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)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE ARBITRATOR FOLLOWING THE SUBSTANTIVE MEETING OF THE ARBITRATOR WITH THE PARTIES

Public Version

May 10, 2019

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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 – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
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EC – Bananas (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (Ecuador) – 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
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USA-82	Notice of Final Results of Antidumping Duty Administrative Review, *Polyethylene Retail Carrier Bags from the People's Republic of China*, 74 Fed. Reg. 63,718 (December 4, 2009)
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1 GENERAL

50. <u>To both parties</u>: The Arbitrator understands that China has excluded *Aluminum Extrusions* from the scope of its estimated level of nullification or impairment but argues that the Arbitrator should include *Aluminum Extrusions* if it were to follow the United States' approach for estimating the level of nullification or impairment.

a. <u>To China</u>: Is this understanding correct? If so, please explain why it would be reasonable to exclude *Aluminum Extrusions* under China's approach but include it under the United States' approach.

b. <u>To the United States</u>: Please comment on China's view that the Arbitrator should include *Aluminum Extrusions* if it were to follow the United States' approach for estimating the level of nullification or impairment.

<u>Response:</u>

1. As discussed in the U.S. responses to the Arbitrator's advance questions,[1] China submitted to the Arbitrator a methodology paper explaining the basis for its request to suspend concessions or other obligations in this dispute. In its methodology paper, China identified 13 antidumping duty orders in connection with its "as applied" claims concerning the Single Rate Presumption, including *Aluminum Extrusions*.

2. While nothing precludes China from subsequently excluding *Aluminum Extrusions* from its calculations, China's amendment cannot be dependent on the Arbitrator adopting a particular methodological approach, as China now suggests.[2] China either should amend its request by removing *Aluminum Extrusions* – regardless of the methodological approach implemented by the Arbitrator – or China should stand by its proposal as explained in its methodology paper. China's vacillating back and forth has caused confusion, and it highlights the uncertainty inherent in China's requested level of suspension and the degree to which China's request is not – and cannot be – equivalent to the level of nullification or impairment. Adopting China's latest suggestion, moreover, would be inconsistent with fundamental principles of procedural fairness, as it places the United States in the position of having to try to argue against a constantly moving target.

2 COUNTERFACTUAL

51. <u>To the United States</u>: In its written submission, the United States submits that the USDOC did not calculate a separate duty rate in four of the anti-dumping orders at issue (*Iron Pipe Fittings*, *Copper Pipe and Tube*, *Washers*, and *Steel Flat Products*) and the United States applies a counterfactual duty rate of 0.00% to replace the

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[1] *See* 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. 1-2.

[2] *See* China's Oral Statement (April 24, 2019) (noting that "if the Arbitrator adopts any approach to calculating N/I other than the reasonable approach proposed by China, *Aluminum Extrusions* must be part of any such alternative calculation."), para. 42.

PRC-wide rate in respect of these four anti-dumping orders. In response to the Arbitrator's questions, the United States submits that the USDOC did not calculate a separate duty rate in only two of the anti-dumping orders at issue (*Steel Flat Products* and *Washers*). For *Steel Flat Products*, the United States argues that "a rate based on facts available (due to the failure to cooperate) could have applied even if the producers and/or exporters were not part of the China-government entity." For *Washers*, the United States argues that "a rate derived from the two known, and individually examined, exporters and/or producers is appropriate."

Please Clarify:

a. Whether a separate duty rate was calculated in *Iron Pipe Fittings* and *Copper Pipe and Tube*.

Response:

3. Upon further review, the United States identified that the U.S. Department of Commerce ("USDOC") had determined a separate rate in *Copper Pipe and Tube* and the United States reflected this in its responses to the Arbitrator's questions.[3] The United States apologizes for any inconvenience this may have caused. The USDOC determined a separate rate in the investigation of *Copper Pipe and Tube* of 36.05 percent, which was applicable to five separate rate respondents.[4] This rate remains in effect with respect to three companies.[5] As a result, under the U.S. counterfactual, the incorrect rate (0.00 percent) should be replaced with the correct rate (36.05 percent).

4. The USDOC has not determined a separate rate under the order on *Iron Pipe Fittings*.[6]

b. Which counterfactual duty rate the United States is proposing for the PRC-wide entity in respect of *Iron Pipe Fittings*, *Copper Pipe and Tube*, *Washers*, and *Steel Flat Products*.

Response:

5. The counterfactual duty rate the United States proposes for *Iron Pipe Fittings*, *Washers*, and *Steel Flat Products* does not change, and remains 0.00 percent. The United States is using 0.00 percent where no separate duty rate was determined in an antidumping proceeding.

6. This approach overstates the level of nullification or impairment for these proceedings because, in each proceeding, the USDOC determined dumping at above 0.00 percent levels. Moreover, in *Steel Flat Products*, all known potential exporters and producers of subject

[3] *See* Written Submission of the United States of America (January 7, 2019) ("U.S. Written Submission"), para. 76.

[4] *See* Copper Pipe and Tube from China, Final Determination (Exhibit USA-50 at Letter S).

[5] *See* Exhibit USA-77.

[6] *See* Exhibit USA-77.

merchandise fall into Group 3.[7] Under the correct counterfactual, however, the only modification is that duties on Group 4 imports are changed from the rate assigned to the China-government entity to a separate duty rate.[8]

7. For *Copper Pipe and Tube*, the counterfactual duty rate for the China-government entity should be 36.05 percent, for the reason explained in response to part (a) of this question.

52. <u>To the United States</u>: With respect to separate duty rates, please explain the following:

a. Does the separate duty rate in the US anti-dumping system correspond to the duty rate set out in Article 9.4 of the Anti-Dumping Agreement? In responding, please explain whether the USDOC assigns non-individually-examined exporters or producers a separate duty rate that is based on total or partial adverse facts available.

b. Please explain how the USDOC calculated the separate duty rates for each of the anti-dumping orders for which there is a separate duty rate on record? Specifically, please clarify whether the USDOC took into account the provisions of Article 9.4 in calculating the separate duty rates in each of the anti-dumping orders. The Arbitrator recalls the three examples that the United States gave during the meeting with the parties. In your response to this question, please explain the calculation of the separate duty rates for all of the 25 anti-dumping orders at issue in this proceeding.

<u>Response</u>:

8. As an initial matter, the United States observes that the issue of whether an antidumping duty rate assigned to a separate rate respondent (*i.e.*, a "separate duty rate") is consistent with Article 9.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") is not one that China raised during the original dispute, nor is it an issue about which the Dispute Settlement Body ("DSB") adopted recommendations.

9. That being said, as the United States demonstrated during the substantive meeting, using illustrative examples derived from the U.S. exhibits, that the USDOC generally calculates the separate duty rate based on the rates assigned to individually-examined respondents. In certain situations, the USDOC has also calculated the separate duty rate by averaging the rates in the

[7] In *Steel Flat Products*, the USDOC issued Q&V questionnaires to all known exporters and producers of the merchandise. However, no exporter or producer to which USDOC issued its Q&V questionnaire provided quantity and value information as requested. *See Cold Rolled Steel Flat Products from China*, Preliminary Determination (Exhibit USA-51 at Letter U) (explaining that the USDOC did not receive quantity and value questionnaire responses from any potential respondents). Because no exporter or producer cooperated in the original investigation—thus all known entities fall under Group 3—there is no nullification and impairment for Steel Flat Products.

[8] *See* U.S. Written Submission at para.41.

petition, or by using a rate calculated for an individually-examined respondent in a prior proceeding.

10. In the 25 orders at issue, when the USDOC chose which rates to use to calculate the separate duty rate, the USDOC did not resort to total or partial facts available based on any alleged failure by the separate rate respondents to cooperate. For complete information on how the United States calculated each of the separate duty rates in Exhibit USA-5 for all of the 25 antidumping orders, the United States refers the Arbitrator to Exhibit USA-79.[9]

53. <u>To both parties</u>: China states that in *Diamond Sawblades*, the USDOC calculated the separate duty rate for non-individually-examined exporters or producers as an average of the duty rates assigned to the individually-examined exporters or producers, which in turn were based on total adverse facts available.

a. <u>To the United States</u>: Does the United States agree with China's assertion?

<u>Response</u>:

11. Yes. In the relevant administrative review of *Diamond Sawblades*, the USDOC calculated a separate rate as an average of the rates applied to the two individually-examined exporters and producers.[10] These individually-examined exporters and producers each received a rate based on facts available.[11]

b. <u>To both parties</u>: Did the USDOC determine the separate duty rate in the manner described by China in any of the other anti-dumping duty orders at issue?

12. No.

54. <u>To both parties</u>: China argues that the United States' use of the separate duty rates on record as the counterfactual for the PRC-wide entity relies on the assumption that these separate duty rates are WTO-consistent. China argues that this assumption is wrong and identifies four categories of "likely" WTO inconsistencies, i.e. the improper use of facts available, the improper double-counting of anti-dumping and countervailing duties, the improper use of the WA-T methodology, and the improper use of zeroing.

a. <u>To China</u>: What is the legal basis for considering, in an Article 22.6 proceeding, the alleged "likely" WTO consistency of the separate duty rates on record when these were not challenged in the original proceedings of this

[9] *See* Exhibit USA-79.

[10] *See Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015–2016*, 83 Fed. Reg. 17,527 (Dep't of Commerce Apr. 20, 2018) (Exhibit USA-81).

[11] *Id.*

dispute? Why would the Arbitrator refrain from adopting a counterfactual that has elements that are alleged "likely" to be in violation of obligations that were not discussed in the original proceedings of this dispute?

b. <u>To the United States</u>: What is the legal basis for your view, expressed at the substantive meeting, that the Arbitrator's mandate does not allow it to take into account the alleged "likely" WTO inconsistency of a proposed counterfactual in determining whether that counterfactual is reasonable?

13. During the substantive meeting, the United States explained that going beyond the DSB's recommendations in a DSU Article 22.6 arbitration would be contrary to the DSU. The mandate of the Arbitrator is explicitly linked in Articles 22.6, 22.7, 22.4, and 22.2 of the DSU to the nullification or impairment resulting from a failure to comply with the "recommendations" of the DSB.[12] 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.[13]

14. 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 level of nullification or impairment resulting from those measures. Going beyond the DSB's recommendations by examining China's arguments regarding "likely"[14] WTO inconsistencies of the U.S. proposed counterfactual would be contrary to the Arbitrator's mandate under the DSU.

15. China does not even present its claims as being ones of "inconsistency" but only of "likely" inconsistency. That is not the type of claim that even an original panel would review, let alone an arbitrator under Article 22.6 of the DSU. Furthermore, China's approach appears to be that the Arbitrator should "presume" that an antidumping duty is inconsistent with the AD Agreement (and thus should not be used in a counterfactual) on the basis of an assertion that it is

[12] 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.").

[13] 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).

[14] *See, e.g*, China's Written Submission (noting that the U.S. proposed counterfactual "assumes that the 'all others' AD rates for 2017 being used are, in fact, WTO-consistent."), para. 217; *see also*, China's Written Submission (noting that "even if the United States can present some defenses to some theories for some of the other cases, it is highly likely that a large number of the 'all others' rates in these cases would continue to be WTO-inconsistent for one or more reasons."), para. 235.

"likely" to be inconsistent. There is no basis for a presumption of inconsistency, let alone a presumption based on an assertion that something is "likely."

16. Furthermore, China's arguments regarding "likely" WTO inconsistencies are completely disconnected from the key issue in this proceeding, which is an analysis of the "benefit" accruing to China under the AD Agreement that, allegedly, has been nullified or impaired as a result of the United States not implementing the DSB's recommendations following the end of the reasonable period of time ("RPT"). As the United States explained in its opening statement during the substantive meeting,[15] China's arguments are based on speculation. An arbitrator's decision, however, is not to be based on speculation.[16]

c. <u>To the United States</u>: In its opening statement, the United States refers to the example of a Member imposing a customs duty, which is found to be in excess of its bound duty rate and thus WTO-inconsistent. If, in this example, the Member does not take any measure to comply and, in a potential Article 22.6 proceeding, proposes to use a counterfactual that involves modifying the WTO-inconsistent customs duty by (i) lowering the rate to a level that continues to be in excess of its bound duty rate, (ii) replacing the customs duty with a quota, or (iii) replacing the customs duty with a ban, would the arbitrator's mandate allow it to take into account the "likely" WTO inconsistency of the modified customs duty, the quota, or the ban?

