

***UNITED STATES – COUNTERVAILING DUTY MEASURES
ON CERTAIN PRODUCTS FROM CHINA***

Recourse to Article 22.6 of the DSU by the United States

(DS437)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE ARBITRATOR’S VIDEOCONFERENCE WITH THE PARTIES**

November 12, 2020

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<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/RW and Add.1, adopted 15 August 2019, as modified by Appellate Body Report WT/DS437/AB/RW
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/AB/RW and Add.1, adopted 15 August 2019
<i>US – Anti-Dumping Methodologies (China) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>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</i> , WT/DS471/ARB and Add.1, 1 November 2019
<i>US – Washing Machines (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>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</i> , WT/DS464/ARB, 8 February 2019
<i>Brazil – Aircraft (Article 22.6 – Brazil)</i>	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement by Brazil</i> , WT/DS46/ARB, 28 August 2000
<i>EC – Bananas (Ecuador) (Article 22.6 – EC)</i>	Decision by the Arbitrator, <i>European Communities – Regime for the Importation, Sale, and Distribution of Bananas (Ecuador) – Recourse to Article 22.6 of the DSU by the EC</i> , WT/DS27/ECU, 24 March 2000

Mr. Chairperson, Members of the Arbitrator:

1. The United States thanks you, and the Secretariat staff assisting you, for your ongoing work in this arbitration. As we all are well aware, these are challenging times, and striking a proper balance between caution and carrying out our work requires a considered approach. As the United States has explained in previous communications, while ongoing health concerns related to the COVID-19 pandemic prevent members of delegations from gathering in a single location, virtual meetings also present significant difficulties for the Parties in terms of effectively coordinating and presenting views. We appreciate the Arbitrator’s consideration of these circumstances in the planning of this virtual session.
2. The central question under the DSU¹ 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. countervailing duty (“CVD”) measures at issue, and if it is not, then what the equivalent level would be.² To answer the first question, the United States has shown that China’s request fails to meet the requirements of the DSU – specifically in terms of the methodology and data China has used to estimate the level of nullification or impairment.
3. The United States recognizes that there are areas of agreement between the Parties. However, as the United States has previously stated,³ key disagreements remain between the Parties over the issues of methodology and data, and these issues are of fundamental importance to the task of the Arbitrator in this proceeding. With this oral statement, the United States will briefly summarize in one place the areas of agreement and disagreement, which have been revealed throughout the course of the proceeding so far in the various submissions and responses to the Arbitrator’s questions.
4. As for agreement, the United States and China agree that the level of nullification or impairment should be determined by estimating the trade effects of removing the WTO-inconsistent aspect of the CVD measures following the expiration of the reasonable period of time (“RPT”). The Parties also agree that this is done by using a counterfactual of reducing the CVD rate by the relevant WTO-inconsistent Less-Than-Adequate-Remuneration (“LTAR”) rate—though the Parties have disagreed on what those rates are for each product. Further, the Parties agree that a two-step Armington-based imperfect substitutes partial equilibrium model is appropriate for estimating the level of nullification or impairment in this proceeding, and that Armington-based approaches taken by the arbitrators in DS464⁴ and DS471⁵ would benefit from certain adjustments.

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 U.S. Comments on China’s Comments on the Meeting of the Parties (April 22, 2020).

⁴ *US – Washing Machines (Article 22.6 – US)*.

⁵ *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*.

5. There is, though, much about which the Parties do not agree. The methodology proposed by China is unacceptable because it generates a distorted counterfactual market that does not represent what the U.S. market would have been like if the CVD rates were WTO-consistent following the expiration of the RPT. Instead, this distorted counterfactual market would generally overestimate the actual market competitiveness of imports from China and would incorrectly attribute to the CVD measures the adverse impact of other factors on China’s market share.

6. China’s methodology thus is incapable of accurately estimating the level of nullification or impairment that is attributable to the maintenance of the CVD measures beyond the expiration of the RPT, as required by Article 22.4 of the DSU. Furthermore, China compounds its methodological error by relying on flawed data that would overestimate the level of nullification or impairment under even a correct methodology.

