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**In the World Trade Organisation
Panel Proceedings**

*China – Measures Imposing Anti-Dumping Duties on High-Performance
Stainless Steel Seamless Tubes ("HP-SSST") From Japan and the
European Union*

(DS454/DS460)

**Comments on China's Responses to Second Set of Questions from the
Panel
European Union**

**Non-confidential Version
Business Confidential Information (BCI) Redacted as Marked [[BCI]]**

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TABLE OF ABBREVIATIONS

Abbreviation	Abbreviated Term
Anti-Dumping Agreement	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
Applicants	Wujin and Walsin
BCI	Business Confidential Information
China	People's Republic of China
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GAAP	Generally Accepted Accounting Principles
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
HP-SSST	High-Performance Stainless Steel Seamless Tubes
JFE	JFE Steel Corporation
Kobe	Kobe Special Tube Co., Ltd.
MOFCOM	Ministry of Commerce of the People's Republic of China
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i>
SMI	Sumitomo Metal Industries, Ltd.
SMST	Salzgitter Mannesmann Stainless Tubes GmbH
Walsin	Changshu Walsin Speciality Steel Co., Ltd.
WTO	World Trade Organization
Wujin	Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd.

I. BCI PROCEDURES

Submission by China concerning the BCI Procedures

1. The European Union notes that China expresses "concern" (for the first time) about the amendments to the BCI procedures being done at a "very late stage", opining that it is not necessary, that it is unusual, and that it might not be appropriate, but without offering any legal analysis in this respect. China asserts that this "may place the parties in a difficult position as regards complying with their obligations concerning BCI issues", but offers no explanation in this respect. China asserts that the EU did not demonstrate that there were any unjustified¹ obstacles hindering it from making and developing its claims and arguments, and re-iterates its arguments regarding Article 6.5 of the Anti-Dumping Agreement.
2. Finally China confirms what the European Union and Japan have always feared: that it refuses and will continue to refuse to adduce relevant documents and information, such as information relating to the price undercutting analysis for product B by year, to the Panel on the spurious basis that Chinese firms (whose interests China represents in these proceedings) have not provided an authorization to that effect. Accordingly, consistent with the principles identified by the Appellate Body in *Canada – Aircraft*, the European Union respectfully requests the Panel to draw the appropriate reasonable inferences from China's continuing refusal to co-operate in these proceedings.

II. MOFCOM'S DUMPING DETERMINATION

A. *Failure to take into account certain information provided during verification*

¹ There appears to be a typographical error in paragraph 3 of China's responses, which apparently should refer to "unjustified" rather than "justified". If that is not the case, then the EU can only agree with China that the relevant obstacles in the original BCI procedures were not justified.

Question 83

At paragraph 209 of its first written submission, China explains, with references to tables 6-5, 6-6 and 6-8, that the financial expenses incurred at the headquarters were not double counted in table 6-5. We note that China submitted an updated English version of table 6 as Exhibit CHN-19. Please review the explanation in paragraph 209 in light of the updated table 6.

3. The EU refers to its responses to Questions 26 to 27 and Question 82. Our claim has always been and remains procedural. We do not accept that China's substantive submissions are responsive to our procedural claim. Nor do we accept that they demonstrate the absence of any double counting in Tables 6-6 to 6-8, this being a matter that it would be most appropriate to leave to the re-determination.

III. INJURY DETERMINATION

Question 91

At page 54 of its Final Determination, MOFCOM refers to the price undercutting effect of subject imports on the price of "domestic like products". We note that the phrase "like product" is expressed in the plural. Did MOFCOM's investigation cover more than one category of "domestic like product", or is the plural meant to refer to the three grades of domestic HP-SSST?

4. In its response to Question 91, China claims that "MOFCOM's likeness finding was based on the likeness between (i) the imported Grade A and the domestically produced Grade A; (ii) the imported Grade B and the domestically produced Grade B; and (iii) the imported Grade C and the domestically produced Grade C. Taking this into account, MOFCOM concluded that the basket of domestically produced grades A, B and C was 'like' the basket of imported grades A, B and C. In other words, the basket of domestically produced grades A, B and C constituted the like product as a whole, which consisted of products that were like each of the respective grades of the product under investigation". China does not provide a footnote as to where in the Final Determination this could be found.