<u>Response</u>:

17. In the example in the U.S. opening statement during the substantive meeting, all three options (lowered to the bound rate, lowered below the bound rate, or terminated entirely) would be clearly WTO consistent so the issue of inconsistency would not arise.

18. Furthermore, an important aspect of the current proceeding is that it involves antidumping duties. Injurious dumping is something that Members have specifically "condemned." Here, there were no findings that China's products were not being dumped. The WTO agreements provide a specific type of measure to respond to this condemned practice – antidumping duties.

19. Therefore, there is no need to be looking at different types of measures for purposes of a counterfactual, such as quotas or bans. It is reasonable to look at a counterfactual in which antidumping duties are maintained, and to consider at what level they would be maintained.

20. As the United States explained in its opening statement,[17] to assess the appropriateness of a counterfactual, prior arbitrators have reasoned that the counterfactual should "reflect at least a

[15] *See* U.S. Opening Statement, para. 33.

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

[17] U.S. Opening Statement, para. 14.

plausible or 'reasonable' compliance scenario."[18] Thus, since there were no findings in the report of the Appellate Body and the report of the panel, as modified by the Appellate Body, that any of the rates proposed to be used in the U.S. counterfactual are WTO inconsistent,[19] it is plausible and reasonable to use them.

d. <u>To the United States</u>: Assuming arguendo that the Arbitrator considers examining the WTO consistency of the separate duty rates in the context of selecting a reasonable counterfactual, please respond to China's arguments regarding each of the four categories of "likely" WTO inconsistencies.

<u>Response</u>:

21. If the Arbitrator were to consider examining the WTO consistency of the separate duty rates, the Arbitrator should not rely on information contained in Exhibit CHN-52, which is riddled with errors and misleading statements. Much of the evidence China uses to support its contentions in Exhibit CHN-52 either contradicts or does not fully support China's arguments. For example:

- In Exhibit CHN-52, China lists, in the fourth column, numerous separate duty rates proposed as counterfactuals by the United States. China also includes in Exhibit CHN-52 a column labelled "Application of Differential Pricing Methodology." Exhibit CHN-52 purports to demonstrate which separate duty rates proposed by the United States are affected by an allegedly WTO-inconsistent differential pricing methodology. To support these assertions, however, China cites to Exhibit CHN-34. Yet, for **numerous** rates described in the fourth column of Exhibit CHN-52, Exhibit CHN-34 demonstrates that the USDOC actually applied its WA-WA methodology when calculating the rates, which corresponds with the normal comparison methodology in the first sentence of Article 2.4.2 of the AD Agreement.[20] China's assertion in its opening statement that 13 of the separate duty rates were affected by "improper application of differential pricing contrary to the second sentence of Article 2.4.2" is therefore **demonstrably incorrect**.[21]

- In Exhibit CHN-52, China lists, in the seventh column, the proceedings which China claims were affected by the USDOC's alleged failure to properly adjust the separate duty rates for domestic subsidies that the USDOC found to be countervailable. However, this argument by China is irrelevant for purposes of assessing the WTO consistency of antidumping duties. The Appellate Body finding with respect to the need to adjust for subsidies concerns a purported obligation under the *Agreement on Subsidies and*

[18] *Id.*

[19] *See* U.S. Written Submission, paras. 12-14

[20] These rates are those listed for corrosion resistant steel (Exhibit CHN-34 at 35), PET film (Exhibit CHN-34 at 129), OTRs (Exhibit CHN-34 at 13), SLP pipe (Exhibit-34 at 152), CSPV (Exhibit CHN-34 at 50), and multilayered wood flooring (Exhibit CHN-34 at 84).

[21] *See* China's Opening Statement, para. 28.

Countervailing Measures ("SCM Agreement"), not the AD Agreement and therefore could not affect the consistency of antidumping duties.

- As demonstrated above, China's assertions in Exhibit CHN-52 that 17 of 18 separate duty rates are affected by "bonafide" WTO inconsistencies is **not** correct.

22. Second, the evidence relied upon by China does not support its assertions. For example, China asserts that the USDOC failed to properly make double remedy adjustments for the separate duty rates assigned in *OTR Tires*, *Circular Welded Carbon Quality Line Pipe*, and *Multilayered Wood Flooring*.[22] In those cases, Exhibit CHN-33 demonstrates that the USDOC declined to make adjustments because the USDOC determined that the respondents did not meet the statutory criteria for an adjustment under U.S. law. And again, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that the purported "imposition of double remedies" is inconsistent with Article 19.3 of the SCM Agreement.[23] China has not challenged in this dispute the U.S. imposition of any countervailing duty measures, and it is entirely unclear how the imposition of an **antidumping** duty measure could be considered inconsistent with **the SCM Agreement**.

23. Finally, as a practical matter, for the Arbitrator to even examine whether the USDOC's decisions in those cases were WTO-consistent, the Arbitrator would have to weigh fact-intensive information unique to each particular proceeding. The Arbitrator would have to consider record evidence specific to each company involved in the determination and evaluate that evidence in light of the AD Agreement, and possibly **the SCM Agreement** (if it were even conceptually possible to examine the consistency of an antidumping duty measure with the SCM Agreement).

24. As the United States has previously explained, the separate duty rates (*i.e.*, Group 2) are not subject to any recommendations adopted by the DSB.[24] Delving in the WTO-consistency of issues not considered by the DSB, and making fact-intensive determinations about those issues, would be contrary to the Arbitrator's mandate under the DSU.

e. <u>To both parties</u>: Assuming arguendo that the Arbitrator does not consider the separate duty rates on record a reasonable counterfactual, are there any alternative duty rates on the record of the anti-dumping duty orders at issue that could be used as the counterfactual duty rates?

<u>Response</u>:

25. In selecting the rates provided in Exhibit USA-5, the United States followed a consistent approach that avoided choosing rates in a haphazard manner. Specifically, the United States

[22] In determining the level of nullification or impairment in connection with the Single Rate Presumption applied in *OTR Tires* and *Wood Flooring*, the United States used a formula-based approach. The formula-based approach did not rely on separate-rates as an input.

[23] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 590.

[24] U.S. Opening Statement, para. 32.

selected the most-recently determined separate duty rate – for cases where a separate duty rate had been determined – as of the end of the RPT. This is an appropriate approach.

26. As recognized in question 68(b), in China's opening statement, China proposed an alternative duty rate in *Furniture*. The rate China proposed was assigned to an individually-examined respondent in 2014.[25] The U.S. approach, however, relies on separate duty rates. Were the United States to rely on the most-recently determined, above *de minimis* rate applied to a separate rate respondent, or if there were no separate rate respondents in the relevant administrative review, then to an individually-examined respondent, at the end of the expiration of the RPT, certain rates would change as follows:

- For *Carrier Bags*, the rate would change from 17.30 percent[26] to 17.92 percent.[27]
- For *PET Film*, the Arbitrator might use 53.63 percent, the simple average of the 35.10 percent and 72.15 percent rates calculated for the mandatory respondents in the 2012-2013 administrative review of *PET Film*.[28] Thus, the rate would change from 31.24 percent[29] to 53.63 percent.
- For *OCTG*, the rate would change from 29.94 percent[30] to 137.62 percent.[31]

55. <u>To the United States</u>: The United States argues that the USDOC did not distinguish between Group 3 and Group 4 exporters or producers and made findings of non-cooperation for the PRC-wide entity as an entity, but in some instances identified by name specific exporters or producers that failed to cooperate.

a. Do Group 3 exporters or producers only consist of exporters or producers identified by name as having failed to cooperate?

<u>Response</u>:

27. As an initial matter, the United States reiterates that the distinction between Group 3 and Group 4 is applied only in connection with the U.S. **formula-based methodology**, which is

[25] *See* China's Opening Statement at the Meeting of the Arbitrator, para.48; Exhibit CHN-50.

[26] Exhibit USA-5.

[27] *Polyethylene Retail Carrier Bags From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 63718 (Dep't of Commerce Dec. 4, 2009) (Exhibit USA-82)

[28] *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumpign Duty Administrative Review and Final Determination of No Shipments; 2012 – 2013* (Exhibit USA-83)

[29] Exhibit USA-5.

[30] Exhibit USA-5.

[31] *Certain Oil Country Tubular Goods From the People's Republic of China; Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Administrative Review Pursuant to Court Decision*, 80 Fed. Reg. 57789 (Dep't of Commerce Sept. 25, 2015) (Exhibit USA-84)

applied to **five** of the antidumping duty proceedings at issue.[32] The U.S. Armington-based model, which is applied to **17** antidumping duty proceedings at issue, makes no distinction between Group 3 companies and Group 4 companies. Therefore, the United States took into account the distinction between Group 3 and Group 4 companies in only one-fifth of the proceedings identified by China. Those proceedings are: *OTR Tires*, *OCTG*, *CPSV*, *Wood Flooring*, and *Wooden Bedroom Furniture*.[33]

28. Moving to the Arbitrator's question, the answer is no. Group 3 consists of all exporters and producers for which there is evidence that the exporters or producers failed to cooperate with the USDOC's investigation, including both those identified by name and those identified by their type of non-cooperative behaviour.

29. Under the Single Rate Presumption, all producers and exporters in China comprise a single entity under government control. In its determinations, the USDOC demonstrated that one or more exporters or producers that formed part of the China-government entity had not cooperated and, as a result, the USDOC found that the China-government entity failed to cooperate.

30. In many of the antidumping duty proceedings at issue, the USDOC issued dozens of Q&V questionnaires, and in some investigations, the vast majority of recipients did not respond. For administrative convenience, the USDOC does not always list the names of all exporters and producers that fail to respond to a Q&V questionnaire. For example, in its preliminary determination in the investigation of *OTR Tires*, the USDOC stated that:

> On July 30, 2007, the Department issued quantity and value ("Q&V") questionnaires to 94 companies… From August 8 to August 20, 2007, 30 exporters of the subject merchandise filed timely responses to the Department's Q&V questionnaire.[34]

31. The USDOC continued:

> [W]e issued the Q&V questionnaire to 94 identified PRC exporters of the subject merchandise but received responses from only 30, with one reporting that it made no shipments of subject merchandise during the POI. The other 29 responses did not account for all imports into the United States from the PRC during the POI. Further, evidence on the record indicates that the 94 identified PRC exporters of subject merchandise received our Q&V questionnaire. See Memorandum to the File,

[32] *See* U.S. Responses to Arbitrator's Advance Questions (demonstrating that the United States did not apply the distinction between Group 3 and Group 4 when using the Armington-based approach. The United States explained that while the distinction between Group 3 and Group 4 exporters or producers is equally relevant under both the formula-based and the Armington-based approaches, due to limitations in CBP's data, the United States was not able to apply this distinction in its calculations using the Armington-based approach. As a result, the United States explained, the Armington model overstates the level of nullification or impairment to a certain degree.), para. 3.

[33] Nevertheless, the Q&V non-response rates in Exhibit USA-55 may be used to estimate the value of imports from Group 4 alone.

[34] Off-the-Road Tires from China, Preliminary Determination (Exhibit USA-51 at Letter D).

