UNITED STATES – COUNTERVAILING DUTY MEASURES ON SUPERCALENDERED PAPER FROM CANADA

Recourse to Article 22.6 of the DSU by the United States

(DS505)

COMMENTS OF THE UNITED STATES OF AMERICA ON CANADA'S RESPONSES TO THE QUESTIONS FROM THE ARBITRATOR FOLLOWING THE VIRTUAL SESSION (THIRD SET OF QUESTIONS)

November 19, 2021

TABLE OF CONTENTS

TABLE OF REPORTS AND AWARDS

Short Form	Full Citation
Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods,* WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
US – Anti-Dumping Methodologies (China) (Article 22.6 – US)	Decision by the Arbitrators, *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,* WT/DS471/ARB, 1 November 2019
US – Supercalendered Paper (Panel)	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018
US – Washing Machines (Korea) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (Recourse to Article 22.6 of the DSU by the United States)*, WT/DS464/ARB, 8 February 2019

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. Written Submission	
USA-1	U.S. Solution and Computer Code for the Armington Partial Equilibrium Model
USA-2	Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada ("Supercalendered Paper IDM") (excerpt)
USA-3	Final Determination Calculations for Resolute FP Canada Inc. ("Resolute's Calculation Memo")
USA-4	19 U.S.C. § 1671d
USA-5	Table of GTAP Sectors with Number of Harmonized Tariff Schedule ("HTS") Categories
USA-6	Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination, 80 Fed. Reg. 63535 (Oct. 20, 2015)
USA-7	Calculation of the All-Others Rate for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada ("Supercalendered Paper All Others Rate Calculation Memo"), Oct. 13, 2015
USA-8	Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Amended All Others Rate Calculation for Final Determination Memo, Dec. 4, 2017
USA-9	Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Amended All Others Rate Calculation for Final Determination Attachment, Dec. 4, 2017
USA-10	Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Orders, 85 Fed. Reg. 52543 (Aug. 26, 2020)
USA-11	Sample U.S. Model Data File
USA-12	*Supercalendered Paper from Canada*, USITC Publication 4583, Investigation No. 701-TA-530 (Final), December 2015 (excerpt)

Exhibit No.	Description
U.S. Responses to First Set of Questions	
USA-13	19 U.S.C. § 1671b
USA-14	19 U.S.C. § 1671e
USA-15	19 U.S.C. § 1675
USA-16	19 U.S.C. § 1677e
USA-17	19 U.S.C. § 1677f
USA-18	19 C.F.R. § 351.212
USA-19	19 C.F.R. § 351.306
USA-20	Paul S. Armington, *A Theory of Demand for Products Distinguished by Place of Production*, IMF Staff Papers, Vol. 16, No. 1 (Mar. 1969) ("Armington (1969)")
USA-21	U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors, USITC Publication Number 4889, April 2019, Appendix I
USA-22	Erika Bethmann *et al*., "A Non-technical Guide to the PE Modeling Portal", USITC Office of Economics Working Paper Series (March 2020) ("Bethmann *et al.* (2020)")
USA-23	Saad Ahmad *et al.*, "A Comparison of Armington Elasticity Estimates in the Trade Literature", USITC Office of Economics Working Paper Series (April 2020) ("Ahmad *et al.* (2020)")
USA-24	Anson Soderbery, "Estimating Import Supply and Demand Elasticities: Analysis and Implications", Journal of International Economics, Vol. 96, Issue 1, May 2015 ("Soderbery (2015)")

Exhibit No.	Description
USA-25	Soderbery (2015) 8-digit HTS level dataset
USA-26	Soderbery (2015) 10-digit HTS level dataset
USA-27	Saad Ahmad & David Riker, "A Method for Estimating the Elasticity of Substitution and Import Sensitivity by Industry", USITC Office of Economics Working Paper Series (May 2019) ("Ahmad & Riker (2019)")
USA-28	Ahmad & Riker (2019) 6-digit NAICS level dataset
USA-29	Thomas Hertel & Dominique van der Mensbrugghe, "Chapter 14: Behavioral Parameters," GTAP 10 Data Base Documentation, Center for Global Trade Analysis (2019)
USA-30	Russell Hillberry & David Hummels (2013), "Chapter 18: Trade Elasticity Parameters for a Computable General Equilibrium Model," Handbook of CGE Modeling, Vol. 1 ("Hilberry & Hummels (2013)")
USA-31	David Riker, "Approximating an Industry-Specific Global Economic Model of Trade Policy", USITC Office of Economics Working Paper Series, November 2020 ("Riker (November 2020)")
USA-32	Jennifer Leith *et al*., "Indonesia Rice Tariff", Poverty and Social Impact Analysis, March 2003 ("Leith *et al.* (2003)")
USA-33	Michael Gasiorek *et al.*, "Which manufacturing industries and sectors are most vulnerable to Brexit?", The World Economy (2019) ("Gasiorek *et al.* (2019)")
USA-34	*Softwood Lumber Products from Canada,* USITC Publication 4749, Investigation Nos. 701-TA-566 and 731-TA-1342 (Final), December 2017 ("USITC Softwood Lumber Final Determination")
USA-35	*Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, USITC Publication 5101, Investigation Nos. 701-TA-627-629 and 731-TA - 1458-1461 (Final), August 2020 ("USITC Wind Towers Final Determination")
USA-36	Certain Fabricated Structured Steel From Canada: Final Negative Countervailing Duty Determination, 85 Fed. Reg. 5387 (Jan. 30, 2020)
USA-37	*Uncoated Groundwood Paper from Canada Does Not Injure U.S. Industry, Says USITC*, USITC News Release 18-103, Aug. 29, 2018

Exhibit No.	Description
USA-38	*100- to 15- Seat Large Civil Aircraft from Canada Do Not Injury U.S. Industry, Says USITC*, USITC News Release 18-015, Jan. 26, 2018
USA-39	USITC Softwood Lumber Foreign Producer/Exporter Questionnaire
USA-40	USITC Softwood Lumber U.S. Producer Questionnaire
USA-41	USITC Softwood Lumber U.S. Importer Questionnaire
USA-42	USITC Softwood Lumber U.S. Purchaser Questionnaire
U.S. Responses to Second Set of Questions	
USA-43	19 U.S.C. § 1592
USA-44	*Welded Stainless Steel Pressure Pipe from China*, USITC Publication 4064, Investigation Nos. 701-TA-454 and 731-TA-1144 (Final), Mar. 2009 (excerpt)
USA-45	*Welded Stainless Steel Pressure Pipe from India*, USITC Publication 4644, Investigation Nos. 701-TA-548 and 731-TA-1298 (Final), Nov. 2016 (excerpt)
USA-46	Saad Ahmad & David Riker, "Updated Estimates of the Trade Elasticity of Substitution", USITC Office of Economics Working Paper Series, May 2020 ("Ahmad & Riker (May 2020)")
USA-47	Understanding between Canada and the United States Concerning Procedures to Apply to Business Confidential Information to the Extent Necessary to Apply a DSB Authorization Consistent with the Arbitrator's Decision ("BCI Understanding")
U.S. Opening Statement at the Virtual Session	
USA-48	Illustrative Table: Nullification or Impairment Under Various Models/Scenarios Using Data from Softwood Lumber from Canada

Exhibit No.	Description
USA-49	David Riker & Samantha Schreiber, "Practical Tools for Modeling the Economic Effects of Tariff Changes", USITC Office of Economics Working Paper Series, November 2020 ("Riker & Schreiber (2020)")
U.S. Responses to Third Set of Questions	
USA-50	Updated U.S. Solution and Computer Code for the Armington Partial Equilibrium Model (Revised Exhibit USA-1)
USA-51	U.S. Solution and Computer Code for N-variety model
USA-52	Data inputs for N-variety model
USA-53	U.S. Response to Question 219: Excel Spreadsheet for Customs Data
USA-54	Table of USITC Investigation Determinations
USA-55	19 C.F.R. § 351.304
USA-56	19 C.F.R. § 351.525
USA-57	71-sector BEA I-O Use Table (2020)
USA-58	71-sector BEA I-O Supply Table (2020)
USA-59	BEA Benchmark Use Table: 405 industries

1 THE APPROPRIATE COUNTERFACTUAL

General Comment:

1. In this document, the United States comments on Canada's responses to the Arbitrator's written questions following the virtual session. The absence of a U.S. comment on an aspect of Canada's response to any particular question should not be understood as agreement with Canada's response.

2. The United States provides these comments without prejudice to the U.S. position that Canada's proposed suspension of concessions is not allowed or is not equivalent to the level of nullification or impairment, which is zero, and therefore Canada's request for suspension of concessions must be rejected.[1] The United States continues to observe that an appropriate way forward for Canada is to agree to suspend this proceeding until such time as it considers that the challenged measure is applied to its goods, should that circumstance ever arise.[2]

1.1 For both parties

181. Below appears a table of scenarios for calculating a counterfactual all-others CVD rate. Could the parties please confirm whether there are any relevant counterfactual scenarios that are *not* reflected in this table, and whether the parties consider the potential ways to calculate the all-others rate indicated in the final column as unreasonable?

Scenario No.	Individually investigated firms used to calculate all-others rate in counterfactual	Potential manner of calculating counterfactual all-others rate
1	None.	Proxy of 0%.[3]
2	One firm.	The firm's counterfactual CVD rate.

[1] *See* U.S. Written Submission, paras. 13-34; U.S. Responses to First Set of Questions, paras. 1-35.
[2] *See* U.S. Responses to First Set of Questions, para. 35; U.S. Opening Statement at the Virtual Session, para. 20 ("[T]he Arbitrator should not assess a level inconsistently with the terms of the DSU simply because Canada insists on pushing forward with this proceeding prematurely.").
[3] In answering this question, the United States is also kindly asked to explain whether a 0% all-others rate would mean that the companies subject to the all-others rate would be excluded from the scope of the CVD order or not.

Scenario No.	Individually investigated firms used to calculate all-others rate in counterfactual	Potential manner of calculating counterfactual all-others rate
3	Two firms *and* the USDOC had in fact used the simple average of firms' CVD rates or the weighted average of firms' CVD rates using publicly available US sales data.	Use methodology the USDOC in fact used.
4	Two firms *and* the USDOC had in fact used three or more firms' confidential US sales data to calculate the weighted average of firms' CVD rates.	Canada first prompts the relevant companies to provide written authorization to the USDOC to share the companies' confidential US sales data with Canada, and, if Canada is able to obtain *all* such data, then calculate the weighted average CVD rate of the relevant firms with that data. Canada then calculates a simple average of the relevant firms' CVD rates and a weighted average of their CVD rates using publicly ranged US sales data from the record of the USDOC proceeding. Canada then selects whichever of those two rates most closely approximates the weighted average rate that was derived from the firms' confidential US sales data. If Canada cannot obtain all such data, then Canada uses the simple average of the relevant firms' counterfactual CVD rates.
5	Three or more firms.	Canada first prompts the relevant companies to provide written authorization to the USDOC to share the companies' confidential US sales data with Canada, and if Canada is able to secure all such data, then Canada calculates the weighted average CVD rate with such data. If Canada cannot obtain all such data, then Canada uses the simple average of the relevant firms' counterfactual CVD rates.

Comment:

3. As a general matter, in some instances, Canada appears to have misunderstood column two of the table, "individually investigated firms used to calculate all-others rate in counterfactual", to equate to the number of companies actually examined in the investigation or administrative review. As explained below, Canada's observation is incorrect since it will not necessarily be the case that the number of companies used in the counterfactual equals the number of companies examined in the proceeding. Further, the United States provides the following comments to Canada's response for each scenario, below.

4. **Scenario 1:** The United States observes that scenario 1 is not necessarily limited to a CVD investigation, nor is it limited to a CVD investigation or administrative review where there is only one individually-examined company, as Canada contends.[4] Indeed, scenario 1 may also apply to CVD administrative reviews if the individually-examined companies in the counterfactual all have a rate of zero or *de minimis*. Therefore, if scenario 1 occurred in a CVD administrative review, the counterfactual CVD rate would be zero.[5] The factual CVD rate would be the CVD rates applied to the companies during the administrative review. The reference year CVD rate would be the rates that the companies had received in the year prior to the administrative review.[6]

5. If the counterfactual in scenario 1 occurred in a CVD investigation, the United States does not agree with Canada's statement that it would not calculate counterfactual duty rates.[7] As the United States has explained, Canada should also calculate a counterfactual duty rate because the duty rates used in the model must be the total duty rates (the sum of the CVD rate and any other contemporaneous duties, including AD duties and any ordinary tariffs).[8]

6. **Scenario 2:** The parties appear to agree on the counterfactual for scenario 2. However, the United States disagrees with Canada concerning the calculation of the counterfactual of the company's CVD rate. As the United States has explained, where the information exists on the record of Commerce's proceeding to calculate a counterfactual CVD rate, such information should be utilized.[9] Only if the information does not exist, then the United States agrees that the removal of the challenged measure would result in the lowering of the total CVD rate for an individually-investigated company to which the measure had been applied.

7. **Scenario 3:** The parties appear to agree on the counterfactual in this scenario.

8. **Scenario 4:** With respect to the calculation of the All Others counterfactual rate, Canada does not need to "follow" and recreate Commerce's methodology, as Canada contends.[10] Rather, as the United States explained in the U.S. response to this question, the averaging methodology used in the counterfactual should be the averaging methodology that was, in fact, used by Commerce in the CVD proceeding at issue, regardless of whether the number of firms used to calculate the counterfactual differs from the number of firms that Commerce originally used. Therefore, for scenario 4, where a weighted average of the actual sales of three or more companies was used by Commerce to calculate the factual All Others rate, Canada should use a

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[4] Canada's Responses to Questions Following the Virtual Session, paras. 1-2.
[5] A zero or *de minimis* rate in a CVD administrative review does not exclude the company from the CVD order. *See* U.S. Responses to First Set of Questions, paras. 44-46; U.S. Responses to Second Set of Questions, para. 3; U.S. Responses to Third Set of Questions, paras. 4-5.
[6] *See also* U.S. Responses to Third Set of Questions, para. 165.
[7] Canada's Responses to Questions Following the Virtual Session, para. 3.
[8] *See* U.S. response to question 131. *See also* U.S. responses to questions 84 and 85 (demonstrating that the failure to include AD duties and ordinary tariffs will not generate a reasoned estimate of nullification or impairment).
[9] *See* U.S. Written Submission, paras. 45-46; U.S. Responses to First Set of Questions, paras. 50-53; U.S. Opening Statement at the Virtual Session, para. 29.
[10] Canada's Responses to Questions Following the Virtual Session, para. 7.

weighted average of the actual sales of the two companies to calculate the counterfactual All Others rate. Indeed, Canada now agrees that, "it is not unreasonable that it requests the relevant companies to provide authorization to Commerce to share their confidential sales values, and use it to calculate the counterfactual All Others rate, as long as the relevant data is provided without undue delay".[11]

9. If the companies do not authorize Canada to use the confidential information to calculate a weighted average, then the United States considers it appropriate to use the publicly ranged sales data on the record of Commerce's proceeding to calculate a weighted average for the counterfactual All Others rate. In the rare event this information is not available on the record,[12] then the simple average of the companies' CVD rates should be used.[13]

10. The United States does not consider it appropriate for Canada to calculate both the simple average of the CVD rates and the weighted average of the publicly ranged sales data, and then simply select the lower of the two averages. As the United States has explained, nothing in the DSU provides that Canada's role as the complaining Member means that Canada can simply have wide (or possibly unbounded) discretion to do as it wants when suspending concessions.[14] Rather, the DSU provides that the purpose of this proceeding is to ensure that the level of suspension requested by Canada is equivalent to the level of nullification or impairment.[15]

11. Canada argues for the choice to select the lower rate because Canada contends that the lower rate is less likely to understate the level of nullification or impairment. In support of this argument, Canada references a prior mathematical example that Canada provided to argue that a simple average would understate nullification or impairment.[16] The United States observes that it would similarly be easy to produce a mathematical example demonstrating that a simple average would overstate nullification or impairment. Regardless, Canada does not contend that the use of a weighted average of the publicly ranged sales would under- or overstate nullification or impairment.[17] Therefore, the U.S. approach – to use the weighted average of the publicly ranged sales as the next option if the companies do not authorize use of the confidential information – is appropriate for scenario 4.

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[11] Canada's Responses to Questions Following the Virtual Session, para. 8.
[12] In each CVD proceeding, Commerce requests the individually-examined companies to submit the publicly-ranged values of their U.S. sales of the relevant product. When the company reports the publicly-ranged values of its export sales of the relevant product to the United States, then the usage of such information would be appropriate. *See* U.S. Responses to Second Set of Questions, para. 105.
[13] U.S. Responses to Third Set of Questions, para. 3.
[14] U.S. Closing Statement at the Virtual Session, para. 10.
[15] *See also* U.S. Closing Statement at the Virtual Session, para. 9 (observing that Canada's proposal throughout the proceeding is to have "discretion" to select the inputs that are the most beneficial to Canada).
[16] Canada's Responses to Questions Following the Virtual Session, para. 9 (citing Canada's Response to First Set of Questions, para. 34).
[17] Indeed, in response to scenario 5, Canada states, "A weighted average duty rate based on publicly ranged sales value may be closer to the weighted average duty rate based on actual sales values." Canada's Responses to Questions Following the Virtual Session, para. 11.

12. **Scenario 5:** The United States again welcomes Canada's acknowledgement that it is not unreasonable for Canada to request the relevant companies (including the unaffected exporters) to provide authorization to Commerce to share the confidential data.[18] Similar to scenario 4, if Canada is unable to obtain authorization, then Canada should first utilize the weighted average of the publicly ranged sales on the recording of Commerce's proceeding to calculate a counterfactual All Others rate.[19] In the event this information is not available on the record, then the simple average of the companies' CVD rates should be used.[20] As explained above, Canada should not have the discretion to simply choose the lower of the two rates.[21]

182. Please assume for purposes of this question that the Arbitrator adopts the methods for calculating the counterfactual all-others rate in the table above.

a. Could the parties please recommend a timeline for: (i) by when Canada should request the relevant firms to release their sales information; and (ii) by when Canada should receive that information in order to use it to calculate a counterfactual all-others rate before Canada could resort to using a simple average? Also, please comment on whether setting both such deadlines would be necessary if the Arbitrator were to adopt a deadline of the kind mentioned in question 185, below; and

Comment:

13. As explained in the U.S. response to this question, the United States understands question 185 to propose a minimum period after which Canada may begin to suspend concessions following a "triggering event". The United States does not view the proposal in question 185 as precluding the parties from pursuing alternative solutions. Therefore, in the event Canada determines to proceed with suspension of concessions, the United States considers it appropriate for the Arbitrator to prescribe a timeline for when Canada should request the relevant companies to release the information and by when Canada should receive that information.

14. In general, the United States does not object to Canada's proposed timeline. Canada proposes that the United States be given 30 days to provide the information to Canada, starting from the time when Canada contacts the companies and notifies the United States.[22] Further, Canada states that the request to the companies and the notification to the United States would be made at the same time.[23] Canada proposes to provide the companies two weeks (14 days) to provide authorization.[24]

[18] Canada's Responses to Questions Following the Virtual Session, para. 10.
[19] Canada's Responses to Questions Following the Virtual Session, para. 11 ("A weighted average duty rate based on publicly ranged sales value may be closer to the weighted average duty rate based on actual sales values.").
[20] U.S. Responses to Third Set of Questions, para. 3.
[21] *See also* U.S. Closing Statement at the Virtual Session, para. 9 (observing that Canada's proposal throughout the proceeding is to have "discretion" to select the inputs that are the most beneficial to Canada).
[22] Canada's Responses to Questions Following the Virtual Session, para. 16.
[23] Canada's Responses to Questions Following the Virtual Session, para. 15.
[24] Canada's Responses to Questions Following the Virtual Session, para. 15.

15. For clarity, the timeline for the United States to provide Canada information should not begin until the United States is in receipt of the companies' authorization to release confidential information. The United States would expect Canada to provide these authorizations to the United States. Upon receipt, the United States would either have two weeks (14 days), or the remainder of the 30-day timeline, whichever is greater, to provide Canada the confidential information from the record of Commerce's proceeding.

16. Importantly, throughout the process, the parties may remain in communication and confer with each other in the event more time is necessary.

b. The Arbitrator notes that it appears possible that the all-others rate could actually increase in the counterfactual.[25] Could the parties please explain whether this is correct, and if so, also please explain how this would be accounted for in each party's proposed model?

