. We recall that even positive trends may indicate negative effects; in itself, an inventory increase that is not "significant" does not establish that the increase has no negative effects.

7.148. Second, nothing in the redetermination suggests that its evaluation of inventories was the sole or the primary focus of MOFCOM's examination of the impact of subject imports. After setting out the fifteen factors, MOFCOM set out the various factors it had considered, of which the "ending inventories" factor was one:

However, the capacity utilization of the like product of the domestic industry during the same period always remain [*sic*] at a relatively low level, the ending inventories presented an increasing trend. Because the selling price of the like product of the domestic industry remained below the sales cost for the long period of time, it resulted in that the like product of the domestic industry could not obtain reasonable profit margins, and the pre-tax profits of the like product of the domestic industry remained negative. ... During the investigation period, the operational cash net flow of the like product experienced relatively significant fluctuations, which also influenced investment and financing activities of the domestic industry.²⁷⁰

The United States has not explained in what way this paragraph represents undue reliance on this one factor.

²⁶⁵ United States' first written submission, paras. 177 and 179.

²⁶⁶ United States' first written submission, para. 170.

²⁶⁷ United States' first written submission, para. 182.

²⁶⁸ Emphasis added.

²⁶⁹ United States' first written submission, para. 179 (emphasis added; fn omitted):

End-of-period inventories as a share of domestic industry production increased only from 2.9 percent in 2006 to 3.3 percent in 2008, while end-of-period inventories as a share of domestic industry shipments increased only from 3.2 percent in 2006 to 3.5 percent in 2008. These ratios ... did not increase significantly between 2006 and 2008.

²⁷⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 68.

7.149. In the light of the above, we find that the United States has not established that MOFCOM's evaluation of inventories was inconsistent with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

7.4.3.3.3 Focus on part of the POI

7.150. The United States argues that:

[B]y China's own admission, MOFCOM's impact analysis focused on the first half of 2009, when the domestic industry's performance lagged, while failing to account for the impact of subject imports on the domestic industry between 2006 and 2008, when the domestic industry's performance strengthened.²⁷¹

The United States does not contest that industry performance "lagged" in the last half-year of the POI. As well, the United States does not contest MOFCOM's findings that some factors evaluated showed negative effects throughout the POI.²⁷² Rather, it asserts that "the domestic industry's performance strengthened" in 2006-2008, that MOFCOM did not adequately "focus" on this period and that MOFCOM focused its examination of impact "on the financial indicators that were consistently weak throughout the period of investigation", to the exclusion of other contradictory factors.²⁷³

7.151. In its redetermination, MOFCOM examined the information regarding each relevant factor and described both positive and negative developments, where relevant, in absolute and relative terms, for the entire period:

The above evidence indicates that, during the investigation period, in order to meet the increasing demand of the domestic market, from 2006 to 2008, the production capacity, production quantity and sales volume of the like product of the domestic industry all increased, and the indicators including market share, employment, per capita wages and labor productivity also increased in different degrees. However, the capacity utilization of the like product of the domestic industry during the same period always remain [*sic*] at a relatively low level, the ending inventories presented an increasing trend. Because the selling price of the like product of the domestic industry remained below the sales cost for the long period of time, it resulted in that the like product of the domestic industry could not obtain reasonable profit margins, and the pre-tax profits of the like product of the domestic industry remained negative. ... In the first half of 2009, all the economic indexes of domestic industry continued to deteriorate.²⁷⁴

7.152. Even if we were to agree with the US assertion that MOFCOM "focused" on the first half of 2009, this does not, in itself, establish that MOFCOM acted inconsistently with Articles 3.4 and 15.4. In this respect, we make three observations.

7.153. First, nothing in Articles 3.1, 3.4, 15.1, or 15.4 prevents an investigating authority from "focusing" on a part of the POI, as long as it does not ignore relevant data and arguments, and its resulting determination is one that an objective and unbiased investigating authority could reach based on the evidence and arguments before it and the explanations given. The United States has not demonstrated that MOFCOM's "focus" was unreasonable or resulted in any lack of objectivity; the fact that there were or might have been different trends in the preceding time-frame (which MOFCOM did discuss) does not, without more, suggest lack of objectivity in focussing on the most recent information.

²⁷¹ United States' second written submission, para. 168.

²⁷² **Profit before tax:** negative, at 2006, 2007, 2008, and H1 2009, at -1.208 billion RMB, -0.084 billion RMB, -1.359 billion RMB and -1.09 billion RMB (i.e. increase of the loss by 1511.72% in 2008 vs 2007 and of 307.28% from H1 2008 to H1 2009).

Return on investment: negative at -13.42%, -0.86%, -12.18% and -9.10%, in 2006, 2007, 2008, and H1 2009; year-on-year growth of 12.56%, -11.31%, and -6.69% in 2007, 2008, and H1 2009.

Net cash flows from operating activities: fluctuated: -218 million RMB in 2006, -10 million RMB in 2007, +69 million RMB in 2008, -433 million RMB in H1 2009. (Redetermination, (Exhibit CHN-1 (translated version)), pp. 67, 68, and 78).

²⁷³ United States' second written submission, para. 171.

²⁷⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 68. (emphasis added)

7.154. Second, the fact that industry performance might have "strengthened" in the 2006-2008 period does not, in itself, bring into question MOFCOM's determination based on its focus on 2009. Even positive trends in earlier parts of the POI may serve as evidence of negative effects²⁷⁵; here, domestic industry performance "strengthened" in some areas, though not others, and to the extent there were positive trends, it was in the context of an expanding market.²⁷⁶ At the same time, as MOFCOM noted, in the first half of 2009, "the losses were close to that of the whole year of 2008".²⁷⁷ The fact that it focused on the most recent data showing major losses does not, in itself, demonstrate that MOFCOM's examination was not objective or unreasonable.

7.155. Third, it is not unreasonable or not objective for an investigating authority to examine the cumulative impact of imports on a domestic industry, but focus its attention on the end of the period examined, when dumping and/or subsidization of imports has been found.

7.156. We find therefore that the United States has not established that MOFCOM's "focus" on the last part of the POI resulted in an examination of the impact of subject imports on the domestic industry inconsistent with the requirements of Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement.

7.4.3.3.4 "Potential" negative effect and future imports

7.157. MOFCOM had found that US exporters "may expand exports to China and will cause further adverse impact on the domestic industry".²⁷⁸ In its first written submission China argued that the United States "improperly disregards MOFCOM's discussion of the continuing trend of U.S. exports".²⁷⁹ The United States replied that "future subject imports could have no impact whatsoever on the domestic industry during the period of investigation".²⁸⁰

7.158. According to China, "the text of Articles 3.4 and 15.4 contemplate [*sic*] evaluation of both current adverse trends but also future declines".²⁸¹ It argues that the phrase "all relevant economic factors" in Article 3.4 is "a phrase that itself can include both present and future trends"²⁸², and "[t]o avoid any ambiguity, the text goes on to specify that these economic factors include the 'actual and potential decline' in a number of specifically enumerated factors".²⁸³ In particular, China relies on the findings of the panel in *EC – Fasteners (China)* to the effect that:

- a. "potential" means "possible as opposed to actual; capable of coming into being or action; latent"; and
- b. "a decline need not have occurred during the period under consideration in order for an investigation authority to find injury".²⁸⁴

7.159. We recall that in *EC – Fasteners (China)* the facts showed not "potential" decline but rather relative decline.²⁸⁵ The panel's exploration of the meaning of "potential" was, in this light, not essential to its findings; for that reason, we do not consider that the discussion is necessarily relevant to or persuasive for our consideration of this issue. More to the point in the context of this

²⁷⁵ Panel Report, *EC – Fasteners (China)*, para. 7.403.

²⁷⁶ A fact that the United States readily acknowledges.

²⁷⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 68.

²⁷⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 70.

²⁷⁹ China's first written submission, para. 344.

²⁸⁰ United States' second written submission, para. 172.

²⁸¹ China's first written submission, para. 345.

²⁸² China's first written submission, para. 345.

²⁸³ China's first written submission, para. 345.

²⁸⁴ China's first written submission, para. 346 (quoting Panel Report, *EC – Fasteners (China)*, para. 7.402).

²⁸⁵ Panel Report, *EC – Fasteners (China)*, paras. 7.399-7.404. In that case, China alleged that since the 4.4% profit margin achieved during the investigation period was close to the 5% level the European Commission considered appropriate, and profitability doubled between 2003 and the investigation period, there was no basis to conclude that dumped imports had a negative effect on profitability. The panel observed that "[t]he use of the word 'potential' in the context of the Article 3.4 non exhaustive list of relevant economic factors indicates to us that a decline need not have occurred during the period under consideration in order for an investigating authority to find injury". The panel concluded that the European Commission's evaluation that the increase in profitability was disproportionately low when compared to the increase in demand, was objective.

case is that MOFCOM's redetermination does not, in fact, appear to address "potential decline" in the sense that term is used in Articles 3.4 and 15.4.

7.160. Articles 3.4 and 15.4 are concerned with the impact of imports during a recent past period on the present state of the domestic industry, and not the impact of future imports on the future state of the industry. The latter is specifically addressed in Articles 3.7 and 15.7, which establish additional criteria for consideration in the context of determining "threat of material injury". A "potential decline" in the sense of Articles 3.4 and 15.4 could not, in our view, be found to support the view that material injury is "possible" as a result of future imports, or that future imports could cause injury in the future. Rather, "potential decline" as a relevant factor in the examination of the impact of subject imports on the present state of the domestic industry would have to be a consequence of the dumped or subsidized imports during the period examined. "Potential decline" exists where, despite the absence of an actual decline (in either absolute or relative terms) during the period examined, imports during the period examined have an impact on the domestic industry such that there is a latent or potential decline with respect to a particular factor which has not yet become manifest.

7.161. As part of its examination of the impact of subject imports, MOFCOM apparently considered the prospective impact of future imports on the state of the industry as a relevant factor. This is not an appropriate consideration in the context of an examination of the impact of dumped and subsidized imports on the domestic industry as part of a determination of present material injury caused by those imports. In our view, MOFCOM's understanding of the relevance of future imports in the context of evaluation of a "potential decline" was not consistent with a proper reading of Articles 3.4 and 15.4. In itself, this might suggest that the "potential decline" portions of MOFCOM's analysis are irrelevant, and nothing in the Agreements prohibits an investigating authority from examining or evaluating irrelevant factors if this does not otherwise have an impact on the investigating authority's overall examination and ultimate determination. In this case, however, China itself argues that MOFCOM relied on this irrelevant factor. In this context, we cannot conclude that MOFCOM's examination of the impact of subject imports was consistent with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, as we cannot know what MOFCOM's conclusion would have been had it not relied on this irrelevant factor.

7.162. In the light of the foregoing, we find that:

- a. the requirement to consider "potential decline" under Articles 3.4 and 15.4 relates to the impact of current imports on the domestic industry such that even absent actual declines, the potential for such declines to materialise may be relevant to the examination of the present impact of subject imports; and
- b. MOFCOM's overall examination and evaluation of all relevant economic factors was affected by its examination of and reliance on an irrelevant factor – the impact of likely future imports – such that its examination of the impact of subject imports on the domestic industry is not consistent with Articles 3.4 and 15.4.

7.4.4 Conclusion

7.163. We find that China acted inconsistently with the requirements of Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement because:

- a. MOFCOM's evaluation of "capacity utilization rates" was faulty; and
- b. MOFCOM relied on an irrelevant economic factor when it examined the impact of likely future imports on "potential decline" in the domestic industry.

7.164. As a consequence, we find that China acted inconsistently with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

7.165. We further find that the United States has not established that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and Articles 15.1 and 15.4 of the SCM Agreement because of MOFCOM's:

- a. evaluation of inventories; or
- b. "focus" on the last part of the POI.

7.5 Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement: causation

7.5.1 Introduction

7.166. In our original report we found MOFCOM's price undercutting and price suppression analysis inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.²⁸⁶ In the light of the relationship between the considerations set out in Article 3.2 of the Anti-Dumping Agreement and Article 15.2²⁸⁷ of the SCM Agreement and the demonstration of causation required by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement²⁸⁸, we were not in a position to determine whether MOFCOM properly demonstrated the existence of a causal link between the subject imports and injury to the domestic industry. We observed that because China's implementation of the Panel's findings in the original report concerning MOFCOM's consideration of price effects would necessarily require that it reconsider its findings of causation²⁸⁹ we did not consider it necessary for the resolution of the dispute to make additional findings under Articles 3.5 and 15.5.

7.167. In this implementation proceeding, we have again found that MOFCOM's price effects analysis was not consistent with Articles 3.2 and 15.2. We have further found that MOFCOM's examination of the state of the industry was not consistent with Articles 3.4 and 15.4. Solely based on these two findings, we cannot conclude that MOFCOM properly demonstrated the existence of a causal link between the subject imports and any injury to the domestic industry.

7.168. Having said that, we recognize that the Panel might well help the parties "secure a positive resolution of the current dispute" if it were to "to make findings with respect to the claims of the United States that are within the terms of reference for this compliance proceeding".²⁹⁰ Therefore, in order to enable the parties to secure a positive resolution of the dispute, whether through implementation of DSB recommendations and rulings in this dispute or otherwise, we will consider the parties' arguments and make findings on the US claims under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

7.5.2 Main arguments of the parties

7.5.2.1 United States

7.169. The US claims of violation of Articles 3.5 and 15.5 rest on four arguments.

7.170. First, MOFCOM's demonstration of causation relied on its consideration of price effects, but MOFCOM's consideration of price underselling and price suppression are WTO-inconsistent, and there is also no evidence of price depression.

7.171. Second, MOFCOM ignored record evidence that subject import volumes did not increase at the expense of the domestic industry:

- a. the domestic industry gained market share at the same time as subject imports gained market share²⁹¹; and
- b. MOFCOM did not examine or explain why such evidence did not undermine its finding of causation, rather MOFCOM insisted that Chinese law allowed it to consider either the

²⁸⁶ We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.

²⁸⁷ We will refer to these as Articles 3.2 and 15.2.

²⁸⁸ We will refer to these as Articles 3.5 and 15.5.

²⁸⁹ Panel Report, *China – Broiler Products*, para. 7.584.

²⁹⁰ Japan's third-party statement, para. 5.

²⁹¹ United States' first written submission, para. 195.

absolute volume increase or relative volume increase, but did not oblige it to consider both.²⁹²

7.172. Third, MOFCOM failed to reconcile its analysis with evidence that the domestic industry's performance had improved as subject import volume and market share increased:

- a. almost all indicators (market share, capacity, output, sales quantity, sales revenue, employment, decrease in loss) show an improvement in the domestic industry's performance between 2006 and 2008, the period during which subject import volume increased by 47%.²⁹³ Many performance indicators also show an improvement if the 2006 figures are compared to those for the first half of 2009²⁹⁴;
- b. MOFCOM predicated its demonstration of causation entirely on developments in the first half of 2009, whereas it was required to examine the causal relationship in relation to the entire POI, not just for a selected period²⁹⁵; and
- c. the domestic industry's lagging performance in the first half of 2009 could not have been the result of subject imports when the bulk of the increase in subject import volume – 90% of the total increase – coincided with strengthening domestic industry performance during the 2006-2008 period.²⁹⁶

7.173. Fourth, MOFCOM ignored evidence that the substantial proportion of subject imports consisting of chicken feet could not have been injurious because domestic producers were incapable of producing more chicken feet without increasing production of other chicken products to uneconomic levels. Over 40% of subject imports consisted of chicken feet, which Chinese producers were incapable of supplying in adequate quantities.²⁹⁷

7.5.2.2 China

7.174. MOFCOM did a proper causation analysis. It was only required to demonstrate that subject imports contributed in some meaningful way to the injury.²⁹⁸ MOFCOM based its determination of the existence of a causal link on a number of key factors, such as the increase in subject import volume and market share, consistent underselling, price suppression, and the domestic industry's inability to use available capacity.²⁹⁹ In particular:

- a. MOFCOM did not ignore evidence about the domestic industry's market share.³⁰⁰ Rather, MOFCOM:
 - i. acknowledged and discussed the increase in market share of domestic firms; and
 - ii. focused on the increase in absolute volume, the drop in market share in the first half of 2009, and low prices/price suppression, which are sufficient to establish a causal link regardless of market share trends.
- b. MOFCOM did not rely on a flawed analysis of price effects³⁰¹, and its conclusions on import volume and price suppression stand and sufficiently support MOFCOM's causation analysis regardless of the Panel's findings on price undercutting.
- c. MOFCOM did not fail to reconcile its analysis of subject import volume and market share with its analysis of causation and the condition of the domestic industry³⁰²:

²⁹² United States' first written submission, paras. 197-198.

²⁹³ United States' first written submission, paras. 203-204.

²⁹⁴ United States' first written submission, para. 205.

²⁹⁵ United States' first written submission, para. 207.

²⁹⁶ United States' first written submission, paras. 208-209.

²⁹⁷ United States' first written submission, paras. 215-216.

²⁹⁸ China's first written submission, para. 370.

²⁹⁹ China's first written submission, para. 380.

³⁰⁰ China's first written submission, paras. 383-387.

³⁰¹ China's first written submission, paras. 388-394.

³⁰² China's first written submission, paras. 395-402.

- i. the United States wrongly focuses on the period 2006-2008. MOFCOM drew a causal link between the increase of subject imports and the declining conditions particularly in the first half of 2009; and
- ii. the United States selectively relies on volume indicators and downplays in particular the sharply weaker financial performance, which MOFCOM relied upon. The US argument that the operating loss narrowed between 2006 and 2008 ignores the growth of the operating loss in absolute terms (on which MOFCOM relied), the cumulative effect of continuing losses, and the increase in operative losses when taken as a percentage of sales.

7.5.3 Evaluation

7.5.3.1 The law

7.175. Article 3.5 of the Anti-Dumping Agreement provides:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.³⁰³

7.176. Articles 3.5 and 15.5 thus requires that an investigating authority, on the basis of an objective examination of positive evidence³⁰⁴:

- a. demonstrate that subject imports are causing injury to the domestic industry; and
- b. ensure that injury caused by other known factors is not attributed to the subject imports.

In making its determination, the investigating authority must demonstrate a relationship of cause and effect, such that subject imports are shown to have contributed to the injury to the domestic industry. Subject imports need not be "the" cause of the injury suffered by the domestic industry, provided they are "a" cause of such injury; that other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship.³⁰⁵

7.177. With respect to non-attribution, Articles 3.5 and 15.5 require an investigating authority to:

- a. examine other known factors that are causing injury to the domestic industry at the same time as subject imports; and
- b. not attribute to subject imports injury caused by such other factors.

³⁰³ Article 15.5 is substantively the same.

³⁰⁴ Panel Report, *China – Cellulose Pulp*, para. 7.26:

While the investigating authority must find a sufficiently clear contribution by dumped imports to demonstrate that they are causing material injury, and explain its determination in that regard, nothing in the first two sentences of Article 3.5 suggests that those imports must be the sole cause of that injury. The language of Article 3.5 as a whole seems clear – the "causal relationship" between dumped imports and material injury may exist even though other factors are also contributing, "at the same time", to the situation of the domestic industry.

³⁰⁵ Panel Report, *Russia – Commercial Vehicles*, para. 7.178 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 67) (adoption/appeal pending).

Articles 3.5 and 15.5 also set out an illustrative list. For these obligations to be triggered, however, Articles 3.5 and 15.5 require that the factor at issue be³⁰⁶:

- a. "known" to the investigating authority;
- b. a factor "other than dumped imports"; and
- c. injuring the domestic industry at the same time as the dumped imports.

The investigating authority must make an assessment of such other factors that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped [or subsidized] imports".³⁰⁷ Neither Agreement, however, sets out specific guidance on how an investigating authority should undertake this assessment or ensure that injuries caused by other factors are not attributed to the subject imports.

7.5.3.2 MOFCOM's redetermination

7.178. At issue before us is whether MOFCOM fulfilled the requirements of Articles 3.1, 3.5, 15.1, and 15.5 in demonstrating causation, and examining and ensuring non-attribution of injury. Because MOFCOM did not change its consideration of price effects, it relied on the same consideration in determining causation and non-attribution in the redetermination as in the Final Anti-Dumping and Countervailing Duties Determinations in the original dispute. In this section we summarize MOFCOM's findings in the redetermination to provide factual context for our evaluation of the US claims.

7.5.3.2.1 Causation

7.179. MOFCOM found that throughout the POI, both the volume and the market share of subject imports "increased continuously"³⁰⁸ against a background of a "significant effect on the selling prices of the like product of the domestic industry" of those imports.³⁰⁹ At the same time, MOFCOM found that the domestic industry:

[C]ould not further reduce its losses or turn losses into profits, and both the pre-tax profit rate and the rate of return on investment were in an extremely low level [*sic*]. In addition, the operational net cash flow fluctuated significantly which also affected investment and financing activities of the domestic industry.³¹⁰

7.180. MOFCOM noted that even as "the demand of the domestic market increased continuously" in the course of the POI, the domestic industry's capacity utilization rate declined, most sharply between the first half of 2008 (79.96%) and the first half of 2009 (66%).³¹¹ It found a causal link

³⁰⁶ Panel Report, *Russia – Commercial Vehicles*, para. 7.179 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *China – GOES*, para. 151; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283; and *EC – Tube or Pipe Fittings*, para. 175) (adoption/appeal pending).

³⁰⁷ Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *EC – Tube or Pipe Fittings*, para. 188.

³⁰⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 70.

³⁰⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 70:

During the investigation period, the developing trend of the import price of the product concerned and the selling price of the like product of the domestic industry were completely consistent, as they both increased from 2006 to 2008 and began to decrease in the first half of 2009. The selling prices of the like product of the domestic industry and the import prices of the product concerned were closely related.

[The price] of the product concerned was consistently lower than the selling price of the like product of the domestic industry, and at the mean time [*sic*], under the effect and support of the U.S government's subsidies, in 2006, 2007, 2008 and the first half of 2009, was lower than the average selling price of the like product of the domestic market ... [.]

We note, however, our findings in respect of MOFCOM's price effects analysis.

³¹⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 71.

³¹¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 71. In particular:

The production quantity and the sales volumes of the like product of the domestic industry and the import volume of the product concerned changed in the opposite direction, the market share of the like product of the domestic industry and the market share of the product concerned changed in the opposite direction, the prices of the like production of the domestic industry and the prices of the production concerned changed in the same direction, which resulted in the sharp drop of the prices of the like product and more significant losses.

between the "large quantity" of dumped and subsidized imports originating in the United States and material injury to the domestic broiler product industry.³¹²

7.181. US interested parties³¹³ had argued that "the absolute quantity of the product concerned did not increase greatly, and the increased quantity just complemented the lost market share of other foreign producers in [sic] Chinese market".³¹⁴ MOFCOM observed that China's anti-dumping law does not require an examination of both absolute and relative trends. As well, while the domestic like product gained market share in the first part of the POI, MOFCOM found that:

[B]ecause the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product; and the domestic like product, while to stabilize the market share, was forced to be sold at a price lower than the production cost [sic].³¹⁵

7.182. US interested parties had also argued that during the POI, "several economic indicators (production quantity, sales volume and sales revenue) presented a virtuously [sic] increasing trend".³¹⁶ MOFCOM found that because:

[T]he domestic industry implemented some newly constructed projects and expansion projects, it was normal that the production capacity, production quantity, sales volume and market share of the like product presented an increase to certain extent [sic] in general, but this did not mean that the domestic industry did not suffer from injury. These indicators were not decisive for determining the injury of the domestic industry in its development period, and could not change the fact that the effective use of the production capacity and the inventory of the domestic industry increased continuously during the investigation period; neither could it change the worsening financial situations of the domestic industry.³¹⁷

7.5.3.2.2 Non-attribution

7.183. MOFCOM found that during the POI, the dumped imports increased even as "the quantity of imports from other countries and regions dropped in general"³¹⁸, while "apparent consumption of the broiler products in China increased".³¹⁹ Accordingly, MOFCOM concluded, "the material injury currently suffered by the domestic industry was not caused by the change of demand or change of consumption modes of the like product of the domestic industry".³²⁰ MOFCOM examined the technological competitiveness of the industry and noted that, "the industry has developed into a highly industrialized industry among domestic animal husbandry industries, with relatively complete industrial system and relatively smooth-running production chain".³²¹ For this reason, "[t]here was no negative impact on the domestic industry caused by backward production process and technology and mismanagement".³²² There were, MOFCOM observed, "no policies of limiting trade activities of the like product of the domestic industry".³²³ Exports of domestic products "were not significant enough to influence the trend and conclusions of the relevant indicators of the like product of the domestic industry".³²⁴ There was no *force majeure* and the financial crisis had no substantive impact on the domestic market.³²⁵

7.184. US interested parties had argued that an increase in grain prices would affect the profitability of the broiler industry. MOFCOM noted the increased costs, but pointed out that:

³¹² Redetermination, (Exhibit CHN-1 (translated version)), p. 72.

³¹³ The US Poultry and Egg Export Council and the US Government, in different submissions.

³¹⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 72.

³¹⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 73.

³¹⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 77.

³¹⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 78.

³¹⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 81.

³¹⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 81.

³²⁰ Redetermination, (Exhibit CHN-1 (translated version)), p. 81.

³²¹ Redetermination, (Exhibit CHN-1 (translated version)), p. 81.

³²² Redetermination, (Exhibit CHN-1 (translated version)), p. 82.

³²³ Redetermination, (Exhibit CHN-1 (translated version)), p. 82.

³²⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 82.

³²⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 83.

[B]ecause the import price of the product concerned was always lower than the average selling price of the like product of the domestic industry, it undercut the price of the like product significantly, resulted in the suppression on the selling price of the domestic like product, and could not pass through the cost caused by price increase of raw materials downward, and the due price increase of the like product which should have occurred hadn't been realized.³²⁶

7.185. US interested parties had further contended that "the change of pork price was the main reason that the price of chicken decreased during the investigation period".³²⁷ MOFCOM concluded that the evidence did not show a link between chicken and pork prices, observing that "the chicken price was not affected directly by the pork price, and was mainly decided by the supply and demand in the chicken market".³²⁸ MOFCOM stressed that:

[T]he demand of the domestic market increased continuously during the investigation period, but the good market environment didn't bring the due profit margin to the domestic industry. On the contrary, the impact of the low-priced import of the product concerned in a large quantity on the domestic industry was significant.³²⁹

7.5.3.3 Analysis

7.186. We recall our findings that MOFCOM's consideration of price effects was not consistent with Articles 3.2 and 15.2. The United States argues that on that basis alone, MOFCOM's causation and non-attribution analyses and determination are not consistent with Articles 3.1, 3.5, 15.1, and 15.5. Price effects were one among a number of factors MOFCOM took into account in its causation determination; as we observed in the original report, because its price effects consideration was inconsistent with the relevant provisions, we cannot conclude that MOFCOM properly demonstrated the existence of a causal link between the subject imports and any injury to the domestic industry. The United States raises three other arguments in this proceeding; we address these below.

7.5.3.3.1 Subject import volumes did not increase at the expense of the domestic industry

7.187. The United States argues that "MOFCOM ignored evidence that subject import volume did not increase at the expense of the domestic industry"³³⁰ because it did not consider evidence that:

- a. the domestic industry gained market share at the same time as subject imports;
- b. "the domestic industry *gained more market share* between 2006 and the first half of 2009, 4.38 percentage points, than the 3.92 percentage points gained by subject imports over the same period"³³¹;
- c. "any increases in U.S. imports simply filled the gap left by Brazil and Argentina when they effectively exited the China [*sic*] market"³³²; and
- d. "40 percent of subject imports consisted of chicken paws that could not have injured the domestic industry, which was incapable of increasing its production of chicken paws".³³³

7.188. In response to the arguments of US interested parties, MOFCOM found:

As to the above claims, the investigating authority considered that, from 2006 to 2008, although the domestic market had a continuously high demand in broiler products, the domestic like product also obtained some market shares. However, that

³²⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 85.