7. As a result, it is appropriate to reject China’s proposed level of nullification or impairment and ask, what level of suspension would be equivalent to the level of nullification or impairment? As explained earlier, the Parties agree that the level of nullification or impairment should be determined by estimating the trade effects of removing the WTO-inconsistent aspect of the CVD measures following the expiration of the RPT. At a basic level, this would require a comparison between the actual value of imports of each product from China to the United States, and the counterfactual value of imports from China to the United States that could have been expected had the CVD rates been WTO-consistent following the expiration of the RPT.

8. The United States has explained that for the **counterfactual**, the relevant WTO-inconsistent CVD rates are the Section 129 CVD rates, and the WTO-consistent CVD rate for each product is calculated by reducing the Section 129 CVD rate by the relevant WTO-inconsistent LTAR rate. The United States has also explained that this is consistent with the fact that the Section 129 CVD rates were the compliance measures reviewed in the Article 21.5 proceedings in this dispute.

9. Having defined an appropriate counterfactual, we then move on to **methodology**: having agreed that the two-step Armington approach can be used to estimate the level of nullification or impairment, the United States has shown that certain adjustments are necessary to generate a counterfactual market representation which accurately determines how the U.S. market would be different if CVD rates were WTO-consistent at the expiration of the RPT (*i.e.*, in 2017). The United States has identified two necessary adjustments: (1) excluding the trade effects of the antidumping (“AD”) duties that also were imposed on the same products so that those effects are not misattributed to the CVD measures; and (2) excluding the trade effects of the positive supply shocks for imports of the same products from third countries, making them more competitive in the U.S. market, so that those effects likewise are not misattributed to the CVD measures. In other words, these adjustments are necessary to properly isolate the trade effects of the CVD measures at issue and estimate the actual level of nullification or impairment.

10. Finally, we need the best **data** available to accurately estimate the level of nullification or impairment. The United States has proposed to use the same data and data estimation methods

chosen by the arbitrator in DS471—save for certain instances where data-based adjustments were necessary, which will be explained later in this oral statement. In estimating the counterfactual value of imports from China, the United States has provided the Arbitrator data that accurately reflect imports from China that are subject to the CVD measures at issue in this proceeding. This contrasts with China’s reliance on basket tariff categories and blanket use of an economy-wide GDP deflator to estimate the market size for each discrete product.

11. The United States’ conclusion that the actual level of nullification or impairment is no more than \$117 million per year is based on an appropriate counterfactual, sound and robust methodology, and the best data available. Today we will discuss why the U.S. approach accurately estimates the trade effects of the CVD measures at issue following the expiration of the RPT, in contrast to China’s proposed approach.

I. ON METHODOLOGIES

A. Methodology Proposed by China

1. Missing the Necessary Modifications

12. The methodology proposed by China cannot correctly estimate the level of nullification or impairment. First and foremost, China’s methodology fails to make the necessary modifications to the two-step Armington model that was adopted by the arbitrator in DS471. As we have mentioned, the two-step Armington approach adopted by the DS471 arbitrator, without incorporating the two adjustments the United States has implemented, does not adequately reflect the relative competitiveness in the U.S. market following the expiration of the RPT in 2017, and results in an inflated estimate of the level of nullification or impairment.

13. This is partly because the DS471 model does not account for the relevant AD measures that applied to imports from China during the RPT—meaning the model is essentially asking how the market would be different if CVD rates were WTO-consistent at the expiration of the RPT and if AD duties were never imposed in the first place.⁶ But there is no dispute that the AD measures were imposed simultaneously or almost simultaneously with the CVD measures at issue, and that China’s actual relative competitiveness in 2017 was directly affected by these AD measures. Therefore, the AD measures should be taken into account in the counterfactual analysis. Otherwise, the DS471 model would end up overstating China’s 2017 counterfactual market share. We will elaborate on this necessary AD adjustment later in this oral statement.

14. Another problem with the DS471 model that China’s approach does not address is that the DS471 model effectively attributes to the CVD measures the trade effects of other factors on China’s relative competitiveness during the interim period between the year prior to the CVD measures and 2017. As the United States has explained, and will further discuss later, entry of new market participants and increased capacity of countries other than China to supply the U.S.

⁶ See Written Submission of the United States of America (February 18, 2020) (“U.S. Written Submission”), paras. 68, 72.

market have influenced China’s relative competitive position.⁷ But the DS471 model does not reflect this, and instead attributes all changes to the CVD measures and ends up significantly overstating China’s counterfactual market share in 2017. China’s methodology neglects to address this crucial shortcoming.

