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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)

**Responses to Second Set of Questions from the Panel
European Union**

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

**Geneva
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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

Question 78

At paragraph 28 of its second written submission, the European Union submits that "[t]his aspect of the BCI procedures has already been prejudicial to the European Union. The European Union would have wished to make and develop certain other claims and arguments, but has been hindered in pursuing that objective by the existence of this requirement for prior authorization." At paragraph 23 of its opening statement at the second meeting of the Panel, the European Union submits that "the European Union would have liked to present and develop other arguments, also implicating data relating to other firms, and would still like to do so, but has to-date been constrained and prevented from doing so by the existence of this rule." Please explain what specific BCI, or type of BCI, the European Union would submit to the Panel if the authorization requirement in Paragraph 2 of the BCI Procedures were revoked. Please also explain how such information would be used to support the European Union's claims.

1. The EU thanks the Panel for its communication dated 22 May 2014: (1) amending paragraph 10 of the Working Procedures (relating to translations) by the insertion of the phrase "to the extent that its significance is reasonably apparent"; (2) deleting paragraph 2 of the BCI Procedures (requiring Parties to obtain prior written authorisation from firms before submitting confidential information); and (3) amending paragraph 1 of the BCI Procedures so that it now refers to information treated as confidential by the investigating authority (as opposed to submitted by the firm). We note that the Panel has not added to the BCI Procedures an express statement to the effect that the Panel will decide any designation disputes arising (as originally proposed by the EU and Japan), and we therefore understand this to be implicit. We recall in this respect that the EU has contested certain designations made by China and we look forward to the Panel's determinations with respect to these matters.
2. As indicated at the hearing, the EU has additional information about the volume and pricing of EU exports that would be of assistance to it in pursuing its injury claims. This should be seen in conjunction with information that the EU has requested the Panel to request from China pursuant to Article 13 of the DSU.

3. Exhibit EU-42 (BCI) contains a re-construction of the import volume and the import price for the dumping investigation period (July 2010 – June 2011). This is a full year period as opposed to the comparison based on a half year period (for the first half of 2011) which China provided. In its recommendation of 2010 the WTO Anti-dumping Committee considered that it is necessary to analyse a period of at least three years in order to make an objective analysis of the developments of the state of the domestic industry.¹ The time periods an authority compares should be equal in order for the analysis to render meaningful results. The 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. It cannot be considered an "objective" examination of the available data. The information for a full year shows that the volume of imports continues to decrease and that the value of imports increases.
4. The calculation in Exhibit EU-42 (BCI) was done as follows: The fourth exporting producer who participated in the investigation is [[BCI]]. The confidential injury questionnaire response of [[BCI]] in the possession of the EU contains the volume and value of imports of [[BCI]] during the dumping investigation period. Using the data of [[BCI]] and the information already submitted to the Panel it is possible to re-calculate the volume and the weighted average value of the imports from the EU and Japan during the dumping investigation period.
5. According to its questionnaire response [[BCI]] has been exporting Product B only. In reply to question 18 of the Questionnaire response (Exhibit EU-43 (BCI)) [[BCI]] stated that it exported [[BCI]] tons in 2010, [[BCI]] 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 dumping investigation period. 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

¹ Recommendation concerning the periods of data collection for anti-dumping investigations, G/ADP/6, p. 1.

period was [[BCI]] EUR. This gives an average price of [[BCI]] EUR for the dumping investigation period.

6. Exhibit JPN-20-EN (BCI) page 8 demonstrates the import volume of SMI for both Product B and Product C and the CIF value of both Product B and Product C. Exhibit JPN-19-EN (BCI) page 6 demonstrates the import volume of Product B and its import CIF value. The values are in Japanese Yen which were converted in EUR on the basis of the statistics for 2011 of the De Nederlandsche Bank available online and cited in Exhibit EU-42 (BCI). Exhibit EU-25-EN (BCI) page 6 demonstrates the import volumes for Product B and Product C of SMST and the CIF import values of SMST for Product B and Product C. Both values are in EUR.
7. On the basis of the data of all companies it was possible to determine the total import volume and import value for the dumping investigation period in EUR. The weighted average values in EUR were converted in Chinese Yuan using the exchange rates in same statistics database as indicated in the previous paragraph. China has disclosed the average import price of all imports both as a CIF value and as an adjusted value. The EU compared the difference between the CIF value and the adjusted value for each year. The difference varies from [[BCI]] Yuan to [[BCI]] Yuan. The EU therefore, added 5 000 Yuan to the weighted average CIF import prices for Product B and Product C to obtain the adjusted weighted average price of imports. This is, therefore, a very conservative estimate.

