

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

Recourse to Article 22.6 of the DSU by the United States

(DS437)

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

November 18, 2020

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Mr. Chairperson, Members of the Arbitrator:

1. The United States once again thanks you, and the Secretariat staff assisting you, for your ongoing work in this arbitration.

2. Over the past two sessions, the United States has shown that China’s requested level of suspension of concessions is not equivalent to the level of nullification or impairment caused by the U.S. countervailing duty (“CVD”) measures at issue. The United States has further provided compelling evidence why the counterfactual, methodology, and data used by the United States are the appropriate choice for correctly estimating the level of nullification or impairment in this proceeding.

3. China, in its opening statement, discussed the initial burden of proof in this proceeding.¹ The United States has made a *prima facie* case that China’s proposed level of suspension is not equivalent to the level of nullification or impairment caused by the CVD measures. Indeed, in the third paragraph of its methodology paper, China essentially conceded that the U.S. objection was well-founded. This is because China reduced its proposed level of suspension to \$1.02 billion annually. Thus, China itself recognized that its initial requested level of suspension – \$2.4 billion annually² – was in excess of the level of nullification or impairment by more than one hundred percent.

4. As China’s requested level of suspension of \$2.4 billion annually is not equivalent to the level of nullification or impairment, the Arbitrator, with the assistance of the Parties, proceeds to determine the correct level of suspension by accurately calculating the level of nullification or impairment. In this phase of the proceeding – after the United States has made its *prima facie* case that China’s requested level of suspension is not equivalent to the level of nullification or impairment – it is now, as prior reports have reasoned, “generally for each party asserting a fact to provide proof thereof.”³ China’s assertions and arguments concerning the correct level of nullification or impairment are entitled to no special deference. And by relying on assumptions and premises that are unsupported by economic theory or actual data, rather than meaningfully engaging with the convincing evidence provided by the United States, China has failed to support its arguments and has failed to rebut the arguments made by the United States.

5. Indeed, the United States has shown that China’s **methodology** would fail to accurately estimate the level of nullification or impairment, as required by Article 22.4 of the DSU. First, the United States has demonstrated that China’s attempt to double the microelasticities used by the arbitrator in DS471, citing a so-called “**rule of two**,” has no merit and is not supported by economic theory or practice. Contrary to China’s contention, standard practice in Armington partial equilibrium (PE) modeling is “the constant elasticity of substitution . . . which has one

¹ See Opening Statement of China at the Meeting of the Arbitrator (November 12, 2020) (“China’s Opening Statement”), paras. 11, 16, 48.

² Recourse to Article 22.2 of the DSU by China (October 28, 2019), WT/DS437/30.

³ *China – Autos (US) (Panel)*, para. 7.6. See also *US – Wool Shirts and Blouses (AB)*, p. 14.

substitution elasticity that describes substitutability across all sources of supply”⁴ – in other words, a “rule of one.”⁵ That is why the arbitrator in DS471 relied on the rule of one.

6. Even the Feenstra paper provided by China calls the so-called rule of two an “*ad hoc* assumption.”⁶ Moreover, the paper rejects the hypothesis testing the rule of two for certain products, and does not affirmatively prove it for the other products either.⁷ Further, the Feenstra study does not cover any of the products at issue in this proceeding, or even any products that are in the same six-digit HTSUS⁸ categories as the products at issue.

7. During this videoconference, China misquoted the United States on several occasions regarding the so-called rule of two. The United States has never said that this arbitrary assumption would be appropriate where trade diversion is expected.⁹ What the United States has said is that “the United States, in principle, does not disagree with the proposition that a nested approach should be considered where trade diversion is expected.”¹⁰ It is misleading to say that a nested approach necessarily means applying the rule of two.