> "Quantity and Value ('Q&V') Tracking," dated September 4, 2007. Based on the above facts, the Department preliminarily determines that there were exports of the subject merchandise under investigation from PRC producers/exporters that did not respond to the Department's questionnaire, and we are treating these PRC producers/exporters as part of the countrywide entity. As a result, use of facts available pursuant to section 776(a)(2)(A) of the Act is warranted for the PRC entity.[35]

32. Of the 90 companies for which information reflects that they received the questionnaire, 14 provided responses while 76 did not.[36] Although the USDOC did not name all non-cooperative companies that failed to respond to Q&V questionnaires in *OTR Tires*, the USDOC did make a determination that the 76 Chinese producers and exporters did not respond to the USDOC's questionnaire and, where one or more exporters or producers that formed part of the China-government entity did not cooperate, found it appropriate to use facts available for the China-government entity. These 76 companies were in Group 3.

b. Did the USDOC follow the process set out in Article 6.8 of the Anti-Dumping Agreement and Annex II thereto with respect to the exporters or producers identified by name? Did the USDOC make individual findings of non-cooperation for these exporters or producers?

Response:

33. This question appears to consider that the USDOC's findings of non-cooperation pertained to individual exporters or producers within the China-government entity. However, in 24 of the 25 antidumping duty investigations identified by China in this arbitration, the USDOC determined that the China-government entity failed to cooperate.[37] The USDOC's finding of non-cooperation pertained to the China-government entity, based on the failure by one or more exporters or producers within the China-government entity, for example, to respond to the USDOC's request for information. The USDOC's finding was not specific to only particular exporters or producers within the China-government entity.

34. As explained previously,[38] where the USDOC determined that the application of facts available to the China-government entity was appropriate, in some instances the USDOC did identify by name certain exporters or producers in the China-government entity that failed, for example, to respond to the USDOC's request for information. It was this failure to respond that served as a basis for finding that the China-government entity failed to cooperate with the USDOC's investigation. In other instances, the USDOC's analysis was more general, focusing on the type of non-cooperative behavior – for instance, explaining that some known

[35] *Id.*

[36] Exhibit USA-55.

[37] The United States did not find that the China-government entity failed to cooperate in *Washers*.

[38] U.S. Responses to the Arbitrator's Advance Questions, para. 16.

exporters/producers in the China-government entity did not respond to a request for quantity and value information and, therefore, the China-government entity did not cooperate.

35. Importantly, information contained in various exhibits on the record describes the failure by exporters or producers within the China-government entity to, for example, respond to USDOC's request for information.[39]

c. Considering that the USDOC does not distinguish between Group 3 and Group 4 exporters or producers, is it appropriate for the Arbitrator to distinguish between Group 3 and Group 4 exporters or producers in selecting its counterfactual?

Response:

36. As an initial matter, the United States emphasizes that, in this proceeding, we have broken down imports from China into four groups solely for purposes of a counterfactual that is able to **isolate** the WTO-inconsistent aspects of the measures at issue.

37. In discussing that the USDOC does not itself distinguish between Group 3 and Group 4 exporters in its antidumping duty determinations,[40] the United States was explaining that the USDOC's determinations do not divide exporters in terms of Group 3 and Group 4. The China-government entity, which is composed of the constituent exporters within the China-government entity, receives a single rate. However, that does not mean that, were the Single Rate Presumption to be removed, all exporters within the China-government entity must be treated alike, particularly when there is evidence that certain exporters failed to respond to the USDOC's requests for information or otherwise did not cooperate.

38. The USDOC's analysis does distinguish between the exporters and producers in Group 3 and Group 4. When describing certain Group 3 exporters and producers, the USDOC identifies some of them by name. For others, the USDOC identifies the number of exporters and producers that failed to cooperate in a particular manner. For all exporters and producers in Group 3, the USDOC makes findings that it does not make for exporters and producers in Group 4.

39. It is therefore appropriate for the Arbitrator to distinguish between the exporters and producers in Groups 3 and 4 when selecting its counterfactual because, based on the USDOC's determinations, the exporters and producers in Group 3 still could receive a rate based on facts available, which is at the same level as the China-government entity rate, even if the Single Rate Presumption were removed.

d. What is the basis for the argument that, after Group 4 exporters or producers are taken out of the PRC-wide entity, the PRC-wide rate would

[39] Exhibit USA-55 identifies instances of failure to respond to USDOC's request for information. This exhibit is not intended to, and does not, provide an exhaustive list of instances of failure to cooperate in the 25 proceedings.

[40] U.S. Response to Arbitrator Advance Questions, para. 15.

continue to apply to Group 3 exporters or producers even though the PRC-wide rate was originally determined for the entity as a whole?

Response:

40. The United States explains below why applying the rate assigned to the China-government entity for Group 3 exporters and producers remains appropriate. However, to reiterate the U.S. clarification in response to Arbitrator question 55(a), the United States only applied the distinction between Group 3 and Group 4 for **five** of the antidumping duty proceedings identified by China; that is, in connection with those five antidumping duty orders for which the United States applied its formula-based methodology.[41] Furthermore, the U.S. formula-based approach does not take into account, or use, antidumping duty rates in determining a level of nullification or impairment. In that respect, the issue of the basis for the statement that the United States could apply to the Group 3 companies the rates originally determined for the China-government entity is not relevant to calculations of nullification or impairment under the formula-based approach. Nor is it applicable to calculations under the Armington model because the United States did not distinguish between Group 3 and Group 4 companies.[42] For purposes of the Armington model, the distinction between Group 3 and Group 4 is relevant insofar as it demonstrates that the United States is likely **overstating** the level of nullification or impairment to some degree.

41. In those antidumping duty proceedings where the USDOC applied a facts available rate to the China-government entity based on non-cooperation by the China-government entity, there is evidence that exporters or producers within Group 3 failed to cooperate with the USDOC's investigation, such that a rate based on facts available could have applied to those exporters or producers even if they were not part of the China-government entity.[43] The USDOC could have determined the same rate – a rate based on facts available – for the companies in Group 3 as those companies received in the underlying investigation, regardless of whether the USDOC also determined such a rate for Group 4.

42. To not recognize this distinction would be to disregard the failure of companies to respond to the USDOC's requests for quantity and value information.

57. To the United States: The United States explains that, in some instances, exporters or producers originally included in the PRC-wide entity subsequently passed the separate rate test and were excluded from the PRC-wide entity. Please explain how the USDOC calculated the duty rates for exporters or producers that were excluded from the PRC-wide entity. In particular, please specify whether these exporters or producers received the separate duty rate or individually calculated rates.

[41] These AD Orders are: *OTR Tires, OCTG, CSPV, Wood Flooring, and Wooden Bedroom Furniture.*

[42] As explained in footnote 47, *supra*, the Q&V non-response rates in Exhibit USA-55 may be used to estimate the value of imports from Group 4 alone.

[43] In one of the antidumping duty proceedings identified by China in this DSU Article 22.6 arbitration, specifically *Washers*, the USDOC did not base the China-government entity rate on adverse facts available.

Response:

43. Exporters or producers originally included in the China-government entity that subsequently pass the separate rate test may receive either a separate duty rate or an individually calculated rate, depending on whether they are selected for individual examination.

44. For example, for the antidumping duty order in *OTR Tires*, there are three companies that were formerly included in the China-government entity: (1) Guizhou Tyre Co. Ltd., (2) Aeolus Tyre Co., Ltd., and (3) Tianjin Leviathan International Trade Co., Ltd.[44] These three companies subsequently passed the separate rate test.[45] In the first administrative review, Guizhou Tyre Co. Ltd. was selected for individual examination, satisfied the separate rate test, and received an individually-examined rate.[46] Aeolus Tyre Co., Ltd. and Tianjian Leviathan International Trade Co. Ltd. satisfied the separate rate test, however, they were not selected for individual examination and therefore received a separate duty rate.[47]

59. **To the United States**: **The United States proposes to modify the separate duty rate in *Coated Paper* because this is based on the individual duty rate for APP-China, calculated using the WA-T methodology (with zeroing), but does not propose to modify the separate duty rate in *Steel Cylinders*, which continues to be based on the individual duty rate previously calculated for BTIC using the WA-T methodology (with zeroing).**

a. How does the United States reconcile its different approaches for the separate duty rates in *Coated Paper* and *Steel Cylinders*?

b. Assuming arguendo that the Arbitrator were to determine a counterfactual for the separate duty rate in *Steel Cylinders*, what duty rate would, in you view, be a reasonable one? Please elaborate.

Response:

45. The United States is modifying the applicable separate duty rate to determine the level of nullification or impairment from the China-government entity in *Steel Cylinders* in a manner consistent with the separate duty rate the United States used in *Coated Paper*; that is, by using the duty rate for BTIC that is not impacted by the WTO-inconsistency identified by the DSB.

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[44] *See Documentation for OTR Tires detailing those Chinese exporters for whom USDOC revoked separate rate status (names of exporters/producers highlighted in yellow)(selected pages)*(Exhibit CHN-30).

[45] *See Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China,* 77 Fed. Reg. 52,683 (Dep't of Commerce Aug. 30, 2012); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 80 Fed. Reg. 26,230 (Dep't of Commerce May 7, 2015)(final results of admin. review); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 81 Fed. Reg. 23,272 (Dep't of Commerce Apr. 20, 2016)(final results of admin. review) (Exhibit USA-85.)

[46] *Id.*

[47] *Id.*

Therefore, the United States is using a duty rate of zero[48] in connection with the calculation of the level of nullification or impairment for the China-government entity in *Steel Cylinders*.

3 ECONOMIC MODEL

3.1 United States' proposed models

61. <u>To the United States</u>: The United States states that "the relevant market shares of Chinese companies prior to the imposition of the anti-dumping duties at issue in this proceeding are not known." However, the United States provided data on the maximum share covered by the PRC-wide entity during the period of investigation (Groups 3 and 4) in Exhibit USA-54.

a. The United States indicates that, in calculating the maximum share of the PRC-wide entity over total US imports from China during the period of investigation, it relied on data queried from the USITC's Dataweb and the HS categories published in the public Fact Sheets accompanying the USDOC's final determinations in the investigations. Please provide an illustrative example of how it calculated the maximum share of the PRC-wide entity during the period of investigation?

<u>Response</u>:

46. To assist the Arbitrator in understanding the U.S. calculation, the United States has prepared a document detailing its step-by-step approach for calculating the maximum share covered by the China-government entity.[49] The United States also demonstrates how it calculated the maximum share covered by the China-government entity using its calculation for *OCTG* as an example.

47. Following the steps identified in Exhibit USA-86, for *OCTG*, the United States first determined the total trade from China during the period of investigation using monthly trade value data for the HTS codes the USDOC specified in the Fact Sheet accompanying the final determination in the underlying investigation.[50] The period of investigation was October 1, 2008, through March 31, 2009.

48. Aggregating the monthly trade values for that period resulted in a ("T") of 2.190 billion USD.[51] Then, using company-specific, period-of-investigation value data reported by respondents in the *OCTG* investigation, the United States calculated the trade shares, as a percentage of T, for (1) the respondents selected for individual examination that were assigned an individual duty rate (*i.e.*, Group 1); (2) the respondents not selected for individual

[48] Exhibit USA-7.

[49] *See* Exhibit USA-86

[50] *See* ITC Dataweb Data for *OCTG* (Exhibit USA-87); *see also*, *Fact Sheet Accompanying the Final Determination in the OCTG Investigation* (Exhibit USA-88)

[51] *See* Exhibit USA-87; *see also*, Exhibit USA-54.

examination that received a separate duty rate (*i.e.*, Group 2); and (3) respondents selected for individual examination that submitted quantity and value information but failed to cooperate in later stages of the investigation and received the China-government entity rate (*i.e.*, among Group 3). Next, the United States added these three trade shares, which in *OCTG* resulted in [[***]]. Finally, the United States subtracted the aggregated trade shares calculated, *i.e.*, the [[***]], from 100 percent to determine the maximum share covered by the China-government entity. In *OCTG*, 100 percent minus [[***]] resulted in a maximum China-government share of [[***]].[52]

b. The United States sets the maximum share covered by the PRC-wide entity to be [[***]] for six anti-dumping orders (*Furniture, Washers, Shrimp, Diamond Sawblades, Steel Cylinders,* and *Ribbons*) and indicates that "[w]here the Mandatory Respondents' and/or Separate Rate Respondents' share exceeds T, the resulting Maximum share covered by the China-government Entity is [[***]]%". Please elaborate further on the circumstances that result in a [[***]] maximum share covered by the PRC-wide entity?

