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

(DS427)

INTEGRATED EXECUTIVE SUMMARY OF

THE PEOPLE'S REPUBLIC OF CHINA

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I. PROCEDURAL ISSUES

A. MOFCOM Did Not Breach Article 6.2 With Respect To The U.S. Request For A Public Hearing

1. The United States claims that MOFCOM breached Article 6.2 of the AD Agreement by not holding a public hearing in response to a U.S. Government request. Although MOFCOM's regulations provide that it may hold such a hearing upon request, consistent with Article 6.2 of the AD Agreement nothing within MOFCOM's regulations mandates that a public hearing be held under any circumstance.

2. As part of a general obligation on investigating authorities to provide a full opportunity for parties to defend their interests, Article 6.2 of the AD Agreement establishes that investigating authorities provide the "opportunity" for "parties with adverse interests" to meet. It does not mandate a public hearing and does not require an adverse party to join any meeting requested by the opposing party, public or otherwise. In other words, there is no obligation that such a meeting *must* occur, and such a meeting would definitively not occur if opposing interests choose not to engage.

3. China views an authority's role under Article 6.2 with respect to any meeting held between interested parties with adverse interests as one of facilitator. In other words, the authority's purpose is to promote the conditions under which such a meeting could occur. This is consistent with the plain meaning of "provide opportunities" as used in Article 6.2. Among the definitions of the word "provide" is "take appropriate measures in view of a possible event; make adequate preparation." The word "opportunity" is defined as "a time or condition favourable for a particular action or aim." By these terms, MOFCOM meets its obligations under Article 6.2 through procedures made available to interested parties that may lead to a meeting of parties with adverse interests organized by the authority in the event those parties mutually desire such a meeting.

4. China does not view the authority's discretion under Article 6.2 as encompassing the right to "refuse" to organize and hold such a meeting of parties with adverse interests. This wrongly implies that it is the authority's decision, in the first instance, as to whether such a meeting should or must take place. Article 6.2 merely states that "authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests . . . ." Thus, where it is clear that parties with adverse interests will not meet, the question of an authority's obligation to organize a meeting of such parties under Article 6.2 becomes moot.

5. Keeping in mind the fact that the interested parties themselves determine whether a meeting of parties with adverse interests actually takes place, China wishes to clarify that in the underlying investigation MOFCOM did not reject a request by the U.S. Government to meet with the petitioner. It accepted that request, but the question of whether a meeting of interested parties with adverse interests could or should take place is a entirely separate matter.

6. In the underlying proceeding, those parties with adverse interests to the United States declined to meet, and therefore the need for the meeting envisioned under Article 6.2 of the

AD Agreement was rendered moot. Nonetheless, MOFCOM afforded the U.S. Government a full opportunity to defend its interests, consistent with Article 6.2, by meeting with U.S. Government officials so that they could present their views orally, and by receiving documents from the U.S. Government after the meeting setting forth the U.S. Government position.

B. MOFCOM Was Not Obligated To Disclose All Aspects Of Its Dumping Calculation

7. The United States claims Article 6.9 of the AD Agreement requires expansive disclosure, reading the "essential facts" to be disclosed under that provision as reaching any and all aspects of an investigating authority's dumping calculation. Indeed, the U.S. argument would seemingly require disclosure of every detail that comprised part of the authority's consideration of the matter, whether it be individual transaction data, the basic calculation methodology, any calculation worksheets, and the calculation program itself. This interpretation of Article 6.9 and a purported obligation of disclosure in a particular form is without merit.

8. The text of Article 6.9 clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests. It does not call for the expansive disclosure called for by the United States or a particular form of disclosure. This reading of the text is consistent with the findings of prior dispute settlement panels that have found Article 6.9 limited to those essential facts that form the basis of the authorities' decision whether to apply definitive measures. Whether a disclosure is comprised of "essential facts" within the meaning of Article 6.9 is fact-specific and depends on the form of disclosure by the administering authority. What is important is that the form of disclosure provides the interested party the basis to defend its interests, consistent with the last sentence of Article 6.9.

9. The criteria for distinguishing essential facts from regular facts must be derived from the context of Article 6.9, which clearly links "essential facts" to the limited purpose of allowing interested parties to defend their interests with respect to an authority's decision whether to apply definitive measures. As outlined by the panel in *EC – Salmon* "essential facts" may be distinguished from "regular facts" based on whether they are "necessary" to enable comments on the determination to apply definitive measures, including comments on the completeness and correctness of the facts being considered, corrections of perceived errors, and interpretative points. China's position is that the calculation program or worksheets, for example, are not necessary to enable comments on the authority's decision whether to apply definitive measures where the authority has made available other disclosures to the interested parties to enable such comments. Again, Article 6.9 does not specify format, only that essential facts are conveyed that allow interested parties to defend their interests.

10. With respect to the distinction between facts and reasoning in the context of Article 6.9, China believes that facts are invariable. For example, if the authority states that the price for a product is X, or that it has declined to make a requested adjustment, those are facts. They are constant and present a specific reference point. In contrast, reasoning consists of the intermediate details of consideration – the variable thought process that leads to an

authority finding that the price of a product is X or concluding that a requested adjustment is unwarranted. These details are not the subject of disclosure under Article 6.9, as the panel in *U.S. -- OCTG Sunset Reviews* made clear.

11. Ultimately, whether we are dealing with "reasoning" or "facts" or whether the two might merge for purposes of identifying "essential facts," MOFCOM disclosed all the information necessary for the respondents to defend their interests, consistent with Article 6.9. The respondents were in control of their own facts, and were provided MOFCOM's basis or description of the various aspects of its dumping calculation.

C. The AD and CVD Petitions Contained Adequate Non-Confidential Summaries, Consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement

12. The U.S. claim about non-confidential summaries is actually quite narrow. The United States does not challenge under Article 6.5 or Article 12.4 the right of this information to be classified as confidential. Rather, the United States challenges only the sufficiency under Article 6.5.1 and Article 12.4.1 of the non-confidential summaries provided. Finally, the U.S. arguments regarding inadequate summaries focus only on the petition. Specifically, the U.S. challenge focuses on the adequacy of the non-confidential summaries for six items contained in the petition and namely the petitioners' production data and five distinct data sets related to "economic position," including production capacity, domestic inventory levels, cash flow, wages and employment, and labor productivity.

13. The U.S. arguments regarding these specific pieces of information are fundamentally flawed. Article 6.5.1 and Article 12.4.1 do not require complete or perfect disclosure. They require only that a non-confidential summary be in "sufficient detail" to permit a "reasonable understanding" of the "substance" of the information. One must therefore consider the detail provided, and whether that detail is enough to understand the information being submitted, given the purpose for which the information is being submitted. The non-confidential summaries in the public version of the petition more than met this standard.

14. For its part, the United States seeks to impute a specific labelling requirement to Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement from the facts and findings involved in *China – GOES*. In that case, the panel found certain of the non-confidential summaries provided in the petition to be inadequate. But the U.S. attempt to draw parallels with the instant case fails. The facts in *China – GOES* are very different from the facts in this dispute. More specifically, unlike *China – GOES*, in this dispute there is no case of "duelling" non-confidential summaries or supplemental summaries found elsewhere in the petition to cause any confusion as to where the non-confidential summaries are provided. Nonetheless, the United States seems to claim that it is impossible to find non-confidential summaries without specific labelling, implying some self-evident requirement to label. It alternatively and erroneously claims that "China argues that the Petitioner did in fact prepare the summaries, at other sections of the Petition, even though they were not labelled as such . . . ." These claims and the purported need in this case to "cobble together" non-confidential summaries from the petition are simply another failed *China – GOES* analogy that has no bearing on whether there exists any specific labelling requirement under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the AD Agreement.