³²⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 86.

³²⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 87.

³²⁹ Redetermination, (Exhibit CHN-1 (translated version)), p. 88.

³³⁰ United States' second written submission, para. 175.

³³¹ United States' first written submission, para. 196. (emphasis original)

³³² United States' first written submission, fn 248.

³³³ United States' second written submission, para. 178.

did not imply that the domestic industry did not suffer from injury. On the contrary, because the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product; and the domestic like product, while to stabilize the market share, was forced to be sold at a price lower than the production cost. [*sic*]

...

When the market demand increased continuously, affected by the further increase of import volume of the product concerned and the continuous decline of price of the product concerned, the production quantity, sales volume, capacity utilization rate and market share of the like product of the domestic market all presented a trend of decrease or reduction of different degrees.³³⁴

7.189. Articles 3.5 and 15.5 require an examination of "all relevant evidence" to establish a "causal relationship" between subject imports and material injury to the domestic industry. Neither Article provides specific guidance as to how individual pieces of evidence – such as the volume of subject imports – should be taken into consideration in demonstrating causation.³³⁵ At a minimum, however, where an interested party makes an argument before the investigating authority as to the impact of a given volume of imports or change in the volume of imports relative to domestic production or other imports, an objective and unbiased investigating authority may not simply ignore the argument on the basis that it has considered the absolute volume of subject imports. There is no disagreement between the parties that such evidence was, indeed, put before MOFCOM; the United States argues that MOFCOM "ignored evidence that subject import volume did not increase at the expense of the domestic industry".

7.190. We have examined MOFCOM's findings in the light of the US argument. We note that MOFCOM started its analysis by referring directly to the argument of the US interested parties:

The U.S. Poultry and Egg Export Council claimed in Comments after the Preliminary Determination that, from 2006 to 2008, the increase of the absolute import volume of the product concerned was to complement sales on the domestic market in China, and the sale volume of the domestic producers in China also increased in the corresponding period, so the import volume of the product concerned had a small effect on the domestic industry. In the first half of 2009, the increase of the import volume of the product concerned was caused by "the seasonal characteristics".³³⁶

Immediately following this paragraph, MOFCOM found that "because the import volume of the product concerned increased substantially and the import price remained at a relatively low level, resulted in significantly undercutting and suppression to the domestic like product".³³⁷ And later, MOFCOM noted: "When the market demand increased continuously, affected by the further increase of import volume of the product concerned and the continuous decline of price of the product concerned ...".³³⁸ Given that MOFCOM expressly acknowledged the argument and responded to it, we cannot find that MOFCOM "ignored" the evidence before it, as the United States argues. Accordingly, we find that the United States has not established that China acted inconsistently with Articles 3.5 and 15.5 on the ground that MOFCOM ignored evidence of import volumes in relation to market share.

³³⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 73.

³³⁵ See, more generally, Panel Report, *China – Cellulose Pulp*: "Article 3 does not provide any specific guidance on how an investigating authority should undertake the examination of the relevant evidence in determining whether dumped imports are causing material injury." Cf. Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141 (citing Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 113 and 118).

³³⁶ Redetermination, (Exhibit CHN-1 (translated version)), pp. 72-73.

³³⁷ Emphasis added.

³³⁸ Emphasis added.

7.5.3.3.2 MOFCOM failed to reconcile its analysis with evidence of improved performance

7.191. This argument of the United States has four supporting parts; we address each in turn.

7.192. First, the United States argues that MOFCOM "failed to address" evidence that "the increase in subject import volume coincided with a significant *improvement* in the domestic industry's performance".³³⁹ We note, however, that the period in which the United States identifies certain "improvements" is not the entirety of the POI. MOFCOM did look at various trends in the POI, noted absolute and relative movements up and down, and drew certain conclusions. It did not "address" the data in the way the United States has done, but the United States has simply reorganized data that MOFCOM did address, and appears to be arguing that MOFCOM's analysis is deficient because it did not address the data organized in the same way. This does not, however, suffice to demonstrate that what MOFCOM did was insufficient or inconsistent with its obligations – merely that a different way of addressing the evidence might lead to a different outcome does not demonstrate error where, as here, there is no necessary reason why the different way should be preferred.

7.193. Second, the United States notes "the lack of any positive evidence linking the *increase* in subject import volume during the 2006-2008 period to any significant *decline* in the domestic industry's performance".³⁴⁰ MOFCOM, however, is not required to find an actual decline in the performance of the domestic industry in order to find injury caused by dumped and subsidized imports.³⁴¹

7.194. Third, the United States argues that performance indicators show an improvement if 2006 figures are compared to those for the first half of 2009. Again, we see no basis on which to conclude that MOFCOM was required to rely on such a comparison in its analysis.³⁴² Indeed, in some instances, such a comparison, without due consideration of intervening trends in the data considered, might well be misleading. The fact that certain performance indicators show improvement when data from 2006 are compared to data from 2009 says nothing about developments in the intervening period during which it is uncontested that the Chinese market expanded – for instance, whether any improvement tracked or lagged market expansion would seem to be a relevant consideration.

7.195. Fourth, the United States argues that MOFCOM predicated its causal link determination entirely on developments in the first half of 2009. However, it is clear that MOFCOM examined year-on-year trends in the first three years of the POI, and period-on-period movements for the last six months. More to the point, we see no basis to conclude that MOFCOM was precluded from focusing on the last part of the POI, for at least three reasons:

- a. Performance indicators were moving in different directions throughout the first three years of the POI; most indicators, however, trended downward in the first half of 2009. MOFCOM was entitled to look at the information before it and assess the cumulative impact of years of dumped imports on the domestic industry during the most recent period.
- b. Information regarding the most recent period is generally most relevant for an analysis of present material injury.
- c. An investigating authority is entitled to consider the possibility of a time-lag between dumped and subsidized imports and injury to the domestic industry through their effects.

7.196. In the light of the foregoing, we find that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the

³³⁹ United States' first written submission, para. 203. (emphasis original)

³⁴⁰ United States' first written submission, para. 204. (emphasis original)

³⁴¹ Panel Report, *EC – Fasteners (China)*, paras. 7.402-7.403.

³⁴² Panel Report, *Russia – Commercial Vehicles*, para. 7.41 and fn 138 (referring to Appellate Body Reports, *US – Steel Safeguards*, paras. 354-355; and *Mexico – Anti-Dumping Measures on Rice*, para. 166; and Panel Report, *Ukraine – Passenger Cars*, para. 7.269) (adoption/appeal pending).

SCM Agreement because MOFCOM "failed to reconcile its analysis with evidence of improved performance" in the domestic industry.

7.5.3.3.3 Constraints on domestic production of chicken feet

7.197. The United States argues that domestic producers were incapable of producing more chicken feet without increasing production of other chicken product models to uneconomic levels. The United States does not question the fact, as found by MOFCOM, that the Chinese market was expanding, or that dumped and subsidized imports from the United States were increasing. China responds in two ways. First, it asserts that the domestic industry could "meet some of that demand with the excess capacity. In particular, since the domestic industry consistently had excess capacity of about 20 percent, the domestic industry could have provided 20 percent more chicken paws."³⁴³ China does not, however, identify where in the redetermination MOFCOM made this finding. Second:

MOFCOM was correct when it found that subject imports of chicken paws were adversely affecting the entire domestic industry producing the like product. The impact was felt on both domestic production of chicken paws, but also domestic production of other chicken parts.³⁴⁴

7.198. We recall our findings, under Article 12.2 of the Anti-Dumping Agreement and Article 22.2 of the SCM Agreement, in the original report in respect of the same US argument: "MOFCOM acknowledged the argument in its Preliminary Determinations and indicated that it considered that all chicken parts competed and were substitutable with one another".³⁴⁵ We concluded that:

MOFCOM could in our view have satisfied its obligations under Articles 12.2 and 12.2.2, and Articles 22.3 and 22.5 through a simple reference to its treatment of the issue in the Preliminary Determination.

7.199. In the redetermination, MOFCOM noted that "[t]he Investigating Authority has analyzed and made determination [*sic*] in the preliminary determination of the original investigation".³⁴⁶ Indeed, in the preliminary determination, MOFCOM had found that:

The Investigating Authority holds that as there are some differences between the Subject Products and the like products in terms of specific feature, usage and quality, they may have their respective types or specifications, and the relationship between them does not necessarily constitute a one-to-one correspondence. However, such differences do not prevent the Investigating Authority from deeming products of different types or specifications as the same category of product for the purpose of investigation. In this case, chicken feet are included in scope of the Subject Products, therefore, the Investigating Authority has carried out investigation on import of all Subject Products including chicken feet, and has analyzed and examined injuries brought to the domestic industry by the Subject Products [*sic*].³⁴⁷

7.200. We find that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement on the ground that MOFCOM failed to adequately consider alleged market constraints on greater domestic production of chicken feet.

7.5.4 Conclusion

7.201. We have found that MOFCOM's consideration of price effects was inconsistent with Articles 3.2 and 15.2. MOFCOM took into account price effects as one element of its determination of causation. We further find that China acted inconsistently with Articles 3.5 and 15.5 by relying,

³⁴³ China's second written submission, para. 351.(fn omitted)

³⁴⁴ China's second written submission, para. 354.

³⁴⁵ Panel Report, *China – Broiler Products*, para. 7.605.

³⁴⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 80.

³⁴⁷ MOFCOM, Preliminary Determination in Anti-dumping Investigation on Imported White-feather Broiler Products from the U.S., (Exhibit USA-22 (translated version)), p. 31.

in MOFCOM's demonstration of a causal link between the subject imports and injury to the domestic industry, on a defective consideration of price effects.

7.202. As a consequence, we find China to have acted inconsistently with Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

7.203. We find, however, that the United States has not established that China acted inconsistently with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement because MOFCOM:

- a. did not consider the volume of dumped imports in both relative and absolute terms;
- b. "failed to reconcile its analysis with evidence of improved performance" in the domestic industry; and
- c. failed to adequately consider alleged market constraints on greater domestic production of chicken feet.

7.6 Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement: notice and ample opportunity to present written evidence

7.6.1 Introduction

7.204. In our original report, we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.³⁴⁸ During the reinvestigation, MOFCOM sought and collected new pricing data from four selected domestic Chinese producers and used these data for the purposes of its consideration of price effects in the redetermination.

7.205. This claim concerns MOFCOM's procedural obligations under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement³⁴⁹ in respect of the interested parties from the United States in the context of the request for pricing information from the Chinese producers.

7.6.2 Main arguments of the parties

7.6.2.1 United States

7.206. China acted inconsistently with Articles 6.1 and 12.1 because MOFCOM did not give notice to the investigated US producers and the US Government (US interested parties) of the information it required, the pricing data, from the Chinese producers during the reinvestigation.³⁵⁰

7.207. The notice requirements in Articles 6.1 and 12.1 are not limited to the interested party to which a request for information is directed.³⁵¹ In this instance, the provisions entitle "all interested parties", including the US interested parties, to notice of the information required from the Chinese producers (as well as ample opportunity to present written evidence).

7.208. The notice requirements relate to making all interested parties aware of the specific information that the investigating authority requires, including the specific questions and requests issued.³⁵² Also, the notice has to come in advance, such that interested parties are afforded the opportunity to defend their interests. These requirements were not met in this case.

7.209. China argues that read together, three documents in the reinvestigation record constitute the "notice" required by Articles 6.1 and 12.1: the Notice of Initiation, the General Verification Letter, and non-confidential summaries provided by the Chinese producers. Yet MOFCOM did not

³⁴⁸ We will refer to these as Articles 3.1, 3.2, 15.1, and 15.2.

³⁴⁹ We will refer to these as Articles 6.1 and 12.1.

³⁵⁰ United States' first written submission, paras. 40 and 42.

³⁵¹ United States' first written submission, para. 40; response to Panel question No. 1, para. 6.

³⁵² United States' response to Panel question No. 1, paras. 1 and 3.

identify the information it required of Chinese producers in any of these documents.³⁵³ They lacked the requisite content, in particular because they did not set out MOFCOM's questions or requests or in any other way identify the relevant information. Nor did they give notice to the US interested parties, in particular to the extent that they were merely made available in MOFCOM's trade remedy public information room without informing the US interested parties.³⁵⁴

7.210. Without notice of the information required from Chinese producers, the US interested parties were also necessarily denied ample opportunity to present written evidence pursuant to the second requirement in Articles 6.1 and 12.1.³⁵⁵ None of the documents cited by China afforded such an opportunity.³⁵⁶ Without knowledge of the required information, there could be no basis for ample opportunity to present relevant evidence.³⁵⁷ Interested parties cannot address through relevant evidence what they do not know.³⁵⁸

7.6.2.2 China

7.211. Articles 6.1 and 12.1 do not apply to the US interested parties in respect of information required of Chinese producers. Rather, these provisions "should be read more directly in relation to those interested parties that are the target of information requests".³⁵⁹ The obligations to give notice and to provide ample opportunity therefore only concern those interested parties that are the target of an information request.³⁶⁰ This position is consistent with the arguments of the European Union.³⁶¹ Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement would protect other interested parties, such as the US interested parties.

7.212. Even if applicable to interested parties not subject to an information request, the requirement to give "notice" has a flexible meaning and can be met by different means depending on the situation of the interested party.³⁶² Articles 6.1 and Article 12.1 require:

- a. giving advance and "active notification" in respect of the party from whom information is required³⁶³; and
- b. access to the required information, in respect of all other interested parties, for example by placing the information provided in response to the information request in a public reading room.³⁶⁴

7.213. MOFCOM complied with its obligations under Articles 6.1 and 12.1 as they apply in respect of US interested parties who were not the target of an information request. MOFCOM was not required to provide to US interested parties the precise questions MOFCOM put to the Chinese producers.³⁶⁵ MOFCOM provided appropriate notice in respect of newly solicited information and its nature and scope, by way of³⁶⁶:

³⁵³ United States' second written submission, paras. 10-34.

³⁵⁴ United States' response to Panel question No. 1, para. 4.

³⁵⁵ United States' first written submission, para. 43; second written submission, paras. 8 and 10.

³⁵⁶ United States' second written submission, paras. 15-18, 24, 32, and 33.

³⁵⁷ United States' second written submission, para. 15.

³⁵⁸ United States' second written submission, para. 17.

³⁵⁹ China's response to Panel question No. 4, para. 11.

³⁶⁰ China's responses to Panel question No. 1(b), paras. 4-5, No. 2, para. 7, and No. 4, para. 11.

³⁶¹ China's responses to Panel question No. 1(b), para. 5, No. 2, para. 7, and No. 4, para. 11. The European Union is a third party in this dispute.

³⁶² China's responses to Panel question No. 1(a), para. 2, and No. 4, para. 10.

³⁶³ China's second written submission, paras. 31-32; response to Panel question Nos. 1(a) and (b), paras. 3-4.

³⁶⁴ China's second written submission, paras. 32 and 34.

³⁶⁵ China's second written submission, para. 35; see also comments on United States' response on Panel question No. 1, para. 1.

³⁶⁶ We understand China to rely on the following three procedural steps, but not on the subsequent injury disclosure, as relevant elements through which MOFCOM allegedly gave notice. (China's first written submission, para. 53 ("procedural steps ... before issuing the Disclosure of Injury Essential Facts dated on 21 May 2014") and para. 60; second written submission, para. 28).

- a. the Notice of Initiation No. 88 (Notice of Initiation) of 25 December 2013.³⁶⁷ The Notice of Initiation indicated that evidence would be re-examined. It referred to the scope of the Panel's finding in its original report, instead of providing interested parties with a listing of the specific information to be requested from the Chinese producers;
- b. the General Verification Letter of 19 February 2014 addressed to Chinese producers and released in MOFCOM's trade remedy public information room, announcing on-the-spot "verifications"³⁶⁸; and
- c. the non-confidential summaries of the sales data provided by the four Chinese producers made available on 20 May 2014 in MOFCOM's trade remedy public information room.³⁶⁹

7.214. A violation of the notice requirement does not necessarily result in a violation of the obligation to give ample opportunity to present written evidence.³⁷⁰ In this instance, MOFCOM complied with its obligation to provide US interested parties ample opportunity to present written evidence because:

- a. it gave adequate notice to the US interested parties; and
- b. throughout the reinvestigation, US interested parties were free to present evidence, and in fact they did so.³⁷¹

7.6.3 Main arguments of the third parties

7.215. The European Union argues that to avoid overburdening investigating authorities, Articles 6.1 and 12.1 should be interpreted narrowly. In particular the notice requirement should only concern information requests to those parties that are supposed to hold the relevant information but not to all other interested parties in an investigation.³⁷² Likewise, the "ample opportunity" should not relate to opportunities to present written evidence on information provided by other interested parties.³⁷³

7.6.4 Evaluation

7.6.4.1 The law

7.216. Article 6.1 of the Anti-Dumping Agreement provides:

All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

The text of Article 12.1 of the SCM Agreement is essentially identical, with references to "interested members" in addition to "all interested parties" and "countervailing duty" rather than "anti-dumping" investigation.

³⁶⁷ MOFCOM, Announcement No. 88 on Casefiling for WTO Rulings on China's Measures of Imposing Countervailing and Antidumping Duties on White feather Broiler Chicken (25 December 2013) (Announcement No. 88), (Exhibit USA-1(translated version)); China's first written submission, para. 54; and second written submission, para. 36.

³⁶⁸ Letter from MOFCOM dated 19 February 2014 on Notification on on-spot Verifications (General Verification Letter), (Exhibit CHN-2 (translated version)); China's first written submission, para. 56; and second written submission, para. 37.

³⁶⁹ Referred to by China as the "public versions of verification exhibits and supplemental information". (China's first written submission, para. 58; second written submission, para. 41; and Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

³⁷⁰ China's response to Panel question No. 2(a), para. 8.

³⁷¹ China's second written submission, paras. 52-53.

³⁷² European Union's third-party submission, paras. 18-20; third-party statement, para. 4.

³⁷³ European Union's third-party statement, para. 6.

7.217. Each provision thus establishes two obligations on the investigating authority concerning the conduct of the investigation:

- a. to give notice to all interested parties of information required by the investigating authorities; and
- b. to provide to all interested parties ample opportunity to present relevant evidence in writing.

7.218. Articles 6.1 and 12.1 enshrine fundamental due process rights.³⁷⁴ In each provision, the two obligations are distinct yet closely related, conferring rights on the same parties.³⁷⁵ The obligations in each provision are inextricably linked, given that they are set out not only in the same paragraph but also in one single sentence. They must be read together; each obligation imparts meaning to the other. In particular, the second obligation clarifies a key purpose of giving notice of the information required to all interested parties: in order to present evidence that is "relevant in respect of the investigation in question", they need to know what the "investigation" is about – that is, what kind of information the investigating authority requires; and implicit in "presenting" written evidence is preparing such evidence, which requires foreknowledge of the contours of the investigation and time to do so.

7.219. Broken down to its constituent parts, the notice requirement has the following elements:

- a. "all interested parties";
- b. "shall be given notice"; and
- c. "of the information which the authorities require".

Below, we consider the meaning of each of these phrases in context and in the light of the express purpose of the requirement embedded in the provisions themselves.

7.6.4.1.1 All interested parties

7.220. "Interested parties", as defined in Article 6.11 of the Anti-Dumping Agreement and Article 12.9 of the SCM Agreement, include exporters or foreign producers.³⁷⁶ The term "interested parties" as used in Articles 6.1 and 12.1 is modified by the word "all". Unless otherwise defined or indicated, "all" means everyone. Nothing in Articles 6.1 and 12.1 suggests a different meaning of "all" in these provisions or otherwise suggests that "all" should be understood as anything other than all for purposes of both the notice requirement and the ample opportunity to present written evidence.

7.221. The context of the provisions supports the view that "all" means all. Where the drafters intended to make a distinction between various interested parties in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement, they did so expressly. For instance, the time-period for replies provided for in Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement is specifically for exporters or foreign producers receiving questionnaires.³⁷⁷ Had it been the intent of the drafters to limit the scope of the notice requirement or the ample opportunity to present written evidence to the recipients of information requests, the drafters could have done so. This is not the case, in contrast to the immediately following provision of Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement.³⁷⁸

³⁷⁴ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

³⁷⁵ "All interested parties" and, in case of Article 12.1 of the SCM Agreement, also "interested Members".

³⁷⁶ Members may add to the list of who is considered an interested party set out in Article 6.11 of the Anti-Dumping Agreement and Article 12.9 of the SCM Agreement.

³⁷⁷ See also Article 6.1.3 of the Anti-Dumping Agreement and Article 12.1.3 of the SCM Agreement in respect of providing the full text of the written application to the known exporters and to the authorities of the exporting Member, and upon request, to other interested parties.

³⁷⁸ We also note the absence of any qualifier in respect of from whom the information is required. A requirement to give notice to all interested parties of "the information which the authorities require of them" would clearly establish a narrower scope for the notice requirement, as argued by China.

7.222. Nothing in the object and purpose of the Anti-Dumping Agreement or the SCM Agreement detracts from this conclusion.³⁷⁹ The provisions at issue here protect the right of interested parties to present written evidence relevant to the investigation. To give effect to this right, all interested parties have an interest in being given notice of the information that an investigating authority requires – not only of them but also of other interested parties – so that they may meaningfully participate and fully defend their interests in an investigation. Notice of information required is, in this sense, fundamental to having an "ample" opportunity to prepare and present written evidence relevant to the investigation. To limit the scope of "all interested parties" to a subgroup of interested parties, those of whom information is required, would thus impermissibly render Articles 6.1 and 12.1 ineffective.

7.223. In the light of the above, the meaning of "all" interested parties is properly understood literally. Where an investigating authority requires information from a particular interested party, that interested party is one of the "all interested parties" to whom notice must be given, and so too are all other interested parties, from whom the information is not required.³⁸⁰

7.6.4.1.2 Shall be given notice

7.224. An obligation to give notice is a requirement to make aware, to transmit information – possibly in a summary fashion – of a state of affairs. In principle, the word "notice" denotes providing information in advance of a given event.³⁸¹ Nothing in Articles 6.1 and 12.1 establishes any guidance regarding the content, form or timing of notice. But turning to the context we discern some guidance in this regard.

7.225. The immediate context of the notice obligation is, of course, the second obligation in Articles 6.1 and 12.1. As we have observed, a key purpose of the notice obligation is to ensure that all interested parties have ample opportunity to present relevant written evidence; implicit in this is that to "present" evidence that is "relevant", interested parties require time to prepare such evidence and enough information to be aware of what the investigation is about. The event in advance of which notice is to be given is, in the light of the context of the provisions, the "opportunities" referred to in the second half of the provision. This, in turn, means that the notice has to come sufficiently "in advance" of the point at which interested parties are to present written evidence in the investigation such that they have the time to do so in a meaningful fashion.³⁸²

7.226. The context of the obligation to give "ample opportunity" in Articles 6.1 and 12.1 and the broader context of Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement as a whole provide additional guidance for the understanding of the obligation to "give notice":

³⁷⁹ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25:

Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.

This view would seem to apply equally to Part V of the SCM Agreement, which establishes substantive and procedural rules on the investigation underlying and imposition of countervailing measures to counteract injurious dumping.

³⁸⁰ In respect of the party from whom information is required, the notice of the information required is given through the information request itself, see Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement, and thus no separate notice is needed, again supporting the conclusion that the recipients of the notice must also be parties other than those from whom information is required. Regarding those other interested parties, the notice of the information required does not necessarily have to be given through the information request itself, see para. 7.233 below.

³⁸¹ For instance, it is also in this sense that the term "notice" has been used when describing the purpose of panel requests in the context of DSU Article 6.2, see e.g. Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 640, 646, and 792; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 118.

³⁸² China refers to the terms "notified" and "public notice" in Article 12 of the Anti-Dumping Agreement and the requirement for "sufficient advance notice" in paragraph 5 of Annex I of the Anti-Dumping Agreement. (China's response to Panel question No. 1(a), para. 3; comments on United States' response to Panel question No. 1, para. 4). China argues that in the absence of such language in Articles 6.1 and 12.1, "notice" has flexible meanings and in particular does not have to come in advance. In our view, however, the provisions China cites to do not detract from the temporal aspect of "notice" in Articles 6.1 and 12.1, as evidenced by the requirement to give "ample opportunity".

- a. Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement require that written evidence provided by one interested party "shall be made available promptly" to other participating interested parties;
- b. Article 6.2 of the Anti-Dumping Agreement establishes an obligation to "provide opportunities" for all interested parties to meet with parties with adverse interests;
- c. Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement require that investigating authorities "provide timely opportunities" for all interested parties to see relevant non-confidential information used; and
- d. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement require the investigating authority to "inform" all interested parties of essential facts.

7.227. Although expressed in different ways, these provisions contemplate two modes of engagement between the investigating authority and interested parties in respect of the information in an investigation: the use of the verb "inform" denotes some form of "active" engagement on the part of the investigating authority, whereas the other formulations suggest a more "passive" obligation to provide opportunities or to make available. The obligation to "give notice" at issue here falls, in our view, closer to the requirement to "inform" on this spectrum of obligation, requiring a positive action on the part of the investigating authority.

7.228. We draw the following conclusions in respect of the obligation to give notice of the information required.

7.229. First, Articles 6.1 and 12.1 require an investigating authority to actively provide something (in this instance "notice of the information which the authorities require") to all interested parties. This obligation entails reaching out and making all interested parties aware of the information in question. Thus, it cannot be satisfied by merely providing access to something that conveys the required notice.

7.230. Second, Articles 6.1 and 12.1 do not set out a specific time-frame for the giving of notice, but they do link the notice requirement with the obligation to give "ample opportunity" to present relevant written evidence. The timing of "notice" must, therefore, be understood in that specific context: sufficiently "in advance" that an interested parties will be able to prepare and present written evidence within the deadlines set by the investigating authority for submission of written evidence on, *inter alia*, the matters as to which information was sought.³⁸³

7.231. Third, Articles 6.1 and 12.1 do not set out specific requirements for the form of the notice or the modalities by which notice is to be given. Form and modalities remain within the discretion of the investigating authority. There might be any number of ways for an investigating authority to give notice. In this regard, we are conscious of the concerns raised in respect of the administrative burden associated with giving notice of the information required to all interested parties. However, our interpretation does not require that an investigating authority give that notice immediately, or in individual communications to all other interested parties in each instance. An investigating authority may choose a manner of giving the required notice that imposes less of an administrative burden.

7.6.4.1.3 Of the information which the authorities require

7.232. The required content of the notice follows from the requirement that notice is to be given "of the information which the authorities require", read in the light of the second half of the provision. The particular information that an investigating authority requires from interested parties thus will determine what the notice must convey, and will vary with the circumstances. At a minimum, a notice must convey an understanding of what information is required in order to enable all interested parties to prepare and submit relevant written evidence regarding the matters as to which information is sought.

³⁸³ In respect of the party from whom information is required, the notice of the information required is given through the information request itself. The notice to all other interested parties from whom information is not required might be given later, possibly even as late as after the information is received, if this is sufficiently early to allow other interested parties enough time to submit written evidence.