II. MOFCOM'S DUMPING DETERMINATION

A. *Fair Comparison: SMST's sales under Grade C*

Question 79

At paragraph 77 of its response to Panel question No. 15(c)(i), the European Union states that "SMST also presented MOFCOM with all of the invoices and other sales documents related to the Chinese transactions." The European Union cites to SMST

dumping questionnaire response, Exhibit EU-10, at internal exhibits 3-19. We note these internal exhibits were not included in Exhibit EU-10. Please provide a copy of internal exhibits 3-19.

8. The European Union understands that this question relates to whether or not the Product C (DMV 310N) thin outer diameter tube transactions used by MOFCOM to establish normal value were comparable to the thick outer diameter tube export transactions with which they were compared. In particular, the question focuses on the issue of price comparability (as opposed to the additional processing costs²). Further, the question focuses particularly on the non-comparability of the thick outer diameter tube export transactions, as opposed to the difference in price between domestic thin outer diameter tube and domestic thick outer diameter tube.³
9. In our First Written Submission, we demonstrated that the CIF export price for thick outer diameter tube of Product C (DMV 310N) was EUR [[BCI]] per metric tonne.⁴ This has not been contested by China (China has had seven opportunities to contest but has not done so⁵). We compared this with the domestic price of the thin outer diameter tube, which we demonstrated to be EUR [[BCI]] per metric tonne.⁶ This has also not been contested by China (China has had seven opportunities to contest but has not done so⁷). We thus demonstrated the very substantial price difference between the domestic thin outer diameter tube relied on by MOFCOM for the purposes of establishing normal value and the thick outer diameter tube exports to China with which they were compared. We have further explained that the price difference reflected the different processing costs.⁸
10. We understand that the Panel is now requesting copies of the invoices relating to the thick outer diameter tube exports to China.

² See the EU Response to Question 80 from the Panel.

³ EU FWS, para. 178, footnote 195 and Exhibit EU-13 (BCI).

⁴ EU FWS, para. 178, footnote 195 and Exhibit EU-25 (BCI).

⁵ FWS, SWS, Opening and Closing Oral Statements at the First Meeting, Opening and Closing Oral Statements at the Second Meeting, China's Reponse to First Set of Questions.

⁶ EU FWS, para. 178, footnote 195 and Exhibit EU-21 (BCI).

⁷ FWS, SWS, Opening and Closing Oral Statements at the First Meeting, Opening and Closing Oral Statements at the Second Meeting, China's Reponse to First Set of Questions.

⁸ See the EU Response to Question 80 from the Panel.

11. Attached at Exhibit EU-39 (BCI) is the final version of SMST Table 3-4 POI China export transactions, showing the [[BCI]] items on page 1 of the table (lines 9 and 10, [[BCI]], DMV 310 N, [[BCI]], item 91004106. Also attached at Exhibit EU-40 (BCI) (electronic only) is investigation exhibit 3-19. Pages 63 to 65 are invoice 91004106, [[BCI]], [[BCI]], DMV 310 N ([[BCI]] transactions), showing a thick outer diameter of "[[BCI]] mm" (compared to the thin outer diameter of [[BCI]] mm for the domestic transactions). In addition, the pro forma invoices for these [[BCI]] (and other) transactions are at pages 37 to 40 of the same exhibit 3-19, and show the same information. The unit price for the first transaction is $[[BCI]]/[[BCI]] = \text{EUR } [[BCI]]$ per metric tonne. The unit price for the second transaction is $[[BCI]]/[[BCI]] = \text{EUR } [[BCI]]$ per metric tonne. This compares to EUR [[BCI]] per metric tonne for tube with an outer diameter of [[BCI]] mm.⁹

Question 80

At paragraph 150 of its first written submission, China submits that "[t]he cost of production reported in Table 6-3 for Grade C is one single cost of production and does not differentiate between different production processes within the grade." At paragraph 77 of its response to Panel question No. 15(c)(i), the European Union submits that "Table 6-3 (DMV 310N (EU)) showed that the unit processing costs (i.e., unit costs of production – unit raw material costs) for the thin secondary system tube were ... greater than any of the other Product C transactions."

