UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

Recourse to Article 22.6 of the DSU by the United States

(DS471)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE MEETING OF THE ARBITRATOR WITH THE PARTIES

April 24, 2019

TABLE OF REPORTS AND AWARDS

Short Form	Full Citation
EC – Hormones (Canada) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999
EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004
US – COOL (Article 22.6 – US)	Decision by the Arbitrators, *United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 22.6 of the DSU by the United States*, WT/DS384/ARB, and Add. 1; WT/DS386/ARB, and Add. 1, circulated 7 December 2015
US – Gambling (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007
US – Tuna II (Mexico) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 22.6 of the DSU by the United States)*, WT/DS381/ARB, 25 April 2017
US – Washing Machines (Article 22.6 – US)	Decision by the Arbitrator, *United States – Anti-dumping and Countervailing Duty Measures on Large Residential Washers from Korea – Recourse to Article 22.6 of the DSU by the United States*, WT/DS464/ARB, 8 February 2019
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
EC – Bananas (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (Ecuador) –*

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	Recourse to Article 22.6 of the DSU by the EC, WT/DS27/ECU, 24 March 2000
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement by Brazil*, WT/DS46/ARB, 28 August 2000

TABLE OF EXHIBITS

Exhibit No.	Description
USA-75	*Executive Order 13659, Streamlining the Export/Import Process for America's Business (February 12, 2014)*
USA-76	*Racing Ahead: How CBP Transformed its Trade Processes to Compete in the Global Economy, by Mary Mason, U.S. Customs and Border Protection, also available at https://www.cbp.gov/frontline/cbp-trade-racing-ahead*
USA-77 (BCI)	*Antidumping Duty Rates Assigned by the U.S. Department of Commerce to Chinese Firms Subject to Anti-Dumping Duties*
USA-78	*The ACE Basics: How to Get Started with CBP's Automated Commercial Environment*, U.S. Customs and Border Protection

1. Mr. Chairman, members of the Arbitrator – on behalf of the United States, we thank you, and the Secretariat staff assisting you – for your ongoing work in this arbitration.

I. INTRODUCTION

2. The central question under the DSU[1] for this proceeding is whether China's request for authorization to suspend concessions is "equivalent" to the level of nullification or impairment caused by the U.S. measures at issue, and if it is not, then what is the equivalent level?[2] To answer the first part of this question, the United States has shown that China's request is not consistent with the requirements of the DSU. This is apparent from the U.S. examination of China's counterfactual, its methodology, and its data.

3. Regarding its counterfactual, China concedes that it goes **beyond** the findings of the DSB[3] by assuming termination of the antidumping duty orders at issue in this proceeding.[4] China's proposed counterfactual has no support in the DSU. China is not entitled to a counterfactual based on more than it would get from U.S. compliance with its WTO obligations, but that is precisely what China is seeking.

4. China's methodology is also not appropriate because it cannot capture the impact of different antidumping duty margins on trade flows, which is the key issue to estimate any nullification or impairment in this proceeding. Consequently, China's methodology is incapable

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[2] DSU Art. 22.7; *see also US – COOL (Art. 22.6 – US)*, paras. 4.1-4.6.

[3] Dispute Settlement Body ("DSB").

[4] China's Responses to the Arbitrator's Advance Questions, para. 2.

of accurately estimating the level of nullification or impairment to ensure that China's requested level of suspension is "equivalent" to the level of nullification or impairment, as required by Article 22.4 of the DSU. China compounds its conceptual and methodological mistakes by using data that, even using a correct approach, would overestimate the level of nullification or impairment.

5. As a result, it is appropriate to move to the second part of the question – what level of suspension would be equivalent to the level of nullification or impairment? At its most basic level, the calculation of the level of nullification or impairment resulting from the WTO-inconsistent measures requires a comparison between the current value of exports of each product from China to the United States and the value of exports from China to the United States that could be expected if the United States had complied with the DSB's recommendations following the expiration of the reasonable period of time ("RPT"). This is the appropriate counterfactual for this proceeding. As we will discuss in the second section of the U.S. opening statement, the arbitrator in *US – Washing Machines (Article 22.6 – US)*, adopted the same type of counterfactual for the antidumping duty measures at issue in that dispute.[5]

6. Once we construct an appropriate counterfactual, we then move on to **methodology**: for each product at issue, what is the most appropriate methodology for estimating the level of nullification or impairment? In response to the one-size-fits-all methodology proposed by

[5] *US – Washing Machines (Article 22.6 – US), paras. 3.7 – 3.24.*

China, the United States proposes two methodologies that accurately estimate the trade effects of the measures subject to DSB recommendations following the expiration of the RPT.