7.233. The obligation is to give notice of the information required; it is not an obligation to disclose the information request itself. Thus, an outline or description of the information required may well suffice to give the requisite notice. If an investigating authority issues a questionnaire to a particular interested party, sending or making available (to the extent this is made known to all other interested parties) this questionnaire to all other interested parties would certainly be one way of giving notice of the information the investigating authority requires. It is not, however, what the provisions necessarily require: nothing in Articles 6.1 and 12.1 specifically requires an investigating authority to provide to all other interested parties the actual questions or requests issued to a particular interested party, although this might be effective and good practice in this context.

7.234. Articles 6.1 and 12.1 require notice of the information required by the investigating authority to enable interested parties to prepare and submit relevant written evidence. For this reason, a notice that informs other interested parties of the information actually submitted by the responding interested party(ies) does not, without more, constitute notice within the meaning of these provisions.

7.6.4.2 The facts

7.235. During the reinvestigation, MOFCOM sought and obtained new pricing data from four Chinese producers through on-the-spot visits (referred to by China and MOFCOM as "verification" visits).³⁸⁴ These took place in early May 2014.³⁸⁵

7.236. MOFCOM did not provide US interested parties with the questions posed to the Chinese producers, nor communicate in any other form directly with US interested parties in respect of the data requested from the Chinese producers.

7.237. MOFCOM placed each of the three documents that China refers to as collectively constituting the alleged "notice" in its trade remedy public information room for any interested party to consult. Other than through the Notice of Initiation, MOFCOM did not, at any point, actively inform the US interested parties that the documents would be or had been made available in the trade remedy public information room.³⁸⁶

7.6.4.3 Analysis

7.6.4.3.1 Notice requirement

7.238. China and the United States agree that "the scope of the notice requirement under the articles is not limited to the precise interested party from whom the information is requested".³⁸⁷ We agree. The US interested parties were therefore entitled to notice of the information MOFCOM required from the Chinese producers.

7.239. China argues that MOFCOM did not act inconsistently with Articles 6.1 and 12.1 because "notice" has "flexible meanings" and can be "effected by different means depending on the situation of the interested party".³⁸⁸ In respect of the interested party receiving the information request, advance and active notice must be given.³⁸⁹ For all other interested parties, those not recipients of the information request, "the disclosure obligation under Articles 6.1 and 12.1 would be satisfied as long as those parties are provided with access to the required information".³⁹⁰ On the facts of this case, China contends that MOFCOM discharged its obligation under Articles 6.1 and 12.1 to give notice in three documents taken together: the Notice of Initiation, the General

³⁸⁴ China's second written submission, para. 39: "MOFCOM decided to use the verification as the tool to obtain further details on the chicken part-specific prices".

³⁸⁵ China's second written submission, para. 51; see also Redetermination, (Exhibit CHN-1 (translated version)), p. 14.

³⁸⁶ China's second written submission, paras. 34 and 38; response to the Panel's question No. 11, paras. 19-21.

³⁸⁷ China's comments on United States' response to Panel question No. 1, para. 2 (quoting United States' response to Panel question No. 1 para. 6).

³⁸⁸ China's responses to Panel question No. 1(a), para. 2, and No. 4, para. 10.

³⁸⁹ China's second written submission, paras. 31-32; response to Panel question Nos. 1 (a) and (b), paras. 3-4.

³⁹⁰ China's second written submission, para. 32.

Verification Letter, and the non-confidential summaries of the sales data provided by the Chinese producers.

7.240. The issue before us therefore is whether the documents invoked by China constitute, when viewed collectively³⁹¹, notice to the US interested parties of the information MOFCOM required from the Chinese producers, pursuant to Articles 6.1 and 12.1.

7.6.4.3.1.1 Notice of Initiation

7.241. The Notice of Initiation states:

On September 25, 2013, WTO dispute settlement body passed the panel report on the dispute case of "China's antidumping and countervailing measures against whitefeather broiler chicken products originated in the U.S.".

... [T]he Ministry of Commerce decides to reinvestigate this case in accordance with the rulings and suggestions in above relevant reports of WTO upon the date of issuance.

The Ministry of Commerce will re-examine the evidence and information obtained in the original anti-dumping and countervailing investigations, and carry out reinvestigations through questionnaires, hearings, and other measures.³⁹²

7.242. We make three observations concerning this document.

7.243. First, China asserts that the reference in the Notice of Initiation to the "panel report" provided sufficient notice of the information required by MOFCOM in its consideration of price effects under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.³⁹³ However, our findings in the original report were not limited to price effects. Even if there had been a specific reference in the Notice of Initiation to our findings in the original report under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, it is not clear that that would have amounted to notice of the information required by MOFCOM in this reinvestigation. Indeed, our findings regarding price effects concerned the comparability of AUVs, whereas MOFCOM's information request to Chinese producers was with respect to a different issue.

7.244. Second, China relies on the reference to "questionnaires, hearings, and other measures" to be carried out during the reinvestigation. This is, however, solely a reference to the means by which MOFCOM might gather information, and says nothing about the information that might or would be required. Articles 6.1 and 12.1 do not set out a notice requirement in respect of how information required is obtained, but in respect of what information is, in fact, required. In this instance, stating that information may be sought through questionnaires, hearings or other means, gives no indication of "the information" that MOFCOM requires. It is possible that conveying, or even making available (if that is made known to the interested parties), the relevant questionnaire to all interested parties would suffice to give notice regarding "the information" that an investigating authority requires. By contrast, merely indicating that there may be "questionnaires" in the document giving notice of the initiation of a proceeding conveys no understanding at all in respect of "the information" that is or may be required in those questionnaires.

7.245. Third, China confirmed that "the earliest moment when US interested parties could learn of the fact that MOFCOM required information from Chinese producers and gain an understanding of what information was required" was through reading the General Verification Letter, dated 19 February 2014.³⁹⁴ In itself, this undermines China's reliance on the Notice of Initiation as one of the documents constituting notice for the purposes of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

³⁹¹ We understand that China is not arguing that each document could, on its own, be characterized as "notice" consistent with Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

³⁹² Announcement No. 88, (Exhibit USA-1(translated version)), p. 1; China's first written submission, para. 54.

³⁹³ China's second written submission, para. 36.

³⁹⁴ China's response to Panel question Nos. 5(e) (i) and (ii), paras. 16-17.

7.246. In the light of the above, we question whether the Notice of Initiation could have contributed to giving the required notice through the three documents at issue, considered in their totality.³⁹⁵

7.6.4.3.1.2 General Verification Letter

7.247. China also relies on the General Verification Letter in support of its position that MOFCOM fulfilled the notice requirement. China asserts that this letter was placed in MOFCOM's trade remedy public information room on 19 February 2014. The letter was addressed to the Chinese producers subject to the on-the-spot verification and data collection.³⁹⁶ It states in part:

You are requested to prepare for the verification beforehand and fully cooperate with the Investigating Team during the verification. Please prepare all the materials and produce relevant evidence in view of the Panel Report.³⁹⁷

7.248. The United States contends that the General Verification Letter constitutes neither in form nor in substance a notice pursuant to Articles 6.1 and 12.1.³⁹⁸

7.249. The letter refers to a "verification" and requests the Chinese producers to "prepare all the materials and produce relevant evidence". It does not mention that additional data may or will be required; perforce, it does not identify what information might or would be required. Reference to a "verification", "all the materials" and "relevant evidence" does not provide any understanding of "the information" that MOFCOM required; mentioning certain sources of information ("materials", "evidence") does not suffice to provide notice of the information required. As we have observed, the reference to the "Panel Report", without more, does not provide additional clarification.³⁹⁹ Substantively, the contribution of the letter to MOFCOM's fulfilment of the "notice" requirement is questionable at best.

7.250. MOFCOM placed the letter in its trade remedy public information room but did not actively inform US interested parties of the letter, nor of the fact that it was available in MOFCOM's trade remedy public information room.⁴⁰⁰ The Notice of Initiation did refer interested parties to the trade remedy public information room. Thus, interested parties that routinely "monitored the public reading room"⁴⁰¹ presumably would have become aware of the letter soon after it was placed in that room.⁴⁰² The Notice of Initiation states in this regard:

Any interested parties may refer to the public evidence and information via Trade Remedy Public Information Room of the Ministry of Commerce. The Ministry of Commerce will guarantee the legal rights of interested parties though such procedures as disclosing information and providing chances for statement of opinions and comments.⁴⁰³

Thus, as we understand it, China argues that:

- a. the Notice of Initiation referred interested parties to the public information room for access to public evidence and information;
- b. MOFCOM placed the General Verification Letter in the public information room;

³⁹⁵ China's initial argument was that the Notice of Initiation (25 December 2013) was part of a series of three documents that taken together amounted to a notice of the information required within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

³⁹⁶ General Verification Letter, (Exhibit CHN-2 (translated version)), p. 1; China's first written submission, para. 56.

³⁹⁷ General Verification Letter, (Exhibit CHN-2 (translated version)), p. 1; China's first written submission, para. 56.

³⁹⁸ United States' second written submission, paras. 20-23.

³⁹⁹ China's second written submission, para. 38.

⁴⁰⁰ China's second written submission, para. 38.

⁴⁰¹ China's response to Panel question No. 11, para. 20.

⁴⁰² China's response to Panel question No. 11, paras. 19-21.

⁴⁰³ Announcement No. 88, (Exhibit USA-1 (translated version)), p. 1.

- c. an online index⁴⁰⁴ was immediately updated to list the non-confidential summaries as available in the public information room; and
- d. the General Verification Letter conveyed more precision about the information required of the Chinese producers.

7.251. China argues that "Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement do not mandate the specific means that investigating authorities must follow to provide notice".⁴⁰⁵ We agree. Nothing in Article 6.1 or 12.1 specifies the form of a notice or how it is to be given. An investigating authority may give notice to all interested parties either individually in each instance that information is required or through more generalized means; properly worded and transmitted, a notice of initiation or verification letters might, singly or together, constitute "notice" within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

7.252. In this case, however, the Notice of Initiation simply refers all interested parties to the public information room but does not indicate what would be made available and when.⁴⁰⁶ A general reference in the Notice of Initiation to a designated location where public information can be consulted, in connection with subsequently making available at that location a document that purports to convey an understanding of the information required, does not suffice to give notice within the meaning of Articles 6.1 and 12.1. MOFCOM did not inform interested parties of the placing of the document allegedly conveying the notice of the information required in the public reading room. Rather, interested parties were expected "to avail themselves of the public reading room to review themselves the public record" and thus to identify on their own the fact that a notice of the information required of Chinese producers had been given.⁴⁰⁷ However, under Articles 6.1 and 12.1 it is for MOFCOM to "give" the interested parties notice – an obligation to give notice cannot be satisfied by expecting the interested parties to monitor the investigating authority to ensure they remain informed when the interested parties are not informed that that is the mechanism by which such notice will be given to them. China's position reduces the notice requirement to an obligation to make a general statement that interested parties may consult information in the public information room. The notice requirement would be stripped of its link to the information required; it would no longer be "of the information which authorities require". Such "notice" would fall short of the due process function of Articles 6.1 and 12.1. A panel may not adopt an interpretation that would render a treaty provision, or part of it, ineffective, and we do not do so in this instance.

7.253. The fact that information was only requested for what China alleges to be a "limited purpose" does not absolve MOFCOM of the obligation to comply with Articles 6.1 and 12.1.⁴⁰⁸ The obligation under the notice requirement to inform all interested parties of the information required is not subject to any limitations with respect to the purpose or use for which information is required.

7.254. In view of the above, for at least two reasons we are not convinced that the General Verification Letter contributed to MOFCOM giving notice to the US interested parties through the three documents at issue considered together:

- a. the letter did not convey any understanding of the additional (pricing) information MOFCOM required from the Chinese producers and thus did not relate to the information required; and
- b. by merely placing the letter in MOFCOM's trade remedy public information room in connection with a reference to that room in the Notice of Initiation, MOFCOM failed to give notice.

⁴⁰⁴ According to China, the online index functions as an overview of the content accessible in the trade remedy public information room. The online index is accessible through MOFCOM's main web page. China does not, however, suggest that the online index provides for any mechanism that (proactively) alerts interested parties that and when a document is made available. (China's response to Panel question No. 13, paras. 23-24).

⁴⁰⁵ China's comments on United States' response to Panel question No. 1, para. 2.

⁴⁰⁶ Also, the Notice of Initiation does not refer to the online index.

⁴⁰⁷ China's comments on United States' response to Panel question No. 3, para. 8

⁴⁰⁸ See, however, China's second written submission, para. 39.

7.6.4.3.1.3 Non-confidential summaries

7.255. China refers to the non-confidential summaries of the data provided by the Chinese producers as the last of the three documents through which MOFCOM allegedly satisfied the notice requirement at issue.⁴⁰⁹ Chinese producers prepared these non-confidential summaries of information they provided to MOFCOM, and MOFCOM placed them in its trade remedy public information room on 20 May 2014.⁴¹⁰

7.256. Even if the non-confidential summaries conveyed the information required, MOFCOM failed to give US interested parties notice in respect of these documents. MOFCOM placed the non-confidential summaries in its trade remedy public information room. As with the General Verification Letter, this does not fulfil China's obligation in respect of the notice requirement. China neither alleges, nor provides evidence to suggest, that MOFCOM informed US interested parties specifically that the non-confidential summaries would be or were available in the trade remedy public information room. Merely making information available in this room without, in any way, calling the attention of the interested parties to this information is, however, not sufficient for purposes of Articles 6.1 and 12.1.

7.257. We are therefore not persuaded that the non-confidential summaries contributed to ensuring MOFCOM's compliance with the obligation to give notice.

7.6.4.3.1.4 Conclusion

7.258. China argues that the three documents at issue collectively satisfy the obligation to give "notice" pursuant to Articles 6.1 and 12.1. While each document may have some connection to China's obligation to give notice of the information required, none, in our view, makes enough of a contribution such that, taken together, they suffice to demonstrate that MOFCOM gave notice to US interested parties of the information required consistently with the requirements of Articles 6.1 and 12.1.

7.259. Neither the Notice of Initiation, nor the General Verification Letter conveyed any understanding in respect of "the information" that MOFCOM required. In respect of the General Verification Letter and the non-confidential summaries, MOFCOM also failed to convey to interested parties the fact that these documents were available for consultation in its trade remedy public information room. This failure was not remedied through the Notice of Initiation, which merely informed interested parties that evidence and information would be available in that room, but in no way informed them that notices required by Articles 6.1 and 12.1 would also be made available in the reading room. Therefore, all three documents, even considered together, do not add up to a complete whole whereby MOFCOM could have given the US interested parties notice of the information required from the Chinese producers.

7.260. Consequently, we find that China acted inconsistently with the notice requirement in Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement by failing to give notice to US interested parties of the information it required of Chinese producers during the reinvestigation.

⁴⁰⁹ Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

⁴¹⁰ In the context of Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement, the United States disputes that these summaries were made available in MOFCOM's trade remedy public information room. China has, however, provided an internal registration document that states that "Post-Verification Supplemental Information Concerning the Re-Investigation on the Anti-dumping and countervailing Measures Imposed on the Broiler Products (public version)" of the four Chinese producers in question was received by the trade remedy public information room on 20 May 2014. (Reading Room for Public Information on Trade Remedy, Acknowledgement of Receipt of Documents (20 May 2014), (Exhibit CHN-44)). See below, paras. 7.298-7.299.

7.6.4.3.2 Obligation to provide ample opportunity to present written evidence

7.261. The United States argues that as a consequence of MOFCOM's failure to provide notice of the required information, MOFCOM also failed to provide the US interested parties with ample opportunity to present written evidence.

7.262. We have found that MOFCOM failed to give notice to the US interested parties and that China thereby acted inconsistently with the notice requirement in Articles 6.1 and 12.1. In this context, it is not necessary for us to make additional findings as to whether, as a consequence of the violation of the notice requirement, MOFCOM also failed to give interested parties ample opportunity to present in writing all evidence which they consider relevant.⁴¹¹

7.6.5 Conclusion

7.263. The United States has established that MOFCOM did not give notice to the US interested parties of the information it required from Chinese producers during the reinvestigation. We therefore find that China acted inconsistently with the notice requirement in Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. As a consequence, it is not necessary for us to make additional findings in respect of the obligation to provide ample opportunities to present written evidence under the same provisions.

7.7 Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement: timely opportunities to see information and to prepare presentations on the basis of this information

7.7.1 Introduction

7.264. In our original report, we found MOFCOM's consideration of price undercutting and price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. During the reinvestigation, MOFCOM sought and collected new pricing data from four selected Chinese domestic producers and used these data in its consideration of price effects in the redetermination.

7.265. This claim concerns whether MOFCOM acted in accordance with its obligations under Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement to provide US interested parties timely opportunities to see information and to prepare presentations on the basis of this information, specifically with reference to information with respect to price effects.⁴¹²

7.7.2 Main arguments of the parties

7.7.2.1 United States

7.266. MOFCOM failed to provide US interested parties timely opportunities to see information in respect of:

- a. non-confidential summaries of pricing data provided by four Chinese producers during the reinvestigation at the request of MOFCOM⁴¹³;

⁴¹¹ We also do not need to resolve, as a general matter, whether a violation of the obligation to give notice of the information required necessarily results in a violation of the obligation to give ample opportunity to present written evidence.

⁴¹² We will refer to these as Articles 6.4 and 12.3.

⁴¹³ United States' first written submission, para. 53; response to Panel question No. 6(a), paras. 17-18. At paragraph 59 of its opening statement, the United States indicates that "MOFCOM was required to disclose not only the public summaries, but also the full data". At paragraph 56 of its second written submission, the United States argues that the release of non-confidential summaries did not fulfil the obligation of Articles 6.4 and 12.3. In its response to Panel question No. 6(b)(i), para. 21, the United States clarifies that it is not asserting that US interested parties were entitled to see Chinese producers' confidential data. We therefore understand the US claim to be limited to non-confidential information, including the non-confidential summaries.

- b. the precise identities of these Chinese producers⁴¹⁴;
- c. MOFCOM's questions or requests issued to these Chinese producers⁴¹⁵;
- d. the "context"⁴¹⁶ of these data, including "the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample"⁴¹⁷;
- e. aggregate data reflecting the information received from the Chinese producers⁴¹⁸; and
- f. MOFCOM's "basis for selecting [the four Chinese] producers for the sample and its methodology for collecting pricing data from them".⁴¹⁹

7.267. MOFCOM did not make available non-confidential summaries of the pricing data provided by the Chinese producers in MOFCOM's trade remedy public information room on 20 May 2014, as China alleges.⁴²⁰ Even if this were the case, MOFCOM did not give notice to the US interested parties, as required by Articles 6.4 and 12.3.⁴²¹ Moreover, in the light of the injury disclosure on 21 May 2014 and the deadline for comments one week later, the opportunity was not "timely" for purposes of these provisions.⁴²²

7.268. MOFCOM's failure to provide timely opportunities to see the information at issue "necessarily" resulted in a breach of the obligation to provide timely opportunities to prepare presentations on the basis of that information.⁴²³ Also, a hearing that China refers to "in no way provided interested parties with an opportunity to prepare presentations" and "itself breached AD Agreement Article 6.4 and SCM Agreement Article 12.3".⁴²⁴

7.7.2.2 China

7.269. MOFCOM acted consistently with Articles 6.4 and 12.3. These provisions do not require active disclosure of information.⁴²⁵ They contain an obligation of a passive nature that MOFCOM satisfied by releasing the information at issue in its trade remedy public information room. Moreover, the United States did not demonstrate that MOFCOM had denied a request by the US interested parties to see the information.⁴²⁶

7.270. Regarding the pricing data and identities of the Chinese producers, MOFCOM provided timely opportunities for all interested parties to see this information through non-confidential summaries submitted by Chinese producers of the information provided by them during the verifications. These non-confidential summaries were received by MOFCOM and made available to US interested parties in its trade remedy public information room on 20 May 2014.⁴²⁷ They

⁴¹⁴ United States' first written submission, para. 53.

⁴¹⁵ United States' first written submission, para. 53; responses to Panel question No. 6(b)(i), para. 21, and No. 7, paras. 28-29.

⁴¹⁶ United States' second written submission, para. 57.

⁴¹⁷ United States' response to Panel question No. 6(b)(i), para. 23.

⁴¹⁸ United States' responses to Panel question No. 6(b)(i), paras. 21 and 23, and No. 6(b)(ii), para. 25.

⁴¹⁹ United States' first written submission, para. 150.

⁴²⁰ United States' response to Panel question No. 6(a), paras. 17-18; comments on China's response to Panel question No. 11, para. 24.

⁴²¹ United States' second written submission, paras. 55 and 59; responses to Panel question No. 6(a), para. 19, No. 6(b)(i), paras. 22 and 23, and No. 10, paras. 36-37.

⁴²² United States' second written submission, paras. 54-55; responses to Panel question No. 6(b)(i), para. 23, and No. 9, paras. 34-35.

⁴²³ United States' first written submission, para. 62; second written submission, paras. 60 and 62.

⁴²⁴ United States' second written submission, paras. 61-62.

⁴²⁵ China's second written submission, para. 86.

⁴²⁶ China's second written submission, para. 87.

⁴²⁷ China's first written submission, para. 90.

contained indexed information on unit prices, sales quantity and value.⁴²⁸ They also disclosed in full the precise identities of the Chinese producers.⁴²⁹

7.271. In respect of the alleged questions or requests posed by MOFCOM, MOFCOM did not issue any questionnaires to the Chinese producers in order to collect additional information. MOFCOM was also not under an obligation under Articles 6.4 and 12.3 to give opportunities to see its oral questions or requests.⁴³⁰ The questions or requests posed by MOFCOM were not "information" that was "used" by MOFCOM within the meaning of Articles 6.4 and 12.3.⁴³¹

7.272. MOFCOM also afforded US interested parties the opportunity to prepare presentations because it complied with its obligation to give US interested parties opportunities to see all information.⁴³² Also, Pilgrim's Pride met with MOFCOM in a disclosure meeting⁴³³ and all US interested parties in fact presented their cases in a hearing with MOFCOM.⁴³⁴

7.7.3 Main arguments of the third parties

7.273. The European Union argues that "relevant information" pursuant to Articles 6.4 and 12.3 includes information requests addressed to other interested parties.⁴³⁵ "Timely opportunities" within the meaning of these provisions must enable interested parties to provide their comments on content, reliability and probative value of the information (and possible counter-evidence). To this end, the information must be made available early enough in the process that the comments can still be taken into account in the decision-making of the investigating authorities.⁴³⁶ Making the information available in an electronic or physical reading room satisfies the obligation to provide opportunities to see the information. There is no requirement to give notice to the interested parties that the information is made available.⁴³⁷

7.7.4 Evaluation

7.7.4.1 The law

7.274. Article 6.4 of the Anti-Dumping Agreement provides:

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

The text of Article 12.3 of the SCM Agreement is essentially identical, with references to "all interested Members and interested parties" instead of "all interested parties", "paragraph 4" instead of "paragraph 5" and "countervailing duty" rather than "anti-dumping" investigation.

7.275. Each provision thus requires the investigating authorities to:

- a. whenever practicable, provide timely opportunities for all interested parties;
- b. to see all information that is:
 - i. relevant to the presentation of their cases,

⁴²⁸ China's first written submission, paras. 90 and 92.

⁴²⁹ China's second written submission, para. 89.

⁴³⁰ China's second written submission, para. 85; comments on United States' responses to Panel question No. 6(b)(ii), para. 16, No. 7, para. 17, and No. 8, para. 18.

⁴³¹ China's comments on United States' response to Panel question No. 8, para. 18.

⁴³² China's first written submission, para. 94.

⁴³³ China's second written submission, para. 90.

⁴³⁴ China's first written submission, para. 95; second written submission, para. 91.

⁴³⁵ European Union's third-party statement, para. 5.

⁴³⁶ European Union's third-party submission, para. 14.

⁴³⁷ European Union's third-party statement, para. 5.

- ii. not confidential as defined in paragraph 5, and
- iii. used by the authorities in the investigation; and
- c. to prepare presentations on the basis of this information.

We address each of these criteria below.

7.7.4.1.1 Whenever practicable provide timely opportunities to see

7.276. "Timely opportunities" to see information must be provided "whenever practicable" throughout the investigation: they must be timely enough for the interested party to be able to prepare presentations on the basis of the information seen.⁴³⁸ Whether "timely opportunities" have been provided to see information must be considered in the light of the circumstances of each case, including the specific information at issue, the step of the investigation to which such information relates, and the practicability of disclosure at certain points in time in the investigation vis-à-vis others.⁴³⁹

7.277. The obligation is to "provide ... opportunities" to see all information. The verb "provide" refers to opportunities, not to the information itself. The obligation is to give opportunities to see the information, not to convey the information itself. At paragraphs 7.226 and 7.227 above, we observed that the modes of engagement between the investigating authority and interested parties in respect of information contemplated in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement ranged along a spectrum from some form of active engagement on the part of the investigating authority to "passive" obligations. The obligation to "provide ... opportunities" falls closer to the passive end of the spectrum. Thus, the obligation to "provide ... opportunities" to see information requires an investigating authority to make available or to provide access to the information at issue. It is not an "active" disclosure obligation in the sense that it requires an investigating authority to reach out to the interested parties, in particular by giving notice to, or otherwise informing the interested parties.

7.278. Nothing in Articles 6.4 and 12.3 sets out conditions for the manner in which an investigating authority must "provide ... opportunities". An investigating authority may proceed in any number of ways, including by making available the information in a physical or electronic reading room.

7.7.4.1.2 All information

7.279. Articles 6.4 and 12.3 refer to "all information". The provisions thus apply to a broad range of information qualified only by three cumulative conditions: the information must be "relevant to the presentation of [the interested parties'] cases", "not confidential" and "used by the authorities".⁴⁴⁰ The information may take various forms, including facts or raw data submitted by the interested parties and information that has been processed, organized or summarized by the investigating authority.⁴⁴¹ An investigating authority's reasoning, internal deliberations, analysis or methodologies in respect of the information, however, do not constitute "information" subject to the obligations under Articles 6.4 and 12.3.⁴⁴²

7.7.4.1.2.1 That is relevant to the presentation of their cases

7.280. Information is "relevant" for purposes of Articles 6.4 and 12.3 when the interested party considers that the information is relevant to the presentation of its case in the context of the investigation.⁴⁴³

⁴³⁸ Panel Report, *EU – Footwear (China)*, paras. 7.602 and 7.650 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.769).

⁴³⁹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.122.

⁴⁴⁰ Appellate Body Report, *EC – Fasteners (China)*, paras. 480 and 495.

⁴⁴¹ Appellate Body Report, *EC – Fasteners (China)*, paras. 480 and 495.

⁴⁴² Appellate Body Report, *EC – Fasteners (China)*, para. 495; Panel Report, *EU – Footwear (China)*, para. 7.603.

⁴⁴³ Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 145; *EC – Fasteners (China)*, para. 479; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.111.

7.7.4.1.2.2 That is not confidential as defined in paragraph 5

7.281. Articles 6.4 and 12.3 only relate to information "that is not confidential as defined in paragraph 5 [paragraph 4 of the SCM Agreement]". Thus, information that has been accorded confidential treatment in accordance with Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement is excluded from the scope of these provisions. If information has been treated as confidential in a manner that does not conform to the requirements of Article 6.5 of the Anti-Dumping Agreement or Article 12.4 of the SCM Agreement, there is no legal basis for according it confidential treatment and such information would, for the purposes of Article 6.4 of the Anti-Dumping Agreement, be considered as information "that is not confidential as defined in paragraph 5".⁴⁴⁴

7.7.4.1.2.3 That is used by the authorities

7.282. The "information" covered by Articles 6.4 and 12.3 is information that is relevant, non-confidential and used by the authorities. The term "used" is not further defined in the Anti-Dumping Agreement or the SCM Agreement, or indeed elsewhere in the WTO Agreement; it can have a broader or a narrower meaning. A narrow interpretation of the term "used" might restrict the information at issue to only those specific items of information that an investigating authority in fact relies upon in making its determinations. This interpretation has been rejected by panels and the Appellate Body.⁴⁴⁵ A broader interpretation of the term might include all information that in one way or another comes before the investigating authority; there are other interpretations possible along this spectrum. For purposes of our task, it suffices to say that nothing in the term "used" in itself tells us where to draw the appropriate line.