Comment:

17. As explained in the U.S. response to this question, it remains unclear how Canada would calculate the level of nullification or impairment in circumstances where the factual duty rate is less than the counterfactual duty rate ($t_{inc} < t_{con}$). The response that Canada provided to this question and question 190 did not further elucidate on this matter.

1.2 For Canada

183. Regarding the ability of a third party to "reverse-engineer" a counterfactual all-others rate that may be based on confidential data, could Canada please respond to the United States' response to question No. 116, and, in particular, indicate whether Canada agrees with the content of that response?

Comment:

18. The United States shares Canada's understanding that question 116 presents the same counterfactual as scenario 4 in the table of question 181, above. As discussed in both the U.S. response and the U.S. comment on Canada's response to question 181, under the scenario where Commerce calculates a factual All Others CVD rate using a weighted average of the actual sales data from three or more companies, but the counterfactual only includes two companies, the U.S. approach is for Canada to continue to use the weighted average based on the actual confidential sales data of the two companies. Indeed, Canada now agrees to request authorization from the relevant companies to do so.[26]

19. Canada has also stated that "[a]ny BCI that Canada would use to calculate the actual weighted average rate, and that rate itself, would be protected by the BCI Understanding."[27]

[25] U.S. Written Submission, para. 54.
[26] Canada's Responses to Questions Following the Virtual Session, para. 8.
[27] Canada's Responses to Questions Following the Virtual Session, para. 25.

Therefore, if the counterfactual All Others CVD rate is the weighted average based on actual confidential sales, the United States expects this statement from Canada to remain true. Accordingly, the concerns of reverse-engineering an All Others rate would not be present, because Canada has represented that it will protect a counterfactual All Others rate calculated using the actual sales data pursuant to the BCI Understanding.

184. Can Canada please clarify whether, in an instance where the USDOC had in fact used three or more firms' confidential sales data to calculate the all-others rate, but, in the counterfactual, the USDOC would have used the individual CVD rates of only two firms to calculate the all-others rate, it is Canada's position that the counterfactual all-others rate in that instance should be zero? If that is incorrect, please clarify how the counterfactual all-others rate should be calculated in that scenario.
Comment:

20. The United States shares Canada's understanding that this question presents the same factual scenario as scenario 4 in the table of question 181. The United States refers the Arbitrator to the U.S. comment to Canada's response to question 181 concerning scenario 4, above.

2 OVERALL METHODOLOGY

2.1 For both parties

185. Could the parties please comment on whether it would be appropriate for the Arbitrator to specify that, following a triggering event, unless Canada suspends concessions sooner, the time-period during which Canada is entitled to suspend concessions with respect to that triggering event starts to run six months following the triggering event?

Comment:

21. The United States refers the Arbitrator to the U.S. response to this question and question 254 in the U.S. Responses to the Third Set of Questions. The United States has no additional comments on Canada's response.

186. The Arbitrator understands that the parties are in agreement that, following a triggering event, Canada would send an initial notification to the United States, and the content of that notification would include the following: (a) a notification that Canada intends to suspend concessions with respect to a given application of the OFA-AFA Measure; (b) the names of all Canadian exporters who are then subject to relevant individual CVD rates affected by the OFA-AFA Measure; (c) the names of all Canadian exporters who are subject to a relevant individual but unaffected CVD rate, and individually investigated companies that were excluded from the scope of the relevant CVD order; (d) a request for the United States to gather data on Canadian imports of the relevant product from US Customs with reference to

the relevant HTS codes from the relevant CVD order or the relevant AD/CVD case number; and (e) the reference period. Could the parties please confirm whether this understanding is correct, and if not, please explain what the content should be?

Comment:

22. The United States refers the Arbitrator to the U.S. response to this question. The United States has no additional comments on Canada's response.

187. Both parties have used the term "unaffected exporters" in their submissions. In this context, could the parties please confirm that this term is comprised of the two following types of companies: (a) Canadian exporters of the relevant product whose CVD rates would not change in the counterfactual; and (b) Canadian exporters of the relevant product who were individually investigated but subject to no CVD rate at all due to their exclusion from the CVD order entirely?

Comment:

23. The United States refers the Arbitrator to the U.S. response to this question. The United States has no additional comments on Canada's response.

2.2 For Canada

188. Could Canada please respond to the United States' assertion that only investigations and administrative reviews can qualify as triggering events owing to the scope of the evidence that Canada provided to prove the existence of the OFA-AFA Measure in the Panel proceeding?[28]

Comment:

24. As the United States has explained, Canada's challenge of an unwritten measure imposed upon Canada a high evidentiary burden to demonstrate the measure's existence.[29] Particularly in the scenario of an unwritten measure, the existence of which is not immediately evident and is disputed by the parties, the evidence used by the complainant demonstrates the existence of the measure.

25. Indeed, the *Argentina – Import Measures (AB)* report reasoned that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant."[30] As Canada also points out, the report further stated, "[…] the specific measure challenged and how it is described or characterized by a complainant will determine the

[28] United States' response to Arbitrator question No. 35, para. 103.
[29] U.S. Responses to First Set of Questions, para. 103.
[30] *Argentina – Import Measures (AB)*, para. 5.108 (emphasis added).

kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged".[31]

26. Canada, having chosen to challenge a purported "ongoing conduct" measure, demonstrated the existence of the measure through the use of nine CVD determinations, consisting of post-2012 investigations or administrative reviews.[32] Canada brought forward no evidence relating to new shipper reviews, expedited reviews, changed circumstances reviews, or sunset reviews. This circumscribes the scope of the "ongoing conduct" measure.

27. Nor could these CVD proceedings have been used to demonstrate the existence of the measure. Indeed, Canada now acknowledges that sunset reviews do not meet the elements of the challenged measure because the other forms of assistance question is not asked and verification does not take place.[33] Similarly, for changed circumstance reviews, new shipper reviews, and expedited reviews, verifications are not required to be conducted. As the United States also discusses in the U.S. response to question 207(d) and in the U.S. comment on Canada's response to question 207(d), neither the U.S. nor Canadian model are able to accommodate for new shipper reviews because a new shipper likely will not have a value of imports during the reference period.

28. Accordingly, contrary to Canada's argument, the evidence utilized by Canada before the original panel to demonstrate the existence of the measure is relevant to assessing whether these additional types of CVD proceedings are considered part of the "ongoing conduct" measure at issue. Given that the panel found the challenged measure to exist on the basis of the evidence used to substantiate the elements of the measure, Canada's sole use of CVD investigations and administrative reviews determines the scope of the challenged measure.

189. Could Canada please respond to the United States' comment that, upon request, "the United States can either submit detailed instructions for adjusting the code or provide updated codes suitable for an additional number of varieties"?[34] In Canada's view, would such actions relieve Canada of any material burdens in running the code for the United States' model, even considering that Canada cannot currently predict how many Canadian "varieties" there may be in a given instance in the future?

<u>Comment</u>:

29. The U.S. model appropriately accounts for the unaffected Canadian exporters to ensure that the calculation of nullification or impairment will result in a reasoned estimate that

[31] Canada's Responses to Questions Following the Virtual Session, para. 44 (citing *Argentina – Import Measures (AB)*, para. 5.110).
[32] *US – Supercalendered Paper (Canada) (Panel)*, para. 7.314 ("Canada argues that in each post-2012 investigation or review listed above . . . .").
[33] Canada's Response to Questions Following the Virtual Session, para. 46.
[34] See United States' response to Arbitrator question No. 132, para. 24.

accurately offsets for the effects on demand for the unaffected variety when the challenged measure is removed from the affected exporters. Canada argues that its approach of only including the affected exporters "alleviates much of the burden".[35] However, Canada's proposed approach for "simplicity" comes at the cost of losing precision and accuracy.[36] In contrast, the United States has proffered a model that has the ability and flexibility to accommodate various potential factual scenarios, while ensuring a reasoned estimate of nullification or impairment by accounting for all Canadian exporters.

30. As Canada now appears to recognize, the number of companies may not only vary in each segment of a CVD proceeding, but may increase over time when accounting for both the All Others rate from the investigation as well as the non-selected companies rate from the administrative reviews.[37] This nuanced and layered factual scenario is not a U.S. model problem, as Canada appears to contend. Rather, any model that accurately offsets for the effects on demand must account for this reality to ensure a reasoned estimate of nullification or impairment. Notably, Canada's formula is unable to accommodate the factual scenarios that may potentially occur through the various segments of a CVD proceeding, as described by Canada. In contrast, the United States, having understood the potential implications of Canada's request for some future, unknown CVD proceeding, has proffered a model that has the ability and flexibility to accommodate any of the scenarios with a varying number of companies.

31. Indeed, the United States has submitted Exhibit USA-51 with the U.S. Responses to the Third Set of Questions, which is a Stata code that runs the U.S. model for any number of Canadian varieties. This code does not need to be adjusted to accommodate different numbers of varieties. It simply requires the data to be input as provided in accompanying Exhibit USA-52.

32. Further, as explained below, Canada exaggerates the difficulty associated with obtaining the necessary information to calibrate the U.S. model for individual Canadian varieties (including the unaffected exporters). Canada also incorrectly asserts that the U.S. model requires data on the value of imports associated with each duty rate in the reference period and the period in which the measure is in effect, and complains that it will be too onerous for Canada to calculate weighted average duty rates for the unaffected variety.[38]

33. The U.S. model only requires value of imports data from the reference period. The parties agree that this data shall be provided by U.S. Customs and Border Protection ("Customs"). All of the information Canada would need to calibrate the value of imports and reference period duty rates could be obtained from the excel spreadsheet as proposed by the

[35] Canada's Responses to Questions Following the Virtual Session, para. 52.
[36] *See also* U.S. Opening Statement at the Virtual Session, paras. 57 *et seq*. (explaining that Exhibit USA-48 demonstrates that Canada's simplifying assumptions have a substantial impact on the calculation of the level of nullification or impairment).
[37] Canada's Responses to Questions Following the Virtual Session, paras. 49-50. However, the United States disagrees with Canada's inclusion of duty rates from expedited reviews. As the United States has explained, expedited reviews are not within the scope of this arbitration proceeding. *See* U.S. Responses to First Set of Questions, para. 103.
[38] Canada's Responses to Questions Following the Virtual Session, para. 48.

United States in Exhibit USA-53. This spreadsheet would provide the reference period value of imports by company in column H (Entered Value) and the duty rates applied to each company in columns I-K (HTS rate, AD rate and CVD rate).[39] Information on factual duty rates is likewise available for each company in the relevant Federal Register notice published by Commerce. This source would include the factual CVD rates of both the affected and unaffected companies. Lastly, for the composite unaffected Canadian variety, the weights used for both the reference duty rate and factual duty rates will be the very same import values obtained from Customs. Therefore, the United States will provide the necessary information in an excel spreadsheet as proposed in Exhibit USA-53 for both the affected and the unaffected Canadian exporters to ensure that the calculation of nullification or impairment is precise and accurately accounts for the offsetting effect.

34. Thus, Canada's description of the process as a "burden" is in reality a very simple additional calculation. This calculation is necessary to gain the precision available from the exact solution offered by the U.S. model. As the United States has demonstrated in Exhibit USA-48 and explained in the U.S. responses throughout this arbitration, Canada's log-linearized model with a pre-determined scaling factor featuring sector-level market shares cannot provide for all possible future scenarios with varying number of companies, and therefore will not result in a reasoned estimate of the level of nullification or impairment.

190. In its response to Arbitrator question No. 127, paragraphs 66-68, Canada introduces an adjustment of *vimp* for the second model run ($vimp_{CON}$ in Canada's notation). Could Canada please:

a. explain why Canada does so and how this application of its formula is theoretically derived;

b. explain why the reference year duty rate in the second model run would change, i.e. it is no longer t^{REF} but t^{CON};

c. illustrate the quantitative effects of this alternative approach compared to its previous submissions with respect to the level of NI; and

d. provide a numerical example highlighting the difference of its newly proposed model execution compared to its previous submissions?

[39] Counter to Canada's implications, it would not be necessary to know the entire history of every duty rate ever applied to each company to run the U.S. model, although Canada acknowledges that it has access to that information as well. Canada's Responses to Questions Following the Virtual Session, paras. 49-50.

Comment:

35. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to all of the subparts in a single comment, below.

36. Contrary to Canada's contention, Canada's model does not "essentially work the same way" as the U.S. model.[40] As the United States explained in the U.S. response to question 197, Canada's proposal to use three different formulas to calculate the level of nullification or impairment – depending on the relative magnitudes between the reference year duty rate (t_{ref}), the factual duty rate with the challenged measure (t_{inc}), and the counterfactual duty rate without the challenged measure (t_{con}) – results in three entirely different counterfactuals, and is inconsistent with Canada's underlying theoretical model. In contrast, the U.S. model consistently reflects one counterfactual regardless of the relative magnitude between the duty rates.

37. Further, Canada fails to fully address the practical implications of its approach. In Figure 2 – in what Canada refers to as the "typical case," when the factual and counterfactual duty rates exceed the reference period duty rates, and the counterfactual duty rate is between the reference period and factual duty rate ($t_{ref} < t_{con} < t_{inc}$) – Canada explains that the formula it proposes to apply under that scenario implies a lower level of nullification or impairment than the formula presented by the Arbitrator in question 127.[41] However, as the United States explained in the U.S. response to question 197, Canada errs in this formula because Canada assumes that the counterfactual rates will have been applied and that Canada will be seeking a modification from the counterfactual rates to the factual rates in a future period after the market has already been adjusted to the counterfactual rates.[42]

38. Further, Canada fails to point out that the application of the third formula Canada proposes – when the factual and counterfactual rates both fall below the reference period duty rates ($t_{con} < t_{inc} < t_{ref}$) – would imply an estimate that would substantially exceed the value produced by the formula presented by the Arbitrator in question 127. Regardless, whether Canada's multi-formula approach produces larger or smaller estimates than the formula presented by the Arbitrator in question 127 is not relevant to the question of whether Canada's approach will result in a reasoned estimate of nullification or impairment. Rather, the issue is whether the methodology will generate an estimate of nullification or impairment that is equivalent to the trade impact of the challenged measure on Canada's imports.

39. However, Canada's multi-formula approach based on the relative magnitude of the duty rates cannot generate a reasoned estimate of nullification or impairment. The United States observes that because Canada's approach is dependent on the relative magnitude of the duty rates, the use of multiple formulas could imply that the level of nullification or impairment associated with a single application of the challenged measure could be based on different

[40] Canada's Responses to Questions Following the Virtual Session, para. 54.
[41] Canada's Responses to Questions Following the Virtual Session, para. 63.
[42] U.S. Responses to Third Set of Questions, para. 30.

counterfactual scenarios for different Canadian companies in the same segment of a CVD proceeding.

40. For example, we assume a hypothetical where the challenged measure is applied to Company A and Company B in an administrative review. For Company A, the reference rate is below both the factual and counterfactual rates such that $t_{ref} < t_{con} < t_{inc}$. In this scenario, Canada's methodology would prescribe calculating the level of nullification or impairment using the formula described in paragraphs 66 through 68 of Canada's response to question 127. As explained in the U.S. response to 197, this formula implies a counterfactual in which the United States will have modified duty rates from the counterfactual rate (t_{con}) to the factual rate (t_{inc}) after duties have previously been changed from the reference rate (t_{ref}) to the counterfactual rate (t_{con}).[43]

41. We further assume that for Company B, the reference rate is between the factual and counterfactual rate such that $t_{con} < t_{ref} < t_{inc}$. In this scenario, Canada's methodology would propose to calculate nullification or impairment using a different formula, specifically, the formula presented by the Arbitrator in question 127.[44] As explained in the U.S. response to question 197, the counterfactual under this formula captures a change from the reference duty rate (t_{ref}) to the counterfactual rate (t_{con}) instead of a change from the reference rate (t_{ref}) to the factual rate (t_{inc}).[45]

42. Therefore, under this hypothetical, Canada's total level of nullification or impairment would be based on two different counterfactual scenarios, further demonstrating why Canada's approach will not produce a reasoned estimate.

43. Lastly, the United States observes that the fact that Canada's log-linearized model requires the counterfactual to differ depending on the relative changes in duty rates in order to minimize the inherent approximation error is further evidence that the approximation bias introduced by the log-linearized formula is substantial, and reveals that use of a log-linear application is not as simple as Canada contends. Indeed, as explained in the U.S. response to question 197, the basis for Canada's complex and inconsistent approach to calculating nullification or impairment is based on the fact that Canada's formula represents an approximate solution to the underlying Armington model.[46]

44. Indeed, Canada now readily admits that in the underlying linearization process of Canada's approach, "calculations based on small percentage differences in duty rates are preferred to calculations based on large differences."[47] As the United States previously

[43] *See* U.S. Responses to Third Set of Questions, para. 30.
[44] Canada's Response to Second Set of Questions, para. 64.
[45] U.S. Responses to Third Set of Questions, para. 29.
[46] Further, as demonstrated by Exhibit USA-48, Canada's approximate solution further compounds each one of Canada's "simplifying" assumptions, thereby magnifying the inherent approximation bias in Canada's formula.
[47] *See* Canada's Responses to Questions Following the Virtual Session, para. 58 ("With the linearized model, the order of calculation matters. This approach is more consistent with the underlying linearization process where

explained, the log-linearization method introduces approximation error into the resulting estimates.[48] The magnitude of this error increases with the size of the percent change in tariff.[49] Therefore, Canada's log-linear approach will not generate a reasoned estimate of nullification or impairment.

191. The Arbitrator understands that according to Canada's formula the level of nullification or impairment (NI) can exceed vimp. This is the case if the product of the scaling factor and the change in duty rate is larger than one (assuming, for the purpose of this question only, that the counterfactual duty rate would equal the reference year duty rate and therefore, no second run of the model would be required). Could Canada please:

a. explain whether this understanding is correct, and whether such a result is economically possible;

b. explain how often such a result would be expected to occur when Canada runs its formula;

c. explain the extent to which such a result should call into question whether the Canadian formula is capable of yielding a "reasoned estimate" of the level of NI; and

d. suggest what should be the level of suspension should the level of NI calculated by Canada's formula exceed vimp?

Comment:

45. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to all of the subparts in a single comment, below.

46. As the United States has previously explained, no economic model can perfectly replicate the inherently complex reality of a product market.[50] Regardless, both parties have utilized and thus implicitly agreed that the Armington partial equilibrium framework is the most appropriate

calculations based on small percentage differences in duty rates are preferred to calculations based on large differences.").

[48] *See also* Riker and Schreiber (2020), p. 1 ("As we would expect, linear approximation magnifies and overstates the absolute magnitudes of the price and quantity effects of a tariff change.") & pp. 4-5 (demonstrating linear approximation error) (Exhibit USA-49).

[49] U.S. Written Submission, para. 88 (citing *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.62 n. 246 ("Unlike solving the Armington model through a linear approximation, the accuracy of the simulation using the Armington model is not affected by the size of the duty rate changes if the model is solved through numerical iteration [that is, directly in its non-linear form]." (citing Hallren & Riker (2017) (Exhibit CAN-04)))). *See also* Riker and Schreiber (2020), pp. 4-5 (Exhibit USA-49).

[50] U.S. Closing Statement at the Virtual Session, para. 4.

for this proceeding.[51] While the United States solves the Armington-based partial equilibrium model exactly in its non-linear form, Canada uses an approximate solution method, *i.e.*, the log-linearized solution. The log-linearization method introduces approximation error into the resulting estimates.[52] As such, the linear approximation error that is generated by Canada's formula – which results from the non-linear solution method – is in addition to any limitations of the Armington framework that Canada implies only applies to the U.S. model.[53]

47. Indeed, Canada's response incorrectly implies that there are differences between the U.S. model and Canada's model that do not exist. Canada alleges that the U.S. model alone has certain limitations because it is an Armington model that features a constant elasticity of substitution assumption.[54] However, both Canada's model and the U.S. model are based on the Armington partial equilibrium model. Both models assume a constant elasticity of substitution demand system.[55] Therefore, all of the limitations described by Canada concerning an Armington-based model implemented with the constant elasticity assumption also apply to Canada's model.[56]

48. In particular, the United States observes that Figure 3 in Canada's response is misleading.[57] The title of Figure 3 suggests that Canada's model does not assume a constant elasticity of substitution demand framework, which is contrary to Canada's actual underlying model. Second, the title implies that log-linearized demand is the same as linear demand. However, this is false. The underlying demand assumed by both models is accurately represented by the red curve. Canada's solution method starts with the same demand functional form as the U.S. model, but linearizes it at the equilibrium point when solving for the effects of a tariff change.[58] In Figure 3, this would be represented by the blue line being tangent to the red curve at the initial equilibrium point.