7. Finally, we need the best **data** available to accurately estimate the counterfactual trade effects, that is, the estimated change in the level of exports had the United States complied with the DSB's recommendations following the expiration of the RPT. Unlike China's basket HTS categories, which overestimate the level of nullification or impairment, the United States has provided the Arbitrator data that accurately reflect Chinese imports that are subject to the antidumping duty orders at issue in this proceeding.

8. The U.S. conclusion that the level of nullification or impairment should be no more than $200.8 million per year is based on an appropriate counterfactual, sound methodologies, and the best data available. The U.S. approach estimates that total U.S. imports from China would increase by 14 percent as compared to actual 2017 U.S. imports from China. This is a reasonable estimate.

9. This contrasts with China's estimates of the level of nullification or impairment, which represent an increase in total U.S. imports from China of **480 percent** over actual 2017 U.S. imports (using China's data, which are HTS basket categories that over-estimate the value of the Chinese imports that are subject to the antidumping duty orders at issue) and **1,044 percent** over actual 2017 U.S. imports (using U.S. Customs data, which provides the most accurate account of the Chinese imports that are subject to the antidumping duty orders at issue). China's estimates are divorced from reality and grossly exaggerate the level of nullification or impairment.

10. The U.S. approach accurately estimates the trade effects of the measures at issue following the expiration of the RPT. We will discuss both approaches today, beginning with the U.S. approach.

II. APPROPRIATE COUNTERFACTUAL REFLECTS BRINGING THE WTO-INCONSISTENT MEASURES INTO COMPLIANCE

A. The Adopted Findings

11. To determine the equivalent level of nullification or impairment in this proceeding, it is necessary to understand the recommendations adopted by the DSB. As explained in the U.S. written submission,[6] the reports adopted by the DSB contain findings that the use by the U.S. Department of Commerce ("USDOC") of a rebuttable presumption that all producers and exporters in China comprise a single entity under government control ("the China-government entity") to which a single antidumping margin is assigned (the Single Rate Presumption ("SRP")), is inconsistent both "as such" and "as applied" with U.S. WTO obligations in certain antidumping investigations and administrative reviews.

12. The reports adopted by the DSB also contain findings that the USDOC's use in certain proceedings of an alternative, average-to-transaction comparison methodology ("targeted dumping methodology"), and the use of "zeroing" in conjunction with that alternative methodology, are inconsistent with U.S. WTO obligations.

[6] *See* Written Submission of the United States of America (January 7, 2019) ("U.S. Written Submission"), paras. 12-14.

13. Accordingly, the findings of WTO inconsistency in the adopted reports relate to certain **aspects** of the U.S. antidumping duty measures. Other aspects of the U.S. antidumping duty measures, however, have not been found to be inconsistent with U.S. WTO obligations. Thus, China's counterfactual is contrary to the DSB's recommendations for it assumes complete termination of the U.S. antidumping duty measures.

B. Modification of the U.S. Anti-Dumping Duty Measures is Reasonable and Plausible; Termination is Not

14. There may be different means by which a Member could bring a measure into conformity with the covered agreements; for example, a duty found to breach a Member's bound rate could be lowered *to* the bound rate, *below* the bound rate, or *terminated* entirely. That choice is, of course, reserved to the responding party. To assess the appropriateness of a counterfactual, prior arbitrators have reasoned that the counterfactual should "reflect at least a plausible or 'reasonable' compliance scenario."[7] Plausibility and reasonableness refer to the ability of a counterfactual to provide a **reliable basis** for a decision in an Article 22.6 proceeding.[8] In *US – Gambling (Article 22.6 – US)*, the arbitrator explained:

> It is thus important for the counterfactual to reflect the nature and scope of such benefits accurately, so that trade flows that will be assumed to occur under the

[7] *US – Gambling (Article 22.6 – US)*, para. 3.27; *see also, US – Washing Machines (Article 22.6 – US)*, para. 3.10; *US – Tuna II (Mexico) (Article 22.6 – US*), para. 4.5.

[8] *US – Gambling (Article 22.6 – US)*, para. 3.25.