15. In sum, China would reiterate that neither Article 12.4.1 of the SCM Agreement nor Article 6.5.1 of the AD Agreement specify that the required non-confidential summaries must take a particular form or be labelled in a particular manner. As identified by the Appellate Body in *EC – Fasteners*, the question is whether due process is served based on the non-confidential summaries presented. China acknowledges that might entail consideration of whether a party may reasonably understand that what it is reading is a non-confidential summary that it can readily relate to specific confidential information that has been redacted, but no more than that.

16. China was unable to respond to any specific arguments made by the United States in its first written submission as it declined to address any of the information found in the petition. At the first substantive meeting, the United States did provide two examples out of the six claims made, to which China would like to provide an immediate response. The first example addressed by the United States is production and standing. Once again, the United States has misapplied the facts from *China – GOES* in an effort to make arguments here. As distinguished from *China – GOES*, in the instant case the petitioners reported that they accounted for more than 50 percent of total domestic production and included with that assertion the data on total domestic production. This information provided more than an understanding of the simple nature of the confidential information; it provided an understanding of the substance of that confidential information, consistent with Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement.

17. The second example offered by the United States in its opening statement at the first substantive meeting concerns production capacity. The United States complains that the lack of published scales on graphs presented in the petition denied parties any ability "to discern whether any specific trends, and the magnitudes thereof, are actually taking place." This statement is incorrect. First, the initial scale line in the graph is labelled zero. Second, the graph presents two data bars for each period, including a bar representing production (yield) and a bar representing production capacity. Given the points of reference provided by the zero scale and simultaneous representation of both production and capacity, both trends and the magnitude of those trends are easily seen. The U.S. claim that the graph does not provide a reasonable understanding of what the underlying information constitutes cannot be sustained.

II. MOFCOM'S ANTIDUMPING DETERMINATIONS

A. MOFCOM'S AD Determination Was Consistent With Article 2.2.1.1 Of The AD Agreement

18. The United States argues that MOFCOM, when determining normal values, unreasonably rejected the respondents' recorded GAAP-consistent production costs in favor of an average cost methodology based on weight. In making this argument, the United States misreads the obligation under Article 2.2.1.1 of the AD Agreement. Contrary to the U.S. argument, Article 2.2.1.1 does not reflect a blind mandate that recorded costs always be used whenever the records are in accordance with GAAP. Article 2.2.1.1 has two independent conditions, including (1) that the records be GAAP-consistent; and (2) that the reasonably reflect the costs associated with production and sale of the product under consideration. Both of these conditions must be met. Whether or not records are GAAP-consistent, an authority

must still look to the particular purposes of the AD Agreement in determining whether the costs to be used in an anti-dumping investigation reasonably reflect the costs associated with the production and sale of the specific product under consideration *in an antidumping context*.

19. China's view of the term "normally" as used in Article 2.2.1.1 also differs from that advanced by the United States. The United States reads the two exceptions to using a respondents' recorded costs expressly indentified in Article 2.2.1.1 as serving to exclusively define the affirmative obligation where the circumstances described in those two exceptions do not exist. China believes that is "normally" the case, but the U.S. interpretation would seemingly reduce the term "normally" to mere surplusage. To achieve the same effect, Article 2.2.1.1 might have been drafted without resort to the term "normally" at all. It seems to China that, in order to give the term "normally" meaning consistent with fundamental rules of treaty interpretation, it must evidence the possibility of some other derogation from the "normal" rule.

20. At its core, the AD Agreement is about establishing a fair price or, more specifically, it is about measuring the degree of any unfairness in price based on differences between normal value and export price. Any cost allocations, therefore, must generate costs of production that allow an authority to use the costs in ways that make sense given the purpose AD Agreement, and that make sense given the specific circumstances of each case. This need to focus on specific circumstances is explicit in the structure of Article 2.2.1.1, which establishes (1) GAAP-consistency and (2) whether records "reasonably reflect" the cost of production as separate and distinct conditions governing the use of a producer's cost records.

21. The key issue is what meaning should be ascribed the terms "reasonably reflect" and "cost associated with the production" as used in Article 2.2.1.1 of the AD Agreement. With respect to the term "cost associated with the production," the meaning must concern what the producer had to pay to be able to produce the items at issue as opposed to revenue gained. This distinction can be critical depending on the circumstance of a particular case. For example, in a value-based cost allocation methodology, how the revenue potential for different products is taken into account, if it is taken into account at all, will dictate whether recorded costs "reasonably reflect" the costs associated with the production and sale of the product under consideration.

22. This issue of value-based methodologies would prove critical in this AD investigation. Though the respondents in the AD investigation produced many forms of broiler products, the respondents in general measured their own performance in terms of the broiler products most popular in the U.S. market, particularly chicken breasts. This approach led to respondents treating certain broiler products subject to the investigation and shipped in substantial volumes to China at high prices as holding little or no value. Thus, important revenue-generating products such as paws absorbed much less of the total cost that had been incurred to produce the whole bird. For example, Tyson treated paws as offal, or effectively waste, and allocated costs to that product based on an offal price. This treatment was inconsistent with the true value of paws in the market and thereby over-allocated costs to other products such as breasts. Keystone adopted an even more extreme approach that grossly undervalued paws for allocation purposes. These approaches did not result in costs that reasonably reflected the cost of production.

23. China believes that respondents bear the burden in the first place of convincing the authority that its costs "reasonably reflect" the cost associated with the production and sale of the product at issue. Read as a whole, Article 2.2.1.1 provides that the foreign respondent must provide the necessary information, the authority must "consider" it, and that the burden of persuasion lies with the foreign respondent, the party that has control over the information and how it is presented to the authority.

24. During the course of the investigation, the respondents failed to meet their burden. Tyson offered a series of arguments as to why its cost allocation methodology was "reasonable." However, Tyson never addressed its *actual* recorded costs or explained, for example, why its *actual* recorded costs for products like paws, wing tips, and gizzards reasonably reflected the cost of production for those products. Rather, Tyson emphasized that its methodology was reasonable because it was GAAP-consistent, and then essentially assumed that GAAP consistent automatically meant "reasonably reflects" the cost of production. In reality, however, the general arguments Tyson made about valued-based approaches did not reflect its actual allocation methodologies. Like Tyson, Keystone also made considerable efforts to demonstrate why its methodology was "reasonable." Once again, the main emphasis was on the assertion that it was GAAP-consistent, not on its actual records.

25. Pilgrim's also sought to defend its cost methodology on the basis of reasonableness with respect to GAAP. Pilgrim never addressed its actual costs, in part because it struggled to even assemble costs that it could reconcile. Although the United States leaves the impression that Pilgrim's submitted internally sound cost data based on a relative sales value approach to allocation, this description is incorrect. The basis for MOFCOM's rejection of Pilgrim's cost data had very little to do with the allocation methodology reflected in the Pilgrim's Pride cost records. The Pilgrim's cost records were rejected because the records reflected widely divergent and irreconcilable production quantities reported in its initial and supplemental responses, as well as other cost data problems. Revised data provided by Pilgrim's Pride after the preliminary disclosure were ruled out of time.

26. Nonetheless, MOFCOM accepted the respondents' total costs for broiler products, although it did not accept the respondents' reported product-specific costs. It provided a simple, clear, and concise explanation for why it did so with respect to each of the respondents under investigation, noting that the reported costs did not "reasonably reflect" the cost of production. However, China further notes that, contrary to U.S. arguments, Article 2.2.1.1 does not contain any requirement for an authority to "explain" its decision to decline to use a respondent's recorded allocated costs. Rather, it merely provides that an authority must "consider all available evidence on the proper allocation of costs . . . ." This is a very different standard, requiring only evidence of "consideration" rather than an explanation. China submits that the record from the underlying investigation presents evidence of MOFCOM's consideration of the allocation issue, consistent with Article 2.2.1.1.