5. According to the Final Determination, MOFCOM at the time did not reach the specific conclusions that each product was like each of the respective grades of the product under investigation. Rather, MOFCOM only found that "the products under investigation and certain domestically produced high-performance stainless steel seamless tubes are basically the same in terms of" a number of factors. "Therefore, the Investigation Authority establishes that domestically produced high-performance stainless steel seamless tubes and the products under investigation are like products"².
6. China referred to the following factors: "physiochemical properties, exterior appearance, production process, production equipment, product usage, sales channels, sales territories and clients, have consistent price trends, and are similar and comparable and can substitute each other".
7. It is only with regard to a single one of these factors, i.e. physiochemical properties, that MOFCOM argued that "domestically produced and imported HP-SSST of the same grade are basically identical in terms of such major technical specifications as chemical composition, metallographic structure grain size, yield strength, tensile strength and hardness, and are substitutable"³. China does not explain what it means by the term "major"; nor does it explain the methodologies employed in making such comparisons.
8. The Final Determination makes clear that the finding relating to respective grades was limited to physiochemical properties only as one of the different factors analysed. The conclusion which MOFCOM drew from its analysis of the different factors concerns only likeness of "the products under investigation and certain domestically produced high-performance stainless steel seamless tubes" as a whole, not likeness of the respective grades.⁴
9. In addition, it is worth recalling that this "likeness" determination (as regards the definition of domestic like products) was reached despite the opposition of

² Final Determination, Exhibit EU-30-EN, p. 28.

³ Final Determination, Exhibit EU-30-EN, p. 23.

⁴ Final Determination, Exhibit EU-30-EN, p. 28.

several interested parties.⁵ It has been argued that (i) the use is different for the different product grades, (ii) the mechanical properties of the different grades are different, and (iii) the chemical composition is different.⁶

Question 92

At paragraph 11 of its opening statement at the second meeting of the Panel, China refers to MOFCOM's clarification that "a large margin decrease of the prices of [Grade C] and [Grade B], both high-end products, will certainly drive down the price of [Grade A], so that a certain price difference among the three can be maintained." In the same paragraph, China submits that "[p]recisely because of the substitutability of Grade A by Grade B and/or Grade C and the resulting price correlation, MOFCOM refused to exclude Grade A from the scope of the investigation." With respect to the substitutability of Grades B/C and Grade A, please explain why a consumer would pay the higher price of Grades B/C if they were to use the product in an application where Grade A is sufficient.

10. MOFCOM would have had to examine price differentials between Grade A and Grades B/C in order to determine whether such price differences could have led to price effects on domestic Product A. Even if a competitive relationship existed (which, as the EU has claimed, was not demonstrated), then such an analysis of cross-grade price effects on domestic Product A would have been necessary. The investigation lacks such an examination.

Question 93

At paragraph 46 of its opening statement at the second meeting of the Panel, Japan submits that "China continues to stress that it was permissible for MOFCOM to rely on the 50% market share retained by subject imports to find causation, even in the absence of an increase in imports." Please explain why MOFCOM considered it appropriate to rely on the *market share retained* by subject imports.

11. In its response, China claims that it "did not rely on the market share retained by subject imports to conclude that the volume of subject imports in itself has an impact on the domestic industry".
12. However, the EU considers that the Final Determination makes clear that indeed, MOFCOM considered it appropriate to rely on the 50% market share retained by

⁵ Final Determination, Exhibit EU-30, pp. 23-28, cf. EU First Written Submission, para. 241.

⁶ Final Determination, Exhibit EU-30, pp. 23-28.

subject imports, in spite of the market share of subject imports dropping from around 90% in 2008 and 2009 to around 50% in 2010 and H1 2011.

13. The Final Determination reads: "*In a nutshell*, for the duration of the investigation period, although the imports of the subject products showed year-on-year declines and their share of the domestic market moved up and down, the share itself remained high at around 50%. *In particular*, the Grade TP347HFG subject product was sold in small quantities only in 2008, accounting for 1.45% of the domestic market in that year. For the duration of the investigation period, the imports of Grade S30432 subject product represented over 70% of China's total imports of the same product and close to or above 90% in domestic market share for the same product with further growth potential. In the same period, the imports of Grade TP310HNbN subject product represented over 20% of China's total imports of the same product and above 90% in domestic market share for the same product. *Therefore*, the imports of the subject products had a relatively noticeable impact on the price of domestic like products"⁷.
14. It follows from the Final Determination that MOFCOM took the fact of the 50% market share, referred to some particular aspects of this market share ("In particular...") and concluded: "*Therefore*, the imports of the subject products had a relatively noticeable impact on the price of domestic like products" (emphasis added). In the view of the EU, this line of argumentation is a *non-sequitur* in the Final Determination. Further, China does not explain which weight it attaches to the fact that the market share dropped significantly. This does not constitute an objective examination.