8. Moreover, we have explained that trade diversion is not expected for the products at issue because, based on evidence, the domestic variety, imports from China, and imports from the rest of the world are not systematically differentiated.¹¹ Indeed, the product-by-product evidence that the United States has provided shows that, for almost all of the products at issue, buyers surveyed by the USITC considered the domestic variety, imports from China, and imports from the rest of the world comparable and interchangeable in terms of product quality, terms of sale, and use.¹² Contrary to China’s argument on Monday, this speaks directly to price response because buyers of these products are likely to respond to price changes and substitute one source for another source, implying that the microelasticity and the macroelasticity are very similar.¹³ China has not provided any evidence that the microelasticities are exactly twice as large as the

⁴ *Bethmann et al.*, p. 2 (Exhibit CHN-60).

⁵ See Written Submission of the United States of America (February 18, 2020) (“U.S. Written Submission”), paras. 109-110.

⁶ *Feenstra et al.*, p. 146 (Exhibit CHN-63). See also U.S. Written Submission, para. 108.

⁷ See U.S. Written Submission, paras. 107-111; Exhibit USA-33; Responses of the United States of America to the Advance Questions from the Arbitrator (May 7, 2020) (“U.S. Responses to Arbitrator’s Advance Questions”), Question No. 1.

⁸ Harmonized Tariff Schedule of the United States.

⁹ See China’s Opening Statement, para. 13. China reiterated this mischaracterization in its oral response to question no. 70 during the videoconference with the Arbitrator.

¹⁰ See U.S. Response to Arbitrator’s Advance Questions, Question No. 1, para. 4.

¹¹ See U.S. Response to Arbitrator’s Advance Questions, Question No. 1, para. 4.

¹² See U.S. Response to Arbitrator’s Advance Questions, Question No. 1.

¹³ See U.S. Response to Arbitrator’s Advance Questions, Question No. 1.

macroelasticities for the relevant products in this proceeding, and thus has not shown why the Arbitrator should deviate from the standard rule of one

9. In addition to relying on an unsupported assumption about substitution elasticities, China’s methodology suffers from another critical systemic flaw. By failing to **control for other factors** affecting China’s market shares in 2017, China’s methodology generates a distorted counterfactual market that does not represent what the U.S. market would have been like in 2017 if the CVD rates were WTO-consistent following the expiration of the RPT. And the distorted counterfactual market shares, in turn, distort the level of nullification or impairment attributable to the CVD measures.

10. In its opening statement¹⁴ and also in its oral response to Question 71 on Monday, China asked if the United States’ rationale for our proposed adjustments, which control for changes in the relevant AD duties and third country supply capacities, should extend to apply to any changes that occur between the imposition of the CVD measure and the remedy year. The simple answer is: yes, as long as the change had impact on market shares over the relevant time period, and there is evidence supporting that relationship. The chosen methodology in this proceeding should “isolate the marginal effect of the WTO-inconsistent duties.”¹⁵ That is precisely what economic modeling does by controlling for other factors that could affect the outcome of interest, which here is China’s 2017 market share. It is a basic concept in economic modeling that, to control for such other factors, those factors must be included in the model as variables. Not including the factors in the model implicitly assumes that they did not affect the U.S. market shares at all. Consequently, all changes in the U.S. market shares, including China’s market share, over the multi-year interim period would be incorrectly attributed to the CVD measures if those other factors were excluded from the model. In other words, such a model would overestimate the level of nullification or impairment actually caused by the CVD measures, by failing to control for other relevant factors.

11. To properly isolate the effect of the CVD measures in this proceeding, the United States has proposed adjustments to control for two factors that affected China’s 2017 market share: (1) the parallel antidumping (AD) duties on the ten products at issue, and (2) the positive supply shocks for imports from third countries that made exporters in those countries more competitive in the U.S. market. The parallel AD duties, which correct for dumping, inherently affected China’s market share, and the AD duty rates can be directly observed and tracked based on public information from the U.S. Department of Commerce (USDOC). With respect to third country supply shocks, the United States has provided conclusive evidence based on reliable trade data and industry analysis by the USITC to support our identification of the relevant supply shocks.

¹⁴ See China’s Opening Statement, paras. 19-20.

¹⁵ China’s Opening Statement, para. 35.