27. Having rejected respondents' reported costs that did not "reasonably reflect" the cost of producing the broiler parts at issue, MOFCOM had to adopt some other reasonable cost allocation that reflected actual conditions in the market rather than respondents' distorting cost methodologies. To this end, Article 2.2.1.1. imposes only two requirements on the authority. First the authority must "consider all available evidence on the proper allocation

of costs." Second, the authority must adjust costs "appropriately" if they do not properly take into account non-recurring costs or start-up expenses. In cases such as the current dispute, that do not involve non-recurring costs or start up costs, there is only one affirmative obligation: " to consider all available evidence on the proper allocation of costs." MOFCOM identified weight (as measured by kilograms) as the one characteristic common to all subject merchandise, but not influenced by factors unique to the very different consumer perceptions in either the U.S. or Chinese markets. Thus, it was on this neutral basis that MOFCOM allocated respondents' raw material costs.

28. MOFCOM considered this allocation based on weight to be reasonable for several reasons. First, a weight-based allocation avoided the distortions that had made the respondents' value-based cost allocations unreasonable, including in particular the arbitrary values the respondents' assigned to products like paws to allocate costs which reflected neither actual market conditions or even an actual price for the specific product. Even the United States own investigating authority, the Department of Commerce, has identified the "circularity" problems inherent in value-based allocation methodologies – all of which came into play here -- when a price is used to set a price. Having rejected respondents' costs as not reasonably reflecting costs, and in the absence of any other compelling argument from respondents, MOFCOM had to find some alternative that avoided these problems. Second, a weight-based allocation also reflected the reality for this product that much of the cost was incurred uniformly to raise the whole bird before it was cut into different parts. Finally, the weight-based allocation was specifically listed as one of the reasonable alternatives in the materials cited by respondents.

29. The United States contends that MOFCOM had an obligation to explain why its approach was proper in relation to other approaches and in light of criticisms advanced by the respondents. But this obligation is not reflected in Article 2.2.1.1. Again, Article 2.2.1.1 imposes an obligation on investigating authorities to "consider" all evidence for the "proper" allocation of costs. Moreover, Article 2.2.1.1 does not specify any particular method for "consideration," and what constitutes adequate "consideration" will vary from case to case. As China demonstrates above, careful consideration of the very sources presented to MOFCOM by the respondents in this case fully justified MOFCOM's use of a weight base measure in this investigation.

30. The circumstances and evidence surrounding the respondents' reported costs were self-evident, as was the need to adopt a neutral basis for assigning costs given the extreme differences in the markets concerned. MOFCOM considered all the evidence during the investigation concerning the allocation of costs to reach a reasonable allocation methodology, and this is reflected in the record. Specifically, the record reflects a sustained line of inquiry by MOFCOM regarding the respondents costs from the first questionnaire, to the supplemental questionnaire, and to the second supplemental questionnaire. In addition, the MOFCOM disclosure documents reflect more than mere receipt of evidence on the part of MOFCOM, but an active investigation of that evidence that it expressly sought from the respondents. MOFCOM "investigated" the evidence in reaching its conclusion, rather than merely taking note of the respondents' submissions. Finally, in the final AD Determination, MOFCOM again stated that neither Tyson nor Keystone provided sufficient reasons to justify their reported costs. Indeed, as discussed in the final AD determination, MOFCOM gave several opportunities for the parties to present their arguments on all issues involved in the

investigation prior to the final determination, and discussed these issues orally with the parties. Ultimately, MOFCOM relied on a weight-based allocation as a compromise and a recognized approach to price regulation proceedings.

B. U.S. Claims Regarding The Treatment Of Freezer Storage Fees And Fair Comparison Under Article 2.4 Of The AD Agreement Should Be Set Aside

31. It is well-established that Articles 4 and 6 of the DSU do not "require a precise and exact identity" between the request for consultations and the panel request. Nonetheless, there are limits to this fundamental rule. In the context of legal claims, a Member may not raise a new legal basis in a panel request that reflects a disconnect from the legal bases set forth in its request for consultations.

32. The U.S. claim under Article 2.4 of the AD Agreement with respect to freezer storage expenses is not referenced in any manner within the U.S. request for consultations in this dispute. On its face, the U.S. consultation request does not specify Article 2.4 of the AD Agreement within any of the thirteen specific items identified by the United States as areas in which China's measures are allegedly inconsistent with GATT 1994 or the AD Agreement. Moreover, none of the specific GATT 1994 or AD Agreement provisions referenced by the United States in its consultation request are reasonably related to the issue of fair comparison, which is the subject matter of Article 2.4 of the AD Agreement. Finally, the U.S. consultation request otherwise makes no mention of freezer storage expenses, which is the factual issue the United States seeks to address in its Article 2.4 claim. Under the circumstances, China believes that the U.S. Article 2.4 claim impermissibly expands the scope of this dispute and is therefore outside the terms of reference of this proceeding. The Panel should therefore set aside the Article 2.4 claim, consistent with Articles 4 and 6 of the Dispute Settlement Understanding (DSU).

33. But even if the panel agrees to consider the U.S. Article 2.4 claim, it is without merit. Contrary to U.S. arguments, freezer fees clearly reflected a difference between export price and normal value affecting price comparability. Throughout the course of the underlying investigation MOFCOM indicated to Keystone what information was necessary to ensure a fair comparison between normal value and export price, meeting its obligation under Article 2.4 to indicate to Keystone what information was necessary to ensure a fair comparison. Keystone, however, provided ambiguous if not misleading responses to MOFCOM regarding such fees.

34. Article 2.4 requires allowances for differences in normal value and export price affecting price comparability. The authority has the obligation to make necessary adjustments so as to effect a fair comparison in ascertaining any margin of dumping. The nature of the obligation to make allowances is a case-specific issue. The Appellate Body has recognized that, "{t}he issue of which specific 'allowances' should be made in any case depends very much on the facts surrounding the calculation of export price and normal value." Thus, while an allowance may not be necessary in one investigation, it may be appropriate in another investigation depending on the information provided by the respondent parties and the facts surrounding the calculation of normal value and export price. The authority's allowances must therefore be guided by the factual record and methodologies

being applied. Moreover, the authority has discretion in how it chooses to effect a "due allowance." As explained by the panel in *EU – Footwear (China),* the only requirement is that it must be "fair."

35. China believes that the provisions of the AD Agreement implicated by the facts of this case fall under Article 2.4. Keystone's failure to properly identify or characterize its freezer storage costs led to the allocation of a majority of those costs to fresh product, thereby reducing constructed normal vale for frozen product. This caused an imbalance in the dumping comparison between constructed normal value and export price given the fact that export price sales were all frozen and therefore incorporated freezer costs. This necessarily affected price comparability. Although these costs might have been accounted for differently in constructed normal value, China sees no basis in either Article 2.2.1.1 or 2.4 for a hierarchy in terms of where such costs should be accounted or adjusted. The discretion must be left to the authority. Having performed its cost allocation, MOFCOM was well within its discretion to make due allowance under Article 2.4 with respect to these costs.

36. In addition, while the obligation to ensure a "fair comparison" lies on the investigating authority, including the responsibility to "indicate to the parties in question what information is necessary to ensure a fair comparison," respondents also have an obligation to be forthright and clear in providing such information. The role of respondents cannot be passive. For example, the panel hearing *EU – Footwear (China)* concluded that interested parties must "make substantiated requests for 'due allowance', whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability." It follows that respondents are equally obligated to substantiate when allowances are not required. Thus, they have an obligation to report expenses correctly and to characterize them correctly where asked. MOFCOM asked precise and detailed questions in both the normal value section and the export prices section of its questionnaire requiring the respondent to report the expenses (including freezer fees) in a way to adjust the differences that affect price comparability. Keystone unreasonably and perhaps intentionally shaded the facts.