Response:

49. The Arbitrator's question identifies the circumstances that result in a [[***]] maximum share covered by the China-government entity. The U.S. calculations were based on trade value information. A [[***]] maximum share for the China-government entity resulted when the trade shares calculated for respondents selected for individual examination and for separate-rate respondents are added together and the resulting shares exceed [[***]] percent.

c. With respect to the six anti-dumping orders identified in the previous sub-question, the Arbitrator notes that the share of the PRC-wide entity in total US imports from China in 2017 has [[***]] values. Please explain how the exporters or producers within the PRC-wide entity increased their share after the imposition of the anti-dumping duties? Is this because the USDOC added new producers or exporters to the PRC-wide entity over the years?

Response:

50. There may be various reasons underlying a scenario where total U.S. imports from China in 2017 is a positive value but the maximum share covered by the China-government entity during the period of investigation was calculated to be [[***]].

51. It is possible that, notwithstanding the positive value in 2017, the China-government entity actually did not increase its share after imposition of the antidumping duties. Specifically, as described in response to Arbitrator question 61(a) and in Exhibit USA-86, in its maximum share calculations, the United States calculated the trade share, as a percentage of T, for respondents that had submitted quantity and value information and were selected for individual

[52] Exhibit USA-54.

examination but did not cooperate with the USDOC's investigation and ultimately were found to be part of the China-government entity. These exporters form a part of Group 3.

52. As the United States has explained, the nullification or impairment accruing to China pertains only to Group 4, not to Group 3.[53] Therefore, the trade share for these exporters is not included in the maximum China-government entity share; instead, the United States subtracted that share from 100 percent in arriving at the maximum share covered by the China-government entity. Accordingly, the positive value in 2017 may, in some cases, be explained by trade from these Group 3 companies that are not covered by the period-of-investigation maximum share covered by the China-government entity calculation in Exhibit USA-54.

53. Finally, it is also possible that there were either new entrants into the market that fell under the China-government entity, or companies that received a separate rate in the investigation lost their separate rate and, in 2017, were shipping as part of the China-government entity.

d. The Arbitrator notes that the calculations presented by the United States show positive levels of nullification or impairment with respect to the six anti-dumping orders identified in sub-question c. If the Arbitrator were to use an Armington-based model through a two-step approach in calculating market shares, could the United States explain how the Arbitrator should estimate the share of US imports from the PRC-wide entity in total US imports from China in cases where the maximum share covered by the PRC-wide entity during the period of investigation is zero?

Response:

54. As explained in part (b) of this question, if the trade shares calculated for respondents selected for individual examination and for separate-rate respondents are added together and the resulting shares exceed 100 percent, the maximum share covered by the China-government entity is zero. In this case, the Arbitrator could accept the 0.00 percent maximum share as evidence that there were no Group 4 imports in 2017. The two-step approach would then properly imply zero nullification or impairment.

55. Recall from the U.S. response to part (a) of this question that a 0.00 percent maximum share implies that all of the imports under the reference HTS codes used in the investigation are accounted for by imports from Groups 1, 2, or a subset of 3. Recall further that Group 3 imports are a part of the China-government entity, but these imports are not implicated by the DSB's recommendations. Based on these facts, it is reasonable to assume the composition of the China-government entity during the period of investigation is representative of its composition in 2017.

56. The Arbitrator points out that the U.S. Armington-based approach estimates a positive value of nullification or impairment for *Washers.* However, the United States has consistently pointed out that the results of its Armington-based model overstate the true level of nullification

[53] *See, e.g.*, United States Written Submission, para. 41.

or impairment because the data on the exact value of imports from China subject to antidumping duties obtained from U.S. Customs does not distinguish between Group 3 and Group 4 imports, and the United States did not attempt to disentangle them in the Armington-based model for any case.[54] Thus, a finding of zero nullification or impairment in the *Washers* case would not be inconsistent with the nullification or impairment estimates provided by the United States.

57. The antidumping orders on *Furniture*, *Shrimp, Diamond Sawblades, Steel Cylinders,* and *Ribbons* have all been in place for more than five years. In the absence of information on the exact composition of Group 4 in 2017, the Arbitrator may decide it is appropriate to use available evidence on the share of the China-government entity in 2017 to estimate the level of nullification or impairment using an Armington-based model calibrated to market conditions in 2017.

62. <u>To the United States</u>: Please provide the following data for *Aluminum Extrusions* for the year prior to the imposition of the anti-dumping duties: (i) domestic shipments, (ii) imports from the PRC-wide entity, (iii) imports from other producers or exporters in China; and (iv) imports from the rest of the world. In light of the fact that the product scope of Aluminum Extrusions expanded from the period of investigation to year 2017, please clarify the product scope (HS10 level) in providing the data on import values.

<u>Response</u>:

58. As an initial matter, the United States notes that China has excluded *Aluminum Extrusions* from the basis for its suspension request.[55]

59. Additionally, to be clear, there were no expansions of the product scope for *Aluminum Extrusions* between the imposition of the antidumping duty order and 2017. The written product description in the antidumping duty order is consistent over time, and it is this written description that defines which products are subject to duties under an antidumping duty order. The import data from U.S. Customs used in the U.S. analysis is the exact value of imports of the products that corresponds to the scope of the order as governed by the written description.

60. While the USDOC identifies HTS codes for convenience and customs purposes, the written description of the scope of the antidumping duty order is dispositive. The additions over time with respect to referenced HTS codes can stem from, for example, changes in HTS subheadings or updates requested by U.S. Customs based on subject products being imported into the United States under HTS subheadings not already identified in the scope. The HTS reference codes active in the initial period and in 2017 are provided on the first page of Exhibit USA-1. The USDOC's references to HTS subheadings assist U.S. Customs and importers in identifying dutiable products at the border, but the written description of the subject product controls with respect to what products are covered by the *Aluminum Extrusions* scope.

[54] *See, e.g.*, U.S. Response to the Arbitrators' Advance Questions, para. 3.

[55] *See* China's Written Submission, footnotes 35, 60, 74, and 83.

61. Since U.S. Customs does not track shipments falling under the written description when antidumping duties are not in place, the United States cannot provide the Arbitrator with the exact value of imports of subject merchandise for the year prior to the imposition of dumping duties. To comply most closely with the Arbitrators request, the United States is providing data on imports from China for the year prior (2010) and the year of implementation (2011) based on HTS reference codes. This is consistent with the U.S. response to question 39(b) of the Arbitrator's Advance Questions.

62. However, Figure 1 below illustrates that, in the case of *Aluminum Extrusions*, relying on HTS codes leads to a particularly extreme distortion in the understanding of how the value of trade subject to duties has evolved over time. Table 1 below provides the value of imports from China under the reference HTS codes active in the initial period (2011) and those active in 2017 alongside the actual value of imports subject to duty in 2017. Table 1 reveals that the value of imports based on HTS reference codes active in 2017 is nearly **800 times greater** than the value of imports actually assessed an antidumping duty under the order in 2017.

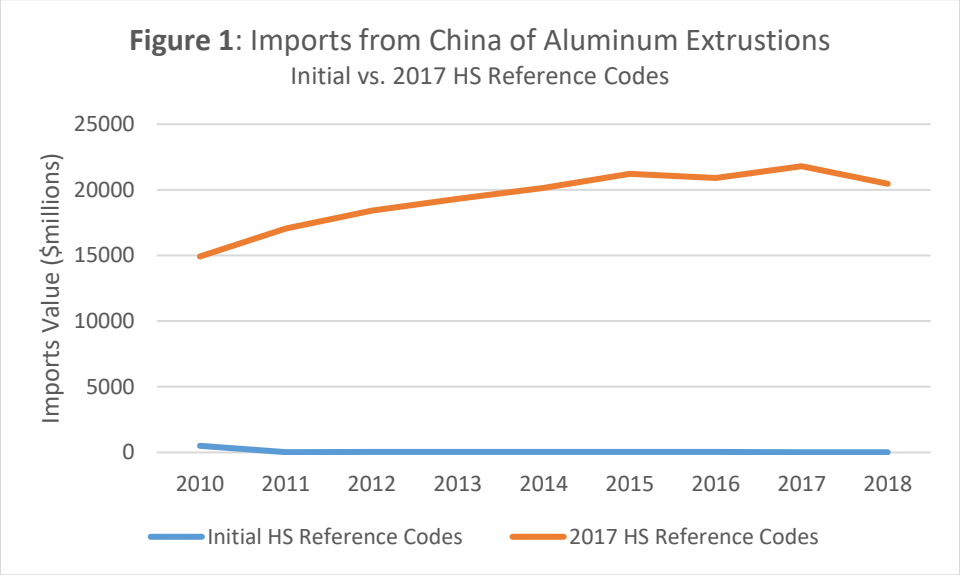

Table 1: Comparing Imports from China – Actual subject imports vs. HS-based measures

	Total Imports from China (millions)		
Data Description	**2010**	**2011**	**2017**
Actual imports subject to antidumping duty (U.S. Customs)	*NA*	*NA*	**[[***]]**
Imports under 2011 reference codes (HS10-level data from U.S. Census)	$502.9	$20.3	$24.8

Imports under 2017 reference codes (HS10-level data from U.S. Census)	$14,923.3	$17,048.1	$21,800.2

63. The United States did its best to comply with the Arbitrator's data request and presents below the information requested. However, the United States emphasizes that the data challenges created by using HTS reference codes to identify imports, which led China to drop *Aluminum Extrusions* from its calculations, likewise complicate the U.S. ability to provide consistent and comparable information on the value of imports under the *Aluminum Extrusions* order before its application. The United States has chosen to provide values of imports from China in parts (ii) and (iii) of this question from two different sources. The value for 2017 is the actual value of imports from China subject to antidumping duties. This value comes from U.S. Customs.

64. The values for 2010 and 2011 correspond to imports value under all of the reference HTS codes identified by the USDOC as including products that fall under the descriptive scope that defines the order as of its initiation in 2011. These values represent an upper bound on the actual value of imports from China under the antidumping order in these years.

(i) U.S. Domestic Shipments:

- 2017 Estimated U.S. Shipments: $5.8 billion
- 2011 Estimated U.S. Shipments: $4.30 billion
- 2010 Estimated U.S. Shipments: $3.56 billion

Calculations:

65. For 2017: Questionnaire data submitted by U.S. producers of aluminum extrusions to the United States International Trade Commission (USITC) during its first sunset review on antidumping and countervailing duty orders on aluminum extrusions from China indicated that U.S. producers' U.S. shipments totaled $5.28 billion in 2015. The USITC applied a 2015-16 growth rate of 1.8 percent and a 2016-17 growth rate of 3.1 percent to 2015 base year data, which provided a shipment estimate for U.S. producers of approximately $5.8 billion for 2017. The USITC derived the estimated growth rates from proprietary industry data.[56]

66. For 2010 and 2011: from the public version of the USITC's sunset review of the antidumping duty order on *Aluminum Extrusions* from China.[57]

[56] *See* Exhibit USA-91

[57] *See Certain Aluminum Extrusions from China* Inv. Nos. 701-TA-475 and 731-A-1177 (Review), USITC Publication 4677, Table I-1, p. I-6 (Exhibit USA-91)

(ii)/(iii) U.S. Imports from China

67. The exact value of imports subject to antidumping duties is available for 2017 from U.S. Customs. Information below is comparable to Exhibit USA-30.

- Total U.S. Imports from China for 2017 (U.S. Customs): **$28.4 million**
- Imports under PRC-wide rate for 2017 (U.S. Customs): **$17.2 million**
- Imports under rest of China rates for 2017 (U.S. Customs): **$11.2 million**

68. The exact value of imports subject to antidumping duties is not available for 2010 and 2011. As explained above, U.S. Customs does not track imports based on the written description of products subject to the antidumping order when the order is not in effect.

69. Below is the total value of U.S. imports under HS reference codes used by Customs to assist in identifying products subject to antidumping duties as of 2011. Information is comparable to Exhibit USA-57.