7.283. In this light, we turn to the immediate context. The information, we recall, must be non-confidential and relevant "to the presentation of [the interested parties'] cases". The term "used" thus further limits the scope of information that is covered by the provisions. An overly narrow interpretation of the term "used" could so limit the scope of such information as to undermine the due process protection given by Articles 6.4 and 12.3, denying an interested party the opportunity to see non-confidential information that is relevant to the presentation of its case.

7.284. We now turn to the broader context. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement establish an obligation to disclose the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures. The "essential facts" for purposes of this provision are not all the facts before the investigating authority.⁴⁴⁶ It would thus appear that where the negotiators envisaged a "narrow" scope of information, i.e. facts that, while they may be "used" are not necessarily "essential", they could and did formulate their intent in precise terms. While previous decisions suggest an unacknowledged premise that information for purposes of Articles 6.4 and 12.3 is in the nature of data, facts or other evidence bearing on the issues to be resolved by an investigating authority, it

⁴⁴⁴ Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.101. The same conclusion applies in respect of Article 12.3 of the SCM Agreement.

⁴⁴⁵ Whether the information was "used" by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to "a required step in the anti-dumping investigation". Thus, Article 6.4 concerns information relating to "issues which the investigating authority is required to consider under the [Anti-Dumping Agreement], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation."

(Appellate Body Report, *EC-Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147; and Panel Report, *EC – Salmon (Norway)*, para. 7.769) (fns omitted))

⁴⁴⁶ Appellate Body Report, *China – GOES*, para. 240 ("Articles 6.9 and 12.8 do not require the disclosure of all the facts that are before an authority but, instead, those that are 'essential'; a word that carries a connotation of significant, important, or salient.") The Panel in *EC – Salmon (Norway)* observed that:

[E]ssential facts under consideration which form the basis of the decision whether to apply definitive measures" are the body of facts essential to the determinations that must be made by the investigating authority before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the investigating authority, not only those that support the decision ultimately reached.

(Panel Report, *EC – Salmon (Norway)*, para. 7.807)

does not necessarily follow that the understanding of information "used" must be so limited.⁴⁴⁷ The reference to information "used" in Articles 6.4 and 12.3, by contrast to Articles 6.9 and 12.8, thus suggests that information "used" may be broader than facts or data relevant to the issues that must be, or actually are, resolved in an investigation. Contextual guidance, though limited, therefore supports the view that a broader interpretation of the concept of information "used" is warranted.

7.285. The purpose of Articles 6.4 and 12.3, to which we must give effect in interpreting them, is clear: Interested parties must be able to prepare presentations on the basis of information which is before the investigating authority which they consider relevant, and which they are to be given opportunities to see under the first part of the provisions. Articles 6.4 and 12.3 are among the important procedural safeguards that ensure that interested parties can defend their interests. Our interpretation of the term "used" ought, we believe, give effect to this important purpose.

7.286. In the light of the above, we conclude that information "used" within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement can be broader than facts or data relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. Whether a particular item of information is one that is "used" by the authorities in a broader sense will depend on the facts and circumstances of each case.

7.7.4.1.3 Provide timely opportunities ... to prepare presentations on the basis of this information

7.287. The two obligations in Articles 6.4 and 12.3 are distinct, yet related. In particular, the second obligation concerns providing opportunities to prepare presentations "on the basis of this information" – that is, the information that interested parties must be given timely opportunities to see. Where an investigating authority has not provided any opportunity to see relevant and non-confidential information that is used by it, it perforce cannot provide any opportunity to prepare presentations on the basis of this information. However, where an opportunity to see information is provided, it may be found to be insufficient if it is not provided in sufficient time to allow the interested parties seeing the information to prepare presentations based on it.

7.7.4.2 Analysis

7.288. The United States brings its claim under Articles 6.4 and 12.3 in respect of the opportunities to see different items of "information" and to prepare presentations on the basis of this information. We address each of these below.

7.7.4.2.1 Providing timely opportunities to see

7.7.4.2.1.1 Preliminary observations

7.289. China argues first that the US claim fails because the United States has not demonstrated that the US interested parties requested to see the information at issue and that MOFCOM denied such request. According to China, an investigating authority does not need to take any action at all in order to comply with Articles 6.4 and 12.3, unless an interested party requests to see the information at issue. It relies on the statement of the panel in *EC – Fasteners (China)* that:

⁴⁴⁷ But see Panel Report, *EU – Footwear (China)*, para. 7.612. The Panel noted that "the mere fact that information 'relates' to a particular issue that is before the investigating authority does not establish that the information was 'used' by the authority in making its determination". It went on to observe that it failed: [T]o see how the "sending of the questionnaires" or "requests to complete questionnaire responses" could have constituted information per se that was "used" by Commission [*sic*] in the selection of the sample, which we understand to be the relevant determination. We do not see the relevance of the dates on which questionnaires were sent to the substantive issues involved in selecting the sample. Indeed, we see nothing in the evidence before us that would indicate that the Commission "used" the fact that the anti-dumping questionnaires were sent to the sampled EU producers on 10 October 2008 in any way in the sample determination. (Panel Report, *EU – Footwear (China)*, para. 7.612)

[A] violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential.⁴⁴⁸

7.290. Articles 6.4 and 12.3 contain "limited" procedural and due process rights⁴⁴⁹; they are limited by the requirements that providing opportunities be "practicable" and that the information be "relevant", "not confidential" and "used". China asks the Panel to further limit the rights of interested parties beyond the limitations already expressly set forth in the provisions by introducing a requirement for a "request".

7.291. We do not find any basis for requiring a "request" to see information before a claim of violation of Articles 6.4 and 12.3 can be made. Textually, the obligation is for investigating authorities to "provide" opportunities. This is in contrast to other obligations in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement that condition the obligation to "provide opportunities" or to "make available" on a "request":

- a. Article 6.1.3 of the Anti-Dumping Agreement and Article 12.1.3 of the SCM Agreement require that the investigating authority "shall provide" the written application to the known exporters and the authorities of the exporting Member (without reference to any request), and "shall make it available, upon request, to other interested parties involved"⁴⁵⁰; and
- b. Article 6.2 of the Anti-Dumping Agreement conditions the obligation to "provide opportunities" to meet with adverse interests with the phrase "on request".⁴⁵¹

The fact that the "relevance" of the information must be assessed from the perspective of the interested party does not detract from our understanding that investigating authorities must provide opportunities irrespective of a request to see the information being made.⁴⁵² Interested parties that are not aware of the existence of certain information before the investigating authority obviously cannot make a request to see that information.⁴⁵³ Such interested parties may well be most in need of the due process protection afforded by Articles 6.4 and 12.3. Yet, a requirement for a request would render void their right to have an opportunity to see information of which they are unaware.⁴⁵⁴ Attributing such a meaning to a treaty provision would lead to an unreasonable result.

7.292. The failure to provide opportunities to see certain information is a violation by omission. There are evidentiary challenges associated with a claim based on an alleged omission. It may be difficult to prove the absence of an opportunity to see information. From an evidentiary perspective, it is therefore useful if a complainant can demonstrate, by reference to record evidence, that an interested party requested to see information that the investigating authority then failed to make available. But the absence of a request by an interested party in itself does not, as a matter of law or fact, mean that an investigating authority has satisfied its obligation to provide timely opportunities to see information under Articles 6.4 and 12.3. Viewed in context, the quotation from *EC – Fasteners (China)* relied on by China does not support its position to the contrary. The panel in that case had already observed that Article 6.4 did not require an investigating authority to "actively disclose" information, and was addressing China's argument that "the investigating authorities were under the obligation to provide" information even in the absence of a request.⁴⁵⁵ The panel rejected the view that there was any obligation to actively

⁴⁴⁸ Panel Report, *EC – Fasteners (China)*, para. 7.480; China's second written submission, para. 87; and comments on United States' response to Panel question No. 10, para. 21.

⁴⁴⁹ Panel Reports, *EC – Fasteners (China)*, para. 7.479; *EU – Footwear (China)*, para. 7.601.

⁴⁵⁰ Emphasis added.

⁴⁵¹ Similarly, Article 6.2 of the Anti-Dumping Agreement and Article 12.2 of the SCM Agreement provide a right to present information orally "[up] on justification".

⁴⁵² An investigating authority may well prefer to rely on an interested party's request to assure itself of the "relevance" of information.

⁴⁵³ This is particularly problematic where, as in the case at hand, the investigating authority also failed to give interested parties notice of the information required pursuant to Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

⁴⁵⁴ But see Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.78.

⁴⁵⁵ Emphasis added.

disclose information under Article 6.4. In this context, the statement that a "violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information" in our view reflects that one way of demonstrating a violation of Article 6.4 would be to show that a request to see information was denied. This does not, however, mean that such a request (and denial) are necessary in order to demonstrate a violation of Articles 6.4 and 12.3.

7.293. In this case, the United States does not assert that a request by the US interested parties to see the information at issue was made and rejected. Rather, the United States points to a statement of the US Government to MOFCOM during the reinvestigation asserting a lack of procedural fairness to support its contention that interested parties were not provided timely opportunities to see information. Specifically, in respect of the information solicited from the Chinese producers, the US Government asserted to MOFCOM that US interested parties had no understanding of what evidence MOFCOM had obtained and relied upon during the reinvestigation.⁴⁵⁶ This is in our view evidence supporting the US allegation that MOFCOM did not provide opportunities to see information.

7.7.4.2.1.2 Non-confidential pricing information

7.294. The United States claims that MOFCOM did not provide timely opportunities to see non-confidential pricing information submitted by the Chinese producers to MOFCOM. It refers in this regard to the fact that non-confidential summaries are not mentioned in the injury disclosure.⁴⁵⁷ China contends that on 20 May 2014, MOFCOM made available in its trade remedy public information room non-confidential summaries which contained indexed pricing data from four Chinese producers.⁴⁵⁸

7.295. There is no disagreement between the parties that the pricing data contained in the non-confidential summaries constituted information that was relevant to the US interested parties' presentations of their cases, not confidential as defined in paragraph 5 of Article 6 of the Anti-Dumping Agreement (and paragraph 4 of Article 12 of the SCM Agreement) and used by MOFCOM. Thus, it is clear that the information at issue falls within the scope of Articles 6.4 and 12.3.

7.296. The disagreement between the parties relates to whether, as a matter of fact, the non-confidential summaries were made available in MOFCOM's trade remedy public information room and, if so, whether the opportunities to see that information were "timely". We address each issue in turn below.

7.297. First, regarding whether the non-confidential summaries were in fact made available in MOFCOM's trade remedy public information room, China contends that MOFCOM made them available there on 20 May 2014, relying on an internal "acknowledgement of receipt" from MOFCOM's trade remedy public information room, Exhibit CHN-44. This document, dated 20 May 2014, acknowledges "receipt of a total of four documents of Post-Verification Supplemental Information Concerning the Re-Investigation on the Anti-dumping and countervailing Measures Imposed on the Broiler Products (public version)" from the four Chinese producers in question.

7.298. The United States argues that Exhibit CHN-44 does not demonstrate that the non-confidential summaries were made available in the trade remedy public information room. The exhibit acknowledges "receipt" of the non-confidential summaries by the trade remedy public information room, but does not confirm that the documents were actually placed in the trade remedy public information room.⁴⁵⁹ Moreover, while there is a signature on the receipt by the

⁴⁵⁶ Statement of the US Government for MOFCOM's Injury Hearing, (Exhibit USA-10), pp. 1-2 of the English translation.

⁴⁵⁷ United States' response to Panel question No. 6(a), paras. 17-18.

⁴⁵⁸ Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)).

⁴⁵⁹ United States' comments on China's response to Panel question No. 11, para. 24.

submitter, an investigating official, there is no signature by a MOFCOM official in the requisite signature line *acknowledging receipt*.⁴⁶⁰

7.299. While the United States notes that the receipt is not signed by an official of the trade remedy public information room, the United States does not assert that the receipt was not issued by MOFCOM's trade remedy public information room. It is not clear to us that an internal acknowledgement issued by the "Reading Room for Public Information on Trade Remedy" of MOFCOM's "Trade Remedy and Investigation Bureau" loses its probative value merely because it is not signed at the appropriate place by a responsible official. The United States further argues that there is a distinction between an acknowledgement of receipt of the non-confidential summaries and a confirmation that these summaries were made available. We agree. But this might well be a formal distinction without a material difference in this case. We note, for example, that:

- a. the English translation version of the redetermination provided by China refers to all non-confidential information being "released to" MOFCOM's trade remedy public information room during the reinvestigation⁴⁶¹;
- b. the same passages in the English translation of the redetermination submitted by the United States refer to non-confidential information being "delivered to" the trade remedy public information room⁴⁶²; and
- c. both translations state that non-confidential information was "released" or "delivered" in accordance with domestic rules on non-confidential information, information access and disclosure, so that all interested parties were able to "search for [look up], read, extract and [photo-] copy" non-confidential information.⁴⁶³

In this context, in our view the references to "release", "delivery" or "receipt" refer to the making available of non-confidential information in MOFCOM's trade remedy public information room.⁴⁶⁴ On balance, we therefore find that the acknowledgement issued by the trade remedy public information room, understood in the light of the redetermination, supports the conclusion that MOFCOM made the non-confidential summaries available in its trade remedy public information room on 20 May 2014, thus giving US interested parties opportunities to see the information at issue.⁴⁶⁵

7.300. We now turn to the second issue, whether MOFCOM provided these opportunities in a timely fashion. The non-confidential summaries of the pricing data were made available on 20 May 2014. The final injury disclosure was made on 21 May 2014, and a deadline for comments of ten days was established.⁴⁶⁶ The redetermination was issued on 8 July 2014, taking effect on 9 July 2014.⁴⁶⁷

7.301. The United States emphasizes MOFCOM's obligation pursuant to Articles 6.4 and 12.3 to provide "timely" opportunities to see the information at issue, and asserts that MOFCOM failed to do so.⁴⁶⁸ The US position is largely predicated on its view that MOFCOM did not make the non-confidential summaries available at all, and we have found otherwise. As a consequence of our decision, any alleged lack of timeliness cannot be simply a consequence of failing to make the information available, but must be assessed on its own merits.

7.302. The United States also argues that:

⁴⁶⁰ United States' comments on China's response to Panel question No. 11, para. 24.

⁴⁶¹ Redetermination, (Exhibit CHN-1 (translated version)), pp. 9 and 13.

⁴⁶² Redetermination, (Exhibit USA-9 (translated version)), pp. 7 and 12.

⁴⁶³ Redetermination, (Exhibit CHN-1 (translated version)), pp. 9 and 13; and Exhibit USA-9 (translated version), pp. 7 and 12.

⁴⁶⁴ We note in this regard that to do otherwise might imply a lack of good faith in MOFCOM's actions, which we consider without any foundation and inappropriate in the circumstances of this case.

⁴⁶⁵ Contrary to the US assertion, MOFCOM was not required under Articles 6.4 and 12.3 to notify US interested parties that the non-confidential summaries had been made available. (See para. 7.277 above).

⁴⁶⁶ Letter from MOFCOM dated 21 May 2014 on disclosure of the determination regarding injury, (Exhibit USA-8 (translated version)), p. 1.

⁴⁶⁷ Redetermination, (Exhibit CHN-1 (translated version)), pp. 1 and 3.

⁴⁶⁸ United States' second written submission, paras. 54, 55, and 59; response to Panel question No. 6(a), para. 20. See also response to Panel question No 9, paras. 34-35.

[E]ven if U.S. interested parties happened upon the summaries [on 20 May 2014] ... they still would not have an opportunity to make timely presentations based on these summaries before MOFCOM issued its [final injury disclosure] – a report which is essentially equivalent to a draft opinion.⁴⁶⁹

[R]egardless of whether or not MOFCOM actually released information to this public reading room [the fact that this would have been] the day before it issued the [final injury disclosure] ... hardly reflects a timely effort by China to enable interested parties to review information relevant to the presentation of their cases – as required by AD Agreement Article 6.4 and SCM Agreement 12.3.⁴⁷⁰

MOFCOM did not give notice to the US interested parties, as required by Articles 6.4 and 12.3.⁴⁷¹ Without notice, and thus knowledge of the existence of the non-confidential summaries in MOFCOM's trade remedy public information room, US interested parties did not have a "timely" opportunity to see the information.⁴⁷² Moreover, the opportunities to see the information were not "timely" because the non-confidential summaries were made available only one day before the injury disclosure was issued.⁴⁷³ Thus, US interested parties did not "have an opportunity to make timely presentations based on these summaries before MOFCOM issued its [injury disclosure] – a report which is essentially equivalent to a draft opinion".⁴⁷⁴

7.303. We understand the US position to be that the pricing information at issue here was made available too late before the issuance of the injury disclosure to be considered "timely". The United States does not, however, explain how the issuance of the final injury disclosure limited the opportunity of the US interested parties to see the information and prepare submissions based on it in time to prepare and submit submissions commenting on the final injury disclosure. Nor has the United States demonstrated that the 10 day period for comments on the injury disclosure was not sufficient to allow US interested parties to see the pricing information in MOFCOM's trade remedy public information room and prepare presentations based on it, to be submitted as comments on the injury disclosure. Timeliness in this context depends on whether interested parties can defend their interests, in particular by preparing (and submitting) presentations based on the information at issue.⁴⁷⁵ This must be assessed on a case-by-case basis.⁴⁷⁶ In this instance the United States has not demonstrated on the basis of the specific circumstances of the case, that the US interested parties did not have timely opportunities to see the information because the non-confidential summaries were only made available on 20 May 2014. In particular, by focusing its arguments on the assertion that there was "no opportunity whatsoever" to see the information⁴⁷⁷, the United States has not demonstrated that in the circumstances of this case the US interested parties were unable to prepare presentations because they lacked "timely" opportunities to see the non-confidential summaries.⁴⁷⁸

⁴⁶⁹ United States' response to Panel question No. 6(b)(i), para. 23.

⁴⁷⁰ United States' response to Panel question No. 9, para. 35 (internal quotations and fn omitted). Similarly, but in the context of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement, United States' second written submission, paras. 25, 33, and 48.

⁴⁷¹ United States' second written submission, paras. 55 and 59; responses to Panel question No. 6(a), para. 19, No. 6(b)(i), paras. 22-23, and No. 10, paras. 36-37.

⁴⁷² United States' second written submission, para. 55; responses to Panel question No. 6(a), para. 20, and No. 9, para. 35.

⁴⁷³ United States' responses to Panel question No. 6(a), paras. 18 and 20, and No. 9, para. 35.

⁴⁷⁴ United States' response to Panel question No. 6(b)(i), para. 23 (emphasis added). We note that the United States does not even assert, unlike in the context of its claim under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement, that the period for comments following the injury disclosure was not enough to provide "timely" opportunities to see the information (and to prepare presentations on this basis).

⁴⁷⁵ Such presentations "are the principal mechanisms through which an [interested party] can defend its interests". (Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149).

⁴⁷⁶ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.122. This case also relates to a situation in which the opportunities to see the information were provided towards the end of the investigation when the final disclosure was made.

⁴⁷⁷ United States' response to Panel question No. 9, para. 34. (emphasis added)

⁴⁷⁸ Moreover, the United States makes certain arguments in relation to the conduct of a hearing that allegedly impaired the US interested parties' ability to make presentations. None of these arguments are, however, relevant for the issue of the timeliness of the opportunity to see information provided through the making available of the non-confidential summaries on 20 May 2014.

7.304. In respect of the non-confidential summaries, the United States has thus failed to demonstrate that MOFCOM did not provide timely opportunities to see the information and to prepare presentations based on it within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement.

7.7.4.2.1.3 The identities of the Chinese producers

7.305. The United States claims that MOFCOM did not provide timely opportunities to see the identities of the Chinese producers from whom MOFCOM required pricing information.

7.306. Each non-confidential summary provided by the Chinese producers indicated the name, and thus the precise identity, of the respective responding producer.⁴⁷⁹ Above, we found that MOFCOM made available the non-confidential summaries on 20 May 2014 and that the United States has not established that MOFCOM failed to provide timely opportunities to see these summaries and prepare presentations. Consequently, the same analysis and conclusions apply to the identities of the Chinese producers that were included in those non-confidential summaries.⁴⁸⁰

7.307. We therefore find that the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the identities of the Chinese producers.

7.7.4.2.1.4 Requests for information

7.308. The United States argues that MOFCOM acted inconsistently with Articles 6.4 and 12.3 because it did not provide timely opportunities for US interested parties to see the questions or requests for information that MOFCOM put to the Chinese producers in order to require additional pricing data. China argues that MOFCOM did not issue any questionnaires to the Chinese producers which MOFCOM could have provided interested parties an opportunity to see.

7.309. There is no disagreement between the parties that MOFCOM did request additional information from the Chinese producers in some way, even if not through formal questionnaires or other written requests. Moreover, it is undisputed that MOFCOM did not provide any opportunities for US interested parties to view the requests for information it put to the Chinese producers, in whatever form.

7.310. The first question we must address is whether MOFCOM's requests for additional information, in whatever form, to the four Chinese companies constitute "information" within the meaning of Articles 6.4 and 12.3. This is the first time a panel has been called upon to consider whether requests for information, in whatever form, fall within the scope of the term "information" in Articles 6.4 and 12.3. Nothing in these provisions or jurisprudence⁴⁸¹ suggests that "information" in Articles 6.4 and 12.3 refers solely to information in the form of evidence or data that is submitted to or obtained by an investigating authority. We see no reason to exclude, *a priori*, requests for information from the scope of "information" within the meaning of Articles 6.4 and 12.3.

7.311. China also argues that there is no obligation under Articles 6.4 and 12.3 to reduce into writing oral questions or requests of information and to make them available in that form to all other interested parties.⁴⁸² This is true. However, the "information" in respect of which the investigating authority has to provide timely opportunities to see is not further qualified in respect of its form; indeed, it "may take various forms ...".⁴⁸³ Nothing in Articles 6.4 and 12.3 limits the

⁴⁷⁹ Post-Verification Supplemental Information concerning the Reinvestigation on the Anti-dumping and Countervailing Measures Imposed on the Broiler Products Originating in the United States (20 May 2014) of Beijing Huadu, Shandong Chunxue, Shandong Minhe, and Da Chan Wanda, (Exhibits CHN-4 through CHN-7 (translated versions)), each on pp. 1-2.

⁴⁸⁰ Our conclusion assumes that the identities of the responding Chinese producers are relevant to the presentation of the US interested parties' cases and used by the authorities, but we express no views as to whether this assumption is, in fact, justified.

⁴⁸¹ The Appellate Body refers to information "including data submitted by the interested parties". (Appellate Body Report, *EC – Fasteners (China)*, para. 480).

⁴⁸² China's comments on United States' response to Panel question No. 8, para. 18.

⁴⁸³ Appellate Body Report, *EC – Fasteners (China)*, para. 480.

information at issue to written information. Context is helpful in this respect: the text in Articles 6 and 12 is specific when the obligation concerns information or evidence in a particular form. For example, Article 6.1 refers to an opportunity to "present in writing all evidence", Article 6.1.2 to "evidence presented in writing", and Article 6.2 to an opportunity, upon justification, to "present other information orally". In this light, the obligation in Articles 6.4 and 12.3 relates to any type of information, whether or not it is in writing, including oral requests for information. In fact, it would undermine the due process protection afforded by the obligation to provide timely opportunities to see information if an investigating authority could avoid giving such opportunities simply by avoiding putting the information at issue into writing. Thus, the term "information" in Articles 6.4 and 12.3, includes requests for information, even if made orally.

7.312. We recall that there are three limitations on the kinds of information subject to the requirements of Articles 6.4 and 12.3, and these limitations are cumulative. We now turn to the third of these⁴⁸⁴: whether the requests for information at issue here, whatever their form, constitute information that was "used" by MOFCOM. The United States contends that the requests were "used" because they were "applied by MOFCOM to generate new injury findings"⁴⁸⁵ and because they "constituted a 'required step in the anti-dumping investigation'", in line with the findings of the Appellate Body in *EC – Tube or Pipe Fittings*.⁴⁸⁶ In response to the Panel's oral questions at the substantive meeting, the United States argued that the requests were "used" because

- a. they were "critical to how MOFCOM reached its ultimate finding";
- b. they were "how MOFCOM got the information that it claims is so critical to its injury analysis";
- c. "MOFCOM had to deliver [them] to a party to obtain something"; and
- d. they "serve[d] a function", here to obtain more information.

7.313. China argues that:

- a. the US position would mean that "any action taken by an authority as part of its conduct in an investigation could be construed as 'related' to a 'required step' in an antidumping (or countervailing duty) investigation". This interpretation would result in an administrative burden that is "impossible to administer"; and
- b. the Appellate Body's findings in *EC – Tube or Pipe Fittings* specifically concern the characterization of data as "information" that is "used" by an investigating authority, not an (oral) request for information.⁴⁸⁷

7.314. We recall our finding at paragraph 7.286 above that the term "used" within the meaning of Articles 6.4 and 12.3 is not limited to information in the nature of data, facts or other evidence relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. We further note our finding in paragraph 7.311 that oral requests for information constitute "information" for the purposes of Articles 6.4 and 12.3. There is no dispute in this case that MOFCOM made, in some form, requests for information to four Chinese producers, that it received pricing data in response to those requests, and that it took that data into consideration in making findings on price undercutting in the redetermination. We make the following observations:

- a. our finding in the original report under Article 3.2 of the Anti-Dumping Agreement related to the composition and comparability of product baskets;

⁴⁸⁴ There is no dispute between the parties as to relevance; we deal with the confidentiality issue below.

⁴⁸⁵ We note in fact that the information requests were used to generate additional data, which in turn were used in considering the issue of injury.

⁴⁸⁶ United States' response to Panel question No. 8, paras. 30-31.

⁴⁸⁷ China's comments on United States' response to Panel question No. 8, para. 18.

- b. in seeking to address this finding in the reinvestigation MOFCOM collected and evaluated pricing data for various broiler product models. The reinvestigation thus did not directly pertain to the composition and comparability of the product baskets whose prices MOFCOM then compared; and
- c. the requests for information to Chinese producers link the pricing information to the issue of composition and comparability of product baskets addressed in our original finding. Thus, in the specific circumstance of this case, those requests for information constitute background and context for understanding and evaluating the pricing data submitted by the producers in light of the issue to be addressed.

We therefore consider that, in the facts of this case, the requests for information constituted information used by MOFCOM in the sense of Articles 6.4 and 12.3, in the reinvestigation.

7.315. In view of the above, we find that China acted inconsistently with Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement because MOFCOM failed to provide timely opportunities for the US interested parties to see the requests for information issued to the Chinese producers.