49. Further, to the extent that Canada suggests that its formula can better characterize the reallocation of U.S. demand across varieties when the challenged measure is removed, such an assertion is false.[59] As the United States has explained, an approximate linear solution to the

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[51] U.S. Closing Statement at the Virtual Session, para. 4. *See also* U.S. comments to Canada's responses to questions 191 and 248(b).
[52] *See* Riker and Schreiber (2020), p. 1 ("As we would expect, linear approximation magnifies and overstates the absolute magnitudes of the price and quantity effects of a tariff change.") & pp. 4-5 (demonstrating linear approximation error) (Exhibit USA-49). *See also US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.62 n. 246 ("Unlike solving the Armington model through a linear approximation, the accuracy of the simulation using the Armington model is not affected by the size of the duty rate changes if the model is solved through numerical iteration [that is, directly in its non-linear form]." (citing Hallren & Riker (2017) (Exhibit CAN-04)).
[53] *See* U.S. Closing Statement at the Virtual Session, para. 4.
[54] Canada's Responses to Questions Following the Virtual Session, para. 73.
[55] *See* Reishus & Lemon Methodology Report, Appendix 1, equations A1-A6; U.S. Written Submission, Appendix 1, equations 1-12.
[56] Canada's Responses to Questions Following the Virtual Session, para. 73.
[57] Canada's Responses to Questions Following the Virtual Session, para. 69 & Figure 3.
[58] Canada's Responses to Questions Following the Virtual Session, para. 68.
[59] Canada's Responses to Questions Following the Virtual Session, para. 74.

model, *i.e.*, Canada's formula, cannot accurately capture the indirect, "offsetting" effects of changes in an individual company's duty rates on other varieties in the model. A linear formula can only approximate what the exact solution would find, and therefore results in imprecise estimates.

50. Lastly, contrary to Canada's argument, it is not a particular benefit of the approximate linear solution that it can imply that a single company can have exactly zero exports to the United States. As the United States explained in the U.S. response to question 196, the U.S. exact, non-linear solution to the Armington model can generate lost export value that is infinitely close to 100 percent. Further, unlike the U.S. model, in cases where $t_{con} = t_{ref}$, Canada's formula will result in a level of nullification or impairment that will exceed the *vimp* of affected exporters.[60] Accordingly, it would not be reasonable to select a methodology that features an approximate solution to the model simply because it permits a Canadian company to lose exactly 100 percent of its exports value.

192. In Proof of Equivalence (Exhibit CAN-105), Canada states that Canada proves the equivalence as between the level of NI obtained with a three-variety version of its model and with the original two-variety version. Could Canada please:

a. explain Canada's claim that "unlike Canada's formula, the market share parameters can only be determined after the WTO-inconsistent duty is imposed". In particular, please clarify whether this has implications for how, and with what data, θ_{CA} in equation (A10) in Canada's methodology paper should be calculated;

Comment:

51. As an initial matter, the United States disagrees with Canada's explanation that the Canadian market share, θ_{CA}, in its model "is the share of U.S. domestic absorption accounted for by imports from Canada."[61] Rather, it would be correct to say that Canada proposes to use a pre-determined, sector-level market share information as a proxy for the actual value of θ_{CA} in its model.[62]

52. Although Canada argues that the use of its proxy for θ_{CA} is an advantage of the Canadian approach,[63] as the United States explained in the U.S. response to questions 68, 76, and 199, the predetermined, sector-level market shares are not a reasonable proxy for the product-specific,

[60] U.S. Responses to Third Set of Questions, paras. 16-22.
[61] Canada's Responses to Questions Following the Virtual Session, para. 77 (emphasis added).
[62] The actual value of θ_{CA} in Canada's model would be calculated using the value of all imports from Canada of the specific product in the reference year in the numerator, and total U.S. domestic absorption of the specific product in the reference year as the denominator. The value of the numerator would be obtained by summing the exact $vimp$ used in Canada's formula with the corresponding value of imports from all other relevant Canadian companies.
[63] Canada's Responses to Questions Following the Virtual Session, paras. 78-79.

contemporary market shares implied by the Armington model.[64] The United States further demonstrated this using data from *Softwood Lumber from Canada* in Exhibit USA-48.[65] Specifically, a comparison of scenarios 1 and 2 in Exhibit USA-48 demonstrates that the use of Canada's proxy for θ_{CA} greatly impacts the estimate of nullification or impairment.[66]

53. Further, as explained in the U.S. comments on Canada's response to question 189, there is no information constraint with respect to use of unaffected companies in the U.S. model, as Canada contends.[67] As Canada has acknowledged, the U.S. model "completely" accounts for the offsetting effects across both unaffected and affected Canadian companies.[68] This is in contrast to Canada's methodology, which does not accurately offset for the effects resulting from the changes in demand among the Canadian imports.[69]

b. explain why the market share of the unaffected Canadian variety, θ_{CAN}, does not feature in the set of equations (9)-(12); and

Comment:

54. The United States does not have comments on Canada's response to subpart (b) of this question.

c. address the United States' claim that "Canada's assertion of equivalence rests in part on an [inappropriate] assumption that the same elasticities are used in both models"?[70]

Comment:

55. Canada now offers Exhibit CAN-135 to show that the proof of equivalence in Exhibit CAN-105 continues to hold even with different supply elasticities between Canadian sources and the other sources. Canada argues that the proof demonstrates that the Canadian formula can

[64] As the United States has explained, Canada's proposal for θ_{CA} in its formula is inconsistent with its model, as defined by equations (A1)-(A6) in Canada's methodology appendix. Indeed, the "public information" Canada proposes to calculate θ_{CA} is aggregated, sector-level data from 2018 and 2019. In contrast, equations (A1)-(A6) in Canada's methodology paper do not include any sector-level variables that are fixed in the past. *See* U.S. responses to questions 68, 76, and 199.
[65] U.S. Opening Statement at the Virtual Session, paras. 64-65.
[66] A comparison of scenarios 1 and 2 demonstrate the impact of using a predetermined, aggregate sector-level market share versus a product-specific market share in Canada's formula. Scenario 1 uses a predetermined, aggregate sector-level market share in Canada's formula. With all else being equal, scenario 2 uses the actual Canadian market share from *Softwood Lumber from Canada*. Using a predetermined, aggregate sector-level market share as a proxy for θ_{CA} in Canada's formula, as Canada proposes, would result in a difference of $53 million, which is 22 percent of the estimate of nullification or impairment in scenario 1. *See* Exhibit USA-48.
[67] Canada's Responses to Questions Following the Virtual Session, paras. 78-79.
[68] Canada's Response to First Set of Questions, para. 84 ("the U.S. approach completely account[s] for the offsetting increase in value of imports experienced by Canadian exporters who are unaffected by the OFA-AFA measure").
[69] *See* U.S. response to question 199.
[70] United States' response to Arbitrator question No. 143, para. 40.

offset for the increase in the value of imports experienced by Canadian exporters who are unaffected by the challenged measure.

56. However, for the same reasons provided in the U.S. response to question 199 concerning the proof of equivalence in Exhibit CAN-105, Exhibit CAN-135 is similarly unpersuasive and fails to demonstrate that Canada's formula can accurately offset for the effects on demand. Indeed, as the United States explained in the U.S. response to question 199, Canada's formula cannot produce an equivalent estimate of nullification or impairment because Canada uses a log-linearized model and continues to use a fixed, aggregate, sector-level market share as a proxy for the product-specific and contemporaneous market share.[71] Therefore, the fact that Exhibit CAN-135 produces a proof of equivalence with different supply elasticities is irrelevant to this proceeding, and fails to demonstrate that Canada's formula is viable for use in this proceeding.

193. Could Canada please:

a. explain why it believes that it will be unable to identify Canadian exporters of "non-subject" products[72];

Comment:

57. Please see the U.S. comment to subpart (c), below.

b. explain what "non-subject" means in this context? If it means Canadian exports of the relevant product from companies that are not subject to any CVD rate (due to their exclusion from the CVD order as a result of the original investigation), could Canada please explain why Canada would not be able to identify such exporters with reference to the original CVD order; and

Comment:

58. The United States does not have comments on Canada's response to subpart (b).[73]

c. address the United States' claim that "Canada can identify the unaffected Canadian exporters".[74]

[71] U.S. Responses to Third Set of Questions, paras. 49-60.
[72] Canada's response to Arbitrator question No. 70, para. 145.
[73] Canada's Responses to Questions Following the Virtual Session, paras. 87-89.
[74] United States' response to Arbitrator question No. 175, para. 94.

Comment:

59. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to subparts (a) and (c) in a single comment, below.

60. As the United States has explained, having a separate unaffected Canadian exporter variety ensures that the calculation of nullification or impairment will accurately offset for the effects on demand in the market if the challenged measure is removed. The parties agree that the United States will provide the value of imports data from Customs. This information will include both the import data for the affected exporters and the unaffected exporters. Therefore, contrary to Canada's contention, Canada will have the import values for all unaffected exporters.[75]

61. In the unlikely circumstance that Customs data is not provided, the United States has explained that Canada should utilize the publicly-ranged sales data from the record of Commerce's proceeding along with data from Census' USA Trade Online. This was also one of the options proposed by Canada.[76] The record of Commerce's proceeding will contain the sales values for the individually-examined companies – both affected and unaffected exporters. With this information, Canada will also be able to obtain a value for the companies under the All Others rate.[77] Therefore, again, contrary to Canada's contention, the value of imports for unaffected exporters is available to Canada.

62. To the extent the Arbitrator considers Canada obtaining information directly from Canadian exporters to be a viable alternative option,[78] the United States disagrees with Canada that unaffected exporters will not have incentive to cooperate and provide the information.[79] Given that CVD rates could increase with the removal of the challenged measure,[80] unaffected exporters could have the incentive to cooperate with Canada in imposing countermeasures to "induce compliance" by the United States and thereby increase the rates of their competitors.[81]

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[75] Canada's Responses to Questions Following the Virtual Session, para. 91 ("Canada expects that it will not able to obtain the import values for all unaffected exporters.").
[76] Canada's Responses to First Set of Questions, para. 191(iii).
[77] U.S. Responses to Second Set of Questions, paras. 108-112.
[78] As the United States has explained, although Canada proposes to have the "discretion" to select from three options if Customs data is not available, the United States considers it appropriate for the Arbitrator to predetermine the primary alternative data source – USA Trade Online with publicly-ranged sales data from Commerce's proceeding – to avoid future disagreement between the parties. U.S. Responses to Second Set of Questions, para. 100. *See also* U.S. Closing Statement at the Virtual Session, para. 9 (concerning Canada's continued advocacy to have "discretion" to select the values and sources that are beneficial to Canada); U.S. comment on Canada's response to question 272, below.
[79] Indeed, Canada now considers it reasonable to request authorization from unaffected exporters for access to confidential data on the record of Commerce's proceeding. Canada's Responses to Questions Following the Virtual Sessions, paras. 8, 10.
[80] U.S. Written Submission, paras. 45, 54.
[81] U.S. Responses to First Set of Questions, para. 70.

63. Lastly, the United States expects that any data used by Canada for the value of imports or for verification will be shared with the United States to ensure transparency and facilitate good faith consultations between the parties. Canada, however, is only prepared to share information with the United States if the company consents.[82] That being the case, Canada should only utilize data for the value of imports or for verification that can be shared with the United States.

194. Could Canada please explain whether Canada would be able to use HS-6 level elasticities of substitution estimated by Fontagnè, Guimbard and Orefice (2020)[83] in the computations of pre-determined scaling factors? If so, could Canada:

a. explain at what level of aggregation (HS-2 chapter, HS-4 headings, or other) would Canada compute scaling factors;

Comment:

64. The United States has explained the concerns with using elasticities that are not from a disaggregated, contemporaneous, and product-specific source. Further, as the United States demonstrated in the U.S. response to question 50, the elasticity values from Fontagne *et al* (2020) exceed those of Soderbery (2015), Ahmad and Riker (2019), and the product-specific values from the Commission reports.

65. However, if the Arbitrator determines to use an aggregate, sector-level source for substitution elasticity,[84] the United States has proposed that the Arbitrator use the median value of the CVD order-specific elasticities from the three academic studies (Soderbery (2015), Ahmad and Riker (2019), and Fontagne *et al* (2020)) with a level of disaggregation at the 6-digit level HTS or higher.[85]

66. As the United States explained under option three of the U.S. tiered approach, where substitution elasticity values are obtained from predetermined sources, the HS-6 level should be used. The United States is surprised by Canada's suggestion to use the HS-4 level from Fontagne *et al* (2020), particularly when Canada previously stated that Canada "prefers the use of the more detailed HS 6-digit estimates in the context of the Canada model, with the use of appropriate weights and correspondence".[86] Indeed, the United States disagrees with Canada's proposal to use the elasticity values at the HS-4 level from Fontagne *et al* (2020) when the HS-6 level is readily available.[87] Although Canada appears to discount the use of the HS-6 data because it involves weighting the HS-6 estimates by the relevant value of imports to the United States, Canada previously stated that the use of HS-4 values from Fontagne *et al* (2020) would

[82] Canada's Responses to Questions Following the Virtual Session, para. 202.
[83] Accessible via https://sites.google.com/view/product-level-trade-elasticity.
[84] As explained, the United States only considers this appropriate if the relevant Commission report does not have the substitution elasticity value, and the parties are unable to agree on an alternative, future source in consultations.
[85] *See* U.S. Responses to Third Set of Questions, para. 39 and U.S. alternative instructions in Annex A.
[86] Canada's Response to Second Set of Questions, para. 75.
[87] *See* Exhibit CAN-140.

also similarly require a weighting exercise.[88] Therefore, it is unclear to the United States why Canada now seeks to use the more aggregated HS-4 level from Fontagne *et al* (2020). Further, the parties already agree that the United States will provide the relevant value of imports from Customs. Accordingly, the information will be readily available to accomplish the weighting exercise if the Arbitrator determines it necessary.

67. In any event, the United States observes that the issue presented in this question is not present under the U.S. preferred approach of using the product-specific elasticity value from the relevant Commission report.

b. submit HS-6 level elasticities of substitution estimated by Fontagnè, Guimbard and Orefice (2020) as an Exhibit; and

Comment:

68. The United States does not have comments on Canada's response to subpart (b).

c. provide an updated version of its Replication Files (Exhibit CAN-74) that uses HS-6 level elasticities of substitution estimated by Fontagnè, Guimbard and Orefice (2020)?

Comment:

69. In the U.S. alternative instructions in response to Annex A, the United States followed the Arbitrator's proposed instructions in Annex A for the zeroes and missing values to be replaced by the median within the more aggregated HS level.[89] If the Arbitrator determines to use a weighted average instead of the median, the weights should be U.S. imports from Canada corresponding to the 6-digit HS sub-heading. Further, the weighted average should only include the statistically significant, non-outlier values.

195. In replying to this question, Canada is invited to make appropriate reference to Canada's response to Arbitrator question No. 43, para. 89.

Could Canada please explain:

a. whether scaling factors are company-specific (i.e. each company or group of companies subject to the all-others rate would have a unique scaling factor assigned to it), or CVD order-specific (i.e. all companies and the companies subject to the all-others rate would all be assigned the same scaling factor);

b. whether, should situations arise in which two or more HTS 10-digit codes are referenced in a given CVD order but fall under the scope of different scaling factors, Canada would calculate a single CVD order-specific scaling factor;

[88] Canada's Response to Second Set of Questions, para. 77.
[89] *See* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, para. 1.5.

c. if so, whether Canada would compute that single scaling factor using a simple average or a weighted average of the relevant scaling factors;

d. if Canada were to use a weighted average, what weights would Canada use;

e. if Canada would not calculate an average CVD order-specific scaling factor, what alternative methodology would Canada follow; and

f. whether there could be situations in which some or none of the HTS 10-digit codes referenced in a given CVD order falls under the scope of a scaling factor, and, if so, how would Canada compute a scaling factor in these situations?

Comment:

70. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to all of the subparts in a single comment, below.

71. The United States observes that the issue identified by this question is not present under the U.S. approach of using a product-specific elasticity from the relevant Commission report. However, if there is a need to resort to the elasticity values from predetermined sources, the United States refers the Arbitrator to option three of the U.S. tiered approach, as provided in the U.S. alternative instructions.[90]

3 ELASTICITY OF SUBSTITUTION

3.1 For Canada

200. Please assume, for purposes of this question only, that two or more HTS 10-digit codes referenced in a given CVD order fall under multiple HS 6-digit categories, and that elasticities of substitution were available at the HS 6-digit level. Could Canada please explain:

a. whether Canada would calculate a CVD order-specific elasticity of substitution by averaging across different substitution elasticities within the CVD order;

b. if so, whether Canada would use a simple average or a weighted average;

c. if Canada were to use a weighted average, what weights would Canada use; and

d. if Canada would not calculate an average, CVD order-specific elasticity of substitution, which methodology would Canada follow?

[90] *See* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.1-1.10.

Comment:

72. Following the form of Canada's response to this question, the United States similarly responds to Canada's response to all of the subparts in a single comment, below.

73. The United States observes that the issue identified by this question is not present under the U.S. approach of using a product-specific elasticity from the relevant Commission report. However, if there is a need to resort to predetermined elasticity values, the U.S. approach to calculating substitution elasticity under option three of the U.S. tiered approach is provided in the U.S. alternative instructions.[91]

4 ELASTICITY OF DEMAND

4.1 For Canada

201. Assume, for purposes of this question only, that two or more HTS 10-digit codes referenced in a given CVD order fall under different elasticities of demand. Could Canada please explain:

a. whether Canada would calculate a CVD order-specific elasticity of demand by averaging across different demand elasticities within the CVD order;

b. if so, whether Canada would use a simple average or a weighted average;

c. if Canada were to use a weighted average, what weights would Canada use; and

d. if Canada would not calculate an average, CVD order-specific elasticity of demand, which methodology would Canada follow?

Comment:

74. Following the form of Canada's response to this question, the United States similarly responds to Canada's response to all of the subparts in a single comment, below.

75. The United States observes that the issue identified by this question is not present under the U.S. approach of using a product-specific elasticity from the relevant Commission report. However, if there is a need to resort to obtaining elasticity values from predetermined

[91] *See* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.1-1.6.

sources, the United States explains the approach for demand elasticity under option three of the U.S. tiered approach in the U.S. alternative instructions.[92]

5 MARKET SHARES AND MARKET SIZE

5.1 For both parties

202. If, in the parties' answers to question No. 207, below, the parties' answers indicated that more than one reference period might be used when Canada runs the model in a given instance (e.g. for one company or group of companies reference year (*t-1)* and for another company reference year (*t*)), and assuming for the moment that the Arbitrator decides to adopt the United States' proposed model, then please explain shipments and for US imports from the rest of the world (i.e. all sources except Canada).

Comment:

76. Although Canada now acknowledges that "all relevant market shares should be based on the same reference period," Canada continues to advocate for the use of a pre-determined, aggregated, sector-level market share.[93] However, as the United States has explained, it is necessary for the market share used in Canada's formula to represent the reference year, *i.e.*, the same year as the data on $vimp$. If the market share is not based on the same reference year as the value of imports, the formula is not consistent with the underlying model.[94] Indeed, using data from *Softwood Lumber from Canada,* the United States also demonstrated in Exhibit USA-48 that, in practice, Canada's pre-determined market shares are not reasonable proxies.[95]

77. Further, Canada exaggerates the difficulty of obtaining contemporaneous market share information. As the United States explains in both the U.S. comment and U.S. response to question 256, the table in Exhibit USA-54 demonstrates that there is a likelihood that the U.S. domestic shipments could be obtained directly from the Commission report.[96] Indeed, in the past seven years, in cases involving Canada, 70 percent of the Commission investigation determinations (that is, 7 of the 10 determinations) publicly reported U.S. domestic shipment information.[97]

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[92] U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.9-1.10.
[93] Canada's Responses to Questions Following the Virtual Session, paras. 107, 109-110.
[94] *See* U.S. comment on Canada's response to question 192; U.S. response to question 76 (and corrected by U.S. comment to Canada's response to question 203). *See also* U.S. responses to questions 47, 68, 143, 199.
[95] Compare scenarios 1 and 2 to see the impact of using a predetermined, aggregate sector-level market share versus a product-specific market share in Canada's formula. Using a predetermined, aggregate sector-level market share in Canada's formula, as Canada proposes, would result in a difference of $53 million, which is 22 percent of the estimate of nullification or impairment in scenario 1.
[96] U.S. comment to Canada's response to question 256; U.S. response to question 256; Exhibit USA-54.
[97] *See* U.S. comment to Canada's response to question 256; U.S. response to question 256; Exhibit USA-54.