15. Unless these two critical problems are remedied, the DS471 model necessarily generates a counterfactual 2017 market that is fundamentally distorted and results in overestimation of how much nullification or impairment is due to the maintenance of the WTO-inconsistent CVD measures beyond the expiration of the RPT.

2. China’s Proposed Changes to the DS471 Model

16. Instead of addressing these fundamental deficiencies of the DS471 Armington approach, China has proposed two other adjustments to the DS471 model,⁸ one of which is to adopt a so-called “rule of two.” This rule assumes that the elasticity of substitution across imported varieties (“micro-elasticity”) is two times the elasticity of substitution between imported goods and domestic goods (“macro-elasticity”). This proposition has serious implications, as it would result in a significantly higher estimate of the level of nullification or impairment.

17. But as the United States has explained in detail in its written submission and responses to questions, China has not demonstrated why the Arbitrator should adopt this rule. There is no product-level evidence in support of applying this arbitrary assumption to the products at issue. Moreover, the assumption lacks any basis in established economic theory. The Feenstra paper China cites to support the so-called rule of two actually does not support China’s proposition. Rather, China has misinterpreted the statistical data presented in the paper and stretched its findings in an attempt to apply its misinterpretation to the products at issue in this proceeding. In contrast, the United States has provided compelling evidence that the macro-elasticity and the micro-elasticity are equal for the same product, based on the relevant U.S. International Trade Commission (“USITC”) reports.

18. Therefore, if the Arbitrator must apply a rule of thumb for elasticities of substitution, the only appropriate choice would be the standard “rule of one” assumption, meaning the substitution elasticity estimates reported in the USITC investigation reports should be used for both micro- and macro-elasticities. These USITC elasticities are tailored to the specific products subject to the duties, and were estimated in consideration of input from both the U.S. and Chinese interested parties to the USITC investigations.

19. The second change proposed by China is to adjust the programming code used by the DS471 arbitrator for net of duties, which would mean the Arbitrator would calculate nullification or impairment on the basis of export revenues, rather than import values as in DS471. The United States has stated that this suggestion – while not addressing the model’s primary defects –

⁷ See U.S. Written Submission, paras. 69, 73-85.

⁸ See Methodology Paper of the People’s Republic of China (March 24, 2020) (“China’s Methodology Paper”), paras. 73-89.

would be reasonable. To assist the Arbitrator, the United States has provided an alternative version of the U.S. programming code in Exhibit USA-105 which incorporates this optional adjustment. If the Arbitrator decides to accept the suggestion, the correct level of nullification or impairment would increase from \$117 million to \$121 million.

B. Methodology Proposed by the United States

20. Returning to the modifications that are necessary for the DS471 model to correctly estimate the level of nullification or impairment attributable to the WTO-inconsistent CVD measures at issue, the United States has demonstrated that its proposed methodology provides a more suitable approach.⁹ Briefly, we will highlight a few points regarding the U.S. methodology, which is a corrected version of the DS471 two-step Armington approach that incorporates two necessary adjustments.

1. First Necessary Adjustment: Accounting for the Effect of Dumping and the Corresponding Antidumping Duties on China’s U.S. Market Share

21. By ignoring contemporaneously imposed AD measures that directly affected imports from China in 2017, the DS471 model would essentially measure how the U.S. market would be different if the CVD rates were WTO-consistent at the expiration of the RPT and if the AD measures were never imposed in the first place. That, of course, would be a false premise, and therefore it is critical to adjust the two-step Armington approach to take into account AD duties.

22. To understand how not accounting for the AD duties would impede the purpose of the two-step Armington approach, it is important to keep in mind that step two of the two-step Armington approach – the step where the level of nullification or impairment is calculated – is calibrated using the counterfactual 2017 U.S. market shares generated in step one. That counterfactual 2017 market from step one is based on trade data from the year prior to the imposition of the relevant CVD measure. But China’s market share in that year-prior was distorted by dumping (in addition to Chinese government subsidies). The United States, to correct for this dumping, imposed AD duties, which remained in place beyond the expiration of the RPT.