7.7.4.2.1.5 Additional "context" regarding the data in the non-confidential summaries and aggregate data

7.316. The United States claims that MOFCOM did not provide opportunities to see the "context"⁴⁸⁸ of the pricing information in the non-confidential summaries, including "the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample".⁴⁸⁹ The United States also claims that MOFCOM did not provide opportunities to see "aggregate data reflecting the information received from the four [Chinese] producers".⁴⁹⁰

7.317. The United States did not demonstrate that these items of "context" themselves constitute "information" that was "relevant", "non-confidential" and "used" within the meaning of Articles 6.4 and 12.3. Thus, there is no basis for us to find that MOFCOM was required to provide timely opportunities to interested parties to see these items of "context". Moreover, the thrust of the US argument is that "the content of these summaries omitted certain critical relevant information that does not, on its face, appear to be data that is 'by nature confidential'".⁴⁹¹ The United States has not, however, demonstrated in what way certain non-confidential information "was withheld" from the non-confidential summaries.⁴⁹² There is no evidence before us to suggest that the non-confidential summaries were in fact incomplete. To the extent that the United States takes issue with the confidential treatment of certain information as such, this would fall within the scope of a claim under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement, which the United States has not made, not within a claim under Articles 6.4 and 12.3.

7.318. With respect to "aggregate data reflecting the information received from the four [Chinese] producers", there is also no evidence that MOFCOM had, in addition to the pricing information itself, non-confidential aggregate information that it used but in respect of which it failed to provide timely opportunities to see. Indeed, the formulation of the US argument suggests that the United States might have preferred that the pricing information from the four producers were provided in a non-confidential aggregate form and made available to interested parties to see. Articles 6.4 and 12.3 do not, however, establish any right to see the "information" recast in a different manner or to see additional, "contextual" details that go beyond the "information" at issue.

⁴⁸⁸ United States' second written submission, para. 57.

⁴⁸⁹ United States' response to Panel question No. 6(b)(i), para. 23.

⁴⁹⁰ United States' responses to Panel question No. 6(b)(i), paras. 21 and 23, and No. 6(b)(ii), para. 25.

⁴⁹¹ United States' response to Panel question No. 6(b)(i), para. 23.

⁴⁹² United States' response to Panel question No. 6(b)(i), para. 21.

7.319. In the light of the foregoing, the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the additional "context" regarding the data in the non-confidential summaries and aggregate data.

7.7.4.2.1.6 Information in respect of "sampling"

7.320. The United States claims that MOFCOM did not disclose the basis for selecting the Chinese producers in the "sample" from which additional pricing data was sought, and the methodology for collecting pricing data from them, contrary to the requirements of Articles 6.4 and 12.3.

7.321. The basis for selecting Chinese producers from whom additional pricing data was sought and the methodology for collecting pricing data both are aspects of MOFCOM's methodology in its investigation and consideration of price effects. Articles 6.4 and 12.3 do not, however, apply to the methodology used by or determinations of the investigating authority and do not require investigating authorities to provide opportunities for interested parties to "see" such methodologies or determinations.⁴⁹³

7.322. We find therefore that the United States has not established its claim under Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement in respect of the basis for selecting Chinese producers in the sample and the methodology for collecting pricing data from them.

7.7.4.2.2 Opportunities to prepare presentations

7.323. The United States argues that MOFCOM failed to provide US interested parties timely opportunities to prepare presentations, as required by the second obligation set forth in Articles 6.4 and 12.3.

7.324. Above, we found that China acted inconsistently with Articles 6.4 and 12.3 because MOFCOM failed to provide timely opportunities for the US interested parties to see the requests for information issued to the Chinese producers. As a consequence, MOFCOM also failed to provide timely opportunities for the US interested parties to prepare presentations on the basis of this information, that is, the information requests.

7.325. We therefore find that China also acted inconsistently with Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement because it did not provide timely opportunities to prepare presentations.

7.7.4.2.3 Issues related to the non-confidential treatment of information

7.326. The United States included a reference to Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement in its panel request. In its first written submission, the United States invoked a breach of Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement as an alternative claim to its principal claim under Article 6.1.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement, which we ruled to fall outside of the Panel's terms of reference.⁴⁹⁴ We do not understand the United States to be advancing an independent claim of violation under Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement⁴⁹⁵; indeed, the United States has not demonstrated that MOFCOM acted inconsistently with the requirements set forth in those provisions.⁴⁹⁶

7.327. To the extent that Articles 6.4 and 12.3 refer, through the reference to non-confidential information as defined by paragraph 5 and 4 respectively, to Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement, the United States argues that certain information was "withheld" or "omitted", although not "by nature confidential" consistent with Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the SCM Agreement.⁴⁹⁷ Whether or not this information was properly treated as confidential is not a question within the

⁴⁹³ Panel Report, *EU – Footwear (China)*, paras. 7.618 and 7.631.

⁴⁹⁴ United States' first written submission, fn 75.

⁴⁹⁵ United States' response to Panel question No. 6(b)(ii), paras. 26-27.

⁴⁹⁶ United States' response to Panel question No. 6(b)(ii), paras. 26-27.

⁴⁹⁷ United States' response to Panel question No. 6(b)(i), paras. 21 and 23.

scope of our jurisdiction in this proceeding. In any event, as discussed above, this information is not "information" that was "used" by MOFCOM.⁴⁹⁸

7.7.5 Conclusion

7.328. In respect of the requests for information made by MOFCOM to the Chinese producers, the United States has established that MOFCOM did not provide timely opportunities for the US interested parties to see this information and to prepare presentations on the basis of it. We therefore find that China acted inconsistently with the two obligations set forth in each of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement.

7.8 Article 6.8 of the Anti-Dumping Agreement and paragraphs 3 and 5 of Annex II: facts available

7.8.1 Introduction

7.329. In our original report, we found that MOFCOM had acted inconsistently with the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in allocating costs for purposes of constructing normal value in respect of Tyson. In the reinvestigation, MOFCOM again constructed Tyson's normal value under Article 2.2 of the Anti-Dumping Agreement; MOFCOM rejected Tyson's reported cost data (including its calculations) and used what it described as "facts available".

7.330. This claim concerns whether MOFCOM acted in accordance with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement when it rejected Tyson's reported cost data and used facts available. The cost data at issue relate to the "raw material" cost incurred in raising a broiler up to split-off ("meat cost") and the processing cost incurred after split-off ("processing cost").

7.8.2 Factual background

7.331. In the original investigation:

- a. Tyson provided, through several submissions, data for meat and processing costs to MOFCOM.
- b. Tyson reported both sets of cost data by chicken "part", such as wing tips, leg quarters, etc. The processing costs were not broken down by processing step.
- c. The data Tyson reported for meat costs included processing costs incurred before the final stage in the production process.

7.332. In the reinvestigation:

- a. MOFCOM requested Tyson to report meat and processing costs at the product brand code level, rather than at the part level.⁴⁹⁹ MOFCOM required Tyson to provide these cost data for each of the more than 1,000 product brand codes ("models") it produced.⁵⁰⁰ MOFCOM also requested Tyson to report processing costs broken down by processing step.⁵⁰¹
- b. Tyson did not have actual cost data for meat and processing costs separated by model and processing step in its accounting records. Therefore, it generated the requested data according to the parameters set by MOFCOM, using the data available in its accounting system (the "aggregate total costs" incurred and the "standard costs").⁵⁰² The standard costs reflect Tyson's expectation as to costs incurred at each particular production step and were used to derive allocation percentages to distinguish meat and processing costs.

⁴⁹⁸ See paras. 7.317-7.319 above.

⁴⁹⁹ United States' second written submission, para. 135. MOFCOM initially only requested data on processing costs. Tyson also provided data on meat costs and MOFCOM in the following also requested data on meat costs.

⁵⁰⁰ United States' first written submission, para. 121.

⁵⁰¹ United States' second written submission, para. 139.

⁵⁰² United States' first written submission, paras. 110-111; second written submission, para. 132.

Tyson disaggregated the available actual aggregate cost data using the allocation percentages derived from standard cost to determine meat and processing costs at each production step. On this basis, Tyson reported data for meat and processing costs for each production step.

- c. Tyson's reported data changed in some aspects in the course of the reinvestigation and it differed in some aspects from the data that it had provided in the original investigation.
- d. In the course of several iterations of questionnaires and supplemental questionnaires, MOFCOM requested Tyson to provide the "actual pure" meat and processing costs and to provide clarification regarding the meat and processing costs it had provided during the original investigation. In response, Tyson provided data and explanations.
- e. In the redetermination, MOFCOM rejected Tyson's reported meat and processing cost data in its entirety. MOFCOM found that the reported data, generated by applying the methodology developed by Tyson using the data available in its accounting records, were not the meat and processing costs actually incurred:

[Tyson] only submitted the meat cost and processing cost, calculated by ratio method (calculating the relevant proportion based on the data from the standard cost system), of each product model. The meat cost and processing cost of each model of the product concerned calculated by this method are not the actual pure meat cost and processing cost of each model of the product concerned. ... Therefore, the Investigating Authority decides not to accept using the ratio method claimed by the Company to calculate the meat cost and processing cost of each model of the product concerned, nor to accept the meat cost and processing cost data of each model of the product concerned calculated by the ratio method.⁵⁰³

7.8.3 Main arguments of the parties

7.8.3.1 United States

7.333. MOFCOM violated Article 6.8 and paragraphs 3 and 5 of Annex II when it rejected the cost data reported by Tyson and used facts available. MOFCOM did not, contrary to the requirements of paragraph 3 of Annex II, establish that the information provided by Tyson was either not verifiable, not appropriately submitted so that it could be used in the investigation without undue difficulties, or not supplied in a timely fashion.⁵⁰⁴ MOFCOM justified the rejection of Tyson's reported data without even considering, much less deciding, whether it could be used consistently with the criteria set out in paragraph 3 of Annex II, in particular in respect of the verifiability of the data. The reasons MOFCOM gave for rejecting Tyson's data were also factually incorrect and did not speak to the verifiability of the data.⁵⁰⁵ In particular, MOFCOM:

- a. incorrectly considered that the cost data reported by Tyson in the reinvestigation did not tie to the cost data reported in the original investigation.⁵⁰⁶ Tyson had explained to MOFCOM that accounting for 20 product models for which data had not been provided during the original investigation resolved the data inconsistency;
- b. wrongly found that Tyson had provided the reported costs for only "some" product models.⁵⁰⁷ Tyson had reported cost data for all of the more than 1,000 product models, but had submitted detailed information for three representative models;
- c. erroneously determined that Tyson had not provided the actual meat and processing costs as requested⁵⁰⁸;

⁵⁰³ Redetermination, (Exhibit CHN-1 (translated version)), p. 43. (emphasis added)

⁵⁰⁴ United States' first written submission, paras. 114-118. See also response to Panel question No. 42, paras. 79-88.

⁵⁰⁵ United States' first written submission, para. 119.

⁵⁰⁶ United States' first written submission, para. 120; second written submission, para. 141.

⁵⁰⁷ United States' first written submission, para. 121.

⁵⁰⁸ United States' first written submission, para. 123; second written submission, paras. 132 and 142.

- d. wrongly faulted Tyson for basing its reported cost data on only part of the POI.⁵⁰⁹ Tyson had calculated the allocation ratios using standard costs for the first half of 2009, rather than for the entire POI, because only those costs were available in its records for the POI. Standard costs for the second half of 2008 were no longer available as they had been purged from Tyson's systems in the ordinary course of business after 118 weeks; and
- e. wrongly faulted Tyson for failing to support the data it reported.⁵¹⁰

7.334. In response to China's arguments, the United States maintains:

- a. China misconstrues the "best of its ability" standard in paragraph 5 of Annex II.⁵¹¹ Moreover, Tyson did act to the best of its ability.⁵¹² Cost data according to MOFCOM's specifications were not available to Tyson. Tyson generated the requested cost data based on a reasonable methodology using the information available in its records. In this way, Tyson derived from the information in its records cost data corresponding as closely as possible to the form requested.
- b. Inconsistencies in the cost data reported in the original investigation and in the reinvestigation were due to changes to the reporting methodology. In particular, costs were not reported by part in the reinvestigation but by model and processing step. Also, they were reported as values specifically constructed for this purpose and they were subject to revisions/corrections made in accordance with MOFCOM's request.⁵¹³ China cannot rely on changes to information submitted in the original investigation to reject data reported during the reinvestigation.⁵¹⁴
- c. Tyson did not misreport data in the original investigation. In the original investigation, Tyson reported its cost data as they were recorded in its cost accounting system in the ordinary course of business and explained that cost accounting system, all of which was also subject to verification, to MOFCOM.⁵¹⁵

7.8.3.2 China

7.335. Article 6.8 and paragraph 5 of Annex II require an interested party to "act to the very best of its ability".⁵¹⁶ An investigating authority does not need to "accept information that 'may not be ideal in all respects' unless the party submitting that information has been acting 'to the best of its ability'".⁵¹⁷ Even if an interested party acts to the very best of its ability, the investigating authority can nevertheless resort to facts available if the requested information is not provided.⁵¹⁸ MOFCOM was entitled to reject Tyson's reported meat and processing cost data and resort to facts available because Tyson failed to act to the (very) best of its ability.⁵¹⁹

In respect of the original investigation:

- a. Tyson misreported cost data by including certain processing cost elements in the reported meat costs⁵²⁰ and by failing to report certain cost data at all (the cost data for 20 product models⁵²¹ and the cost data for "some product codes" of chicken feet⁵²²).

⁵⁰⁹ United States' first written submission, para. 124; second written submission, para. 140.

⁵¹⁰ United States' first written submission, para. 125.

⁵¹¹ United States' second written submission, para. 129; comments on China's responses to Panel question No. 36(a), para. 55, No. 36(b), para. 57, and No. 37(a), para. 60.

⁵¹² United States' second written submission, paras. 130, 132, 135, and 145.

⁵¹³ United States' second written submission, paras. 131, 143, and 144.

⁵¹⁴ United States' second written submission, para. 144.

⁵¹⁵ United States' second written submission, paras. 136-138.

⁵¹⁶ China's second written submission, paras. 221, 223, and 224. (emphasis added)

⁵¹⁷ China's first written submission, para. 196 (emphasis original); see also second written submission, para. 223; and responses to Panel question No. 36(a), paras. 133-134, and No. 36(b), paras. 135-136.

⁵¹⁸ China's second written submission, paras. 229 and 235.

⁵¹⁹ China's first written submission, paras. 195, 209, and 240; second written submission, paras. 221 and 250; and response to Panel question No. 36(b), paras. 137 and 141.

⁵²⁰ China's first written submission, paras. 205-206; second written submission, para. 240.

⁵²¹ China's first written submission, paras. 206 and 233.

⁵²² China's first written submission, para. 228.

- b. Tyson did not disclose the alleged misreporting of that data during the original investigation.⁵²³
- c. Tyson provided inconsistent data over the course of the original investigation.⁵²⁴

In respect of the reinvestigation:

- a. Tyson never provided the "actual pure" meat and processing costs that MOFCOM had requested.⁵²⁵ Tyson could have provided the requested data; at least it did not explain, or explained too late, what its accounting records could provide.⁵²⁶
- b. Tyson failed to provide timely and sufficient explanation and clarification in respect of the reported data.⁵²⁷
- c. Tyson did not report cost data on the basis of the full POI.⁵²⁸ Even assuming that Tyson did not have data for the entire period, the reported meat cost data were distorted and Tyson did not address MOFCOM's concerns raised in the disclosure.
- d. Tyson provided inconsistent data.⁵²⁹
- e. Tyson provided negative processing costs for "some individual models".⁵³⁰ Tyson provided a satisfactory explanation too late, in its response to the second supplemental questionnaire.⁵³¹
- f. Regarding "some product codes" of chicken feet, Tyson failed to provide cost data at all or failed to provide sufficient explanation in a timely manner.⁵³²

7.8.4 Main arguments of third parties

7.336. The European Union argues that the instrument of facts available does not serve to punish non-cooperating interested parties but to overcome lacunae which arise from the absence of useable data.⁵³³ Even if a respondent cooperates to the best of its ability, this does not necessarily preclude the use of facts available to replace missing or defective necessary information. To the extent that information is not missing, for instance because the respondent has provided partial information, it cannot be replaced.⁵³⁴ But the obligation to take into account non-ideal data applies only in case of a fully cooperating respondent acting to the best of its ability. And even in case of a fully cooperating respondent, the data it submits must only be used insofar as it meets the criteria in paragraph 3 of Annex II. Where an investigating authority wants to disregard data as "unreliable" pursuant to paragraph 3, the burden of substantiating its unreliability falls on the investigating authority.⁵³⁵

⁵²³ China's first written submission, paras. 205 and 233; comments on United States' response to Panel question No. 42, para. 70.

⁵²⁴ China's first written submission, paras. 218-219.

⁵²⁵ China's first written submission, paras. 207 and 217; response to Panel question No. 36(b), para. 140.

⁵²⁶ China's second written submission, para. 246; responses to Panel question No. 36(b), para. 139, and No. 40, paras. 154 and 156; and comments on United States' response to Panel question No. 42, paras. 66 and 71.

⁵²⁷ China's first written submission, paras. 234-237; response to Panel question No. 36(b), para. 140.

⁵²⁸ China's first written submission, para. 238.

⁵²⁹ China's first written submission, paras. 218-219 and 233.

⁵³⁰ China's first written submission, paras. 224-227.

⁵³¹ China's first written submission, para. 227.

⁵³² China's first written submission, para. 228.

⁵³³ European Union's third-party statement, para. 11.

⁵³⁴ European Union's third-party statement, para. 12.

⁵³⁵ European Union's third-party statement, para. 13.

7.8.5 Evaluation

7.8.5.1 The law

7.337. Article 6.8 of the Anti-Dumping Agreement provides:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.⁵³⁶

7.338. The first sentence of paragraph 3 of Annex II of the Anti-Dumping Agreement provides:

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

7.339. Paragraph 5 of Annex II of the Anti-Dumping Agreement provides:

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

7.340. The first sentence of Article 6.8 establishes a closed list of circumstances involving the unavailability of information in which an investigating authority is permitted to use facts available. The second sentence of Article 6.8 sets out the relationship between Article 6.8 and Annex II. It mandates that Annex II must be "observed" in the application of "this paragraph".⁵³⁷ Paragraphs 3 and 5 of Annex II address the situation in which an interested party has provided necessary information, but the investigating authority may not be entirely satisfied.

7.341. Paragraph 3 provides that all submitted information that satisfies the criteria set out in that paragraph must be taken into account when determinations are made. The investigating authority must consider every element of information submitted in accordance with the criteria of paragraph 3.⁵³⁸ Where information meets the requirements of paragraph 3 such that an investigating authority must take it into account, the investigating authority may not conclude that, in respect of that information, necessary information has not been provided within the meaning of Article 6.8. The investigating authority is therefore not entitled to reject that information and use facts available instead.⁵³⁹

7.342. Paragraph 3 sets out the specific criteria that an investigating authority must apply before rejecting information submitted to it and relying on facts available instead. To the extent the investigating authority is not satisfied with submitted information, it must consider whether those elements of information satisfy the criteria of paragraph 3.⁵⁴⁰

- a. The information must be verifiable. Information is verifiable when the accuracy and reliability of the information can be assessed by an objective process of examination.⁵⁴¹ This process may be through on-the-spot verification, further requests for information or other means.⁵⁴²

⁵³⁶ Emphasis added.

⁵³⁷ Even though Annex II is largely phrased in hortatory language, it is settled that the provisions of Annex II are mandatory. (Panel Report, *US – Steel Plate*, para. 7.56).

⁵³⁸ Panel Report, *US – Steel Plate*, para. 7.57.

⁵³⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 81; Panel Report, *EC – Salmon (Norway)*, para. 7.355.

⁵⁴⁰ Panel Report, *US – Steel Plate*, paras. 7.58, 7.61, and 7.62.

⁵⁴¹ Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, para. 7.357.

⁵⁴² Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, paras. 7.358-7.360.

- b. The information must be "appropriately submitted so that it can be used in the investigation without undue difficulties". There is no particular circumstance or situation in which this criterion will be satisfied; rather, the investigating authority must explain the basis for its conclusion that information, which meets the other criteria of paragraph 3, cannot be used in the investigation without undue difficulties.⁵⁴³
- c. The information must be supplied in a timely fashion, that is, submitted within a reasonable period of time.⁵⁴⁴

7.343. Because every element of information that satisfies the criteria of paragraph 3 must be taken into account, an investigating authority is not entitled to reject all information submitted and apply facts available, when only individual elements of that information fail to satisfy the criteria of paragraph 3.⁵⁴⁵ An investigating authority must, at a minimum, explain in what way the information that it is rejecting does not meet the requirements of paragraph 3.

7.344. Paragraph 5, in turn, requires that an investigating authority may not disregard information that is less than ideal where the interested party submitting the information has acted to the "best of its ability". In this sense, it is supplemental to paragraph 3 and not an exception to it; information that satisfies the requirements of paragraph 3, even if not perfect, may not be disregarded.⁵⁴⁶ The investigating authority must, in the first instance, use all the information provided by an interested party that acted to the "best of its ability", even if the information is less than perfect.⁵⁴⁷

7.345. Thus, paragraphs 3 and 5 require an investigating authority to take into account and not disregard the information submitted by an interested party that meets the conditions set out in those paragraphs.

7.8.5.2 Analysis

7.346. As we understand it, the principal claim of the United States is that in using facts available in respect of a constructed cost of production for Tyson, MOFCOM acted inconsistently with Article 6.8 and paragraph 3 of Annex II.⁵⁴⁸

7.347. The United States argues that MOFCOM did not demonstrate that Tyson's reported data did not meet the criteria of paragraph 3, and in particular that the data were not verifiable.⁵⁴⁹ MOFCOM:

- a. incorrectly considered that the cost data reported by Tyson in the reinvestigation did not tie to the cost data reported in the original investigation;
- b. wrongly found that Tyson had provided the reported costs for only "some" product models;
- c. erroneously determined that Tyson had not provided actual meat and processing costs as requested;
- d. wrongly faulted Tyson for basing its reported cost data on only part of the POI; and
- e. wrongly faulted Tyson for failing to support the data it reported.

⁵⁴³ Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74 (emphasis added); *EC – Salmon (Norway)*, para. 7.364.

⁵⁴⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 84; Panel Reports, *US – Steel Plate*, para. 7.76; *EC – Salmon (Norway)*, para. 7.369. The final criterion of paragraph 3, that the information must be supplied in a medium or computer language requested by the authorities, is not of relevance in this proceeding.

⁵⁴⁵ Panel Report, *US – Steel Plate*, para. 7.75; but see *ibid.* paras. 7.59-7.60.

⁵⁴⁶ Panel Report, *US – Steel Plate*, para. 7.65.

⁵⁴⁷ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 288.

⁵⁴⁸ United States' first written submission, paras. 114-126.

⁵⁴⁹ United States' first written submission, paras. 115-118. There is no disagreement between the parties as to the legal standard that applies to establish that information is or is not "verifiable".

With reference to the reinvestigation's questionnaires and questionnaire responses, the United States also argues that MOFCOM "did not meaningfully engage with the data" Tyson did provide and did not take into account what Tyson could provide.⁵⁵⁰ MOFCOM merely continued to insist that Tyson did not provide separate "pure" meat and processing costs; it did not take any steps to verify Tyson's reported data; it did not provide any, and much less an adequate, explanation that would justify the rejection of the data.⁵⁵¹ While the US argument has elements pertaining to both paragraphs 3 and 5 – what Tyson did and what it could provide – we understand the core of the US argument to be that MOFCOM failed:

- a. to consider whether the information satisfied the criteria of paragraph 3; and
- b. to explain in what way the information it rejected failed to satisfy the requirements of paragraph 3.

7.348. On its face, the redetermination supports the US argument. MOFCOM, we recall, rejected Tyson's reported data because, in its view, Tyson had failed to provide "actual pure" meat and processing cost data.⁵⁵² But nowhere in the redetermination does MOFCOM explain in what way it "observed", as required by Article 6.8, the criteria set out in paragraph 3 of Annex II in rejecting Tyson's data. As our questions to the parties made clear, we identified elements in the redetermination that might relate to the criteria of paragraph 3.⁵⁵³ Clearly, an investigating authority is not required to signpost its analysis and each of its findings by expressly linking them to specific obligations in the Anti-Dumping Agreement. In this instance, however, nothing in the redetermination demonstrates meaningful consideration by MOFCOM of the criteria in paragraph 3. Nor is there any link between those criteria and MOFCOM's ultimate decision to reject all of the reported data. Our view that MOFCOM failed to "observe" the criteria set out in paragraph 3 is confirmed by China's arguments before us: throughout its submissions China linked MOFCOM's findings only to MOFCOM's alleged conclusion that Tyson had failed to act to the "best of its ability" in accordance with paragraph 5, not to Tyson's data failing any of the criteria in paragraph 3.

7.349. As we understand China's arguments, based on its submissions and including its answers to our questions, China's position rests on two lines of argument, a direct response in respect of paragraph 3 and an indirect response in respect of paragraph 5 of Annex II.

7.8.5.2.1 China's response in respect of paragraph 3 of Annex II

7.350. China makes two arguments in respect of paragraph 3.

7.351. First, China asserts that:

MOFCOM would have been open to any reasonable (and verifiable) method to ensure that processing costs would be linked to a product specific model at each processing steps. But instead of presenting such a method in the original investigation or in the reinvestigation, Tyson obscured the fact that the reported meat costs in fact contained a significant portion of processing costs incurred at prior production stages. Tyson thus failed to provide information "which is appropriately submitted so that it can be used in the investigation without undue difficulties" as required by Paragraph 3 ...[.]⁵⁵⁴

7.352. This argument gives rise to at least two concerns:

- a. China does not refer to anything in the redetermination, or indeed anywhere else in the record of the investigation, indicating that MOFCOM found that Tyson failed to provide information "which is appropriately submitted so that it can be used in the investigation

⁵⁵⁰ United States' response to Panel question No. 42, para. 79.

⁵⁵¹ United States' response to Panel question No. 42, paras. 79-88.

⁵⁵² See fn 503 above.

⁵⁵³ Redetermination, (Exhibit CHN-1 (translated version)), pp. 40 and 42.

⁵⁵⁴ China's response to Panel question No. 39, para. 152 (emphasis added). At the substantive meeting of the Panel with the parties, China also asserted in respect of whether – and if so, where – in the redetermination MOFCOM applied and made findings in respect of the criteria set out in paragraph 3 of Annex II, that "MOFCOM had not received 'appropriately submitted' information on the distinction between meat and processing cost".

without undue difficulties". We see nothing to suggest such a finding was either considered or made anywhere in the redetermination. China's argument thus appears to us to be an after the fact justification.

- b. Even if we were to accept that MOFCOM rejected the data Tyson reported because they were not "appropriately submitted so that [they] can be used ... without undue difficulties", we note that MOFCOM appears to have relied upon Tyson's cost data reported in the reinvestigation as the "best information available".⁵⁵⁵ Thus, MOFCOM in fact used the information submitted by Tyson's, albeit in a different way. By definition, where MOFCOM has, in fact, used Tyson's data as "best information available", it seems to us that we cannot conclude that that same data was not "appropriately submitted so that [they] can be used ... without undue difficulties".⁵⁵⁶

7.353. Second, in respect of the verifiability of Tyson's data, China argues:

The United States also incorrectly accuses MOFCOM of not taking meaningful steps to clarify and verify the data provided by Tyson in response to MOFCOM's requests during the re-investigation. But this ignores the many insufficient Tyson questionnaires responses that shows MOFCOM took meaning action to clarify and verify.⁵⁵⁷

China does not argue that MOFCOM made a finding that all of Tyson's data were not verifiable. It asserts, but does not demonstrate by reference to the redetermination or the record, that MOFCOM took any meaningful action to verify Tyson's data, such that it could reasonably have arrived at the conclusion that the data were not verifiable.