37. As far as how MOFCOM allocated freezer storage costs upon rejecting Keystone's reported costs and resorting to constructed NV, China reiterates that before any re-allocation by MOFCOM Keystone had previously allocated freezer fees to products without classifying or distinguishing between frozen products and non-frozen products. Thus, MOFCOM had no basis to understand the nature of those specific costs. MOFCOM allocated Keystone's reported total costs, including the reported "other expenses," on a weight-averaged basis across all production. Thus, constructed NV included a weight-averaged proportion of those costs. The practical effect of this allocation, unknown to MOFCOM at the time given how Keystone reported and characterized costs, was that constructed NV for frozen product models was artificially low given that a much larger proportion of domestic sales were of fresh, not frozen product, but freezer costs were allocated over all production on a weight-averaged basis.

38. MOFCOM made an EP adjustment to account for this imbalance rather than any modification to constructed NV in light of Keystone's failure to properly report these costs with respect to export price. Although other adjustments might have been made in pursuit of the same fair comparison under Article 2.4, the text of Article 2.4 leaves the form of the

adjustment to the discretion of the investigating authority. Article 2.4 only states that in conducting the comparison between NV and EP "due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Given the distortion with respect to how freezer costs were allocated, there was a clear issue of price comparability for which due allowance was necessary.

C. **MOFCOM's Determination Of The AD "All Others" Rate**

39. The petition in the underlying investigation identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. In addition, MOFCOM received an entry of appearance from the U.S. association representing poultry exporters, that itself is comprised of about 200 member companies and organizations. Given the large number of interested parties, MOFCOM exercised the discretion afforded under Article 6.10 of the AD Agreement to limit its examination of producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

40. In its public notification of the initiation of an investigation, MOFCOM made it clear that all exporters/producers should register with the Ministry, were subject to individual investigation, and were subject to an antidumping rate based on facts available if they did not register and or fully participate in the investigation. The United States acknowledges that the initiation notice was provided to the United States and the six known producers/exporters of broiler products, as well as the fact that a request was made to the U.S Embassy to notify any other producers or exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 6.1 of the AD Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. The notice also clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

41. In its preliminary and final determinations, MOFCOM followed the rule in Article 9.4 with respect to known exporters or producers not included in the examination and assigned to those interested parties the weighted average margin of dumping established with respect to the selected exporters or producers. With respect to unknown exporters or producers, MOFCOM applied a facts available rate as provided under Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Specifically, in assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation.

42. In its preliminary and final results, MOFCOM stated that it would apply facts available. The basis for applying facts available was the lack of cooperation reflected in the failure of unknown parties to make an entry of appearance or provide a questionnaire

response. MOFCOM noted that it relied on facts available, including the best information available, to determine normal value and export price. This information was not disclosed because if came from confidential sources, but consisted of the highest calculated normal value and the lowest recorded export price.

43. China believes its disclosure complied with the requirements of Articles 6.9 of the AD Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary AD and CVD determinations. This disclosure, well in advance of the final determination, was in "sufficient time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Articles 6.9 and 12.8 do not require this degree of disclosure.

44. The context provided by Article 6.5.1 of the Anti-Dumping Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 6.5.1applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the authority, and thus have limited contextual relevance for what the authority must do under Article 6.9 of the AD Agreement.

D. MOFCOM's Obligations Under Article 1 Of The AD Agreement

45. The United States has also raised a claim under Article 1 of the AD Agreement, which provides that "{a}n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." To the extent China has addressed all of the substantive claims raised by the United States and acted consistently with its obligations under the AD Agreement, the United States' Article 1 claim lacks merit and should be set aside.

III. MOFCOM'S CVD DETERMINATIONS

A. MOFCOM's Determination of the CVD "All Others" Rate

46. The facts surrounding the "all others" rate issued in the preliminary and final determinations of the CVD proceeding are virtually the same as those presented with respect to the AD "all others" rate. The petition identified six U.S. producers of broiler products. Upon initiation MOFCOM received 36 separate entries of appearance in the antidumping investigation from U.S. producers/exporters. This constituted the universe of "known" exporters or producers. MOFCOM also received the entry of the U.S. trade association, USAPEEC. As in the AD case, MOFCOM exercised its discretion and limited its

examination of interested parties or producers to a reasonable number, including Pilgrim's, Tyson, and Keystone. MOFCOM also chose an alternate respondent in the event that one of the three mandatory respondents withdrew from the investigation.

47. As acknowledged by the United States, the initiation notice was provided to the United States and the six known producers/exporters of broiler products, and a request was made of the U.S. Embassy to notify all other known producers and exporters. As stated in the notice, public notice was posted on the website of the Ministry of Commerce in order to ensure notice to all possible exporters/producers. Finally, it was also available in the MOFCOM reading room. It is MOFCOM's position that these three separate actions provided the necessary notice to all producers/exporters required by Article 22.2 of the SCM Agreement in that it specified the necessity to register with the authorities, the time required for the registration, and the information required by the authorities in the investigation. Again, the notice clearly stated the consequences of any failure to cooperate with the registration and other requirements specified in the notice.

48. With respect to unknown exporters or producers, MOFCOM applied a rate consistent with Article 12.7 of the SCM Agreement and in line with the considerations reflected under Annex II of the AD Agreement. In assigning the "all others" rate, MOFCOM found that the exporters/producers who were unknown and who did not make themselves known were not cooperating with the investigation and applied an "all others" rate based on "facts available" as provided under Article 12.7 of the SCM Agreement and paragraph 7 of Annex II of the AD Agreement.

49. The "all others" rate included one subsidy program – the upstream subsidy (feed) program. MOFCOM calculated the *ad valorem* rate based on the data of one of the sampled companies and used the "competitive benefit" method to calculate the benefit. The "all others" rate is higher than the rate assigned to the sampled companies because of the distinction between the "competitive benefit" analysis and the "pass-through" analysis applied by MOFCOM. If the competitive benefit exceeded the amount that may actually pass through from the upstream subsidy, then MOFCOM took the pass-through amount as the basis of the subsidy benefit for the sampled companies. This resulted in MOFCOM applying the pass-through amount in the case of Tyson and Keystone, and the competitive benefit amount in the case of Pilgrim's. For the "all others" rate, MOFCOM applied an *ad valorem* rate based on the competitive benefit amount of one of the sampled companies that had their *ad valorem* subsidy rate determined using the pass-through amount.

50. China believes its disclosure complied with the requirements of Article 12.8 of the SCM Agreement. Specifically, China disclosed its proposed "all others" rates in the preliminary CVD determination. This disclosure, well in advance of the final determination, was in "sufficient time" for parties to consider this preliminary determination, comment if they wished, and otherwise to defend their interests. So the only real issue is whether the degree of disclosure was sufficient to qualify as providing the "essential facts," and whether any further disclosure of details (perhaps using a non-confidential summary) would be necessary. China believes that Article 12.8 does not require this degree of disclosure.

51. The context provided by Article 12.4.1 of the SCM Agreement does not change this analysis. China notes two key points about these provisions. First, the need for a non-

confidential summary of other information for other purposes does not impose such a requirement on the details of the "all others rate." The fact that a non-confidential summary could be prepared does not require it to be prepared. On their face, this provisions require only "sufficient detail to be permit a reasonable understanding," not whatever detail might be possible. Second, Article 12.4.1 applies to materials presented by "interested parties," not to analysis done by the investigating authorities themselves. No interested parties in this case provided BCI data about the "all others rate;" MOFCOM did this analysis itself. These provisions therefore do not apply to the authority, and thus have limited contextual relevance for what the authority must do under Article 12.8 of the SCM Agreement.

B. MOFCOM's Subsidy Allocation With Respect To Feed Subsidies Was Proper

52. In its first written submission, the United States claims that MOFCOM breached Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by misallocating the subsidy found to exist. At the outset, China does not dispute that an investigating authority has an obligation under GATT 1994 and the SCM Agreement to align the numerator and denominator in calculating the appropriate subsidy margin. China agrees that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 set forth a fundamental rule to this effect, as elaborated by the Appellate Body and various dispute settlement panels.