> counterfactual can, in turn, provide a reliable basis for an estimation of the level of nullification or impairment of such benefits.[9]

15. This approach has been followed by arbitrators in other Article 22.6 proceedings as well.[10] Conversely, an **unreasonable** counterfactual is one that assumes a compliance scenario that goes beyond the DSB recommendations, thus leading to a suspension in excess of the actual level of nullification or impairment.[11]

16. The U.S. counterfactual provides the Arbitrator a **reliable basis** to estimate the level of nullification or impairment. For purposes of the counterfactual with respect to the DSB's recommendation related to the SRP and the use of a China-government entity rate, the antidumping duties that apply to Chinese imports at issue in this proceeding should be broken down into categories to **isolate** the WTO-inconsistent aspect of the measures:

- **Group 1**: Duties on Chinese imports from firms to which individual duty rates apply;
- **Group 2**: Duties on Chinese imports from firms that were not individually examined yet received what we label as a "separate duty rate." That is, they receive a rate separate from the rate assigned to the China-government entity;

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[9] *US – Gambling (Article 22.6 – US)*, para. 3.25.

[10] *See e.g.*, *US – Washing Machines (Article 22.6 – US)*, paras. 3.10-3.12; *see also*, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 4.5.

[11] *US – Gambling (Article 22.6 – US)*, para. 3.27.

- **Group 3**: Duties on Chinese imports from firms that are subject to the China-government entity rate (which was based on facts available) where there is evidence that they failed to cooperate with the USDOC's investigation, such that a rate based on facts available could have been applied to those firms even once they are not considered part of the China-government entity; and

- **Group 4**: Duties on Chinese imports from firms that are subject to the China-government entity antidumping duty rate where there is no evidence that the firms failed to cooperate with the USDOC's investigation. This category – Group 4 – is the **only** category that would potentially result in any nullification or impairment based on the DSB's recommendations related to the SRP and the use of the China-government entity rate.

17. In a **reasonable** counterfactual, the only modification is that duties on Group 4 imports shift from the rate assigned to the China-government entity to the "separate duty rate". Except for certain antidumping duty rates determined using the "targeted dumping methodology" in conjunction with "zeroing," which we will discuss shortly, all other antidumping duties remain unchanged.

18. In other words, for each product subject to the "as applied" findings and for each product China has identified in connection with the "as such" findings, the correct question is: how many additional exports from China would enter the United States under the separate duty rate if the presumption of a China-government entity were eliminated?

19. And for the counterfactual regarding the DSB's recommendation concerning the USDOC's use of the "targeted dumping methodology" in conjunction with "zeroing," only **certain** companies were assigned antidumping duty rates under that approach.

20. Those rates can also be isolated and the level of nullification or impairment resulting from their maintenance following the expiration of the RPT can be estimated accurately without assuming, as China does, the complete termination of the U.S. antidumping duty measures.[12]

21. Accordingly, the evidence before the Arbitrator establishes that these scenarios—modification of the U.S. antidumping duty measures on products from China—are "reasonable" and "plausible" counterfactuals for this proceeding.

22. In contrast, China's counterfactual is not reasonable for it would lead to a suspension in **excess** of the level of nullification or impairment, which is inconsistent with the requirement in Article 22.4 of the DSU that the level of suspension be "equivalent" to the level of nullification or impairment.

C. China's Counterfactual Has No Support in the DSU

23. China asserts that there are "extreme practical difficulties in using a counterfactual limited to just withdrawal of the WTO-inconsistent AD calculation methodologies".[13] China

[12] U.S. Written Submission, paras. 99-110.

[13] China's Response to the Arbitrator's Advance Questions, para. 2.

proposes that, to avoid these purported difficulties, the Arbitrator should base the estimation of the level of nullification or impairment on an incorrect counterfactual.

24. As a practical matter, isolating the WTO-inconsistent U.S. antidumping duties is not difficult. And, as a legal matter, going beyond the DSB's recommendations—as China proposes—would be contrary to the DSU.

25. Yet, in its written submission, China argues that Articles 3.7, 22.1, and 22.8 of the DSU support its approach of going **beyond** the DSB's recommendations.[14]

26. China is wrong. In the first place, as explained above, the mandate of the Arbitrator is explicitly linked in DSU Articles 22.6, 22.7, 22.4, and 22.2 to the nullification or impairment resulting from a failure to comply with the "recommendations" of the DSB.[15] The "recommendation" adopted by the DSB is delimited in DSU Article 19.1 as the recommendation of a panel or the Appellate Body to bring a measure found to be inconsistent with a covered agreement into conformity with that covered agreement.[16] Similarly, the three provisions cited

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[14] Written Submission of China (February 13, 2019) ("China's Written Submission"), paras. 11-19.