Question 94

At paragraph 489 of its first written submission, China seems to suggest that the complainants' Article 3.5 claims against MOFCOM's determination of a causal link between subject imports and injury to the domestic industry are dependent on, or consequential to, their Article 3.2 and 3.4 claims concerning MOFCOM's price effects and impact analyses. China also seems to suggest that because the Article 3.2 and 3.4 claims have no merit, the dependent or consequential Article 3.5 claims should also fail. Is this a correct portrayal of China's position?

⁷ Final Determination, Exhibit EU-30-EN, p. 65-66 (emphasis added).

a. **If not, please explain.**

b. **If so, please explain the basis for China's understanding that the complainants' have only made dependent/consequential claims in respect of MOFCOM's determination of a causal link between subject imports and injury to the domestic industry.**

15. In its response to the Panel question, China argues that certain claims are "purely consequential" based on the way they are phrased. China refers to para. 282 of the EU First Written Submission: "As such, a finding of causation is *dependent* upon the outcomes of the investigating authority's analyses of the previous steps – namely, the volume and price effects of dumped imports and their impact on the domestic industry producing like products"⁸. The European Union has explained in its response to Panel Question 88 that this does not mean that the claims are merely consequential. Even where evidence and arguments may be similar, this may support independent claims under Articles 3.2, 3.4 and 3.5.⁹ The arguments made by the EU under Article 3.2 and 3.4, as well as its additional arguments, support independent claims under Article 3.5. The fact that these are independent claims is not in contradiction with the fact that if the EU claims under Article 3.2 or 3.4 are being upheld, then those EU causation claims which are similar in evidence and argumentation would need to be upheld as well (although they are legally independent from its 3.2 and 3.4 claims).

16. One such example of where evidence and arguments may be similar but at the same time supporting claims under different articles is the re-construction of the import volume and the import price for the dumping investigation period (July 2010 – June 2011).¹⁰ By using the data on volumes and price of [[BCI]] and information provided during the proceedings in DS460, it was possible to re-calculate the volume of imports during the dumping investigation period ("DIP") and to provide an estimate of the import prices:

⁸ EU First Written Submission, para. 282.

⁹ Panel Report, *China – Autos (US)*, paras. 7.297-7.363.

¹⁰ European Union Response to Panel Question No. 78, paras. 3-7.

17.

Tons	2008	2009	2010	01-06.2011	DIP
EU&JP	20,100	16,400	4,500	2,600	3,669
TP347HFG	22	-	-	-	
S30432	14,691	12,648	3,749	2,432	3,498
TP310HNbN	5,387	3,75 2	752	168	171
Import Price					
Yuan/ton	2008	2009	2010	01-06.2011	DIP with adj
All Grades adj	125,100	107,300	86,700	79,000	85,555
TP347HFG					
S30432	112,300	93,800	83,700	76,900	84,135
TP310HNbN	159,619	152,803	101,664	109,408	114,559
TP310HNbN	159,983	152,819	101,863	109,236	

18. The results of the calculation show that during the dumping investigation period the volume of imports continues to decrease and the average import price increases. The results of this analysis undermine MOFCOM's conclusion of injury not just with respect to a claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, but also with respect to Articles 3.1 and 3.2 as well as Articles 3.1 and 3.4.

19. The volume of imports was calculated as follows:

20. During the DIP Product B was imported in China by all four exporting producers, SMI, Kobe, SMST and [[BCI]]. SMI imported [[BCI]] tons¹¹, Kobe imported [[BCI]] tons¹², SMST imported [[BCI]] tons¹³ and [[BCI]] imported [[BCI]] tons¹⁴. The total amount of imports is 3 498 tons of Product B.

¹¹ Exhibit JPN-20-EN(BCI) page 8, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell C15.

¹² Exhibit JPN-19-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell C16.

¹³ Exhibit EU-25-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell C17.

¹⁴ In reply to question 18 of the Questionnaire response (Exhibit EU-43 (BCI)) [[BCI]] stated that it exported [[BCI]] tons in 2010, 98 tons in the first half of 2010 and [[BCI]] tons in the first half of 2011 to China. It follows that [[BCI]] exported [[BCI]] tons during the DIP. Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell C18.