53. At the same time, China does dispute the United States' simplistic rendition of the facts in the underlying proceeding. In this case, MOFCOM needed to calculate the indirect benefit to the respondents from upstream subsides conferred on corn and soybeans purchased and consumed by the respondents in the production of subject merchandise. Over a series of questions posed in the original and a series of supplemental questionnaires issued to Tyson and Pilgrim's, MOFCOM sought to collect the information necessary to engage in an appropriate calculation. Based on the responses, MOFCOM was able to make a determination on the quantity of purchased corn and soybean meal consumed in the production of the subject merchandise.

54. The United States, for its part, erroneously suggests that the entire matter may be reduced to a single question posed in MOCFOM's second supplemental questionnaire focused on total purchases of corn, soybeans, and soybean meal. In so doing, the United States ignores MOFCOM's more direct efforts to receive information from Tyson and Pilgrim's focused on purchased feed consumption related to the production of subject merchandise, and the responses received in turn. Based on the totality of the responses received, as well as the deficiencies therein, MOFCOM applied the information that respondents themselves attributed to the production of subject merchandise.

55. Specifically, the subsidy per unit of the subject products was calculated on the basis of feed purchased and consumed in the production of subject merchandise during the POI. Given likely inventory effects, MOFCOM understood that there could be differences in terms of the amount purchased and the amount consumed over the same period. Thus, as between reported purchases and consumption, it would use the lesser of the two figures. This was the basic data upon which MOFCOM would rely in its calculation. To confirm all data, MOFCOM sought detailed information on the production cost of feed, live broilers, and subject merchandise, as well as consumption of feed in the production of subject

merchandise. Through this detailed information, MOFCOM could more confidently trace feed purchased and consumed in the production of subject merchandise during the POI to confirm that data was reported correctly.

56. MOFCOM ultimately received the basic information necessary to calculate the subsidy benefit in response to questions posed in the second supplemental questionnaire on purchases of feed consumed in the production of subject merchandise during the POI. In terms of other data MOFCOM requested and might have used to track and scrutinize the consumption data to ensure it had captured all actual consumption, that data was never fully provided, but did not prevent the ability to calculate a margin. MOFCOM did not require or obtain information from elsewhere to perform the respondents' subsidy calculation. It used the information held out by the respondents as their total consumption of feed in the production of the subject merchandise during the period of investigation.

57. Based on an examination of reported purchases and consumption, MOFCOM used the feed consumption data reported in response to question I.4 of the second supplemental questionnaire for Tyson and question I.6 of the second supplemental questionnaire with respect to Pilgrim's, both of which also matched the reported purchase data. The denominator used was the sales quantity of subject merchandise. MOFCOM did consider the alternative provided by the respondents. Neither Tyson or Pilgrim provided any information to correct or clarify its submission of data on feed consumption in the production of subject merchandise, therefore, after considering the alternative provided by U.S. respondents, MOFCOM had to rely on the data used in its calculation.

58. After its preliminary results, MOFCOM received arguments by both respondents. In both instances Tyson and Pilgrim's argued that MOFCOM had over-allocated feed subsidies to subject merchandise and sought to clarify that the feed information provided encompassed more than subject merchandise. In none of these arguments, however, did either respondent actually provide a basis for MOFCOM to discard the feed information used in the calculation.

59. In terms of MOFCOM's disclosure, the disclosure documents identify both the unsubsidized benchmark price for feed materials and the subsidized purchase prices reported by the respondents for the same materials. The difference in the unsubsidized and subsidized prices was then multiplied against a total quantity of corn and a total quantity of soybean meal. These data on corn and soybean meal would reveal where in the questionnaire responses that MOFCOM derived the information, and namely from the reported purchases and consumption data of the respondents from the second supplemental questionnaire. In terms of the denominator – total sales quantity of subject merchandise – this figure was also disclosed and could also be traced by the respondents to data reported to MOFCOM in their questionnaire responses.

C. **China's Obligations Under Article 10 of the SCM Agreement**

60. The United States has raised several claims under the SCM Agreement that China has addressed in succession. To the extent China has demonstrated that its actions are consistent with the provisions of Article VI of GATT 1994 and the terms of the SCM Agreement as raised by the United States, this U.S. Article 10 claim should be rejected.

IV. MOFCOM'S INJURY DETERMINATION

61. The starting point for the Panel's analysis in this dispute is a situation where: (1) increasing volumes of subject imports that gained market share and had adverse volume effects on the domestic industry, (2) a domestic industry that suffered consistent operating losses that built up over the period and worsened at the end of period, and (3) no other explanations for these operating losses and severe declines in 2009 have been presented. These circumstances are unchallenged by the United States, which casts doubt on whether it has established a *prima facie* case.

A. MOFCOM Properly Defined the Domestic Industry As Required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement

62. The description by the United States of the process whereby MOFCOM determined the domestic industry seriously distorts what actually happened. MOFCOM fully complied with China's obligations under the WTO. MOFCOM's investigations were not biased, and simply reflected the realities of a highly fragmented industry for which there was no complete list of producers. MOFCOM did not exclude any cooperating producers from its investigations. To the contrary, MOFCOM's investigations included enough of the larger domestic producers to qualify as a "major proportion," and thus objectively examined the domestic industry in full compliance with the obligations under the WTO.

63. First, MOFCOM published its notice of investigation on 27 September 2009, inviting all interested parties to participate in the investigation and register with the authorities. That notice referenced "interested parties," but also made clear that the data being collected would include production – a clear reference to "domestic producers." Thus, all parties were on notice about the conduct of this case.

64. Second, MOFCOM distributed domestic producer questionnaires to every known Chinese producer of broiler chicken products. This case did not involve a few domestic producers that collectively represented only a small portion of the total domestic production of broiler products. Rather, the petition on its face identified those larger producers that collectively produced more than 50 percent of the estimated total production in China. By sending questionnaires to the "known producers," MOFCOM was thus sending questionnaires to those Chinese producers that alone represented the major proportion of the domestic industry.

65. Third, even though MOFCOM already had identified a group of domestic producers that represented more than 50 percent of total production, MOFCOM took the additional step of placing the domestic producer questionnaire on the MOFCOM web site, again inviting any interested parties who produced broiler chicken during the period of investigation to complete the questionnaire. By doing so, MOFCOM was reasonably trying to improve an already substantial coverage of the domestic producers.

66. This process resulted in MOFCOM receiving questionnaire responses from 17 domestic producers. The total domestic producer responses thus included both members of the petitioning association and non-members of that association.

67. Under the circumstances of this investigation, MOFCOM took reasonable steps to conduct its investigation. MOFCOM started with a group of domestic producers that produced enough subject merchandise to qualify as a major proportion of the total industry. And MOFCOM then took additional steps that sought to improve the coverage. Although the efforts to expand the coverage were not as successful as MOFCOM might have hoped, MOFCOM made reasonable good faith efforts to obtain the additional data.

68. MOFCOM also had a basis in positive evidence for finding the 17 responses from domestic producers represented a major proportion of the domestic industry. Neutral and reliable estimates of total domestic production were included in the petition, as were official customs statistics on both imports into China and exports from China. MOFCOM thus had positive evidence to determine reliable estimates of both the total production in China, total apparent consumption in China, and the shares of those represented by the 17 responses.

69. Although the estimates of total domestic production were themselves neutral and reliable, MOFCOM was able to further assess and confirm the reliability of these estimates in two ways. First, MOFCOM officials reviewed worksheets during the verification, confirmed the reasonableness of the estimation and confirmed the reasonableness of the assumptions under in those worksheets. Second, this same estimation methodology has been used in other contexts for other purposes.

70. Thus, the United States is incorrect when it says MOFCOM defined the industry as only those companies supporting the petitions. That is not what MOFCOM did. MOFCOM made reasonable efforts to obtain as many questionnaire responses as it could, both contacting all known producers and using public postings on its website in an attempt to reach others. MOFCOM eventually obtained 17 timely and usable responses over the course of the entire proceeding. It so happens that all 17 of those responding domestic producers supported the petitions. But this situation is very different than limiting the investigation to only those companies that supported the petitions. MOFCOM in no way limited the companies participating in its investigation.