- a. **Please comment on China's statement, and explain its relation to the European Union's assertion.**
 - b. **Please review the citation attached to the European Union's statement. It appears that the citation refers to a paragraph in the European Union's first written submission which addresses the production cost of Grade B, rather than Grade C.**
12. Footnote 42 to paragraph 77 of the EU Response to Panel Question 15(c)(i) contains a typographical error. It should refer to paragraph 177 (not 167) of the EU FWS. The reference to Table 6-3 is correct.
13. Exhibit EU-41 (electronic only) (BCI) contains Table 6-3 for Product C (DMV 310N) (EU) as submitted, with an additional worksheet showing the same data on a per unit basis and including a subtotal for processing costs to aid in the

⁹ EU FWS, para. 178, footnote 195 and Exhibit EU-21 (BCI).

comparison of costs.¹⁰ Table 6-3 demonstrates that, during the period of investigation, EU production and sales of Product C (DMV 310N) took place in [[BCI]]. The sales quantities reported in Table 6-3 correspond exactly to the sales quantities for the six transactions involving Product C reported in Table 4-2 (Exhibit CHN-6-EN). The [[BCI]] months in which the thin tubes were produced and sold were [[BCI]]. The European Union has already provided the documents relating to these sales at Exhibit EU-21 (BCI).¹¹ Exhibit EU-21 (BCI), page 3, is dated [[BCI]] and shows a net weight of "[[BCI]] KG" and a thin diameter tube of "[[BCI]]mm". This reconciles to [[BCI]] on both worksheets in Exhibit EU-41 (BCI) ("[[BCI]]"). Thus, all of the product produced and sold in [[BCI]] was thin diameter. The same reconciliation applies to Exhibit EU-21 (BCI), page 5 (dated [[BCI]], net weight "[[BCI]]" and a thin diameter tube of "[[BCI]]mm"), which reconciles to [[BCI]] on both worksheets in Exhibit EU-41 (BCI) ("[[BCI]]"). Thus, all of the product produced and sold in [[BCI]] was thin diameter.

14. The data relating to [[BCI]] related to [[BCI]] samples and was specifically rejected by MOFCOM as unrepresentative.¹² Sales and production occurred in representative quantities in [[BCI]].
15. The unit processing costs for the thin tube in cells [[BCI]] and [[BCI]] of the unit worksheet are far in excess of the unit processing costs for [[BCI]]. As shown by Table 6-3 (Exhibit EU-41), processing costs are the total of those costs, such as labour, fuel and energy, expended in transforming the raw materials into finished tubes. These processing costs relate in large part to the rolling/drawing process. As SMST explained to MOFCOM, ".. because of their very thin dimensions, they require more extensive rolling/drawing resulting in higher costs of production"¹³ and "Thin diameter tube requires more extensive

¹⁰ See also: Exhibit CH-7-EN SMST Table 6 (electronic file) (BCI).

¹¹ EU FWS, para. 178 and footnotes 192 and 195, referring to Exhibit EU-21 (BCI).

¹² EU FWS, para. 169 and footnote 183, citing the Preliminary Determination at page 29 and the Final Determination at page 41.

¹³ SMST Comments on Preliminary Dumping Disclosure, para. 5 (Exhibit EU-19) (BCI); EU First Opening Oral Statement, para. 33 and footnote 13, para. 36 and footnote 23, and paras. 39-40; EU Responses to Panel Questions 11, 15, 16 and 17.

rolling/drawing, resulting in higher costs of production and prices."¹⁴ These cost differences are evident from Table 6-4¹⁵ where each item of processing costs (e.g., direct materials, direct labour, etc.) is substantially higher for the thin tube produced in [[BCI]] than for the Product C tube produced in any other month, including the sample tube produced in [[BCI]].