- Total U.S. Imports from China for 2010 (HTS, from U.S. Census): **$502.9 million**
- Total U.S. Imports from China for 2011 (HTS, U.S. Census): **$20.3 million**

Information used to estimate Group 4 import value from HS reference-based data

70. First Step: Maximum share covered by China-Government Entity during period of investigation. Source: USDOC. Compare to Exhibit USA-54.

Maximum Share Calculation

- Trade during the period of investigation for relevant HTS codes: $380 million
- Share of trade covered by the mandatory respondents and separate rate respondents: [[***]]
- Maximum share covered by the China-government entity: [[***]]

71. Second Step: Quantity & Value (Q&V) non-response rate during the period of investigation to separate out Group 3 from Group 4.[58] Compare to information in Exhibit USA-55.

[58] *See* the U.S. Responses to Arbitrator's Advance Questions, paras. 160-165.

Q&V Non-Response Rate Calculation

83/130 = 63.8% non-response rate.[59] The USDOC issued a Q&V questionnaire to 130 potential producers or exporters of subject merchandise;[60] 83 firms that received the Q&V questionnaire did not respond.[61]

Applicable Share Calculation

72. Third Step: Applicable share of trade attributable to subject China, following methodology in Exhibit USA-56.

Applicable Share = Maximum Share × (1 – Q&V non-response rate) = [[***]]

(iv) U.S. Imports from the Rest of the World

73. HTS Reference-Based Data from U.S. Census.

For HTS reference codes active in 2017

- U.S. Imports from ROW for 2010: $30,855.2 million
- U.S. Imports from ROW for 2011: $36,155.1 million
- U.S. Imports from ROW for 2017: $41.490.5 million

For HTS reference codes active in 2011

- U.S. Imports from ROW for 2010: $492.8 million
- U.S. Imports from ROW for 2011: $621.5 million
- U.S. Imports from ROW for 2017: $1,077.9 million

63. To the United States: The United States indicates that the USDOC used a two-step process to calculate the relevant share of US imports that were assigned the PRC-wide rate (subject China) and the share of US imports that were assigned separate rates (non-subject China). The first step determined the actual level of imports by exporters or producers that were included in the PRC-wide entity in general (Groups 3 and 4). The second step, when available, involved separating Group 4

[59] This is a conservative estimate given available information.

[60] Exhibit USA-51 at Letter A, at 69,410.

[61] *See Memorandum to Wendy Frankel from Eugene Degnan, Subject: Selection of Mandatory Respondents, Antidumping Investigation of Aluminum Extrusions from the People's Republic of China*, (December 31, 2009), (Exhibit USA-93); *see also*, Exhibit USA-51 at Letter A, at 69,406 n.14 states that 34 companies that were issued a Q&V questionnaire responded. Were the United States to rely on that figure, the non-response rate would be 96/130, or 73.8 percent.

imports from Group 3 imports using the share of non-response to the USDOC's Q&V questionnaire in each investigation.

a. Is the Arbitrator correct in understanding that the United States separates Group 4 imports from Group 3 imports for all five anti-dumping orders for which it uses the formula-based approach to estimate the level of nullification or impairment , and that the United States does not separate Group 3 imports from Group 4 imports for the anti-dumping orders for which it uses the Armington-based model to estimate the level of nullification or impairment?

Response:

74. That is correct. For the five antidumping orders (*Wood Flooring, OCTG, CSPV cells, Off-The-Road Tires,* and *Bedroom Furniture*), the United States separates Group 4 imports from Group 3 imports and uses the formula-based approach to estimate the level of nullification or impairment. To calculate an estimate of these shares, the United States uses information from the period of investigation.

75. The United States calculates the level of nullification or impairment by multiplying the "applicable share" by total 2017 U.S. imports for the specific product under the antidumping order reported by U.S. Customs. The estimated levels of nullification or impairment resulting from the application of the formula-based approach are presented in Exhibit USA-53.

76. The "applicable share" for Group 4 companies is calculated by multiplying the "maximum share" of imports that may have been assigned the China-government entity rate during the period of investigation (Group 3 and Group 4 companies) by one minus the "share of non-response" to the USDOC's Q&V questionnaire (separating out Group 4 companies from Group 3 companies).

77. To calculate the "maximum share," first the United States calculated the level of trade during the period of investigation for the relevant HTS codes. The United States then calculated the share of trade covered by the mandatory respondents and the separate rate respondents. The remainder share of trade is the "maximum share" covered by the China-government entity rate during the period of investigation (Group 3 and Group 4 companies). Exhibit USA-54 provides the "maximum share" for each of the 24 orders.

78. To calculate the "share of non-response," the United States calculated the share of companies that did not respond to the USDOC Q&V questionnaire and could have correctly been assigned a rate based on facts available, which was the basis on which the China-government entity rate was determined in the relevant investigations. Exhibit USA-55 provides the "share of non-response" for each of the 24 orders. One minus this non-response rate is used to separate Group 3 from Group 4. The U.S. response to question 62 demonstrates how the "share of non-response" is calculated.

79. To use the four-country Armington model, it is first necessary to define 2017 imports from subject imports versus non-subject imports from China. U.S. Customs is able to compile

U.S. import data for all products subject to an antidumping order. The United States has provided a table with U.S. Customs-sourced data for each of the 12 products subject to "as applied" findings and for each of the 12 products subject to "as such" findings (Exhibit USA-30). This U.S. Customs data is separated into total imports subject to an antidumping order as well as total imports subject to the China-government entity rate (PRC-Wide Rate, Column 3) and imports from China subject to other rates. This trade data under the China-government entity rate includes subject imports from China (Group 3 and Group 4). In the counterfactual analysis we conduct using the Armington model, these subject imports include Group 3 (*i.e.*, imports from firms that are subject to the China-government entity antidumping duty rate for which there is evidence that they failed to cooperate with the USDOC's investigation, such that a rate based on facts available could have applied even if they were not part of the China-government entity). Thus, it is likely that the level of subject imports from China determined using the U.S. Customs data (*i.e.*, Group 3 and Group 4 firms) is overstated, but the estimate is reasonable given data limitations. Exhibit USA-55 could be used as a reasonable estimate to further separate out Group 3 from Group 4 in the U.S. Customs data.

b. When the United States separates Group 4 imports from Group 3 imports using the share of non-response to the USDOC's Q&V questionnaire in each investigation, the United States seems to assume that the imports are exactly the same from every identified potential producer or exporter of subject merchandise from which the USDOC specifically requested Q&V information. Is the Arbitrator's understanding correct?

Response:

80. The United States is not certain what is meant by the question's use of the phrase "exactly the same". Nevertheless, the United States observes that the exporters or producers that comprise Group 3 and Group 4 are potential exporters or producers of merchandise subject to a given antidumping duty investigation. Therefore, the imports at issue from these exporters or producers would be the same to the extent they are imports of merchandise that fall under the same description as the description of merchandise covered by the scope of a given antidumping duty order. In that light, it is reasonable to treat subject imports from potential exporters and producers of subject merchandise as the same; that is, as meeting the description of merchandise subject to an antidumping duty investigation.

81. The United States uses the Q&V response rates as a reasonable estimate to separate out Group 4 imports from Group 3 imports.

82. By separating Group 4 imports using the share of non-response, the United States is assuming that the proportion of imports value from the Group 3/Group 4 aggregate attributable to Group 4 is equal to one minus the share of non-response to the USDOC's Q&V questionnaire.

83. Given practical limits on the ability of the United States to compile exact imports value for every Chinese exporting firm under every order, this is a reasonable assumption. It draws on evidence of the prevalence of non-cooperating firms in an investigation to identify Group 4 imports across 24 orders. The United States is not aware of evidence to suggest that the share of

imports value from Group 4 firms among firms subject to the China-government entity rate should be expected to be systematically larger or smaller than the non-response rate to the Q&V questionnaire.

c. If the answer to the previous sub-question is in the affirmative, could the United States please comment on the reasonableness of assuming that imports from all identified Chinese producers or exporters are the same?

Response:

84. The United States refers the Arbitrator to the U.S. response to part (b) of this question.

64. To the United States: The United States argues that "[t]he presence of systematic shocks that affect all firms in China or in a comparison group in a given year causes DID estimates to be inconsistent". Please explain if the presence of systematic shocks that affect all firms in China or in a comparison group in a given year would affect the validity of the formula-based approach that the United States proposes?

Response:

85. The presence of systematic shocks affecting a given country in a given year does not affect the validity of the formula-based approach. Country and year-specific shocks generate inconsistency[62] in tabular DID estimates because the core of the DID method is a **comparison** between China and other importers. Since the tabular DID methodology does not take into account systematic shocks affecting all firms within a country, but which differ across countries, the comparison does not produce a consistent estimate of the difference in imports that is attributable to antidumping duties. This drawback of tabular DID is documented in an excerpt from China's primary methodological reference, Angrist and Pischke (2008)[63], provided by the United States as Exhibit USA-41.[64] The formula-based approach does not involve a comparison between imports from two different countries. Therefore, this consideration is irrelevant for the formula-based approach.

86. Although inconsistency due to systematic shocks may sound like an abstract and technical critique, it most certainly is not. As Angrist and Pischke (2008) explains, it boils down to a violation of the parallel trends assumption that affects tabular DID as a general rule.[65] As China states and graphically depicts in its own methodology paper, tabular DID requires a parallel trend assumption.[66] This requirement is specific to the DID methodology and is linked

[62] The term "inconsistency" is used here in a technical sense. Namely, it refers specifically to the statistical concept of inconsistency. This concept is described in the U.S. response to the arbitrators' advance questions in footnote 55, with supporting documentation in Exhibit USA-40.

[63] Exhibit CHN-13

[64] See Exhibit USA-41, pages 317-318.

[65] *Id.*

[66] China methodology paper, para. 40. And Figure 3.

to the underlying idea – using the parlance in China's methodology paper – that a comparison between imports that are "treated" by antidumping duties to imports that are not "treated" will reveal the effect of the antidumping duty treatment. The parallel trends requirement is a fundamental assumption that allows for the conclusion that the comparison at the heart of the DID methodology truly reveals the effect of the duties and isolates this effect from all other factors that may cause imports from China to differ from those of a comparison group. Among these factors are the systematic shocks referenced in this question.

87. In its written submission[67] and opening statement[68], China argued that the U.S. critiques of China's DID methodology are manufactured by the United States and do not apply to China's tabular implementation. This is false. In addition to the material in China's methodology paper, the United States refers to Exhibit CHN-18, which is an excerpt from a highly-respected textbook that thoroughly discusses the demands of DID analysis and extensively covers implementation issues. Exhibit USA-41 is an additional excerpt from the same book, which describes how the systematic shocks described in this question make tabular DID estimates inconsistent.

65. <u>To both parties</u>: For purposes of this question, assume arguendo that the Arbitrator uses the Armington-based model with a two-step approach, also used by the arbitrator in *US – Washing Machines* (*Article 22.6 – US*).

a. <u>To both parties</u>: The Arbitrator's understanding is that, ideally, this calculation would be made, for each of the 25 anti-dumping orders, as follows:

1. Identify the composition of the PRC-wide entity in 2017.

2. Identify, for the year preceding the imposition of the relevant anti-dumping duties, the value of imports from the producers or exporters that were included in the entity in 2017, i.e. the PRC-wide entity as composed in 2017.

3. On that basis, find the market share of the PRC-wide entity (as composed in 2017) in the year preceding the imposition of the relevant anti-dumping duties. In the same way, calculate the market shares for the year preceding the imposition of the relevant anti-dumping duties, namely: domestic shipments, imports from the rest of China, and imports from the rest of the world.

4. Apply the Armington-based model to calculate the market shares of the PRC-wide entity (as composed in 2017) as well as the other three sources, following the imposition of the relevant anti-dumping duties.

[67] China's Responses to the Arbitrator's Advance Questions, para. 83.

[68] China's Opening Statement, para. 76

5. Use these newly calculated market shares for all the four sources as their market shares in the year 2017. In other words, replace the actual market shares presented by the United States for 2017 with these newly calculated market shares.