[15] DSU Art. 22.6 ("When the situation described in paragraph 2 occurs, … if the Member concerned objects to the level of suspension proposed, … the matter shall be referred to arbitration."), 22.7 ("The arbitrator acting pursuant to paragraph 6 … shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."), 22.2 ("If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time …"), 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.").

[16] DSU Art. 19.1 ("Where a panel or the Appellate Body *concludes that a measure is inconsistent* with a covered agreement, it *shall recommend* that the Member concerned bring the measure into conformity with that agreement") (footnotes omitted).

by China refer to the **recommendations** adopted by the DSB that follow a finding that a measure is WTO-inconsistent. For instance, Article 22.1 provides that compensation and suspension of concessions "are temporary measures available in the event that *the recommendations* and rulings are not implemented within a reasonable period of time."

27. Similarly, both Articles 3.7 and 22.8 of the DSU explicitly refer to measures "found to be inconsistent"[17] with a covered agreement and the "recommendations" of the DSB.[18] The findings referenced in these two provisions concern the findings in reports that are adopted by the DSB.

28. Thus, the DSU provisions on suspension of concessions relate to the effects of the measures subject to DSB recommendations that follow from a finding of inconsistency with the covered agreements. The role of the Arbitrator is to assess the trade effects of those measures. Going beyond the DSB's recommendations would be inconsistent with the DSU as previous arbitrators have understood.[19]

[17] DSU Art. 3.7 ("In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.").

[18] DSU Art. 22.8 ("The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as *the measure found to be inconsistent* with a covered agreement has been removed, or the Member that must implement *recommendations* or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

[19] *See, e.g., US – Tuna II (Mexico) (Article 22.6 – US)*, para. 3.20; *see also EC – Hormones (Article 22.6 – EC)*, para. 39; US – Washing Machines (Article 22.6 – US), para. 3.39.

D. The Counterfactual Adopted by the Arbitrator in *US – Washing Machines (Article 22.6 – US)* is Instructive

29. One final point on the counterfactual before discussing methodologies. Unlike China, the United States believes that the counterfactual adopted by the arbitrator in *US – Washing Machines (Article 22.6 – US)* for the antidumping duty measures at issue in that dispute is instructive for purposes of this proceeding.[20] In its response to the Arbitrator's advance questions, China makes a series of baseless arguments to distinguish the facts in *US – Washing Machines (Article 22.6 – US)* from the facts in this proceeding.[21]

30. First, China points to a "difference in the scale of the dispute and the number of distinct measures at issue."[22] On this point, China seems to express support for the U.S. approach of carefully examining each product at issue, and each WTO-inconsistent measure, to determine an appropriate methodological framework for estimating nullification or impairment. This careful and more precise approach is the only one through which the Arbitrator can accurately estimate the "equivalent level" of nullification or impairment.

31. Second, China asserts that the U.S. counterfactual is not consistent with WTO rules.[23] China's assertion is erroneous. As the United States explained in its responses to the Arbitrator's

[20] *US – Washing Machines (Article 22.6 – US)*, paras. 3.7 – 3.24.

[21] China's Responses to the Arbitrator's Advance questions, paras 13 – 26.

[22] China's Responses to the Arbitrator's Advance Questions, para. 15.

[23] *See e.g.*, China's Responses to the Arbitrator's Advance Questions, para. 18-19.

advance questions, the U.S. proposed counterfactual would comply with the findings of the DSB.[24]

32. The Group 2 and Group 3 duties are not subject to any recommendations adopted by the DSB. The DSB recommendations do not **require** the United States to revise Group 2 or Group 3 duties in the process of bringing Group 4 duties into compliance with U.S. WTO obligations.

33. As a result, China's argument is based on speculation – "maybe" *x* might happen, or "there is a possibility" that *y* could happen. But an arbitrator's decision is not to be based on speculation.[25]

34. Third, China asserts that it has "vigorously challenged the propriety of some of the data inputs" used by the United States.[26] As explained in the U.S. responses to the Arbitrator's advance questions, the United States relies on a **limited** amount of confidential data.[27] While these data cannot be substituted with publicly available data, they are appropriate to use in this proceeding because they most accurately reflect the value of Chinse imports that are subject to the antidumping duty orders at issue in this proceeding.