23. Therefore, a step one model that does not account for the AD duties cannot estimate China’s actual relative competitiveness and thus cannot generate an adequate representation of the counterfactual 2017 market. And in turn, the step two model calibrated with this incorrect counterfactual 2017 market would incorrectly suggest that imports from China would be more competitive than they actually were in 2017 because it would not account for the correction for dumping – the AD duties – that was in effect at the end of the RPT. As a result, the step two model would overestimate China’s relative competitiveness in 2017 and thus overestimate the level of nullification or impairment. Therefore, only a two-step approach that properly accounts

⁹ See U.S. Written Submission, paras. 64-105.

for the AD duties can accurately simulate China’s relative competitiveness and thus accurately estimate the level of nullification or impairment.

2. Second Necessary Adjustment: Accounting for “Supply Shock,” *i.e.*, Factors Other than Trade Remedy Measures that Influenced the Evolution of Market Shares in the Interim Period

24. The second adjustment that is needed for the DS471 model to accurately estimate the level of nullification or impairment is what the United States refers to as the “supply shock adjustment.” Without this adjustment, the two-step Armington approach would implicitly and incorrectly assume that the CVD measures imposed on Chinese firms are the only factor contributing to the changes in China’s market share between the year-prior and when the RPT expired. However, in reality many other factors have influenced the evolution of China’s (and other suppliers’) market shares over a period of six to nine years.

25. The United States has provided evidence for five of the products¹⁰ that investments of private firms or changes in government policy boosted the supply potential of certain third countries and resulted in imports from those countries gaining U.S. market share at China’s expense. In other words, these positive supply shocks improved the relative competitiveness of those third countries and led to the relative deterioration of China’s competitive position in the U.S. market during the interim period.

26. Such changes during the interim period should be reflected in the step one counterfactual market that is used to calibrate the step two model. Otherwise, the step one counterfactual market would not represent China’s actual relative competitiveness in 2017, and in turn, cannot be used to correctly estimate the level of nullification or impairment.

27. As the United States has explained, in principle, the two-step Armington approach should incorporate a supply shock adjustment for every product for which the relative competitiveness of third country suppliers has evolved between the year-prior and 2017. However, it is not possible to directly observe supply shocks and their magnitude by country. As the best alternative, the United States has relied on two types of information to make the best effort to measure the relevant supply shocks: 1) trade data trends showing disproportionate increases in certain third countries’ market shares relative to other exporting countries between the year in which the CVD measure was imposed and 2017, and 2) documented evidence in relevant USITC investigations of any industry investment or government policy changes in those third countries during the same period. Using this evidence-based method, the United States has identified the “Rising Supplier” countries for Aluminum Extrusions, OCTG, Solar Panels, Line Pipe, and Pressure Pipe, and detailed the government policies or industry investments that are linked to the expansion of their supply potential. We have also explained that we have not found sufficient

¹⁰ Aluminum Extrusions, OCTG, Solar Panels, Line Pipe, Pressure Pipe.

evidence and data to recommend implementing the supply shock adjustment for the remaining products.¹¹

28. As the United States has shown, the supply shock adjustment is evidence-based and industry-specific. Without implementing the supply shock adjustment, the two-step Armington approach would incorrectly attribute to the CVD measures at issue the trade effects of policy-driven changes in the global supply market that are unrelated to U.S. trade remedy measures. Therefore, the supply shock adjustment is necessary to accurately estimate the level of nullification or impairment.

3. Correct Year-Prior

29. It is also necessary to ensure that the correct year-prior is used in the two-step Armington approach. As the United States has explained, the correct year-prior for each product is the year prior to the imposition of the final CVD measure. China has attempted to deviate from the approach taken by the DS471 arbitrator and argued that the year-prior should be based on the date of imposition of the preliminary CVD measure. However, we have explained that the imposition of a CVD measure is not made final until both the U.S. Department of Commerce and the USITC make affirmative final determinations. Any cash deposits collected following an affirmative preliminary CVD determination are merely provisional and subject to refund depending on the outcome of the final determination. Moreover, for all of the products at issue, no provisional CVD duties were collected for several months between the expiration of the provisional CVD period and the publication of the final CVD determination.¹²

30. The United States agreed with the arbitrator in DS471 and now proposes to the Arbitrator in this proceeding that the correct year-prior is the year prior to the final duty measure. It is crucial that the Arbitrator selects the correct year-prior, rather than adopting China’s novel but unsupported methodology, because correct estimation of the level of nullification or impairment depends on an accurate step one counterfactual 2017 market, which is generated using trade data from the year-prior. Thus, an incorrect year-prior would mean incorrect step one results, which would mean an incorrect estimate of the level of nullification or impairment.