Please comment on this method of calculating the market shares.

Response:

88. As the United States has previously explained,[69] it would be **legally incorrect** for the Arbitrator to adjust the market share of Chinese imports in the base year (2017) to address China's argument concerning purportedly "depressed"[70] trade levels. The level of trade in the base year is the correct level of trade under the measure to which to apply a counterfactual.

89. Under Article 22.1 of the DSU, the suspension of concessions or other obligations is available in the event that the recommendations of the DSB are not implemented within a reasonable period of time.[71] In this proceeding, the RPT for the United States to implement the DSB's recommendations expired on August 22, 2018.[72] Thus, during the base year (2017), the RPT had not yet expired and the United States was not yet obligated to have completed implementation.

90. Because China can find no support in the DSU for its argument, China attempts to make a misleading appeal to fairness.[73] While China makes an emotional plea, this proceeding is about economic analysis and measuring trade effects. The economic analysis in this proceeding turns on the estimated trade effects of the United States implementing the DSB's recommendations **as of** the expiration of the RPT.

91. China appears to agree. In its methodology paper, China explains that the "question that must be answered [in this proceeding] is what would have been the value of imports from China in 2017 'but for' the United States continued imposition of the WTO inconsistent measures."[74] 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.

92. Moreover, it would be **incorrect** for the Arbitrator to use the value of Chinese imports in the year preceding the imposition of an antidumping duty order because, as the USDOC found, Chinese imports were being **dumped** during that time period. Thus, the value of Chinese

[69] *See* U.S. Opening Statement at the Meeting of the Arbitrator with the Parties, para. 61.

[70] *See* China's Responses to the Arbitrator's Advance Questions, para. 45.

[71] *See* Article 22.1 of the DSU.

[72] *See* U.S. Written Submission, para. 15.

[73] See China's Opening Statement (noting that "there is no doubt that the US market in 2017 looks nothing like the market before the orders were imposed and distorted the market."), para.58.

[74] China's Methodology Paper, para. 74.

imports in the year preceding an antidumping duty order are not a valid basis for a calculation of the level of nullification or impairment.

93. Nevertheless, to assist the Arbitrator, the United States makes the following observations regarding the methodology suggested in the question to artificially adjust Chinese market shares.

94. As an initial matter, the United States notes that, where the information requested in question 65(a) is not available, the two-step approach presented by the United States during the substantive meeting could be used to implement a methodology similar to the two-step approach used by the arbitrator in *US – Washing Machines (Article 22.6 – US).*

95. To provide a broad preview of the two-step approach, in the first step, the Arbitrator would calculate market shares resulting from imposition of the antidumping duty. And, in the second step, the Arbitrator would use (a) market share data from the first step, (b) subject China value data for 2017, and (c) model parameters to calculate the level of nullification or impairment. We explain each step below:

96. <u>Step 1</u>

Data Inputs: 1-5

1) The Arbitrator must break out total U.S. imports from China into Subject China (Group 4, or closest to Group 4) and Non-Subject China (Groups 1-3). The United States has provided the Arbitrator the information necessary to estimate this data in Exhibit USA-54 and Exhibit USA-55.
2) Use prior year data for U.S. imports from China and the rest of the world (ROW), and U.S. shipment data, which are provided in Exhibit USA-57 and Exhibit USA-58.
3) Use the China-government entity antidumping duty rate and a simple average of the Non-Subject duty rate, which are in Exhibit USA-93.
4) Use parameter estimates for each antidumping duty order, which are presented in Exhibit USA-16.
5) Apply antidumping duties on both Subject China (with China-government entity rate) and Non-Subject China.

Application of the Model

6) Finally, use the Armington model with data inputs (1) through (5) above to calculate the new market shares to be used in Step 2 below.

<u>Step 2</u>

1) Calculate actual total U.S. consumption in 2017 as the sum of U.S. domestic shipments (Exhibit USA-58), U.S. imports from the ROW (Exhibit USA-57), U.S. imports from Subject China (Exhibit USA-30), and U.S. imports from Non-Subject China (Exhibit USA-30).
2) Apply the market shares estimated in Step 1 above to total U.S. consumption for 2017.

3) Adjust the China-government rate to the separate rate for Subject China only in the Armington Model (Exhibit USA-5).
4) Use parameter estimates for each antidumping duty order (Exhibit USA-16).
5) The level of nullification or impairment equals the change in total China (the gain in Subject China from the lowering of its antidumping duty rate, and the decline in Non-Subject China). Note, imports from Non-Subject China, U.S. shipments, and imports from ROW will decline as imports from Subject China increase. The level of nullification or impairment is the combination of both U.S. imports from Subject and Non-subject China.

97. The United States disagrees with two-step approach suggested by the question because such an approach would result in significantly **distorted** estimates of nullification or impairment. First, in contrast to the steps listed in question 65(a)(1-3) of proposed two-step approach, the objective should be to identify the value of imports from **Group 4**, rather than the value of imports covered by the China-government entity, which, as the United States has explained throughout this proceeding, includes imports from **Group 3**.[75]

98. The United States did not separate Group 4 imports in its Armington-based model simply because the information necessary to separate Group 3 and Group 4 was not available on a timely basis for 2017 import data. However, information from the period of investigation that can be used to separate Group 4 imports in the year **prior** to the order's implementation is available.[76]

99. Second, the steps listed in question 65(a)(4) and (5) propose to estimate market shares in the year duties were imposed by applying changes in duty rates to Subject China from a baseline defined using data from the year **prior** to the imposition of the antidumping duty order. In contrast, in question 65(a)(2-4), this must also involve applying changes to duty rates on Non-Subject China (as explained in the U.S. suggested two-step approach) to correctly establish the relative competitiveness of Subject and Non-Subject China in the estimated market shares after duties are implemented. These model-based market share estimates then define the baseline market shares for 2017.

100. The baseline from which the level of nullification or impairment is thus calculated will not be consistent with observed market outcomes for any source country in 2017. Rather, it will be based on the model's estimated initial impact of antidumping duties, including duty rates on imports outside the China-government entity, which have been not been found to be WTO-inconsistent.

101. The two-step approach suggested by the question distorts the relative competitiveness among all four entities in the market compared to what is actually observed in 2017. The evolution of market shares over time reflects many factors that are entirely unrelated to

[75] Group 3 includes Chinese imports from firms that are subject to the China-government entity antidumping duty rate for which there is evidence that they failed to cooperate with the USDOC's investigation, such that a rate based on facts available could have applied even if they were not part of the China-government entity.

[76] *See* Exhibit USA-55.

antidumping duties on a small portion of imports from China. Thus, it is entirely **inappropriate** to estimate the level of nullification or impairment on this alternative picture of the market, which relies on information from trade flows that may be upwards of a decade old.

102. This distortion, which is an unavoidable drawback of the two-step approach suggested by the question, would result in a level of suspension that is **not equivalent** to the level of nullification or impairment. Moreover, the implications of the two-step approach are more significant in this proceeding than in *US – Washing Machines (Article 22.6 – US)*. This proceeding involves a four-entity model rather than the two-entity model that was used in *US – Washing Machines (Article 22.6 – US)*. Importantly, two of the entities that are used in this proceeding are components of China and are only distinguished by antidumping duty rates.

b. <u>To the United States:</u> Please provide the Arbitrator with information on the composition of the PRC-wide entity as of 2017, as well as the value of the imports from each of these producers or exporters in 2017. Please provide this data in Excel by filling out the relevant columns of Tables 2 and 3 in Appendix II.

<u>Response</u>:

103. In Exhibit USA-95, the United States is providing the names of companies that shipped products under the China-government entity rate in 2017 for one antidumping duty order at issue, *OCTG*.[77] Due to the limited timeframe provided by the Arbitrator to respond to post-hearing questions, the United States was only able to provide 2017 data for *OCTG*.

104. Note that the data in Exhibit USA-95 **matches** the data in Exhibit USA-30 (2017 Imports from China as Reported by U.S. Customs). This is significant as it confirms that the U.S. Customs data the United States has provided the Arbitrator is accurate.

105. The United States is not able to provide a comprehensive list of Chinese firms subject to the China-government entity rate as of 2017 that includes firms that did **not** ship products to the United States in 2017. However, the United States did provide a list of Chinese firms that received separate rates in 2017.[78] The remaining Chinese firms would have received the China-government entity rate in 2017.

c. <u>To the United States</u>: The Arbitrator notes that the United States provided data on domestic shipments, total imports from China and total imports from the rest of the world. The data missing in order to implement the Armington-based model with the two-step approach is that pertaining to the value of imports from the PRC-wide entity. Please provide the Arbitrator with the following data pertaining to the year prior to the imposition of the relevant anti- dumping duties: (i) imports from the PRC-wide entity (as

[77] *See* Exhibit USA-95.

[78] *See* Exhibit USA-77.

composed in 2017), and (ii) imports from other Chinese producers or exporters.

Response:

106. In Exhibit USA-94, the United States is providing data on imports from China pertaining to the year prior to the imposition of the relevant antidumping duties by specific Chinese firms. Due to the limited timeframe provided by the Arbitrator to respond to post-hearing questions, the United States has not been able to double-check the data in Exhibit USA-94 for accuracy and completeness. Nevertheless, the United State is providing Exhibit USA-94 to be of assistance to the Arbitrator.

107. Note that the data in Exhibit USA-94 do not exactly match aggregate totals of HTS data reported in the year prior value column in Exhibit USA-57 because the data in Exhibit USA-94 are raw data directly reported by U.S. Customs at the transaction level. Unlike the data in Exhibit USA-57 – which were processed by U.S. Census to create and maintain official statistics – the data in Exhibit USA-94 have not been processed. As such, the data in Exhibit USA-94 may vary from official, aggregated statistics. In addition, prior to 2009, the data in Exhibit USA-94 do not include all importer company names and corresponding data.

108. The United States was also unable to link the Chinese firms under the China-government rate in 2017 to those companies identified in Exhibit USA-94.

d. To the United States: In case the information requested in sub-question c is not available, please provide the following:

1. Company-specific data on the import values for Chinese exporters or producers within the PRC-wide entity (as composed at the time of the imposition of the relevant anti-dumping duties) and those outside the PRC-wide entity, for the year prior to the imposition of the relevant anti-dumping duties. Please provide this data in Excel by filling out the relevant columns of Tables 2 and 3 in Appendix II.

2. If the company-specific data requested in sub-question d.1 is not available, please provide information on the aggregated share of the PRC-wide entity (as composed at the time of the imposition of the relevant anti-dumping duties) in the total value of imports from China, for the year prior to the imposition of the relevant anti-dumping duties.

Response:

109. As discussed in the U.S. response to question 65(c), in Exhibit USA-94, the United States is providing data on imports from China pertaining to the year prior to the imposition of the relevant antidumping duties by specific Chinese firms.

3. If the aggregated data requested in sub-question d.2 is not available, please explain on what basis the Arbitrator should infer the share of the PRC-wide entity (as composed at the time of the imposition of the relevant anti-dumping duties) in the total value of imports from China, for the year prior to the imposition of the relevant anti-dumping duties.

For instance, could the maximum share covered by the PRC-wide entity in total US imports from China during the period of investigation, presented in Exhibit USA-54, be used as proxy to calculate the aggregate market share of the PRC-wide entity for the year prior to the imposition of anti-dumping duties?

Response:

110. Yes, the maximum share data presented in Exhibit USA-54 could be used as a proxy. The United States recommends using the maximum share covered by the China-government entity presented in Exhibit USA-54 to identify imports from the China-government entity.

111. The United States also suggests that the Arbitrator use the Q&V non-response rate to estimate the value of imports from Group 4 alone. The Q&V non-response rates for each anti-dumping duty order are available in Exhibit USA-55. In addition, the application of the maximum share and Q&V non-response rate to isolate Group 4 imports is described in Exhibit USA-56. The challenges compiling the data requested by the Arbitrator discussed in 65(b) and 65(c) of this answer are a further reason for the Arbitrator to use this information to estimate the value of imports from Group 4.