35. We will elaborate on data at the end of this opening statement.

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[24] Responses of the United States to the Advance Questions from the Arbitrator (April 1, 2019) ("U.S. Responses to the Arbitrator's Advance Questions"), paras. 4-9.

[25] *See US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.10.

[26] China's Responses to the Arbitrator's Advance Questions, para. 21.

[27] U.S. Responses to the Arbitrator's Advance Questions, paras. 110-115.

36. Accordingly, China's arguments regarding the counterfactual in *US – Washing Machines (Article 22.6 – US)* are in error.

37. For these reasons, the U.S. proposal – modification of the U.S. antidumping duty measures on products from China – is a reasonable and plausible counterfactual scenario that would be consistent with the DSB's recommendations in this dispute. The counterfactual China proposes – termination of the measures – is not.

III. ON METHODOLOGIES

A. China's Methodology Cannot Estimate the Correct Level of Nullification or Impairment

38. In addition to proposing an incorrect counterfactual, China proposes that the Arbitrator use a methodology that is not suitable for determining the level of nullification or impairment in this proceeding.

39. China's proposed methodology—Differences-in-Differences ("DID") tabular analysis—is not appropriate in this proceeding for a host of reasons, as the United States has demonstrated.[28] As an initial matter, China's DID tabular analysis cannot account for the impact of antidumping duty **margins** on trade flows. China's tabular DID methodology is only able to

[28] U.S. Written Submission, paras. 111-161; U.S. Responses to the Arbitrators Advance Questions, paras. 42-88.

estimate the termination of all antidumping duties on imports from China, including WTO-consistent duties on imports from China (Group 1, Group 2, and Group 3).

40. Thus, it is not possible, as a legal matter, to use China's DID tabular analysis, because it necessarily would overstate the level of nullification or impairment by including in the estimate the removal of WTO-**consistent** duties.

1. China's Methodology is Premised on False Assumptions

41. Besides not being able to capture the correct counterfactual, China's implementation of tabular DID analysis does not (and cannot) meet the parallel trends, uniformity, and stability assumptions. As discussed in the U.S. written submission and the U.S. responses to the Arbitrator's advance questions, if these three key assumptions do not hold, China's tabular DID methodology will produce estimates that are inaccurate.[29]

42. In its methodology paper, China acknowledges the importance of the parallel trends assumption and asserts that it made a "considerable effort" to demonstrate that the parallel trends assumption holds for its control groups.[30]

43. Yet, when the Arbitrator asked China about these three key assumptions in the advance questions, China failed to respond. For instance, question 19(a) asked China whether it agrees

[29] *See, e*.g., U.S. Written Submission, paras. 129 – 148.

[30] Chinas' Methodology Paper (November 26, 2018), para. 40.

"that these three key assumptions must hold for a tabular DID analysis". In its response, China simply did not answer the question.

44. In addition, question 19(a) asked "How did China test empirically the validity of each assumption?" China responded: "China does not believe it is required to empirically validate the **technical conditions** proposed by the United States".[31] Given China's assertions in its methodology paper regarding the parallel trends assumptions, this response is puzzling. DID requirements are not "technical conditions" proposed by the United States. Rather, these requirements are intrinsic to DID analysis and are discussed by the authors China cites in support of its methodology.[32] If DID requirements are not met, DID methodology cannot provide a reliable estimate.

45. The economics literature cautions against the misapplication of DID analysis.[33] In Exhibits USA-34 and USA-35, the United States has provided two studies that detail key **weaknesses** of DID analysis in a setting that does not meet the required conditions. Notably, the authors of these studies are among those China relies on to explain and justify its methodology.[34]

46. China's failure to respond to the Panel's question, and assertion that it need not show the situation meets the requirements for a DID analysis, is a strong indication that China itself has recognized that its application of DID analysis is not able to meet the three key assumptions that

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[31] China's Responses to the Arbitrator's Advance Questions, para. 83 (bold added).

[32] *See* Besley in Exhibit CHN-18 and Duflo in Exhibit CHN-46.

[33] Exhibit USA-35, page 250.

[34] *See* Besley in Exhibit CHN-18 and Duflo in Exhibit CHN-46.

must hold for DID to provide reliable estimates. If China is unwilling to acknowledge this, then China should explain to the Arbitrator how China's application of DID analysis meets the three key assumptions.