7.354. We recall our task in helping the parties resolve their dispute: to make findings as to whether a complaining party has presented a *prima facie* case of inconsistency with the requirements of the WTO agreements, and whether in response, a responding party has effectively rebutted the *prima facie* case of the complainant. While a panel may develop its own reasoning in arriving at its findings and recommendations in respect of those claims of the complainant that are properly before it, it is of course not for a panel to make the case for either party. We underline that this core consideration is relevant in respect not just of evidence before a panel, but also of a disputing party's arguments: stressing and advancing some arguments rather than others, whether as a matter of litigation strategy or for policy reasons, is an important sovereign right of a disputing party; it is not for a panel to second guess a party's judgment in this respect. In that sense, we must respect China's decision not to elaborate arguments under paragraph 3, but this also means that it has not successfully rebutted the *prima facie* case put forward by the United States under this paragraph.

7.8.5.2.2 China's response in respect of paragraph 5 of Annex II

7.355. China's principal response to the US claim appears to be that Tyson did not act to the "[very] best of its ability" and therefore MOFCOM was entitled to reject all of Tyson's data and use facts available. China's position is premised on the view, reiterated throughout this proceeding, that:

[Paragraph 5] recognizes that although information may not always be "ideal", the authority need not accept information that "may not be ideal in all respects" unless the party submitting that information has been acting "to the best of its ability".⁵⁵⁸

"[R]esponding parties are required to act to the very best of their ability when responding to the investigating authority. Failure to do so entitles the investigating authority to resort to facts available ... [.]"⁵⁵⁹

⁵⁵⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 44. In the context of responding to the United States' Article 2.2.1.1 claim, China was adamant about the fact that MOFCOM had used Tyson's own data.

⁵⁵⁶ Emphasis added.

⁵⁵⁷ China's comments on United States' response to Panel question No. 42, para. 67. (fn omitted)

⁵⁵⁸ China's first written submission, para. 196 (emphasis original); see also response to Panel question No. 36(a), paras. 133-134.

⁵⁵⁹ China's second written submission, para. 223. (emphasis added)

"[A]n investigating authority may resort to facts available whenever the responding party fails to act to the very best of its ability."⁵⁶⁰

"[A]n investigating authority is entitled to resort to facts available if a responding party does not act to the very best of its ability, or when the information provided is not of the best quality ... [.]"⁵⁶¹

As we understand it, therefore, China's argument posits paragraph 5 as a defence or an exception to paragraph 3: where an interested party does not act to the "very best of its ability" in providing information requested, an investigating authority is entitled to reject the submitted information and proceed to use fact available, even if the submitted information satisfies the criteria of paragraph 3.

7.356. Paragraph 5 provides that investigating authorities are "not justified" ... from disregarding" information that is not ideal in all respects, provided the interested party acted to the "best of its ability".⁵⁶² We note that China repeatedly adds the word "very" to this latter standard, with no justification proffered.⁵⁶³ China's proposed interpretation raises the level of effort required of an interested party submitting information and thus makes it more likely that information not ideal in all respects may be disregarded. It is elementary that a panel is enjoined from inserting words into the text of a provision; nor does anything in the context of paragraph 5 require or even permit such an interpretation. We decline China's invitation to read into paragraph 5 an adverb that is not there.

7.357. Turning to the text of that provision, nothing in its structure or actual wording suggests that paragraph 5 allows for the rejection of information that meets the criteria set forth in paragraph 3 but is not ideal in all respects.⁵⁶⁴ Rather, the provision establishes an obligation for an investigating authority to use such information provided the interested party submitting it acted to the best of its ability. As described above, paragraph 5 is properly understood as supplementing paragraph 3. Information that satisfies the requirements of paragraph 3, even if not "ideal in all respects", may not be disregarded provided the interested party has acted to the best of its ability. It would turn paragraph 5 on its head to read it as a defence or exception entitling an investigating authority to reject submitted information and resort to facts available "unless the party submitting that information has been acting 'to the best of its ability'". We therefore do not agree with China's understanding of paragraph 5.

7.358. The United States has, as we have found, established its claim based on paragraph 3. It follows from our analysis of the relationship between paragraphs 3 and 5 that any argument solely in respect of paragraph 5, as China has made in this case, is not an effective rebuttal of the case of inconsistency with paragraph 3 substantiated by the United States.

7.8.6 Conclusion

7.359. In the light of the above, we find that the United States has established that China acted inconsistently with Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement in rejecting all of Tyson's submitted data in the reinvestigation and relying on facts available.

7.9 Article 6.9 of the Anti-Dumping Agreement: essential facts

7.9.1 Introduction

7.360. In the original dispute, we found that China had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement during the original investigation because MOFCOM did not inform

⁵⁶⁰ China's second written submission, para. 224. (emphasis added)

⁵⁶¹ China's second written submission, para. 233 (emphasis added); see also response to Panel question No. 36(b), paras. 135-137.

⁵⁶² Emphasis added.

⁵⁶³ When asked by the Panel, China did not explain the interpretative steps that led to its proposition. (China's response to Panel question No. 36, paras. 135-141).

⁵⁶⁴ Paragraph 5 also neither requires an interested party to act to the "very" best of its ability, nor to provide information that is of "best quality".

US interested parties, including Pilgrim's Pride and Keystone, of the essential facts underlying the determination that dumping existed.⁵⁶⁵

7.361. The US claim in this compliance proceeding concerns whether China acted inconsistently with Article 6.9 during the reinvestigation by failing to inform Pilgrim's Pride and Keystone of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

7.9.2 Main arguments of the parties

7.9.2.1 United States

7.362. MOFCOM acted inconsistently with Article 6.9 by failing to disclose the essential facts underlying the determination of the dumping margin in respect of Pilgrim's Pride and Keystone.⁵⁶⁶ The specific facts alleged not to have been disclosed during the reinvestigation are:

- a. With respect to Pilgrim's Pride: The data and margin calculations from the original investigation. MOFCOM never revealed the data and calculations that led to its determination in the original investigation despite the Panel in the original dispute finding that the failure to disclose this information was inconsistent with Article 6.9.⁵⁶⁷ During the reinvestigation, MOFCOM did not reinvestigate Pilgrim's Pride but did allegedly correct an error in the original dumping margin calculation. All of the original data and margin calculations therefore also constituted essential facts in the reinvestigation which MOFCOM had to disclose.⁵⁶⁸ Without knowing them and the nature of the alleged error, Pilgrim's Pride could not defend itself in the reinvestigation.⁵⁶⁹ MOFCOM's disclosure, however, including an Excel file provided to Pilgrim's Pride on 16 May 2014, only made available the new, "corrected" data and calculations.⁵⁷⁰ This disclosure also came too late for Pilgrim's Pride to defend its interests.
- b. With respect to Keystone: The data and margin calculations from the original investigation and the reinvestigation.⁵⁷¹ Although Keystone did not cooperate during the reinvestigation, it was entitled to disclosure of the essential facts, including its confidential data and calculations. MOFCOM did not disclose this information either to Keystone or its legal agents, although Keystone had provided proof of authorization of its agents to receive MOFCOM's disclosure of Keystone's information.

7.9.2.2 China

7.363. MOFCOM did not act inconsistently with Article 6.9:

- a. With respect to Pilgrim's Pride: The data and calculations from the original investigation did not constitute essential facts for purposes of the reinvestigation.⁵⁷² Moreover, MOFCOM disclosed the essential facts of the redetermination to Pilgrim's Pride in an Excel file provided to Pilgrim's Pride on 16 May 2014.⁵⁷³ This document contained all the

⁵⁶⁵ Panel Report, *China – Broiler Products*, paras. 7.100 and 7.106.

⁵⁶⁶ In its panel request, the United States also cited Article 12.8 of the SCM Agreement. Although the first written submission at paragraph 4 included a reference to this provision, the United States did not develop any arguments, nor adduced any evidence, in any of its submissions in respect of an alleged violation of Article 12.8. Indeed, the focus of the entirety of the US arguments is on the alleged lack of disclosure of the data and calculations underlying the dumping margins. We therefore do not further address Article 12.8.

During this proceeding, the United States did not, however, pursue a claim under this provision.

⁵⁶⁷ United States opening statement at the meeting of the Panel, para. 64.

⁵⁶⁸ United States' response to Panel question No. 23(b), para. 47.

⁵⁶⁹ United States' first written submission, paras. 73 and 77; second written submission, para. 65; and response to Panel question No. 23(b), paras. 48-49.

⁵⁷⁰ United States' first written submission, para. 76; second written submission, para. 71; and comments on China's response to Panel question No. 16(a), para. 30.

⁵⁷¹ United States' second written submission, paras. 78 and 84; response to Panel question No. 22, para. 40.

⁵⁷² China's second written submission, paras. 94, 95, 100, 104, and 105.

⁵⁷³ China's first written submission, paras. 103 and 109; second written submission, para. 106; and response to Panel question No. 16(a), paras. 27-29.

data from the original investigation and the modified data.⁵⁷⁴ The changes that were made were explained in a narrative accompanying the document that contained the data.

- b. With respect to Keystone: MOFCOM could not disclose the data and calculations at issue. This information was confidential to Keystone. Keystone, however, did not respond to MOFCOM during the reinvestigation. In particular, it did not authorize an agent to represent Keystone in the reinvestigation and to receive MOFCOM's disclosure containing Keystone's confidential information. In these circumstances, MOFCOM only made a public disclosure containing non-confidential information. In any case, there is a difference in disclosure obligations with respect to cooperating parties, on the one hand, and non-cooperating parties, on the other.⁵⁷⁵ In respect of a non-cooperating party, such as Keystone, the essential facts that must be disclosed are those set out by this Panel in its original report (the basis for resort to facts available, the requested information, and the facts used to replace the missing information).⁵⁷⁶ MOFCOM made all of these essential facts in respect of Keystone publicly available.

7.9.3 Evaluation

7.9.3.1 The law

7.364. Article 6.9 of the Anti-Dumping Agreement provides:

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

The first sentence is the operative part of Article 6.9. It sets out the following required elements:

- a. shall inform;
- b. all interested parties;
- c. before a final determination is made; and
- d. of the essential facts.

The second sentence of Article 6.9 is, on its face, a temporal exhortation. As context for the central obligation in Article 6.9⁵⁷⁷, it gives an indication both of why disclosure is to be made⁵⁷⁸ and when it must be made.

7.9.3.1.1 Essential facts

7.365. Article 6.9 requires the disclosure of "the essential facts under consideration which form the basis for the decision whether to apply definitive measures". There are three cumulative elements defining what must be disclosed:

- a. essential facts;
- b. under consideration; and
- c. which form the basis for the decision whether to apply definitive measures.

⁵⁷⁴ China's first written submission, paras. 97, 103, and 109; responses to Panel question No. 15, para. 26, No. 16(a), para. 30, and No. 16(c), paras. 35-36.

⁵⁷⁵ China's response to Panel question No. 17, paras. 41-43.

⁵⁷⁶ China's first written submission, paras. 112 and 121; second written submission, paras. 119-120.

⁵⁷⁷ Appellate Body Report, *China – GOES*, para. 240.

⁵⁷⁸ Panel Report, *EC – Salmon (Norway)*, para. 7.805.

7.366. It is now settled that "essential facts under consideration" are "those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping ... duties".⁵⁷⁹ Moreover, the essential facts must form the basis for the decision whether to apply definitive measures. This decision relates to the imposition of anti-dumping duties. For facts to form the basis of this decision, they must be significant in the process of reaching this decision, whether it is because they are salient for a decision to apply definitive measures or salient for a contrary outcome.⁵⁸⁰ The decision to impose duties or not is necessarily linked to the final determination. Facts are therefore significant, for example, when they are supportive of the final determination and are thus relied upon in making an affirmative decision to impose duties.⁵⁸¹ Yet, facts may still be significant for the decision to impose duties if they are ultimately not used in and/or do not support the final determination.⁵⁸²

7.367. The Panel's findings on essential facts in the original report are relevant in this proceeding. First, the Panel found that Article 6.9 required the disclosure of the following essential facts in respect of the dumping determination for the cooperating and investigated exporters in the original investigation:

- a. the data underlying the determination that form the basis for the calculation of the dumping margin, including any adjustments⁵⁸³;
- b. the comparisons of home market and export sales⁵⁸⁴; and
- c. the formulae applied for these comparisons.⁵⁸⁵

In particular – and critical for this proceeding – the Panel found that "the calculations themselves (including any files or spreadsheets created during the calculations)" that are made to determine the dumping margin are not essential facts that must be disclosed.⁵⁸⁶

7.368. Second, the Panel addressed the Article 6.9 disclosure requirement in respect of "unknown" exporters to whom facts available were applied in establishing a "residual" rate:

Interpreting Article 6.9 in the light of Article 6.8, the "essential facts" that MOFCOM was expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information. In our view, the above information is facts under consideration in MOFCOM's determination to apply facts available. Furthermore, this information formed the basis for MOFCOM's determination, on the basis of facts available ... [.]⁵⁸⁷

7.9.3.1.2 The obligation to "inform"

7.369. Among the different modes of engagement between the investigating authority and interested parties in respect of information contemplated in Article 6 of the Anti-Dumping Agreement and described above at paragraphs 7.226 and 7.227, the requirement to "inform" is an "active" disclosure obligation.

7.370. Article 6.9 does not set out rules or any guidance on how all interested parties are to be informed of the essential facts. In these circumstances, the investigating authority has a large margin of discretion.

⁵⁷⁹ Appellate Body Report, *China – GOES*, para. 240. (emphasis added)

⁵⁸⁰ Appellate Body Report, *China – GOES*, para. 240.

⁵⁸¹ Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.246.

⁵⁸² Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.246.

⁵⁸³ Panel Report, *China – Broiler Products*, paras. 7.90-7.91.

⁵⁸⁴ Panel Report, *China – Broiler Products*, para. 7.91.

⁵⁸⁵ Panel Report, *China – Broiler Products*, para. 7.91.

⁵⁸⁶ Panel Report, *China – Broiler Products*, para. 7.92. (emphasis added)

⁵⁸⁷ Panel Report, *China – Broiler Products*, para. 7.317.

7.371. The requirement to inform is unqualified. It is in principle subject only to other obligations, such as Article 6.5 regarding the protection of confidential information, that run concurrently in respect of certain types of facts. As well, according to the second sentence in Article 6.9, the obligation to "inform" must be fulfilled in a timely fashion, so as to allow interested parties to defend their interests.⁵⁸⁸

7.9.3.1.3 Conclusion

7.372. In the light of the foregoing, under Article 6.9:

- a. data that are the basis for the determination of the dumping margin must be disclosed, whereas there is no requirement to disclose the actual calculations themselves;
- b. disclosure must be made in respect of essential facts that are under consideration – that is, facts that are significant or salient for the decision whether to impose definitive measures; and
- c. an investigating authority has a margin of discretion in how to disclose essential facts, but this discretion is not absolute.

7.9.3.2 Analysis

7.9.3.2.1 Disclosure obligation in respect of dumping margin calculations

7.373. The United States argues that MOFCOM should have made available the dumping margin calculations in respect of Pilgrim's Pride from the original investigation and in respect of Keystone from the original investigation as well as the reinvestigation.

7.374. In this proceeding, the United States refers to "calculations". As the term itself implies, the United States appears to have in mind the "precise mathematical calculations" that MOFCOM "performed" or "conducted".⁵⁸⁹ In a number of instances the United States refers to "calculation methodology" – and even then the United States links knowledge of the "precise calculation methodology" to the disclosure of the "calculations" themselves.⁵⁹⁰ We therefore consider that the United States is asserting that MOFCOM should have disclosed the actual "calculations" underlying the dumping margin determination, not only the calculation methodology.

7.375. In support of its position, the United States argues that this Panel in the original dispute:

- a. "recognized that Article 6.9 requires the *complete* disclosure of margin calculations"⁵⁹¹;
- b. "found that MOFCOM failed to make available the calculations it performed ... including the calculation of the normal value and export price for the respondents"⁵⁹²; and
- c. "found that MOFCOM's failure to disclose the original calculations denied Pilgrim's Pride the ability to ascertain the accuracy of the new rate by evaluating what has changed."⁵⁹³

The United States relies upon paragraphs 7.91 and 7.100 of the Panel Report in the original dispute for these propositions.⁵⁹⁴

⁵⁸⁸ Panel Reports, *China – X-Ray Equipment*, para. 7.400; *Russia – Commercial Vehicles*, para. 7.254 (adoption/appeal pending).

⁵⁸⁹ United States' first written submission, paras. 68 and 75; opening statement at the meeting of the Panel, para. 62; and response to Panel question No. 23(b), para. 51.

⁵⁹⁰ United States' second written submission, para. 69 ("Pilgrim's was entitled to know the adjustments and precise calculation methodology – and that required knowing what the original calculations and data were"); opening statement at the meeting of the Panel, para. 64; and response to Panel question No. 23(a), para. 44.

⁵⁹¹ United States' first written submission, para. 70; second written submission, para. 67. (emphasis original)

⁵⁹² United States' first written submission, para. 68.

⁵⁹³ United States' second written submission, para. 68.

⁵⁹⁴ United States' first written submission, para. 70; second written submission, paras. 67-68.

7.376. At paragraphs 7.91 and 7.100 of the Panel Report in the original dispute, we found that in the context of the determination of dumping, the underlying data and formulae are essential facts that must be disclosed and that MOFCOM had failed to do so in respect of Pilgrim's Pride. Nowhere in these paragraphs did we mention calculations. Indeed, we specifically found that calculations "are not 'essential facts' that must be disclosed".⁵⁹⁵

7.377. The United States also argues that the requirement to disclose margin calculations was endorsed by the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.⁵⁹⁶ The United States refers to the following passage:

Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping.⁵⁹⁷

However, a margin calculation methodology is different from margin calculations themselves. In fact, the term "calculation methodology" was used in this passage by the Appellate Body in the context of the European Union's argument that "the calculation methodology, such as the formulae used in calculations and the data applied in the formulae", must be disclosed under Article 6.9.⁵⁹⁸ This confirms our findings in the original report in relation to what must be disclosed: data and formulae, but not the calculations.

7.378. We therefore find that the United States has not established its claim under Article 6.9 of the Anti-Dumping Agreement in respect of disclosure of margin calculations.

7.9.3.2.2 Disclosure obligation in respect of the "original" data of Pilgrim's Pride

7.379. The data at issue relate to the calculations underlying the dumping margin determination made in the original investigation (the "original" data). The United States claims that MOFCOM did not provide these original data to Pilgrim's Pride during the reinvestigation.

7.380. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement must assert and prove its claim.⁵⁹⁹ A complainant will satisfy its burden when it establishes a *prima facie* case, namely a case that, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complainant.⁶⁰⁰ It is generally for each party asserting a fact to provide evidence supporting the assertion.⁶⁰¹ In this dispute, therefore, it is for the United States to establish that China did not provide the original data to Pilgrim's Pride and thereby acted inconsistently with Article 6.9.

7.381. We recognise that a claim of violation based on an alleged omission – here the lack of disclosure – raises evidentiary challenges.⁶⁰² Difficulties exist for the complainant to establish the absence of something, but also for a panel in making findings of fact in relation to an absence or actions not done. A panel must therefore exercise a measure of discretion in respect of the evidence required to establish a claim based on an alleged omission. Regardless of these difficulties, at a minimum it should be uncontroversial to say that mere allegation of an omission does not amount to proof.

⁵⁹⁵ In discussing the findings of the panel in *China – X-Ray Equipment*, we found that:

To the extent that the panel in *China – X-Ray Equipment*'s reference to the "actual mathematical determination" was to the calculations themselves (including any files or spreadsheets created during the calculations), we agree that these are not "essential facts" that must be disclosed.

(Panel Report, *China – Broiler Products*, para. 7.92 (emphasis added))

⁵⁹⁶ United States' first written submission, para. 71.

⁵⁹⁷ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131. (emphasis added)

⁵⁹⁸ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.125. (emphasis added)

⁵⁹⁹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

⁶⁰⁰ Appellate Body Report, *EC – Hormones*, para. 104.

⁶⁰¹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

⁶⁰² See our earlier observations in this respect at para. 7.292 above.

7.382. It is instructive to consider the arguments and evidence presented to us in the course of this proceeding to illustrate the difficulties a panel faces when the allegation concerns the failure to disclose.

7.383. The United States claims that MOFCOM did not provide the original data to Pilgrim's Pride during the reinvestigation.⁶⁰³ However, in none of its submissions did the United States refer to any evidence that could support this factual assertion.⁶⁰⁴ The United States relies only on statements in the redetermination.⁶⁰⁵ But these simply confirm that MOFCOM identified and corrected a calculation error in the original determination and that it made a disclosure. They do not give any indication as to what MOFCOM did or did not disclose.⁶⁰⁶

7.384. The United States acknowledges that MOFCOM disclosed "new" data – data related to the reinvestigation – to Pilgrim's Pride. Initially, the United States asserted this to have occurred on 17 June 2014 in response to disclosure comments made by Pilgrim's Pride.⁶⁰⁷ After China referred to an alleged disclosure of the original data on 16 May 2014, the United States agreed that MOFCOM disclosed the new data on that date.⁶⁰⁸

7.385. China argues that MOFCOM had, in fact, disclosed the original data to Pilgrim's Pride during the reinvestigation. Initially, it relied on an Excel file that MOFCOM allegedly provided to Pilgrim's Pride on 16 May 2014 (Exhibit CHN-8).⁶⁰⁹ Exhibit CHN-8 contains empty tables; there is no reference to the investigation, or the reinvestigation, or to the type of data at issue, and none to Pilgrim's Pride. The generic labelling of the rows and columns indicates that the tables pertain to data related to the construction of normal value and the calculation of dumping margins. It is not apparent, however, that the data and calculations contained in these tables – redacted from the exhibit – are those from the original investigation and are those for Pilgrim's Pride.

7.386. China then submitted Exhibit CHN-45, which "provides a more detailed public version of the same underlying document" of which Exhibit CHN-8 was a public summary, and thus presumably a more detailed public version of the alleged disclosure of the original data on 16 May 2014.⁶¹⁰ While actual figures are redacted⁶¹¹, China describes the content of Exhibit CHN-45 to "consist[] of six separate tabs":

The first tab "5% test" shows the test of whether the home sales are sufficient to constitute a viable home market;

The second tab "cost and expense for NV" lists the cost and expenses for constructed normal value for all different models of broiler products;

The third tab "table 4-2" lists the price and expense data for all of the sales transactions, providing data for all distinct sales transactions;

⁶⁰³ United States' second written submission, para. 65.

⁶⁰⁴ For example, an objection in the course of the reinvestigation by an interested party to a failure to disclose.

⁶⁰⁵ United States' first written submission, para. 75; comments on China's response to Panel question No. 16(b), para. 33.

⁶⁰⁶ The United States could also be understood to suggest that the redetermination itself did not provide sufficient disclosure which, in its view, serves as evidence that MOFCOM did not disclose the original data. (United States' first written submission, para. 75: "MOFCOM's redetermination sheds no additional light on the data or calculation 'corrections'"). The issue between the parties is not, however, whether MOFCOM disclosed the original data through the redetermination but through a separate disclosure instrument.

⁶⁰⁷ United States' first written submission, para. 76.

⁶⁰⁸ United States' second written submission, para. 71. The redetermination refers to a disclosure on 16 May 2014. (Redetermination, (Exhibit CHN-1 (translated version)), p. 7).

⁶⁰⁹ China's first written submission, paras. 103 and 109; second written submission, para. 106.

⁶¹⁰ China's response to Panel question No. 16(a), para. 28.

⁶¹¹ China stated at the substantive meeting that the United States had not submitted an authorizing letter from Pilgrim's Pride for the compliance proceeding and therefore could not provide the underlying confidential data. The United States observes that "[u]nder the Panel's Working Procedures, China does not need an authorizing letter 'in respect of BCI for which a party already submitted an authorizing letter in the original Panel proceeding proceedings', which Pilgrim's Pride did." (United States comments on China's response to Panel question No. 16(a), para. 29 (referring to the Additional Working Procedures of the Panel Concerning Business Confidential Information, para. 3) (fn omitted)).

The fourth tab "domestic sales > cost" lists those all transactions that had sales prices above cost;

The fifth tab "revised Table 3-4" provides export sales to China, which is used as the basis to determine the CIF price and the ex factory price (the net price after adjustments); and

The sixth tab "calculation of Dumping Margin" provides the calculation of the overall average margin of dumping.

...

[T]he first five tabs of the spreadsheet provided in Exhibit CHN-45 ... were unchanged from the original investigation; only tab six – the calculation of the dumping margin – changed in the re-investigation.⁶¹²

7.387. China also submitted Exhibit CHN-46, which it describes as a narrative to Exhibit CHN-45 that MOFCOM provided to Pilgrim's Pride. Exhibit CHN-46 expressly refers to Pilgrim's Pride, but it is undated and the relationship to Exhibit CHN-45 is, on its face, not entirely clear. Exhibit CHN-46 may, however, be understood to refer to Exhibit CHN-45 and to provide explanations in respect of the data and the calculations in Exhibit CHN-45.⁶¹³

7.388. The United States does not contest that Exhibits CHN-45 and CHN-46 were provided to Pilgrim's Pride as part of the disclosure on 16 May 2014.⁶¹⁴ "[W]hile the United States is not in a position to comment on what underlying data might be in Exhibit CHN-45 were it not redacted, the United States" challenges the cogency and reliability of Exhibit CHN-45 by noting that:

- a. "on its face it does not appear to be the unmodified spreadsheet from the original investigation; it appears to be the spreadsheet *for the reinvestigation*"⁶¹⁵;
- b. "China has not explained how this table would allow Pilgrim's to reconstruct its original rate of 53.4 percent – *and what has changed since*"⁶¹⁶; and
- c. "[in respect of Exhibits CHN-45 and CHN-46, China did not] identify[] the precise language or figures in those documents that constitute the changes between the margin calculated in the original investigation and in the reinvestigation".⁶¹⁷

China responds that although prepared for the reinvestigation⁶¹⁸, this exhibit contains all the original data.

⁶¹² China's responses to Panel question No. 16(a), para. 29, and No. 16(c), para. 39. (emphasis added)

⁶¹³ For example, Exhibit CHN-46 mentions "modified Form 3-4" and "Form 4-2" which appears to refer to what China described as the third ("table 4-2") and fifth tab ("revised table 3-4") in Exhibit CHN-45.

⁶¹⁴ In its general comments on China's response to the Panel's questions (paras. 2-4), the United States raised concerns regarding the late submission of exhibits in China's response to the Panel's questions, including Exhibits CHN-45 and CHN-46. The United States argued that these exhibits were submitted outside of the deadlines prescribed by the Panel's Working Procedures. We have sympathy for the view that China could have initially provided evidence that did not raise the concerns that we identified in respect of Exhibit CHN-8. In response to our request to address these concerns, China submitted CHN-45 and CHN-46. These exhibits were therefore properly submitted in accordance with paragraph 8 of our Working Procedures as "evidence necessary for purposes of ... answers to questions".

⁶¹⁵ United States' comments on China's response to Panel question No. 16(a), para. 30. (emphasis original)

⁶¹⁶ United States' comments on China's response to Panel question No. 16(a), para. 30. (emphasis original)

⁶¹⁷ United States' comments on China's response to Panel question No. 16(b), para. 34.

⁶¹⁸ The United States argues that Exhibit CHN-45 is, in China's own submission, a public summary of the original data and that a summary cannot satisfy the disclosure obligation of Article 6.9. (United States' comments on China's response to Panel question No. 16(c), para. 35). The US statement mischaracterizes Exhibit CHN-45. During the substantive meeting and in its response to Panel question No. 16(a), paras. 27-28, China explained that Exhibit CHN-45 is a public summary of the underlying disclosure prepared for the purpose of this dispute.