16. Moreover, the unit processing costs for the thin tube in cells [[BCI]] and [[BCI]] of the unit worksheet are also far in excess of the processing costs for the Product C tube sold to China and reflected in Table 6-3 (DMV 310N) (CN).¹⁶ By contrast, the processing costs for the Product C tube sold to China are very close to those for the Product C tube produced in [[BCI]] and sold in the EU market (i.e., unit processing costs for [[BCI]] of the unit processing cost worksheet.

B. It is also important to note that the difference in processing costs is not due to low production volumes as suggested by China during the second substantive meeting with the parties. This is clearly demonstrated by comparing the processing costs for the sample tube produced in [[BCI]] with the processing costs for the other Product C tube produced. Even though the sample tube has by far the lowest production quantity and the highest per-unit raw material costs, its processing costs are comparable to those of the tube produced in [[BCI]] and far below those of the thin tube. Thus, it is evident that the higher processing costs for thin tube are not due to low production volumes. The use of SG&A amounts for Grade B

Question 81

At paragraph 45 of its response to Panel question No. 8, the European Union states that "[t]he EU claims are of inconsistencies with ... Article 2.2.1 and Article 2.2.1.1. ... In addition, a determination of breach of Article 2.2.2 would have as a consequence that the Panel should also find a breach of each of the other provisions." (emphasis added) Please explain whether the European Union's claims under Articles 2.2.1 and 2.2.1.1 of the AD Agreement are consequential to or independent from the European Union's claim under Article 2.2.2 of the AD Agreement.

¹⁴ SMST Comments on Final Dumping Disclosure (Exhibit EU-28) (BCI), quoted at EU FWS, para. 178 and footnote 197.

¹⁵ Exhibit CH-7-EN SMST Table 6 (electronic file) (BCI).

¹⁶ Table 6-3 (DMV 310N) (CN) shows total processing costs of [[BCI]] (total of cells O12 to O16). When divided by the total production quantity of [[BCI]], this yields unit costs of processing of [[BCI]].

17. To briefly recall the EU position with respect to this matter. The EU has expressly referenced Article 2.2.2¹⁷ in its Panel Request, and China has never pretended that it thought the EU was referring to anything else, nor could it plausibly do so. The case law confirms that this is sufficient if there is only one obligation, or interlinked obligations. There is only one obligation in that provision (not four, as China would have it), which relates to the basis for calculating SG&A. In any event, the term "pertaining to" links the two terms under discussion between the parties. This is sufficient for the Panel to reject China's Article 6.2 claim.
18. Contrary to what China asserts, the EU did not "expressly limit" its claim: it simply provided a brief summary, which was, by definition, shorter than Article 2.2.2 itself. To construe every "brief summary" as an "express limitation", as China would have it, would empty the term "brief summary" in Article 6.2 of the DSU of meaning. The standard is Article 6.2 is merely sufficiency.
19. This conclusion is confirmed by the attendant circumstances of the inadequate disclosure by China. By definition, a panel request cannot be clearer than a disclosure. With respect to the constructed normal value for Product B, MOFCOM's written disclosure during the investigation contained only the final number (i.e., the calculated constructed normal value). No numbers were given for any of the items, such as the costs of production or SG&A, used in MOFCOM's constructed normal value calculation. Rather, MOFCOM provided only a general narrative description without precise references to the numbers involved or their source. Moreover, while China claimed during the second substantive meeting with the parties that the numbers used in its calculation can be found in Table 7-1 to SMST's original questionnaire submission (Exhibit CHN-8-EN), a comparison of Table 7-1 with the calculations provided at paragraph 50 of China's Second Written Submission shows that not one of the figures or rates listed in paragraph 50 can be found in Table 7-1.

¹⁷ "For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."