21. During the DIP Product C was imported in China only by SMI and SMST. SMI imported about [[BCI]] tons¹⁵ and SMST imported about [[BCI]] tons¹⁶. The total volume of imported Product C is 171 tons.
22. It follows that the total volume of imports of Products B and C during the DIP is 3 669 which is more than 800 tons less than the volume of imports in 2010.
23. As regards prices: While it was possible to estimate the CIF import price, it seemed impossible to re-construct the adjustment the investigating authority made to that CIF import price in order to bring it to the same level of trade as the Chinese domestic prices ex works. Therefore, the following methodology was used to arrive at a very conservative estimate.
24. During the DIP Product B was imported in China by all four exporting producers, SMI, Kobe, SMST and [[BCI]]. SMI's weighted average CIF price was [[BCI]] Japanese Yen¹⁷, Kobe's weighted average CIF price was [[BCI]] Japanese Yen¹⁸, SMST's weighted average CIF price was [[BCI]] EUR¹⁹ and [[BCI]] weighted average CIF price was [[BCI]] EUR²⁰. As the CIF weighted average prices are in different currencies, it was necessary to convert them to a single currency. As a first step the weighted average CIF price in Japanese yen was converted into EUR on the basis of the statistics of De Nederlandsche Bank.²¹ The exchange rate for 2010 was used as it provides a very conservative estimate.²² On the basis of this calculation SMI's weighted average CIF price was [[BCI]] EUR and Kobe's weighted average CIF price was [[BCI]] EUR.

¹⁵ Exhibit JPN-20-EN(BCI) page 8, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell F15.

¹⁶ Exhibit EU-25-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell F17.

¹⁷ Exhibit JPN-20-EN(BCI) page 8, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B15.

¹⁸ Exhibit JPN-19-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B16.

¹⁹ Exhibit EU-25-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B17.

²⁰ In response to question 28 [[BCI]] reported that its sales revenue in 2010 was [[BCI]] EUR, in the first half of 2010 – [[BCI]] EUR and in the first half of 2011 – [[BCI]] EUR. Therefore, its revenue during the dumping investigation period was [[BCI]] EUR. This revenue is divided by [[BCI]] tons which gives an average price of [[BCI]] EUR for the DIP. Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B18.

²¹ <http://www.statistics.dnb.nl/en/financial-markets/exchange-rates/index.jsp>

²² Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell E9. Using the exchange rate for 2011 (Cell F9) would result in higher weighted average CIF price in EUR.

25. The weighted average prices in EUR for each company were multiplied by the volume of imports for each company.²³ The sum of the values that resulted from this calculation was divided by the total volume of imports of Product B 3 498 tons which resulted in a weighted average price of 8 821 EUR.²⁴ This price in EUR had to be converted to Chinese Yuan on the basis of the statistics of De Nederlandsche Bank for 2010.²⁵ This resulted in a weighted average CIF price for Product B of 79 135 Yuan. As it is unclear how China did the adjustment (even after China provided Exhibit CHN-23-EN), the European Union calculated by adding 5 000 Yuan to that price which appears to be a conservative estimate. The weighted average import prices for all product types at CIF basis and adjusted is in the Final Disclosure Document²⁶.

Yuan/ton ²⁷	2008	2009	2010	01-06.2011
All grades CIF	118,300	101,700	78,500	71,100
All Grades adj	125,100	107,300	86,700	79,000
Difference	6,800	5,600	8,200	7,900

26. A simple subtraction of the CIF price from the adjusted prices shows that the adjustment varies from 5 600 to 8 200 Yuan. The European Union calculated with only 5 000 Yuan. This resulted in an adjusted price for Product B of 84 135 Yuan or a price slightly higher than the price of Product B in 2010.

27. During the DIP Product C was imported in China only by SMI and SMST. SMI's weighted average CIF price was [[BCI]] Japanese Yen²⁸ and SMST's weighted average CIF price was [[BCI]] EUR²⁹. SMI CIF price was converted in EUR on the basis of the statistics of De Nederlandsche Bank for 2011.³⁰ It was decided to use the data for 2011 because according to the Final Disclosure Document³¹ the import volume of Product C for the first half of 2011 was 168. As the total volume of imports during the DIP is 171 it appears that almost all

²³ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cells D15 to D18.

²⁴ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B19.

²⁵ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B21 – The formula used is the price in Cell B19 multiplied by the exchange rate in cell E10.

²⁶ Exhibit JPN-2-EN, pages 49, 51 and 52.

²⁷ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cells A31 to E36.

²⁸ Exhibit JPN-20-EN(BCI) page 8, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell E15.

²⁹ Exhibit EU-25-EN(BCI) page 6, Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell E17.