12. Regarding the **AD adjustment**, China, in its opening statement, mentioned DS464 and DS471 in an attempt to support its unadjusted two-step Armington approach.¹⁶ However, it is necessary to recall that, in those arbitration proceedings, none of the parties had proposed a two-step Armington approach to begin with, and thus no party proposed any adjustments to control for other relevant factors in a two-step Armington approach. It is also notable that China, in DS471, initially provided alternative estimates of nullification or impairment “taking into account the impact of CVD measures.”¹⁷ While the methodology China proposed in DS471 was not an Armington-based model, China’s reasoning that the model should account for the CVD duties in that arbitration, which concerned AD duties, should likewise apply in this arbitration.

13. The United States further stresses that adjusting the two-step Armington approach to control for the AD duties is not equivalent to estimating the effect of the WTO-inconsistent AD duties. The United States is fully aware that the point of this proceeding is to estimate the trade effects of the CVD measures and not the AD measures. Nothing about the United States’ proposal concerns whether the parallel AD duty rates are WTO-consistent or inconsistent.¹⁸ The United States has simply taken the AD duty rates as they are, and incorporated them into the model so that the trade effects of any changes in the AD measures are not misattributed to the CVD measures.

14. In the same vein, it is entirely inaccurate to argue that the adjustment to control for changes in the **third countries’ relative competitiveness** would eliminate the first step of the two-step Armington approach.¹⁹ On the contrary, when certain third countries have become more competitive in the U.S. market due to reasons that are independent from the CVD measures at issue (such as changes in industry investments or government policies in those countries), failure to control for those supply shocks would contravene the very objective of the two-step approach by generating counterfactual market shares that do not represent the actual relative competitiveness of each variety in 2017. Instead, the model would ignore the deterioration of China’s competitiveness relative to those third countries that stem from the investment and policy changes, and would, in turn, overstate the trade effects of modifying the CVD rates.

15. In sum, the United States has shown that China’s methodology is fundamentally flawed and incapable of correctly estimating the level of nullification or impairment. The United States has provided the Arbitrator a methodology that successfully achieves the objective of the two-step Armington approach by using a correct assumption about substitution elasticities and by properly isolating the effects of the CVD measures at issue.

16. The United States also has shown that the correct **year-prior** for each product is the year prior to the imposition of the final CVD measure. The arbitrator in DS471 likewise determined

¹⁶ See China’s Opening Statement, para. 29.

¹⁷ Executive Summary of the Arguments of China, *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 17 (Annex B-2 of WT/DS471/ARB/Add.1).

¹⁸ See U.S. Response to Arbitrator’s Advance Questions, Question No. 4.

¹⁹ See China’s Opening Statement, paras. 31, 34.

the year-prior based on the date of the final CVD measure. It appears that China, in its methodology paper in this proceeding, originally agreed with this method for seven of the products,²⁰ but later changed its view and revised the year-prior for Aluminum Extrusions, Steel Cylinders, and Wire Strand.²¹ However, China’s justification for basing the year-prior on the date of the preliminary CVD measure is unavailing.

17. First, as the United States has explained, preliminary duties are temporary in nature, and no provisional CVD duties were collected for a “gap period” of several months between the expiration of the provisional CVD measure and the publication of the final CVD determination.²² China does not explain how or why changes in trade flows during the gap period should be attributed to CVD duties when there were no CVD duties in place.

18. Second, the OCTG example China provides to support the purported “distorting effects of the preliminary duties”²³ unjustifiably assumes that the 99 percent drop in OCTG imports from China in 2009 was due to the imposition of the preliminary CVD duties. China does not provide any evidence that the preliminary CVD duties are, in fact, the cause. China neglects to consider that 2009 was at the height of the Great Recession, or that there may have been industry events or other factors that contributed to the decline in demand for products that are primarily used in oil and gas wells.²⁴

19. Third, the mere fact that certain imports from China significantly declined around the same time as the imposition of the preliminary duties does not prove that any Chinese exporters exited the U.S. market due to the preliminary duties.

20. Accordingly, the United States opposes China’s unreasonable attempt to use trade data from irrelevant years, and once again requests that the Arbitrator select the correct year-prior – that is, the year prior to the final CVD measure – consistent with the approach used by the arbitrator in DS471.