20. This conclusion is further confirmed by the attendant circumstances of the investigation itself, because it has always been clear that, in repeatedly directing MOFCOM away from Table 6-3 and to Table 6-5, SMST was directing MOFCOM to the actual data pertaining to production and sales in the ordinary course of trade. The matter is embedded in full in Table 6-5, because use of Table 6-5 will fully meet the EU concerns. SMST could not be expected to guess that MOFCOM had decided to rely on data that MOFCOM had itself rejected as unrepresentative.
21. China's assertions about the consultations cannot change this conclusion. They are confidential. They are without prejudice to DSU proceedings. There is no agreed record. China cannot cure its failure to provide proper written disclosure by asserting that it orally referred to one number, subsumed within a vast exchange of views and information over two days. And in any event the number in question still did not reconcile with the measure at issue and disclosure actually given to SMST. China could not use such a device to force further consultations and delay. Finally, China's allegation that the EU breached Article 4.6 of the DSU is moot because China itself finally chose to disclose the calculation in its Second Written Submission.
22. On the substance of the matter, despite having had ample and repeated opportunities to comment, China has not contested the facts or the evidence: MOFCOM relied on aberrational data relating to samples, instead of actual data pertaining to sales in the ordinary course of trade; the calculation was not made on the basis of records kept by SMST; and the amount is not reasonable.
23. Against this background, the European Union makes claims under Article 2.2, Article 2.2.2, Article 2.2.1 and Article 2.2.1.1. Each claim is made independently. In addition, each claim is also made consecutive on any of the other claims. Furthermore, each provision is context for each of the other claims. In the event that the Panel accepts the EU claim under Article 2.2.2 in its entirety, the EU would agree that the Panel may exercise judicial economy with respect to the other claims.

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

Question 82

At paragraph 44 of its opening statement at the second meeting of the Panel, China submits that "Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement contain no obligation for an investigating authority to accept information presented to it during the verification visit. These provisions leave a significant margin of discretion to investigating authorities." Please identify the specific obligation in Article 6.7 and Annex I, paragraph 7 which is at issue in the European Union's claim relating to China's alleged refusal to take into account certain information provided during the on-the-spot investigation. In your answer, please explain how this obligation can be read into the provisions at issue.

24. The EU *procedural* claim is that, by rejecting certain information provided by SMST at the verification, *only* because it was provided at the verification (as expressly stated in the measure at issue), China acted inconsistently with Article 6.7 and Annex I, paragraph 7 and Article 6.8 and Annex II, paragraphs 3 and 6 of the Anti-Dumping Agreement. As we explained in our First Written Submission,¹⁸ we think that, if a Member would adopt a rule that information provided at verification would *always* be rejected, that would be as such inconsistent with the cited provisions of the Anti-Dumping Agreement. We think that this conclusion results from a consideration of all of these provisions, taken together. We think that investigating authorities must make an objective assessment of all the information submitted to them in a timely manner. We think that they are not entitled to simply ignore information submitted to them in a timely manner. We think that they are not entitled to rely on other information, unless they respect the relevant conditions set out in the Anti-Dumping Agreement.
25. This is not a question of "reading an obligation into the provisions at issue". Rather, it is a question of reviewing all the cited obligations and provisions, and asking the question: taken as a whole, do these provisions (1) better support the conclusion that an investigating authority is entitled to *always* refuse to take into account information provided at verification and rely instead on other information; or do they (2) better support the conclusion that such an absolute

¹⁸ EU FWS, paras. 98-109; EU Response to Question 26 from the Panel; EU SWS, paras. 46-50.

rule would be as such inconsistent with these provisions? The EU submission is that these provisions and obligations overwhelmingly support the second conclusion. This in turn leads to the conclusion that the measure at issue, considered on its own terms and without *ex post* rationalisation, is WTO inconsistent, because the *only* reason given for rejecting the information is that it was provided at verification.

26. Fortunately, China's response has considerably facilitated the Panel's task. China does not argue that it is entitled to *always* reject information only because it is provided at verification. There is therefore no dispute on this point. China's position is understandable. China appears to understand that such a proposition cannot be supported on the basis of the provisions and obligations referenced by the EU. China also appears to understand that, when its own firms would be subjected to anti-dumping investigations, if the investigating authority would purport to apply an absolute rule of exclusion of information provided at verification, this would be unreasonable and detrimental to China's interests. China also appears to understand that, as an investigating authority itself, if it would apply such a rule it would have to apply it in an even-handed way, including with respect to its own domestic industry. This means that its own domestic industry could never provide information at verifications. Evidently, this would also be problematic for China.
27. Therefore, the Parties agree that the provisions and obligations cited by the European Union preclude such an absolute rule: this is not what is in dispute between the Parties. Furthermore, and as a necessary consequence, the Parties agree that an investigating authority may *sometimes* accept information at verification and *sometimes* reject it. In other words, investigating authorities have some margin of discretion on this issue. However, as we explained in our First Written Submission, that margin of discretion is not entirely unfettered. Rather, it is subject to the application of certain objective criteria, referenced in our First Written Submission (such as whether a reasonable period of time has been afforded, or whether an investigation would be significantly impeded, or whether information is verifiable, or whether the information could be used without undue difficulties).