³⁰ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell E15. The exchange rate in Cell F9 was used.

imports were made in 2011. SMI's CIF price in EUR is thus [[BCI]] EUR. The weighted average prices in EUR for each company were multiplied by the volume of imports for each company.³² The sum of the values that resulted from this calculation was divided by the total volume of imports of Product C 171 tons which resulted in a weighted average price of [[BCI]] EUR.³³ This price in EUR was converted to Chinese Yuan on the basis of the statistics of De Nederlandsche Bank for 2010.³⁴ Using the data for 2010 was a mistake in favour of China as it resulted in a slightly lower weighted average CIF price for Product C of 109 559 Yuan. As for Product B the European Union added 5 000 Yuan to adjust the CIF price for Product C which resulted in 114 559 Yuan. This price is significantly higher than the price in 2010 (over 10 000 Yuan more).

28. The weighted average CIF price for Products B and C was calculated as follows. First, the EU multiplied the weighted average CIF price for Product B (79 135 Yuan, cell B21) by the volume of imports of Product B (3 498 tons Cell C21). Second, the EU multiplied the weighted average CIF price for Product C (109 559 Yuan, Cell E21) by the total volume of imports of Product C (171 tons, Cell F21). The total value of imports of Product B was added to the total value of imports of Product C and the resulted amount was divided by the total volume of imports of Products B and C (Cell D22). This resulted in a weighted average CIF price of 80 555 Yuan.³⁵ The European Union added 5 000 Yuan to adjust that price. The price that resulted 85 555 Yuan is slightly lower than the price in 2010 (86 700 Yuan). The weighted average price for both product types is lower because of the weighting involved. While in 2010 the import volume of Product C represented about 17% of the total import volume during the DIP the import volume of Product C represented only about 5% of the total import volume.

³¹ Exhibit JPN-2-EN, pages 43 and 51 (the data is derived from the data in the disclosure).

³² Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cells E15 and E18.

³³ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell B19.

³⁴ Exhibit EU-42 Calculation (Electronic file) (BCI), Details, Cell E21 – The formula used is the price in Cell E19 multiplied by the exchange rate in cell E10.

³⁵ All references in this paragraph are references to Exhibit EU-42 Calculation (Electronic file) (BCI).

29. Overall, it could be established that the import prices for Product B and Product C increased during the DIP in comparison with 2010.
30. As the European Union has argued, China's comparison of half year data with data obtained on an annual basis does not lead to meaningful conclusions on trends in the development of an industry.³⁶ The information for a full year shows that the volume of imports continues to decrease and that the value of imports increases.³⁷ China's comparison of half year data with data obtained on an annual basis cannot be considered an "objective" examination³⁸ of the available data as required by Articles 3.1 and 3.2; Articles 3.1 and 3.4; Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The violation of the "objective examination" requirement in Article 3.1 is not restricted to China's determination of a causal link (Articles 3.1 and 3.5 of the Anti-Dumping Agreement), but vitiates at the same time China's price effects analysis (Articles 3.1 and 3.2) and China's impact analysis (Articles 3.1 and 3.4).
31. Therefore, contrary to what China states in its response to Panel Question No. 94, such claims made under Article 3.1 and 3.5 are not merely consequential to the claims under Articles 3.1 and 3.2; 3.1 and 3.4. The European Union argues that even where evidence and arguments may be similar such as in this example, this may support independent claims under Articles 3.2, 3.4 and 3.5.³⁹

Question 95

MOFCOM performed its non-attribution analysis by considering whether certain factors broke the causal link between subject imports and injury to the domestic industry. If the Panel were to find that MOFCOM's determination of such causal link were inconsistent with Article 3.5, would this finding necessarily mean that MOFCOM's non-attribution analysis was also flawed, in the sense that there is no basis to determine whether a causal link that is not properly shown to exist may or may not have been broken? Please explain.

32. China limits its response to a request for an exercise of judicial economy by the Panel. The European Union considers that if the Panel were to find that

³⁶ European Union Response to Panel Question No. 78, para. 3.

³⁷ European Union Response to Panel Question No. 78, para. 3.

³⁸ European Union Response to Panel Question No. 78, para. 3.

³⁹ Panel Report, *China – Autos (US)*, paras. 7.297-7.363.

MOFCOM's determination of such causal link were inconsistent with Article 3.5, then this finding would necessarily mean that MOFCOM's non-attribution analysis was also flawed. In order to secure a prompt resolution of this dispute, the European Union respectfully requests the Panel to make findings with respect to each of the claims by the European Union under Articles 3.1, 3.2, 3.4 and 3.5, without exercising judicial economy as to any of those claims.