78. In the event that data in the Commission report is not public, the U.S. alternative instructions present a tiered approach to address this scenario – *i.e.*, if domestic market share data from the Commission report is not public – and also define inputs for market shares of each variety to obtain the total value of the relevant U.S. market (Y).[98] The U.S. alternative instructions thus provide for the use of product-specific, contemporaneous data, where available, and for reasonable proxies where such data are unavailable.

5.2 For Canada

203. Could Canada please comment on the United States' assertion that the level of NI will be biased downward/upward if the future market share increases/decreases relative to the fixed, pre-determined market share in Canada's formula?[99]

Comment:

79. As an initial matter, as the United States explained at the virtual session, the United States wishes to correct the U.S. response to question 76 and clarify that the level of nullification or impairment calculated from a formula using a predetermined market share will be biased upward if the future market share increases relative to the predetermined, sector-level market share. That is, if the fixed, past market share used to calculate the level of nullification or impairment is less than the contemporaneous market share associated with the value of imports input, then the estimate of nullification or impairment obtained from Canada's formula will be inflated.

80. Further, the United States disagrees with Canada that there is "no reason to believe that the expected future market shares will be on average higher or lower than the pre-determined market share."[100] As the United States explained in the U.S. response to question 260, because CVD duties are applied in response to a finding that a government has provided subsidies to an industry, it is reasonable to expect that in many instances such subsidies will have increased Canada's market share relative to the predetermined share, thus inflating the estimate of nullification or impairment under Canada's approach.[101]

81. Second, the assertion that a key advantage of Canada's approach is there is separation between the market share parameter used in the scaling factor and the value of imports is false.[102] Rather, this separation between the market share and the value of imports renders Canada's formula inconsistent with the Armington model that Canada purports to approximate.[103] As the United States demonstrated in the U.S. response to question 199, the market share parameter and

[98] *See* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.12-1.22.
[99] United States' response to Arbitrator question No. 76, para. 204.
[100] Canada's Responses to Questions Following the Virtual Session, para. 111.
[101] U.S. Responses to Third Set of Questions, paras. 180-185. *See also* U.S. Opening Statement at the Virtual Session, paras. 54, 64-66.
[102] Canada's Responses to Questions Following the Virtual Session, para. 112.
[103] *See* U.S. response to question 76.

the value of imports are, in fact, fundamentally linked in the Armington model from which Canada's formula is derived.[104]

82. Finally, Canada argues that changes in market share over time have only "little to modest impact" on the scaling factor.[105] Canada, therefore, appears to imply that the estimate of nullification or impairment is insensitive to changes in the market share values used in the scaling factor. However, this is false. Using data from *Softwood Lumber from Canada,* the United States demonstrated in Exhibit USA-48 the impact of using a predetermined market share as a proxy for the actual product-specific market share. In Exhibit USA-48, the use of Canada's scaling factor that "differs by only 22 percent"[106] translates into an estimate that inflates nullification or impairment by 22 percent.[107]

83. Canada attempts to diminish this result by arguing that the difference is "only" 22 percent and that such a difference is "reasonable".[108] Canada's assertion is disingenuous. In Exhibit USA-48, the United States provided a hypothetical example in scenarios 1 and 2 with a very small change in duty rates. That is, the hypotheticals used a reference duty rate of 17.99 percent, a factual duty rate of 20 percent, and a counterfactual duty rate of 18 percent. A comparison of scenarios 1 and 2 results in a scaling factor that differs by 22 percent, which amounts to $53 million over the estimate produced by Canada's formula when the scaling factor uses the exact market share.[109] The United States does not consider such an amount to be insignificant nor reasonable.

84. To illustrate further the large impact that Canada's predetermined market share has on the estimate of nullification or impairment, the United States continues the hypothetical from Exhibit USA-48 and produces an additional table below. Scenarios 1 and 2 from Exhibit USA-48 are reproduced as Scenarios 1 and 2 in Table 1, below. Table 1 also includes an additional pair of scenarios that are identical to Scenarios 1 and 2, but hypothesizes a larger change in duty rates from the 17.99 percent in the reference period. Therefore, in Scenarios 3 and 4 in Table 1, the hypothetical assumes 40 percent as the factual rate and 20 percent as the counterfactual rate.[110] In this hypothetical, a 22 percent difference in the scaling factor amounts to $530 million over

[104] *See* U.S. Responses to Third Set of Questions, para. 51 (demonstrating how the definition of θ_{CA} in Canada's own derivation of its formula is by definition, inextricably linked to $vimp$).
[105] Canada's Responses to Questions Following the Virtual Session, para. 114.
[106] Canada's Responses to Questions Following the Virtual Session, para. 113.
[107] As explained in Exhibit USA-48, comparing scenarios 1 and 2 results in a difference of $53 million, which is 22 percent of the estimate of nullification or impairment in scenario 1 (using a predetermined market share). Put another way, a difference of $53 million is 27% of the estimate of nullification or impairment in scenario 2 (using a product-specific market share).
[108] Canada's Responses to Questions Following the Virtual Session, paras. 113-114.
[109] In Exhibit USA-48 and Table 1, below, compare scenarios 1 and 2 to see the impact of using a predetermined, aggregate sector-level market share versus a product-specific market share in Canada's formula with a very small duty rate change. Using a predetermined, aggregate sector-level market share in Canada's formula, as Canada proposes, would result in a difference of $53 million, which is 22 percent of the estimate of nullification or impairment in scenario 1.
[110] These hypothetical rates were also the rates used in scenarios 6 and 7 of Exhibit USA-48 to demonstrate the approximation bias of a linear model when there is a large change in duty rates.

the estimate produced by Canada's formula when the scaling factor uses the exact market share.[111] Certainly, a difference of $530 million is neither insignificant nor reasonable. Therefore, a 22 percent difference clearly demonstrates that the use of a predetermined, sector-level market share will not produce a result that is equivalent to the level of nullification or impairment actually experienced by Canada, and is therefore inconsistent with Article 22.7 of the DSU.

Table 1: Nullification or Impairment Under Canada's Formula with Canada vs. U.S. Market Share Parameter[112]

Scenario	**Duty Rate Change**	**Canada Market Share (θ_{CA})**	**Subject duty rates**		**NI ($ in thousands)**
1. Canada Base Model	Small duty rate change	0.08[113]	t_ref	17.99	$243,107
			t_inc	20.00	
			t_con	18.00	
2. Canada Base Model using actual Softwood Lumber market share	Small duty rate change	0.322[114]	t_ref	17.99	$190,157
			t_inc	20.00	
			t_con	18.00	
3. Canada Base Model	Large duty rate change	0.08	t_ref	17.99	$2,431,068
			t_inc	40.00	
			t_con	20.00	
4. Canada Base Model using actual Softwood Lumber market share	Large duty rate change	0.322	t_ref	17.99	$1,901,567
			t_inc	40.00	
			t_con	20.00	

204. To calculate the share of total (i.e. from *all* non-US countries) imports in US consumption at the level of Caliendo and Parro sectors, or of HS 2-digit chapters, Canada computes a weighted average of BEA industries import shares, mapped to HTS 10-digit product codes, with weights given by HTS 10-digit level shares of

[111] Compare scenarios 3 and 4 in Table 1, above, to see the impact of using a predetermined, aggregate sector-level market share versus a product-specific market share in Canada's formula with a larger change in duty rate. Using a predetermined, aggregate sector-level market share in Canada's formula, as Canada proposes, would result in a difference of $530 million, which is 22 percent of the estimate of nullification or impairment in scenario 3.

[112] All scenarios apply Canada's formula using the Arbitrator's definition of nullification or impairment as discussed in Question 127, $NI = vimp * SCF * \frac{(t_{inc} - t_{con})}{1+t_{ref}}$. The elasticities used in the examples are those used in Exhibit USA-48, Scenario 1.

[113] Reishus & Lemon Methodology Report, p. 14, Figure 2.

[114] USITC Softwood Lumber Final Determination, p. IV-12, Table IV-7 (Exhibit USA-34).

***Canadian* imports in total US imports.[115] Could Canada please explain and justify the use of a weighted average, and its choice of weights?**

Comment:

85. The United States maintains that it is inappropriate to calibrate a model of an unknown, future specific product at a specific point in time using highly aggregated data from a fixed, past period. Such an approach cannot produce a reasoned estimate of nullification or impairment. The United States provides detailed instructions on the U.S. methodology for calculating market shares in the U.S. alternative instructions in Annex A of the U.S. Responses to Third Set of Questions.[116]

6 CHANGE IN DUTY RATE

6.1 For both parties

207. Assume that an investigation occurs in year t. There are three individually investigated companies, A, B, and C. Companies A and B are given individual CVD rates affected by the OFA-AFA Measure. Company C is given an unaffected individual CVD rate. The all-others rate is also affected by the OFA-AFA Measure. Canada runs the model at this time and suspends concessions. An administrative review occurs and concludes in year t+1.[117]

For each scenario below, please explain: (a) which companies Canada would run the model for in year t+1; (b) what the reference period (for value of imports/market shares and change of duty rate) would be for each individually investigated company (whether affected or unaffected), and the companies subject to the all-others rate; and (c) to what extent the newly calculated level of suspension would replace the level calculated in year t.[118]

Comment:

86. As the United States explained in the U.S. response to this question, the United States has modified its proposal for the reference year to be the year prior to the most recent application of the challenged measure to adequately reflect and accommodate the characteristics of the challenged measure.[119] Specifically, the characteristics of the challenged measure are such that the measure is unlikely to occur for several years in the same CVD proceeding, thereby resulting

[115] Canada's methodology report, para. 5 in Appendix 2.
[116] U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.12-1.22.
[117] Please assume strictly for purposes of this question that the Arbitrator agrees with Canada's position that a triggering event occurs when a CVD rate affected by the OFA-AFA Measure is imposed on a Canadian company, even if such duties have not been assessed.
[118] Please assume strictly for purposes of this question that the Arbitrator would not define the duration of the reference period as anything other than one calendar year.
[119] U.S. Responses to Third Set of Questions, para. 68.

in outdated reference year data if the reference year always remains the year prior to the original application of the challenged measure.[120] The United States has amended its approach to ensure that the level of nullification or impairment will be reasonable and accurate. In contrast, Canada's approach, by refusing to accommodate for the challenged measure at issue, will definitively produce a level of nullification or impairment that does not reflect the market conditions at the time of the new application of the challenged measure.

87. Indeed, in the scenarios described in the subparts below, evaluating the level of nullification or impairment associated with the application of the challenged measure to an unknown future product requires a model that represents the market in year t for that product. Such a model would be calibrated with parameters – elasticities and market share – that represent the market in year t and would scale the product of the value of imports of the exporters in year t and the change in the duty rates between year t and year $t + 1$, the year in which the measure is applied. Canada, however, maintains the use of year $t - 1$ for the reference period.

88. The United States provides the following comments to Canada's responses to each subpart without prejudice to the U.S. position that Canada may only seek to suspend concessions after duties have been assessed.

a) In the administrative review, Company A's OFA-AFA rate is taken off and replaced with a WTO-consistent CVD rate. Company B retains its WTO-inconsistent CVD rate originally affected by the OFA-AFA Measure, and the all-others rate is again affected by the OFA-AFA Measure, but changes.[121] Canada runs the model and suspends concessions.

Comment:

89. As the United States clarified in the U.S. response to this subpart, an affected All Others rate in an administrative review means that there must be an additional company that was affected by the new application of the challenged measure.[122] Therefore, the United States understands this scenario to include an administrative review of both Company A and at least one additional company, "Company D". Further, as the United States has explained and as Canada appears to also recognize,[123] there is both an All Others rate in the investigation, as well as the All Others rate in an administrative review. Canada's response, however, does not provide an explanation for its treatment of "Company D" and the All Others rate from the investigation.

90. In Canada's response, Canada considers Company B and the All Others rate in the administrative review to be affected exporters. Canada treats the two as separate affected varieties. As the United States explains above, the scenario described also requires "Company

[120] U.S. Responses to Third Set of Questions, para. 76.
[121] The Arbitrator understands that a reference period for unaffected companies would only be necessary under the US model.
[122] U.S. Responses to Third Set of Questions, para. 79.
[123] Canada's Responses to Questions Following the Virtual Session, paras. 49, 262.

D" and the All Others rate from the investigation. Canada has not provided an explanation for its treatment of these latter two varieties. To the extent that Canada would also treat "Company D" and the All Others rate from the investigation as additional separate varieties, it is clear that contrary to Canada's assertion in response to question 250(d),[124] Canada's approach treats each affected company as a separate variety and Canada's approach has multiple Canadian varieties based on changes in duty rates.[125]

91. Importantly, with multiple Canadian varieties and differing changes in duty rates, Canada's approach may require different formulas for each variety to calculate the level of nullification or impairment because Canada would choose from three different formulas depending on the relative magnitude between the reference year duty rate, the factual rate, and the counterfactual rate.[126] This means that Canada would be utilizing different counterfactual scenarios to generate the total level of nullification or impairment.[127] In contrast, a properly specified model would apply a consistent definition for calculating nullification or impairment for all varieties.

92. For the All Others rate, Canada proposes to use the new factual and counterfactual duty rates from year t +1. However, the reference period duty rate and value of imports would be from year $t-1$. Therefore, the result from Canada's formula does not reflect the level of nullification or impairment attributed to the change in the All Others rate in the administrative review, year t +1. Rather, by using the reference period duty rate and the value of imports from year $t-1$, Canada is instead estimating the level of nullification or impairment as if the rates from the administrative review were imposed during the investigation, year t. That is, the formula is approximating the change in the value of imports in the investigation year attributable to moving from the investigation year duty rates to the factual and counterfactual rates from the administrative review.

93. Further, if "Company D" previously received the affected All Others rate from the investigation, but now has a new affected individually-examined CVD rate, Canada would also need to take this into account. However, Canada has not provided an explanation for how it would account for this scenario under Canada's approach. To assist the Arbitrator, the United States assumes that Canada's approach would be the same as its approach for the All Others rate, that is, using the factual and counterfactual rate in year t +1, but the reference period duty rate and value of imports from year $t-1$. If that is the case, by using a reference year of $t-1$, Canada would again be estimating the level of nullification or impairment as if "Company D's" rate from the administrative review was imposed during the investigation, year t.

[124] *See* Canada's Responses to Questions Following the Virtual Session, para. 257.
[125] *See* U.S. comment to Canada's response to question 250(d) (explaining that Canada's formula does not maintain only a single Canadian variety as Canada contends).
[126] *See* Canada's response to questions 127 and 190; U.S. response to question 197; U.S. comment to Canada's response to question 190.
[127] *See* U.S. comment to Canada's response to question 190.

94. Lastly, Canada's formula fails to accurately account for the fact that Company A is no longer affected by the challenged measure. Indeed, Canada maintains that it will not change the level of nullification or impairment for Company B because the company has a legacy affected rate.[128] Therefore, Canada's approach will overstate the level of nullification or impairment because Canada fails to explicitly account for the fact that Company A is no longer affected, but yet maintains the level of nullification or impairment from Company B.

95. For the U.S. approach under the U.S. model, please see the U.S. response to this subpart.

b) In the administrative review, Company A is assigned a new CVD rate but its new CVD rate is again affected by a new application of the OFA-AFA Measure. Company B retains its originally imposed OFA-AFA-affected CVD rate. Company C is assigned an individual CVD rate affected by a new application of the OFA-AFA Measure. Canada runs the model and suspends concessions.

Comment:

96. In its response to this subpart, Canada provides the same procedures that are discussed in its response to subpart (a). Accordingly, the U.S. comments on Canada's response to subpart (a) apply equally to Canada's approach under subpart (b).

97. For the U.S. approach under the U.S. model, please see the U.S. response to this subpart.

c) In the administrative review, Company C becomes subject to an affected all-others rate, but previously had an individually assigned CVD rate. All other individually investigated companies retain their original CVD rates. Canada runs the model and suspends concessions. Please also explain how to calculate the all-others *vimp* and change of duty rate in this example, with a special eye to explain how Company C would factor into that calculation, if at all.

Comment:

98. As the United States explained in the U.S. response to this subpart, the scenario as described is not possible without also including additional companies. This is because for Company C to subsequently have an affected All Others CVD rate in the administrative review, other companies must have also been individually-examined in the administrative review, with at least one being affected by the challenged measure. Therefore, to facilitate a response to this question, the United States further assumed that "Companies D and E" are reviewed in the administrative review. Canada's response does provide an explanation for how Canada's formula would handle the additional companies in the administrative review. Canada's response also does not discuss how Canada would treat the All Others rate from the investigation.

[128] Canada's Responses to Questions Following the Virtual Session, para. 124.

99. In general, Canada again provides the same procedure that is discussed in Canada's response to subpart (a). Accordingly, the U.S. comments to Canada's response to subpart (a) apply equally to Canada's approach under subpart (c).

100. In addition, Canada proposes for the calculation of the level of nullification or impairment associated with the All Others rate in the administrative review to include the reference year imports for Company C.[129] By doing so, Canada's calculation of the level of nullification or impairment would estimate the impact on imports under the All Others rate as if Company C had been part of the All Others variety in the original investigation, rather than an individually affected variety later incorporated into the All Others rate. As such, Canada's approach would not be assessing the impact of Company C in the All Others rate during the administrative review. Additionally, Canada does not explain how it will adjust the All Others rate from the investigation, which some companies – the United States assumed a "Company D" and "Company E" in the U.S response – may no longer be a part of as a result of the administrative review.

101. For the U.S. approach under the U.S. model, please see the U.S. response to this subpart. Contrary to Canada's contention, the U.S. model is not "more complicated", and, in fact, in operation, is simpler. Canada simply would need to input the relevant data inputs – most of which would also be needed to calculate Canada's formula – and the model would generate the estimate of the level of nullification or impairment.

d) In year t+1, instead of an administrative review occurring, a new shipper review occurs. The new shipper is assigned an individual CVD rate that is affected by the OFA-AFA Measure. Canada runs the model and suspends concessions. As part of this response, please also explain whether a new all-others rate would be calculated in any CVD proceeding other than an investigation or administrative review.

Please be specific in your answers and indicate whether and how your answer would change based on whether the Arbitrator were to adopt the Canadian formula or the US model.

Comment:

102. As the United States has explained, new shipper reviews are not within the scope of this arbitration proceeding.[130] Canada's response to subpart (d) is a further demonstration that new shipper reviews are not properly within the scope of this arbitration proceeding.

103. The methodology Canada proposes for calculating nullification or impairment attributable to a new shipper in a new shipper review is inappropriate because it is unconnected with the market the new shipper is entering. The appropriate reference period to evaluate the

[129] Canada's Response to Questions Following the Virtual Session, para. 134.
[130] U.S. Responses to First Set of Questions, para. 103.

impact of the challenged measure on a new shipper is the year prior to the imposition of the measure. As the United States explained, it is unlikely that this information will be available because, by definition, a new shipper is a company that did not previously export the product.[131] Further, under Canada's approach, it is almost certain that there will be no imports to utilize because Canada proposes to use a reference year of $t-1$. By definition, a new shipper will not have a value of imports during the period of investigation.[132] That is, to qualify as a new shipper, the company requesting the review cannot have exported during the period of investigation, which would likely be year $t-1$.[133] Therefore, under Canada's approach, the new shipper is devoid of a value for imports from year $t-1$.

104. To remedy this, Canada proposes to use the annualized imports value from an unnamed year[134] and create import values for year $t-1$ by applying the new shipper's estimated share of imports under the All Others rate in the unnamed year to the value of imports under the All Others rate in the year $t-1$. However, this method fails to account for the fact that the composition of the All Others rate differs between segments of a proceeding.[135]

105. Second, Canada's approach may likely inflate the estimate of nullification or impairment. This becomes clearer if we assume that the new shipper review happens in year $t+4$. In that case, Canada would be estimating a value of imports for the new shipper based on import flows five years in the past. During these five years, the value of imports under the All Others rate may have declined, as a result of the composition of the All Others rate changing as well as having been affected by CVD and AD duties that are not at issue in this proceeding. In that very likely scenario, Canada would be inflating the estimate of nullification or impairment to the extent that it would also be inflating its estimate of the new shipper's imaginary imports from year $t-1$.

106. Canada's approach – to artificially create a reference period value of imports for the new shipper – is a further demonstration that new shipper reviews are not within the scope of this proceeding. Further, such an approach only magnifies the flaws in Canada's formula, which already ensure the estimate is disconnected from actual market conditions. Canada's proposal to use pre-determined scaling factors parameterized with fixed, past, sector-level market shares and elasticities, and now with an artificial value of imports, ensures that the formula does not correctly characterize the market in any scenario.