II. ON DATA

31. 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 a critically flawed methodology and incorrect data. In this final section, we further clarify why China’s proposed data and data estimation methods, especially the GDP deflator approach, are invalid and why the data used by the United States is the most appropriate choice in this proceeding.

¹¹ See Responses of the United States of America to the Advance Questions from the Arbitrator (May 7, 2020) (“U.S. Responses to Arbitrator’s Advance Questions”), Question No. 5.

¹² See U.S. Response to Arbitrator’s Advance Question No. 2.

A. Year-Prior U.S. Market Data

32. The United States and China disagree on the U.S. market data for the year-prior and for the base year 2017. The United States has generally used the data that the arbitrator in DS471 chose to use for the seven products¹³ for which AD measures were at issue in the DS471 arbitration proceeding, and we have estimated the data for the other three products that were not at issue in DS471¹⁴ by applying estimation methods that are similar to those applied by the DS471 arbitrator.¹⁵ In contrast, China has unnecessarily deviated from the data and data estimation methods used by the DS471 arbitrator and has proposed data that are not suitable for accurately estimating the level of nullification or impairment.

33. First, for the year-prior data, China has chosen the wrong year-prior for three of the products,¹⁶ and has misidentified the relevant domestic shipments or imports values for three other products.¹⁷ And for Kitchen Shelving, China’s estimated imports values improperly rely on “basket”¹⁸ HTSUS¹⁹ categories that broadly include a number of products that fall outside the scope of the Kitchen Shelving CVD measure.²⁰

34. In contrast, the United States has correctly identified the year-prior for each product in a manner that is consistent with the year-prior identified by the arbitrator in DS471, and has used the domestic shipments and imports values that were either used by the DS471 arbitrator, or calculated those values using sources and methods similar to those relied on by the DS471 arbitrator. For products for which the DS471 arbitrator used BCI data from U.S. Customs and Border Protection (“USCBP”) for year-prior imports from China,²¹ we have used the same USCBP data – which we have clarified are based on the reference HTSUS codes from the investigation product scope, and not on the AD or CVD orders.²² Lastly, for Kitchen Shelving, the United States corrected for the overinclusion problem of relying on basket tariff categories by

¹³ Aluminum Extrusions, Line Pipe, OCTG, Print Graphics, Seamless Pipe, Solar Panels, and Steel Cylinders.

¹⁴ Kitchen Shelving, Pressure Pipe, and Wire Strand.

¹⁵ *But see* U.S. Written Submission, paras. 144-47 and Responses of the United States of America to the Follow-Up Questions from the Arbitrator (August 21, 2020) (“U.S. Responses to Arbitrator’s Follow-Up Questions”), Question No. 48.

¹⁶ OCTG, Line Pipe, and Pressure Pipe. *See* U.S. Written Submission, para. 125.

¹⁷ Print Graphics, Steel Cylinders, and Solar Panels. *See* U.S. Written Submission, para. 126.

¹⁸ *Certain Kitchen Appliance Shelving and Racks from China*, Investigation Nos. 701-TA-458 and 731-TA-1154 (Review), USITC Publication 4098 (August 2009), p. I-6 (Exhibit CHN-19) (“All of these statistical reporting numbers are residual or ‘basket’ categories and contain a number of other products besides certain [Kitchen Shelving].”) *See also* U.S. Response to Arbitrator’s Follow-Up Question No. 35.

¹⁹ Harmonized Tariff Schedule of the United States.

²⁰ *See* U.S. Written Submission, para. 127; U.S. Response to Arbitrator’s Advance Question No. 11; U.S. Responses to Arbitrator’s Follow-Up Questions No. 35 and 37.

²¹ Line Pipe, OCTG, Solar Panels, and Steel Cylinders.

²² *See* U.S. Response to Arbitrator’s Follow-Up Question No. 47.

incorporating industry data-based adjustments to data collected in the relevant USITC investigations.²³

B. 2017 U.S. Market Data

35. For the 2017 U.S. market data, the United States has generally used the data already reported by the DS471 arbitrator for the seven products that were also at issue in that arbitration. As for the other three products, the United States has calculated an estimate using detailed analysis for each component of the U.S. market – similar to the reasoned methods used in DS471.