Question 96

Please comment on the complainants' argument (footnote 75 of Japan's second written submission, and paragraph 67 of the EU's second written submission) that, even when only two producers are involved, the disclosure of one producer's weighted average prices would only reveal confidential information to the other producer if that other producer knew the volume of sales, and therefore the degree of weighting, involved.

33. First, China declines to answer the question on the grounds that it is "legally" and "factually" "irrelevant".⁴⁰ The European Union and Japan have already explained why they consider that China has failed to comply with its obligations under Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement, and we will not repeat those arguments here. The Panel would not have asked the question unless it considered that the answer might be relevant.
34. Second, China is incorrect to assert that precise information concerning the total volume of sales is available.⁴¹ The information in Table 4 of the Complainants' First Written Submissions is in this respect merely derived and approximated data, which has never been confirmed by China. The pertinent question is whether or not, with respect to this specific issue, China complied with Articles 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. The answer to that question is that China failed to comply with these obligations. It failed to at least provide a range of data which would have been able to eliminate the concerns raised by Japan and the EU.

⁴⁰ China's Response to Panel Question 96, paras. 27-31.

⁴¹ China's Response to Panel Question 96, para. 31.

Question 97

Please clarify the basis for China's assertion, at paragraph 32 of its opening statement at the second meeting of the Panel, that "[t]he complainants eventually appeared to acknowledge that MOFCOM did analyse extensively [the] competitive relationship" between imported and domestic Grade C.

35. In its response to the Panel question, China refers to the argumentation provided by Japan in its Second Written Submission, starting at para. 34. In the view of the European Union, Japan shows in its paragraphs 34-37 in detail that China's finding on the issue of a competitive relationship between imported and domestic products for purposes of China's like product determination is not the result of an "objective examination" based on "positive evidence". As Japan correctly points out, in China's like product determination, China refers to an allegedly "wide range of evidence"⁴² only by means of blanket references, and does not provide an explanation as to how these documents support MOFCOM's conclusion.⁴³ The European Union fully agrees with, endorses and incorporates Japan's considerations as described in its Second Written Submission, paras. 34-37, and the EU also refers back to its own Second Written Submission, paras. 162-170.
36. The European Union does not consider that the complainants thus "acknowledge that MOFCOM did analyse extensively [the] competitive relationship" between imported and domestic Grade C. Rather the opposite, the discussion shows that even as part of its like product determination, China's considerations regarding competition between imported and domestic product are lacking and do not constitute an "objective examination" based on "positive evidence". The European Union agrees with Japan that the evidence China refers to does not support a conclusion that imported and domestic Product C competed with one another. This however is a pre-condition for conducting an injury analysis.
37. The European Union has already pointed out previously that a price undercutting test requires not only that the products compete but also that the

⁴² China's Response to Panel Question 35, paras. 120-122.

prices are comparable, a finding that China has not made. The EU considers that the Panel in *China – X-Ray Equipment* found that MOFCOM's "conclusion in the context of considering the scope of the investigation, namely that the domestic product was 'like' the product under consideration, does not mean that MOFCOM fulfilled its obligation to ensure price comparability when conducting its price effects analysis under Article 3.2 of the Anti-Dumping Agreement"⁴⁴.

IV. ARTICLE 6.8

Question 98

Please comment on Japan's argument, at paragraph 57 of its opening statement at the second meeting of the Panel, that MOFCOM's posting of the questionnaire on its website was not sufficient to make unknown Japanese exporters aware of the existence of that questionnaire "because the questionnaire was not published at a place or through the use of a medium officially specified beforehand in the applicable Chinese laws and regulations".

38. The European Union has no further comments on this issue.

V. TREATMENT OF CONFIDENTIAL INFORMATION

Question 99

At paragraph 298 of its second written submission, China submits that "Japan still fails to see that, [] with respect to Appendix V to the Petition, MOFCOM explained why it considered that the Petitioner's confidentiality request was justified with regard to the name of the third party providing the report and with regard to the entire text of the report. It appears that Japan has yet to spot the footnote to the relevant text." (footnotes omitted) In the Panel's view, China appears to read MOFCOM's explanation of why MOFCOM considered that the request was justified into footnote 18 quoted at paragraph 175 of China's response to Panel question No. 67. Please comment.

39. China purports to respond to Questions 99-102 together, based on the assertion that they are related. This obscures China's responses. The Panel would not have framed distinct questions unless it was seeking distinct responses. In this respect,

⁴³ Japan's Second Written Submission, para. 35, second bullet point.