208. The parties have explained that, after a CVD order is issued, importers indicate an "AD/CVD case number" on Form 7501. As a matter of terminology, could the parties please clarify whether the correct term is indeed "CVD/AD Case Number", or is it a "CVD Number"? Could the parties please also confirm that this number is

[131] U.S. Responses to Third Set of Questions, para. 97.
[132] U.S. Responses to Third Set of Questions, para. 97; Canada's Responses to Questions Following the Virtual Session, para. 140.
[133] Canada's Responses to Questions Following the Virtual Session, para. 141 n. 97.
[134] The United States assumes Canada is referencing a year in which the new shipper had imports.
[135] U.S. Responses to Third Set of Questions, para. 79 n. 70; Canadas's Responses to Questions Following the Virtual Session, para. 49.

associated with the specific values of imports on Form 7501 that the importers consider to be subject to a relevant CVD order?

Comment:

107. The United States does not have comments on Canada's response to this question.

209. The Arbitrator understands that the parties agree that, regarding the change in duty rate, the reference period CVD rate with respect to a company or group of companies:

a) will be zero unless that company or group of companies had previously been assigned a CVD rate as a result of a CVD order resulting from an original investigation (or subsequent CVD proceeding such as an administrative review) concerning the same product to which the OFA-AFA Measure was applied; and

b) if the reference period CVD rates varies, the reference period CVD rate will be the weighted average of the CVD rates using the number of months that the relevant rates were in effect as weights.

Could the parties please confirm this understanding? If it is correct, could the parties then further state their understanding of how the weights would be assigned if a reference period CVD rate was not in effect for a whole number of months (e.g. if the reference period CVD rate was 5% through 10 April, and then changed to 10% through 31 December)?

Comment:

108. The United States does not have comments on Canada's response to this question.

7 VALUE OF THE IMPORTS

7.1 For both parties

214. The Arbitrator notes that Canada has indicated that it will, in its initial notification to the United States following a triggering event, identify, *inter alia*, the "cross-owned affiliates" of individually investigated firms.[136] Could the parties please explain the role of "cross-owned affiliates" in the collection of CVDs under the US system? Are "cross-owned affiliates" of companies subject to CVD rates always assigned the same CVD rate? How are "cross-owned affiliates" identified by importers who must decide how to assign CVD rates to imports? How would Canada identify "cross-owned affiliates", and how often would that judgment be expected to coincide with importers'?

[136] Canada's response to Arbitrator question No. 154, paras. 105-106.

Comment:

109. The United States does not have comments on Canada's response to this question.

215. The Arbitrator thanks the parties for their jointly proposed BCI Understanding. The Arbitrator would like to confirm its understanding that, in order for US Customs to release import data to Canada, it would not be "necessary" (within the meaning of the first line of paragraph 3 of the draft BCI Understanding) for Canada to "obtain an authorizing letter" from the entity that submitted such information, although, in order for the USDOC to release confidential information on the record of a USDOC proceeding, such an authorizing letter would be necessary?

Comment:

110. The United States refers the Arbitrator to the U.S. response to this question. The United States does not have further comments on Canada's response.

216. It is the Arbitrator's understanding that, in US Customs data collected from Form 7501, specific values of imports are always assigned to unique HTS 10-digit level code. Could the parties please confirm this understanding?

Comment:

111. The United States does not have comments on Canada's response.

217. The parties have explained that, after a CVD order is issued, importers indicate an "AD/CVD case number" on Form 7501 when the importer considers that the relevant imports, or certain of such relevant imports, are subject to that unique CVD order. Could the parties please confirm that the importers will include this number and associate it with relevant imports even when the imports are from a Canadian exporter that was excluded entirely from the scope of the CVD order (e.g. because it was assigned a zero or *de minimis* individual CVD rate in the original investigation)? Can the parties also please confirm that such a "AD/CVD case number" is assigned to values of imports associated with specific and unique HTS 10-digit level codes?

Comment:

112. In its response, Canada provides an example from the CVD investigation of Steel Rebar from Turkey concerning the assignment of a company-specific case number to an excluded company.[137] The United States confirms that company-specific case numbers are assigned to excluded companies and signal to Customs that cash deposits should not be collected from that specific exporter.

[137] Canada's Responses to Questions Following the Virtual Session, para. 163.

113. However, as the United States explained in the U.S. response to this question, when the imports from a company are not subject to AD/CVD duties, importers are not required to report an AD/CVD case number on the entry summary form 7501. Therefore, although the importer entering merchandise may use the 10-digit AD/CVD company case number, this is not required.

114. Regardless, to ensure that an excluded company's value of imports is accounted for in the model, the United States will provide Customs the excluded company's name and request the value of imports that entered under the relevant 10-digit HTS codes.

218. The parties appear to disagree as to whether Statistics Canada is in possession of company-specific data with respect to Canadian exporters. Could the parties please clarify this apparent disagreement?[138]

Comment:

115. In Canada's response, Canada confirms that it would only be able to receive aggregated, non-confidential data from Statistics Canada on an 8-digit HS basis.[139] Accordingly, the United States maintains that the provision of aggregated, company-specific Customs data is appropriate for both the calculation of nullification or impairment and for verification. Indeed, Canada has explained that the use of aggregated 8-digit HS data from Statistics Canada is intended to reveal any "large-scale error in reporting the U.S. Customs data. It is not intended to capture minor discrepancies in company-specific data provided by U.S. Customs."[140] Thus, it remains unclear to the United States the purpose of providing disaggregated, entry-by-entry, 10-digit HTS Customs information when Canada would only use aggregated, 8-digit HS data from Statistic Canada data for verification.

219. Assume that the Arbitrator considered it reasonable for Canada to receive information from US Customs, pursuant to the parties' BCI Understanding, in disaggregated form as suggested by Canada.[141] In this case, could the parties please submit a joint proposal for an excel spreadsheet format that would contain such data? Please also assume that the USDOC would *further* offer a suggested assignment of aggregated values with reference to: (a) each individually investigated

[138] United States' response to Arbitrator question No. 156; Canada's response to Arbitrator question No. 172, para. 168.
[139] Canada's Responses to Questions Following the Virtual Session, para. 168. *See also* Canada's Response to Second Set of Questions, para. 114.
[140] Canada's Response to Second Set of Questions, para. 114. Indeed, although U.S. import data is shared with Statistics Canada for statistical purposes for Canadian exports, it is unlikely that the data would match up. This is because different processes are used between Statistics Canada and Census to formulate the final statistics. *See* Steven Mozes & Diane Oberg, U.S. – Canada Data Exchange, 1990-2001, p. 7 ("Despite the exchange, the two countries' data are not identical. There are still differences between the two sets of statistics, particularly at the detailed level.") (Exhibit CAN-146).
[141] Canada's response to Arbitrator question No. 86, para. 182, and No. 154, para. 105.

company (whether affected or unaffected); and (b) companies subject to the all-others rate.

Comment:

116. The United States refers the Arbitrator to the U.S. response to this question, as well as accompanying Exhibit USA-53, which contains the U.S. proposal for the required fields in the excel spreadsheet. Importantly, the United States observes that the parties appear to agree on many of the fields in the spreadsheet, but the discrepancy relates to the fields necessary for verification. Specifically, Canada explains that entry type, importer of record name and address, importer number, description of merchandise, net quantity in HTSUS units, CHGS, port code, and export date all relate to verification of data.[142] With the exception of entry type, the United States disagrees on the necessity of providing the remaining fields because they will not assist Canada in verifying the Customs data.

117. This is because although Canada requests disaggregated, entry-by-entry shipment information from each Canadian company (both unaffected and affected),[143] Canada will only verify this data with aggregated information. That is, Canada proposes to utilize Statistics Canada data, or data obtained directly from Canadian companies.[144] As discussed above in the U.S. comment to question 218, Statistics Canada data will only be provided to Canada on an aggregated, 8-digit HS basis. Canada has also stated that the use of Statistics Canada data "is not intended to capture minor discrepancies in company-specific data provided by U.S. Customs."[145]

118. With respect to the import data obtained directly from Canadian companies, the United States does not believe that it is likely for the company to provide entry-by-entry shipment information to Canada and the United States for purposes of verification. Importantly, as the United States explains in the U.S. comment on Canada's response to question 225, all information used to verify Customs data must be shared with the United States for a transparent verification process and to facilitate good-faith consultations and avoid future disagreements. Canada, however, has only proposed to provide the United States with company-specific information for verification if the company consents.[146]

119. Accordingly, the United States does not agree to the inclusion of the following fields in the excel spreadsheet: importer of record name and address, importer number, description of merchandise, net quantity in HTSUS units, CHGS, port code, and export date. These extraneous fields are neither necessary for the calculation of nullification or impairment, nor necessary for verification.

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[142] Canada's Responses to Questions Following the Virtual Session, p. 55, Table 1.
[143] The United States observes that although Canada states that manufacturer name and manufacturer ID relates only to affected exporters, in the U.S. model, the United States would also provide the information for the unaffected exporters. *See* Canada's Responses to Questions Following the Virtual Session, p. 55, Table 1.
[144] Canada's Response to First Set of Questions, para. 185.
[145] Canada's Response to Second Set of Questions, para. 114.
[146] Canada's Responses to Questions Following the Virtual Session, para. 202.

220. If Canada had to calculate relevant values of imports in the absence of US Customs data using information obtained directly from Canadian companies, how should Canada convert Canadian dollar values to US dollar values for purposes of calculating a level of NI (assuming the Canadian companies keep their records in Canadian dollars)?

Comment:

120. As previously explained, the United States only considers it appropriate to obtain the value of imports directly from the Canadian exporters in the unlikely circumstance that the United States does not provide Customs data to Canada and the data is also not available from the record of Commerce's proceeding.[147] In the rare circumstance that information is obtained directly from Canadian companies, the United States believes it to be unlikely that the exporting Canadian company would provide data to Canada (and the United States)[148] on a per shipment basis and would likely only provide the data on an annual, aggregated basis. Therefore, the United States maintains that the best source for converting Canadian dollar values to U.S. dollar values would be the Canadian Dollar per U.S. Dollar, period average exchange rate in the International Financial Statistics (IFS) published by the International Monetary Fund (IMF).[149]

221. If the parties continue to disagree regarding how to calculate the value of imports following consultations, would it be reasonable to either: (a) allow Canada to use company-specific data obtained directly form companies (for those companies' data only); (b) prescribe specific minimum searches in the ACE database that could occur that would yield the data set for a company or group of companies; (c) defer to the judgment of US Customs regarding how to aggregate the values (see question No. 219, above); or (d) some other solution? For option (b), would the following search criteria be appropriate?

Comment:

121. As the United States has explained, an instruction by the Arbitrator in its decision for the United States to provide the relevant import value data collected by Customs for the relevant product for the reference period would be sufficient and consistent with prior arbitrator decisions.[150] Specific instruction as to how Customs should perform the data search in ACE is not necessary. However, if the parties fail to come to agreement during consultations, then certain search criteria elements could be prescribed, as discussed below in subparts (a) through (d) of this question. The United States maintains that option (c) of the Arbitrator's question,

[147] U.S. Responses to Third Set of Questions, paras. 133-135; U.S. Responses to Second Set of Questions, para. 106. *See also* U.S. comment on Canada's response to question 272, below.
[148] As explained in the U.S. comment on Canada's response to question 225, all information used by Canada to verify Customs data should be shared with the United States for a transparent verification process and to facilitate productive consultations and avoid future disagreements between the parties.
[149] The database is available from the IMF website at https://data.imf.org/regular.aspx?key=61545850.
[150] U.S. Responses to Second Set of Questions, para. 77.

defer to the judgment of Customs regarding how to aggregate the values, is the most appropriate solution if the parties continue to disagree over the dataset.[151] Ultimately though, if the parties cannot reach agreement (even after the advice of Customs), as discussed in subpart (d) of this question, the dataset should not be supplemented.[152]

122. In addition, the United States refers the Arbitrator to the U.S. response to question 232, which is relevant to Canada's request for disaggregated data.[153] As the United States has explained, disaggregated, entry-by-entry data are neither necessary for verification, nor for the calculation of the level of nullification or impairment. Further, as the United States explains in the U.S. comment on question 225, below, the United States expects all information used by Canada to verify Customs data to be shared with the United States for a transparent verification process and to facilitate good faith consultations and avoid future disagreements between the parties. Although Canada seeks shipment-specific data from the United States, it remains unclear whether Canadian companies would consent to the sharing of such information with the United States.

123. With this understanding, the United States provides further comments on Canada's responses to each subpart, below.

a) <u>Exports during the Reference Period</u>. If the parties disagree as to whether a particular shipment reflected on Form 7501 entered the United States during the reference period, then the "Entry Date" field on that Form 7501 for the relevant shipment will control.

<u>Comment</u>:

124. The United States observes that both parties appear to agree with this search criterion.

b) <u>Relevant Product</u>. If the parties disagree as to the extent to which a particular shipment reflected on Form 7501 reflects exports from Canada of the relevant product, then, for a pre-investigation reference period the relevant HTS codes will control (i.e. all products entering under one or more relevant HTS codes could be treated as the relevant product). For a post-investigation reference period, the relevant AD/CVD case number will control (i.e. all products that have been

[151] In particular, Customs is the U.S. agency responsible for trade data on entries subject to AD/CVD duties and would be the best suited to determine which entries are relevant to the CVD order. U.S. Responses to Third Set of Questions, para. 136.
[152] *See also* U.S. response to question 230 (discussing the unreasonableness of Canada's proposal to only verify and supplement data from affected exporters, while failing to verify or supplement data from unaffected exporters); U.S. Closing Statement at the Virtual Session, para. 10 ("Nothing in the DSU provides that Canada's role as the complaining Member means that Canada can simply have wide (or possibly unbounded) discretion to do as it wants when suspending concessions.").
[153] U.S. Responses to Third Set of Questions, paras. 152-154.

assigned the relevant AD/CVD case number could be treated as the relevant product).

Comment:

125. As further discussed in the U.S. response to this subpart, only the primary 10-digit HTS codes should be used to avoid overinclusion of imports. Further, as explained in the U.S. response to question 230, the United States does not consider it appropriate for Canada to only verify and supplement the data of the affected exporters. Canada has stated that it is unlikely that Canada will be able to verify or supplement the data of the unaffected exporters.[154] Therefore, Canada's proposal – to only verify and supplement the data of the affected exporters – would have a disproportionate and unreasonable effect on the level of nullification or impairment by potentially only increasing the value of the affected exporters, while leaving the value of the unaffected exporters untouched.

c) Assignment to Canadian company. If the parties disagree with respect to which Canadian company to assign a particular shipment of the relevant product reflected in Form 7501, the shipment could be assigned to an individually investigated Canadian company (whether affected or unaffected by the OFA-AFA Measure) if any of the following applies:

i. the "Manufacturer Name" matches that of an individually investigated company as written in the relevant USDOC final determination, CVD order, or final results;

ii. the "Manufacturer ID" of the company was previously or subsequently assigned to a company in any other Form 7501 reflecting imports of any product during the reference period whose name matches that of an individually examined company in the CVD order;

iii. the company-specific CVD case number assigned to the company was previously or subsequently assigned to a company in any other Form 7501 reflecting imports of any product during the reference period whose name matches that of an individually examined company in the CVD order; or

iv. the relevant Form 7501 specified that the company's products are subject to a specific CVD rate that is unique to a particular individually investigated company subject to the relevant US CVD order.[155]

If none of the above circumstances apply, but the shipment was otherwise associated with an import from Canada of the relevant product during the

[154] Canada's Responses to Questions Following the Virtual Session, paras. 208-209.
[155] The United States is also kindly requested to please explain whether Form 7501 will specify that a particular value of a shipment is associated with a specific numerical CVD rate.

reference period, then the shipment will be assigned to the group of companies subject to the "all-others" rate.

Comment:

126. First, although the United States agrees to the inclusion of cross-owned affiliates in the value of imports, Canada states that all cross-owned affiliates of an individually-investigated company should be considered an affected exporter.[156] The United States clarifies that this would only be the case if the individually-investigated company was an affected exporter. If the individually-investigated company was an unaffected exporter, then the cross-owned affiliates would receive the same categorization.

127. Second, the United States disagrees with the provision of disaggregated, entry-by-entry shipment information for the purpose of Canada verifying any variations in spelling or grammar.[157] To address Canada's concern, as the United States explained in the U.S. response to question 219 and the accompanying U.S. proposed excel spreadsheet in Exhibit USA-53, the United States proposes to submit aggregated values on a manufacturer name/manufacturer ID combination basis to allow Canada to ensure the accuracy of the value of imports attributed to a Canadian manufacturer due to any potential misspellings.[158]

128. Lastly, the United States agrees with Canada's approach to identifying the value of imports under the All Others rate in the investigation and under the non-selected companies' rate in the administrative review.[159]

d) Under-inclusivity of US Customs dataset. If the parties disagree as to the inclusivity of the US Customs data set (i.e. whether the dataset should be supplemented with additional shipment values not originally contained in the US Customs data set), then the *dataset will not be supplemented*.

Comment:

129. The United States refers the Arbitrator to the U.S. response to question 230, which discusses the unreasonableness of Canada's proposal to only verify and supplement data from affected exporters, while failing to verify or supplement data from unaffected exporters.[160] Indeed, as a result of the unbalanced nature of Canada's proposal and potential artificial increase to the level of nullification or impairment, the United States maintains that the dataset should not be supplemented if the parties disagree on the inclusivity of the Customs dataset. If Canada ultimately has the ability to supplement the dataset as it wants, over any U.S. objections, Canada effectively has no incentive to engage in consultations with the United States. Further, nothing

[156] Canada's Responses to Questions Following the Virtual Session, para. 185.
[157] Canada's Responses to Questions Following the Virtual Session, para. 186.
[158] U.S. Responses to Third Set of Questions, paras. 131-132.
[159] Canada's Responses to Questions Following the Virtual Session, para. 187.
[160] *See also* Canada's Responses to Questions Following the Virtual Session, paras. 208-209.

in the DSU provides that a Member can simply have wide (or possibly unbounded) discretion to do as it wants when suspending concessions.[161]

7.2 For Canada

222. In the event that Canada must calculate the value of imports in the absence of US Customs data, could Canada please comment on the whether it would be appropriate for the Arbitrator to prescribe search parameters to be used vis-à-vis sources such as USITC DataWeb, USA Trade Online, and Statistics Canada? If the answer is yes, what should those prescribed search parameters be?

Comment:

130. As an initial matter, as the United States has explained, in the unlikely circumstance that Customs data is not provided, Canada should utilize the publicly-ranged sales value from the record of Commerce's proceeding along with the data from the Census' USA Trade Online.[162] The United States considers it appropriate for the Arbitrator to predetermine the primary alternative data source to avoid future disagreement between the parties when each of the alternatives sources provide different values of imports.[163]

131. To the extent the Arbitrator considers USITC DataWeb, USA Trade Online, or Statistics Canada to be viable alternative sources in the unlikely absence of Customs data, the United States provides the following comments.

132. The United States observes that the parties appear to agree that USA Trade Online is slightly preferable to USITC DataWeb.[164] Accordingly, USITC DataWeb should not be considered as an alternative source. The United States provides the remaining comments without prejudice to this position.

133. The United States considers that certain search parameters could be prescribed if the alternative source were USITC DataWeb, USA Trade Online, or Statistics Canada. The United States generally agrees with Canada's search criteria, with the following caveats.

134. First, as the United States has explained, only the primary 10-digit HTS codes should be included.[165]

135. Second, if the Arbitrator were to select USITC DataWeb, the United States does not consider it appropriate to use "general imports" in the search parameters. Rather, "imports for consumption" should be used since these are the imports to which the duties are applied. "General imports" measures the total physical arrivals of merchandise from foreign countries,

[161] U.S. Closing Statement at the Virtual Session, para 10.
[162] *See* U.S. Responses to Third Set of Questions, Annex, U.S. Alternative Instructions, para. 1.14-1.16; U.S. Responses to Second Set of Questions, paras. 104-112.
[163] *See also* U.S. comment to Canada's response to question 272, below.
[164] Canada's Responses to Questions Following the Virtual Session, para. 192 n. 132.
[165] *See* U.S. Responses to Third Set of Questions, para. 140.

regardless of whether such merchandise enters the U.S. customs territory immediately or is entered into bonded warehouses or free trade zones under Customs' custody. In contrast, "imports for consumption" measures the total merchandise that has physically cleared through Customs immediately or after withdrawal for consumption from bonded warehouses or free trade zones under Customs' custody.