21. Lastly, the United States has shown that China fails to use accurate **data** to estimate the U.S. market, thus further compounding the problems with China’s methodology. As the United States has explained, China’s application of a GDP deflator is inappropriate and is not supported by economic theory.²⁵ A GDP deflator is a measurement of inflation. Accordingly, the outcome of China’s GDP deflator approach is merely to state the value of the U.S. market in an earlier time period in terms of 2017 dollars—it does not estimate the actual size of the U.S.

²⁰ Aluminum Extrusions, Kitchen Shelving, Print Graphics, Seamless Pipe, Solar Panels, Steel Cylinders, and Wire Strand. See Exhibits CHN-53 and USA-117 (BCI).

²¹ See China’s Written Submission, para. 22.

²² See U.S. Response to Arbitrator’s Advance Questions, Question No. 2.

²³ China’s Opening Statement, para. 47.

²⁴ See *Certain Oil Country Tubular Goods from China, Investigation No. 701-TA-463 (Final)*, USITC Publication 4124 (January 2010), p. I-3 (Exhibit CHN-23).

²⁵ See U.S. Written Submission, paras. 148-150; U.S. Response to Arbitrator’s Advance Questions, Question No. 23.

market in 2017.²⁶ Contrary to China’s argument on Monday, there is no basis to assert that the U.S. market for each individual product should grow in line with the prices of all goods and services produced in the United States. Yet, China’s deflator method would inherently assume constant consumption between the earlier data year and the remedy year. Furthermore, regardless of the number of years over which a GDP deflator is applied, the detailed diagrams provided by the United States²⁷ illustrate that the deflator’s estimate for the 2017 market size would vary depending on the year that the deflator happens to extrapolate from—which demonstrates that the GDP deflator method is not a reliable proxy for projecting a future market size.

22. In contrast, the United States has provided the Arbitrator with 2017 U.S. market estimates that rely on a more appropriate methodology – using industry-specific data to accurately estimate each component of the U.S. market for each product (*i.e.*, U.S. domestic shipments, imports from China, and imports from the rest of the world) and summing those estimates. This is the methodology that the DS471 arbitrator used and it is also the methodology that the USITC uses in its investigations. Where we have adjusted data used by the DS471 arbitrator due to an overinclusion issue²⁸ or due to the availability of better data,²⁹ we have provided ample evidence and explanations for the application of those adjustments.³⁰

23. The United States also has corrected inaccurate statements made by China regarding 2017 data. For instance, for Print Graphics, the United States has clarified that the updates to the HTSUS codes in 2012 were not a redefinition of the product scope, contrary to China’s oral response to Question 89 on Monday. The five new HTSUS codes were merely subdivisions of certain HTSUS codes that were already part of the reference HTSUS codes for Print Graphics, and the technical update did not alter the scope of the subject product. For Print Graphics and any other products, the United States has clarified that a product scope of a CVD order is determined by the written description of the subject product in the CVD order and not by the reference HTSUS codes.³¹

24. Additionally, the United States has endeavored to provide the Arbitrator with the most recent relevant data, including data that became available after the United States submitted its written submission and responses to questions from the Arbitrator. The July 2020 USITC report

²⁶ See U.S. Response to Arbitrator’s Advance Questions, Question No. 23.

²⁷ See U.S. Response to Arbitrator’s Advance Questions, Question No. 23; Exhibit USA-102 (BCI).

²⁸ See U.S. Written Submission, paras. 145-146 (discussing data adjustments for Print Graphics and Seamless Pipe).

²⁹ See Responses of the United States of America to the Follow-Up Questions from the Arbitrator (August 21, 2020) (“U.S. Responses to Arbitrator’s Follow-Up Questions”), Question No. 62 (discussing newly available actual data for Steel Cylinders).

³⁰ See U.S. Written Submission, paras. 145-146.