28. None of these objective criteria are referenced in the measure at issue. Instead, the measure at issue gives as the *only* reason for rejecting the information that it was provided at verification. This means that China failed to exercise its discretion with respect to this matter. If one agrees that in a certain situation (X) one has a discretion to do (A) or (B), on the basis of objective criteria (Y, Z ...); but then faced with situation X one decides to do A *simply because one is in situation X*, and *without reference to objective criteria Y,Z ...*, then one has simply completely failed to exercise one's discretion at all. That is the basis of the EU complaint, a complaint that, in effect, China has expressly acknowledged. We therefore respectfully request the Panel to confirm that the EU claim is well-founded.

III. INJURY DETERMINATION

Question 84

Please comment on China's assertion, in its reply to Panel question No. 34, that "it is incorrect" that imports of Grades B and C represented only about 20% of the volume of total production of HP-SSST by the domestic industry.

29. The European Union refers to, endorses and incorporates the respective statements by Japan in Japan's Second Written Submission, footnote 12.
30. In addition, it deserves to be mentioned that even at this late stage of the proceedings, China merely alleges that the figure of 20% is not correct while it does not provide figures for the calculation which in China's view would be correct. China's assertion is without merit, as is explained in Japan's Second Written Submission, footnote 12.

Question 85

At paragraphs 273-276 of its first written submission, China contends that the complainants' Articles 3.1/3.2 claim concerning the difference in quantity between the volume of imports and the volume of domestic sales of Grade C relates to the procedural question of the adequacy of MOFCOM's explanation of its treatment of that matter, rather than the substantive question of the adequacy of MOFCOM's treatment of that quantitative difference. China contends that the procedural issue raised by the complainants falls outside the scope of Articles 3.1 and 3.2. Please comment.

31. The European Union considers that the Panel should decide on this issue in light of the clarifications provided by the Appellate Body in *China – GOES*¹⁹:

129. Turning to the obligations in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, an investigating authority is instructed to "consider" a series of specific inquiries. [...]

130. The notion of the word "consider", when cast as an obligation upon a decision maker, is to oblige it to take something into account in reaching its decision. By the use of the word "consider", Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make a definitive determination on the volume of subject imports and the effect of such imports on domestic prices. Nonetheless, an authority's consideration of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.

131. Furthermore, while the consideration of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of what the investigating authority is required to consider. The fact that the authority is only required to consider, rather than to make a final determination, does not change the subject matter that requires consideration under Articles 3.2 and 15.2, which includes "whether the effect of" the subject imports is to depress prices or prevent price increases to a significant degree. We further discuss below what this requirement entails. Finally, **an investigating authority's consideration under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed considered such factors.**

132. On appeal, China maintains that Articles 3.2 and 15.2 impose "only a limited obligation on authorities" to "consider" the price effects of subject imports, that is, to "examine; look at attentively; [and] think carefully about" such price effects. [...] In our view, China is correct that an investigating

¹⁹ Appellate Body Report, *China – GOES*, para. 129 – 132 (footnotes omitted, emphasis added).

authority's obligation in this respect does not require it to reach a definitive determination. However, as noted above, this does not alter the subject matter of the authority's consideration, or the fact that the authority's consideration must be based on positive evidence and involve an objective examination, **and must be reflected in relevant documentation, such as an authority's final determination.**

32. The Appellate Body thus found that Article 3.2 contains an obligation that an investigating authority's consideration under Article 3.2 must be reflected in relevant documentation. The Appellate Body found that the reach of this obligation is determined by its purpose. The purpose is broad: it is "to allow an interested party to verify whether the authority indeed considered such factors". This has clarified that Article 3.2 contains broad procedural obligations which emanate directly from Article 3.2.
33. In the view of the European Union, the very narrow reading by China is not consistent with these clarifications provided by the Appellate Body.