112. Finally, in Exhibit USA-96, the United States is providing calculations to separate imports from Subject China (Group 4) from total imports from China.

e. In case the Arbitrator has no information about the composition of the PRC-wide entity (as of the imposition of the anti-dumping duties) and the composition of the PRC-wide entity (as of 2017), on what basis should the Arbitrator quantify the change in the composition of the PRC-wide entity from the imposition of the anti-dumping duties to the year 2017?

Response:

113. The Arbitrator has identified limits on the U.S. ability to precisely identify the composition of the China-government entity, and more importantly, Group 4. The United States took these limits into account in its methodological approaches to estimate the levels of nullification or impairment.

114. The United States reiterates that using the standard Armington model for cases where trade flows are sufficiently large to characterize relative competitiveness and the formula-approach when subject-China trade flows are very small relative to total imports from China

delivers results that correspond, as closely as it is reasonably possible to estimate, a value that is equivalent to the level of nullification or impairment at issue.

115. The U.S. Armington-based approach incorporates the composition of the China-government entity as observed in 2017 data from U.S. Customs in an analysis based on observed 2017 market outcomes. The U.S. formula-based approach, which is used for five antidumping orders, relies on information on the composition of the China-government entity during the period of investigation in analysis based on information regarding Group 4's relative competitiveness prior to the order. Both approaches implicitly assume the composition of the China-government entity does not change. These are reasonable assumptions based on available information.

116. Note that the Armington-based approach **overstates** the level of nullification or impairment because it does not separate Group 3 from Group 4 (though the Arbitrator **could** use the Q&V information to isolate Group 3 from Group 4). The formula approach also overstates the level of nullification or impairment because it assumes the pre-order market share of Group 4 is informative for 2017 imports, and, of necessity, assumes the elimination of antidumping duties rather than reduction to the separate rate.

f. Could the United States please explain, in light of its oral response to the Arbitrator's question during the substantive meeting, whether, in applying the two-step Armington-based model as in *US – Washing Machines* (Article 22.6 – US), the initial tariff duty rate of imports from the PRC-wide entity and imports from the rest of China should be set to zero? If not, could the United States provide the applied tariff rate at the HS10 level of the products covered by the anti-dumping orders at issue for the year prior to the imposition of the anti-dumping duty and for the year 2017 for the 25 anti-dumping orders at issue?

Response:

117. The relevant information for implementing the model is the change in the duty rate implied by the imposition of antidumping duties. The level of the existing tariff is irrelevant.

66. To both parties: The Arbitrator notes China's argument that the data on the value of imports of the producers or exporters in the PRC-entity, presented by the United States as part of its proposed calculations, is confidential and cannot be verified by China and the Arbitrator.

a. To China: Please clarify which specific information China is referring to as well as the sources of such information

b. To the United States: Please comment on China's argument.

Response:

118. As an initial matter, the DSU does not preclude an arbitrator from using confidential data. Arbitrators in previous Article 22.6 proceedings have used confidential data.[79] Furthermore, it is not clear what China means by "verified." If China means that China is able to audit the companies involved, including through access to their business data, then this is an issue separate from whether the data are public or confidential. Just because data is public does not mean that there is a means for another Member to "verify" it or audit it.

119. The United States emphasizes that it relies on a **limited** amount 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. This limited amount of confidential data is appropriate to use in this proceeding because it is the best data to accurately estimate the trade effects of the correct counterfactual. The rest of the U.S. data is sourced from public sources.

120. The Arbitrator should rely on the U.S. Customs data and the USDOC data 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. For each antidumping duty order at issue in this proceeding, U.S. Customs is able to precisely determine which imports fall under the China-government entity rate.

121. In contrast, China's approach to data – using basket HTS categories – is unreasonable because it over-estimates the value of trade of products subject to measures at issue. Many of the reference HTS codes are broad categories, of which the product subject to an antidumping duty order is just a subset.

122. China's approach to data does **not** provide a **reliable basis** to estimate the level of 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.

68. <u>To both parties</u>: In its opening statement, China argues that the United States, in its proposed calculations, used incorrect duty rates and incorrect market shares in estimating the level of nullification or impairment, and points to specific examples concerning *Furniture*.

a. <u>To China</u>: Did the United States, in your view, use incorrect duty rates or market shares for any of the other anti-dumping orders at issue? If so, please provide relevant evidence in support of your view.

b. <u>To the United States</u>: Please respond to China's argument. In doing so, please provide relevant evidence in support of your view

[79] *See US – Washing Machines (Article 22.6)*, 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.

Response:

123. China's arguments lack merit. China contends that the United States should use an alternative duty rate for *Furniture*. In selecting the rates provided in Exhibit USA-5, the United States followed a consistent approach that avoided choosing rates in a haphazard manner. Specifically, the United States selected the most-recently determined separate duty rate – for cases where a separate duty rate had been determined – as of the end of the RPT.

124. The 41.75 percent duty rate included in Exhibit USA-5 for *Furniture* was the most-recently determined separate duty rate applied to separate-rate respondents in an administrative review as of the end of the RPT. The 3.25 percent rate that China proposes was not determined as a separate duty rate. Instead, the USDOC determined that rate for an individually-examined respondent. Selecting the 3.25 percent rate would be incongruous with the consistent manner in which the United States determined which rate to include in Exhibit USA-5 because it was not determined as a separate duty rate. Accordingly, China is incorrect in proposing that the 3.25 percent be used.

125. China also argues that the level of nullification or impairment should not be limited to the trade covered by the China-government entity. However, the appropriate counterfactual is the estimated value of exports of relevant products from China to the United States if the WTO-inconsistent U.S. antidumping duty measure were brought into compliance (*i.e.*, the China-government entity determined on the basis of the Single Rate Presumption were eliminated). Therefore, calculating a level of nullification or impairment stemming from trade other than by the China-government entity would exceed an equivalent level of nullification or impairment, and therefore be inconsistent with Article 22.4 of the DSU.

126. Additionally, China bases its argument on its contention that the composition of the China-government entity changes over time, frequently growing and rarely contracting.[80] The United States recalls that, during the substantive meeting, China stated that the "maximum share" calculations were a starting point. Yet, China insists that the "maximum share" calculations are not reflective of the China-government entity share in 2017 due to the fact that the separate-rate status of certain exporters from underlying investigations was subsequently revoked.[81] The United States explained, however, that not only can exporters lose their separate status and become part of the China-government entity but exporters can also obtain separate status and, thereby, exit the China-government entity.[82]

127. Examining the antidumping orders that China identified in Exhibit CHN-27, Exhibit CHN-28, Exhibit CHN-29, and Exhibit CHN-30, which allegedly support China's claims of

[80] China's Opening Statement at the Meeting of the Arbitrator, para 49.

[81] China Written Submission, para.148.

[82] U.S. Response to Arbitrator's Advance Questions, paras. 21-22.

growth of the China-government entity in terms of known exporters, reveals that, for certain of the cited cases, China's argument is incorrect.[83]

128. For example, for *OTR Tires*, while, by 2017, one exporter (Double Coin Holdings Ltd.) had lost its separate-rate status from the investigation and thus become part of the China-government entity, nine other exporters gained separate-rate status.[84] In other words, more known exporters received separate-rate status and exited the China-government entity than exporters which had their separate-rate status revoked and were consequently treated as part of the China-government entity.

129. For *CSPV*, nine exporters that had separate-rate status in the investigation had their separate-rate status revoked by 2017. However, 15 exporters received separate-rate status following the investigation and maintained that status for some, if not all, of 2017.

130. With respect to *OCTG*, a proceeding not identified in China's aforementioned exhibits, but for which the United States applied its formula-based approach, no exporter that had separate-rate status during the investigation had its separate-rate status revoked by 2017. Furthermore, two exporters were found to be eligible for separate-rate status following the investigation.

131. Accordingly, China's contention that the United States used incorrect duty rates and incorrect market shares lacks merit.

69. <u>To both parties</u>: To both parties: In *OCTG*, the USDOC calculated an individual duty rate of 32.07% for TPCO using the WA-T methodology (with zeroing) and applied this duty rate as the separate duty rate to non-individually-examined exporters or producers (Group 2). The United States explains that the WA-WA duty rate on record for TPCO is [[***]]%, but does not propose to use this as a counterfactual duty rate. For purposes of the questions below, assume arguendo that the Arbitrator chooses the WA-WA duty rate on record as the counterfactual duty rate for TPCO and as the counterfactual duty rate for the separate duty rate assigned to Group 2 exporters or producers.

a. <u>To the United States</u>: Please provide the necessary company-specific data to calculate the level of nullification or impairment stemming from the WTO-inconsistent WA-T duty rates assigned to TPCO and Group 2 exporters or producers. In particular, please provide: (i) the value of imports from TPCO in 2017; (ii) the value of imports from TPCO in the year preceding the imposition of the relevant anti-dumping duty; (iii) the number of Group 2 exporters or producers in 2017; (iv) the names of Group 2 exporters or producers in 2017; (v) the value of imports from Group 2 exporters or

[83] Exhibit USA-89.

[84] Exhibit CHN-30 purports to demonstrate that two other exporters, Guizhou Tyre Co., Ltd. And Aeolus Tyre Col, Ltd. had their separate rates revoked and became part of the China-government entity. However, that same exhibit demonstrates that these exporters maintained separate rate status during part of the benchmark year, 2017.

producers in 2017; (vi) the number of Group 2 exporters or producers in the original investigation; (vii) the names of Group 2 exporters or producers in the original investigation; and (viii) the value of imports from Group 2 exporters or producers in the year preceding the imposition of the relevant anti-dumping duty.

Response:

132. China did not challenge the separate duty rates applied to Group 2 firms and the DSB adopted no findings concerning the Group 2 firms.[85] Accordingly, as a legal matter, there can be no nullification or impairment resulting from the separate duty rates applied to Group 2 firms.

133. The value of imports from TPCO in 2017 were [[***]].[86]

134. As the United States explained in the response to question 65, it would be **incorrect** for the Arbitrator to use the value of imports from TPCO in the year preceding the imposition of the antidumping duty order because, as the USDOC found, Chinese imports were being **dumped** during that time period. Thus, the value of TPCO's imports in the year preceding the order are **not** a valid basis for a calculation of the level of nullification or impairment.

135. Nevertheless, to be of assistance to the Arbitrator, the United States is providing the value of imports from TPCO in the year preceding the antidumping duty order: in 2009, TPCO's imports to the United States were [[***]].

b. To both parties: If this data is not available, which data, in your view, would be a reasonable proxy?

c. To the United States: Does the use of the WA-WA duty rate as the counterfactual duty rate for TPCO and for Group 2 exporters or producers impact the calculation of the level of nullification or impairment stemming from the WTO-inconsistent use of the Single Rate Presumption in OCTG? Please elaborate.

Response:

136. As explained in the U.S. response to question 69(a), China did not challenge the separate duty rates applied to Group 2 firms and the DSB adopted no findings concerning the Group 2 firms.[87] Accordingly, as a legal matter, there is no legal basis to assume, for purposes of this proceeding, that there is any nullification or impairment resulting from the separate duty rates applied to Group 2 firms.

[85] *See US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.5-7.6.

[86] *See* Exhibit USA-30, value for A-570-943-002, under *OCTG*.

[87] *See US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.5-7.6.

137. Regarding TPCO, it would not be unreasonable for the Arbitrator to use the duty rate calculated using the average-to-average comparison methodology, which is [[***]] percent, as a counterfactual duty rate. Nonetheless, as the United States explained in its written submission, there is not a sufficient level of OCTG imports from China in 2017 to apply the Armington-based model for this product.[88]

138. Since the tariff modification that would apply in the U.S. counterfactual is **less** than [[***]] percent, the impact would be so small that it cannot be "meaningfully quantified."[89] Thus, an estimation of zero as the level of nullification or impairment is reasonable and plausible.