³¹ See U.S. Response to Arbitrator’s Follow-Up Questions, Question No. 59. The United States also made a similar clarification in its oral response to the Arbitrator’s Questions No. 88 and 91.

on OCTG³² is an example. The United States recently submitted this new report as an exhibit to provide the Arbitrator updated figures pertaining to the 2017 U.S. market for OCTG. As a result, an updated domestic supply elasticity figure is available for the Arbitrator’s use, and China has agreed with using this more recent estimate.³³ The United States further notes that the new OCTG report includes a 2017 domestic shipments figure of \$3.099 billion³⁴ and again requests that the Arbitrator use this actual value, instead of an estimate provided by either Party.³⁵ Doing so would produce a more accurate estimate of nullification or impairment – **\$106 million** total.

25. During Monday’s Q&A session, the Arbitrator asked the United States to comment on China’s opening statement, paragraph 56, regarding the year-prior Solar Panels data. The United States would like to take this opportunity to provide a brief comment. In an effort to use the same data that the arbitrator in DS471 used, the United States has used USITC data in cases where the DS471 arbitrator used USITC data – relying on the most recent relevant USITC reports, as shown in the example of the July 2020 OCTG report. For the year-prior Solar Panels data, as we explained on Monday in response to Question 75, the DS471 arbitrator did not use USITC data for imports from China and imports from the rest of the world, so the United States likewise did not use USITC data. The difference between the USITC-reported data and the HTSUS-based data used by the arbitrator in DS471 (and thus by the United States in this proceeding) is simply due to the difference in scope: the former is compiled from data collected by USITC and includes module imports only, whereas the latter aggregates all imports under the reference HTSUS codes and includes both cell and module imports.³⁶

26. Thus, China’s criticism is unwarranted. The United States has been consistent in its approach of using the same data and data estimation methods used by the DS471 arbitrator.³⁷ Contrary to China’s mischaracterization,³⁸ the United States has not made any unexplained adjustments to the HTSUS-based year-prior data,³⁹ and certainly has substantiated the adjustments that are necessary for Kitchen Shelving.⁴⁰ The United States also has provided a

³² *Oil Country Tubular Goods from India, Korea, Turkey, Ukraine, and Vietnam, Investigation Nos. 701-TA-499-00 and 731-TA-1215-1216, 1221-1223 (Review)*, USITC Publication 5090 (July 2020), Table III-8 (Exhibit USA-148).

³³ China expressed its agreement in its oral response to the Arbitrator’s Question No. 79.

³⁴ *See Oil Country Tubular Goods from India, Korea, Turkey, Ukraine, and Vietnam, Investigation Nos. 701-TA-499-00 and 731-TA-1215-1216, 1221-1223 (Review)*, USITC Publication 5090 (July 2020), Table III-8 (Exhibit USA-148).

³⁵ *See* U.S. Response to Arbitrator’s Follow-Up Questions, Question No. 57.

³⁶ *See* U.S. Response to Arbitrator’s Advance Questions, Question No. 10.

³⁷ *See* U.S. Written Submission, paras. 124-127.

³⁸ *See* China’s Opening Statement, para. 52.

³⁹ *See* Exhibit USA-117 (BCI).

⁴⁰ *See* U.S. Written Submission, para. 127; Exhibit USA-61; U.S. Response to Arbitrator’s Advance Questions, Question No. 11; U.S. Response to Arbitrator’s Follow-Up Questions, Question Nos. 35, 37.

complete explanation and a supporting exhibit when we replaced the year-prior domestic shipments figure used by the DS471 arbitrator with actual data that had become available.⁴¹

27. In closing, for the reasons the United States has given in this proceeding, the Arbitrator should find that the level of suspension of concessions requested by China is well in excess of the actual level of nullification or impairment due to the CVD measures – an issue on which China has conceded – and should further find that the correct level of nullification or impairment is no more than **\$106 million** annually.

28. This concludes the U.S. closing statement. Thank you, and we look forward to responding to any additional questions in writing.

⁴¹ See U.S. Responses to Arbitrator’s Follow-Up Questions, Question No. 62 (discussing newly available actual data for Steel Cylinders).