2. China's False Arguments on Flexibility

47. China asserts that its approach offers the Arbitrator "flexibility" in calculating the level of nullification or impairment by providing estimates from a few highly **unorthodox** specifications of tabular DID analysis[35]—each of which, the United States has demonstrated, do not meet basic DID requirements. This is a false choice.

48. China offers the Arbitrator results based on a handful of highly-aggregated comparison groups that actually are very similar to each other. The **Total Imports from the World** comparison group is an inappropriate comparison group because it includes imports from China. The observed trend in U.S. imports is therefore not representative of the trend in imports **absent** antidumping duties.

49. And the **Non-Subject** comparison group is also inappropriate. The economics literature suggests that antidumping duties typically increase imports from non-assessed countries. [36]

[35] *See e.g.*, China's Written Submission, paras. 96 - 101; *see also*, China's responses to the Arbitrator's questions, paras. 89-94.

[36] *See e.g.*, Carter, C. and K. Gunning-Trant. (2010). US trade remedy law and agriculture: trade diversion and investigation effects. Canadian Journal of Economics/Revue canadienne d'économique, 43(1), 97-126.

Including countries that benefit from these "spillovers" thus inflates the trend on which China relies.

3. China's Final Estimates of Nullification or Impairment Are Fundamentally Biased and Mutually Exclusive

50. Finally, the "metrics" China provides the Arbitrator are **mutually exclusive**.

51. As discussed in the U.S. response to question 17(a) from the Arbitrator's advance questions (and demonstrated with equations and a graph), the final estimates of nullification or impairment presented by China for each antidumping duty order are **averages** of estimates obtained from tabular DID analysis showing the differences in the level of import values and estimates obtained from tabular DID analysis showing the differences in the natural logarithm ("log") of import values.[37]

52. As noted in China's own exhibit,[38] a DID model may be applied to a variable in levels or in logs, but the parallel trends assumption can only be met in either levels or logs. Put another way, the parallel trends assumption **cannot be met** in **both** levels **and** logs. China's estimates from these metrics are therefore **biased**. Contrary to China's assertions, the distortions attributable to China's incorrect application of tabular DID analysis do not average out. Rather, they accumulate.

[37] U.S. Responses to the Advance Questions from the Arbitrator, paras. 79-83.

[38] Exhibit CHN-18, footnote 7, page 230.

4. There Is No Support in the Economics Literature for Using DID Tabular Analysis To Estimate the Effects of Antidumping Duties on Imports

53. After an extensive search of the economics literature, the United States did **not** find any academic studies using DID tabular analysis to estimate the effects of antidumping duties or tariffs on imports.

54. The United States also could **not** find any studies that support China's highly unorthodox use of comparison groups comprising aggregated imports from many countries.

55. In short, there is **no** support in the economics literature for what China is attempting to do with the DID tabular approach. Moreover, no Article 22.6 arbitrator has **ever** relied on DID tabular methodology to estimate the level of nullification or impairment in a WTO dispute settlement proceeding.

56. By using DID methodology, China has traded accuracy for simplicity. China's approach, while simple, is **not** suitable for this proceeding because it cannot provide a correct estimate of the level of nullification or impairment – China's estimate is not one that is "equivalent" to the level of nullification or impairment, as required by Article 22.4 of the DSU.

B. U.S. Methodologies

57. The United States has demonstrated that its two proposed methodologies provide a reasonable approach to estimating the level of nullification or impairment.[39] Very briefly, we will highlight a few points regarding the U.S. methodologies: the Armington model and the formula-based approach.

1. Armington Model

58. Unlike China's approach, the Armington-based simulation model used by the United States is the **industry standard** and is utilized by governments around the world as well as international organizations, such as the World Bank.[40] Economists have spent about 45 years using this class of models to analyze the economic impacts of shocks to trade policy.[41]

59. The equations derived from the Armington model predict international trade flows more **accurately** than any other empirical trade model.[42] The Armington model is the best tool the Arbitrator can use to estimate **accurately** the value of exports of relevant products from China to the United States if the antidumping measures at issue had been brought into compliance with the DSB's recommendations following the end of the RPT.

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[39] *See* U.S. Written Submission, paras. 42-110.

[40] U.S. Responses to Advance Questions, paras. 133.