Question 86

Assume that a company's exports of widgets are subject to an anti-dumping investigation, in the context of which the investigating authority is considering the existence of price undercutting. Assume that widgets are sold in a large number of model configurations, but that only certain model configurations are sold by both exporters and domestic producers in the importing country. Is there an obligation on the investigating authority under Article 3.2 to consider the existence of price undercutting in respect of those models that are sold exclusively by domestic producers, and for which there are no imports? Or should price undercutting only be considered in respect of those models that are both imported and sold domestically? Please explain.

34. A price undercutting analysis "ultimately must be used to assess whether dumped imports 'through the effects of dumping, as set forth in paragraphs 2 and 4' are causing injury to the domestic industry"²⁰. The European Union considers that useful guidance as to question 86 can be found in the Appellate Body Report in *US – Hot-Rolled Steel*:

[I]t may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the

evaluation of the domestic industry, Article 3.1 of the Anti-Dumping Agreement requires that such a sectoral examination be conducted in an “objective” manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, **examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole.** Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry.

...

[A]n examination of only certain parts of a domestic industry does not ensure a proper evaluation of the **state of the domestic industry as a whole**, and does not, therefore, satisfy the requirements of “objectiv[ity]” in Article 3.1 of the Anti-Dumping Agreement.²¹

35. A price undercutting conclusion that concerns the product as a whole needs to be based on an analysis that is capable to of supporting such a broad conclusion. An analysis does not support such a conclusion if it shows that the vast majority of domestic production is not subject to price undercutting by subject imports.
36. The European Union refers back to para. 88 of its Opening Statement at the First Substantive Meeting with the Panel. During the reference period, the aggregate domestic production of Products B and C (for which China found an alleged price undercutting effect) was limited, amounting to only 20% of China's overall HP-SSST production during that period. The domestic production of Product A (for which China found no price undercutting) accounted for almost 80% of the domestic production. Just as in the widget example, China could have examined "all of the other parts that make up the industry"²² by conducting a cross-type analysis of price effects. If a WTO member does not conduct a cross-type analysis of price effects but simply

²⁰²⁰ Panel Report, *China – X-Ray Equipment*, para. 7.50.

²¹ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204 and 206 (emphasis added).

²² Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

extends its findings with respect to such sub-categories to the whole group of like domestic products, it breaks the logical progression of inquiry required by the Appellate Body.

Question 87

Please explain how, in your view, an investigating authority should evaluate the magnitude of the margin of dumping in conformity with Article 3.4.

37. The European Union shares the view of the Panel in *China – X-Ray Equipment*, para. 7.183-7.184. According to the Panel, "an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment"²³. The Panel further clarifies that it understands "evaluation" to mean "an analysis and an assessment, of the magnitude of the margin of dumping in terms of its relevance to the impact of the dumped imports on the domestic industry"²⁴. The European Union considers this a proper clarification of the meaning of "evaluation" in Article 3.4. As the Panel found, the obligation to evaluate is breached if the investigating authority is "silent on the relevance or irrelevance of the magnitude of the margin of dumping in relation to the impact of the dumped imports on the domestic industry"²⁵.

Question 88

At paragraph 118 of its opening statement at the second meeting of the Panel, the European Union contends that MOFCOM's causation determination "lacks any foundation in its analysis of the volume, price effects and impact of HP-SSST imports". Japan makes a similar argument at paragraphs 43 and 44 of its opening statement at the second meeting of the Panel. At paragraph 489 of its first written submission, China appears 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 appears 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.

- a. Are the complainants' Article 3.5 causation claims dependent on their Article 3.2 and 3.4 claims?**

²³ Panel Report, *China – X-Ray Equipment*, para. 7.183.

²⁴ Panel Report, *China – X-Ray Equipment*, para. 7.184.

²⁵ Panel Report, *China – X-Ray Equipment*, para. 7.183.