⁴⁴ Panel Report, *China – X-Ray Equipment*, para. 7.66.

therefore, China is not responsive to the Panels questions. The European Union respectfully requests the Panel to take this into consideration when making its objective assessment.

40. China does not directly, clearly and specifically response to Question 99. Insofar as the European Union can discern, China's response to Question 99, even if in part implied or reasonably inferred from China's partial silence, is yes. China asserts that footnote 18 contains an explanation by MOFCOM of why MOFCOM considered the request for confidentiality was justified. The European Union disagrees. As we have already indicated, we agree in this respect with Japan's submissions on this point, including Japan's response to Question 99. Footnote 18 summarises the reasons advanced by the Petitioners. It does not contain reasoning attributable to MOFCOM.

Question 100

At paragraphs 715-716 of its first written submission and paragraphs 174-175 of its response to Panel question No. 67, China quotes MOFCOM's injury disclosure and final determination. Please clarify which appendix is addressed in this quote.

41. China does not directly, clearly and specifically response to Question 100. Insofar as the European Union can discern, China's response to Question 100, even if in part implied or reasonably inferred from China's partial silence, is that the quotations referenced by the Panel refer to Appendix V. They do not refer to any other appendix and there is no basis for "extrapolating" them to any other appendix.

Question 101

At paragraph 295 of its second written submission, China refers to MOFCOM's response to an allegation that the import data contained in one of the appendices was unreliable. In the same paragraph, China submits that "MOFCOM's explanation can be extrapolated to apply to the remaining three appendices, as the Petitioners' reasons for requesting confidential information were similar, if not identical, for all four appendices in question." Please indicate where this reasoning can be found in the record of the underlying anti-dumping proceedings.

42. China does not directly, clearly and specifically response to Question 101. Insofar as the European Union can discern, China's response to Question 101, even if in

part implied or reasonably inferred from China's partial silence, is that the reasoning referenced by the Panel cannot be found in the record of the underlying anti-dumping proceedings.

Question 102

At paragraph 294 of its second written submission, China submits that "the Anti-Dumping Agreement imposes no obligation on an investigating authority to explain why it considers that confidential treatment is warranted." At paragraph 79 of its opening statement at the second meeting of the Panel, China "disagrees with Japan's apparent position that an investigating authority is under an obligation to place its scrutiny of the confidentiality requests on the record". At paragraph 67 of its opening statement at the second meeting of the Panel, Japan submits that "Japan fails to see how anyone, including this Panel, could evaluate whether an investigating authority has 'objectively assess[ed]' and 'scrutinize[d]' a petitioner's attempted showing of good cause." Please explain how a panel should examine whether an investigating authority objectively assessed "good cause" for confidential treatment and scrutinized a party's showing with a view to determining whether the submitting party has sufficiently substantiated its request (Appellate Body Report, *EC – Fasteners*, para. 539), if an investigating authority need not explain why it considers that confidential treatment is warranted.

43. China does not directly, clearly and specifically response to Question 102. Insofar as the European Union can discern, China's response to Question 102, even if in part implied or reasonably inferred from China's partial silence, is that there is no basis on which a panel could examine whether an investigating authority objectively assessed "good cause" for confidential treatment and scrutinized a party's showing with a view to determining whether the submitting party has sufficiently substantiated its request, if an investigating authority need not, and does not, explain why it considers that confidential treatment is warranted.

Question 103

Please provide a BCI copy (with the names of the third party institutes redacted if necessary) of the confidential reports summarized in appendices V and VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and appendix to the petitioners' supplemental evidence of 29 March 2012.

44. The European Union refers to Japan's comments on China's response to Panel Question 103 by way of incorporation.

45. The European Union shares Japan's surprise at the scant nature of the confidential versions of these four appendices. In the view of the European Union, they cannot appropriately serve as “positive evidence” in this dispute. The reports do not contain detail regarding the methodologies and evidence used by the authors. This puts into question the reliability of these reports.
46. The confidential versions of these four appendices submitted by China serve to demonstrate both that: (i) MOFCOM lacked “good cause” to treat their full texts as confidential in accordance with Article 6.5 of the Anti-Dumping Agreement; and (ii) MOFCOM failed to require sufficient non-confidential summaries in accordance with Article 6.5.1 of the Anti-Dumping Agreement.
47. The following examples elaborate further on these claims.
48. With respect to Appendix V to the Petition, the European Union makes the following observations, based on a comparison of the confidential version provided in Exhibit CHN-21 with the non-confidential version contained in the Petition at Exhibit EU-1:
49. Under Section 3 of this appendix, the confidential version indicates the following, which is not included in the non-confidential version: [[BCI]]. There is no “good cause” to keep this statement confidential, because [[BCI]]. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain this fact.
50. Also under Section 3 of this appendix, immediately following the sentence just quoted, the confidential version states the following regarding the methodology used to determine the data regarding domestic HP-SSST demand, which is not included in the non-confidential version: [[BCI]]. The methodology is expressed in generic terms. Disclosing it does not lead to any risks. Therefore there is no “good cause” to keep this statement confidential. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain a summary of this methodology.