[41] U.S. Responses to Advance Questions, paras. 133.

[42] U.S. Responses to the Arbitrator's Advance Questions, para. 134.

60. In response to questions from the Arbitrator, the United States has addressed China's criticism of the Armington model and has demonstrated that China's criticism is unfounded and disconnected from the issues before the Arbitrator.[43]

61. In addition, in paragraph 45 of its responses to the Arbitrator's advance questions, China asserts that the Armington model "underestimates" the level of nullification or impairment by using what China refers to as "the artificially depressed level of imports in 2017 as the base level."[44] China's argument is nonsense. China proposed using 2017 as the baseline for the counterfactual in this proceeding. Legally, it would be incorrect to adjust the base year to account for purportedly depressed or suppressed trade levels. The level of trade in the base year is the level of trade under the measure. The United States was **not** obligated to bring the measures into compliance until the end of the RPT. As the Arbitrator is well aware, the aim of this proceeding is to estimate the effect of bringing the WTO-inconsistent measures into compliance **following** the expiration of the RPT. Thus, to estimate the trade effects of the WTO-inconsistent measure, the Arbitrator needs a base year with trade that is **affected** by the measure.

62. China has given the Arbitrator no valid reason not to use Armington model. The Armington model is the correct economic tool with which to estimate the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent measures on 17 products from China after the expiration of the RPT.

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[43] *See* U.S. Responses to the Arbitrator's Advance Questions, paras. 131-135.

[44] China's Responses to the Arbitrator's Advance Questions, para. 45.

2. Formula-based Approach

63. The United States has explained why it is necessary and appropriate to apply the formula-based approach for antidumping duty orders where Group 4 imports relative to total U.S. imports from China are sufficiently close to **zero**, such that the Armington model should not be used.

64. China's assertion that the formula-based approach is a "very close cousin" to DID analysis is baseless.[45] The formula-based approach is not similar to DID analysis and does **not** depend on the same assumptions to provide unbiased estimates.

65. Consistent with the correct counterfactual, the formula-based approach applies the market share for a specific **category** of Chinese imports during the period of investigation to total U.S. imports from China subject to U.S. antidumping duties in 2017.

66. As explained in the U.S. written submission, the formula-based approach is consistent with the approach taken by arbitrators in previous Article 22.6 proceedings.[46]

67. Again, China has given the Arbitrator no reason not to use the U.S. formula-based approach. For five products, the formula-based approach is an appropriate methodology to estimate the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent measures after the expiration of the RPT.

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[45] China's Written Submission, para. 5.

[46] U.S. Written Submission, paras. 88-90.

IV. THE BEST DATA AVAILABLE

68. The United States has demonstrated that China's proposed level of suspension is contrary to the DSU. China's proposed level is not equivalent to the level of nullification or impairment because China's estimates are based on an inappropriate counterfactual, a fundamentally flawed methodology, and incorrect **data**.

69. In this final section, we briefly expand on the U.S. responses to the Arbitrator's advance questions regarding China's criticism of the U.S. reliance on a **limited** amount of confidential data.

A. U.S. Data Accurately Estimates Trade Effects

70. As an initial matter, we emphasize that this limited amount of confidential data is appropriate to use in this proceeding because it is the best data available to **accurately** estimate the trade effects of the U.S. proposed counterfactual. As explained in the U.S. response to question 29, most of the data on which the United States relies is **publicly available** data. We only rely on **two** sets of confidential data: (1) import data from U.S. Customs; and (2) data from the USDOC regarding the relevant share of total U.S. imports that was assigned the China-government entity rate.

71. As an initial matter, nothing in the DSU **precludes** an arbitrator from using confidential data or requires an arbitrator to use only public information. Thus, arbitrators in previous Article 22.6 proceedings have used confidential data.[47]

72. The Arbitrator should rely on the U.S. Customs data and the USDOC data in this proceeding because they provide the most **accurate** estimates of the Chinese imports that are covered by the antidumping duty orders at issue in this proceeding. The U.S. data on the value of imports subject to antidumping duties is collected by U.S. Customs, the federal agency that **enforces** antidumping duty orders.

73. U.S. Customs collects duties and data on imports (and exports) through its automated system, the Automated Commercial Environment (ACE). ACE is the system through which traders—not the U.S. government—report imports and exports.[48] Through ACE, U.S. Customs collects data that allows the U.S. to determine which Chinese imports fall under the China-government entity rate. This means that ACE provides the most **accurate** source of data regarding antidumping duties collected by the United States. Thus, for each antidumping duty order at issue in this proceeding, ACE is able to **precisely** determine which imports fall under the China-government rate.