- b. If the Panel were to reject the Article 3.2 and 3.4 claims, would the complainants' Article 3.5 claims also necessarily fail, or should the arguments made by the complainants in support of those claims be understood by the Panel to support independent claims under Article 3.5 in respect of MOFCOM's determination of a causal link between subject imports and injury to the domestic industry? Please explain.**
38. The European Union refers back to its First Written Submission, paras. 281-325. In the view of the European Union, its Article 3.5 causation claims relate to its Article 3.2 and 3.4 claims in the following way: If the EU claims under Article 3.2 or 3.4 are being upheld, then the EU causation claims (which are legally independent from its 3.2 and 3.4 claims) would need to be upheld as well. The reason is that a finding of causation is dependent upon the outcomes of the investigating authority's analyses of the previous steps, as described by the EU in its First Written Submission, paras. 281-325. However, the Article 3.5 causation claims are independent from the Article 3.2 and 3.4 claims in the sense that the EU considers that its Article 3.5 should be upheld even if the Panel decided not to uphold the EU claims under Articles 3.2 and 3.4.
39. As described in the EU First Written Submission, paras. 281-325, the EU causation claims go beyond being a mere consequence of the EU argumentation under Article 3.2 and 3.4. The EU considers that should its Article 3.2 and Article 3.4 fail, this would not mean that its Article 3.5 claim also necessarily fails. The EU considers that it has brought independent claims under Article 3.5 in respect of MOFCOM's determination of a causal link between subject imports and injury to the domestic industry.

Question 89

With regard to paragraphs 104-106 of the European Union's opening statement at the second meeting of the Panel, and paragraph 20 of Japan's opening statement at the second meeting of the Panel, please comment on China's argument, at paragraph 99 of its second written submission, that:

MOFCOM thus explicitly found that the imported grades and the corresponding domestically produced grades are "basically identical" and "substitutable". As such, it found that the imported Grade A was "like" the domestically produced Grade A, the imported Grade B was "like" the domestically produced Grade B, and the imported Grade C was "like" the domestically produced Grade C. On this basis, MOFCOM concluded that the basket of domestically produced grades A, B and C was "like" the basket of imported grades A, B and C. At the first

meeting of the Panel with the parties, the European Union stated that it is very clear for an informed person that the more extensive the rolling/drawing is, the higher the cost of production will be. If this is so, why did SMST not request an adjustment in its earlier responses (instead of initially responding to MOFCOM that physical differences will not have any substantial impact on the production costs or sales prices)?

40. China makes this point as regards Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The European Union has argued that what matters with respect to Articles 3.1 and 3.2 is commercial substitutability, not mere technical substitutability. The finding China refers to is a finding by MOFCOM on "physicochemical properties"²⁶ only, not on "Like Products" in general, and even less on the issue of commercial substitutability. It does not look into the issue of commercial substitutability and the question of whether a competitive relationship existed, and thus does not address the issues that matter for an analysis under Articles 3.1 and 3.2. A finding by MOFCOM that products of the same grade were technically substitutable does not imply that a competitive relationship existed. On the contrary, the statements of domestic importers as regards lack of commercial substitutability, the inverse price movements between imported and domestic products as well as the significant difference between imported and domestic products all suggest that domestic and imported Product C were not in a competitive relationship.

Question 90

With regard to the scope of the European Union's Article 6.9 claim, is the European Union claiming that MOFCOM failed to disclose the import price for Grade B? While this data seems to be covered by the claim set forth in item (i) of paragraph 130 of the European Union's first written submission, we note that the table set forth at paragraph 29 of the same submission indicates that import price data for Grade B was disclosed. Please explain.

41. The European Union thanks the Panel for this possibility to clarify the issue. The respective part of paragraph 130 of the EU First Written Submission reads: "Specifically, China failed to disclose: (i) complete information about the import prices it used in its price effects analysis (although an import price for Product C could be derived from other information supplied by China)". As the

²⁶ Final Determination, Exhibit EU-30, p. 23.

EU pointed out in its table set forth at paragraph 29, the EU considers that China has disclosed the import price data for Grade B. Read together with the table set forth at paragraph 29, the EU claim in paragraph 130 about the lack of "complete information" therefore only relates to the lack of information on import prices China used in its price effects analysis for Products A and C.

IV. 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.

42. The European Union agrees with Japan's submissions with respect to this matter.