51. With respect to Appendix VIII to the Petition, the European Union makes the following observations, based on a comparison of the confidential version provided in Exhibit CHN-22 with the non-confidential version contained in the Petition at Exhibit EU-1 (including the specific numbers that the European Union understands to be provided at pages 26 and 31-32 of the Petition):
52. The confidential version of this appendix indicates that the figures contained therein are the result of [[BCI]] and [[BCI]]. The non-confidential version provides no such indication. There is no information on sources. The methodology is expressed in generic terms. Disclosing it does not lead to any risks. Therefore there is no “good cause” to keep these statements confidential. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain a summary of this methodology.
53. Regarding the [[BCI]], the confidential version of this appendix indicates the source of the data to be [[BCI]]. This is a public source. The non-confidential version provides no such indication. Disclosing such a public source does not lead to any risks. Therefore there is no "good cause" to keep this source confidential. Moreover, the summary contained in the non-confidential version of this appendix (including pages 31-32 of the Petition where these data are disclosed) is insufficient because it does not contain a summary of this source.
54. With respect to Appendix 59 to Petitioners’ Supplemental Evidence of 1 March 2012, the European Union makes the following observations, based on a comparison of the confidential version provided in Exhibit CHN-23 with the non-confidential version contained in Exhibit EU-15:
55. The confidential version of this appendix indicates that the figures contained therein are the result of [[BCI]] and [[BCI]]. The non-confidential version provides no such indication. The methodology is expressed in generic terms. Disclosing it does not lead to any risks. Therefore there is no “good cause” to keep these statements confidential. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain a summary of this methodology.

56. Regarding the [[BCI]], the confidential version of this appendix indicates the source of the data to be [[BCI]]. The non-confidential version provides no such indication. There is no apparent “good cause” for keeping confidential [[BCI]]. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain a summary of this source information.
57. The European Union also considers that the summary was misleading. For example, CHN-23 states: "Container transportation: [[BCI]]"⁴⁵. The summary in Exhibit EU-15 states however: "40-50 RM/ton for container transportation"⁴⁶.
58. With respect to the Appendix to Petitioners' Supplemental Evidence of 29 March 2012, the European Union makes the following observation, based on a comparison of the confidential version provided in Exhibit CHN-24 with the non-confidential version contained in Exhibit EU-16:
59. The confidential version of this appendix contains [[BCI]]. The non-confidential version discusses only domestic production statistics. There is no apparent “good cause” for keeping confidential [[BCI]]. Moreover, the summary contained in the non-confidential version of this appendix is insufficient because it does not contain a summary of this information.
60. In addition, the European Union fails to understand the several concerns that China alleges petitioners to have raised in support of their requests for full confidentiality, such as the inability of the authors to sell the same data to others for remuneration (given that the data itself were already disclosed) or ensuring third parties would cooperate with the authors and provide information in the future (given that nothing in these reports identifies any confidential third party sources of information).⁴⁷ The confidential versions of the four appendices submitted by China reveal that the non-confidential versions withhold generic or public statements regarding sources and methodologies as confidential and disclose the various pieces of numerical data supplied within these reports.

⁴⁵ Exhibit CHN-23-EN, p. 2.

⁴⁶ Exhibit EU-15-EN, p. 11. It is not a translation error since Exhibit EU-15-CN, p. 6, states the same range of "40-50" RMB which in the view of the European Union is misleading.

⁴⁷ See China's First Written Submission, para. 728.

Further, the confidential versions do not contain any identities of confidential third party sources that provided information to the authors of these reports.

61. In the view of the European Union, the confidential versions of the four appendices at issue confirm that petitioners' confidentiality concerns could have been addressed by disclosing the full texts of the reports while redacting the names of the third party authors.
62. By failing to require such disclosures, MOFCOM violated its obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, because it failed to ensure that "good cause" was shown prior to treating the full texts as confidential and failed to require sufficient non-confidential summaries.