7.389. The US claim here is that MOFCOM failed to disclose the essential facts, in this case, the original data. Article 6.9 is concerned with the disclosure of essential facts. It does not prescribe the format in which the disclosure should be made. The format of this disclosure, whether it is in a spreadsheet prepared for the reinvestigation containing the original data, or it is a spreadsheet from the original investigation containing the original data, is not relevant for this claim. What is pertinent is the substance of the disclosure, not its format.

7.390. Further, the United States claims that Exhibit CHN-45 does not "allow Pilgrim's to reconstruct its original rate of 53.4 per cent" and to identify "what has changed since". It also argues that China did not point to where the changes are set out in Exhibits CHN-45 and CHN-46. Exhibit CHN-46 on its face appears to explain the error in the equation for the dumping margin that MOFCOM corrected, which resulted in a change in the dumping margin.⁶¹⁹ It describes the equation that was used in the original determination, how it was corrected, and the corrected equation that was used during the reinvestigation. The United States has not questioned the authenticity of Exhibit CHN-46, challenged its probative value or otherwise addressed its content. In particular, the United States did not demonstrate that the specific explanations in CHN-46 in respect of the changes to the dumping margin equation, in connection with the dumping margin calculation disclosed in "tab six" of Exhibit CHN-45, were insufficient to allow Pilgrim's Pride to understand the changes and to ascertain their accuracy.

7.391. The United States does not contest that an unredacted version of Exhibit CHN-45 as well as Exhibit CHN-46 were disclosed to Pilgrim's Pride on 16 May 2014. We find therefore that, as a matter of fact, Pilgrim's Pride was in possession of the unredacted data set out in the first five "tabs" of Exhibit CHN-45 and the explanations in Exhibit CHN-46. Since China's first written submission, the parties made arguments and disagreed in respect of what MOFCOM disclosed to Pilgrim's Pride on 16 May 2014. This factual issue was also amply discussed during the substantive meeting of the Panel with the parties. At no point did the United States offer any evidence to support its allegation that the original data had not been disclosed, nor did it provide any evidence as to what was, in its view, disclosed to Pilgrim's Pride on 16 May 2014. In response to China's evidence, the United States also declined the opportunity to comment on whether Exhibit CHN-45 included the original data on the basis of extensive redactions for confidentiality purposes. As noted, we are sympathetic to the challenges inherent in establishing a claim of lack of disclosure.⁶²⁰ However, it is ultimately the responsibility of the complainant to establish its case. In this proceeding, the allegation is not one of complete absence of disclosure: rather, the United States argues that MOFCOM disclosed the new, but not the original data. In such circumstances, the United States could have sought to establish the alleged omission by demonstrating what was provided and how that disclosure did not encompass what should, in its view, have also been disclosed. Moreover, it would have been open to the United States to refer to Pilgrim's Pride and verify the content of Exhibit CHN-45. The United States did not do so.

7.392. In the light of the above and based on the totality of the evidence before us and the arguments developed by the parties, we draw the following conclusions:

- a. Considering Exhibit CHN-45 in the light of Exhibit CHN-46 suggests that at least part of the data in Exhibit CHN-45, namely the data in "table 4-2" and "revised Table 3-4", were original data.⁶²¹ The evidence therefore does not support the US assertion that MOFCOM did not provide any original data at all.

⁶¹⁹ Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), pp. 6-7.

⁶²⁰ The United States relies on our findings in the preliminary ruling in the context of Articles 6.1 and 6.4 of the Anti-Dumping Agreement. In that context, we found that a complainant may not be expected to pin-point with any precision in a panel request information it does not have and might not even know about. The situation under this Article 6.9 claim is not, however, "analogous". (United States' comments on China's response to Panel question No. 16(b), para. 33). Contrary to the US assertion, the evidence suggests that Pilgrim's Pride had ascertained, and even commented on, the error and correction at issue here, see para. 7.392 below.

⁶²¹ Redacted Version of Disclosure Narrative Provided to Pilgrim's Pride, (Exhibit CHN-46), p. 2. See also Redacted Version of MOFCOM Response to Pilgrim's Pride Comments on Initial Disclosure (17 June 2014), (Exhibit CHN-47), p. 2 ("The data used in the disclosure of re-investigation was from the data submitted by your company. For example, the export price was based on the Table 3-4 submitted by you after the verification.")

- b. The parties agree that MOFCOM made a disclosure to Pilgrim's Pride on 16 May 2014 and that Pilgrim's Pride provided comments. According to the uncontradicted evidence on the record, Pilgrim's Pride appears to have based its comments on original and new data and to have addressed in substance the change in the dumping margin equation as identified in Exhibit CHN-46.⁶²² The only documents that the Panel received from the parties to consider as the alleged "disclosure" in question were, apart from Exhibit CHN-8, Exhibits CHN-45 and CHN-46. In the absence of any evidence and arguments to the contrary, it appears that Pilgrim's Pride made its disclosure comments, including its comments on the correction of the calculation error, on the basis of the (unredacted) information conveyed through Exhibits CHN-45 and CHN-46. The evidence therefore does not support the US allegation that Pilgrim's Pride did not have the data from the original investigation and could not defend its interests because it did not know the alleged error that MOFCOM corrected in the reinvestigation.

7.393. On balance, we find that the United States has not established its claim in respect of the allegation that MOFCOM did not provide the original data to Pilgrim's Pride.⁶²³

7.394. Finally, we understand the US position to be that the disclosure on 16 May 2014 occurred too late for Pilgrim's Pride to defend its interests.⁶²⁴ Beyond mere assertion, the United States does not explain how the disclosure on 16 May 2014 was not made in sufficient time for Pilgrim's Pride to defend its interests. The United States makes no arguments as to what would have been "early enough" or what would have been "adequate time" for Pilgrim's Pride to defend itself.⁶²⁵ The fact that the disclosure occurred "at the tail end of the reinvestigation" does not in itself mean that Pilgrim's Pride did not have sufficient time to defend itself.⁶²⁶ In fact, we recall that Pilgrim's Pride commented on the disclosure, including on the calculation error and the corrections.⁶²⁷ We therefore have no basis to conclude that the disclosure on 16 May 2014 did not take place in sufficient time for Pilgrim's Pride to defend its interest.

7.395. As a consequence, we find that the United States has not established that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM did not disclose the original data to Pilgrim's Pride.

7.9.3.2.3 Disclosure obligation in respect of the data of Keystone

7.396. The United States claims that MOFCOM did not disclose the data from the original investigation underlying the original dumping determination and the data from the reinvestigation underlying the dumping redetermination (the "original" data and the "new" data, respectively) to Keystone during the reinvestigation, in violation of Article 6.9.⁶²⁸

⁶²² Comments of Pilgrim's Pride on Disclosure of the Final Ruling of the Reinvestigation (28 May 2014), (Exhibit USA-27 (BCI)); Redacted Version of MOFCOM Response to Pilgrim's Pride Comments on Initial Disclosure (17 June 2014), (Exhibit CHN-47).

⁶²³ This finding is entirely contingent on the facts of this case. In particular, we do not mean to suggest that a complainant has to demonstrate, by reference to the investigation's record, that an interested party requested to see the information at issue during the investigation, or made a procedural objection in this respect, in order to establish a case of lack of disclosure.

⁶²⁴ United States' second written submission, paras. 70, 71, and 73.

⁶²⁵ United States' second written submission, para. 73.

⁶²⁶ United States' second written submission, para. 70.

⁶²⁷ See above fn 622.

⁶²⁸ The United States at no point explained how or why the "original" data were essential facts that formed the basis for the decision to impose anti-dumping duties in the reinvestigation. Unlike the situation of Pilgrim's Pride, where the United States argues that the "original" data were necessary for Pilgrim's Pride to understand the corrected calculations and thus to defend its interests in the reinvestigation, for Keystone, the United States has not pointed to any link between the "original" data and the determination in the reinvestigation. Rather, we understand the United States to challenge the alleged lack of implementation of the DSB's recommendations and rulings in respect of the "original" data: "The Panel in the original dispute previously found that China acted inconsistently with its WTO obligations by failing to disclose this information from the original investigation. ... Despite this finding from the Panel, MOFCOM has once again failed to disclose this information to Keystone, in contravention of Article 6.9." (United States' response to Panel question No. 22, paras. 41-42).

7.397. The following facts are not in dispute between the parties:

- a. During the original investigation, Keystone was fully cooperating and provided data to MOFCOM, which MOFCOM used in making its determination of dumping. During the reinvestigation, MOFCOM sought to reinvestigate Keystone.
- b. MOFCOM issued a questionnaire to Keystone but Keystone did not respond and did not cooperate throughout the reinvestigation.⁶²⁹
- c. MOFCOM, as a result, used facts available in respect of two items of information in establishing a dumping margin for Keystone.⁶³⁰
- d. In respect of other matters, MOFCOM used the information submitted by Keystone during the original investigation.
- e. During the reinvestigation, MOFCOM did not disclose any Keystone-confidential information, including the data at issue, directly to Keystone or to any agent allegedly representing Keystone.
- f. MOFCOM disclosed non-confidential information in respect of Keystone through a public disclosure.⁶³¹

7.398. As well, there is no disagreement between the parties that Article 6.9 applies to non-cooperating exporters, and thus, in the context of the reinvestigation, to Keystone.⁶³² This is consistent with our findings in the original report applying the disclosure requirement to the essential facts in respect of the "residual" rate for "unknown" exporters established using facts available.⁶³³

7.399. China argues, however, that the facts that are "essential", and that therefore must be disclosed, differ as between cooperating interested parties, on the one hand, and non-cooperating interested parties, such as Keystone, on the other.⁶³⁴ In respect of the latter, MOFCOM only needed to disclose the following essential facts: (a) the basis for resort to facts available; (b) the requested information; and (c) the facts used to replace the missing information.⁶³⁵ MOFCOM disclosed all these essential facts through a number of publicly available documents.⁶³⁶

7.400. We see no basis in the text or context of Article 6.9 for distinguishing between cooperating and non-cooperating interested parties for purposes of the disclosure requirement.⁶³⁷ Article 6.9 refers to "all interested parties" without making any distinctions among them. The facts that are "essential" may vary from interested party to interested party, but it is not the characterization of the particular interested party as cooperating or not that determines whether facts are "essential", but the relevance of those facts to the determinations to be made by the investigating authority. China refers to the use of the words "whenever practicable" in Article 6.4 and the disciplines on use of facts available under Article 6.8 to argue that Article 6.9 has different obligations in respect of cooperating and non-cooperating parties.⁶³⁸ Article 6.9 does not contain the words "whenever practicable", nor does it refer to either Article 6.4 or 6.8. So the relevance of the words "whenever

⁶²⁹ United States' second written submission, fn 93.

⁶³⁰ These two items of information were "[t]he quantity and cost of free products listed in 'other products' and 'processing costs'. (China's response to Panel question No. 18, para. 45).

⁶³¹ Disclosure of Essential Facts upon Which the Re-determination in DS 427 of Dumping and Subsidy on Broiler Products was Made (29 May 2014), (Exhibit CHN-33 (translated version)); Redacted Version of Disclosure Narrative Provided to Keystone (29 May 2014), (Exhibit CHN-48).

⁶³² The parties do however disagree as to which essential facts an investigating authority must disclose to a non-cooperating interested party, see below para. 7.399.

⁶³³ Panel Report, *China – Broiler Products*, paras. 7.314-7.323.

⁶³⁴ China's second written submission, para. 119; response to Panel question No. 17, paras. 41-43.

⁶³⁵ China's first written submission, paras. 112 and 121; second written submission, paras. 119-120.

⁶³⁶ China's first written submission, paras. 118-120; second written submission, paras. 120-122.

⁶³⁷ But see China's response to Panel question No. 17, paras. 42-43.

⁶³⁸ China's response to Panel question No. 17, para. 43.

practicable", found only in Article 6.4, and the disciplines on facts available specifically addressed in Article 6.8 to a Member's obligations under Article 6.9 is not self-evident.⁶³⁹

7.401. Regarding the distinction between cooperating and non-cooperating interested parties, China also relies on our findings in the original report concerning the disclosure of essential facts pertaining to the "residual" dumping margin for "unknown" exporters based on facts available.⁶⁴⁰ We do not share China's understanding of our findings. We did not limit the universe of facts to be disclosed when using facts available to the matters China refers to above at paragraph 7.399. We specifically found that Article 6.9 required disclosure of the facts that are "used to replace the missing information".⁶⁴¹ These are clearly any facts that are significant in reaching the decision to impose duties and, therefore, constitute essential facts. Thus, we clarified the notion of essential facts in the case of use of facts available by also requiring the disclosure of the reasons for resort to facts available and the information that was requested from the interested party. In any event, our findings concerned the particular "essential facts" that the investigating authority arrived at through the use of facts available; they did not concern the disclosure of other essential facts to a non-cooperating interested party that are not based on or themselves facts available. In this instance, MOFCOM used facts available only to replace two particular items of information. For the rest, it used Keystone's information already on the record from the original investigation. Our findings in the original dispute could therefore only be relevant to the two specific items of information in respect of which MOFCOM used facts available in the reinvestigation, not to the rest of Keystone's essential facts.

7.402. China argues that it disclosed the essential facts through a public disclosure of non-confidential information of Keystone.⁶⁴² In this context, China, however, refers to the disclosure of information that is not the subject matter of the US claim. The US claim is not about the disclosure of non-confidential data through publicly available documents. Rather, it relates to Keystone's confidential data that the United States argues MOFCOM was required to make available to Keystone. In respect of the confidential information, China acknowledges that MOFCOM would have disclosed these confidential data to Keystone or its legal agents as essential facts had Keystone responded or provided a power of attorney authorizing its legal agents. According to China:

- a. MOFCOM was required to maintain confidentiality of the data at issue;
- b. Keystone did not respond to MOFCOM's questionnaire;
- c. Keystone did not have an authorized legal agent; and
- d. MOFCOM was legally precluded from making the required disclosure.

7.403. The United States does not argue that MOFCOM was under a positive obligation to actively seek out Keystone and inform it of the data at issue. Rather, the US challenge concentrates on the fact that MOFCOM did not disclose the information to Keystone's putative legal agents on the basis that it could not confirm that they were authorized to receive confidential data on behalf of Keystone.

7.404. The issue for us in this dispute therefore concerns MOFCOM's obligation to "inform" Keystone of the essential facts in the circumstances of this case. Below, we set out the sequence of events as we understand it:

⁶³⁹ In any event, nothing in the phrase "whenever practicable" as used in Article 6.4 with respect to the obligation for investigating authorities to provide opportunities to all interested parties to see information suggests such that it is intended to distinguish between cooperating and non-cooperating interested parties even in the context of Article 6.4 itself. Similarly, we fail to see, and China has not explained, how the fact that Article 6.8 establishes the conditions for use of facts available supports distinguishing between cooperating and non-cooperating interested parties in the context of Article 6.9. We recognize that paragraph 7 of Annex II of the Anti-Dumping Agreement does refer to an interested party that "does not cooperate" in the context of the use of facts available, but nothing in that provision has any bearing on the obligation to disclose essential facts pursuant to Article 6.9.

⁶⁴⁰ Panel Report, *China – Broiler Products*, para. 7.317; see above, para. 7.368.

⁶⁴¹ Panel Report, *China – Broiler Products*, para. 7.317. (emphasis added)

⁶⁴² China's second written submission, para. 122; responses to Panel question No. 18, para. 46, and No. 19(c)(ii), para. 57.

- a. On 7 January 2014, MOFCOM issued an anti-dumping questionnaire to Keystone in the reinvestigation.⁶⁴³ Keystone did not respond.

- b. On 16 May 2014, MOFCOM sent a letter to the US Embassy in Beijing stating:

As Keystone Foods LLC has failed to submit its questionnaire response for the reinvestigation and also failed to participate in other dumping and subsidy reinvestigation procedures, the investigating authority is unable to disclose the basic facts supporting the determination regarding the reinvestigation. According to the way of contact reported by the company in the original questionnaire response, we have sent a letter about this to the company. In order to ensure the company's right of comments on the disclosure, we request you to assist in notifying the company to contact with the investigating authority as soon as possible.⁶⁴⁴

- c. On 20 May 2014, the US Embassy forwarded a "memorandum" from the US law firm Steptoe & Johnson LLP (Steptoe) that had represented Keystone in the original investigation purporting to give authorization for MOFCOM to serve any disclosure to Thomas J. Trendl at Steptoe or Scott Lindsay at the US Embassy in Beijing:

With explicit authorization and approval from Keystone Foods, by this memorandum, Keystone Foods notifies MOFCOM that it may serve any and all disclosure documents in this matter on Thomas J. Trendl, Partner in Steptoe & Johnson's Washington, D.C. office or Scott Lindsay, Enforcement & Compliance, US Embassy. Their respective full contact information is provided below. Please contact Thomas J. Trendl should you have any questions.⁶⁴⁵

- d. On 22 May 2014, MOFCOM responded to the memorandum by letter to the US Embassy, stating that:

[T]he memorandum did not include Keystone Foods' power of attorney authorizing the law firm to represent the company in responding to the reinvestigation; nor did the memorandum include Keystone Foods' power of attorney authorizing the lawyers of the law firm to serve as the legal counsels of the company or authorizing Mr. Scott Lindsay to receive any disclosure documents on behalf of the company.

To protect the business confidential information of the company, according to the relevant provision of the *Anti-dumping Regulations of the*

⁶⁴³ According to China, MOFCOM sent the reinvestigation questionnaire to the Chinese law firm Jincheng Tongda & Neal (JT&N) that had represented Keystone during the original investigation. (China's response to Panel question No. 19(a), paras. 47-48 (referring to Redetermination, (Exhibit CHN-1 (translated version)), pp. 5 and 7)). China asserts that JT&N transmitted the questionnaire to Keystone, confirmed to MOFCOM that Keystone had received it and told MOFCOM that Keystone would not respond to it. (Responses to Panel question No. 19(b), para. 50, and No. 19(c)(ii), para. 55; see also the acknowledgement of receipt of Keystone's questionnaire signed by JT&N at Registration of Receipt of initial questionnaire by three law firms, (Exhibit CHN-50)). At the same time, China asserts that "JT&N confirmed that it no longer represented Keystone in the re-investigation". (Response to Panel question No. 19(b), para. 50; see also Email from Mr Fu Xin of JT&N dated 6 June 2017 to Mr Yu Jinbao on issues concerning the reinvestigation, (Exhibit CHN-57), apparently for purposes of this Panel proceeding, stating that JT&N was not authorized to act for Keystone during the reinvestigation). The United States, in turn, presented an alleged authorization by Keystone of Mr Fu at JT&N to receive disclosure documents from MOFCOM during the reinvestigation. (Memorandum from Keystone dated 21 May 2014 on service of Keystone-specific disclosure documents, (Exhibit USA-35); see below China's procedural objection and our assessment of this exhibit's probative value at paras. 7.410-7.413). Be that as it may, however, the United States' acknowledges that "[i]n the reinvestigation, MOFCOM sent a questionnaire to Keystone ... but Keystone declined to cooperate." (United States' second written submission, fn 93).

⁶⁴⁴ Letter from MOFCOM dated 16 May 2014 on disclosure of the redetermination, (Exhibit USA-5 (translated version)), p. 2; Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

⁶⁴⁵ Memorandum from Keystone dated 20 May 2014 on service of Keystone-specific disclosure documents, (Exhibits CHN-10/USA-29 (translated version)). See also Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

People's Republic of China, without the company's explicit authorization, the Investigating Authority is unable to provide the disclosure relating to the company to any third party. Given the tight schedule of the investigation, we ask that Keystone Foods be noted the requirement on comment period.⁶⁴⁶

- e. In a "memorandum" dated 21 May 2014, signed by Crystal Graham, vice president finance of Keystone, and, according to the United States, faxed to MOFCOM on 29 May 2014, Keystone:

[N]otifies and authorizes MOFCOM that it may serve any and all disclosure documents in this matter to Steptoe & Johnson, LLP and Jincheng Tongda & Neal ("JT&N"). Their respective full contact information is provided below.⁶⁴⁷

The contact information is given in respect of Eric C. Emerson at Steptoe's Beijing office and Fu Xin at JT&N.

- f. On 29 May 2014, MOFCOM made a public disclosure in respect of Keystone's non-confidential information.⁶⁴⁸

7.405. At issue between the parties is whether MOFCOM violated Article 6.9 because it failed to disclose the confidential data in question to any agent allegedly representing Keystone, and in particular Steptoe. According to China, MOFCOM did not receive the additional documentation it was seeking as proof of appointment of agent and for that reason alone MOFCOM was not in a position to disclose Keystone's confidential data to an unauthorized third party.⁶⁴⁹ The United States argues that Keystone had provided proof of authorization to MOFCOM so that it should have disclosed the data at issue to Steptoe.

7.406. MOFCOM's request for proof of appointment as agent was made, according to China, pursuant to an existing set of regulations. The United States does not question the fact of the legal requirement. It does not argue that such a legal requirement in itself leads to a biased or unobjective outcome and it does not allege that in this instance MOFCOM applied the regulations in a biased manner or unobjectively. Rather, it appears to argue that in objectively abiding by an otherwise unobjectionable legal requirement and not disclosing Keystone's information to a third party, MOFCOM acted inconsistently with Article 6.9.

7.407. The issue for us to resolve therefore is whether Keystone provided proof of authorization of its purported agent, in particular its legal counsel, to MOFCOM.

7.408. The United States relies on the "memorandum" of 20 May 2014. On at least three occasions in this proceeding, it characterized this document as a "power of attorney"; it also referred to it as an "authorization".⁶⁵⁰ There is no evidence before us as to what constitutes a "power of attorney" or an "authorization" in US or Chinese law. But it is not necessary for us to

⁶⁴⁶ Letter from MOFCOM dated 22 May 2014 to US Embassy on authorisation on the reinvestigation disclosure of Keystone, (Exhibit CHN-11 (translated version)) (emphasis original); see also Letter from MOFCOM dated 22 May 2014 to the US Embassy on the Keystone-specific disclosure authorisation, (Exhibit USA-30 (translated version)), relating to the same document.

⁶⁴⁷ Memorandum from Keystone dated 21 May 2014 on service of Keystone-specific disclosure documents, (Exhibit USA-35); see below China's procedural objection and our assessment of this exhibit's probative value at paras. 7.410-7.413.

⁶⁴⁸ Disclosure of Essential Facts upon Which the Re-determination in DS 427 of Dumping and Subsidy on Broiler Products was Made (29 May 2014), (Exhibit CHN-33 (translated version)); Redacted Version of Disclosure Narrative Provided to Keystone (29 May 2014), (Exhibit CHN-48).

⁶⁴⁹ We do not agree with the United States' view that "China's argument that the purported lack of authorization somehow prevented disclosure ... is simply a *post hoc* excuse." (Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, para. 3). The United States' own Exhibits USA-9, p. 7 and USA-30 demonstrate that the lack of authorization was indeed MOFCOM's concern at the time, as acknowledged by the United States in its second written submission, para. 87.

⁶⁵⁰ United States' second written submission, para. 87; opening statement at the meeting of the Panel, para. 67; and response to Panel question No. 20, para. 38.

resolve that question. The "memorandum" of 20 May 2014 is a letter signed by Thomas J. Trendl at Steptoe stating that MOFCOM may serve Keystone's disclosure to him or Scott Lindsay at the US Embassy. There is a reference in the "memorandum" to an "authorization" by Keystone, but it is not accompanied or followed by Keystone's authorization of Mr Trendl and/or Mr Lindsay. As a matter of fact, we find that mere assertion by legal counsel of agency is not proof of an agency relationship.⁶⁵¹ As a matter of law, we find that MOFCOM did not act unreasonably in not accepting as proof of an agency relationship a mere assertion by the alleged agent itself.

7.409. In its letter of 22 May 2014 to the US Embassy, MOFCOM communicated its concern about lack of authorization to disclose Keystone's confidential information, indicated that in these circumstances it could not disclose the confidential information and urged Keystone to respond. We have no reason to believe that this letter did not reach Keystone⁶⁵², nor does the United States argue that it did not. Rather, the United States acknowledges that, "to [its] knowledge, Keystone did not respond to MOFCOM's letter".⁶⁵³

7.410. The United States also relies on a "memorandum" from Keystone, dated 21 May 2014 and allegedly faxed to MOFCOM on 29 May 2014, authorizing Eric C. Emerson at Steptoe's Beijing office and Fu Xin at JT&N to receive Keystone's disclosure. The United States submitted this "memorandum" as Exhibit USA-35 in its comments on China's responses to the Panel's written questions.⁶⁵⁴ Relying on this exhibit, the United States asserts that it "has reason to believe that the statements proffered by China [in respect of the lack of proof of authorization of Keystone's purported representatives] are not completely accurate".⁶⁵⁵ China objects to the submission of Exhibit USA-35 arguing that under the Panel's Working Procedures all evidence should have been submitted by the substantive meeting of the Panel with the parties and that the United States did not demonstrate any "good cause" for a late submission.⁶⁵⁶

7.411. We recall the arguments of the United States about the late submission of evidence by China and in particular that "China's provision of exhibits at this late stage raise concerns relating to procedural fairness".⁶⁵⁷ The Panel's Working Procedures in this proceeding provide that:

Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause.⁶⁵⁸

7.412. In this instance, the position of China with respect to the issue of the (lack of) authorization of Keystone's purported agents has been clear since 2014 and, in the context of this dispute, at least since the first written submission of China. Moreover, we put a specific question on this very subject to the United States both orally at the substantive meeting and subsequently in writing. The United States has had three years and multiple opportunities to clarify this specific point. It is therefore not entirely clear to us why the United States would be seeking to "confirm[] China's account" only at a late stage of the proceedings and, allegedly, only in respect of China's responses to our questions.⁶⁵⁹ The United States even acknowledges that it submitted the exhibit

⁶⁵¹ The United States emphasizes the request in the "memorandum" to "contact 'Thomas J. Trendl should you [MOFCOM] have any questions'". (Response to Panel question No. 21, para. 39; Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, fn 4). But neither this request, nor MOFCOM's alleged failure to contact Mr Trendl, detract from our conclusion that mere assertion by legal counsel of agency is not proof of an agency relationship.

⁶⁵² The exchange of communications from 16 and 20 May 2014 supports the conclusion that Keystone also received the letter of 22 May 2014.

⁶⁵³ United States' response to Panel question No. 21, para. 39.

⁶⁵⁴ In an e-mail of 25 May 2017 to the Chairperson of the Panel, the United States clarified that the United States relies on Exhibit USA-35 to support the assertions made at paragraph 38 of its comments on China's response to Panel question No. 19.

⁶⁵⁵ United States' comments on China's response to Panel question No. 19, para. 38.

⁶⁵⁶ Letter from China dated 12 June 2017 to the Chairperson of the Panel, pp. 1-3.

⁶⁵⁷ United States' general comments on China's response to Panel questions, paras. 1-4.

⁶⁵⁸ Working Procedures of the Panel (adopted on 9 November 2016), para. 8.

⁶⁵⁹ United States' comments on China's response to Panel question No. 19, para. 38; Letter from the United States dated 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, paras. 6-7.

to us in order to address an assertion that China made in its second written submission.⁶⁶⁰ We see no reason why the United States should be considered to have had, and the United States neither asserted nor demonstrated that it had, "good cause" to adduce evidence in its comments on China's responses to the Panel's written questions in order to rebut an assertion China had already made, by the United States' own admission, in the second written submission.