223. In the event that Canada must calculate the value of imports in the absence of US Customs data, could Canada please comment on the whether it would be appropriate for the Arbitrator to prescribe consultations procedures with the United States regarding Canada's calculation of the values of imports? If so, how long should such consultations take and what should be the prescribed outcome if the parties cannot agree on the data to be used after holding such consultations? What role might US Customs data play, if at all, in such consultations?

Comment:

136. For consultations, Canada has proposed to share information obtained directly from Canadian exporters if the exporters consent.[166] To ensure transparency and productive consultations, Canada should only be permitted to use data that can be shared with the United States as the basis of the value of imports. If the exporters do not consent, the United States does not consider it appropriate to use such data as the basis of the value of imports.

137. This is appropriate given that both parties should have access to any information utilized to calculate the level of nullification or impairment. Canada should not be permitted to use information that could not be shared with the United States, thereby depriving the United States of the opportunity to ensure that the model will produce an estimate that is equivalent to the level of nullification or impairment.

224. In the event that Canada must calculate the value of imports in the absence of US Customs data, could Canada please comment on whether it would be appropriate for the Arbitrator to set a time by when Canada should calculate the value of imports? Would setting such a deadline be necessary in the event the Arbitrator prescribed an overall deadline of the kind mentioned in question No. 185, above?

Comment:

138. The United States agrees with Canada that it is unnecessary to provide a time limit by when Canada should calculate the value of imports. With respect to the Arbitrator's reference to question 185, as the United States previously explained, the United States understands question 185 to propose a minimum start date by which Canada may begin to suspend concessions following a "triggering event". The use of a minimum start date helps ensure that the level of suspension of concessions is equivalent to the level of nullification or impairment, consistent

[166] Canada's Responses to Questions Following the Virtual Session, para. 196 n. 137.

with Article 22.7 of the DSU.[167] Therefore, although a minimum start date is appropriate, it is unnecessary to provide an end date by when Canada may suspend concessions.

225. Could Canada explain whether all data upon which Canada would rely to either verify US Customs data or that Canada would use to calculate the value of imports in the absence of US Customs data would be able to be shared and discussed with the United States during consultations?

Comment:

139. The United States expects that all information used by Canada to verify Customs data will be shared with the United States for a transparent verification process and to facilitate productive consultations and avoid future disagreements between the parties. Canada, however, has only proposed to provide the United States with company-specific information used in verification if the company consents.[168] Therefore, to the extent that Canada were to use data directly from Canadian companies for verification purposes, the United States considers it appropriate for Canada to only use the data for verification if the company consents for Canada to share the data with the United States.

140. Further, Canada should only be permitted to use company-specific data for verification if Canada is able to verify both the affected and the unaffected Canadian companies.[169] Canada, however, has stated that it is unlikely that Canada will be able to verify the data of unaffected exporters.[170]

141. Therefore, based upon Canada's own representations, it appears that Canada's proposal to utilize data directly from Canadian companies for verification is not viable for this proceeding.

226. Regarding which 10-digit HTS codes in a relevant CVD order should be used to define the scope of the relevant product, could Canada please comment on the United States' assertions that only the "primary" set of HTS codes should be used?[171]

Comment:

142. The United States refers the Arbitrator to the U.S. responses to questions 221(b) and 265 in the U.S. Responses to the Third Set of Questions, which concern the necessity of only

[167] U.S. Responses to Third Set of Questions, para. 174.
[168] Canada's Responses to Questions Following the Virtual Session, para. 202.
[169] *See* U.S. Responses to Third Set of Questions, para. 149 (explaining that Canada's proposal to only verify and supplement the data from affected companies, while leaving the data from the unaffected companies unverified and untouched, will generate an artificial level of nullification or impairment).
[170] Canada's Responses to Questions Following the Virtual Session, para. 208 ("With respect to data for unaffected exporters required under the U.S. model, it is probable that Canada will be unable to verify the data because it is unlikely that unaffected exporters would provide Canada access to their records.").
[171] United States' response to Arbitrator question No. 178, para. 103.

including primary 10-digit HTS codes to avoid overinclusion in the value of imports. In particular, as the United States explained, the Commission does not determine injury on the basis of the products that entered under the secondary HTS codes.[172] Therefore, the inclusion of secondary 10-digit HTS codes would not be reflective of the product assessed by the Commission to reach an affirmative determination of injury.

143. Further, the United States provides clarification related to Canada's assertion that Customs will apply duties to imports under any HTS code included in the CVD order, without regard to whether it was imported under a "primary" HTS code.[173] As the United States has explained, entries subject to AD/CVD cash deposits or duties are ultimately determined by the written description of the scope of the AD/CVD orders, and are not limited to HTS classifications. The inclusion or exclusion of an HTS classification in the scope of an AD/CVD order does not determine whether a product falls within the scope of the order.[174]

227. The Arbitrator understands that it is Canada's position that, if consultations fail between the US and Canada regarding how to calculate the value of imports with respect to any particular company or group of companies, and US Customs data was provided to Canada, then Canada would use data obtained directly from Canadian companies for the value of imports, but only to replace the US Customs data with respect to the particular company or group of companies in question only (i.e. US Customs data would still be used for all the other companies who did not directly provide data to Canada). Could Canada please confirm this understanding? Would Canada's position change if the Arbitrator deemed it reasonable to calculate a market share for unaffected exporters in accordance with the US model, and thus Canada and the United States may be consulting about the values of imports from unaffected companies as well?

Comment:

144. The United States refers the Arbitrator to the U.S. response to question 230 in the U.S. Responses to the Third Set of Questions. The United States does not have further comments on Canada's response.

8 INFLATIONARY ADJUSTMENT

8.1 For both parties

236. Could the parties please explain the specific purpose of the inflationary adjustment? In particular, is the purpose: (a) to track the level of NI that results from the application of the challenged measure; and/or (b) to preserve the real value of suspensions of concessions (or, perhaps alternately stated, preserve the economic

[172] *See, e.g.*, USITC Softwood Lumber Final Report, p. IV-1 n. 1 (listing only the primary 10-digit level HTS codes) (Exhibit USA-34).
[173] Canada's Responses to Questions Following the Virtual Session, para. 207.
[174] *See* U.S. Responses to First Set of Questions, para. 251.

impact of such suspension on the United States) even in an inflationary environment? Whichever it is, could the parties please specifically explain how the parties' proposed inflationary indices accomplish the relevant purpose?

Comment:

145. The United States does not have comments on Canada's response to this question.

237. The Arbitrator notes that PPIs from the U.S. BLS are available in an annualized format. Could the parties please explain whether they agree on the use of annual data for inflation adjustment, or would the parties consider it more appropriate to calculate average annual inflation rates based on monthly data? In the latter case, should there be a simple or a weighted average applied?

Comment:

146. The United States does not have comments on Canada's response to this question.

A.1 THE APPROPRIATE COUNTERFACTUAL

A.1.1 For both parties

238. It is the Arbitrator's understanding that a company's CVD rate would not be used to calculate the counterfactual all-others rate, for purposes of this arbitration proceeding, if the company's CVD rate would not be used to calculate the all-others rate under the terms of, specifically, 19 U.S.C. § 1671d(c)(5)(i). The parties are requested to provide their written responses to question No. 181 with this understanding in mind.

Comment:

147. As previously explained, the United States confirms that if a company's CVD rate is zero, *de minimis*, or entirely based upon facts available (as provided in 19 U.S.C. § 1671d(c)(5)(A)(i)), for the purposes of this arbitration proceeding, such a company's CVD rate would be excluded from the calculation of the counterfactual All Others rate.[175]

148. The United State observes that this situation – where a company is not included in the counterfactual All Others rate because its counterfactual CVD rate is zero, *de minimis*, or entirely based on facts available – could potentially occur in any of the scenarios in the table of question 181.[176]

239. In light of the parties' oral responses to question No. 181, could the parties please explain whether, for Scenarios 4 and 5 in that question, in the event that Canada

[175] U.S. Responses to First Set of Questions, para. 75; U.S. Responses to Third Set of Questions, para. 5.
[176] *Cf.* Canada's Responses to Questions Following the Virtual Session, para. 215.

could not secure the appropriate data from the relevant Canadian companies, Canada should therefore use a weighted average using publicly ranged data as weights, rather than use a simple average of companies' CVD rates as proposed in the last column of the table in that question?

Comment:

149. The United States refers the Arbitrator to the U.S. comments on Canada's response to question 181 concerning scenarios 4 and 5. The United States does not have further comments on Canada's response.

240. Could the parties please confirm that, in the context of US CVD proceedings, if a company could be described as both unaffected and not individually investigated (as these terms have been used in this arbitration proceeding), the only such companies are those that are assigned an unaffected all-others CVD rate?

Comment:

150. The United States does not have comments on Canada's response to this question.

A.2 OVERALL METHDOLOGY

A.2.1 For both parties

244. In its oral response to question No. 207, the United States indicated that, in a situation where a triggering event occurs at a time when the prior calendar year was one in which "legacy" CVD rates (as the United States used that term) affected by the OFA-AFA Measure were in effect, a new run of the model would only treat the newly affected companies as the affected variety, and the newly calculated level of NI would be summed with the previously calculated level of NI from the previous triggering event. In their written responses to question No. 207, could the parties please explain:

a. whether this approach would lead to double-counting of a level of NI with respect to a company which had an affected "legacy" CVD rate and then was assigned a newly affected CVD rate in the administrative review (e.g. Company A in question 207(b));

Comment on subpart (a):

151. As the United States discusses in the U.S. response to question 207, the previously calculated level of nullification or impairment must be modified when a prior application of the

challenged measure is removed and companies are no longer assessed an affected CVD rate.[177] Therefore, contrary to Canada's assertion, the U.S. approach does not lead to double counting.

152. The U.S. approach also ensures that the level of suspension is equivalent to the level of nullification or impairment actually experienced by Canada. That is, if there is new application of the challenged measure in a CVD proceeding, the level of nullification or impairment that is being calculated relates only to the new application of the challenged measure. Therefore, the counterfactual will detect the difference between the real-world market situation where the challenged measure is applied to the newly affected companies and the one in which the challenged measure is not applied to the newly affected companies. The total level of suspension would be the sum of the level of nullification or impairment resulting from the initial application of the challenged measure (modified as necessary) plus the level of nullification or impairment resulting from the new application of the challenged measure.

153. In contrast, Canada maintains the use of the reference period from the year prior to the original application of the challenged measure – which, as the United States has explained, will in reality be several years prior to the new application[178] – thereby effectively ensuring that the calculation of the level of nullification or impairment from the new application of the challenged measure will not be equivalent to the actual trade impact experienced by Canada.

b. whether taking the change of duty rates and *vimps* of certain companies from a reference period in which certain companies' CVD rates were affected by the OFA-AFA Measure (i.e. "legacy" affected CVD rates) would be consistent with the basic function of a counterfactual, i.e. to detect the difference between the real-world market situation and one in which the OFA-AFA Measure were not used by the USDOC; and

c. whether using instead, as the reference period, the most recent calendar year in which no company were subject to a CVD rate affected by the OFA-AFA Measure (as Canada appeared to argue would be more appropriate in its oral answer to question No. 207) would be preferable?

Comment on subparts (b) and (c):

154. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to subparts (b) and (c) in a single comment.

155. For the reasons explained in the U.S. response to question 207,[179] the U.S. approach to use the reference period from the year prior to the most recent application of the challenged measure will ensure that the level of nullification or impairment reflects the actual market

[177] U.S. Responses to Third Set of Questions, para. 88. *See also* U.S. Responses to Third Set of Questions, paras. 71 n. 65, 73, 75, 83, 93-94.
[178] U.S. Responses to Third Set of Questions, para. 76.
[179] U.S. Responses to Third Set of Questions, paras. 73-77.

conditions experienced by the Canadian exporters at the time of the new application of the challenged measure.

156. Further, Canada may also continue to suspend concessions for the prior application of the challenged measure to the legacy companies, with modifications as necessary, thereby suspending concessions for both applications of the challenged measure. In contrast, by utilizing a reference period dating back to the year prior to the original application of the challenged measure, Canada's approach is completely disconnected from the market conditions at the time of the new application of the challenged measure.

245. Could the parties please confirm that, under either party's model, Canada would alter the level of NI and associated suspension accordingly whenever one of the following events occurs: (a) an unaffected company becomes an affected company; (b) an affected company is assigned a new CVD rate affected by a new application of the OFA-AFA measure; or (c) an affected company becomes an unaffected company.

Comment:

157. The United States does not have comments on Canada's response to this question.

246. During the meeting with the parties, the Arbitrator's questions reflected concerns regarding, *inter alia*, certain aspects of the parties' models. In particular, and with respect to the Canadian model, the Arbitrator has concerns about certain aspects of the technical accuracy of the model (esp. instances in which the level of NI could exceed the *vimp*, the implications of Exhibit USA-48, and the extent to which offsetting effects as between Canadian producers are taken into account). With respect to the United States' model, the Arbitrator has particular concerns regarding whether the value of domestic shipments could be reasonably determined using the data sources the United States proffers in that context, and, relatedly, whether a total value of the US market for a given product could be obtained (values which are critical to calculating all relevant market shares under the United States' model). In light of such concerns, and without prejudice to the content of the parties' forthcoming written responses to the Arbitrator's other questions, the Arbitrator requests that the parties comment on the proposed alternate ways of calculating the substitution elasticity, the demand elasticity, and relevant market shares described in Annex A to this set of questions. For purposes of this question, also please assume that the Arbitrator decided to adopt a four-varieties version of the United States' model to compute the level of NI (see question Nos. 129 and 132).

Comment:

158. As an initial matter, the United States has provided detailed instructions for how model parameters may be obtained for any unknown future product in the U.S. alternative instructions

in Annex A.[180] These alternative instructions are without prejudice to the U.S. position that each affected Canadian company should be a distinct and separate Canadian variety.[181]

159. The U.S. alternative instructions provide a clear hierarchy of sources for each parameter, as described in the U.S. response to question 198. At the top of the hierarchy for each input are product-specific, contemporaneous values that most precisely characterize the future market for the unknown future product. To eliminate the possibility of future disagreements between the parties and ensure that Canada always has the ability to calculate nullification or impairment, the U.S. instructions also provide alternative sources to use in the event that the most precise, product-specific and contemporaneous information is not available. Therefore, the United States refers the Arbitrator to the U.S. alternative instructions for the U.S. approach.

160. The United States also provides the following additional comments on Canada's response. In the U.S. alternative instructions in Annex A, the United States has agreed with the Arbitrator's suggestion that outliers, missing, and zero values should be replaced with median values from the more aggregate level. If the Arbitrator chooses to replace missing and zero values with a weighted average, as Canada proposes, the United States clarifies that the appropriate weights should be based upon the U.S. imports from Canada during the reference period.

161. In addition, Canada appears to interpret the Arbitrator's draft instructions on calculating m_{can} and m_{acan} in the event the CVD order covers multiple 10-digit HTS categories as representing Canada's share of the relevant imports across all relevant HTS 10-digit codes.[182] However, the U.S. alternative instructions in Annex A prescribe the use of a weighted average market share across all primary 10-digit HTS categories.[183] This is appropriate since the market share is the variable the Arbitrator's instructions seek to estimate.

162. The United States also addresses Canada's contention that Commission reports are not an appropriate source for market share information and elasticity parameter estimates.[184] Below, the United States addresses each one of Canada's arguments against the use of the Commission report in turn.

163. First, Canada contends that the information in the Commission reports cannot be presently verified.[185] Certainly, the characteristics of the U.S. market for an unknown future product cannot be presently verified because Canada has chosen to pursue suspension of

[180] U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, para. 229 *et seq.*
[181] *See* Exhibit USA-51, which contains a Stata program that adjusts the U.S. model to accommodate any numbers of varieties. Accompanying Exhibit USA-52 includes the data inputs for this model.
[182] Canada's Responses to Questions Following the Virtual Session, para. 236.
[183] *See* U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, para. 1.19. *See also* U.S. Responses to Third Set of Questions, Annex A, U.S. Revised Instructions, para. NEW 1.6.
[184] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Written Submission, paras. 106, 108-109, 141-143; Canada's Opening Statement, paras. 39-44).
[185] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Written Submission, para. 106).

concessions for some future, hypothetical level of nullification or impairment that may never occur. Regardless of the unique posture of this proceeding concerning some future, unknown conduct, the United States emphasizes that it is essential for model parameters to be, in fact, representative of the market for the unknown future product.

164. As the United States has explained, the elasticity estimates in Commission reports would be tailored to the specific future product and are accompanied by detailed and well-documented discussions of the elements that inform the Commission's elasticity estimates.[186] This information includes expert assessments from the U.S. domestic industry, the foreign producers, and foreign government officials with a high degree of familiarity with the specific product.[187] The United States considers that this tailored nature of the Commission report estimates is an advantage compared to quantitative academic studies like Fontagne *et al* (2020), Ahmad and Riker (2019), and Soderbery (2015), which describe the global market for aggregated product categories rather than the U.S. market for the specific product under prevailing conditions such as those available in Commission reports. As such, for Canada to insist on predetermined parameter values – most egregiously for market share,[188] but also for elasticities[189] – is to disregard the requirement that the methodology should produce a result that is equivalent to the level of nullification or impairment that is experienced by Canada.

165. Further, Canada argues against the use of future Commission reports because Canada alleges that the parties will not have had the opportunity to assess and verify the data.[190] However, both the Government of Canada and Canadian companies will have already had the opportunity to submit information and opine on the parameter values before the Commission.[191] Notably, both the Government of Canada in *Softwood Lumber* and the Canadian companies in *Wind Towers* advocated for lower elasticity estimates before the Commission than the estimates proposed by Canada in this proceeding.[192]

166. Canada also disagrees with the Commission's qualitative approach to estimating elasticities.[193] However, as previously explained, quantitative estimates of elasticities are

[186] *E.g.,* USITC Softwood Lumber from Canada Final Determination, pp. II-1 to II-29 (Exhibit USA-34).
[187] *E.g.,* USITC Softwood Lumber from Canada Final Determination, pp. II-27 to II-29 (Exhibit USA-34).
[188] *See* Exhibit USA-48 (comparing scenario 1 with Canada's predetermined market share with scenario 2 with the product-specific market share resulted in a difference of $53 million, which is 22 percent of the estimate of nullification or impairment in scenario 1). *See also* U.S. comment to Canada's response to question 203, in particular Table 1.
[189] *See* Exhibit USA-48 (comparing scenario 2 with Canada's predetermined elasticities with scenario 3 with product-specific elasticities resulted in a difference of $94 million, which is 50 percent of the estimate of nullification or impairment in scenario 2).
[190] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Written Submission, para. 141).
[191] U.S. Responses to First Set of Questions, paras. 153 n. 221, 155 n. 225, 175 n. 251, 182 n. 265.
[192] *See* U.S. Responses to First Set of Questions, paras. 153 n. 221 (highlighting the Government of Canada's position in the *Softwood Lumber* investigation), 175 n. 251 (highlighting the Canadian respondents' position in the *Wind Towers* investigation).
[193] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Opening Statement, para. 41).

themselves not without controversy and may vary depending on the methodology and over time.[194] For example, with respect to substitution elasticities, as discussed in Ahmad *et al.* (2020), there is no consensus among economics practitioners on the ideal methodology.[195] Indeed, as demonstrated in the U.S. response to question 50, different methodologies produce varying parameter estimates.[196]

167. Further, Canada incorrectly implies that the Commission's change in elasticity estimates over time, such as in the *Welded Stainless Steel Pressure Pipe* investigations, is not based on changes in market conditions, but rather based on the Commission's "variable" qualitative analysis.[197] This is false. As previously explained, the Commission reports are based on an analysis of questionnaire responses from U.S. producers, importers, purchasers, and foreign producers, relevant academic studies and econometric studies, and interested party comments. Indeed, as is plainly evident from the two Commission reports in the *Welded Stainless Steel Pressure Pipe* investigations, the investigations contained different data sets and have different periods of investigation.[198]

168. Lastly, Canada also argues that there is no guarantee Commission estimates will be available.[199] As the United States has explained, the Commission has published elasticity estimates for every CVD and AD investigation since 1987. It is reasonable to expect this to continue in the future. In any case, although the United States believes it to be a rare circumstance where the Commission report would not contain an elasticity estimate, the U.S. alternative instructions provide a tiered approach in the event Commission elasticity estimates or data necessary to compute market shares are not available in Commission reports.