71. MOFCOM also contacted the Ministry of Agriculture, which collects statistical data on the number of farms, but does not have any information on specific producers. In addition, the Ministry of Agriculture collects data on all chickens, both white feather broiler chickens (subject merchandise) and yellow feather chickens (non-subject merchandise).

72. The United States identifies two separate legal theories to argue that MOFCOM acted inconsistently with its WTO obligations. But in both instances, the United States has mischaracterized the underlying facts at issue, misstated the relevant legal obligations as they applied in this case, and misread the guidance provided by the Appellate Body in *EC-Fasteners*.

73. The first U.S. argument focuses on one key phrase in Article 3.1 and 15.1 – the need for authorities to conduct an "objective examination." The United States has not presented any arguments about the lack of "positive evidence." The United States argues that because the process of determining the domestic industry was biased, the determination itself was not an "objective examination" of this key issue. This U.S. argument is incorrect in several respects.

74. First, the United States is factually mistaken in that the MOFCOM process was not biased. MOFCOM undertook a reasonable and unbiased process to identify and collect information from enough domestic producers to represent a "major proportion" of the domestic industry as a whole. Second, the United States is also factually mistaken in saying the Chinese industry is not fragmented. The Chinese industry includes millions of domestic producers. Third, the United States has misread the guidance in *EC – Fasteners (AB)*. That guidance in fact demonstrates why MOFCOM's determination in this case complied with the "objective examination" requirement of Articles 3.1 and 15.1.

75. "Objective examination" under Articles 3.1 and 15.1 do not require an impractical quest for perfection. Rather, "objective examination" – particularly in an area such as deciding how much investigation is enough in the context of defining a highly fragmented domestic industry – allows flexibility. MOFCOM properly defined the domestic industry as including those producers who represented more than 50 percent of the total industry and thus satisfied the "major proportion" test.

76. This interpretation reflects the guidance about the meaning of Article 4.1 provided by the Appellate Body in *EC – Fasteners*. The Appellate Body offered what is essentially a sliding scale test: the more substantial the percentage of the total domestic industry covered, the less concerned the investigating authorities need to be about obtaining further responses. Under this sliding scale logic, the converse is equally true. The higher the proportion covered, the less sensitive the authority needs to be to obtaining further responses. When the authority already has responses representing a high proportion of the total domestic industry, that response already, in the words of the Appellate Body, appropriately "reflects the total production of the producers as a whole."

77. Beyond the high proportion in this case, there are other facts that also limit any possible obligation on MOFCOM to have done anything more. First, this industry is highly fragmented, and the Appellate Body has specifically recognized that in such highly fragmented industries, the "major proportion" test in Article 4.1 "provides an investigating authority with some flexibility to define the domestic industry in the light of what is reasonable and practically possible."

78. Second, respondents provided MOFCOM with only limited information on additional domestic producers that should be contacted that were not already known. The names of the four allegedly unknown Chinese producers provided in the U.S. FWS were in fact the names of companies that either were already known and contacted, or knew about the case and decided not to cooperate by providing responses.

79. Third, MOFCOM in fact had no other names of domestic producers to contact or questionnaire responses to use in the analysis, other than companies that had already responded or decided not to respond. This fact is critical. This case does not involve the "active exclusion of certain domestic producers" that makes an Article 4.1 determination "more susceptible" to a WTO inconsistency, and that the Appellate Body criticized in *EC - Fasteners*.

80. Fourth, since MOFCOM had questionnaire responses from all the larger producers, additional questionnaire responses from smaller producers would not materially affect the analysis. Estimates based on record evidence demonstrate that additional producers would likely have represented much less than 1 percent of total domestic production.

81. The second U.S. argument presents a more limited, but equally erroneous argument under Articles 4.1 and 16.1. The U.S. argument fundamentally misreads the obligation of these provisions. First, the United States ignores the fact that Articles 4.1 and 16.1 set forth two distinct tests that the United States tried to blurs into one test. Under Articles 4.1 and 16.1, the authorities may choose to define the domestic industry as "the domestic producers as a whole." Alternatively, the authorities can define the domestic industry as including only those domestic producers whose "collective output constitutes a major proportion of the total domestic production."

82. Second, the United States conveniently overlooks the extent to which the phrase "major proportion" leaves the authorities with considerable discretion. This provision does not specify any numerical threshold, unlike the provisions on standing that set forth specific rules based on 25 percent and 50 percent of total domestic production. When addressing this issue, the Appellate Body noted only that this phrase should be understood as "a relatively high proportion of the total domestic production." Nothing in the Appellate Body decision in *EC – Fasteners (AB)* imposes any different obligations.

83. Contrary to the U.S. argument, MOFCOM did not intentionally exclude any domestic producers from its investigation. The United States apparently misses the importance of a key phrase that it cites from *EC – Fasteners (AB)*, that the authorities in that case had "excluded producers that provided relevant information." It is true that authorities have only limited discretion actually to collect information, but then to ignore it. In the anti-dumping investigation at issue in *EC Fasteners*, the investigating authorities actually had contact information for 318 known producers, but ultimately based their determination on only 45 of those 318 known producers. That situation is totally different from the present case, where MOFCOM used the available data for all known Chinese producers.

84. The U.S. argument is essentially that if MOFCOM could have theoretically done more, it had an obligation to do more. The proper application of the "major proportion" test under Articles 4.1 and 16.1 does not require the authorities to include data from unknown domestic producers, particularly not when the authority has collected and analyzed data from known producers accounting for more than 50 percent of total domestic production.

B. MOFCOM Properly Found Adverse Price Effects As Required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement

85. Although the United States challenges the MOFCOM findings of adverse price effects on both substantive and procedural grounds, both lines of attack fail. MOFCOM reasonably exercised its discretion as the administering authority to gather facts, consider those facts, and analyze them in its discussion of adverse price effects. The WTO Agreements do not require countries to follow any single approach or use any specific methodology. Rather, the relevant international obligations reflect very specific rules that respect the discretion of

national authorities to conduct investigations in ways that are appropriate to each country, and in ways that are appropriate to each specific case.

1. MOFCOM reasonably found multiple adverse price effects in these cases

86. MOFCOM collected positive evidence to serve as the basis for its consideration of adverse price effects within the meaning of Articles 3.2 and 15.2. MOFCOM collected data on the average prices earned by domestic producers for their sales of all broiler chicken products. The questionnaires to the domestic producers asked for the overall sales quantity and sales value, from which MOFCOM could determine an overall average unit value ("AUV") for each relevant period of time. MOFCOM also collected similar data on the average prices earned by U.S. exporters for their overall sales of broiler products in China, as reflected in official Chinese customs statistics. Here as well, MOFCOM was able to use sales quantities and sales values to determine overall AUVs for the relevant periods. MOFCOM then used these data to assess trends and to compare the relative price levels of domestically produced broiler products as a whole and imports of broiler products from the United States as whole.

87. MOFCOM objectively examined that positive evidence. MOFCOM's Final Determinations confirm that MOFOM considered and discussed each of the three specific types of adverse price effects set forth in Articles 3.2 and 15.2. Ultimately, MOFCOM focused on the price undercutting and price suppression in its discussion of adverse price effects. Although Articles 3.2 and 15.2 make clear that authorities may consider as many or as few of these enumerated price effects as may be appropriate in a particular case, MOFCOM considered all three categories before focusing its discussion on the two adverse price effects that were the most pronounced in these cases. Doing so was completely consistent with the discretion afforded authorities under Articles 3.2 and 15.2.

88. MOFCOM objectively evaluated the evidence using a methodology that focused on broader trends for the subject merchandise overall. Although there may be other methodologies that authorities could use, MOFCOM's methodology was consistent with the discretion afforded to authorities by the texts of Articles 3.2 and 15.2.