70. <u>To both parties</u>: In *Steel Cylinders*, the USDOC continues to assign a separate duty rate to Group 2 exporters or producers based on the individual duty rate previously calculated for BTIC using the WA-T methodology (with zeroing), but the United States does not propose to use a counterfactual duty rate. For purposes of the questions below, assume arguendo that the Arbitrator chooses a counterfactual duty rate for the separate duty rate.

a. <u>To the United States</u>: Please provide the necessary company-specific data to calculate the level of nullification or impairment stemming from the continued use of the WTO-inconsistent WA T duty rate as the separate duty rate for Group 2 exporters or producers. In particular, please provide: (i) the number of Group 2 exporters or producers in 2017; (ii) the names of Group 2 exporters or producers in 2017; (iii) the value of imports from Group 2 exporters or producers in 2017; (iv) the number of Group 2 exporters or producers in the original investigation; (v) the names of Group 2 exporters or producers in the original investigation; and (vi) the value of imports from Group 2 exporters or producers in the year preceding the imposition of the anti-dumping duty.

b. <u>To both parties</u>: If this data is not available, which data, in your view, would be a reasonable proxy?

c. <u>To the United States</u>: Does the use of a counterfactual duty for Group 2 exporters or producers impact the calculation of the level of nullification or impairment stemming from the WTO-inconsistent use of the Single Rate Presumption in *Steel Cylinders*?

<u>Response</u>:

139. As explained in the U.S. response to question 69(a), China did not challenge the separate duty rates applied to Group 2 firms and the DSB adopted no findings concerning the Group 2

[88] *See* U.S. Written Submission, para. 109.

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

firms.[90] Accordingly, as a legal matter, there can be no nullification or impairment resulting from the separate duty rates applied to Group 2 firms.

71. <u>To the United States</u>: In Exhibit USA-57, the United States has provided data on US imports from China and the rest of the world for the year prior to the imposition of anti-dumping duties, the year of imposition of the anti-dumping duties, and 2017. However, it appears that the data in Exhibit USA-57 for 2017 do not match with the data in Exhibit USA-21, Exhibit USA-52 or Exhibit USA-53. Please see Table 1 in Appendix I for a summary of these discrepancies.

a. Could the United States please explain the reason(s) for these data discrepancies?

<u>Response</u>:

140. The differences between Exhibits USA-57 and USA-52 and USA-53 are limited to the values for imports from China. The reason for the difference is that the data have two different purposes and come from two different sources.

141. Exhibits USA-52 and USA-53 present the exact value of imports from China that were subject to antidumping duties under each order in 2017. These data come from U.S. Customs. This is the most accurate data for the purposes of determining the level of nullification or impairment. The United States notes that the arbitrator in *US – Washing Machines (Article 22.6 – US)* relied on confidential data from U.S. Customs.[91] U.S. Customs data on the value of imports from China is used as an input in the U.S. Armington model and formula approaches. Exhibits USA-52 and USA-53 present the inputs for these two methodologies respectively.

142. Exhibit USA-57 contains data requested in question 39(b) of the Arbitrator's Advance Questions. The Arbitrator requested data on imports and domestic shipments for each order for the year each order was imposed and the year prior. U.S. Customs does not track the value of shipments subject to antidumping duties in years before the duties are imposed. Therefore, despite the fact that it overstates the value of trade subject to duties, in order to respond to the arbitrator's request in question 39(b), the United States relied on data based on the reference HTS codes used by U.S. Customs to identify shipments that may be subject to antidumping duties. This data overstates the value of imports subject to antidumping duties under each antidumping duty order since some of the value under the reference HTS codes is not subject to antidumping duties. The data are obtained from the U.S. Census Bureau. Exhibit USA-57 includes China imports data based on HTS reference codes for 2017 in order to provide the arbitrator with comparable data over time.

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[90] *See US – Anti-Dumping Methodologies (China) (Panel)*, paras. 7.5-7.6.

[91] *See US – Washing Machines* (*Article 22.6 – US*) (noting that because "the United States' authorities are responsible for applying antidumping and countervailing duties, and for collecting data on the value of imports, the Arbitrator requested the United State to provide data on the value of imports from Korea with respect to the tariff lines on which antidumping duties were collected each year from 2011 to 2017."), para. 3.110.

143. Finally, the United States notes that Exhibit USA-30 supersedes Exhibit USA-21 because it is more comprehensive. Exhibit USA-21 was compiled during a period when the U.S. ability to access the data was limited due to a lapse in appropriations for the U.S. government.[92]

b. Could the United States indicate which data should be used as the basis for estimating the level of nullification or impairment using the Armington-based model or the formula-based approach?

Response:

144. The data from U.S. customs in Exhibits USA-30, USA-52, and USA-53 should be used as the basis for estimating the level of nullification or impairment. These exhibits contain the exact value of imports from China that were subject to duties in 2017.

72. To the United States: The Arbitrator notes additional data discrepancies summarized as follows:

- **Exhibit USA-56 indicates the maximum share covered by PRC-wide entity during the period of investigation is 45.5% for *OTR Tires*. However, in Exhibit USA-54 the maximum share covered by PRC-wide entity during the period of investigation is 43.1%.**

- **Exhibit USA-52 indicates the PRC-wide duty rate for *Iron Pipe Fittings* is 75%. However, in Exhibit USA-5 the PRC-wide duty rate is 75.5%.**

- **Exhibit USA-52 indicates that the domestic shipment for *Truck Tires* is 13860 million USD, however, in Exhibit USA-58 the domestic shipment for *Truck Tires* in year 2017 is 11740.449 million USD and in Exhibit USA-31 the domestic shipment for *Truck Tires* is 13500 million USD.**

- **Exhibit USA-52 and Exhibit USA-58 indicate that the domestic shipment for *Circular Welded Carbon Quality Steel* in year 2017 is 923.7 million USD, however, in Exhibit USA-31 the domestic shipment for *Circular Welded Carbon Quality Steel* in year 2017 is 542.482 million USD.**

- **Exhibit USA-52 and Exhibit USA-58 indicate that the domestic shipment for *Circular Welded Carbon Quality Steel Line Pipe* in year 2017 is 542.5 million USD, however, in Exhibit USA-31 the domestic shipment for *Circular Welded Carbon Quality Steel Line Pipe* in year 2017 is 923.716 million USD**.

Could the United States please indicate which data sources should be used as the basis to estimate the level of nullification or impairment?

Response:

[92] *See* U.S. Written Submission, fn.2.

145. The discrepancies identified by the Arbitrator are due to typographical errors made by the United States in compiling the exhibits. We address each below:

- The correct maximum share covered by the China-government entity during the period of investigation is 43.1 percent. The correct value is in Exhibit USA-54. This is the value used to calculate the level of nullification or impairment in the formula-based approach (*see also* Exhibit USA-53). The incorrect value in USA-56 is a typographical error.[93]

- The correct China-government duty rate for *Iron Pipe Fittings* is 75.5 percent. Exhibit USA-5 is correct. The incorrect value in USA-52 is an error. Although the incorrect value was used in the U.S. Armington model, since the difference is only 0.5 percent, it is unlikely to affect the results in a meaningful way.

- The correct domestic shipments values for *Truck Tires, Circular Welded Carbon Quality Steel* and *Circular Welded Carbon Quality Steel Line Pipe* are in Exhibit USA-58. These are the values used in the U.S. calculation of the level of nullification or impairment. The domestic shipments value for *Truck Tires* in USA-52 is a typographical error and was not actually included in the modelling results presented.[94]

- The United States notes that the domestic shipments values for *Circular Welded Carbon Quality Steel* and *Circular Welded Carbon Quality Steel Line Pipe* are correct as submitted in Exhibit USA-52. The purpose of Exhibit USA-31 was to correct select typographical errors in Exhibit USA-13. Information in Exhibits USA-52 and USA-58 supersedes data in Exhibit USA-31.

73. <u>To the United States</u>: The Arbitrator notes that the United States provides two separate duty rates in Exhibit USA-5 for *Steel Wire Rod*. Could the United States please clarify which duty rate should be used as the separate duty rate for the purpose of applying the Armington-based model to estimate the level of nullification or impairment for this anti-dumping order?

<u>Response</u>:

146. The Arbitrator should use the 93.18 percent rate. The 93.18 percent is the most recently-determined separate duty rate as of the expiration of the RPT.[95]

[93] *See* revised Exhibit USA-56. The corrected maximum share value (column (a)) and the corresponding change to the applicable share value (column (d)) for *OTR Tires* are in bold font.

[94] *See* revised Exhibit USA-52. The single correction, to the U.S. shipments value for *Truck Tires*, is in bold font in column 2.

[95] *See* Exhibit USA-77; *see also Carbon and Certain Alloy Steel Wire Rod From the People's Republic of China: Antidumping Duty Order*, 80 FR 1015 (Dep't of Commerce Jan. 8, 2015); CBP Message No. 5009304 (Jan. 9, 2015) (Exhibit USA-90).

Clarifying Comment on Appendix I

147. Appendix I of the Arbitrator's questions following the substantive meeting identifies discrepancies in the data across U.S. exhibits. Data discrepancies arise for three reasons: (1) the United States was able to obtain more complete information for its responses to the Arbitrator's questions that was not accessible when the United States prepared its written submission; (2) in the U.S. responses to advanced questions from the Arbitrator, the United States provided two different measures of 2017 imports from China; and (3) the United States made a few typographical errors.

148. To be clear, the key exhibits to reference are Exhibits USA-52 and USA-53. These exhibits contain the inputs necessary to capture the correct counterfactual used by the United States in its Armington and formula-based methodologies, respectively. There are two errors in Exhibit USA-52: a typographical error on the value of U.S. shipments in *Truck Tires* and an error in the China-government entity rate in *Iron Pipe Fittings*, both of which have been corrected and the United States is submitting a corrected version of Exhibit USA-52 with these responses. It is important to note that the correct value for U.S. shipments for this order was used in the modeling. As such, the modeling results for *Iron Pipe Fittings* are correct as previously submitted. The modeling results for *Iron Pipe Fittings* incorrectly applied a China government entity rate of 75.0 percent instead of the correct value of 75.5 percent. This small change is unlikely to meaningfully change the modeling results.

149. With respect to discrepancies relative to Exhibit USA-21, that exhibit contains the value of imports from China subject to antidumping duties under each order as obtained from U.S. Customs at the time of the U.S. written submission. Exhibit USA-21 is superseded by Exhibit USA-30. As explained in the U.S. response to the Arbitrator's advance question 30(a),[96] in Exhibit USA-30, the United States was able to provide the Arbitrator with more comprehensive data on imports from China under each order than was included in Exhibit USA-21. The imports values in Exhibit USA-30 reflect the full and exact value of imports from China subject to antidumping duties under each order. In addition, the discrepancies relative to Exhibit USA-21 were a consequence of the U.S. limited ability to access data from U.S. Customs during the preparation of the U.S. written submission due to a lapse in government appropriations.

150. With respect to Exhibit USA-57, that exhibit contains data specifically requested in question 39(b) of the Arbitrator's advance questions. The Arbitrator requested data on imports and domestic shipments for the year each order was imposed and the year prior. U.S. Customs does not track the value of shipments subject to antidumping duties in years before the duties are imposed. To address the Arbitrator's request, the United States compiled data on imports from China based on the reference HTS codes used by U.S. Customs to identify shipments that may be subject to antidumping duties. These data overstate the value of imports subject to antidumping duties under each order, since much of the value under the reference HTS codes is not subject to antidumping duties. Exhibit USA-57 includes data on imports from China in 2017 obtained from the U.S. Census Bureau based on HTS reference codes to provide the Arbitrator with data comparable to the imports value provided for the year prior to the order. The U.S. has

[96] U.S. Responses to Advance Questions from the Arbitrator, paras. 116-120.

discovered an error in the year prior and application year values provided for ***Circular Welded Carbon Quality Steel*** in Exhibit USA-57. The correct values are provided below:

	China (millions)		**ROW (millions)**	
	Year Prior Value	**Application Year Value**	**Year Prior Value**	**Application Year Value**
Carbon Quality Steel	**547.9**	**107.1**	**853.3**	**1676.2**