169. For all of these reasons, Canada's arguments against the use of the relevant Commission report are unpersuasive. In contrast, the U.S. tiered approach provided in the U.S. alternative instructions will ensure that, in the best case scenario, future, product-specific information will be utilized. The United States provides a last option in the U.S. tiered approach to ensure that Canada will have the ability to calculate the level of nullification or impairment in the absence of product-specific information.

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[194] *See* U.S. Responses to First Set of Questions, paras. 149-152; Ahmad *et al.* (2020) (Exhibit USA-23). *See also* U.S. Responses to Second Set of Questions, paras. 31-32; Ahmad & Riker (May 2020) (Exhibit USA-46).
[195] *See* U.S. Responses to First Set of Questions, para. 152; Ahmad *et al.* (2020), p. 18 (Exhibit USA-23).
[196] U.S. Responses to First Set of Questions, para. 151 & Comparison Table 1.
[197] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Opening Statement, para. 42).
[198] To see the difference in the data considered in evaluating domestic supply elasticity, compare USITC Welded Stainless Steel Pressure Pipe from China Final Determination, pp. II-2 (Exhibit USA-44) with USITC Welded Stainless Steel Pressure Pipe from India Final Determination, pp. II-3 to II-6 (Exhibit USA-45). To see the difference in the data considered in evaluating substitution elasticity, compare USITC Welded Stainless Steel Pressure Pipe from China Final Determination, pp. II-8 to II-13 (Exhibit USA-44) with USITC Welded Stainless Steel Pressure Pipe from India Final Determination, pp. II-12 to II-24 (Exhibit USA-45).
[199] Canada's Responses to Questions Following the Virtual Session, para. 224 (citing Canada's Opening Statement, para. 44).

A.2.2 For Canada

247. In light of Canada's oral response to question No. 207, could Canada please explain whether it is Canada's position that the reference period should be the same year for all relevant companies, and that year should be the most recent calendar year in which no company subject to the relevant CVD order was subject to a CVD rate that was affected by the OFA-AFA Measure?

Comment:

170. As a general matter, the United States agrees that the reference year should typically reflect the full year prior to the application of a measure, because the data from this time period will not have been affected and will therefore be suitable for use to determine the level of trade impacted by a measure. As Canada points out, the United States also made similar observations at the outset of this proceeding. However, as this proceeding has progressed, both parties have modified their positions on issues as additional, potential factual scenarios have been contemplated. Indeed, because Canada has chosen to pursue an arbitration for some future, unknown level of nullification or impairment that may never occur, the United States has been faced with ensuring that any model – if adopted by the Arbitrator – has the ability to accommodate these potential future scenarios and yield a reasoned estimate of nullification or impairment.

171. Therefore, with respect to the reference period, as the United States explained in the U.S. response to question 207, after further consideration of the characteristics of the challenged measure and the implications of the scenarios in question 207, the United States revised its position, and explained that the reference year will always be the year prior to the most recent application of the challenged measure.[200] This approach is sensible because applications of the challenged measure – if they ever were to occur – in the same CVD proceeding would most likely be several years apart.[201]

172. The United States does not consider this modification to be an extreme deviation from the general U.S. position. That is, as discussed above, the purpose of the reference period is to obtain data on imports from the closest period in time that has not been affected by the measure. Therefore, if there is a new application of the challenged measure in a CVD proceeding that also has legacy affected rates, the new calculation of nullification or impairment will be limited to assessing the level of nullification or impairment arising from the new application of the measure. The reference period will thus be the year prior to the new application of the challenged measure. It is important to use this most recent period in order to capture the effects on the trade flows of the totality of changes in the market between one application of the challenged measure and another. Further, this is consistent with the general U.S. view that the reference period should not contain data that has been affected by the measure – that is, the measure that the calculation seeks to assess. In this instance, the calculation pertains to the new

[200] U.S. Responses to Third Set of Questions, para. 76 n. 68.
[201] *See also* U.S. Responses to Third Set of Questions, para. 76.

application of the measure, and therefore, the use of data from the closest period of time that is not affected by the new measure is appropriate.

173. Lastly, Canada's reliance on *US – Washing Machines (Korea) (Article 22.6 – US)* is misplaced. In that proceeding, the arbitrator sought to ensure that the reference period used would not be a period of time in which the WTO-inconsistent measure was in place because this would lead to a diminished level of trade used in the calculation, and would therefore lead to a reduced estimate of the level of nullification or impairment.[202]

174. Those concerns, however, are not present here. As the United States explained, in the very unlikely event that there are two applications of the challenged measure in separate segments of a CVD proceeding, it remains appropriate to use the year prior to the most recent application to measure the level of nullification or impairment attributable to that application because Canada will also continue to suspend concessions for the original level of nullification or impairment.[203] The United States considers that Canada's ability to suspend concessions in response to any earlier and separate applications of the challenged measure will have compensated for its effects on Canada's trade flows in the year prior to the most recent application of the measure.

248. In its oral response to Arbitrator question No. 191, Canada argued that an estimated level of NI exceeding *vimp* implies that the WTO-inconsistent duty rate was prohibitively high. The Arbitrator understands that Armington models rule out such occurrences because of their very nature resting on the Armington assumption that goods are only imperfectly substitutable across countries of origin. Canada seems to argue that Canadian imports could fall to zero because the demand structure in Canada's model is linear. However, the Arbitrator understands that Canada's proposed Armington model in fact features a non-linear demand structure that is only linearized around the equilibrium for the purpose of deriving an algebraic solution. Could Canada please confirm the Arbitrator's understanding that:

a. Canada's proposed Armington model in fact features a non-linear demand structure; and

<u>Comment</u>:

175. The United States has no comments on Canada's response to subpart (a).

b. in Armington models, prohibitively high tariffs only exist asymptotically, i.e. in very extreme scenarios?

[202] *US – Washing Machines (Korea) (Article 22.6 – US)*, para. 3.115.
[203] The prior suspension of concessions must be modified when a prior application of the challenged measure is removed and companies are no longer assessed an affected CVD rate. U.S. Responses to Third Set of Questions, para. 71 n. 65.

Comment:

176. As the United States explained in the U.S. comment on Canada's response to question 191, Canada falsely distinguishes its approach from the United States by suggesting that only the U.S. model is a non-linear model. The Armington-based partial equilibrium model – from which both the approaches of the United States and Canada are derived – is a non-linear model. As the United States pointed out in its comment on Canada's response to question 191, the set of equations that define Canada's underlying model[204] is a non-linear system of equations.

177. Therefore, as the United States previously explained,[205] both the U.S. and Canadian models share the limitations of the Armington model. Canada's approach then takes a further step and approximates the solution to that non-linear system of equations by first log-linearizing the model around its initial equilibrium values. Canada's formula is therefore derived from a log-linearized solution of the Armington model. The reason that Canada's formula can produce a result in which duty rates are prohibitive or – unrealistically – more than prohibitive, is because it is only an approximate solution to the model. As such, Canada's formula adds to any limitations of the Armington model by introducing additional error from approximation.

249. Could Canada please explain how often it would expect its formula to produce a result where NI exceeds the *vimp*?

Comment:

178. The United States agrees with Canada that it is difficult to determine how often a single application of Canada's formula will produce a result where the level of nullification or impairment exceeds the value of imports.[206] Yet, despite this statement, Canada goes on to assert that it is unlikely for the results to exceed *vimp* "considering the magnitude of countervailing duties typically imposed against Canada by the United States."[207] Canada is unable to make this assessment, however, because Canada has chosen to pursue a dispute for some future, unknown level of nullification or impairment that is not currently applied to Canada, and may never be applied to Canada.

179. Regardless, as discussed in the U.S. response to question 196, a single run of the U.S. model cannot generate a result where Canada's lost exports value exceeds 100 percent of its exports value to the United States.

250. Could Canada please explain whether it considers that Exhibit USA-48 calls into question the ability of Canada's model to offer a "reasoned estimate" of the level of NI? As part of your answer, please address, in order, the following baskets of issues

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[204] *See* Reishus & Lemon Methodology Report, Appendix 1, p. 18 (equations A1-A6).
[205] *See* U.S. Comment to Question 191, above. *See also* U.S. Closing Statement at the Virtual Session, para. 4.
[206] In the U.S. response to question 196, the United States observed that in the *Softwood Lumber* example illustrated in Exhibit USA-48, this result would be obtained from Canada's base formula (scenario 1) if t_{inc} were greater than 0.4. *See* U.S. response to question 196.
[207] Canada's Responses to Questions Following the Virtual Session, para. 246.

(along with specific reference to related scenarios in Exhibit USA-48) raised by the United States in its opening statement at the meeting with the parties, which the United States argues are technical weaknesses in the Canadian model:

Comment:

180. Contrary to Canada's contention, Exhibit USA-48 does not simply show different results that are obtained under different assumptions. Rather, Exhibit USA-48 demonstrates that Canada's simplifying assumptions systematically distort and frequently inflate nullification or impairment estimates. In the example of the CVD order on *Softwood Lumber*, these assumptions produce a substantially inflated estimate of the level of nullification or impairment actually experienced by Canada. But these assumptions could also produce a deflated estimate. Therefore, as the scenarios in the exhibit illustrate, contrary to Canada's representations, Canada's purportedly "simple" approach greatly impacts the calculation of nullification or impairment. Therefore, Canada's approach cannot generate an estimate that is equivalent to nullification or impairment.

a. the use of pre-determined, aggregate sector-level market shares versus product- and market-specific market shares;

Comment:

181. The United States has maintained that it is essential that market share be product-specific and contemporaneous to the extent possible. Only if such information is not available, the U.S. tiered approach provides the possible proxies for product-specific and contemporaneous market share.

182. As the results in Exhibit USA-48 confirm, sector-level market shares from a fixed past year will not produce a result that is equivalent to the level of nullification or impairment in fact experienced by Canada for the product and time period at issue.[208] As the United States demonstrated in the U.S. comment to question 203, above, what Canada characterizes as a difference of "only" 22 percent in the scaling factor implies a substantial inflation of the nullification or impairment estimate. Indeed, in Table 1 of the U.S. comment on Canada's response to question 203, above, the United States illustrates that with a larger change in duty rates, a difference of "only" 22 percent implies a difference of $530 million.[209] Therefore, the substantial impact on nullification or impairment under Canada's predetermined scaling factor is neither insignificant nor reasonable.

[208] *See* Exhibit USA-48 (compare scenarios 1 and 2).

[209] As the United States explained, a comparison of scenarios 3 and 4 in Table 1 of U.S. comment to question 203 demonstrates the impact of using a predetermined, aggregate sector-level market share versus a product-specific market share in Canada's formula with a larger change in duty rate. Using a predetermined, aggregate sector-level market share in Canada's formula, as Canada proposes, would result in a difference of $530 million, which is 22 percent of the estimate of nullification or impairment in scenario 3.

b. the use of the same, rather than different, values for domestic and import supply elasticity;

Comment:

183. The United States has proposed to use product-specific values of the domestic supply elasticity obtained from recent Commission reports for the specific product. The Commission report is the best source of information, and will typically be the only source that is tailored to the product. If the Commission estimate is not available, the United States has suggested using a value of 1.55, which is the median value over manufacturing industries from Riker (November 2020).[210]

184. For import supply elasticity, the United States has suggested a value of 10. The value of 10 was also initially proposed by Canada.[211] Further, this value was also used by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*,[212] as well as in academic literature submitted by the United States.[213]

185. As the United States has explained, having domestic supply elasticity lower than import supply elasticity is consistent with standard modeling practice.[214] The United States welcomes Canada's recognition that the elasticity of supply for imports can be higher than that of domestic sources.[215] However, having made this acknowledgement, Canada, without providing a reasoned explanation, has changed its proposal for import supply elasticity from a value of 10 to a value of 15, based upon a single publication submitted by the United States, that is, Gasiorek *et al* (2019).[216] Importantly, Gasiorek *et al.* (2019) explained the use of 15 for imports as "high but finite".[217] Canada, however, has not provided any support for the use of a "high but finite" import supply elasticity.

186. Further, the United States disagrees with the use of 7.7 for the "aggregated non-Canadian" supply, as Canada proposes. As the United States has explained, the supply from U.S. domestic sources and the rest of the world must be defined as separate varieties because it is not reasonable to assume that the domestic and import supply elasticity are equal.[218] However, Canada's model proposes to aggregate these two sources of supply together.[219] As such, Canada's proposal of a value of 7.7 for "aggregated non-Canadian supply" is not relevant if the

[210] *See* U.S. Responses to Third Set of Questions, para. 41; Riker (November 2020), Table 6 (Exhibit USA-31). *See also* U.S. Responses to First Set of Questions, para. 176.
[211] Reishus & Lemon Methodology Report, para. 27
[212] *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 7.37.
[213] Leith *et al.* (2003), p. 33 n. 29 (Exhibit USA-32).
[214] U.S. response to question 64 (detailing studies that have applied this assumption).
[215] Canada's Responses to Questions Following the Virtual Session, para. 251.
[216] Canada's Responses to Questions Following the Virtual Session, para. 251; Canada's Response to Second Set of Questions, para. 88 (citing Gasiorek *et al.* (2019) (Exhibit USA-33).
[217] Gasiorek *et al.* (2019), p. 29 (Exhibit USA-33).
[218] *See* U.S. Written Submission, para. 121.
[219] Canada's Response to Second Set of Questions, para. 89.

Arbitrator determines to utilize at least a four-variety model, as described in the draft instructions in Annex A of the questions and consistent with standard modeling practice.[220] In addition, as discussed in the U.S. response to question 63, the value of 7.7 for domestic supply elasticity is not appropriate for this proceeding.[221]

c. the use of log-linearized formula versus an exact non-linear model solution; and

d. the exclusion, rather than inclusion, of the unaffected Canadian variety.

Comment:

187. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to subparts (c) and (d) in a single comment, below.

188. First, the United States contests Canada's suggestion that the U.S. and Canadian models are simply different, but produce equally approximate estimates of nullification or impairment.[222] While it is true that no economic model will perfectly replicate the infinitely complicated set of interactions that define a product market, both parties have utilized and thus implicitly agreed that the Armington framework is the most appropriate for this proceeding.[223]

189. Importantly, and contrary to Canada's assertion, there can be no question that the U.S. model is more precise within the common Armington framework than is Canada's formula. This is true for every modeling choice, as detailed below.

190. Model specification: In addition to the domestic and multiple affected Canadian varieties that feature in both the U.S. model and Canadian formula,[224] the U.S. model also includes an explicit unaffected Canadian variety and a rest of the world variety. The U.S. model also specifies separate domestic and import supply elasticities. These specification choices mean that the U.S. model can more precisely capture how U.S. demand is reallocated across sources after a change in duty rates, and thus more precisely capture both direct and offsetting effects on imports from Canada.

191. Model calibration: The U.S. approach calls for the use of parameters that are product-specific and contemporaneous, to the extent possible. In contrast, Canada calls for the use of pre-determined, broad, sector-level elasticities and market shares to parameterize the model. The

[220] U.S. response to question 64.
[221] U.S. Responses to First Set of Questions, paras. 172-173.
[222] Canada's Responses to Questions Following the Virtual Session, para. 253.
[223] U.S. Closing Statement at the Virtual Session, para. 4. *See also* U.S. comments to Canada's responses to question 191 and 248(b).
[224] Despite Canada's protest to the contrary, Canada's formula does in fact specify for multiple affected varieties. However, rather than solve the model for the multiple affected varieties simultaneously, Canada solves the model through log-linearization and proposes to apply the formula to each group separately, thus defining multiple Canadian varieties.

U.S. approach to model calibration thus more precisely characterizes the model for the specific future product in the specific future reference year.

192. Model solution: The United States solves the model directly in its non-linear form, thereby obtaining an exact solution to the system of equations that defines the U.S. model. Canada solves the model through log-linearization, thereby obtaining an approximate solution to the system of equations that defines Canada's model. By definition, an approximate solution is less precise than an exact solution.[225]

193. Canada implies that approximation bias is a term the United States is casually applying to describe the difference between the formula's results and reality.[226] In fact, approximation bias, or approximation error, has a very specific meaning in this context. The linear approximation error to which the United States refers is the difference between log-linearized and non-linear model estimates.[227] Canada's approximation error is additional to any difference between Armington model results and the infinitely complex actual market, thereby consistently impacting the level of nullification or impairment.

194. Exhibit USA-48 demonstrates that not only does each of Canada's modeling choices result in an approximation of the actual value of nullification or impairment obtained when product-specific, contemporaneous values are used, but can also have a substantial impact on the estimate of nullification or impairment. Further, Exhibit USA-48 illustrates that each one of Canada's modeling choices tends to build upon the others, resulting in a substantial impact and inflation of the estimate of nullification or impairment.

195. Canada argues that the U.S model "deviates" from the Armington model by creating multiple Canadian varieties.[228] However, as the United States explained in the U.S. response to question 46, while defining varieties by country of origin is a common simplifying assumption in Armington-based models, Armington (1969) notes that "the assumption that products are distinguished by place of production is a very convenient point of departure".[229] Therefore, in an Armington-based model, varieties are defined to capture imperfect substitutability across sources – which may be defined geographically or otherwise. There is no theoretical reason why there should not be multiple Canadian varieties in the model as long as they are parameterized correctly.[230]

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[225] *See also* U.S. comments to Canada's responses to question 191 and 248(b); Riker and Schreiber (2020), pp. 4-5 (demonstrating linear approximation error) (Exhibit USA-49).
[226] Canada's Responses to Questions Following the Virtual Session, para. 258.
[227] *See also* Riker and Schreiber (2020), pp. 4-5 (Exhibit USA-49).
[228] Canada's Responses to Questions Following the Virtual Session, para. 254.
[229] *See* U.S. Responses to First Set of Questions, para. 130 (citing Paul S. Armington, *A Theory of Demand for Products Distinguished by Place of Production*, IMF Staff Papers, Vol. 16, No. 1 (Mar. 1969) ("Armington (1969)"), p. 171 (Exhibit USA-20)).
[230] Further, as the United States has explained, the United States is not introducing an innovation in this respect. U.S. Responses to First Set of Questions, para. 131. For instance, in one application of the partial equilibrium Armington framework, the Commission (2019) defines a model in which varieties are distinguished not by country,

196. Further, it is reasonable to differentiate varieties by changes in duty rates and to consolidate the companies with duty rates that do not change between the factual and counterfactual scenarios into a single variety. As explained in the U.S. response to question 246 in Annex A,[231] in addition to the precision afforded by defining each affected variety individually, specifying each affected Canadian variety individually allows "legacy" CVD rates to be adjusted as the challenged measure is removed from individual companies, as described in the U.S. response to question 207.

197. In fact, counter to Canada's assertion, Canada's formula does not maintain only a single Canadian variety.[232] The model in Canada's methodology paper, from which its formula is derived, only defines a single Canadian variety, but Canada proposes:[233]

> if there are multiple groups of exporters with different duty rates attributed to the OFA-AFA measure, then the calculation can be performed for each group separately, based on the value of imports associated with that group. The resulting amounts for each group of exporters can then be added together. For example, if there are two respondent companies and each one has a duty resulting from the application of the OFA-AFA measure, and the group of all other exporters have a different rate including duties attributable to the OFA-AFA measure (where the counterfactual rate is zero), then the calculation using the data attributed to each group can be performed separately and the resulting lost value added together to obtain the appropriate level of nullification or impairment.

198. Therefore, based upon Canada's methodology paper, Canada proposes to apply the formula to each group separately, thus defining multiple Canadian varieties. Canada defines the multiple groups as those with "different rate[s] including duties attributable to the OFA-AFA measure", thus differentiating Canadian varieties by duty rates. Canada, however, uses a formula derived from the log-linearized solution to the Armington model; obtains the result for each group separately; and then sums the value to obtain the level of nullification or impairment.

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but by the type of platform through which they are purchased. To study the market for "retail goods" in Mexico and Canada, the model defines three varieties: goods purchased at brick-and-mortar retail outlets, goods purchased from non-U.S. e-commerce firms, and goods purchased from U.S. e-commerce firms.[230] *See* USITC (2019), U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors, USITC Publication Number 4889, April 2019, Appendix I (Exhibit USA-21). Moreover, the Armington model used by the arbitrator in *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)* also defined three varieties of subject-country imports, differentiated by duty rates. *US – Anti-Dumping Methodologies (China) (Article 22.6 – US)*, para. 6.80 (applying the Armington model with five varieties, which included three Chinese varieties).

[231] *See* U.S. Responses to Third Set of Questions, Annex A, para. 230.