2. MOFCOM properly found price undercutting within the meaning of Articles 3.2 and 15.2 specifically and Articles 3.1 and 15.1 more generally

89. At the outset, China notes that Articles 3.2 and 15.2 do not specify any particular methodology for analyzing price undercutting. Authorities thus have broad discretion in choosing a methodology, provided that methodology represents an "objective examination" of the "positive evidence" before the authorities.

90. That is precisely what MOFCOM did in these injury investigations. The United States attacks MOFCOM's alleged failure to take into account different levels of trade. But MOFCOM did consider this issue. This issue was raised by the U.S. respondents, and addressed by the respondents, by the domestic producers, and by MOFCOM in its

determinations. MOFCOM both summarized the comments by the parties and then addressed those comments.

91. The U.S. argument presupposes an automatic obligation to consider resale prices charged by importers rather than purchase prices paid by importers, as reflected in the official import statistics. Such an obligation simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. MOFCOM's use of landed prices in China allowed the authority to compare domestic prices and import prices on a comparable basis, without the more difficult – and in these particular investigations, impossible -- administrative burden of determining comparable prices at a later stage in the distribution chain. China notes that even the U.S. exporters reported uncertainty about who actually served as importers of their product into China. The existence of other theoretically possible reasonable methods does not render MOFCOM's practically realistic method to be unreasonable or otherwise not "objective."

92. The core legal issue is whether there is any obligation on MOFCOM (or any authority) to use only an average resale price from an importer, rather than an average sale price to an importer. The resale price from the importer could be higher, lower, or the same. Costs could be passed along in the resale price, or they could be absorbed by the importer to make the sale. The importer might earn of a profit or a loss on the resale. Thus in the abstract, the resale price could be higher or lower. Nor has the United States pointed to any record evidence suggesting a material difference in the levels of trade. MOFCOM's method is neutral – and an "objective examination" – to consider either the average price to the importer or the average price from the importer. Absent some evidence before the authority suggesting a distortion of some sort, either approach would be permissible under Articles 3 and 15.

93. Indeed, this dispute shows that resale prices can be lower. As discussed during the first meeting with the Panel, a survey conducted by they U.S. Department of Agriculture suggests that during 2008 the vast majority of importers in China were reselling imported broiler chicken at 20-30 percent losses. The United States argument assumes that importer resale prices must always be higher. This assumption is just wrong. It is not necessarily true. Moreover, during the investigation, the U.S. respondents provided no evidence suggesting it was true. Indeed, in light of the U.S. Department of Agriculture report, it now seems likely that no such evidence was provided to MOFCOM because in fact importers were selling at significant losses during the critical period 2008. There is no record evidence contradicting this public statement that importers were reselling at a loss. No importers responded to the importer questionnaires.

94. The United States also attacks MOFCOM's alleged failure to take into account differences in product mix. But MOFCOM also considered this issue. The U.S. argument presupposes an obligation to consider specific product segments, rather than the product as a whole, another obligation that simply does not exist specifically in either Articles 3.2 or l5.2, or more generally in the obligation of "objective examination" under Articles 3.1 and 15.1. Authorities have discretion on such issues. Both overall averages and more specific averages are both reasonable alternatives, absent some evidence in a particular investigation indicating a material distortion. In these investigations, the U.S. respondents presented only general arguments, not specific evidence of material distortions. Indeed, the data presented by the

United States before this Panel – when viewed in its entirely – demonstrates the error of the U.S. argument. By using broader averages rather than more narrow product categories, MOFCOM in fact understated the degree of price undercutting in these investigations.

95. The U.S. respondent argument was inherently flawed. This argument proceeds from a false premise that chicken breast prices were higher. The record evidence before MOFCOM – in the form of numerous domestic producer invoices, including 21 individual invoices with both chicken breast and chicken paw transactions – demonstrates that chicken breast prices were lower, not higher, than chicken paw prices. So the U.S. respondent premise of the methodology overstating the magnitude of underselling is backwards; the methodology actually understates the magnitude of underselling. Such an approach does not violate any obligation of "objective examination," since the MOFCOM methodology based on the facts of this case was in fact conservative.

96. Beyond mischaracterizing the issues of level of trade and product mix, the United States also ignored the issue of "likeness" among the various types of subject merchandise. It would not be an "objective examination" to compare the prices of different like products, but it would be "objective" to compare products that are part of the same like product. In cases where the administering authority has defined a single like product, and that finding of a single like product has not been challenged before the Panel, there is nothing in the "objective examination" requirement that forces authorities to conduct a price comparison based on product segments within the single like product. Comparisons in a particular case may or may not be objective, depending on the facts of each case.

97. Perhaps recognizing the limited scope of the obligations under Articles 3.2 and 15.2, the United States also presents a more sweeping argument under Articles 3.1 and 15.1. The United States accuses MOFCOM of "failure to control for such obvious differences." Yet, this argument rests on two fundamental errors.

98. First, this argument assumes these differences are "obvious" when they are not at all obvious, and were not demonstrated to the satisfaction of the authorities during the proceedings below. The respondents before MOFCOM and the United States before this Panel assume that the price paid by the importer is necessarily and always at a different level of trade than the price offered by domestic producers. But that is not necessarily the case at all. These investigations illustrate just how murky that issue can be in a particular case. The respondents before MOFCOM and the United States before this Panel also assume that the higher portion of chicken paws in U.S. exports to China distorted the average import price downward. But that is not only not necessarily true, but in fact is false in these investigations. In the Chinese market, chicken paws are a premium item with a higher price, and thus the higher proportion of chicken paws actually distorted the average import price upward, not downward. The more basic point is that the differences alleged by the United States are hardly obvious; they depend on specific facts in specific cases.

99. Second, this argument also incorrectly assumes that more detail always trumps less detail, and that such less detail is thus inherently not "objective." The United States is trying to use Articles 3.1 and 15.1 to impose its own vision of investigative methodologies on MOFCOM. The United States may prefer to conduct pricing analysis based on resale prices by importers, but that does not mean that all countries must use this method. The landed

price in a country – as reflected in official import statistics – is another reasonable method that MOFCOM could reasonably and "objectively" decide to use in a specific case. Similarly, the United States may prefer to conduct pricing analysis on specific products, but that does not mean all countries must use this method, and that using an overall average is inherently wrong. The use of average prices is another reasonable method – and one that in this case conservatively understated the margins of underselling.

100. On both of these issues, the United States has failed to meet it burden of establishing a *prima facie* case that MOFCOM's methodologies as applied in these specific investigations were inconsistent with China's WTO obligations. The specific facts of these cases – as discussed in more detail below – fully support the WTO consistency of the choices MOFCOM made in these investigations.

3. MOFCOM's finding of price suppression would alone be sufficient to comply with the obligations under Article 3.2 and 15.2

101. The United States argues that MOFCOM's finding of price suppression "is predicated entirely on its defective finding of significant underselling," and therefore must fail. But this argument is incorrect both legally and factually in several respects.

102. As a legal matter, the United States is trying to read into Articles 3.2 and 15.2 obligations that do not exist in those provisions. The U.S. argument makes two key legal errors. First, the U.S. argument ignores the textual elements of Articles 3.2 and 15.2 that make explicit that price suppression is an alternative to price undercutting. In particular the term "otherwise" separates price undercutting on the one hand and price depression and price suppression on the other hand. Similarly, the disjunctive term "or" separates price depression and price suppression. The text thus makes explicit that these three analytic techniques are each distinct ways for the authority to find adverse price effects. Any one of them alone can be sufficient. In particular, the text expressly sets out price suppression as an adverse price effect that may exist even if price undercutting has not been found.