36. In contrast, China unnecessarily resorts to a novel approach of applying a GDP deflator to an estimated value of an earlier U.S. market for a specific product and extrapolating the value of the 2017 U.S. market for that product. This, as the United States has explained, is not supported by economic theory. A GDP deflator is based on the entire U.S. economy and is not tailored to specific products. We have explained that a GDP deflator, which is nominal GDP divided by real GDP, is a measurement of inflation. Accordingly, the outcome of China’s GDP deflator approach is merely the value of an earlier U.S. market in terms of 2017 dollars—it does not estimate the size of the 2017 U.S. market.²⁴ By attempting to project a future market size using a GDP deflator, China is improperly assuming that the product market remained constant between an earlier data year and 2017.

37. Using detailed diagrams, we have shown that there is no relationship between the actual value of the 2017 U.S. market for a given product and the projected 2017 value calculated by applying an economy-wide GDP deflator on the value from an earlier year chosen by China.²⁵ Moreover, we have explained more generally that any deflator, by nature, would fail to serve as an accurate proxy for estimating U.S. market size in a given year. China’s GDP deflator method is fundamentally unsound and is incapable of generating accurate estimates.

38. We emphasize that the most appropriate method to estimate 2017 U.S. market data for each product is the method the United States has used – using industry-specific data to estimate each component of the U.S. market for each product (*i.e.*, U.S. domestic shipments, U.S. imports from China, and U.S. imports from the rest of the world) and summing those estimates. This is the method that the DS471 arbitrator used and also the method that the USITC uses in its investigations.

39. Accordingly, the United States, as mentioned earlier, has generally used the same 2017 U.S. domestic shipments and imports data and data estimation methods that the DS471 arbitrator used. Thus, for 2017 imports from China, the United States has used USCBP data reporting company-specific imports of subject merchandise that are subject to the CVD measures at issue. As we have explained, these data, which are collected by the U.S. federal agency that enforces

²³ See U.S. Responses to Arbitrator’s Follow-Up Questions No. 35 and 37.

²⁴ See U.S. Response to Arbitrator’s Advance Question No. 23.

²⁵ See U.S. Response to Arbitrator’s Advance Question No. 23.

CVD measures at the time of importation, provide the most accurate estimates of the imports from China that are covered by the CVD measures at issue in this proceeding.

40. While the United States has used HTSUS-based data for the year-prior data – due to lack of a better alternative – USCBP data is the most precise and best data available for the 2017 imports from China of products subject to the CVD measures, and is the most reliable basis to estimate the actual level of nullification or impairment. We emphasize that nothing in the DSU precludes an arbitrator from using confidential data, and arbitrators in previous Article 22.6 proceedings, including DS471, have relied on confidential data.²⁶ We have provided the Arbitrator the complete BCI USCBP data on imports from China that are needed for the two-step Armington approach in this proceeding.

41. On the same basis, while the DS471 arbitrator used the HTSUS-based data for 2017 imports from the rest of the world, the United States in this proceeding has adjusted these values for four of the products²⁷ for which the actual subject product is only a subset of the reference HTSUS categories cited in the USITC’s product scope description. For these four products, there was a significant discrepancy between the value of imports under the reference HTSUS categories and the value of imports of actual subject products. The United States therefore has derived a ratio based on USITC investigation data to adjust the HTSUS-based data or estimated the value of imports of the actual subject product based on industry data.²⁸ At the same time, for the remaining six products, the United States has used the same data used by the DS471 arbitrator for 2017 imports from the rest of the world because the product scope was defined sufficiently by HTSUS categories.

III. CONCLUSION

42. For the reasons given in the U.S. written submission, the U.S. responses to the Arbitrator’s advance questions and follow-up 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 actual level of nullification or impairment. The United States has shown that the appropriate level of nullification or impairment is no more than **\$117 million** annually.

43. This concludes the U.S. oral statement. The United States will be prepared during the next videoconference session to provide responses to the questions that the Arbitrator sent to the Parties in advance of this videoconference. The United States would also welcome any additional questions from the Arbitrator, and we will endeavor to respond to any such questions in writing following the conclusion of the videoconference.

²⁶ 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.

²⁷ Print Graphics, Seamless Pipe, Kitchen Shelving, and Pressure Pipe.

²⁸ See U.S. Written Submission, paras. 144-47.