[232] Canada's Responses to Questions Following the Virtual Session, para. 257.

[233] Reishus & Lemon Methodology Report, para. 37.

199. In contrast, the U.S. model is run directly in the exact non-linear form, and data for each variety is input into the model at the same time. In fact, the United States has provided a Stata program of the U.S. model which has the capability to accommodate any number of varieties.[234]

200. Thus, Canada's formula produces approximation bias in addition to any limitations that the U.S. and Canadian models already share from the Armington framework. Accordingly, the Arbitrator should reject Canada's formula because it will not produce a reasoned estimate of the level of nullification or impairment.

251. In its oral response to part (b) of Arbitrator question No. 192 regarding the Proof of Equivalence (Exhibit CAN-105), Canada argued that "the common elasticity of supply used for all varieties implies that neither θ_{CAN} nor θ_{US} is necessary to characterize the effect of the change in duty". However, in its oral response to part (c) of that question, Canada claimed that if the analysis was conducted assuming the elasticity of supply for Canadian and non-Canadian sources differ, then "the mathematics would once again demonstrate that Canada's proposed two-variety model provides the equivalent result as obtained from the more complicated and unnecessary three-variety model." Could Canada please:

a. clarify whether the assumption that all sources of supply have the same elasticity is necessary in the Proof of Equivalence, or whether equivalence is also obtained assuming different supply elasticities; and

b. clarify whether equivalence is also obtained assuming a different elasticity for domestic (i.e. US) and foreign (i.e. non-US) supply?

Comment:

201. Following the form of Canada's response to this question, the United States similarly comments on Canada's response to all of the subparts in a single comment, below.

202. As the United States has explained in the U.S. responses to questions 143 and 199, and in the U.S. comment on Canada's response to question 192, Canada's various demonstrations of equivalence in Exhibits CAN-105, CAN-135, and CAN-149 are irrelevant to the question of whether Canada's formula fully accounts for the offsetting effects on imports of unaffected Canadian exporters. Therefore, regardless of whether different elasticities are assumed for the domestic supply and rest of the world supply, Canada's imprecise, approximate formula cannot accurately account for these offsetting effects. More importantly, Canada's use of broad, sector-level market shares from a past time period and the use of an approximate, log-linear solution method ensure that Canada's formula does not produce an estimate that is equivalent to the level

[234] *See* Exhibit USA-51, and accompanying Exhibit USA-52.

of nullification or impairment actually experienced by Canada that is attributable to the challenged measure.

252. During the meeting with the parties, Canada expressed concerns that, particularly in the context of the United States' retrospective system for administering CVDs, the amount of data required by the United States' model, and the nature of the code implementing the model, could become too burdensome and/or rigid to accommodate all situations in which a level of NI would need to be calculated. Could Canada please elaborate on these concerns (taking into account the possibility of using a four-variety US model described in question Nos. 129 and 132, and in Annex A to this document)? In particular, are there any specific scenarios for which Canada believes the US model would be particularly problematic in calculating a level of NI due to the concerns that Canada has raised in this context (e.g. if the duty rates of relevant companies and the composition of the unaffected and affected varieties changed over time)?

Comment:

203. The United States refers the Arbitrator to the U.S. comment on Canada's response to question 189, as well as the U.S. alternative instructions in Annex A of the U.S. Responses to the Third Set of Questions. The United States does not have further comments on Canada's response.

A.3 MARKET SHARES AND MARKET SIZE

A.3.1 For both parties

256. Could the parties please clarify whether USITC reports contain the value of domestic shipments of the relevant product and/or the value of the entire US market for the relevant product, and if so whether each is usually confidential?

Comment:

204. Both Canada and the United States submitted exhibits listing Commission reports to demonstrate the frequency with which the value of domestic shipments and the value of the entries to the U.S. market are publicly available. To assist the Arbitrator, the United States compares Exhibit CAN-150 and Exhibit USA-54, below.

205. As the United States explained, Exhibit USA-54 contains the Commission's determinations from AD/CVD investigations completed over the last seven years, starting with investigations filed in October 2014. Exhibit USA-54 therefore contains a total of 109 completed injury determinations, of which 108 are final determinations, and one is a negative

preliminary determination. In contrast, Exhibit CAN-150 only contains the "thirty most recent" Commission injury determinations.[235]

206. However, six of the determinations listed in Exhibit CAN-150 are "staggered" determinations, where the Commission issued more than one final determination in its investigation of a product as a result of Commerce extending the schedule for some countries but not others, or Commerce extending the schedule for the AD investigation but not the CVD investigation of the same country. For example, Silicon Metal from Malaysia (Pub. 5220) relates to the same investigation and product as Silicon Metal from Bosnia and Herzegovina, Iceland, and Kazakhstan (Pub. 5180).[236] In contrast, in Exhibit USA-54, the United States only counts Silicon Metal from Bosnia and Herzegovina, Iceland, Kazakhstan, and Malaysia once. In Exhibit CAN-150, Canada similarly lists both Standard Steel Welded Wire Mesh from Mexico (Pub. 5217), and the related case, Standard Steel Welded Wire Mesh from Mexico (Pub. 5175); and Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Tunisia, and Ukraine (Pub. 5196), and the related case, Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates (Pub. 5153).[237] Canada thereby effectively double counted these investigations, and Canada's list should only be considered to include a total of 27 determinations.[238]

207. The United States observes that two of the determinations listed in Exhibit CAN-150 – Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Korea, Russia, and Ukraine (Pub. 5222) and Utility Scale Wind Towers from Malaysia and Spain (Pubs. 5215, 5219) – were not included in Exhibit USA-54. These two determinations are both a part of "staggered" investigations that have not yet been completed by the Commission. Therefore, the two determinations were not included in the U.S. list, which only included Commission investigations that were completed prior to the end of September 2021.[239]

208. Even taking into account these two additional determinations, Exhibit CAN-150 and USA-54, together, still demonstrate that 43 percent of the Commission's investigation determinations (that is, 48 of the 111 determinations) publicly reported U.S. domestic shipment information,[240] and 35 percent of the Commission investigation determinations (that is, 39 of the 111 determinations) publicly reported U.S. apparent consumption. The numbers for the cases

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[235] Canada's Responses to Questions Following the Virtual Session, para. 265.
[236] Exhibit CAN-150, pp. 2-3.
[237] This determination is only listed once in Exhibit USA-54. *See* Exhibit USA-54, p. 5.
[238] Canada seems to implicitly acknowledge "staggered" determinations. In the first instance of Standard Steel Welded Wire Mesh from Mexico on the first page of the table of Exhibit CAN-150, Canada lists both Publication No. 5217 and 5175. However, Canada then lists Publication 5175 again on the second page of the table. Further, Canada only counted the staggered determinations of Utility Scale Wind Towers from Spain (Pub. 5219) and Utility Scale Wind Towers from Malaysia (Pub 5215) once.
[239] Glass Containers from China (Pub. 5132) is not listed in Exhibit USA-54, but relates to Glass Containers from China (Pub. 5068), which is included in USA-54.
[240] As explained in the U.S. response to this question, determinations marked as "mixed" in Exhibit USA-54 were counted as public in the above percentage because some of the years reported public U.S. domestic shipment data. None of these determinations involved Canada. *See* U.S. Responses to Third Set of Questions, para. 177 n. 123.

involving Canada remain the same since neither of the two additional determinations involved Canada. That is, for cases involving Canada, 70 percent of the Commission investigation determinations (that is, 7 of the 10 determinations) publicly reported U.S. domestic shipment information, and 50 percent of the Commission investigation determinations (that is, 5 of the 10 determinations) publicly reported U.S. apparent consumption.

209. Therefore, the tables in Exhibit CAN-150 and Exhibit USA-54, together, continue to demonstrate that there is a likelihood that the U.S. domestic shipments could be obtained directly from the Commission report. Importantly, because this arbitration proceeding involves the unprecedented request to suspend concessions for some future, unknown level of nullification or impairment, and therefore involves an unknown future CVD proceeding, the demonstration of the possibility of the existence of public U.S. domestic shipments value in Commission reports should be accounted for in any instructions from the Arbitrator to ensure that any future scenarios are appropriately accommodated.

A.3.2 For Canada

257. Could Canada please clarify why the level of NI calculated in equation (A10) in Canada's Methodology Report using Canada's market share based on a broad sector in the reference period (i.e. before application of the WTO-inconsistent duty) would be equivalent to the level of NI calculated in equation (14) of the Proof of Equivalence (Exhibit CAN-105) on a product-specific basis, using affected and unaffected market shares after the application of the WTO-inconsistent duty? Related to this, could Canada confirm that $\boldsymbol{\theta_{CA}}$ in Canada's Methodology Report (i.e. Canada's market share before application of the WTO-inconsistent duty) is assumed to be identical to $\boldsymbol{\theta_{CA}}$ defined in the transformation of equation (16) to equation (17) in Proof of Equivalence (Exhibit CAN-105) as the sum of the affected and unaffected market shares after the application of the WTO-inconsistent duty?

<u>Comment</u>:

210. The United States does not have comments on Canada's response to this question.

258. In Proof of Equivalence (Exhibit CAN-105), Canada claims that "in equilibrium $\boldsymbol{\theta_{CA} = \frac{vimp_{CAD}}{\sum_i vimp_i} + \frac{vimp_{CAN}}{\sum_i vimp_i}}$".

a. Is the Arbitrator correct in understanding that the expression $\boldsymbol{\theta_{CA} = \frac{vimp_{CAD}}{\sum_i vimp_i} + \frac{vimp_{CAN}}{\sum_i vimp_i}}$ can be rewritten, in the proof, as $\boldsymbol{\theta_{CA} = \theta_{CAD} + \theta_{CAN}}$?

b. Would Canada agree that $\boldsymbol{\theta_{CAD}}$ and $\boldsymbol{\theta_{CAN}}$, and therefore their sum, can only be determined after the WTO-inconsistent duty is imposed?

c. If so, would Canada agree that $\theta_{CAD} + \theta_{CAN}$, i.e. the sum of market shares of the affected and non-affected Canadian variety, is equal to the Canadian market share after the imposition of the measure, defined for the purposes of this measure θ_{CA}^{POST}?

d. If so, could Canada please explain the equivalence, used to derive equation (17), between the Canadian market share after the imposition of the measure, θ_{CA}^{POST}, and the Canadian market share before the imposition of the measure, defined for the purposes of this question θ_{CA}^{PRE}, that Canada uses in Equation (A10) in Canada's Methodology Paper? In particular, could Canada please explain whether it will necessarily be the case that $\theta_{CA}^{POST} = \theta_{CA}^{PRE}$?

e. Could Canada please explain whether and why the equivalence (or lack thereof) between θ_{CA}^{POST} and θ_{CA}^{PRE} would show that Canada's formula takes offsetting effects into account, and more generally that it yields a reasoned estimate of NI?

If it is efficient to do so, please respond to this question in responding to the previous question.

Comment:

211. The United States does not have comments on Canada's response to this question.

259. The Arbitrator understands that, in Canada's model, Canada's market share (θ_{CA}) would fall after the imposition of the OFA-AFA Measure if there is at least one non-Canadian variety, and the supply elasticities are all the same. Could Canada please confirm whether this understanding is correct? Could Canada please also elaborate on whether θ_{CA} would fall, stay constant, or could possibly even increase after the imposition of the OFA-AFA Measure in a version of Canada's model with different supply elasticities from Canadian and non-Canadian sources, or in a version of Canada's model with different supply elasticities from US and non-US sources? If it is efficient to do so, please respond to this question in responding to the previous two questions.

Comment:

212. The United States does not have comments on Canada's response to this question.

A.4 VALUE OF IMPORTS

A.4.1 For both parties

264. Could the parties please confirm whether Canadian exporters have any role to play in the assignment of a CVD Number to their exports to the United States, or

whether importers alone determine whether a CVD Number should be assigned to certain US imports?

Comment:

213. The United States does not have comments on Canada's response to this question.

265. Could the parties please clarify whether, when the USDOC indicates in a CVD order that certain 10-digit HTS codes "may" or "might" contain the relevant product, this designation means: (a) that only the minority of the goods imported under each such HTS code are expected to be within the scope of the CVD order; (b) that each such HTS code is expected to contain a mix of goods that are and are not within the scope of the CVD order (even if the majority of such goods could still be expected to be within the scope of the CVD order); or (c) something else? If the answer is (c), please explain.

Comment:

214. The United States refers the Arbitrator to the U.S. response to this question. The United States does not have further comments on Canada's response.

266. Could the parties please clarify whether Statistics Canada has the capability to identify the value of the exports to the United States of a particular Canadian company for a specific time-period?

Comment:

215. The United States does not have comments on Canada's response to this question.

267. During the course of this proceeding, both parties have referred to "publicly ranged" data present in USDOC record documents, and upon which Canada could rely in its calculations of the level of NI in certain contexts. Could the parties please explain what exactly "publicly ranged" data are? In particular, what is/are the source(s) of relevant "publicly ranged" data, and what form does it take?

Comment:

216. The United States does not have comments on Canada's response to this question.

268. In light of the parties' oral responses to question No. 214, could the parties please, in their written responses to that question, clarify whether the cross-owned affiliates of a particular company might change over time? For example, might the list of a given company's cross-owned affiliates be identified as one group of companies at the end of an USDOC CVD investigation, but be identified as a different group of companies at the conclusion of a subsequent administrative review? If the

composition of the group of cross-owned affiliates could change, would Canada use the most recently identified group in calculating a level of NI?

Comment:

217. Both parties appear to agree that the composition of the group cross-owned affiliates may change between segments of a proceeding (*i.e.*, from a CVD investigation to an administrative review, or from one administrative review to a subsequent review). However, Canada asserts that if the composition changes, Canada intends to use the group of cross-owned affiliates that applied during the reference period to calculate the level of nullification or impairment.[241]

218. The United States disagrees. The initial composition of the group of cross-owned affiliates should be the group that is identified by Commerce in the segment of the CVD proceeding involving the challenged measure. If the composition of the cross-owned affiliates then subsequently changes, Canada should modify the calculation to reflect the changes in the group to ensure that the level of suspension is equivalent to the level of nullification or impairment actually being experienced by Canada. If the cross-owned affiliates are affected exporters, under Canada's approach, to continually maintain the original group of cross-owned affiliates despite the fact that certain companies may no longer be affiliated, would mean that Canada intends to continue to suspend concessions for companies that are no longer affected by the challenged measure, contrary to the DSU.

A.4.2 For Canada

269. In its oral comments on the United States' response to question No. 229, Canada appeared to indicate that the OFA-AFA Measure would not be used in an aggregated investigation. Could Canada please clarify whether its position is that when the USDOC performs an aggregated investigation, such investigation will never be a triggering event and thus whether a value of imports would even have to be determined when an aggregate investigation takes place?

Comment:

219. The United States refers the Arbitrator to the U.S. response to question 229. The United States does not have further comments on Canada's response.

270. In its oral response to question No. 222, Canada referred to the use of "Statistics Canada concordance tables … to change US import values to Canadian exports values". In its written response to question No. 222 could Canada please clarify what these concordance tables are and their purpose?

[241] Canada's Responses to Questions Following the Virtual Session, para. 283.

Comment:

220. The United States does not have comments on Canada's response to this question.

271. In its oral response to question No. 193, Canada appeared to indicate that if an unaffected exporter were not individually investigated, then Canada would not be able to identify that exporter. Could Canada please elaborate on this concern? In particular, would this concern only arise in the situation where Canada would have to calculate a level of NI in the absence of US Customs data (which presumably would have identified all exporters, whether affected or unaffected)?

Comment:

221. The United States refers the Arbitrator to the U.S. comments on Canada's response to questions 189 and 193(c), above. The United States does not have further comments on Canada's response.

272. In its oral comments on the United States' oral response to question No. 230, Canada has referred to "three data sources" that Canada should be allowed to choose from when calculating the value of imports. Could Canada please clarify what exactly these "three data sources" are, and whether they could be used individually to obtain the value of imports? In particular, are the three data sources: (a) USITC Dataweb, USA Trade Online, and Statistics Canada; or (b) Canadian companies, and USDOC record data as combined with an aggregated data source (i.e. USITC Dataweb, USA Trade Online, or Statistics Canada)?

Comment:

222. With respect to the use of USA Trade Online and USITC DataWeb, the United States has proposed that USA Trade Online be used along with the publicly-ranged sales value from the record of Commerce's proceeding. Canada now appears to agree with the United States that USA Trade Online is the preferable source.[242] Accordingly, any set of instructions issued by the Arbitrator should only instruct the parties to utilize USA Trade Online.

223. With respect to the second source, the United States clarifies that Canada has proposed to obtain information directly from only affected Canadian companies.[243] Canada represents that it will not able to obtain data from unaffected exporters.[244] The United States does not agree that

[242] Canada's Responses to Questions Following the Virtual Session, para. 192 n. 132. As the United States previously explained, while USA Trade Online and USITC DataWeb are updated each month with the release of new month's trade data, USA Trade Online revises some imports from Canada on a monthly basis and also updates the aggregate total of U.S. trade with Canada on a monthly basis in the current year. *See* U.S. Responses to Second Set of Questions, para. 100 n. 85; U.S. Responses to Third Set of Questions, para. 144.
[243] Canada's Responses to Questions Following the Virtual Session, paras. 91-92.
[244] Canada's Responses to Questions Following the Virtual Session, para. 92.

unaffected Canadian exporters will not have the incentive to cooperate.[245] However, if one were to follow Canada's logic, it appears that Canada's second alternative source does not obtain data for unaffected exporters, rending this second option unviable for a model that accurately provides for an unaffected exporter variety.

224. Therefore, the United States maintains that the primary alternative source that should be used is the publicly-ranged sales value from the record of Commerce's proceeding along with Census' USA Trade Online data.[246] In the limited circumstance that the information is not available on the record of Commerce's proceeding,[247] the United States considers it appropriate for Canada to obtain the value of imports for the reference year directly from the affected and unaffected Canadian exporters.

225. If Canada is unable to obtain the information directly from the individually-examined unaffected exporters, then Canada may obtain the information from Statistics Canada. Indeed, although Canada appears to agree with the U.S. suggestion to use publicly ranged sales values from the record of Commerce's proceeding to obtain the share (and in turn, the value) of imports from Canada attributable to the All Others companies in its response to question 222,[248] Canada now proposes to use Statistics Canada to obtain information for the composite All Others category in its response to this question.[249] That being the case, Canada would similarly be able to obtain information for the composite unaffected exporters variety from Statistics Canada without divulging company-specific information.

226. However, if there is only one unaffected exporter or a limited number of unaffected exporters such that Statistics Canada is unable to provide the information to Canada, then Canada could calculate the market share of the unaffected exporters using the known

[245] U.S. Responses to First Set of Questions, para. 70. Indeed, Canada has agreed to request authorization to confidential information on the record of Commerce's proceeding from unaffected exporters. Canada's Responses to Questions Following the Virtual Session, para. 8.
[246] As the United States has explained, although Canada proposes to have the "discretion" to select from the three options if Customs data is not available, the United States considers it appropriate for the Arbitrator to predetermine only one alternative data source – USA Trade Online with publicly-ranged sales data from Commerce's proceeding – to avoid future disagreement between the parties. U.S. Responses to Second Set of Questions, para. 100. *See also* U.S. Closing Statement at the Virtual Session, para. 9 (concerning Canada's continued advocacy to have "discretion" to select the values and sources that are beneficial to Canada).
[247] U.S. Responses to Second Set of Questions, paras. 105-106 (explaining that the presence of information typically exists on the record of Commerce's proceeding, but is dependent on the individually-examined companies to report the information).
[248] Canada's Responses to Questions Following the Virtual Session, para. 193 n. 133. *See also* U.S. Responses to Second Set of Questions, para. 110; U.S. Responses to Third Set of Questions, Annex A, U.S. Alternative Instructions, paras. 1.14-1.15.
[249] Canada's Responses to Questions Following the Virtual Session, para. 296.

information,[250] and in turn apply that share to the reference period USA Trade Online data to obtain a value of imports for the unaffected exporters.[251]

[250] That is, Canada asserts that it can obtain the value of imports directly from affected exporters and now also asserts that it can obtain the value of imports for the All Others rate from Statistics Canada. Using this known information, Canada could then solve for the market share of the unaffected exporters variety.

[251] This is an option of last resort. That is, this scenario only occurs after: (1) Customs data is not available, (2) Canada is unable to obtain the value of imports directly from the unaffected exporters, and (3) Canada is unable to obtain the value of imports for the composite unaffected exporter variety from Statistics Canada.