103. Second, Articles 3.2 and 15.2 require only a showing of the existence of adverse price effects. The United States is simply wrong to argue that these provisions also require a showing that subject imports caused or affected the price suppression. Rather, price suppression is the effect that an authority observes in the domestic industry. Any obligation to find such a causal nexus is found elsewhere in Articles 3 and 15, not in Articles 3.2 and 15.2.

104. As a factual matter, MOFCOM's finding of price suppression was not dependent on the existence of underselling. Price suppression is a distinct finding that has nothing to do with the relative prices of subject imports and domestic prices. Rather, price suppression – as found by MOFCOM in these investigations – generally reflects a comparison of domestic prices and domestic costs over time. There may well be other ways for authorities to discern price suppression, but this comparison of changing prices to changing costs is the most commonly used analytic technique. Domestic prices in this case were able to increase over the period, but were not able to increase enough to cover rising costs. Thus, domestic price increases to cover rising costs that would otherwise have been expected did not occur, the

profit margins eroded, and the consequence was price suppression. None of this depends on any findings of price undercutting.

105. Thus, regardless of the relative price levels of domestic and imported broiler parts, the domestic prices were suppressed by the volume and market share effects of the subject imports. Subject imports were increasing their volume and market share, which triggered the domestic firm response to avoid further loss of volume. The price suppression can rest exclusively on the adverse volume effects of the subject imports, and MOFCOM expressly set price suppression as an independent and additional adverse price effect.

4. MOFCOM properly disclosed sufficient factual information about its findings of adverse price effects as required by Articles 6 and 12 of the AD Agreement and Articles 12 and 22 of the SCM Agreement

106. The United States incorrectly asserts that MOFCOM acknowledged the need for some adjustment to account for different levels of trade. This claim is not true. MOFCOM's Final Determinations discussed the need to adjust for the customs duties imposed on different types of broiler chicken products imported from the United States, to create a comparable landed, duty-paid basis for price comparisons, not any other adjustment.

107. This U.S. procedural argument thus rests on a cascading set of false assumptions. The United States assumes that MOFCOM made an adjustment for level of trade that MOFCOM did not make. The United States then assumes that the MOFCOM price effects discussion rests on the finding or price undercutting, when in fact MOFCOM had two legally independent bases for its price effects discussion. MOFCOM in fact complied with all its procedural obligations.

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

108. The United States has seriously mischaracterized the MOFCOM determinations about material injury. The United States accuses MOFCOM of ignoring the positive evidence, and focusing on a few isolated indicia of injury. Yet it is the United States that ignores the totality of the evidence before MOFCOM, and selectivity picks time periods to create the illusion of a domestic industry doing acceptably, when the domestic industry in fact was suffering material injury.

109. Regarding the overall argument about adverse impact, the United States makes three analytic errors. First, the United States comments only about the period 2006-2008 and says nothing at all about the sharp declines in virtually every indicator during the first half of 2009. MOFCOM discussed sixteen different economic indicators, and for each of those indicators discussed the same consistent periods of time: full years 2006, 2007, and 2008, and the change in the first half of 2009 relative to the same period during 2008.

110. Second, the United States also says nothing about the MOFCOM discussion of likely continuing U.S. exports to China. Material injury at the end of an investigative period

reinforced by expected near term trends is still material injury. The United States has completely ignored this factor.

111. Third, the United States focuses on volume indicators, and ignored the weak financial indicators over the entire period. A domestic industry with net operating losses every year of the investigative period is an industry suffering material injury. The United States cannot make these financial losses go away by ignoring them. When discussing both gross profits and net profits, MOFCOM added additional discussion of 2007, putting in context the modest improvement in 2007 that contrasted with the overall performance over the period and underscored the decline in financial performance in 2008.

112. The U.S. argument about two specific injury indicators fares no better. Although Articles 3.4 and 15.4 list numerous factors to be considered, the United States raises claims about only two. MOFCOM's Final Determinations included "an evaluation of" these two factors, and thus complied with the relevant obligation. That the United States disagrees with how MOFCOM evaluated these two specific factors does not mean the MOFCOM evaluation of all the various factors was not an "objective examination." To the contrary, MOFCOM reasonably evaluated both factors and addressed U.S. arguments about these factors, and all the other factors in its Final Determinations.

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

113. At the outset, it is important to note the specific parameters of the challenge being raised by the United States relating to causation. The United States – in its request for consultations, its request for a panel, and in it first written submission -- has focused its challenge solely on the issue of causal link as specified in the first and second sentences. In other words, the United States has <u>not</u> included any claims about other causes, or about MOFCOM's approach to considering other causes and thus ensuring non-attribution as required by the third sentence of Articles 3.5 and 15.5.

114. Thus, the issue before this Panel is simply whether MOFCOM properly established the "causal relationship" between subject imports and the injury to the Chinese domestic industry required by the first and second sentences of Articles 3.5 and 15.5. The Appellate Body has repeatedly made clear that a causation requirement in the context of a trade remedy proceeding requires only that the imports under investigation have <u>contributed</u> in some meaningful way to the injury being suffered by the domestic industry. The Appellate Body in *US – Wheat Gluten* interpreted the word "cause" and the term "causal link" to reflect a relationship in which increased imports "contribute to 'bringing about', 'producing' or 'inducing' the serious injury." The Appellate Body was careful to clarify that the authority need not show that the subject imports were the only cause, or the major cause, of the injury. Rather, the authority need only show that the imports contribute in some manner, *"even though other factors are also contributing, 'at the same time', to the situation of the domestic industry."* Although the Appellate Body has not directly addressed the degree of "contribution" necessary, in *U.S. – Tyres (China)* it equated "significant cause" to "important contribution." The Appellate Body explained that "significant cause" amounted to more than

a mere contribution, implying that the use of "cause" alone equals little more than the imports merely contributing to the serious injury.

115. Indeed, the United States has agreed with this interpretation of the scope of Articles 3.5 and 15.5. In its talking points presented to MOFCOM during this proceeding, the United States argued that MOFCOM did not show a "meaningful contribution" by subject imports. In making this argument, the United States acknowledges that subject imports need not be the only cause, the most important cause, or even an important or significant cause. Rather, subject imports need only be making some meaningful contribution to the material injury being suffered.

116. Thus, the burden on the United States in making a *prima facie* claim under Articles 3.5 and 15.5 is to demonstrate that MOFCOM failed to show that subject imports were making a meaningful contribution to the material injury. On the other hand, China can defeat the U.S. claim simply by showing that MOFCOM reasonably found that subject imports were contributing in some way to the material injury. Subject imports need not be a "significant cause, " a phrase used in other WTO contexts. Rather, subject imports need only be a "cause," and may be one of many causes and still be sufficient to satisfy Articles 3.5 and 15.5.

117. The United States tries to meet this *prima facie* burden with three arguments, but they all fail. First, MOFCOM did not ignore evidence about market share. Rather, it is the United States that tries to ignore market share gain by U.S. subject imports at the expense of the Chinese industry as a whole. The United States ignores the fact that subject imports from the United States gained much more market share than non-subject imports from other countries lost.

118. Second, MOFCOM did not rely on price undercutting analysis as the sole basis for its discussion of adverse price effects. Rather, MOFCOM reasonably relied on both proper price undercutting analysis and proper price suppression analysis as legally independent bases for adverse price effects. Even without any finding of price undercutting, MOFCOM established a causal link based on increasing subject import volume and price suppression.

119. Third, MOFCOM did not fail to reconcile its causation analysis with trends over the period. Rather, it is the U.S. argument that tries to ignore and downplay the sharp declines in the first half of 2009 and the dismal financial performance over the entire period of investigation. The existence of some positive trends does not negative the conclusions MOFCOM drew from weak and deteriorating financial performance over the period.

120. MOFCOM thus properly established the "causal relationship" required by Articles 3.5 and 15.5. Since the United States does not otherwise make any distinct arguments under Articles 3.1 and 15.1, the failure of the U.S. arguments under Articles 3.5 and 15.5 means that MOFCOM has fully complied with its WTO obligations regarding causal link.

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