7.413. Be that as it may, it is not necessary for us to make a finding on whether we may or should accept the exhibit, because we do not in any event find it persuasive. As the United States itself observes in respect of China's arguments relating to MOFCOM's online index⁶⁶¹, there are no time-stamps or other records indicating when the "memorandum" was in fact faxed (or otherwise sent) to MOFCOM⁶⁶² – and here, we are not dealing with an internal receipt but an alleged communication between an interested party and the investigating authority. The exhibit does not mention a number to which it could have been faxed or sent. The United States argues that it has not found a record of MOFCOM's response⁶⁶³; but there is also no record of follow-up by the US Counsel or indeed by the US Government asserting to MOFCOM that the condition for disclosure had been met. In fact, and in contrast to the "memorandum" of 20 May 2014, the record of the reinvestigation does not mention the "memorandum" of 21 May 2014 allegedly faxed to MOFCOM on 29 May 2014.⁶⁶⁴ We also note that the evidence demonstrates that on 16 and 22 May 2014, MOFCOM took repeated action to contact Keystone in respect of the disclosure. In its letter of 22 May 2014, it specifically responded to the "memorandum" of 20 May 2014 and addressed the lack of authorization of Keystone's purported agent. Against this background, MOFCOM's silence, after reaching out to Keystone on this very issue twice, in respect of an authorization allegedly provided to it on 29 May 2014 and the absence of follow up by Keystone, its counsel or the US Embassy is telling, as is the fact that MOFCOM listed the "memorandum" of 20 May 2014 in its records but left out any reference to the "memorandum" of 21 May 2014. For these reasons, we are not persuaded that Exhibit USA-35 establishes that Keystone did, in fact, provide MOFCOM with proof of authorization of its agents.

7.414. In the light of the above, we find as a matter of fact that:

- a. MOFCOM disclosed non-confidential information in respect of Keystone;
- b. MOFCOM did not disclose confidential information in respect of Keystone; and
- c. when approached by certain persons purporting to be agents of Keystone for the purposes of disclosure, MOFCOM sought proof of authorization of agency.

7.415. In our view, it was not unreasonable for MOFCOM to consider that the memorandum of 20 May 2014 by Steptoe did not amount to such authorization. We further find that the United States has not established that Keystone provided such proof of authorization to MOFCOM at another time in another document.

7.416. In these circumstances, we find that MOFCOM did not act in a biased or unobjective manner in finding that the purported agents of Keystone were not authorized to receive disclosure of Keystone's confidential data at issue. Accordingly, we conclude that the United States has not demonstrated that MOFCOM's admitted failure to inform Keystone of the essential facts at issue was inconsistent with Article 6.9 of the Anti-Dumping Agreement.

7.9.4 Conclusion

7.417. We find that the United States has not established that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in respect of the failure to disclose data and

⁶⁶⁰ At paragraph 2 of its letter of 26 June 2017 to the Chairperson commenting on China's letter of 12 June 2017 to the Chairperson, the United States argues that "[t]he exhibit rebuts a specific assertion made by China – that MOFCOM lacked an authorization signed by Keystone Foods" and in footnote 2 to this statement it refers to "e.g., China, Second Written Submission, para. 114 ('No other evidence was submitted that Keystone in fact actually authorized Steptoe & Johnson to act on its behalf, and neither Keystone nor the firm took any additional steps nor filed any additional information or explanation.')" (emphasis added)

⁶⁶¹ United States' comments on China's response to Panel question No. 11, para. 24.

⁶⁶² China disputes that MOFCOM had received the alleged fax. (Letter from China dated 12 June 2017 to the Chairperson of the Panel, p. 2).

⁶⁶³ United States' comments on China's response to Panel question No. 19, para. 39.

⁶⁶⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 7.

calculations from the original investigation and/or the reinvestigation underlying the dumping margins for Pilgrim's Pride and Keystone.

7.10 Article 9.4(i) of the Anti-Dumping Agreement: maximum amount of anti-dumping duty for imports from exporters not individually examined

7.418. The United States alleges that MOFCOM acted inconsistently with Article 9.4(i) of the Anti-Dumping Agreement because, in the redetermination, it set the "residual" rate⁶⁶⁵ for unknown exporters or producers⁶⁶⁶ in excess of the weighted average margin of dumping established with respect to exporters individually examined under Article 6.10 of the Anti-Dumping Agreement.

7.10.1 Findings of the Panel in the original report

7.419. In the original report, we made findings regarding the use of facts available under Article 6.8 and Annex II of the Anti-Dumping Agreement in establishing the "residual" rate.⁶⁶⁷ In the original investigation, MOFCOM had used facts available to establish a "residual" rate of 105.4% for US exporters that had not registered with MOFCOM in response to the Notice of Initiation and, as a consequence, were considered unknown, and also did not file a questionnaire response.⁶⁶⁸

7.420. We found that MOFCOM's Notice of Initiation and registration requirement were sufficient to inform foreign exporters of the information required of them and of the possible use of facts available if they did not supply that information to MOFCOM within a reasonable time.⁶⁶⁹ We thus considered that MOFCOM had fulfilled the conditions set forth in paragraph 1 of Annex II, allowing it to resort to facts available in establishing an anti-dumping duty rate for exporters that did not register with MOFCOM and provide requested information.⁶⁷⁰

7.421. Nevertheless, we found that MOFCOM acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in the manner in which it used facts available in determining that rate.⁶⁷¹ We found that the determination failed to sufficiently explain which facts on the record MOFCOM used to calculate the "residual" rate.

7.10.2 MOFCOM's findings in the redetermination

7.422. On 25 December 2013, MOFCOM issued a Notice of Initiation in respect of the reinvestigation.⁶⁷² Unlike in the original investigation, this Notice of Initiation did not set forth a requirement for interested parties to register or specify information that would be required.

7.423. In the redetermination, MOFCOM established anti-dumping duty rates for three groups of exporters:

⁶⁶⁵ In both its original investigation and the reinvestigation, in addition to determining individual rates for certain exporters individually examined, MOFCOM established a separate "all others" rate in accordance with Article 9.4 of the Anti-Dumping Agreement which it applied to exporters that had registered following the Notice of Initiation in the original investigation, and a second "all others" rate, based on facts available, which applied to any foreign exporter or producer that had not registered in the original investigation. While MOFCOM, and the parties in this dispute, refer to this second rate as an "all others" rate, in order to avoid the confusion which may arise from referring to two different anti-dumping duty rates established on different bases and applied to different categories of foreign exporters or producers, we will, as some other panels have, refer to this second "all others" rate as a "residual" rate. We note that the Anti-Dumping Agreement does not refer to either an "all others" rate or a "residual" rate, and thus these terms have no legal significance. We use them in this report in order to more clearly distinguish the rate applicable to exporters or producers that are not individually examined pursuant to Article 6.10 of the Anti-Dumping Agreement and for whom a separate anti-dumping duty rate is established under Article 9.4 ("all others" rate) from the rate that is at issue here ("residual" rate).

⁶⁶⁶ References to "exporters" shall be understood to include foreign producers in this context.

⁶⁶⁷ Panel Report, *China – Broiler Products*, paras. 7.298-7.313.

⁶⁶⁸ Panel Report, *China – Broiler Products*, paras. 7.276 and 7.278.

⁶⁶⁹ Panel Report, *China – Broiler Products*, para. 7.306.

⁶⁷⁰ Panel Report, *China – Broiler Products*, para. 7.307.

⁶⁷¹ Panel Report, *China – Broiler Products*, paras. 7.308-7.313.

⁶⁷² Announcement No. 88, (Exhibit USA-1 (translated version)).

- a. individual dumping margins for each examined exporter⁶⁷³;
- b. a single dumping margin for other exporters which had registered but were not individually examined in the original investigation, based on the weighted average of the margins of the examined exporters⁶⁷⁴; and
- c. a single "residual" anti-dumping rate for all other US exporters.⁶⁷⁵

7.424. This latter "residual" rate applied to unknown exporters that "did not register for participating in the [original] investigation".⁶⁷⁶ In the reinvestigation, MOFCOM did not seek out or ask these exporters to cooperate, and as noted, there was no provision for registration with MOFCOM in the context of the reinvestigation. In the redetermination, MOFCOM indicated that:

Regarding all other U.S. companies who did not respond to, nor did they submit [*sic*] the questionnaire responses, in accordance with Article 21 of the *Anti-Dumping Regulation*, the Investigating Authority decides to use the facts available and the best information available to determine their normal value and export price.⁶⁷⁷

MOFCOM explained that it had decided "to use the evidence and materials of Pilgrim's Pride Corporation to determine the normal value, export price, price adjustment items and CIF prices for all other U.S. companies."⁶⁷⁸ MOFCOM established the "residual" rate based on the rate determined for Pilgrim's Pride, 73.8%, the highest rate found for any of the examined exporters.

7.10.3 Main arguments of the parties

7.10.3.1 United States

7.425. Article 9.4(i) imposes a ceiling on the "residual" rate based on facts available in certain circumstances. This does not mean that Article 9.4 imposes a general cap on rates determined on the basis of Article 6.8; and it does not mean that Article 9.4 applies to unknown exporters that do not come forward when an investigating authority requires registration to identify and select exporters for the limited investigation.⁶⁷⁹ Rather, on the facts of this case, the "residual" rate in the redetermination was in excess of the ceiling established by Article 9.4(i).⁶⁸⁰

7.426. In the original investigation, MOFCOM required foreign exporters to register in order to identify all companies from among which MOFCOM could select for limited examination. But in the reinvestigation MOFCOM did not provide for a similar process of registration.⁶⁸¹ MOFCOM had already limited the investigation during the original investigation to certain exporters and did not reopen the selection of the exporters for examination during the reinvestigation. Unlike in the original investigation, MOFCOM did not invite any exporters to register and cooperate.⁶⁸² In these

⁶⁷³ Redetermination, (Exhibit CHN-1 (translated version)), appendix II, p. 89.

⁶⁷⁴ Redetermination, (Exhibit CHN-1 (translated version)), p. 56 and appendix II, pp. 89-90.

⁶⁷⁵ Redetermination, (Exhibit CHN-1 (translated version)), p. 56 and appendix II, p. 90.

⁶⁷⁶ Redetermination, (Exhibit CHN-1 (translated version)), p. 57.

⁶⁷⁷ Redetermination, (Exhibit CHN-1 (translated version)), p. 56. As in the original investigation (Panel Report, *China – Broiler Products*, para. 7.274) the examined companies in the reinvestigation were Keystone, Tyson and Pilgrim's Pride, although the latter was not reinvestigated during the reinvestigation. Questionnaires were only sent to Keystone and Tyson. (Redetermination, (Exhibit CHN-1 (translated version)), p. 5). Consequently, and as in the original dispute, the use of facts available for the "all others" rate did not attach to an alleged failure of "all other" US companies to submit questionnaire responses, but to the failure to register for the investigation.

⁶⁷⁸ Redetermination, (Exhibit CHN-1 (translated version)), p. 57.

⁶⁷⁹ United States' second written submission, para. 125: "[T]he exporters subject to MOFCOM's ["residual"] rate were not asked to cooperate in MOFCOM's reinvestigation, and to apply the highest antidumping duty rate to them is inconsistent with Article 9.4", and fn 171: "The key point, consistent with the text of Article 9.4, is that [*sic*] applies to producers not subject to the examination period. **The United States agrees the situation would be different if a particular party was solicited information but declined to do so.**" (emphasis added)

⁶⁸⁰ United States' first written submission, para. 104.

⁶⁸¹ United States' response to the oral questions of the Panel at the meeting.

⁶⁸² United States' second written submission, para. 125; see also response to the Panel question No. 44, para. 92.

circumstances, MOFCOM applied the 73.8% facts available rate to exporters who did not have any opportunity to cooperate in the reinvestigation. In this instance, where "sampling" has already been done, all exporters that are not subject to the examination and that were not required to register, fall under the protection of Article 9.4(i) with respect to the ceiling.

7.427. China's position that this provision does not apply to non-cooperative exporters or producers is inconsistent with the plain text of Article 9.4.⁶⁸³ The Panel should not follow the reasoning developed in *EC – Salmon (Norway)* and invoked by China. The findings made in *EC – Salmon (Norway)* create an "artificial distinction between exporters or producers that register with an investigating authority and who are not examined – and exporter [*sic*] or producers that are not simply examined".⁶⁸⁴ Moreover, as the Appellate Body in *US – Hot Rolled Steel* stated, Article 9.4 applies to exporters or producers who were not asked to cooperate in the investigation.

7.10.3.2 China

7.428. In line with the panel's findings in *EC – Salmon (Norway)*, Article 9.4 only governs the maximum amount of anti-dumping duties that may be imposed on and collected from unexamined but cooperating exporters; it does not apply to non-cooperating exporters.⁶⁸⁵ The "residual" rate challenged by the United States only applies to exporters that did not register and identify themselves for the purpose of the investigation; it does not apply to companies that cooperated but were not selected for the limited examination, for which a separate margin was determined in accordance with Article 9.4. Exporters that did not register and identify themselves for the purpose of the investigation are no different from non-cooperating exporters to which Article 9.4 does not apply.⁶⁸⁶ Article 9.4(i) is therefore also inapplicable to the rate at issue here.

7.429. As part of its implementation obligation, MOFCOM was not required to, and in fact did not, offer the "unknown" exporters a second opportunity to cooperate during the reinvestigation.⁶⁸⁷ In order to bring China into compliance with its WTO obligations, MOFCOM did not have to redo the entire investigation; in particular MOFCOM did not need to ask the unknown producers again to register.⁶⁸⁸

7.10.4 Evaluation

7.430. In the original report we confirmed that a "residual" rate for unknown exporters can be based on facts available, and the use of facts available in such a case is, in turn, subject to the disciplines of Article 6.8 and Annex II. In this compliance dispute, we are presented with a different but related question. The issue before us now is whether, in the particular circumstances of this case, the ceiling provided for in Article 9.4(i) applies to the "residual" rate established in the reinvestigation for exporters considered "unknown" because they had not registered in the original investigation.

7.10.4.1 The law

7.431. Article 9.4 of the Anti-Dumping Agreement provides:

When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or ... [.]

⁶⁸³ United States' second written submission, paras. 123 and 125.

⁶⁸⁴ United States' second written submission, fn 171.

⁶⁸⁵ China's first written submission, paras. 243 and 250 (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.431-7.433).

⁶⁸⁶ China's first written submission, para. 248.

⁶⁸⁷ China's second written submission, para. 220; opening statement at the meeting of the Panel, para. 40.

⁶⁸⁸ China's response to the oral questions of the Panel at the meeting.

7.432. Article 9.4 regulates the maximum amount of anti-dumping duty that may be imposed or collected in respect of imports from exporters that were not individually examined pursuant to Article 6.10.⁶⁸⁹ Where, in accordance with Article 6.10, an investigating authority limits its examination to a selected group of exporters, the investigating authority may determine an anti-dumping duty rate to be applied to those exporters who were not included in the group selected for individual examination group, subject to the conditions set forth in Article 9.4, including the ceiling on the duty rate.⁶⁹⁰ However, Article 9.4 does not specifically address the duty rate that may be applied to exporters not known to the investigating authority and which therefore are not available to be selected for individual examination.

7.10.4.2 Analysis

7.433. As we understand it, the US claim is premised on the assertions that:

- a. the distinction between known and unknown exporters that MOFCOM properly made in the original investigation did not carry over into the reinvestigation; and
- b. the factual predicate for determining unknown exporters in the original investigation, i.e. that they had not registered, did not hold in the reinvestigation, and therefore the duty-rate cap in Article 9.4(i) applied to all unexamined exporters, including those that were "unknown" to MOFCOM.

7.434. As we understand it, the United States does not argue that China was required to undertake an entirely new investigation as part of its implementation obligation. In fact, neither the Anti-Dumping Agreement nor the SCM Agreement, nor any other relevant WTO agreement, provides any guidance regarding how adopted recommendations and rulings of the DSB following findings of inconsistency with the Anti-Dumping and/or SCM Agreements are to be implemented. Implementation of DSB recommendations and rulings is left, in the first instance⁶⁹¹, to the discretion of the Member in question. Some, such as the United States, the European Union, and China itself, have specific legal instruments setting out procedures to be followed for implementation following findings of inconsistency with the Anti-Dumping and/or SCM Agreements.⁶⁹² China's rules allow MOFCOM to conduct a reinvestigation for implementation purposes, which MOFCOM did in this case. China's rules do not require, and MOFCOM in this instance did not ask for, re-registration by the exporters.

7.435. Our specific findings under Article 6.8 in the original dispute frame China's obligation to bring itself into conformity in respect of the "residual" rate established on facts available. In the present context, the key points from our findings are:

- a. in the original investigation, the Notice of Initiation required exporters to register and to provide certain information;
- b. MOFCOM was entitled to distinguish between known and unknown exporters – those that did not register – in establishing anti-dumping duty rates for these two groups; and

⁶⁸⁹ Article 6.10 provides:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

⁶⁹⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 115.

⁶⁹¹ The second sentence of Article 19.1 of the DSU allows for a panel or the Appellate Body to suggest ways in which a Member could implement its recommendations. Article 21.3 of the DSU provides for a Member to "inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". It has been recognized in jurisprudence that Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation. (Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.11).

⁶⁹² See the reference to the "Interim Rules for Implementing the World Trade Organization Rulings on Trade Remedy Disputes" in Announcement No. 88, (Exhibit USA-1 (translated version)).

- c. in the circumstances of the original investigation, MOFCOM could apply a "residual" anti-dumping duty based on facts available in respect of exporters that did not register and thus did not provide requested information – the "unknown" exporters.

7.436. China's obligation to bring its measure into conformity with the Anti-Dumping Agreement, and thus comply with the recommendations and rulings of the DSB, existed in respect of the aspects of the measure found to be WTO inconsistent.⁶⁹³ China limited the reinvestigation to those matters it considered necessary to bring MOFCOM's original determination into conformity with the Anti-Dumping Agreement. With regard to the duty rate at issue here, this involved ensuring that the manner in which MOFCOM selected the facts available on the basis of which it established the duty rate to be applied to "unknown" exporters was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. The United States does not argue that anything in the Anti-Dumping Agreement, or any other relevant agreement, required China to relaunch the investigation as if it were a whole new investigation or, specifically on the facts of this case, to repeat the original, or provide for a new, registration mechanism to give "unknown" exporters a second chance to provide information.

7.437. That China issued a new Notice of Initiation with respect to the reinvestigation does not necessarily mean that in the reinvestigation, MOFCOM was required to re-open or undertake a new process for establishing which exporters would be examined individually. In fact, in the reinvestigation MOFCOM did not change its approach with respect to the US exporters to be individually examined, the exporters that had registered but were not examined, and the "unknown" foreign exporters or producers as determined in the original determination. For the purpose specifically of applying the ceiling in Article 9.4, the absence of a registration requirement in the reinvestigation does not reopen the question of which exporters may be treated as known but unexamined, and which may be treated as unknown. MOFCOM had originally limited the examination to three selected exporters and continued to do so in the reinvestigation. As far as we are aware, no previously "unknown" exporter sought to participate or provide information in the reinvestigation. In these circumstances, we see no basis to conclude that MOFCOM was somehow precluded in the reinvestigation from establishing a duty rate based on facts available for all other "unknown" exporters without regard to the limitation set forth in Article 9.4(i).⁶⁹⁴

7.10.5 Conclusion

7.438. In the light of the above, we find that the United States has not established that MOFCOM failed to comply with Article 9.4(i) of the Anti-Dumping Agreement in the reinvestigation by determining a "residual" duty rate based on facts available to be applied to "unknown" exporters.

7.11 Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement: public notice

7.11.1 Introduction

7.439. The United States alleges that MOFCOM failed to address in the redetermination key causation arguments raised by US respondents in the reinvestigation. This is inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement⁶⁹⁵, which require investigating authorities to issue public notices of their final determinations that include "all relevant information on matters of fact and law" material to their determinations, including the reasons for the investigating authority's acceptance or rejection of relevant arguments or claims made by interested parties.

7.11.2 Main arguments of the parties

7.11.2.1 United States

7.440. US respondents raised the following arguments that were material to MOFCOM's determination of causation under Articles 3.5 and 15.5:

⁶⁹³ See, e.g. Award of the Arbitrator, *Argentina – Hides and Leather (Article 21.3(c))*, paras. 40-41.

⁶⁹⁴ We note in this context that the United States has not made any claim under Article 6.8 or Annex II of the Anti-Dumping Agreement with respect to the "residual" rate established.

⁶⁹⁵ We will refer to these as Articles 12.2, 12.2.2, 22.3, and 22.5.

- a. there could be no link between subject imports and material injury because subject import volume increased entirely at the expense of non-subject imports and did not take any market share from the domestic industry⁶⁹⁶; and
- b. subject imports could not have had an adverse impact on the domestic industry because over 40% of subject imports consisted of chicken feet, which Chinese producers were incapable of supplying in adequate quantities.⁶⁹⁷

7.441. MOFCOM rejected these arguments without providing a sufficiently detailed or sound explanation of its reasoning in the public notices of the final determinations. MOFCOM thus failed to address in the redetermination key causation arguments raised by US respondents in the reinvestigation inconsistently with Articles 12.2, 12.2.2, 22.3, and 22.5.

7.11.2.2 China

7.442. MOFCOM sufficiently addressed both issues in the redetermination. In respect of the market share argument, the Panel in its original report did not find a violation, and MOFCOM has not done anything differently in the redetermination. In respect of the chicken feet argument, MOFCOM cross-referenced its rejection of the argument in the preliminary determination, in accordance with the findings of the Panel in the original dispute.

7.11.3 The law

7.443. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement provide:

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.444. Articles 22.3 and 22.5 of the SCM Agreement similarly provide:

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

⁶⁹⁶ United States' first written submission, paras. 212-213.

⁶⁹⁷ United States' first written submission, paras. 214-216.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

7.445. Articles 12.2 and 22.3 require that a public notice be given of any preliminary or final determination and that each such notice set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. The term "issue of fact and law considered material" includes "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination"⁶⁹⁸; what may constitute such an issue is determined by the framework of the substantive provisions of the agreement concerned.⁶⁹⁹

7.446. Articles 12.2.2 and 22.5 require that the public notice contain all relevant information on the matters of fact and law and reasons that have led to the imposition of final measures. The notice must allow an understanding of the factual basis that led to the imposition of final measures and give a reasoned account of the factual support for an authority's decision.⁷⁰⁰ Under these provisions, parties whose interests are affected by the imposition of final measures are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties, and seeks to guarantee that interested parties are able to pursue judicial review of a final determination as provided for in the agreements.⁷⁰¹ An investigating authority is required to include in the public notice sufficient detail concerning the authority's findings and conclusions to allow interested parties to assess the conformity of those findings and conclusions with domestic law and the WTO Agreement.⁷⁰²

7.11.4 Analysis and conclusion

7.447. We recall our observation in the original report to the effect that a number of other panels have exercised judicial economy in relation to claims under Articles 12.2 or 12.2.2 of the Anti-Dumping Agreement in circumstances where a substantive inconsistency with another provision of the Anti-Dumping Agreement had been found.⁷⁰³ In the original report we refrained from making substantive findings in respect of Articles 3.5 and 15.5, but proceeded to make findings under Articles 12.2, 12.2.2, 22.3, and 22.5 given their relevance "for the purposes of implementation".

7.448. We have found that the redetermination's causation analysis is inconsistent with Articles 3.5 and 15.5. In this light, we consider it is not necessary to make additional findings as to whether a substantively flawed determination was adequately set out in the public notice of that determination in accordance with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

⁶⁹⁸ Panel Report, *China – Broiler Products*, para. 7.327.

⁶⁹⁹ Panel Report, *China – Broiler Products*, para. 7.327 (referring to Appellate Body Report, *China – GOES*, para. 257).

⁷⁰⁰ Panel Report, *China – Broiler Products*, para. 7.328 (referring to Appellate Body Report, *China – GOES*, para. 256).

⁷⁰¹ Panel Report, *China – Broiler Products*, para. 7.328 (referring to Appellate Body Report, *China – GOES*, para. 258).

⁷⁰² Panel Report, *China – Broiler Products*, para. 7.328 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.459).

⁷⁰³ Panel Report, *China – Broiler Products*, para. 7.325 (referring to Panel Reports, *EC – Bed Linen*, para. 6.259; and *EC – Fasteners (China)*, para. 7.548).

7.12 Consequential claims

7.449. The United States claims that China acted inconsistently with Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994, as a consequence of the alleged violations of the Anti-Dumping Agreement and the SCM Agreement.⁷⁰⁴

7.450. China argues that the United States has not presented a *prima facie* case and therefore has not established its claims of consequential violations under Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994.⁷⁰⁵

7.451. As is clear from the panel request, the US claims under Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994 are consequential. That is, any findings of violation would necessarily depend on and follow our conclusions on violations with respect to the substantive claims brought by the United States under other provisions of the Anti-Dumping Agreement and the SCM Agreement. It is particular to the nature of a consequential claim that a *prima facie* case is effectively made out where a complaining party establishes a violation of a substantive provision and demonstrates that the consequential claim is predicated on the substantive provision. China does not dispute the predicate relationship; for its part, the United States asserted claims of consequential violations of Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994 on the basis of its substantive claims.⁷⁰⁶

7.452. China expressed concern because the United States did not set out arguments in support of its consequential claims in its first written submission.⁷⁰⁷ China did not demonstrate that it suffered any prejudice or that the panel process was impeded in any way as a result. We recall that in an Article 21.5 proceeding, both first and rebuttal submissions are submitted before the panel meets with the parties. Given the nature of consequential claims, as described above, while it would have been preferable for the United States to include its arguments in support of those claims in its first written submission⁷⁰⁸, in the circumstances of this dispute we see no reason not to consider and resolve these claims.

7.453. In the light of the foregoing, we conclude that, as a consequence of the inconsistencies with the Anti-Dumping Agreement and the SCM Agreement we have found, China acted inconsistently with Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this report, we conclude that the US claims under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement and Article 12.1.2 of the SCM Agreement are not within our terms of reference.⁷⁰⁹

8.2. For the reasons set forth in this report, we conclude that the United States has demonstrated that China acted inconsistently with:

- a. the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement;
- b. Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement;
- c. Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement;

⁷⁰⁴ United States' second written submission, para. 224.

⁷⁰⁵ China's first written submission, para. 411; second written submission, paras. 365-367.

⁷⁰⁶ United States' panel request, paras. 11, 12, and 13; second written submission, para. 224.

⁷⁰⁷ China's first written submission, para. 411; second written submission, para. 365.

⁷⁰⁸ Paragraph 6 of the Panel's Working Procedures specifies that, before the substantive meeting of the Panel with the parties, each party "shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively". The Panel retains the right to modify its working procedures.

⁷⁰⁹ See the Panel's preliminary ruling, Annex E-1.

- d. Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement;
- e. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement;
- f. Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement;
- g. Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement; and
- h. Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement and Article VI of the GATT 1994.

8.3. For the reasons set forth in this report, we conclude that the United States has not demonstrated that China acted inconsistently with:

- a. Article 6.9 of the Anti-Dumping Agreement; and
- b. Article 9.4(i) of the Anti-Dumping Agreement.

8.4. We do not consider it necessary to address the US claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

8.5. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent MOFCOM has acted inconsistently with certain provisions of the Anti-Dumping and SCM Agreements, we conclude that China has nullified or impaired benefits accruing to the United States under these agreements.

8.6. Above, we concluded that China acted inconsistently with certain provisions of the Anti-Dumping and SCM Agreements. Accordingly, China's measures taken to comply with the DSB's recommendations and rulings in the original dispute, at issue in this proceeding, are inconsistent with the relevant covered agreements. China therefore failed to comply with the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements. To the extent that China failed to comply with the recommendations and rulings of the DSB, those recommendations and rulings remain operative.