[47] *See US – Washing Machines (Article 22.6 - US)*, paras. 3.110-3.112; *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.10-2.14; *EC – Bananas (Ecuador) (Article 22.6 – EC)*, paras. 38-41.

[48] Exhibit USA-66.

74. We also observe that ACE is the U.S. technical approach to realizing the Single Window concept, which is a **commitment** in Article 10.4 of the WTO Trade Facilitation Agreement.

75. China's approach to data—capturing total trade flows occurring under basket HTS categories—is unreasonable because it **grossly** over-estimates the value of trade of products subject to the WTO-inconsistent aspects of U.S. antidumping measures. Many of the reference HTS codes are broad categories, of which the product subject to an antidumping duty order is just a subset.

76. China's data does not provide a **reliable basis** to estimate nullification or impairment in this proceeding. If the Arbitrator were to use China's incorrect data, it would lead to a level of suspension that would be **well in excess** of the actual level of nullification or impairment.

B. U.S. Data is Reliable

77. To address any concerns about the reliability of the U.S. confidential data, the United States is providing to the Arbitrator four additional exhibits. Three of these exhibits provide useful context on the ACE system. The fourth exhibit (Exhibit USA-75), containing business confidential information (BCI), provides the antidumping duty rates assigned by the USDOC to Chinese firms in **each** antidumping duty order at issue in this proceeding.[49] We briefly explain each of these new exhibits.

[49] *See* Exhibit USA-75.

78. First, in Exhibit USA-75, we provide a U.S. Executive Order establishing that the Single Window—and its supporting systems, such as ACE—is the primary means of U.S. federal agencies for receiving data and other relevant documentation required for the release of imported cargo and clearance of cargo for export.[50] Multiple U.S. federal agencies rely on ACE for receiving data. For instance, ACE is the single system that importers and customs brokers **must** use to submit documentation required by U.S. Customs.

79. Second, in Exhibit USA-76, the United States is providing a brief article, published by U.S. Customs on the transformation of its trade processes.[51] This article provides information on the evolution of the customs automation process and the Single Window.

80. Third, in Exhibit USA-77, the United States is providing the antidumping duty rates assigned by the USDOC to Chinese firms in **each** antidumping duty order at issue in this proceeding.[52] Exhibit USA-77, when used in conjunction with Exhibit USA-30, establishes that many Chinese firms that have been assigned WTO-consistent antidumping duty rates that are **lower** than the separate rate export to the United States in small quantities or **not** at all. Thus, the accuracy of U.S. Customs data can be corroborated by China through its exporting firms.

81. Fourth, in USA-78, we provide a flow chart on how traders use ACE.[53] This chart demonstrates how importers file data **directly** into to ACE. It also shows how ACE interacts

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[50] See Exhibit USA-75, Executive Order 13,660 (March 6, 2014), page 2, section 3(b).

[51] *See* Exhibit USA-76.

[52] *See* Exhibit USA-77.

[53] *See* Exhibit USA-78.

with the trade community and U.S. federal agencies, including U.S. Customs. Firms that transmit import data to the U.S. government through ACE have a legal obligation to provide the **correct** information of cargo entering the United States. Thus, the U.S. Customs data the United States has provided is the most accurate data of Chinese imports that are subject to the antidumping duty orders at issue in this proceeding.

V. CONCLUSION

82. The United States has met its burden to establish a presumption in this arbitration that the level of suspension of concessions requested by China is **not** equivalent to the level of nullification or impairment. Accordingly, it is for China "to submit arguments and evidence sufficient to rebut" the presumption that the United States has established.[54]

83. For the reasons given in the U.S. written submission, the U.S. responses to the Arbitrator's advance questions, and in this oral statement, the United States respectfully requests that the Arbitrator find that the level of suspension of concessions requested by China is **well in excess** of the equivalent level of nullification or impairment. Were the Arbitrator to go on to estimate the level of suspension equivalent to the nullification or impairment, the actual level of nullification or impairment is no more than **$200.8 million** annually.

[54] *See EC – Hormones (US) (Article 22.6 – EC)*, para. 9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.

84. This concludes the U.S. oral statement. The United States would welcome any additional questions from the Arbitrator.